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Federal Defender Newsletter
May 2016

CJA PANEL TRAINING

The next Sacramento CJA panel training will be held on Wednesday, May 18, 2016 at 5:00 p.m. in the jury lounge on the 4th floor of the Sacramento federal courthouse, 501 I St. AFD Norma Aguilar from the Southern District of California will present "Defending Sex Trafficking Cases."

The next Fresno CJA panel training will be held on Tuesday, May 17, 2016 at 5:30 p.m. in the jury room at the Fresno District Courthouse: "A Roundtable Discussion with Representatives from the U.S. Attorney's Office, U.S. Pretrial Services and U.S. Probation."

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Check out 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 is updated.

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. 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

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.

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.

CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or 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, is the Backup CJA Representative.
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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, Or Karen Mosher, karen_mosher@fd.org.

Sacramento: Lexi Negin, lexi_negin@fd.org or Ben Galloway, ben_d_galloway@fd.org.

NATIONAL DEFENDER SERVICES TRAININGS

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.

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. In April 2016, 3 amended judgments were filed resulting in a total time reduction of approximately 7.4 years. While the value of early release is inestimable for defendants, their families, and their friends, the early releases in April result in a taxpayer cost savings of approximately $216,758. So far 369 defendants in this district have received a reduction in their sentences under Amendment 782.

INTERESTING INFORMATION ON-LINE

***TED Talks* - Adam Foss:** A Prosecutor's Vision for a Better Justice System, http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system

DEFENSE WINS IN THE SUPREME COURT!

Welch v. United States, No. 15-6418 (4/18/16). The Supreme Court held that the rule announced in Johnson (invalidating the ACCA residual clause) is substantive and thus retroactive. Johnson's holding is substantive because it alters "the range of conduct or the class of persons that the law punishes." It is not procedural because procedural rules "regulate only the manner of determining the defendant's culpability," and Johnson "had nothing to do with" that. "The residual clause is invalid under *Johnson*, so it can no longer mandate or authorize any sentence."

Molina-Martinez v. United States, No. 14-8913. In an opinion by Kennedy (joined by Roberts, Ginsburg, Breyer, Sotomayor and Kagan), the Court held: "courts reviewing sentencing errors cannot apply a categorical rule requiring additional evidence in cases, like this one, where the district court applied an incorrect range but nevertheless sentenced the defendant within the correct range.... [A] defendant can rely on the application of an incorrect Guidelines range to show an effect on his substantial rights." The Court reasoned: "From the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used. In most cases a defendant who has shown

that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." In other words: "When a defendant is sentenced under an incorrect Guidelines range -- whether or not the defendant's ultimate sentence falls within the correct range -- the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error."

NOTABLE NINTH CIRCUIT CASES

US v. Parnell, No. 14-30208 (4-12-16)(Fisher with Berzon, Watford concurring). The Ninth Circuit vacated an ACCA sentence and remanded because the previous Massachusetts conviction for armed robbery is not a "crime of violence" under a categorical analysis. Under the state statute, minimal nonviolent force, or even a threat of force, like in purse snatching, can be armed robbery if the victim is cognizant of the force. Because the degree of force required to commit armed robbery is immaterial so long as the victim is aware of it, the state statute does not have the element of use, or threat of use, of physical force against another.

US v. Argueta-Rosales, No. 14-50384 (4-12-16)(Fisher and Foote, D.J. The Ninth Circuit vacated an illegal reentry conviction and remanded. The defendant argued that he was in a delusional state, and believed he was being chased by Mexican gangs. He only wanted to be imprisoned. The trial court had used only a "knowingly" mens rea instead of specific intent. Under *Lombera-Valdovinos*, 429 F.3d 927 (9th Cir. 2005), a defendant who attempted reentry to be imprisoned and was under official restraint cannot be convicted. The error was not harmless, as the evidence was contested.

US v. Pete, No. 14-10370 (4-11-16)(Berzon with Fletcher and Bea). This is a Miller v. Alabama, 132 S.Ct 2455 (2012)(juvenile life sentence) resentencing case. The underlying offense was a felony murder, second degree murder, and sexual assault. The defendant, 16 at the time of the offense, was tried and convicted as an adult. Under Miller, the district court resentenced him to 708 months. Before the resentencing, the court had denied counsel's request for funding for a neuropsychologist to evaluate the defendant and to develop mitigating mental health evidence. On appeal, the Ninth Circuit held that the court abused its discretion in denying the indigent defendant's request for such an expert under 18 USC § 3006A(e). The court found that a reasonable attorney would have asked for an evaluation, and the evaluation could have been powerful mitigating evidence. The youth of the defendant meant that he could have changed and matured, and the information could have informed his rehabilitation.

Gallegos v. Ryan, No. 08-99029 (4-7-16)(Berzon, Callahan, Bea). The Ninth Circuit ordered a remand in this habeas case for consideration on a possible Brady claim. This petitioner was convicted and sentenced to death for murder and sexual assault on a minor. The lead detective in this case, it was discovered, had committed various misdeeds in a number of other cases. That information was never provided to the defense.

US v. Onuoha, No. 15-50300 (4-20-16)(Gould, with Berzon and Steeh, D.J.) This is a Sell involuntary medication issue. The Ninth Circuit reversed the district court's order for involuntary medication to treat defendant's schizophrenia and to restore him to competency. The Ninth Circuit found that the government had an

important interest in prosecuting the defendant, who had made a threat that shut down LAX. However, under Sell, the defendant has an interest in the best medical course of action. The district court clearly erred in finding that involuntary medication was in the defendant's best interests given the effect of anti-psychotic medication under the circumstances, the course of treatment, and the amount proposed to be given. The Ninth Circuit remanded to the district court for a full consideration of the best medical interest of the defendant and the contradictory medical evidence.

LETTER FROM THE DEFENDER

As the third of our series on representing the incompetent client, I encourage defense counsel to explore an out-of-custody restoration for the released pretrial client.

Several state and county criminal courts already use out-of-custody restoration. *See e.g.* AZ Rev.Stat. 13-4519(a); California Legislative Analyst's Office, *An Alternative Approach: Treating the Incompetent to Stand Trial* (1/3/2012) about Jail-Based Competency Treatment project http://lao.ca.gov/reports/2012/hlth/ist/incompetent-stand-trial-010312.aspx. For certain categories of defendants, out-of-custody restoration provides a safer environment for restoration away from defendants whose mental illnesses may manifest violently, clients who have done nothing to warrant being incarcerated after being released and who are likely to respond to the educational format certain restoration programs recommend. Further, given that housing an inmate in the Bureau of Prisons costs $2,552 per month, out-of-custody restoration can also save taxpayer money.

First, talk with Client to try to explain what you want to propose. Be sure to ask about what counseling Client is participating in and any psychotropic medications Client is taking.

Then, verify with Client's Pretrial Officer to see how Client is doing, verifying counseling and medication(s).

The big challenge currently is finding a psychologist or psychiatrist willing to do the restoration. In the Sacramento area, the Sacramento County Jail has a Jail-Based Competency Treatment program which might recommend someone. https://www.beaconreader.com/amy-yannello/sacramento-sheriff-implements-competency-restoration-program. Contacting that Jail's program, or the one in Riverside County or San Bernardino County may also turn up recommendations for Fresno or Bakersfield clients. Once you locate a potential expert, you can have the doctor review the restoration materials on the Mental Competency website above and see if he/she is willing to take on the task. Then you need a cost estimate for the multiple meetings restoration requires.

Armed with a doctor and treatment plan, explain your proposed out-of-custody restoration to the AUSA. You'll stand a better chance of getting the judge to go along.

Now you're ready to propose the treatment plan to your judge. The hurdle will now be who pays for the out-of-custody restoration – the CJA as the court's expert, but through defense counsel. Pretrial can't pay – an advisory memo from D.C. took care of that. DOJ by statute pays for restoration only in custody. For Federal Defender clients, our Office can't pay – restoration may not be in our client's best interest and our paying for restoration is a conflict of interest. Further, while the CJA budget can pay for expert evaluations, it cannot be used for client treatment. You will propose the restoration doctor be the Court's expert, to advise on the Client's competency.

Be sure the judge does **not** find the client incompetent – remember that once the judge utters those words, the statute requires Client go into the Attorney General's custody. Be sure also the judge doesn't on the record retain the doctor for the purpose of restoration

advice, only for competency advice. Also, set a status conference for after, say, 5 sessions requiring the expert to report progress to the court. This is also a good time to be sure the expert is sticking to the estimated budget or if the judge needs to approve additional fees. 18 U.S.C. § 3006A(e)(2)(B) and (3); *Guide to Judiciary Policy*, Vol. 7A, Chap.3, §§ 310.20.10(a) and 310.20.30(b).