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# Federal Defender Newsletter

## May 2014

### CJA PANEL TRAINING

Sacramento CJA Panel Training will be held on Wednesday, May 21, 2014 at 5:00 p.m. in the jury room at the U.S. District Court, 501 I St. AUSA Jared Dolan and AFD Lexi Negin will be presenting "Grand Jury Representation."

Fresno CJA Panel Training will be on May 20, 2014 (Third Tuesday) at 5:30 p.m. The topic will be announced. The training will be held in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno.

### CONGRATULATIONS TO OUR NEW CJA PANEL MEMBERS

Tatiana Filippova, Jeff Staniels, and Todd Leras have all been added to the CJA criminal defense panel in Sacramento's District Court. Please welcome them!

### 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.

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

### 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,
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### ♪ NOTABLE CASES ♫

### UNITED STATES SUPREME COURT

Paroline v. United States, No. 12-8561, 5-4 Opinion by Justice Kennedy. The Court holds that restitution in child pornography cases is "proper . . . only to the extent the defendant's offense proximately caused a victim's losses." The Court rejects the argument that any one defendant is responsible for the entire loss amount. It also rejects the argument (advanced in the dissent joined by 3 justices) that no restitution is appropriate in these cases. The Court instead directs that a court "should order restitution in an amount that
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comports with the defendant's relative role in the causal process that underlies the victim's general losses." This amount would "not be severe," but would not be "a token or nominal amount." The Court sets forth factors to consider in determining the amount of loss.

Ajoku v. United States (No. 13-7264). The issued an order remanding the case to the Ninth Circuit in light of the Solicitor General's concession that the mens rea for false statements under section 1001 and under the medical records statute 1035; the petition below sets out the split, with the Court granting certiorari and vacating the conviction based on the Solicitor General's concession of error that a jury must find that the defendant "acted with knowledge that his conduct was unlawful." The Ninth Circuit has previously been on the wrong side of a split on this element.

**NINTH CIRCUIT**

US v. Christian, No. 12-10202 (4-17-14)(Fisher with Berzon.) The Ninth Circuit vacates two counts of sending threats via email because the district court precluded the defense expert from testifying about diminished capacity. The defendant allegedly emailed threats to the chief prosecutor of North Las Vegas after the office could not help the defendant in retrieving his car. The expert, a psychologist, had examined the defendant for competency. The district court focused on that purpose for preclusion, but the Ninth Circuit holds that the court should have instead examined the substance of the examination. The psychologist found that the defendant suffered from extensive psychosis and delusions and had difficulty forming intent. The evidence should have been admitted. Of special note is the extension of a civil trial rule from Estate of Barabin v. AstenJohnson, Inc., 740 F.3d 457 (9th Cir. 2014)(en banc) to criminal matters. In Barabin, the Ninth Circuit held that erroneous admission of prejudicial expert testimony requires a new trial. Applying that reasoning to the criminal context, the court holds that the erroneous preclusion of expert testimony requires vacating the conviction and remanding for a new trial.

US v. Emmett, No. 13-50387 (4-17-14)(Nelson with Paez). The district court denied defendant's motion for early termination of supervised release. There was no response by probation or the prosecutor. The defendant argued that he had obeyed the SR terms, his offense was not violent, further supervision was a waste of resources, and he was not receiving any benefit. The district court denied the motion because supervision did not pose undue hardship. The Ninth Circuit holds that it was an abuse of discretion for the court not to address the issues raised, or have a hearing. More was required.

Forbes v. Franke, No. 12-35843 (4-18-14)(Trott with Goodwin and Fletcher). The Ninth Circuit reverses a dismissal of a habeas petition and remands for equitable tolling. The petitioner suffered from delusions so severe that he was unable to appreciate the need for a timely filing of post-conviction challenges. Indeed, the nature of the delusions -- that he was working for the FBI and ordered to "lay low" as bait for the cartels -- exacerbated the situation. In Bills v. Clark, 628 F.3d 1092 (9th Cir. 2010), the Ninth Circuit established a two-prong test to determine whether a mental impairment was extraordinary as to warrant equitable tolling. The impairment must be (1) so severe that the petitioner was personally unable to understand the need to timely file; and (2) made it impossible to meet the filing deadline despite diligence. Here, the district court applied an overly rigid test, rather than examining the totality of

circumstances, including the severity of the petitioner's illness, and its manifestations,

US v. Harrington, No. 12-10526 (4-18-14)(Noonan, with Reinhardt and Hurwitz). Three times the federal park ranger told the driver in the national park that he could refuse the breath test, but that refusal could result in a fine and imprisonment if he was subsequently convicted of the DUI. Three times the driver refused. The driver asked for his lawyer. He was charged with a variety of misdemeanors, but the DUI was dismissed. He was convicted of the federal misdemeanor of failing to take the test. He argued that the conviction was illegal because he had been told (consistent with California law) that he could be punished for it only if convicted of the DUI. The Ninth Circuit agreed with the defense and reversed the conviction. Even though there was no constitutional right to an admonition, the ranger's misadvisement about the law violated due process. If an admonition is given, it has to be correct.

US v. Villalobos, No. 12-50300 (4-11-14)(M. Smith with Fletcher; concurrence by Watford). In this case, the Ninth Circuit holds that a jury instruction defining "threat" was overbroad. The instruction as given rendered any nonviolent threat inherently wrong. Not all threats are criminal or even actionable. However, the error in this case was harmless.

US v. Dominguez-Maroyoqui, No. 13-50066 (4-7-14)(Watford with Farris and N. Smith). This is an appeal from an illegal reentry sentence. At sentencing, the trial court held that a prior federal assault conviction under section 111(a) was a crime of violence. Subsection 111(a) is assault on a federal officer with a three year max. Its elements require only force, not physical force. This differs from subsection 111(b) which requires *physical* force. In this case, the Ninth Circuit reverses and remands for resentencing because it finds that section 111(a) is not categorically a crime of violence. The Ninth Circuit acknowledges that under US v. Juvenile Female, 556 F.3d 943 (9th Cir. 2009), subsection 111(b) is a crime of violence due to the physical force element, which is defined as violent force. Under 111(a), violence is not an element. If the offense is not a categorical crime of violence, then a modified categorical approach is not applicable because the statute is not divisible.

US v. Gomez, No. 11-30262 (4-24-14) (Paez, with Fisher and Gould). Revising an opinion involving an issue of first impression, the Ninth Circuit finds that a four year age difference is a required element in generic statutory rape. The panel thus holds that Ariz. Rev. Stat. § 13-1405 is not a crime of violence (COV) under U.S.S.G. § 2L1.2(b)(1)(A)(ii). The Arizona statute makes it an offense to have sex with a person "under fifteen" but did not exempt those within four years in age. This means that the statute is not a categorical crime of violence because it is missing that element. It remands the case for resentencing and withdraws its prior opinion from October 2013 in this appeal. The Ninth Circuit also finds error in the underlying removal proceeding because the defendant was denied an opportunity to appeal the order. His waiver of the appeal was not knowing. The immigration court failed to assess whether the defendant actually knew his rights. However, this error was harmless here.

US v. Hernandez-Estrada, No. 11-50417 (4-30-14) (en banc) (Thomas for majority). In an en banc decision, the Ninth Circuit overrules its rigid statistical rule of "absolute disparity" when it comes to analyzing a fair-cross-section challenge to the jury panel. In its place, the Ninth Circuit sets forth a more flexible approach, which avoids any one statistical method

(all have problems) and requires both statistical and legal significance. This case arises from a challenge in the Southern District of California to the underrepresentation of Hispanics and African-Americans in a jury pool. The test established in Duren v. Missouri, 439 U.S. 357 (1979), requires (1) a distinctive group; (2) statistically underrepresented; and (3) the underrepresentation is caused by systematic exclusion. Here, African Americans are under 6% of the population but an absolute disparity rule would have required at least a 7.7% difference between group and representation. This meant that African-Americans could never mount a challenge. The new test would require a district court to consider whether the circumstances establish statistical and legal significance.

Dixon v. Williams, No. 10-17145 (4-30-14) (per curiam with Noonan, Thomas, and Berzon). The Ninth Circuit reverses and remands denial of a habeas challenge. The Ninth Circuit finds that use of an erroneous self-defense instruction was error and not harmless. The facts showed that the petitioner was threatened by gang members (one repeatedly with a box cutter), and during a fight, went and got a gun from his nearby car and shot and killed the victim. He argued that he had a reasonable fear. In the instruction on self-defense, the court said that it was not a defense to the charge if the defendant had an "honest and *reasonable*" instead of "unreasonable" fear. This was error, but the state courts found it harmless. The Ninth Circuit held such a conclusion was unreasonable, because of the evidence presented, and the possible lesser included offense (manslaughter) given.

Butler v. Long, No. 10-55202 (5-2-14)(per curiam with Pregerson, Berzon, and Amon, Chief D.J.) If a court dismisses a timely first habeas petition, containing both exhausted and unexhausted claims, it must afford the petitioner an opportunity to dismiss the unexhausted claims. This was not done here. Instead, when petitioner came back with a second amended petition, the court dismissed it as untimely. On appeal, petitioner argues that equitable tolling should allow him to file exhausted claims. The petitioner, having been convicted of premeditated murder, had raised a number of issues in state court. At least one claim -- failure to give a voluntary manslaughter instruction -- was exhausted. The Ninth Circuit reversed the denial and remanded to permit equitable tolling to allow a second petition to be filed and to see if any other dismissed claims were exhausted.

## LETTER FROM THE DEFENDER

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| Dave Chappelle (DC): | *How can black people rise up and over come?* |
| White female: | *Um, can they rise up and overcome? Well - Can they?* |
| DC: | *That is correct!* |
| White male, Professor of African-American Studies & History: | *Reparations.* |
| DC: | *That is acceptable.* |
| White male, Television Writer for Chris rock show and Chappelle's show: | *There's a complex answer there.* |
| DC: | *That is correct!* |

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| White male Deejay: | *Stayin' alive.* |
| DC: | *That is correct!* |
| Black male barber, Brooklyn, NY: | *By stop cuttin' each others' throat.* |
| DC: | *That also is correct. How can black people rise up and overcome?* |
| White female: | *Get out and vote?* |
| DC: | *ANH* *That is incorrect, I'm sorry.* |

~ Chappelle Show skit of a game show called *I Know Black People* (excerpt)

I recently fielded a call from a former client of the Office (though, honestly, are our clients ever truly former vs. forever?). She wanted to know how to expunge her conviction. While possible in California state court, expungement hasn't been possible in for a federal felony conviction since 1988, the expungement statute itself expunged as part of the Reagan Era sentencing "reforms" which also brought us the Sentencing Guidelines. We could talk about restoring her civil rights though.

Our clients, upon felony conviction, lose their rights to vote, serve on a jury, hold public (elected) office, and possess a firearm (18 U.S.C. § 922(g) includes ammunition also). There is no federal court process to restore civil rights. Each state, however, has its own laws and procedures concerning restoration of rights, and, I mean, really different. Further, it may be your rights were restored in State A, but, move to State B and you might have to go through the process again.

In California, one is disenfranchised from voting while serving one's jail or prison sentence. With California state convictions, **right to vote** is restored automatically once the felony sentence of imprisonment including parole is completed. Cal. Const., Art 2, §4: "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony." The Administrative Office of the U.S. Courts' General Counsel issued an opinion in 2008 stating those with federal felony convictions serving probation or supervised release retained or regained the right to vote because "federal probation and supervision release are separate sentences from the sentence of imprisonment." That may be limited to voting in the federal election, while voting for those running for State offices may have to wait for total sentence completion.

**Serving on a jury or running for public office** are not for the Californian convicted of any felony or malfeasance in office and whose civil rights have not been restored by pardon. Cal. Const. Art. V, § 8(a) and Cal. Penal Code §§ 4800, 4812, 4813 (Governor's authority to pardon); Cal. Civ. Proc. Code § 203(a)(5): "All persons are eligible and qualified to be prospective trial jurors, except . . . [p]ersons who have been convicted of convicted of malfeasance in office or a felony, and whose civil rights have not been restored." To be pardoned in California, the felon must wait 10 years after the sentence is completed and provide a *Certificate of Rehabilitation* when applying to the California Governor for a pardon. Margaret Colgate Love, the author compiling restoration information for the National Association of Criminal Defense Lawyers (NACDL), concludes that, to serve on a California state jury or run for office in California, the federal felon needs a presidential pardon. Cross the border to Arizona, those rights are automatically restored once the sentence is entirely completed; of course, one may ask, "Who wants to serve on a jury or run for office in Arizona anyway?"

Only a Governor's pardon can restore all firearms privileges lost for California felony convictions and misdemeanor convictions involving use of firearm. For certain misdemeanor convictions, including domestic violence, the firearm privilege loss may be for 10 years. Cal. Penal Code §§ 12021(a), 4852.17. When considering whether a convicted felon with civil rights restored has violated 18 U.S.C. § 922(g)(1) – felon in possession of a firearm, 18 U.S.C. § 921(a)(20) says, "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a

conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. " *U.S. Attorney Manual*, Title 9, Criminal Resource Manual § 1435. *United States v. Ramos,* 961 F.2d 1003, 1009 (1st Cir), *cert denied* 113 S.Ct. 364 (1992), says a state court judge has to expressly say, in restoring a state felon's civil rights, that the felon is exempted from Section 922(g)(1)'s prohibitions. However, the *U.S. Attorney Manual* says DOJ's Criminal Division says, "where State law contains any provision purporting to restore civil rights either upon application of the defendant or automatically upon completion of the sentence – it should be given effect."

Have a federal felony conviction? Only federal law can nullify the felony conviction's effect through expungement (doesn't exist except after habeas for wrongful conviction), presidential pardon, or federal restoration of civil rights (which doesn't exist) before the federal felon can possess a firearm. *Beecham v. United States*, 511 U.S. 368 (1994), cited in the *U.S. Attorney Manual* above.

Of course, there are numerous other consequences of any conviction: impediments to becoming bonded as a contractor, licensing for anyone in the medical profession, insurance sales, and the list goes on. Presidential pardons, along with clemencies for those victimized by over exuberant Congressional legislators funding reelection by ever-increasing criminal penalties, are the cry of the day.

California gubernatorial pardons (for those wishing to serve on juries, run for public office, or possess a firearm) require:

- Exemplary behavior for a long period of time;
- Discharge from probation, parole (for federal felons: supervised release) be 10 years or older without any further criminal activity;
- A *Certificate of Rehabilitation*, a court order declaring the felon has been rehabilitated of his or her crime.

Each California Superior Court seems to have its own packet. A similar procedure should follow for presidential pardons. http://www.justice.gov/pardon/forms.htm.

Each United States President since George Washington has exercised the constitutional ability to undo, as much as a president can, the consequence and burden of being convicted of a crime. The motivation in granting a pardon or commutation can be the gratitude for saving the president from drowning when partying on a Massachusetts beach while in college (Clinton's pardon of Fife Symington), to believing the person simply not guilty of the crime (Polk's dismissal of mutiny charges against John C. Frémont [a man whose fingerprints are all over California Nevada, and Arizona]), to saving a nation from the miasma of prosecuting a former president (Ford's pardon of Nixon before any charges were filed). Nestled among those high-profile cases are the pardons, commutations and clemencies for people who proved themselves and the better lives they made. And while voting, even when restored after a felony conviction, may not help the black people to rise up and overcome, the undoing of a conviction's consequences through restoration and pardon may be one person's proof of rising up **and** overcoming.

~ Heather E. Williams
Federal Defender, Eastern District of California

## 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.

## 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