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# Federal Defender Newsletter

## May 2011

### **CJA PANEL TRAINING**

Sacramento CJA Panel Training: CJA Panel Administrator will present on "How to Use the CJA eVoucher System." CJA eVoucher is a proposed new electronic system for submitting vouchers. The training will take place on Wednesday, May 18, 2011 at 5:30 p.m. at 801 I St., 4<sup>th</sup> floor. After the May training, we will take our summer break and resume panel training in September.

Fresno CJA Panel Training will not be held in May. Instead, the Federal Defender's Office and the CJA Panel will be honoring Panel Administrator Nancy McGee at a retirement party.

### **THE END OF AN ERA**

Fresno CJA Panel Administrator Nancy McGee is retiring in June. You can ask her yourself about her retirement plans, but we don't think they involve writing a tell-all book about the foibles of the Fresno panel. Nancy joined the Federal Defender's Office as the CJA Panel Administrator in May 1993. She has more than earned the right to a happy, voucher-free new life. The CJA Panel and the Federal Defender's Office have scheduled a retirement reception honoring Nancy for Tuesday, May 17, 2011, from 5:00 to 7:00 p.m. at the 9th floor conference room in the Robert E. Coyle Federal Courthouse.

If you wish to attend, please notify Supervising AFD Francine Zepeda. The cost to attend is \$35 per person, and this cost will cover hors d'oeuvres and a gift.

### **CJA PANEL ATTORNEY PAYMENTS**

On April 15, 2011, funding became available to process all deferred CJA panel attorney payments. By April 22, the backlog of outstanding payments had been eliminated. Chief Judge Ishii, on behalf of all the Eastern District judges, conveyed his sincerest thanks to the district's CJA panel attorneys for continuing to serve their clients and the court during the time period when payments were delayed and the timing of future payments was uncertain.

### **POST-CONVICTION RISK ASSESSMENT**

Since March of this year the Administrative Office of U.S. Courts has put in place a national risk assessment program at U.S. Probation offices. The program involves a series of oral and written questions given to each person on probation or supervised release that address issues about his or her background, family and home life, opinions, substance abuse history, etc. The answers are scored and the composite score puts the person in one of several ranges (low risk of future criminal behavior, medium, high). Rich Ertola, the Chief Probation Officer in

our district, has indicated that the primary purpose of this program is to provide information to supervising probation officers to use in determining whether to decrease supervision of any individuals in the low category and to concentrate probation resources (job counseling, drug programs, psych counseling) on people in the higher risk categories. Two other goals are to reduce the number of revocations and provide life skills to help prevent recidivism. The probation office in this district is experiencing a severe budget crunch and is unable to fill several open positions. So the office needs to concentrate its resources on the individuals who most need its assistance. At some point, some of these risk assessment questions will become part of the presentence interview. By then, we should receive the promised training from the AO, so that we can assist our clients in answering these questions in a manner that maximizes the client's chances of receiving needed assistance during supervision.

## **SUMMER TRAINING PROGRAMS**

### Courtroom Presentations

The current plan is to schedule the courtroom presentations program for June in both Fresno and Sacramento. Once logistics are worked out in both venues, we'll inform everyone by e-mail.

### Electronic Vouchers

All of the districts in the Ninth Circuit will soon be moving to an electronic voucher system to process CJA attorney and expert vouchers. The May CJA Panel Training program in Sacramento will be devoted to this topic. Sacramento CJA Panel Administrator Kurt Heiser has met with Judge England in Sacramento. Judge England will be doing the first test run of this system in our district. We anticipate scheduling a training program for all the Sacramento judges in early summer. We will also be offering panel attorneys and their staff additional training, either one-on-one or in small groups, throughout June and July. Once the system

has been up and running for a few months, Kurt will provide training to the Fresno division. We anticipate the first CJA training program in Fresno in the Fall to be on this topic and a judicial training session will be conducted roughly simultaneously.

## **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 Melody Walcott (Fresno) [melody\\_walcott@fd.org](mailto:melody_walcott@fd.org) or Rachelle Barbour (Sacramento) at [rachelle\\_barbour@fd.org](mailto:rachelle_barbour@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.

## **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.

## **NOTABLE CASES**

U.S. vs. Apodaca, No. 09-50372 (4-12-11)(Cudahy [visiting from 7th Cir.] with Wardlaw; concurrence by W. Fletcher). Lifetime supervision on one count of possession of child pornography was affirmed in an opinion that significantly questions the harshness of sentencing in child pornography cases. The Ninth Circuit (especially the concurring opinion by W. Fletcher) expresses uneasiness with the

guideline recommendations for possession. The court noted the distinction between possessors of illegal images and contact offenders. The opinion and concurrence provide arguments why long sentences and lifetime supervised release terms may be inappropriate.

United States v. Bibbins, No. 09-16775 (4-20-11)(Paez, with Noonan and Bea). The Ninth Circuit holds that the CFR violation for resisting a government requires a mens rea of willfulness. The Ninth Circuit reasons that a person cannot resist someone or something without forming an intent to do so. In reaching this conclusion, the Ninth Circuit notes that interpretations should favor consistent mens rea requirements across the various offenses within a criminal statute. The Ninth Circuit states a preference for avoiding strict liability for Forest Service regulations.

U.S. v. Sandoval-Gonzalez, No. 09-50446 (4-25-11)(Reinhardt, with Kozinski and Wardlaw). In a 1326 prosecution, "derivative citizenship" is not affirmative defense, because the government has to prove alienage as an element. There is no presumption of alienage for a defendant born abroad. The "criminal defendant faces no burden whatsoever regarding the issue of derivative citizenship in a prosecution for an offense of which alienage is an element." In this case, where the government presented a birth certificate showing that the defendant was born in Mexico to a father from the U.S., the error was not harmless.

Congrats to our former law clerk Hanni Fakhoury, who got this win while working as an AFD at the Fed Defenders of San Diego.

Miller v. Oregon Board of Parole and Post-Prison Supervision, No. 07-36086 (4-25-11)(Burns, D.J. S.D, Calif., with Paez and Clifton). The Ninth Circuit finds that an Oregon statute does indeed create a liberty interest in early eligibility for parole. Although there is a liberty interest, under Swarthout v.

Cooke, 131 S. Ct. 859 (2011), a federal court only looks to whether procedural due process was followed rather than whether the decision as to eligibility was correct. Oregon gave procedural due process.

US v. Henderson, No. 09-50544 (4-29-11)(B. Fletcher with concurrences by Berzon and Callahan). "We therefore hold that, similar to the crack cocaine Guidelines, district courts may vary from the child pornography Guidelines, 2G2.2, based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." The Ninth Circuit notes the ratcheting up of the child porn Guidelines, concluding that the Guidelines have been extensively revised 9 times in 23 years, and that the revisions by and large have been a result of Congressional mandates and not the result of empirical study. A variance from such Guidelines, in crack and here in child porn, is not suspect. Of course, each sentencing is different, and a court must individualize the sentencing. A court must consider its power to vary, and it can vary on policy grounds in this case, and in other cases for other crimes if explained. A remand is necessary to allow the court to exercise its discretion. Berzon, concurring, writes to emphasize how odd the Guidelines are in this case and makes no sense from a sentencing perspective. She cites Troy Stabenow's study, "Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines", Jan. 1, 2009 (available at <http://www.fd.org>).