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Federal Defender Newsletter
May 2017

CJA PANEL TRAINING

The next **Sacramento** CJA panel training is Wednesday, May 17, 2017 at 5:00 p.m. in the jury lounge, 4th floor of the federal courthouse, 501 I Street. Don Vilfer, former head of Sacramento FBI's White Collar Crime and Computer Crime Unit in Sacramento, and others will present "Digital Forensics: Finding Exculpatory Evidence and Keeping Government Experts Honest."

The next **Fresno** CJA panel training is Tuesday, May 16, 2017, 5:30-6:30 in the jury room of the federal courthouse: Andrew K. Neitor, esq. (San Diego) will present "Federal Criminal Convictions: Identifying and Minimizing Immigration Consequences."

CJA On-Line & On Call

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. CJA lawyers can log in, and any private defense lawyer can apply for a log-in from the site itself.

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.

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.

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_galloway@fd.org.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet providing 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.

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.

NATIONAL DEFENDER SERVICES TRAININGS
(register at www.fd.org)

Fundamentals of Federal Criminal Defense
Houston, Texas
June 8 - June 9, 2017

Winning Strategies
Houston, Texas
June 8 - June 10, 2017

DIVERSITY AND ALL IT INCLUDES

The Federal Defender Office created a Diversity Committee whose members quickly realized "diversity" encompasses so many topics:

- implicit bias and how it impacts how we practice law, treat clients, how judges, jurors, prosecutors, probation and pretrial officers act and react based upon it;
- challenges and goals in creating and keeping a diverse office and CJA Panel;
- engendering awareness and sensitivity to coworkers, other professionals, clients and their families, and our community;
- recognizing diversity encompasses race, ethnicity and culture; gender, gender identity, gender expression, and sexual orientation; age and experience; religious and areligious; politics;
- education, information, open discussion, consolation, encouragement, speaking up; and
- so much more, some of which the Diversity Committee plans to share in this newsletter starting in June.

SUPREME COURT OPINIONS

Nelson v. Colorado, No. 15-1256 (4-19-17) (Ginsburg, J.) "When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes." The plaintiffs challenged Colorado's retention of conviction-related assessments unless the prevailing party proves her innocence in a separate civil proceeding by clear and convincing evidence. The Court held that this scheme offends the Fourteenth Amendment's guarantee of due process.

Manrique v. United States, No. 15-7250 (4-19-17) (Thomas, J.). Writing for a 6-2 majority, Justice Thomas held that when a criminal defendant files a notice of appeal from the original judgment of conviction and does not separately file a notice of appeal from a deferred restitution award, he may not challenge the restitution order on appeal if the government timely objects. So, if your federal case has a deferred restitution hearing after sentencing, as so many do, remember to file your timely notice of appeal for the sentencing, and a separate timely notice of appeal for the restitution order, to preserve the right to appeal both.

NINTH CIRCUIT OPINONS

US v. Arriaga-Pinon, No. 16-50188 (4-7-17)(Thomas w/Kleinfeld & Nguyen; concurrence by Thomas). The Ninth Circuit vacates an illegal reentry sentence and remands, holding that the district court erred in applying the modified categorical approach to find Cal Vehicle Code § 10851(a)(vehicle theft) an aggravated felony. At the prior state plea colloquy, the defendant admitted to either unlawful

driving or taking the car. Although the Ninth Circuit had previously held that this statute is divisible, and therefore the modified categorical approach can be applied to the divisible sections, the defendant argued that under Mathis v. US, 136 S. Ct 2243 (2016), the statute must be regarded as indivisible. The Ninth Circuit sidestepped whether Mathis overturned this precedent because, under the facts presented in this case, the defendant had pled nolo, to the statute; he did not describe specific details, and the record was ambiguous. The prior was not an aggravated felony.

Nasby v. McDaniel, No. 14-17313 (4-10-17)(Reinhardt w/Owens & Mendoza). "In his petition, Nasby asserts serious constitutional violations based on prosecutorial misconduct, the issue of coerced testimony, ineffective assistance of trial and appellate counsel, and errors in the jury instructions. The district court rejected Nasby's claims and dismissed his petition. Because it did so without obtaining or reviewing the record of the relevant proceedings in state court, we vacate and remand for its review of the pertinent state court record." The Ninth Circuit looked to Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997), which held that the court must obtain and review the relevant portions of the record or conduct an evidentiary hearing on its own. This independent assessment is required for a meaningful review. Five other Circuits have reached similar conclusions.

US v. Davis, No. 15-10402 (4-14-17)(Tashima w/Hurwitz & Adelman). The Ninth Circuit reversed a conviction for "attempted sex trafficking" due to a variance between the indictment and the proof at trial. The defendant argued that the court and prosecution constructively amended the attempted sex trafficking count from "knowing or in reckless disregard" of the age to "reasonable opportunity to observe." The prosecution argued this theory to the jury about the issue of age. The court instructed on this issue. The Ninth Circuit held that this changed the indictment from two options of proof --either knowledge or recklessness-- to a third option, reasonable opportunity to observe. This constructive alteration was such that it was impossible to know if the grand jury would have indicted for the crime proved. The conviction was thus reversed. Although the defendant was serving 300 months on the other count that was affirmed, resentencing was necessary.

Weeden v. Johnson, No. 14-17366 (4-21-17)(Hurwitz w/Molloy). The Ninth Circuit found ineffective assistance of counsel in this juvenile habeas. The petitioner was 14 when she allegedly organized a bungled robbery in which a victim was shot and died. She was not present. The defense lawyer mounted a character defense. He did not have testing done because it would interfere with his trial strategy. Subsequent testing, post-conviction, revealed severe cognitive deficiencies. The Ninth Circuit reversed for ineffective assistance of counsel, stating that counsel's investigation must determine trial strategy and not the other way around. Such failure to investigate violated Strickland.

US v. Velazquez, No. 14-10311 (5-1-17)(Friedland w/Gilman; concurrence by Kozinski). The defendant was charged with conspiracy, drug trafficking, and gun counts and faced a very long sentence (over 40 years). Represented by first one, and then another CJA counsel, she tried to get a third lawyer, arguing that counsel never adequately met with her, never explained the plea, and had missed court deadlines. The district court denied her

timely motions for new counsel without conducting an adequate inquiry. She ultimately entered a plea, retained counsel, and was sentenced to 121 months. Despite a waiver, she appealed. The Ninth Circuit vacated and remanded, finding that the district court had abused its discretion in denying the motion to substitute counsel. The waiver did not bar the appeal as it went to ineffective assistance and her attempts to get a new lawyer. In terms of the merits of her motion for new counsel, the Ninth Circuit considered (1) whether the court adequately inquired into the request; (2) the extent of the conflict between counsel and defendant; and (3) the timeliness of the request. In this case, with timely requests, supported by motions and evidence, the court failed to hold a hearing and explore the breakdown in communications. There was also pressure from the magistrate judge on the defendant to accept the plea deal.

LETTER FROM THE DEFENDER

On Monday, April 24, 2017, the United States Supreme Court denied *certiorari* in *Salazar-Limon v. City of Houston.* Justice Sotomayor dissented, joined by Justice Ginsburg.[i]

Salazar-Limon sought review from the Fifth Circuit opinion affirming a district judge's summary judgment grant for the defendants Houston, Texas, city government and a police officer. Salazar-Limon's civil suit against them stemmed from a Houston Police officer shooting Salazar-Limon in the back in what Salazar-Limon said was "excessive force."

Justice Sotomayor voted to grant *certiorari* noting there was a "genuine dispute as to a() material fact": Salazar-Limon said he was walking away from the officer when shot (hence how he was shot in the **back**); the officer claimed "Salazar-Limon turned toward him and reached for his waistband – as if for a gun – before the officer shot."[ii] The district judge, instead of recognizing this "material fact" dispute which, when it exists, requires denying summary judgment,[iii] "credited the officer's version of events and granted summary judgment to . . . the officer and the city."[iv]

Justice Sotomayor noted the Supreme Court, via *per curiam* opinions, has "not hesitated to summarily reverse courts for wrongly denying *officers* the protection of qualified immunity in cases involving use of force."[v] But she then calls her colleagues out on this "asymmetry" of law by denying Salazar-Limon's *cert* petition:

> *But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified immunity cases imposes no less harm on "society as a whole,"*[vi] *than does the erroneous denial of summary judgment in such cases.*[vii]

A suspect **must** receive the same legal benefit as a police officer, or, in our cases, a defendant benefit the same from a law the State can exercise when the facts apply may apply to a defendant's circumstance.

In fact, caselaw suggests the standard to admit defense evidence should be **easier** for a defendant than the government. Borrowing from reverse Fed.R.Evid. 404(b) cases, "the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword."[viii]

For instance, a decade ago, the Supreme Court decided *Davis v. Washington*, where Justice Scalia's opinion gave guidance in how to "determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause."[ix] *Davis* developed the "on-going emergency" analysis which could include the unavailable declarant reporting while the emergency was happening or "even of the [911] operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon,"[x] or the "questions (are) necessary to secure (police officer) safety or the safety of the public."[xi] In *Davis*, the Davis 911 call qualified

and was admissible, but the companion case of *Hammon* was not.

So what happens if a 911 call contains information provided as part of an "ongoing emergency," information helpful to the defendant, how does the defendant bring out that information if the declarant's unavailable? Remember, *Davis* is a Confrontation case and the Government has no right of confrontation. Will the residual hearsay exception kick in and adopt *Davis*' analysis?[xii] What about in California State Court, where there is no residual hearsay rule or caselaw? How then does this 911 call statement, trustworthy enough to avoid the Confrontation clause, get admitted?

When a defendant presents the same facts as the State would were the roles reversed, and a court denies admission, then it also denies Justice Sotomayor's "symmetry" of law.

Remember in John Grisham's *A Time to Kill*, at the end, where defense counsel in closing argument asks everyone to close their eyes and tells the graphic story of kidnaping, brutal rape, assaults, and attempted murder of his African-American client's young daughter? Then he waits a beat and asks the jury to imagine that little girl was white?

That's "symmetry of law." When we hold up the *Davis* mirror, or the 404(b) mirror, or the sentencing mitigation mirror, or the no "probably cause" mirror, that mirror **must** reflect all those who meet the objective standards, regardless of skin color or gender, rich or poor, prosecution or accused.

That's what Justice looks like.

~ Heather E. Williams, FD-EDCA

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[i] 581 U.S. ___ (2017).

[ii] *Id.*

[iii] Fed.R.Civ.Proc. 56(a).

[iv] *Salazar-Limon*, (slip op., at 1).

[v] *Id.*, (slip op., at 8-9), citations omitted (emphasis added).

[vi] *Id.,* (slip op., at 9), citing *City and County of San Francisco v. Sheehan*, 575 U.S. ___, 135 S.Ct. 1765, 1774, n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

[vii] *Id.,* (slip op., at 9).

[viii] *United States v. Wright*, 625 F.3d 583, 608 (9th Cir. 2010), citing *United States v. Aboumoussallem*, 726 F.2d 906, 911 (2d Cir. 1984) (discussed with approval in *United States v. McCourt*, 925 F.2d 1229, 1234 (9th Cir. 1991), explaining "*Aboumoussallem* is exemplary of a number of cases in which courts have admitted similar acts evidence for defense purposes").

[ix] 547 U.S. 813, 817 (2006).

[x] *Id.*, at 827.

[xi] *Id.,* at 829.

[xii] Fed.R.Evid. 807, assuming the excited utterance exception (Fed.R.Evid. 803(2)) does not apply.