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Federal Defender Newsletter
June 2015

CJA PANEL TRAINING

Panel Training is on Summer Vacation!! Enjoy your summer and see you in September!

CJA REPRESENTATIVES

Scott Cameron is our District CJA Representative for Panel members who have questions and issues unique to our Panel lawyers. He can be reached at (916) 769-8842 or snc@snc-attorney.com. David Torres of Bakersfield is the Backup-CJA Representative. He can be reached at (661) 326-0857 or dtorres@lawtorres.com.

COURTHOUSE HAS DISCONTINUED PROVIDING GUEST WIFI SERVICES

At the close of business on Friday, May 8, 2015, the District Court disconnected its Guest Wi-Fi services (CaedGuest) in all courthouses. The Information Technology department is currently researching an alternative method for providing public Internet access for all courthouses that will comply with AO policy. This may affect attorneys in the Courthouse, especially those in trial who need quick Internet access from laptops.

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Check out www.fd.org for unlimited information to help your federal practice. While you're there, take the survey on the home page and have input in the redesign of the site! Please note that you can also sign up on the website to automatically receive emails when fd.org is updated. The Federal Defender Training Division also provides a telephone hotline with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

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 – Peggy Sasso, Peggy_Sasso@fd.org, Andras Farkas, Andras_Farkas@fd.org, or Karen Mosher, karen_mosher@fd.org.
Sacramento: Lexi Negin, lexi_negin@fd.org.

DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to start granting sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base
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Offense Level 2-level reduction in drug cases. In May, 31 amended judgments were filed resulting in a total time reduction of approximately 47.25 years (567 months). While the value of early release is inestimable for defendants, their families, and their friends, the early releases in May result in a taxpayer cost savings of approximately $1,384.029. So far 163 defendants in this district have received a reduction in their sentences under Amendment 782.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes panel training materials through its website: www.cae-fpd.org. We will try to post training materials **before** the trainings for you to print out 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.

♪ NOTABLE CASES

SUPREME COURT

Henderson v. United States, 575 U.S. __ (2015). A court may approve a convicted felon's request to transfer his firearms to another person provided the other person does not allow the convicted person to maintain any control over the gun, i.e., constructively possess it.

Elonis v. United States, No. 13-983. The Court held that "negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals."

Mellouli v. Lynch, No. 13-1034. The Court held that an immigrant's Kansas paraphernalia conviction for concealing unnamed orange pills in his sock did not trigger removal under 8 USC 1227(a)(2)(B)(i), Applying the categorical approach, the Court held that "to trigger removal under 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug 'defined in [section 802].'" That did not happen here because it was "immaterial under [the Kansas law] whether the substances were *defined in 21 USC 802*. Nor did the State charge, or seek to prove, that Mellouli possessed a substance on the 802 schedules."

NINTH CIRCUIT

Comstock v. Humphries, No. 14-15311 (Owens, with Berzon and Bybee). The Ninth Circuit reversed the denial of a Nevada state prisoner's federal habeas petition, holding that the state courts' rejection of the petitioner's Brady claim was contrary to clearly established federal law. The petitioner was convicted of possessing stolen property, namely a championship ring awarded to a former college wrestler. His defense at trial was that he found the ring, not that it had been stolen. Before sentencing, the wrestler wrote a letter to the trial judge expressing doubt that the ring had been stolen at all; he said that he might simply have lost the ring outside his apartment after taking it off while he was repairing his motorcycle. The petitioner and his ex-girlfriend had been living in the same apartment complex at the time. In his sentencing letter to the judge, the wrestler said he told both the detective and the prosecutor that he might simply have lost the ring, and lamented that this information was never brought up at trial.

The jury convicted the petitioner of possessing stolen property received by means of larceny; as a habitual offender, the petitioner received a 10-25 year sentence. Based on the wrestler's statement in his sentencing letter,

petitioner moved for a new trial, complaining that the prosecution's failure to disclose his statements before trial amounted to a Brady violation. The trial court denied this motion. The Nevada Supreme Court affirmed in a one-sentence order, declining to hold an evidentiary hearing on the subject of what the wrestler told the police, reasoning that there was no new evidence that was undisclosed. The federal habeas court denied relief as well.

The Ninth Circuit first held that the wrestler's statement was favorable to the petitioner, because it would have impeached the wrestler's own trial testimony that he never misplaced or lost the ring outside of his apartment. The statement had been suppressed, and the Nevada Supreme Court's decision was not entitled to AEDPA deference because it made no findings on that question (such that review was de novo). Nor did the state ever argue that it did not suppress the statement; it consistently argued that it was unaware of the statement and defended against the Brady claim on materiality grounds. And the Ninth Circuit held that the statement was material. The Nevada Supreme Court's characterization of the statement as "mere speculation" ignored its "exculpatory value in light of the testimony and the prosecutor's closing argument." (The trial prosecutor had argued that the ring had been stolen because the wrestler felt it to have great sentimental value.) If the petitioner had known about the statement, he could have asked specific, pointed questions on cross-examination about what the wrestler did with the ring. "Because the State suppressed [the wrestler's] recollection of these particular, relevant facts, the defense was empty-handed during... cross-examination." Moreover, there was no direct evidence of the petitioner's guilt, so a meaningful opportunity to cross-examine the prosecution's star witness might have changed the outcome of the trial.

In re Her Majesty the Queen in Right of Canada, No. 15-71346 (per curiam). The motions panel denied a mandamus petition filed under the Crime Victims' Rights Act by the Government of Canada, seeking restitution for certain monies it lost as a result of fraudulent schemes involving American renewable fuel credits. The CVRA isn't a substantive basis for seeking a restitution award, but merely a vehicle for vindicating the right to prompt determination of restitution. In any event Canada was not a victim of the fraud schemes here, because they were targeted at American companies.

United States v. Brown, No. 13-10354 (Berzon with Reinhardt and Gould). What should happen when a defendant wants to fire his retained counsel? The Ninth Circuit reiterated that, unless the defendant's reasons for discharging counsel interfere with the fair, efficient, and orderly administration of justice, the judge must allow retained counsel to withdraw and, if the defendant is indigent, appoint substitute counsel under the Criminal Justice Act. Here, because the district judge (who has a track record of hostility toward appointed counsel, see United States v. Tillman, 756 F.3d 1144 (9th Cir. 2014)) neither gave a valid reason for denying the defendant's request to fire retained counsel nor for declining to appoint the Federal Public Defender to represent the defendant, the court vacated the defendant's convictions and remanded for a new trial. The Sixth Amendment right to counsel has two components -- a defendant is entitled to retained counsel of his own choosing, and a right to effective assistance of counsel. He does not have a right to appointed counsel of his own choosing; his choices are limited to retaining any lawyer he wants, accepting

the services of appointed counsel if he is eligible, or representing himself. The only limitation on the right to counsel of choice is that the choice must not interfere with the orderly administration of justice. A defendant who seeks to fire retained counsel and is otherwise indigent must be appointed counsel under the CJA. The court may not leave a criminal defendant without counsel unless it complies with the procedure described in Faretta v. California, 422 U.S. 806 (1975).

The Ninth Circuit first stressed that this motion was never about counsel's desire to withdraw, whether because he wasn't getting paid or for some other reason. This motion was about the defendant trying to fire his lawyer because his lawyer wasn't presenting the defense he thought was most important. When "it is apparent that the defendant, not the attorney, instigated the withdrawal motion, the defendant's Sixth Amendment rights should trump whatever concerns the court has about the lawyer's motives." It was clear here that the defendant did not trust his lawyers to present the defense he thought was appropriate, owing in part to a breakdown in communication between them. These are all sufficient concerns for allowing a defendant to fire counsel; indeed, so far as the Sixth Amendment was concerned, the defendant could fire counsel for any reason at all. So the district judge's belief that retained counsel could do a better job than the Federal Public Defender was utterly beside the point. And although the judge may have had some concerns about the timing of the request to withdraw, that was not the basis for denying the request to withdraw, and in any event the judge did give counsel another month to prepare for trial. The judge simply made no findings about whether allowing withdrawal would impede the orderly administration of justice. Because no such findings could be supported by the record, the Ninth Circuit held that the defendant should have been granted appointed counsel. The denial of the defendant's right to counsel of choice was structural error, and so the court vacated the defendant's convictions and remanded for a new trial.

US v. Cazares, No. 06-50677 (5-14-15)(Piersol, Sr. D.J., with Pregerson and Fletcher). Defendants appealed convictions for Avenues 43 Latino street gang activity designed to force African-Americans to leave a neighborhood under 18 USC § 241 and for § 245 for shooting an individual because of his race. There were also firearm counts related to murder. The Ninth Circuit faulted the trial court for (1) not making an adequate record why voir dire had to be in camera and not in public; (2) admitting "expert" testimony by an agent identifying who "the worst" gang members were, and who had the most clout; and (3) admitting expert testimony as to firearm identification to a "scientific certainty"; and (4) not explaining, in admitting testimony under the forfeiture by wrongdoing exception to Confrontation, that the acts were of a coconspirator and came in as part of the conspiracy.

Riley v. McDaniel, No. 11-99004 (5-15-15)(Reinhardt with McKeown and M. Smith). The Ninth Circuit grants relief, reversing the district court's denial of petitioner's capital habeas and remanding for a new trial. At the time of the trial, the State of Nevada used "deliberation" as a distinct separate element, apart from premeditation. The trial court, however, gave an instruction that defined deliberation as part of premeditation. This conflation, at the time, was a due process violation. It was prejudicial because at the time of the offense, the petitioner suffered from cocaine addiction and was emotional agitated. These conditions could have created doubt as to whether he could really "deliberate."

Zavala v. Ives, No. 13-56615 (Reinhardt with Wardlaw; concurrence and dissent by Callhahan). The Ninth Circuit grants habeas relief to a federal prisoner under 28 U.S.C. § 2241 for credit for time spent in ICE custody prior to being charged with an immigration offense. He should have received credit.

US v. Johnston, No. 13-10097 (5-26-15)(McKeown with Murguia and Friedland). In the double jeopardy context, the Ninth Circuit reiterates that possession of child porn is a lesser of receipt of child porn. As such, a defendant cannot be convicted of the lesser (possession) when also convicted of the greater (receipt). US v. Davenport, 519 F.3d 940 (9th Cir. 2008). The defendant here was convicted of both for the same conduct. The government, in trying to preserve the convictions, argued that different evidence supported the convictions. The Ninth Circuit did not see it that way. The indictment and verdict form were not clear as to the evidence and there was overlap. The burden rested on the government to separately charge and delineate the evidence. The prosecution's argument in closing did not suffice as to discern what evidence went where. The possession conviction is vacated.

Doe v. Ayers, No. 15-99006 (5-27-15) (motions panel). The Ninth Circuit discusses in when a case can and should be sealed and the opinion published with a pseudonym. This is a particularly unusual case as the Ninth Circuit granted penalty-phase habeas relief in a death penalty case.

US v. Crooked Arm, No. 13-30297 (6-8-15)(Per curiam with Noonan, Hawkins and Gold). The Migratory Bird Act of 1918 (MBTA), 28 USC 1291, is the subject of this per curiam opinion affirming the felony conviction for conspiracy, but vacating the other felony count for trafficking in migratory bird parts in violation of 16 USC 703(a), 707(b) as they should be misdemeanors.

Bemore v. Chappell, No. 12-99005 (Berzon with Reinhardt and Gould) In this capital habeas case, the Ninth Circuit reversed the denial of a penalty-phase IAC claim, partly based on the deficient performance of counsel at the guilt phase.

The petitioner and another man robbed a liquor store in San Diego, and during the robbery an employee of the liquor store was brutally tortured and killed. Despite overwhelming evidence involving mental health and drug addiction that was available to show both diminished capacity and a reason not to impose a death sentence, counsel instead pursued a "novel" alibi defense. The petitioner testified that he couldn't have robbed the liquor store because at the time he was robbing a record store instead. And at the penalty phase, the mitigation plan was to portray the petitioner as a good guy with a drug problem -- a portrayal that was undermined, in part, by evidence that he had planned to poison the evening meal at the jail in the hopes of sending multiple inmates to the hospital and thereby facilitating the escape of at least some of them.

The opinion takes counsel to task for failing to investigate the petitioner's "alibi" and potential diminished-capacity defenses at the guilt phase, and concludes that the failure to investigate amounts to deficient performance under Strickland, Richter, and AEDPA.

Lee v. Jacquez, No. 12-56258 (Nguyen with Schroeder and Pregerson). The Ninth Circuit reversed the dismissal of a California state prisoner's § 2254 petition on procedural-default grounds, holding that

the state did not prove that the state-law procedural bar under Ex parte Dixon, 264 P.2d 513 (Cal. 1953), was firmly established or regularly followed at the time of the supposed default.

Zapata v. Vasquez, No. 12-17503 (Fisher with Reinhardt and Berzon). The Ninth Circuit reversed the denial of a California state prisoner's § 2254 claim, holding that trial counsel rendered ineffective assistance in failing to object to the prosecutor's racial slurs during rebuttal closing argument. The opinion also names the prosecutor, a Deputy District Attorney in Santa Clara County, California.
The issue in this appeal revolves around statements that the prosecutor made in his rebuttal closing argument. Although his initial closing argument was based on the evidence presented at trial, his rebuttal closing argument involved a fictional account of the victim's last moments that was unsupported by any trial evidence and that included inflammatory racial slurs against Latinos of Mexican descent. Defense counsel failed to object to these statements, so the petitioner's claim of prosecutorial misconduct was procedurally defaulted. He relied on the ineffective assistance of trial counsel to excuse the default, and the court found ineffective assistance and reversed the denial.