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Federal Defender Newsletter

March 2016

CJA PANEL TRAINING

The next Sacramento CJA panel training will be on Wednesday, March 16, 2016 at 5:00 p.m. in the jury lounge on the 4th floor of the federal courthouse, 501 I St. AFD Ann McClintock will be presenting on "Crimes of Violence and United States v. Johnson."

The Fresno CJA panel training will be held on March 15, 2016 at 5:30 p.m. in the jury room at the Fresno District Courthouse. It will be a video presentation: Alan Ellis on "What Every Federal Criminal Defense Attorney Needs to Know About the BOP."

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Check out [www.fd.org](http://www.fd.org) for unlimited information to help your federal practice. You can also sign up on the website to automatically receive emails when [fd.org](http://www.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.

The Federal Defender for the Eastern District of California, Heather E. Williams, is being evaluated for possible reappointment by the United States Court of Appeals for the Ninth Circuit. For information on this process and to submit your comments, [click here](#)

### CARDONE COMMITTEE TO REVIEW THE CJA PROGRAM MEETS IN SAN FRANCISCO MARCH 2-3, 2016

The Committee, appointed by Chief Justice John Roberts, to review the Criminal Justice Act Program has been holding hearings around the United States. SDTX District Judge Kathleen Cardone heads the Committee.

The Cardone Committee holds hearings in San Francisco March 2 and 3, 2016.

<http://cjastudy.fd.org/public-hearings/public-hearing-san-francisco-california>

EDCA CJA Representative Scott Cameron testifies **Wednesday, March 2, 2016 from 4:30 – 6:30 p.m.** EDCA-Magistrate Judge Carolyn K. Delaney, EDCA, and Federal Defender Heather Williams are testifying **Thursday, March 3 from 4:00 – 6:00 p.m.** Hearings are open to the public and each witness's written and spoken testimony will be available on the Committee's website.

<http://cjastudy.fd.org/>

### PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet that provides court clothing to your clients. We are in dire need of court-appropriate clothing for women. Please consider donating any old suits, or other appropriate professional clothing to the client clothes closet.

## ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes panel training materials through its website: [www.cae-fpd.org](http://www.cae-fpd.org). We will try to post training materials before trainings to print out and bring to training for note taking. Not on the panel, but wishing training materials? Contact Lexi Negin, [lexi.negin@fd.org](mailto:lexi.negin@fd.org)

## PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at <http://wvs.fd.org>. The podcast may be downloaded using iTunes.

## CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or [snc@snc-attorney.com](mailto:snc@snc-attorney.com), is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857 or [dtorres@lawtorres.com](mailto:dtorres@lawtorres.com), is the Backup CJA Representative.

## TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:  
Fresno – Peggy Sasso, [Peggy\\_Sasso@fd.org](mailto:Peggy_Sasso@fd.org),  
Or Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org).  
Sacramento: Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org) or  
Ben Galloway, [ben\\_d\\_galloway@fd.org](mailto:ben_d_galloway@fd.org).

## NATIONAL DEFENDER SERVICES TRAININGS

### LAW & TECHNOLOGY SERIES: TECHNIQUES IN ELECTRONIC CASE MANAGEMENT WORKSHOP

SALT LAKE CITY, UTAH | March 10 - March 12,  
2016

### TRIAL SKILLS ACADEMY

SAN DIEGO, CALIFORNIA | April 24 - April 29,  
2016

### FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE SEMINAR

DENVER, COLORADO | May 19 - May 20, 2016

### WINNING STRATEGIES SEMINAR

DENVER, COLORADO | May 19 - May 21, 2016

For more information and to register, please visit  
[www.fd.org](http://www.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 Offense Level 2-level reduction in drug cases.

**This year, 17 amended judgments were filed resulting in a total time reduction of approximately 33.34 years (400 months).**

While the value of early release is inestimable for defendants, their families, and their friends, **the early releases in 2016 result in a taxpayer cost savings of approximately \$976,388. So far 360 defendants in this district have received a reduction in their sentences under Amendment 782.**

**NOTABLE NINTH CIRCUIT CASES**

Smith v. Schriro, Nos. 96-99025, 96-99026, 10-99011 (Reinhardt with Schroeder, dissent by Callahan). The Ninth Circuit reversed the district court's denial of an Arizona state prisoner's claim that he was ineligible to be executed under Atkins v. Virginia, 536 U.S. 304 (2002), and remanded with instructions to grant the writ and order the state courts to resentence the petitioner to something other than death.

The petitioner was convicted of sexual assault and first-degree murder in 1982, and filed his federal habeas petition in 1987, before the effective date of AEDPA. Thus the limitation on relief set forth at 28 U.S.C. § 2254(d) does not govern the Atkins claim in this appeal.

While the petitioner's appeal from the denial of his 1987 habeas petition was pending, the Supreme Court decided Atkins. The Ninth Circuit stayed proceedings to allow the petitioner to exhaust his Atkins claim, and the trial court held a two-day hearing on the claim in 2007. It denied the claim, and the state courts affirmed the denial. The district court denied the claim as well. The Ninth Circuit conducted extensive analysis of the state court's findings and concluded that deference was inappropriate under pre-AEDPA 28 U.S.C. § 2254(d)(8) because the state court's conclusions lacked fair support in the record. On de novo review, the majority concluded that the petitioner's Atkins claim should have succeeded based on the evidence presented to the superior court.

United States v. Johnson, No. 14-10113 (2-5-16) (Rosenthal, DJ (S.D. Tex.) with Kozinski and Tallman). The Ninth Circuit vacated a sentence for false statements

and perjury and remanded for resentencing because the sentencing judge failed to make express findings of willfulness and materiality to support the obstruction of justice enhancement under U.S.S.G. § 3C1.1.

Before a judge can impose the obstruction enhancement, he must find that the defendant willfully gave material false testimony. The defendant here argued that his trial testimony simply repeated his testimony before the grand jury, which was the basis for some of the charges for which he stood trial. Because the sentencing judge did not make express findings about whether his trial testimony was willful or material, the court remanded for resentencing.

Daire v. Lattimore, No. 12-55667 (2-9-16) (per curiam en banc opinion; panel was Thomas, Reinhardt, McKeown, Tallman, Rawlinson, Bybee, Callahan, Bea, NR Smith, Murguia, and Watford). An en banc panel affirmed that the usual test for ineffective assistance of counsel found in Strickland v. Washington, 466 U.S. 668 (1984), is the "clearly established federal law" that governs claims of ineffective assistance of counsel in noncapital sentencing proceedings for purposes of 28 U.S.C. § 2254(d)(1).

The petitioner was convicted of first-degree burglary and sentenced pursuant to California's three-strikes law. Her habeas claim centers on a kind of escape hatch, under which California sentencing judges are allowed to sentence outside the three-strikes scheme in the face of appropriate mitigating evidence. Her claim is that sentencing counsel was ineffective for failing to present mitigating evidence -- a claim that is subject to AEDPA's limitation on relief to state-court decisions that run afoul of "clearly established federal law, as

determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). After surveying the Supreme Court's decisions, and especially Lafler v. Cooper, 132 S. Ct. 1376 (2012), the en banc panel concluded that Strickland applies to this claim. It then returned the case to the three-judge panel for further proceedings.

Deck v. Jenkins, No. 13-55130 (2-9-2016)(Christen, with Thomas) In amended opinions following the denial of rehearing en banc, the Ninth Circuit reversed the denial of a California state prisoner's habeas petition challenging his conviction for attempted child molestation, holding that the prosecutor committed prejudicial misconduct in closing argument through argument that negated the mens rea element of the crime.

The petitioner was caught in an undercover sting operation and charged with attempt to commit a lewd act on a child under 14, and under California law attempt requires more than "mere preparation" to commit the crime. The prosecutor told the jury that it had to find that the petitioner was going to "meet her and break the ice" and follow through on his effort to have sex with the "girl" "the next day, the next week, maybe in two weekends," or "just some point in the future." The California Court of Appeal found that these statements misstated California law of attempt, but that the jury instructions cured any error in the prosecutor's closing argument -- even though the jury asked for clarification of what they were required to find.

Clearly established federal law provides that a prosecutor's closing argument gives rise to a due process violation if it makes the trial "fundamentally unfair." The state court's finding of no federal due-process violation was an unreasonable application

of the fundamental-fairness standard. For one thing, the prosecutor's comments were not isolated or inadvertent. They undermined the petitioner's theory of defense, which was consistent with California law -- that he did not intend to have sex with the "girl" on the night he met her at the apartment complex. "We need not engage in speculative Monday morning quarterbacking to know the rebuttal argument may have seriously misled the jury; the jury's note to the trial court after the start of deliberations went straight to this contested point of law" about when the petitioner intended to have sex with the "girl." And for another thing, the trial judge never correctly instructed the jury, so the court of appeal's reasoning on that score was flawed. Finally, there was not overwhelming other evidence that the petitioner intended to have sex with the "girl" on the night he went to meet her. All of this left the majority with "grave doubt" about whether the error affected the verdict, and so it reversed the denial of the petition with instructions to grant the writ and retry the petitioner within a reasonable time.

US v. Eglash, No. 14-30132 (2-17-16)(Christen, concurrence by Kleinfeld). This concerns the final step necessary to complete a fraud under Schmuck and US v. Brown, 771 F.3d 1149 (9th Cir 2014). The Ninth Circuit held that getting a "notice" from the SSA about an award was a necessary final step that supported a mail fraud conviction. However, a "summary" of statements sent by the SSA did not qualify. The Ninth Circuit reversed the conviction on that count.

US v. Murguia-Rodriguez, No. 14-10400 (3-1-16)(Reinhardt with Tashima). A divided Ninth Circuit panel vacated and remanded because the district court failed to comply with the procedural safeguards

of 28 USC § 1827(f)(1) when the court dismissed the interpreter. The district court at sentencing had asked the defendant if he was willing to proceed at sentencing without an interpreter. He said he was, but stated that the interpreter should stand by just in case he had difficulties. The court pressed him, stating that the interpreter was busy with other duties. This request by the court, and the acquiescence by the defendant, was not a valid waiver. The court failed to explain the nature and effect of the waiver, and the defendant did not expressly on the record agree to a waiver of interpreter services. Finding error, the Ninth Circuit then declines to exercise its discretion in determining whether the error was harmless. The majority finds that the government had waived its harmlessness argument.

## LETTER FROM THE DEFENDER

The next few months let's discuss issues concerning client competency: different ways to request evaluations, who pays and when, when our client is sent away for evaluation vs. restoration, out-of-custody client's possibility for out-of-custody restoration, and forced medication.

Let's start with the differing ways to request a competency evaluation and who pays and when.

## FACT SCENARIOS:

The following fact scenarios address the differing rules applied for retained, CJA-appointed, and FPD-appointed counsel to get a client psychologically evaluated for competency, insanity at the time of the offense, or sentencing. They cite the source of payments, fee limits (if any), and supporting rule or statute. Following the scenarios are the relevant statutes and rules.

## EX PARTE PSYCHOLOGICAL EVALUATIONS

- 1. Retained lawyer** seeks psychological evaluation, not sure if client incompetent, insane at time of offense, or suffers from mental illness > retainer agreement requires costs of experts be paid by client, client cannot afford expert costs:
  - Ex parte motion to court requesting CJA funds pay for expert evaluation  
**GRANTED:**  
18 U.S.C. §3006A(e); *Guide to Judiciary Policy (Guide)*, Vol.7, Pt.A, Ch.3, § 310.10.10, § 320.20.20(a)  
<http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-320-authorization-investigative-expert> .
  - Fees limited to CJA limits (\$150 per hour, \$2400 maximum unless prior authorization by chief circuit judge): *Guide*, Vol.7, Pt.A, Ch.3, § 310.20.10(a), § 320.20.30.
- 2. CJA Panel lawyer** seeks psychological evaluation, not sure if client incompetent, insane at time of offense, or suffers from mental illness:
  - Ex parte motion to court requesting CJA funds pay for expert evaluation  
**GRANTED:**  
18 U.S.C. §3006A(e); *Guide*, Vol.7, Pt.A, Ch.3, § 310.10.10, § 320.20.20(a).
  - Fees limited to CJA limits (\$150 per hour, \$2400 maximum unless prior authorization by chief circuit judge): *Guide*, Vol.7, Pt.A, Ch.3, § 310.20.10(a), § 320.20.30.
- 3. FPD lawyer** seeks psychological evaluation, not sure if client incompetent, insane at time of offense, or suffers from mental illness:
  - FPD pays from own budget, no fee limitation. 18 U.S.C. § 3006A(g)(2)(A).

## PSYCHOLOGICAL EVALUATION FOR COMPETENCY OR INSANITY BY COURT ORDER

1. **Retained lawyer** seeks psychological evaluation for competency or insanity at time of offense:
  - Motion to court requesting DOJ funds pay for expert evaluation  
**GRANTED:**  
*Guide*, Vol.7, Pt.A, Ch.3, § 320.20.20(b), § 320.20.10(a) and (b), § 320.20.60(a) and (b).
  - Fees are not limited to CJA limits:  
*Guide*, Vol.7, Pt.A, Ch.3, § 320.20.30, unless maybe “dual purpose exam” §320.20.50.
2. **CJA Panel lawyer** seeks psychological evaluation for competency or insanity at time of offense:
  - Motion to court requesting DOJ funds pay for expert evaluation  
**GRANTED:**  
*Guide*, Vol.7, Pt.A, Ch.3, § 320.20.20(b), § 320.20.10(a) and (b), § 320.20.60(a) and (b).
  - Fees are not limited to CJA limits:  
*Guide*, Vol.7, Pt.A, Ch.3, § 320.20.30, unless maybe “dual purpose exam” §320.20.50.
3. **FPD lawyer** seeks psychological evaluation for competency or insanity at time of offense:
  - Motion to court requesting DOJ funds to pay for expert evaluation  
**GRANTED:**  
*Guide*, Vol.7, Pt.A, Ch.3, § 320.20.20(b), § 320.20.10(a) and (b), § 320.20.60(a) and (b).
  - Fees are not limited to CJA limits:  
*Guide*, Vol.7, Pt.A, Ch.3, § 320.20.30, unless maybe “dual purpose exam” §320.20.50.

## APPLICABLE LAWS AND RULES

### **18 U.S.C. § 3006A**

#### **(e) Services Other Than Counsel.—**

**(1) Upon Request.—** Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

...

#### **(g)(2) Types of Defender Organizations.—**

##### **(A) Federal Public Defender**

**Organization.—** A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. . . . The Director of the Administrative Office shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) [hourly rate for CJA Panel lawyers] or (e).

### **18 U.S.C. § 4241**

**(b) Psychiatric or Psychological Examination and Report.—** Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

### **18 U.S.C. § 4247**

**(b) Psychiatric or Psychological Examination.—** A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court . . . . For the purposes of an examination pursuant to an order under

section 4241, . . . the court may commit the person to be examined for a reasonable period, but not to exceed thirty days . . . to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241. . . upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

*Guide to Judicial Policy*, Vol.7, Pt.A, Chapter 1

**§ 130 Applicability**

The guidance contained in this volume applies to the providers of services under the CJA, federal courts, judiciary personnel, and all others responsible for the operation of any aspect of the Defender Services program.

Chapter 3

**§ 310.10.10 Overview**

(a) Investigative, expert, or other services necessary to adequate representation, as authorized by subsection (e) of the Criminal Justice Act (CJA) (18 U.S.C. § 3006A), are available to persons who are eligible under the CJA, including persons who have retained counsel but who are found by the court to be financially unable to obtain the necessary services.

(b) In this connection, a person with retained counsel is financially unable to obtain the necessary services if the person's resources are in excess of the amount needed to provide the person and the person's dependents with the necessities of life, provide defendant's release on bond, and pay a reasonable fee to the person's retained counsel, but are insufficient to pay for the necessary services.

**§ 310.20.10 With Prior Authorization**

(a) With prior authorization, compensation for investigative, expert, and other services is limited to the amounts in the following table for CJA-compensable work performed on or after the effective date. For guidelines applicable to capital cases, **see:** Guide, Vol 7A, § 660.10.40 and § 660.20.

| <b>§ 310.20.10(a) Waivable Case Compensation Maximums for Investigative, Expert, and Other Services</b> |                                        |                                                                                                          |
|---------------------------------------------------------------------------------------------------------|----------------------------------------|----------------------------------------------------------------------------------------------------------|
| <b>If services were performed between.</b>                                                              | <b>The compensation maximum is ...</b> | <b>Authority</b>                                                                                         |
| 05/27/10 to present                                                                                     | \$2,400                                | Federal Judiciary Administrative Improvements Act of 2010, Pub. L. No. 111-174, enacted on May 27, 2010. |

**§ 320.20 Psychiatrists, Psychologists**

**§ 320.20.10 Type of Examinations**

Chapter 313 of Title 18, as amended by the Insanity Defense Reform Act of 1984 (Chapter IV of the Comprehensive Crime Control Act of 1984), provides for **court-directed** psychiatric or psychological examination of individuals in connection with the various proceedings to determine mental condition authorized under that chapter. The functions of these separate proceedings are to determine:

- (a) the mental competency of a defendant to stand trial (18 U.S.C. § 4241);
- (b) insanity at the time of the offense (18 U.S.C. § 4242);

...



## § 320.20.20 Source of Payment

(a) CJA funds are used to pay for psychiatric and related services obtained in accordance with subsection (e) of the CJA upon a determination that the services are "necessary for an adequate defense." These are "defense" services, where the defendant selects the expert and controls the disclosure of the expert's report.

(b) It is important to note that psychiatrists and related experts may be used in many circumstances in which payment is made from a source **other** than the CJA appropriation. In these situations the court or the government selects the expert and persons other than the defendant also have access to the expert's report. The Department of Justice (DOJ) generally pays for these "non-defense" services. The chart in § 320.20.60 summarizes payment responsibility for the various circumstances in which psychiatric and related services are utilized.

## § 320.20.30 Limitation of Amount

The limitations contained in § 310.20 apply to compensation claims submitted by "defense" psychiatrists and related experts, to be paid out of the CJA appropriation. For information regarding "dual purpose" examinations, **see**: § 320.20.50.



**§ 320.20.50 Dual Purpose Examinations**

(a) On occasion, a psychiatrist or related expert will be asked to examine an individual for both a "defense" purpose and a "non-defense" purpose. In these cases, the defense has waived the confidentiality of the "defense" portion of the examination. In such dual purpose examinations, for the convenience of the expert providing the service, the entire compensation claim may be submitted on Form CJA 21, or, in a death penalty proceeding, Form CJA 31. The CJA will pay the expert the total amount approved and obtain reimbursement to the CJA appropriation from the DOJ for one-half of the cost. As a result of the AO's need to seek reimbursement from the DOJ, claims submitted for dual purpose examinations must be accompanied by separate court orders that indicate:

- who requested the examination;
- the specific purpose(s) of the examination;

- to whom the examination is directed; and
- to whom copies of the report are to be given.
- (b) The limitation in § 320.20.30 applies to 50 percent of the claim for a dual purpose examination in which a portion of the examination is for "defense" purposes.
- (c) In some "dual purpose" examinations both portions of the examination are chargeable to the same payment source. For instance, if the examination included evaluation of competency to stand trial under 18 U.S.C. § 4241 and evaluation of sanity at the time of the offense under 18 U.S.C. § 4242, the DOJ would be responsible for both portions of the examination and the entire compensation claim should be submitted to the U.S. attorney or assistant U.S. attorney.

| <b>§ 320.20.60 Summary Chart: Responsibility for Payment of Psychiatric and Related Expert Services</b>                                                                                                            |                                             |                                                                                                                                                                                        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Type of Service</b>                                                                                                                                                                                             | <b>CJA</b>                                  | <b>DOJ</b>                                                                                                                                                                             |
| (a) To determine mental competency to stand trial, under 18 U.S.C. § 4241<br>(1) Examination costs<br>(2) Testimony costs for examiner if called at hearing<br>(3) Testimony costs for examiner if called at trial | (3) If witness appears on behalf of defense | (1) Yes, regardless of which party requests, including examination on court's own motion<br>(2) Yes, regardless of which party calls<br>(3) If witness appears on behalf of government |
| (b) To determine existence of insanity at time of offense, under 18 U.S.C. § 4242<br>(1) Examination costs<br>(2) Testimony costs for examiner if called at trial                                                  |                                             | (1) Yes.<br>(2) Yes, regardless of which party calls                                                                                                                                   |

Chapter 4

**§ 430.20 Payment of Investigative, Expert, and Other Services**

(a) All defender organizations have general authorization to procure investigative, expert and other services as contemplated under 18 U.S.C. § 3006A(e), as amended, provided that total expenditures for the BOCs that comprise investigative, expert and other services do not exceed the funding available in those BOCs.

(b) The limitations set forth in §310.20 do not apply to federal public or community defender organizations.

Hope this information helps in deciding how to ask for a competency evaluation. Next time – evaluation vs. restoration.

~ Heather E. Williams, FD-CAE