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Federal Defender Newsletter

November 2016

CJA PANEL TRAINING

The next Sacramento CJA panel training will be on Wednesday, November 16, 2016 at 5:00 p.m. in the jury lounge on the 4th floor of the federal courthouse, 501 I St. Chief Probation Officer Robert Ramirez with several of the supervising Probation Officers will be presenting "An Introduction to the U.S. Probation Office: Supervision and Presentence Reports."

The Fresno CJA panel training will be held on Tuesday, November 15, 2016 at 5:30 p.m. in the jury room at the Fresno District Courthouse. AFD Ann McClintock will be presenting the U.S. Supreme Court update.

JINGLE, MINGLE, & BE MERRY!!!

Please join the Federal Defender's Office and the CJA Panel on December 9, 2016 for the Annual Holiday Party! We'll be decking the halls at the Old Post Office Building, 801 I Street, in Sacramento from 4:00 to 7:00.

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,
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Sacramento: Lexi Negin,
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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.

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.

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What it lacks in length,
happiness makes up for in height.

~ Robert Frost

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)

Train the Trainers Workshop
Atlanta, Georgia
November 2 - November 4, 2016

Winning Strategies Seminar
Long Beach, California
January 12 - January 14, 2017

Fundamentals of Federal Criminal Defense Seminar
Long Beach, California
January 12 - January 13, 2017

IMPORTANT SUPREME COURT CERT. GRANTS

(1) *Dean v. United States*, No. 15-9260

Issue: Whether *Pepper v. United States*, 562 U.S. 476 (2011), overruled *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), and related opinions from the

Eighth Circuit to the extent that those opinions limit the district court's discretion to consider the mandatory consecutive sentence under 18 U.S.C. § 924(c) in determining the appropriate sentence for the felony serving as the basis for the Section 924(c) conviction.

(2) *Esquivel-Quintana v. Lynch*, No. 16-54

Issue: Whether a conviction under one of the seven state statutes criminalizing consensual sexual intercourse between a 21-year-old and someone almost 18 constitutes an "aggravated felony" of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal.

BRAVO TO CLIENT RICO MAYO

In April 2014, the Department of Justice announced presidential clemency or sentence commutation criteria for defendants currently serving a federal prison sentence and who, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense(s) today. They included:

- non-violent, low-level offenders without significant ties to large scale criminal organizations, gangs or cartels;
- who served at least 10 years of their prison sentence;
- who do not have a significant criminal history;
- demonstrated good conduct in prison; and
- have no history of violence prior to or during their current term of imprisonment.

Our bench approved General Order 547 to appoint the Federal Defender to review cases for clemency/commutation petitions.

We reviewed numerous inmate cases. Because of an Administrative Office of the U.S. Courts decision interpreting 18 U.S.C. § 3006A, the Criminal Justice Act, as precluding Federal Defender offices from representing federal defendants in non-capital clemency actions, we helped prepare the clemency applications for lawyers volunteering to do these clemency representations.

One petitioner was Rico Mayo. AFD Matthew Bockmon originally represented 26-year-old Rico starting in 1997 on 2 counts of possession with intent to distribute near mandatory minimum amounts of cocaine base while possessing 2 guns. While Rico had only misdemeanors in his record, they were enough to disqualify him for safety valve.

Matt and Rico went to trial, but it was the Bermuda triangle of facts: the nation's paranoia over crack cocaine, a very tough prosecutor, and a young man angry over how the system was treating him. Despite Matt's best efforts and arguments, Rico received a 420 month sentence – 35 years in prison, winning nothing on appeal. As Rico wrote in 2014 to his sentencing judge: *I will never forget that when it came time to sentence me on February 9, 1998, the recommendation of sentence in my Presentence report was a sentence of 535 mos. My attorney did file a downward departure. The prosecutor in response did not object to the downward departure and you then granted it and then sentenced me to 420 months saying that 420 months was more than enough time for me. I thanked you for that and started to cry.*

Rico did everything right since then while in prison. To quote AFD Lexi Negin who was deeply involved in his petition: *Mr. Mayo has spent 19 years in prison. During that 19 years his conduct has been*

excellent and he earned every certificate an inmate possibly could.

CJA Panel Attorney Dennis Waks sent Rico's petition to the Pardon Attorney Office where Rico was lucky enough to have Larry Kupers (a former Defender Services lawyer) from the Pardon Attorney Office review and recommend that President Obama commute Rico's sentence.

On Thursday, October 27, 2016, the Federal Defender found out that President Obama granted Rico's petition and commuted his sentence by approximately 15 years, taking him from a release date of June 8, 2027 to February 24, 2017, just 4 months away to permit Rico's transition home.

As Lexi said: *It was one of the nicest moments of my career to deliver this news with Heather by telephone to Mr. Mayo in Englewood FCI.*

DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to grant sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base Offense Level 2-level reduction in drug cases. As of October 31, 2016, 402 defendants in this district have received a reduction in their sentences under Amendment 782 resulting in a total time reduction of 8,434 months (703 years). While the value of early release is inestimable for defendants, their families, and their friends, the sentence reductions since the inception of Amendment 782 has resulted in a taxpayer cost savings of approximately \$22,480,287.

Johnson Update

Two defendants in this district have received sentence reductions after U.S. v. Johnson, resulting in a total time reduction of 342 months (28.5 years). This saves taxpayers approximately \$911,363.

LETTER FROM THE DEFENDER

At the recent Eastern District Conference, the criminal breakout session featured David Dratman questioning Chief Judge Lawrence O'Neill, former Chief Judge Morrison England, and guest attorney Alan Ellis about sentencing and Bureau of Prisons matters. The time went quickly with many subjects covered, but two I want to raise here: client allocution and psychological evaluations for sentencing purposes.

Allocution

Both judges felt our client's allocution was a major persuasive sentencing opportunity. The right allocution could sway a judge's decision. Yet how many of us spend time with clients reviewing what can be said at sentencing? Do we ask them to tell us what they've learned from their arrests? From the court process? How has it all changed them? What are their plans? Their dreams? If they want a lesser sentence to be with their families, why wasn't family the priority when they committed the crime, what's changed?

Judges, despite their best efforts, get jaded. Who wouldn't be suspicious of jailhouse religion, so prepare clients to explain why and how their changed attitude will maintain in the light outside the prison or jail cell. Having a client show some insight to her circumstance or his behavior can carry weight in the judge's sentencing decision, turning its focus from

punishment into an investment in the client.

Of course, it needs to be in the client's words, not ours. And we must understand our clients are not just unaccustomed to public speaking, but to speaking with someone as important as a judge; it's a frightening experience. I have sometimes engaged in a Q-and-A during sentencing, to try to draw the client out, to explain to a judge more conversationally my client's feelings.

Psychological Evaluations for Sentencing
18 U.S.C. § 4244(a) allows for "Motion[s] To Determine Present Mental Condition of Convicted Defendant.— A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility."

So the motion's results don't just give BOP information on how to best designate and treat client (medication, counseling, support groups, all the above) once in BOP custody, but can also provide Client and the court with insight how mental illness contributed to the offense. Untreated

mental illness is a mitigating sentencing consideration, and a substance abuse disorder can qualify Client for special BOP programs. 18 U.S.C. § 3553(a)(1) Defendant's history and characteristics; U.S.S.G. § 5H1.3 Mental and Emotional Conditions and § 5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction.

Both Assistant Federal Defenders and CJA counsel can file motions pursuant to Section 4244(a) and, depending upon your concern, you can request the motion can be filed *ex parte* and under seal. DOJ pays for such evaluations. *Guide to Judicial Policy*, Vol.7A, Ch.3, § 320.20.60(a)(1) and (b)(1).