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# Federal Defender Newsletter
## July 2013

### CJA PANEL TRAINING

Sacramento will have an optional brown bag CJA Panel training session on Friday, July 12th from noon to 1:00 p.m. in the 4th floor conference room at 801 I Street. Federal Defender Heather Williams will be presenting "How to Collaterally Attack Deportations," including information on recognizing derivative citizenship, immigration consequences of criminal convictions, the Taylor/Shepard/ Descamps analysis of prior convictions, and 1326 sentencing arguments.

Regular panel training is on summer break until September.

Have a great summer!

### FEDERAL DEFENDER'S OFFICE ANNUAL GOLF TOURNAMENT

Please join us for the Federal Defender's Office Annual Golf Tournament on August 23rd at the Empire Ranch Golf Course in Folsom. Shotgun start is at 12:30 p.m. There will be individual scores and a team scramble. Please contact Henry Hawkins for details at (916) 498-5700.

### CLIENT CLOTHES CLOSET

Do you need clothing for a client going to trial or for a client released from the jail? Are you interested in donating clothes to our Client Clothes Closet or money to cover the cost of cleaning client clothing? If so, please contact Debra Lancaster at 498-5700.

### TOPICS FOR FUTURE TRAINING SESSIONS

Do you know a good speaker for the Federal Defender's panel training program, or would you like the office to address a particular legal topic or practice area? Email your suggestions to Francine Zepeda (Fresno) at francine_zepeda@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

### ADDRESS, PHONE OR EMAIL UPDATES

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

**ONLINE MATERIALS FOR CJA PANEL TRAINING**

The Federal Defender's Office will be distributing panel training materials through our website: www.cae-fpd.org. We will try to post training materials **before** the trainings for you to printout and bring to training for note taking. Any lawyer not on the panel, but wishing training materials should contact Lexi_Negin@fd.org.

**NOTABLE CASES**

**Supreme Court**

Alleyne v. United States, No. 11-9335 (6-17-13), Thomas, J., with Sotomayor, Ginsburg, Kagan & Breyer (5-4).
The Supreme Court overruled two prior cases (McMillan and Harris) and held that because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an element of the crime that must be submitted to a jury and found beyond a reasonable doubt. This applies to drug type and quantity, and any other mandatory minimum fact. A judge may no longer impose a mandatory minimum based on a finding of drug quantity by a preponderance of the evidence. Importantly, five justices appear willing to reconsider the holding in Almendarez-Torres that prior convictions that increase a statutory sentencing range need not be proven to a jury beyond a reasonable doubt.

Descamps v. United States, No. 11-9540 (6-20-13) Kagan, J. (8-1).
The defendant was charged with being a felon in possession of a firearm and having three prior violent felonies that qualified him for sentencing under the Armed Career Criminal Act (ACCA). Congress has provided that "burglary" is a violent felony, and what Congress had in mind was the traditional, generic definition of burglary: unlawfully entering a building. However the California state burglary statute applies to a broader range of conduct: it is possible to violate the burglary statute even if you do not enter a building unlawfully. Unlike some state statutes that have multiple clauses, the California statute simply has one indivisible set of elements: it applies whenever somebody enters into certain locations with intent to commit a crime therein. Thus, based on the conviction itself, a court could not tell whether the entry had been unlawful, which is required for "generic" federal burglary. The lower courts had looked at the plea colloquy to supply the missing element. This was wrong: when a state criminal statute contains but a single set of indivisible elements, the modified categorical approach does not apply and convictions under such statutes can therefore never constitute predicate offenses for an enhanced sentence. In the Court's words: "We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over." The opinion also contained a detailed criticism of the Ninth Circuit's contrary reasoning, and a thorough recitation of the law underlying the categorical and modified categorical approaches.

Sekhar v. United States, No. 12-357 (6-26-13) Scalia, J. (9-0). The Court ruled that attempting to compel someone to recommend that his employer approve an investment does not constitute "the obtaining of property from another" under the Hobbs Act's definition of extortion, 18 U.S.C. § 1951(b)(2).

**Ninth Circuit**

United States v. Muniz-Jaquez, No. 12-50056 (6-10-13)(Goodwin, with Kleinfeld and Silverman). In the middle of an illegal reentry trial, where the defense was "official restraint," a testifying agent indicated that there were border patrol dispatch tapes. The prosecutor had not been aware of them. Defense counsel had made a Rule 16 request previously and renewed it at trial. Counsel also asked that the court order

production of the tapes. The court refused, saying that the request was "a fishing expedition" and immaterial. The trial court also did not review them. The Ninth Circuit remanded for production of the tapes and any new trial motions. The Ninth Circuit concluded that this was not Brady, yet, but that the tapes did fall under Rule 16, and that they were relevant to the "official restraint" defense as the tapes might show that the border patrol kept a group crossing the border under surveillance. The district court abused its discretion by refusing to order production.

United States v. Gillenwater, No. 11-30363 (6-17-13)(Paez, with Fisher and Gould). A defendant has a right to testify at his competency hearing under 18 USC § 4241 and 4247. They government may only use that testimony at trial for impeachment. The Ninth Circuit also stresses that a defendant has to be warned about disruptive behavior before he is removed from the courtroom, and that disruptive behavior ("you won't be a judge for long" "I'll wait for the Republicans to come back") will prevent him from testifying. The Ninth Circuit discusses the right to testify, how it is personal, and cannot be waived by counsel at trial, and states that a competency hearing is like a trial. A defendant has the right to testify under the statutory scheme and the Constitution. The case is vacated and remanded for a new competency hearing, where the defendant could testify.

United States v. Gonzalez Vasquez, No. 11-30176 (6-18-13)(Kleinfeld with Schroeder and M. Smith). The Ninth Circuit held that a suspended sentence is not like "probation of more than a year" and thus did not merit a criminal history point. The defendant had gotten a prior driving conviction, with a sentence of 90 days jail, with 84 days suspended. The sentence did not include probation and therefore the conviction did not merit any criminal history points.

United States v. Avery, No. 12-35209 (6-18-13)(Tallman with Tashima and N. Smith). Petitioner was convicted of "honest services" fraud. He served four years in custody. Here the conviction gets reversed in light of Skilling. The offense of conviction is no longer a crime.

United States v. Hernandez-Meza, No. 12-50220 (6-21-13)(Kozinski with Wardlaw and Gould). This is an illegal reentry prosecution. The defendant argued that he might be a derivative citizen. He did not put on evidence, but asserted the defense in cross exam of the government witnesses and in requested jury instructions. The government asked to reopen the case to present a document that cut against a derivative citizenship claim. That document had never been disclosed to the defense. The district court allowed the government to reopen its case to present the document. The Ninth Circuit found various errors in the government not disclosing the immigration documents to the defense, and the court allowing the government to reopen. There was also a speedy trial violation. The case was reassigned to a different trial judge on remand.

**CJA REPRESENTATIVE**

Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, carl.faller@fallerdefense.com.

Each district has a CJA Panel Attorney District Representative (pdf), selected from among the members of the CJA panel, with the approval of the chief judge.

*CJA Panel Attorney District Representatives:*

- *lead their district CJA panel;*
- *attend the annual National Conference of CJA Panel Attorney District Representatives;*
- *serve as liaison between the CJA panel and the federal defender organization, the court and the AO's Office of Defender Services;*
- *comment on proposed legislation relating to the CJA;*
- *work toward improving the quality of representation as well as the conditions under which panel attorneys provide representation.*

## *Letter from the Defender*

**WHAT'S WITH FPDS, CJA PANEL & OUR BUDGETS?**

Between the headlines about sequestration, budgets cuts and layoffs, there are many questions and sometimes not many answers. Let me try.

**The Fiscal 2013 Budget and Sequestration Cuts**

While sequestration affected all federal offices, funding to implement FY2013's Criminal Justice Act pursuant to 18 U.S.C. § 3006A was cut a total of 10% after sequestration. Unlike many government agencies, the Federal Public Defenders (FPDs) have no ability to earn money or accept money from any entity other than Congress. The Administrative Office of the U.S. Courts (AO), upon whom we rely as our funding voice to Congress and who manages our separate, independent agency allocation, decided Defender Office budgets would be cut 10% and CJA Panel payments would be deferred 15 business days (but not reduced) to meet Office of Defender Services' (ODS) budget shortfall. For FPDs, this meant furloughing staff (in some offices up to a month or more) and/or laying staff off (a permanent loss of positions). For CJA, it meant deferring payments for 10% of the time remaining in the Fiscal Year (from sequestration March 1 through September 30 = 155 days, 10% equals 15 days). The delay-of-payment measure puts ODS immediately in the red starting FY2014.

For my Office, one furlough day saves about $40,000; per employee, it is $400 to $500. Rather than lay-off staff, our furlough decision required 18 to 19 furloughs days between April 1 and September 30, with 13 immediately being scheduled. By rethinking our expenses for experts, computer and software upgrades, and training, and some additional money from Congress to ODS, we reduced our furlough days to seven - barring unforeseen yet necessary expenses, FY2013's last furlough Friday will be July 5.

**FISCAL 2014: 23% BUDGET CUTS**

As I said, deferral means ODS starts out FY14 in debt for CJA Panel payments. The AO doesn't want to do that every year until Congress gets its act together and adequately funds indigent defense representation. To avoid starting FY15 in debt and address expected additional budget cuts expected for FY14 (other legislation like sequestration looms to be effective October 1, 2013), the AO calculated that if FPDs had their budgets cut 23% in FY14, there would be no deferral need. For my Office, a 23% budget cut means taking about 100 furlough days in FY13 (3-4 days per pay period: unacceptable) and/or laying off 30-35 staff of my 90 person office (horrific). To fully stop our layoffs or furloughs, a 47 day deferral of Panel payments would be needed (also unacceptable).

As one of our District's prosecutors immediately recognized: "That magnitude of cuts would be disastrous, aside from . . . causing many more cases to be paneled out at a higher cost." Reducing FPD caseloads even one-third means increasing CJA representations commensurately. With the proposed 23% reduced budget, taxpayers will pay an additional $1 million and more for court-appointed representations in the Eastern District alone. Then multiply that by almost 90 Defender Offices.

In addition to the taxpayer expense for additional CJA Panel appointments, there are trickle-down costs to the Court, Court agencies, and U.S Marshals. For every case necessarily continued because of FPD furlough days and being able to work only 60% - 90% of the time, there are some needed continuances. Cases in our already overworked and busy courthouse then take longer to resolve. When hearings are continued, Pretrial Supervision costs of $220.29 per each out-of-custody continued defendant per month is spent by taxpayers. If the defendants are in-custody, the U.S. Marshals pay an additional $2221.22 (Bureau of Prisons facilities) to $3500 plus (private prisons) per defendant per month for continued hearings.

What was intended as a cost-savings measure, is anything but. Ironic that, in the 50th year anniversary of *Gideon v. Wainwright* which led to the FPDs' creation, there is a risk the international exemplar for providing justice for criminal defendants in an economical way may shrink to much increased taxpayer expense.

Of course, some combination of furloughs, layoffs and CJA Panel payment deferrals is also possible to meet the budget shortfall. But the best solution if for Congress to adequately fund indigent defense. Let your Congressperson know. Let your friends and family know. Exercise your 1st Amendment right to freedom of speech so everyone can maintain their 6th Amendment right to counsel, even if they cannot afford to pay for one.

~ Heather E. Williams
Federal Defender, Eastern District of California.

Check out www.fd.org for unlimited information to help your federal practice.