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Federal Defender Newsletter
June 2014

CJA PANEL TRAINING

Panel training in Fresno and Sacramento is on summer vacation! Sacramento panel training will return on September 17, 2014 (third Wednesday) at 5:00 p.m. in the jury lounge at the U.S. District Court. Fresno panel training will return on September 16, 2014 (third Tuesday).

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, lexi_negin@fd.org.

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 suggestions to:
Fresno - Janet Bateman,
janet_bateman@fd.org,
Ann McGlenon, ann_mcglenon@fd.org, or
Karen Mosher, karen_mosher@fd.org, or
Sacramento: Lexi Negin, lexi_negin@fd.org.

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

Defender Services Office
Training Branch National Trainings
http://www.fd.org/navigation/training-events

UPCOMING TRAINING

SENTENCING ADVOCACY WORKSHOP
PHILADELPHIA, PENNSYLVANIA | June 19-21 2014

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE
MINNEAPOLIS, MINNESOTA | July 31 2014

MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR
MINNEAPOLIS, MINNESOTA | July 31-August 02 2014

BREAKING NEWS FROM DEFENDER SERVICES

PANEL RATE UPDATE: The Defender Services Committee recently decided to recommend that the CJA Panel rate go to the statutory maximum in FY16 (effective 10/1/2015) which would be $144 per hour. It might, however, be phased in or otherwise changed, as the proposal makes its way through other judicial committees.

DRUGS MINUS 2-SENTENCING COMMISSION UPDATE: The Judicial Criminal Law Committee recommended to the US Sentencing Commission (USSC) that the two-level downward adjustment effective 11/1/2014 be retroactive (which is when the courts will be authorized to
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accept and grant petitions for sentence reduction), but any inmate granted a sentence reduction will not be eligible for release until 5/1/2015 to give Probation the time to prepare reports. The USSC seems evenly divided on retroactivity with one swing vote to determine the outcome. A decision should be made on 7/18/14. http://news.uscourts.gov/judiciary-supports-sentencing-amendment-retroactivity-delayed-implementation-training.

DEFENDER SERVICES CARRYOVER: Defender Services expects to have a $93,000,000 carryover (surplus) from FY14 to FY15, meaning there should be no deferral of Panel payments come September.

♪ NOTABLE CASES ♫

UNITED STATES SUPREME COURT

Hall v. Florida, No. 12-10882 (5-27-14). Florida's threshold requirement, as interpreted by the Florida Supreme Court, that defendants show an IQ test score of 70 or below before being permitted to submit additional intellectual disability evidence is unconstitutional because it creates an unacceptable risk that persons with intellectual disabilities will be executed.

Bond v. United States, No. 12-158 (6-2-14). Section 229 of the Chemical Weapons Convention Implementation Act of 1998, which criminalizes, among other things, the possession or use of "chemical weapons," does not reach Bond's conviction for simple assault, arising from her efforts to poison her husband's mistress by spreading chemicals on (among other things) her doorknob, causing only a minor burn that was easily treated with water.

NOTE: While the Court decided on the above treaty provision, Justice Scalia's concurrence raises the issue whether, constitutionally, every case potentially meeting a crime's specific elements should be made a "federal case" – whether the statute is constitutional as applied to a particular defendant.

NINTH CIRCUIT

United States v. Preston, No. 11-10511 (5-12-14)(en banc)(Berzon with concurrences by Graber and Gould). An en banc panel of the Ninth Circuit ordered that an involuntary confession must be suppressed and reversed a conviction for abusive sexual contact. The court found the confession of an intellectually challenged (65 IQ) 18-year-old to be involuntary due to the totality of circumstances, including the tactics of the police. The defendant was charged with sexually abusing a young boy. The child supposedly reported abuse to his family (who were feuding with defendant's family on the Navajo reservation) and complained of pain. There was no physical evidence and the child spun a fantastical tale that all agreed had many elements of fabrication. However, the police conducted a non-custodial interview of the defendant and got a confession. In holding the non-custodial confession to be involuntary, the court wrote: "To elicit this confession, the police, among other tactics, repeatedly presented Preston with the choice of confessing to a heinous crime or a less heinous crime; rejected his denials of guilt; instructed him on the responses they would accept; and fed him details of the crime to which they wanted him to confess." Although he was not in custody, the tactics and his condition resulted in an involuntary confession. The majority opinion here reviews at great length the

suspect tactics of the police. The Ninth Circuit overruled Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1991), which had held that the issue of police coercion must be considered first, and only then other factors (such as mental state) could be considered. Derrick is inconsistent with Supreme Court analysis.

NOTE: Preston's situation would not have been clearer for any court under the new Department of Justice Memorandum, *Policy Concerning Electronic Recording of Statements* (5/12/2014). http://s3.documentcloud.org/documents/1165406/recording-policy.pdf. The recording requirement isn't applicable to non-custodial interrogations, such as Preston's. For other exceptions, see Harvey Silverglate's opinion piece in *Forbes*, *DOJ's New Recording Policy: The Exceptions Swallow the Rule* (6/2/2014) http://www.forbes.com/sites/harveysilverglate/2014/06/02/dojs-new-recording-policy-the-exceptions-swallow-the-rule/.

Hurles v. Ryan, No. 08-99032 (5-16-14)(Nelson with Pregerson; dissent by Ikuta). The Ninth Circuit remands for two evidentiary hearings in this appeal from the denial of a capital petition. First, it remands on the issue whether state appellant counsel was ineffective for not raising issues of denial of funding for a neurological expert, when the defense at trial was insanity, and there was a basis for such testing. This is a Martinez remand, to see if procedural default can be overcome due to IAC. The second remand is for an evidentiary hearing to see if the state trial judge's failure to recuse herself violated due process. At the state trial, the court denied a motion for second counsel in this capital case. A special action was taken, and the trial judge weighed in with a brief supporting her decision. The judge's brief characterized the case as "brutal", referenced the need to conserve resources, pointed out what the defense had not done, and threatened defense counsel. The Ninth Circuit held that the state court's factual finding on the denial of recusal was unreasonable and remanded.

United States v. Brooks, No. 12-30264 (5-7-14)(Christen, with Fisher and Gould). Sell v. United States, 539 US 166 (2003) sets forth the test to be applied for involuntary medication. In this case, the Ninth Circuit considers whether the court appropriately applied the *Sell* test in order to force medication to render the defendant competent to stand trial. The Ninth Circuit agreed with the parties that a remand was necessary to set forth time limitations for the involuntary medication and when the court needed to be informed of the competency status. Since a year had already passed, the Ninth Circuit also provided additional guidance in remanding for a new *Sell* analysis. The trial court must consider the amount of time the defendant has been confined, the length of time of a civil commitment, and the sentence the defendant might face if restored to competency and convicted. The court also had to weigh and balance the interests in the prosecution and the impact of delay.

Vega v. Ryan, No. 12-15631 (5-19-14) (per curiam, with Schroeder, Bybee and Beistline, Chief D.J.). The Ninth Circuit reversed denial of a habeas petition. The Ninth Circuit also withdrew its prior decision in this case. The petitioner, convicted of sex abuse of a minor, after charges had been dismissed twice before, raised IAC when his lawyer on the third set of charges failed to review the file or interview a witness to whom the victim had recanted. The witness was the victim's priest, although the recantation occurred outside of a confession. Although the victim had recanted to her mother, the Ninth Circuit held that corroborating

recantation was critical, especially to the priest, and the lawyer had been performed below professional standards and there was prejudice.

United States v. Rangel-Guzman, No. 13-50059 (Kozinski, CJ, with Clifton, J, and Rakoff, DJ (SDNY)). The Ninth Circuit affirmed a conviction for importation of marijuana but remanded for resentencing because the district court failed to explain why the defendant did not qualify for the two-level safety-valve reduction under U.S.S.G. § 2D1.1(b)(16).

United States v. Guerrero-Jasso, No. 12-10372 (Berzon, Paez, conc. by Fernandez). The defense had a sophisticated strategy in this illegal reentry case: the defendant pled guilty to reentering the country without authorization after being removed, but did NOT to admit to key removal dates charged in the Information. He received a forty-two month sentence, but the Ninth Circuit reversed because the correct statutory maximum was twenty-four months. The fact that would have increased the twenty-four month statutory maximum to twenty-years (!) was that defendant's prior removal was subsequent to his aggravated felony conviction. This element was required under *Apprendi* to be either admitted by the defendant or found by a jury beyond a reasonable doubt. As the guilty plea did not establish this fact under *Apprendi*, the two-year statutory maximum applies.

LETTER FROM THE DEFENDER

See NOTES above.

FORMER FEDERAL DEFENDER EMPLOYEES LOOKING FOR EMPLOYMENT

Becky Darwazeh, darwazeh1@hotmail.com: Secretarial, Legal Assistant

Yvonne Jurado, yvonneee@live.com, (916)230-0483: Paralegal, Secretarial, Legal Assistant, CJA voucher preparation and filing

Karen Sanders, kvs.legaltech@gmail.com, (916)454-2957 (h), (916)216-3106 (cell) Karen has over 20 years of experience as the computer systems administrator at FDO. She'll be providing legal technical and litigation support services. Hourly reasonable rates are available.

Lupita Llanes, lupitallanes@gmail.com, (559) 360-4754: Secretarial and Office Management work. Bilingual Spanish/English services.