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Federal Defender Newsletter
November 2013

CJA PANEL TRAINING

Join us for Fresno CJA Panel Training on November 19th (Third Tuesday each month) at 5:30 p.m. in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno. The topic is *Sentencing Advocacy: Nuts and Bolts*, featuring a panel of distinguished advocates, including CJA Attorney John Garland, and AFDs Jeremy Kroger and Peggy Sasso.

Sacramento CJA Panel Training will take place on November 20th (Third Wednesday) with AFD David Porter's *Annual Supreme Court Update*. Please join us at 5:00 p.m. in the fourth floor jury lounge of the U.S. District Court, 501 I Street.

FEDERAL DEFENDER AND CJA HOLIDAY PARTY

Please join us on Friday, December 6th at 4:00 p.m. in the main hall at the Old Post Office Building, at 801 I Street, for a holiday celebration. Children are especially welcome to our winter wonderland!

LEXISNEXIS SOFTWARE AVAILABLE AT REDUCED PRICE TO CJA PANEL ATTORNEYS

LexisNexis has once again agreed to offer the CaseMap /DocManager /TimeMap bundle to CJA panel offices at **a special reduced price of $387.50 through November 15, 2013**. The GSA price for this bundle is normally $875.00. After November 15th, the bundle will be offered at a still significantly discounted rate of $437.50. Also, CJA panel attorneys will not have to pay annual maintenance or subscription fees in order to receive technical support and to obtain upgrades of the CaseMap software for as long as we can continue the national maintenance agreement with LexisNexis.

For CJA panel attorneys who purchased their CaseMap licenses through the Office of Defender Services's national maintenance contract, you are eligible to upgrade to CaseMap 10 free of charge. In addition to discounts for the CaseMap / DocManager / TimeMap bundle, LexisNexis is also offering TextMap at **a special reduced price of $97.00 through November 15, 2013**. The GSA price for TextMap is normally $323.00. After November 15th, TextMap will be offered at a still discounted rate to CJA Panel of $161.00. **TextMap** is a transcript summary tool that can be integrated with CaseMap. For CJA panel inquiries: contact Courtney

Kessler with LexisNexis at 904-373-2201 or courtney.kessler@lexisnexis.com for assistance and questions. If you have any questions regarding the use of CaseMap within CJA panel attorneys' offices or whether your licenses are listed as part of the national maintenance contract, please contact either Alex Roberts or Kelly Scribner of the National Litigation Support Team at 510-637-3500, or by email: alex_roberts@fd.org or kelly_scribner@fd.org.

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.

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, or

Sacramento: Lexi Negin, lexi_negin@fd.org.

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

MICROSOFT WORD TRANSITION

DON'T FORGET: The District Court converted from WordPerfect to Microsoft Word on **October 1, 2013.** That means that documents sent directly to judges' chambers for the court to edit before filing must be in Word format. This includes stipulations and proposed orders. Court Word formats and judge font preferences can be found at http://www.caed.uscourts.gov/caednew/index.cfm/attorney-info/word-format/

♪ NOTABLE CASES ♫

United States v. Cortes, No. 12-50137 (9th Cir. Oct. 9, 2013) (Silverman, J., with Thomas and Fisher, JJ.) --- The Ninth Circuit reversed a conviction for conspiring to possess with intent to distribute more than five kilograms of cocaine, finding an error with the judge's instruction to the jury on the defense of entrapment and holding that a sentencing entrapment claim must be tried to the jury when that claim will affect the minimum or maximum sentence.

This is a fake stash house case; ATF agents contrived to induce the defendant's participation in a scheme to lead an assembled gang to rob what ATF agents represented was a house where 100 kilograms of cocaine were stored. The defendant's participation in the scheme was induced through playing on the defendant's sympathy for the agent's story about being burned by a drug cartel and assuring the defendant that he and his confederates would be allowed to keep half of whatever amount of drugs was in the house.

At trial the defendant requested jury instructions on both entrapment and
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sentencing entrapment. The judge declined to give the latter instruction, believing that it would be "subsumed" within any instruction on entrapment. On the entrapment defense, the judge instructed the jury along the lines of the model instruction, but modified the instruction in light of the Ninth Circuit's decision in United States v. Spentz, 653 F.3d 815 (9th Cir. 2011). With respect to the predisposition element of the entrapment defense, the court instructed the jury that "the amount of drugs or the profit that would be derived from their sale does not constitute an inducement supporting entrapment." The trial judge believed that Spentz required this modification of the model instruction. The jury convicted the defendant on all the charges, and he was ultimately sentenced to 20 years in prison.

The Ninth Circuit held that the trial judge's modification of the entrapment instruction overstated the holding in Spentz. Cases prior to Spentz had held that a pecuniary inducement could support an entrapment defense, so long as there was evidence of other, non-pecuniary inducements as well, such as the repeated overtures on the part of government agents, playing on the defendant's dire financial situation, or being reimbursed for an investment related to the criminal scheme. By instructing the jury that the drugs or profit cannot per se establish inducement, the panel said, the trial judge "slightly overstated" the holding in Spentz. Instead, judges should instruct the jury that a profit motivation "cannot on its own establish" an entrapment defense.

On the sentencing-entrapment claim, the Ninth Circuit noted that a defendant "is entitled to present his sentencing entrapment defense to the jury if the success of that defense would result in a lower statutory sentencing range." Here, that would have been the case -- the defendant was indicted on a crime based on five kilograms of cocaine, which carries a mandatory minimum sentence of ten years. But if he could prove that he only had the ability to procure on his own, say, two kilograms of cocaine, then he would be exposed only to a five-year mandatory minimum sentence. And this would have affected the statutory maximum sentence to which the defendant was exposed as well. Moreover, under Alleyne v. United States, 133 S. Ct. 2151 (2013), the facts supporting a mandatory minimum sentence are within the domain of the jury. The panel then proposed a jury instruction for sentencing-entrapment cases.

Lujan v. Garcia, No. 10-55637 (10-29-13) (Bencivengo, D.J., with Tashima and Bybee). The Ninth Circuit affirms in part the granting of habeas relief in a first degree murder case. The police violated Miranda when they failed to advise the petitioner of his right to counsel during custodial interrogations. Petitioner's later statements were presented at trial. The Ninth Circuit affirms the suppression of the later statements used in the state's case in chief as "fruit of the poisonous tree." Such relief has not been undermined by Elstad or Supreme Court cases. The Ninth Circuit also vacated the district court's relief, which was to give the state the option of release or reduction of the charges to second degree murder. The latter option -- reduction -- was not proposed by the state courts, and overstepped the admittedly broad powers of relief a district court has in shaping habeas relief. The district court fashioned the relief in reviewing the trial evidence, and this is inappropriate under the circumstances.

US v. Kyle, 12-10208 (10-30-13) (Marshall, Sr D.J., with Berzon and Bybee). Imagine a federal judge looking at a proffered plea agreement, indicating she will reject the terms, but then musing that if the sentence, was say, 60 months rather than 30, because of various factors and reasons, well maybe the court will accept it. Has the court engaged in plea negotiations which violate Fed R Crim P 11(c)(1)(C)? In this case, the Ninth Circuit holds that it does, under a plain error standard. The defendant here pled to child porn charges. The first plea was for a 360 month sentence. The trial court rejected that plea agreement, and then the court indicated that it would consider a plea that would be less than life, and explained his reasoning. Under a second plea agreement, the defendant got 450 months.

The Ninth Circuit found plain error in the court's musings about the factors involved and what a sentence might be. This put pressure on the defendant. The Ninth Circuit also found that there was no invited error in counsel wondering possibly if the court would take any plea. The Ninth Circuit stressed that the court impermissibly and prejudicially engaged in plea negotiations when the court encourages a defendant to plead guilty or commits itself to a sentence of a certain level of severity. The court simply cannot apply any pressure or give any indication that it would commit to a sentence.

The Ninth Circuit (applying US v. Davila, 133 S.Ct 2139 (2013)) looked at the whole record to see if the defendant was prejudiced. It remanded the case to a different judge.

Amado v. Gonzalez, No. 11-56420 (10-30-13) (Hellerstein, Sr. D.J., with Fletcher; dissent by Rawlinson). The petitioner was convicted of murder by aiding and abetting a senseless gang shooting on a public bus. The petitioner was placed at the bus stop, but there was no direct evidence that he was a gang member. However, a witness did say he carried a weapon. The prosecutor never disclosed the fact that the witness had committed a robbery, was on probation, and was a gang member. The state court thought this was harmless. The Ninth Circuit held that this was a clear Brady violation and a violation of established Supreme Court law. It was prejudicial because the witness was the only one who testified to the gun and was critical.

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ADDRESS, PHONE OR EMAIL UPDATES

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Calvin Peebles at the same number.

CJA REPRESENTATIVE

Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, carl.faller@fallerdefense.com.
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Former Federal Defender-CAE 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.

Letter from the Defender

Last month, I became involved when a former client alleged the Federal Defender Office (and one lawyer in particular) had rendered ineffective assistance of counsel (IAC) related to advice on pleading "guilty." And it got me to thinking about how we defense lawyers respond to such allegations (and I include State Bar complaints in this).

First, it made me realize the Defender Office lawyers needed some guidance on how to **procedurally** respond when IAC allegations are made. We now have a policy which requires:

- Notifying me when it happens;
- Disclosing information in the file and related to representation only to the extent required and relevant to the allegations made;
- Fighting to preserve the sanctity of attorney-client and work product privileges for all else not relevant to the allegations.

So, from now on, if you are representing one of these defendants, don't be surprised when we ask you to come by and go through the file (as many times as you want) and let us know what papers you want copied. Since parts of the file may be admitted as evidence, and we are a Government agency, we prefer to keep the originals.

We'll also be asking the court for a protective order so we don't disclose irrelevant privileged information and documents. When we are required to disclose documents to the Government, we will review the relevant papers with an eye to redacting irrelevant portions and will provide the court with unredacted (to be filed under seal) and proposed redacted versions.

Feel free to contact Linda Harter, Charles Lee or me regarding any IAC claims against the Federal Defender Office.

I've also been thinking about the other way defense counsel **personally** respond when faced with an IAC claim or State Bar complaint. One camp understands why allegations are made: whether representation was lacking or not, our client – sometimes former client - is paying a price with prison time, restrictions on liberty, and further consequences to life beyond the case; who wouldn't, given a second chance, try for something better. Others of us take offense, are incredulous such accusations could be lobbed after all we did for Client, after we worked so hard, after Client refused to follow our advice, after our strategy failed. Some take it personally, sometimes in denial we could have missed something, or could have made a mistake.

I'll never forget an IAC hearing where former defense counsel sat at the prosecution's table for the evidentiary hearing. That attorney, after the 9th Circuit found him ineffective, asked me to move the appellate court to depersonalize the opinion so no one would know it was him. (My client objected; the 9th Circuit denied the motion).

I also remember very well -- after testifying that I had not insisted my then-17 year old client take the juvenile court plea offer to misdemeanor disorderly conduct, then representing him when transferred to adult court where he was sentenced to 105 years prison after trial, being found guilty of 5 counts sexual conduct with his younger sister – when the judge found I was IAC for not insisting, the relief I felt that I had been ineffective.

Our original goal as defense counsel was to lessen that time, lessen those restrictions, lessen those consequences. Why should we take a differing stance or attitude upon IAC allegations when their result could be our original goal? We try our best, but sometimes our best doesn't work. There are some cases that haunt us, or we have 20-20 hindsight upon reflection. We don't know it all, though we are pretty darn smart and clever. And, sometimes, those charges are flat out incorrect.

So, when faced with those allegations, don't take offense so quickly. The compassion which brought us to this career can continue in the face of accusation, unjust or just. The facts are the facts – someone else will decide what they mean. And whatever the decision, you will learn something, about the law, and about yourself.

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

CLIENT CLOTHES CLOSET

Do you need clothing for a client going to trial or for a client released from the jail? Are you interested in donating clothes to our client clothes closet or money to cover the cost of cleaning client clothing? If so, please contact Katina Whalen at 498-5700.

Defender Services Office
Training Branch
National Trainings
http://www.fd.org/navigation/training-events

PANEL ATTORNEY PROGRAMS

WINNING STRATEGIES SEMINAR

HILTON HEAD ISLAND, SOUTH CAROLINA | January 30 - February 01, 2014
REGISTER HERE
FINANCIAL ASSISTANCE APPLICATION

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE

HILTON HEAD ISLAND, SOUTH CAROLINA | January 30 - January 31, 2014
REGISTER HERE
FINANCIAL ASSISTANCE APPLICATION

COMBINED FEDERAL DEFENDER STAFF and PRIVATE CJA PRACTITIONERS PROGRAMS

LAW & TECHNOLOGY SERIES: TECHNIQUES IN ELECTRONIC CASE MANAGEMENT WORKSHOP

SAN FRANCISCO, CALIFORNIA | January 23 - January 25, 2014
REGISTER HERE
DRAFT AGENDA
FINANCIAL ASSISTANCE APPLICATION

SENTENCING ADVOCACY WORKSHOP

LONG BEACH, CALIFORNIA | March 06 - March 08, 2014

TRIAL SKILLS ACADEMY

SAN DIEGO, CALIFORNIA | April 27 - May 02, 2014