

Daniel J. Broderick
Federal Defender

Linda C. Harter
Chief Assistant Defender

Francine Zepeda
Fresno Branch Chief

OFFICE OF THE FEDERAL DEFENDER
EASTERN DISTRICT OF CALIFORNIA
801 I STREET, THIRD FLOOR
SACRAMENTO, CALIFORNIA 95814
(916) 498-5700 Fax: (916) 498-5710



Federal Defender Newsletter

June 2012

CJA PANEL TRAINING

Panel training is on summer break during June, July, and August, and will resume in September. Have a nice summer!

INQUIRIES INTO THE PLEA BARGAINING PROCESS

The U.S. Attorney's office has decided to alter what it says at trial confirmation hearings regarding plea offers, in response to the U.S. Supreme Court opinions in Missouri v. Frye and Laffler v. Cooper. At a recent judges' meeting that did not include our office, U.S. Attorney Ben Wagner indicated that the AUSA's would be putting on the record that a plea offer had been made and presumably that it was rejected. Under Rule 11(c)(1), a federal court cannot participate in plea discussions. Thus, it is unclear what, if anything, the judges plan to do when the AUSA's make their statements. There does not appear to be any reason for the defense to say anything other than you are confirming for trial. Anything other than a statement that you are aware of your ethical duties with respect to plea offers from the government, would implicitly or explicitly reveal confidential client communications and violate Rule 11.

JUSTICE LEAGUE SOFTBALL SEASON

The FDO's softball season is in full swing. recruiting players for the upcoming Justice League softball season!! Please join us on Thursday evenings at either McKinley Park or Glen Hall Park. Contact Henry Hawkins at Henry_Hawkins@fd.org for the schedule.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website - www.cae-fpd.org. If a lawyer is not on the panel, but would like the materials, he or she should contact Lexi_Negin@fd.org.

CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, or are interested in donating clothing to the client clothes closet, please contact Debra Lancaster at 498-5700. If you are interested in donating clothing or money to cover the cost of cleaning client clothing, please contact Debra.

TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, or if you would like the office to address a particular legal topic or practice area, please e-mail your suggestions to Charles Lee (Fresno) at charles_lee@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the email version of the newsletter or attachments, please call Kurt Heiser at (916) 498-5700. Also, if you are receiving a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

CONVERSION FROM WORDPERFECT TO MICROSOFT WORD PLANNED FOR THE FALL

The Department of Justice recently announced that it is migrating from WordPerfect to Microsoft Word effective September 30, 2012. The Administrative Office of the U.S. Courts is also planning a similar conversion that would affect documents and sample pleadings distributed to the CJA panel from the Federal Defender office. Additional information about this conversion will be distributed prior to the time of any conversion.

MORE INFORMATION FROM THE TECH WORLD

As announced earlier this year, a contract for an Evidence Review Platform (ERP) for the Defender Services program was awarded to EC America, a subsidiary of immixGroup, Inc., in partnership with AccessData (see January 13, 2012 announcement).

We are pleased to announce that for CJA panel attorneys and federal defender offices, space is available on the web-hosted version

of Summation, CaseVantage, for select cases. If approved, some or all case materials can be hosted on the CaseVantage platform for free, with a discounted rate available for larger cases needing to host additional data. Using a secure, legal review web-hosted platform such as CaseVantage is advantageous for multi-defendant cases with large volumes of information so that case materials are located in one central repository and easily reviewed, tagged and accessed by all defense teams from wherever they are as long as they have an internet connection. This greatly alleviates the need for panel attorneys to have specific hardware, software or IT support usually necessary to utilize similar Evidence Review Platforms on your local office network, and it allows defense teams to capture, organize, analyze, and review case-related electronic data. Along with the hosted space, AccessData provides project management expertise and training for all users of the system.

CaseVantage is a tool designed for legal work. Its online database links to the case data which allows you, among other things, to keep private notes about the case data; bulk tag, filter, annotate and code information about the files which you can share with others on your defense team; review the electronic data without changing the underlying background information about them; and open and view many computer file types even if you don't have the underlying software on your computer (e.g. you would not need to have Microsoft Excel to view an XLS spreadsheet).

In order to assess whether your particular case qualifies for free, secure hosted space, please do the following:

1. Have an attorney on the case contact the National Litigation Support Team at 510-637-3500 to discuss the particulars about the material you wish to have hosted. Make sure to identify whether the local

federal defender office is involved as well and whether or not there are any retained counsel. Consider whether any of the discovery should not be web-hosted, even on a secure platform, due to its confidential or sensitive nature (see the Recommendations for ESI Discovery Production in Federal Criminal Cases at http://www.fd.org/odstb_esi.htm for further guidance regarding ESI security concerns). To assist you prior to your call, it may help you to review the "Initial Discovery and 3rd Party Data Assessment Checklist" on [fd.org](http://www.fd.org) as these are some of the questions we will ask you in order to determine the volume and the technical nature of the data that you are seeking to host.

2. Schedule a demonstration of CaseVantage for all parties with Brooke Oppenheimer our designated project manager at AccessData to ensure that the web-hosted service fits your need. Please submit your request in writing to FPD_CJA_services@AccessData.com. This special email address has been set up to draw her attention to your request and to facilitate tracking for AccessData.

3. Discuss the option of using CaseVantage with all defense teams and identify any parties who do not wish to participate and have access to the document platform.

Hosted space will be prioritized in the order that granted requests are received. Space is limited and this is a service for all CJA panel and FDO attorneys, so we cannot guarantee that there will be space available for every case. If space is not available, AccessData will provide a reduced rate for CJA panel attorneys and FDOs.

Please do not hesitate to contact either Kelly Scribner (kelly_scribner@fd.org), Alex Roberts (alex_roberts@fd.org) or Sean Broderick (sean_broderick@fd.org) at 510-637-3500 if you have any questions or need further

clarification.

NOTABLE CASES

Nedds v. Calderon, No. 08-56520 (5-4-12)(Pregerson, with Fisher and Berzon). The district court dismissed petitioner's habeas petition as untimely. The petitioner appealed, arguing that equitable tolling should apply and that his petition be considered timely. The Ninth Circuit agreed and reversed. The petitioner relied on existing Ninth Circuit precedent in delaying his federal habeas while he worked his way through the state court. When he did file his petition, it would have been timely under precedent. The Supreme Court subsequently decided that if the time it took to file a state habeas is deemed unreasonable, then the federal statute is not tolled. Petitioner acted in conformance with the Ninth Circuit's precedent, moved expeditiously when the Supreme Court ruled, and should be entitled to equitable tolling. The case is remanded for a decision on the merits.

Ward v. Chavez, No. 09-17016 (5-8-12)(Rakoff, Sr. D.J. SDNY, with M. Smith; Wallace dissenting). This involves the payment of a restitution order. Here, the district court ordered the defendant to make restitution "immediately" but did not consider his ability to pay during his lengthy sentence, nor set up a payment schedule. The court left it to the BOP. This is an improper delegation. The petitioner, who was employed in the BOP, argued that the BOP could not just set what it considered fair. This is a core judicial function. The Ninth Circuit agreed, and reversed and remanded. The Ninth Circuit followed the Gunning and Lemoine precedents in requiring the court to set an amount after considering the ability to pay. The Ninth Circuit also held that the petitioner did not have to exhaust administrative remedies after the first denial by the warden, because to do so would have been futile under section 2241.

Thomas v. Chappell, No. 09-99024 (5-10-12)(Graber with Bea; dissent by O'Scannlain). Petitioner claimed, "Bo did it!" when he was prosecuted for two murders that occurred in 1985 in a homeless encampment near the San Francisco Bay. The petitioner was last seen with the victims, had been traveling with them, had partied with them, and had a high powered rifle that matched the bullet wounds. He also made some strange comments, and asked a friend to hold a rifle cleaning kit for him. But, there was no motive and no direct witness evidence; the petitioner had reported the rifle stolen, and there was evidence that someone else (Bo) did it. The problem was that defense counsel failed to find the witnesses that placed Bo at the scene, and made some comments that could be construed as admission of guilty knowledge. The state supreme court found counsel ineffective, but held no prejudice. The district court found prejudice and granted the writ. The Ninth Circuit affirmed, holding that prejudice existed. It was a close question at trial without the witnesses (five day jury deliberation) and the Ninth Circuit concluded that the state court constitutionally erred in not finding prejudice.

US v. Cervantes, No. 09-50521 (5-16-12)(Pregerson with Nelson; dissent by Ikuta). The case involves a Fourth Amendment motion arising out of an auto stop, an arrest, and the impoundment of the vehicle, in which two kilos of cocaine were found and inventoried. The defendant was observed leaving a so-called stash house, taking the long way home, and then, the next day, after some trips, driving his car again. The agent asked the local police to follow and make a lawful arrest to help investigate. The police observe the "failure to stop" and pulled defendant over. He could not find his license (located the next day), and so was arrested for driving without one. Before he was arrested, the car was impounded. The Ninth Circuit reversed the denial of the Fourth Amendment motion, holding that there was no probable cause to stop the defendant after

leaving the stash house. The conclusion that it was a house of ill-repute was a mere conclusion; no facts were given. As for taking the long way home, there could be many innocent reasons. Thus, leaving the house, with a white box, is not enough. As for the stop, the problem with that comes from the police failing to impound the car after the arrest. They impounded first, which violates the California procedure. The police also acted pretextually. Lastly, the car posed no danger.

Rodgers v. Marshall, No. 10-55816 (5-17-12)(Zouhary, D.J.,with Reinhardt and W. Fletcher). In habeas, the Ninth Circuit considers whether a petitioner, who at trial had represented himself, can get counsel for a new trial motion. The Ninth Circuit emphatically holds that he may. The Ninth Circuit finds that the period for the filing of a motion for a new trial (post-verdict, pre-sentencing) is a critical stage that still warrants counsel. Here, the petitioner had been convicted of aggravated assault and other offenses, and deemed he needed a lawyer to help him with a new trial. Even if a defendant has previously waived counsel, he can still request representation at this stage, and the court must give it due deference. Such a request was made here, but brushed off by the state trial court (the petitioner had vacillated with representation and self-representation over a period of time, and the court was frustrated). Under AEDPA, the state courts' decisions denying counsel were unreasonable and contrary to established Supreme Court precedent. Because the right to counsel is fundamental, a showing of prejudice is not required. The case is remanded to allow the filing of a new trial motion with counsel. The petitioner does not get counsel for sentencing because he did not request representation at that stage and proceeded pro per.

US v. Harris, No. 11-10053 (Noonan with B. Fletcher and Paez)(5-25-12). The defendant was sentenced by a judge other than the one who presided over the trial. The Ninth

Circuit held this violated Federal Rule of Criminal Procedure 25(b), which states that a different judge can take over sentencing after a verdict or finding of guilt only if the original judge is unavailable. This was not the case here. The defendant was charged with three counts of assaulting a correctional officer. The defendant suffered from organic brain damage and was prone to violent behavior. Before trial, the court rejected a plea agreement with a stipulated sentence of 60 months, but indicated that a sentence below the guidelines might be warranted given the circumstances. After trial, and on the day of sentencing, the case was reassigned to a visiting judge. There was no explanation given. The visiting judge explained she was aware of the PSR and objections, but had no other information. The judge denied a request to reset the sentencing before the original judge (thereby preserving the issue), and proceeded to sentence the defendant to 188 months. The Ninth Circuit held this reassignment to be an abuse of discretion. Rule 25 presumes the presiding judge takes the sentencing, unless the judge is unavailable due to death, illness, absence and so forth. The presiding judge seems to have been available but had just transferred the case to a visiting judge, as was the court practice. A busy docket or a court in turmoil from a tragedy (the Tucson shootings) did not justify such a transfer. The case is remanded for resentencing.