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Federal Defender Newsletter
October 2013

CJA PANEL TRAINING

Join us for Fresno CJA Panel Training on October 15th (Third Tuesday each month) at 5:30 p.m. in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno. Federal Defender Heather Williams will be screening a movie and discussing it: "Gideon's Trumpet: Let's Hope the Trumpet's Not Playing Taps.".

Sacramento CJA Panel Training will take place on October 16th (Third Wednesday) with CJA Panel Attorneys Tim Warriner, Krista Hart, and John Balazs presenting "Appellate Lawyers, Trial Lawyers: Why Can't We All Just Get Along?" Please join us at 5:00 p.m. in the fourth floor jury lounge of the U.S. District Court, 501 I Street.

CHARLES LEE, FRESNO'S NEW SUPERVISING ATTORNEY

We are pleased to announce Charles Lee as the Federal Defender's new Fresno Branch Supervising Attorney, stepping into Francine Zepeda's position after her appointment to Fresno County Superior Court.

Charles has been with the Federal Defender for several years, coming to us an experienced trial lawyer from being with the Fresno County Public Defender.

These are challenging times to take on running a government office, but Charles has vision to improve both client representation and assist the CJA panel.

Congratulations, Charles!

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.

♪ NOTABLE CASES ♫

Detrich v. Ryan, No. 08-99001 (9-3-13)(en banc)(W. Fletcher and plurality with Pregerson, Reinhardt and Christen; concurrence by Nguyen; concurrence by Watford). The Ninth Circuit splinters over a Martinez remand for ineffective assistance of state post-conviction counsel. The majority opinion remands to determine whether the state post-conviction counsel in this capital petition was ineffective. The plurality explores the four prongs set forth in Martinez for overcoming procedural default and finding cause and prejudice: (1) the IAC claim had to be substantial; (2)
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the "cause" was that petition had either no counsel or ineffective counsel during state review; (3) the state post-conviction review was the only proceeding to examine ineffective assistance of trial counsel (not a hybrid approach); and (4) state law requires the claims to be raised in an initial review collateral proceeding. The explanation provides a framework of analysis for procedural default under Martinez and distinguishes it from the prejudice and cause analysis in Strickland. Nguyen concurs but believes that the standards for cause and prejudice remain the same under Martinez and Strickland. Watford just wanted the case to be remanded and need not say more. Graber with others would forego a remand, under the facts, and decide the sentencing IAC claims now.

Dow v. Virga, No. 11-17678 (9-5-13) (Reinhardt with M. Smith and Carr, Sr. D.J.) In this second degree robbery habeas challenge, the Ninth Circuit reverses the denial of the petition. It holds that (1) the state prosecutor did commit prosecutorial misconduct; (2) it was not harmless; and (3) the state court's application of federal law was unreasonable. Here, even the state court found prosecutorial misconduct when the prosecutor knowingly elicited false testimony. The prosecutor had the detective testify that the petitioner, rather than his lawyer, had asked that eye patches be used to cover up a facial scar during a line-up. The lawyer had asked because of a concern about a false identification since only the petitioner had a facial scar. After eliciting the false testimony, the prosecutor than argued that it showed consciousness of guilt. The Ninth Circuit agrees with the state courts that this was misconduct and reverses the denial of the petition because it was not harmless. The state courts had been unreasonable in applying clearly established federal precedent.

US v. Dunn, No. 12-10388 (9-6-13)(M. Smith, with O'Scannlain and Anello D.J). Defendant received 100 months on a crack case. After the FSA, his guidelines were lowered to 77 to 96 months. He sought resentencing, based in part on his post-conviction rehabilitation. The district court denied a reduced sentence. The Ninth Circuit concludes that it has jurisdiction to review resentencing proceedings in their entirety, including the discretionary decision to refuse resentencing. Accordingly, the Ninth can continue to hear appeals from the discretionary denial of relief on crack resentencing.

Sossa v. Diaz, No. 10-56104 (9-10-13)(Paez, with Watford and Kennelly, D.J.) The Ninth Circuit reverses a dismissal for the untimeliness of a petition, finds equitable tolling for relying on a magistrate judge's order extending the time for filing (which was after the AEDPA jurisdictional time limit), and remands for consideration for further equitable tolling based the petitioner's lack of access to the prison library and lock-down.

US v. Lopez-Cruz, No. 11-50551 (9-12-13)(Reinhardt, with Canby and Wardlaw). The Ninth Circuit holds that a there is an expectation of privacy when a phone rings, and an agent, having consensually taken the phone from a defendant, answers it and impersonates the owner. The agent was investigating possible alien smuggling. He stopped the defendant, noticed two cell phones, and asked if he could search them. One phone than rang, the agent answered it, and fellow smugglers were on the other end. The Ninth Circuit affirms the district court's suppression of the

statements and calls. The court holds there was an expectation of privacy; the consent was limited to a search and not to answering the phone; and the defendant had standing to raise the issue.

Ayala v. Wong, No. 09-99005 (9-13-13)(Reinhardt with Wardlaw). The Ninth Circuit reverses the district court and grants a habeas petition for Batson violations. The state trial court had recognized that Batson challenges met the prima facie threshold. However, it conducted steps 2 and 3 of the Batson analysis ex parte because of security concerns. The case is almost thirty years old. The attorney's juror notes and questionnaires have been lost. There is no record. It cannot be presumed that the court followed the analysis. As a result, the petitioner was prevented from making a Batson violation showing.

Larsen v. Soto, No. 10-56118 (9-16-13)(Wardlaw, with Canby and Reinhardt). The Ninth Circuit affirms the denial of the Warden's motion to dismiss petitioner's habeas as untimely and AEDPA barred. The court concludes that petitioner has made the requisite showing of actual innocence needed. Schlup allows a successor petition or excuses bars if the petitioner meets the exceedingly high standard of whether a reasonable jury would not have found the petitioner guilty. In this identification case, the petitioner made the requisite showing.

US v. Bahr, No. 12-30218 (9-16-13)(Goodwin, with Reinhardt and Hurwitz). "We make clear now that the use of unconstitutionally compelled statements to determine a sentence in a later, unrelated criminal proceeding is unconstitutional." Here, the statements were a result of compelled treatment in a state proceeding that were used in a PSR for a present child porn sentencing. The statements were compelled as part of a "full disclosure" polygraph test regarding the defendant's sexual history. It was not required that the defendant assert the right against self-incrimination when the risk of incrimination is apparent and he had no choice but to comply.

US v. Grandberry, No. 11-50498 (9-17-13)(Berzon, with Rakoff, D.J.). The Ninth Circuit suppresses guns and crack due to an illegal search. The defendant was a parolee, and under Samson his residence could be searched without suspicion. However, this search occurred in a residence where he did not reside. There was no evidence that the defendant lived at the apartment, although he did visit it at least six times over a couple days and his girlfriend lived there. He did not have keys to it, nor exhibited control. Ninth Circuit allowed the defendant to challenge the search of a place he was at even if he did not live there.

US v. Arqueta-Ramos, No. 10-10618 (9-20-13)(Paez, with Fernandez and Berzon). Even with en masse changes of plea, there still has to be individual questioning of guilt under Fed. R. Crim. P. 11. This is another opinion arising from "Operation Streamline" in which our government prosecutes all illegal crossers in a border sector (approximately 70 a day) in the Tucson division. The Ninth Circuit vacates a guilty plea and sentence because the defendant was never individually and personally addressed regarding her Rule 11 rights. The large group was addressed en masse about its rights. That is permissible. Shortly thereafter, a smaller group of 5, including the defendant, was questioned as a group about maximum penalties, threats, rights to trial, appeal,

and factual basis. The only person-to-person question during the proceeding was whether the defendant pled guilty or not guilty. This was inadequate under Rule 11. For a guilty plea, even under Streamline, Rule 11 procedures have to be followed, and there must be assurances that the defendant knows what he or she is doing. The defendant, significantly, had objected and asked for an individual colloquy, but this was denied. The Ninth Circuit also holds that the error was not harmless because the government, bearing the burden, could not prove that she would have pled guilty under the proper procedure.

Smith v. Lopez, No. 12-55860 (9-23-13)(Thomas, with Hurwitz and Beistline, Chief DJ AK). The Ninth Circuit affirms the grant of habeas relief. In a murder prosecution, the prosecutor presented the case as if the petitioner was the actual murderer of his wife. The case was defended on that basis, with the petitioner arguing that he was physically incapable of committing the bludgeoning death, and that his employee had motive and opportunity. The prosecutor asked for and got an aiding and abetting instruction at the last moment and argued that someone else could have done it. The Ninth Circuit finds that the petitioner did not have notice of the aiding and abetting charge, and his right to notice was violated.

Graves v. McEwen, No. 10-17203 (9-24-13)(Hurwitz, with Graber and Bea). Does a lawyer, representing a petitioner in the appeal of a 2254 petition with a certificate of appealability, but finding no colorable or meritorious issues, withdraw through an Anders motion and brief, or does counsel just file a motion to withdraw? The Ninth Circuit holds the circuit rule, 9th Cir. R. 4-1(c)(6), controls and requires an Anders brief.

US v. Liu, No. 10-10613 (10-1-13)(Nguyen with Noonan and Fisher). The Ninth Circuit reverses and remands convictions for criminal copyright infringement and trafficking in counterfeit labels. The reversals were for errors in the jury instructions. The defendant in "willfully making copies" had to know specifically that he was acting illegally. Similarly, to "knowingly traffic" means that the defendant must have acted with the knowledge that the labels were counterfeit. Here, the defendant made copies of DVDs and CDs that supposedly infringed on copyright protection. He argued that he simply did not know they were illegal. The court's instructions were erroneous because they did not require that the defendant know his acts were illegal or that the counterfeits were indeed counterfeits.

US v. Gomez, No. 11-30262 (10-7-13)(Paez with Fisher and Gould). This is an opinion dealing with a categorical approach for sexual conduct with a minor. For sentencing purposes under 1326, the Ninth Circuit holds that sexual conduct with a minor under Ariz. Rev. Stat 13-1405 is not a "crime of violence" as defined in 2L1.2(b)(1)(A)(ii). The state offense which encompasses victims even "under fifteen" is not a generic "sexual abuse of a minor" offense since it is lacking a knowingly element and an "abuse" element for those older than 14; and it does not have the four year difference in age. Under Deschamps, a missing element cannot be supplied by a modified categorical approach. As for the conviction itself, the Ninth Circuit finds errors in the underlying removal hearing. The defendant was subject to an en masse proceeding where rights were read to a group, and he was presented

with a printed form waiver of rights. It is unclear whether he knew what rights he was waiving. He had difficulty reading Spanish. There is no evidence that the officer reviewed his rights with him. As such, he was denied his right to appeal his removal order as the waiver was not knowingly; and his waiver of his other rights were also not voluntary, knowing, and intelligent.

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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.

Letter from the Defender

Flowers are red, young man.
Green leaves are green.
There's no need to see flowers any other way
Than the way they always have been seen.
~ Harry Chapin
Flowers are Red

On one of Judy Clarke's visits to Tucson during the Jared Loughner case, we met so she could ask questions about Tucson District Court procedures. One was about subpoenas and, after giving my description, she asked, "Why do you do it that way? Why don't you do X?"

Why? Why?! Well, of course, because that's the way we'd always done it in Tucson and it seemed to work just fine. Or did it? . . .

So, take no offense, but:

- About those Pretrial reports at detention hearings, wouldn't it be easier, a real time saver to be able to keep them and not have to jot down at warp speed, as the PTS officer hovers, all the criminal history and personal stuff your client told Pretrial but hasn't yet told you? It would be much easier (and maybe save taxpayer and CJA money) for filing motions to reopen the detention hearing or start researching criminal history to just keep the report. General Order 120 prohibits it; the later Local Rule is silent. Fourteen districts in the Ninth Circuit allow keeping the entire report, with twenty more allowing retention of the Criminal History section.

- DOJ should pay for our doctors to do competency evaluations. The *Guide to Judiciary Policy*, Vol.7, Pt.A, Ch.3, § 320.20.20(b), § 320.20.10(a) and (b), § 320.20.60(a) and (b), http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch03.pdf. Clients shouldn't be stuck every time with being moved to LA for 3 - 4 months for the Government's evaluation, only to be found incompetent and have to be shipped off to Springfield or Butner for an additional 4-6 months to be "restored." Maybe we can get prosecutors to allow our doctor's evaluation first or stipulate to our doctor's evaluation, before insisting clients be sent away?

- Should we ask the court to issue an emergency General Order to Local Rule 170 and General Order 113A concerning the payment for transcripts by CJA or Federal Defenders? Currently, this Court has authorized court reporters to receive the maximum payment possible under the *Guide to Judiciary* Policy, Vol.6, Chap.5, §510 *et* seq, which says:
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> "The Conference, pursuant to 28 U.S.C. § 753(f) authorized district courts to prescribe fees which court reporters may charge and collect for transcripts requested by the parties, including the United States, at the following rates." JCUS-MAR 80, pp. 17-18.

I certainly don't begrudge our court reporters any income; they have special talents and skills, and their work is vital to protecting our clients. But during this time of 10% sequestration impacting the Defender's Office with layoffs, furloughs, and continued reduced budgets, and also affecting CJA Panel attorney payments with a 10 day payment deferral to end FY2013 (followed now by government shutdown with further deferral until either a continuing resolution or budget is passed), plus an emergency $15 per hour pay reduction which began September 1 and is planned to continue for a year, with an added 4 week pay deferral at FY2014's end, might not court reporter transcript fees accommodate our budgets? In at least one court, the court reporters charged for 10% fewer pages to support that Defender Office.

Just a few ideas from a fresher set of eyes. Keep up the good fight and let me know your thoughts!

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

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

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