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Federal Defender Newsletter

October 2017

CJA PANEL TRAINING

- Sacramento: Wednesday, October 18, 5:00 p.m. in the jury lounge, US District Court, 4th floor, 501 I Street. Ninth Circuit CJA Case-Budgeting Attorneys Kristine Fox and Laura Paul from the Office of the 9th Circuit Executive will present "Working with Your Ninth Circuit Case-Budgeting Attorneys to Get the Resources You Need."
- Fresno: Tuesday, October 17, 5:30-6:30 in the jury room of the federal courthouse, Davina T. Chen, Esq., will present "That Doesn't Count: Challenging Drug Priors and Other Predicates."

BENJAMIN GALLOWAY IS FD-CAE's NEW CHIEF ASSISTANT

On October 2, 2017, longtime AFD Benjamin Galloway became the new Chief Assistant Federal Defender for the Eastern District of California. Ben replaces Linda Allison, who held the position for 11 years.

Linda will return to the Felony Trial Unit as Senior Litigator and continue to supervise the Misdemeanor Unit. Thank you Linda for your long period of hard work on behalf of our Office!

PLEASE WELCOME NEW CHU AFD ALYSSA MACK

Alyssa started with the FDO October 2, 2017 as a Capital Habeas Unit AFD. Before joining our Office, she clerked for 18 months with Yosemite Magistrate Judge Seng. But Alyssa is a public defender at heart, practicing as a Brooklyn Public Defender in Brooklyn for four and a half years. She is originally from Baltimore, Maryland, and went to NYU Law School. Please join us in welcoming her to Sacramento.

FAREWELL AND GOOD LUCK TO TIVON SCHARDL!

Tivon Schardl, a veteran attorney in our Capital Habeas Unit, will be headed to Austin, Texas, to start a new CHU in the Western District of Texas. Tivon leaves Sacramento in November. We thank Tivon for all his hard work in our district and wish him luck in Austin!

PATHWAYS TO PROGRESS 2017

Attend Pathways to Progress 2017, on October 11, 2017 from 12:30-3:30 p.m. at the Kennedy Learning Center! Encourage clients to come as well! Expect 20-30 social service providers, training sessions, resume review services, and mock job interviews for supervisees and former offenders. Please pass this date along to clients. Flyer attached.

16TH ANNUAL GOLF TOURNAMENT

The annual golf tournament will take place on **October 6, 2017** at **1:00 p.m.** with a modified shotgun start. All skill levels are welcome. Cost for the tournament is \$80.00 per person and includes 18 holes, range balls, cart, dinner, and prizes! Please join us at Woodcreek Golf Course, 5880 Woodcreek Oaks Blvd., in Roseville. Contact Melvin or Henry for more information at (916) 498-5700 melvin_buford@fd.org or henry_hawkins@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.

CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

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, 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, dtorres@lawtorres.com, is the Backup CJA Representative.

ARE YOU INTERESTED IN BEING A CJA REPRESENTATIVE?

Scott Cameron's term as our District CJA Representative expires this year. David Torres will then become our District's Representative for 2018-2020.

If you are on the Sacramento CJA Panel and are interested in being the Back-up CJA Representative during David's term, segueing into being CJA Representative for 2021-2023, please let Heather Williams heather_williams@fd.org or Kurt Heiser kurt_heiser@fd.org know.

The annual panel application open period has an October 31, 2017 deadline. If you are up for renewal this year, you should have already received a reminder to send in a renewal application.

IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

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
Noa Oren, noa_oren@fd.org.

SUPREME COURT CERT. GRANTS

City of Hays, Kansas v. Vogt will consider the scope of the Fifth Amendment's "self-incrimination" clause – specifically, whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

Collins v. Virginia asks the Court to clarify the scope of the "automobile exception" to the warrant requirement – specifically, whether it applies to a car parked on private property, close to a home.

Byrd v. United States raises questions about the expectations of privacy in rental car for someone who is not an authorized driver.

Rosales-Mireles v. United States raises a question regarding the standard for the court of appeals to correct a plain error.

McCoy v. Louisiana asks whether it is unconstitutional for defense counsel to concede a defendant's guilt over the defendant's objection.

NINTH CIRCUIT OPINONS

US v. Jayavarman, No. 16-30082 (9-26-17)(Clifton w/Graber & M. Smith). The Ninth Circuit dismisses a conviction for

"attempt to aid and abet" travel with intent to engage in illicit sex under 18 USC 2243(b). The government conceded that there is no "attempt" offense for this crime. Under the federal criminal code, there must be a specific "attempt" offense. Even though the Ninth Circuit decision affirms another count of conviction, it remands the case for resentencing. The court had indicated it imposed a holistic sentence, which took into account both convictions. Accordingly, a resentencing was necessary.

Ybarra v. Filson, No. 17-71465 (9-1-17)(Tallman w/Silverman & Clifton). In a capital habeas, the Ninth Circuit reverses a denial of a motion to reopen a habeas petition on an *Atkins* claim.

US v. Doe, No. 15-50259 (9-12-17)(Christen w/Watford & Soto). This is an important case that deals with the issue of sealing filings and documents related to cooperation departures. The Ninth Circuit reverses the district court's denial of a motion to seal those documents. The court had refused to seal cooperation documents, including the departure memo based upon a qualified First Amendment right for public access that was not rebutted. The Ninth Circuit reverses. It assumes without deciding that there is a qualified first amendment public right to access. However, the defendant rebutted the presumption given his cooperation against a Mexican cartel and several other defendants both in and out of custody, and threats made to him and his family.

Of note is the discussion on whether courts should create dummy dockets, or have an entry that is sealed in every case, to prevent certain red flags for cooperation. Cooperators are at risk in the BOP and the courts have been trying to protect them. The panel discusses the Court Committee

on Administration and Court Management's (CCACM) report on cooperators and the grave risks they face. CCACM advocates the process, in place in many districts, of having a sealed supplement or portion in filings and in sentencings to camouflage whether there has been cooperation. This procedure though is not without controversy, as it endorses sealed proceedings in every criminal matter, keeps information from the public and press, and creates misleading entries. There must be an individualized assessment.

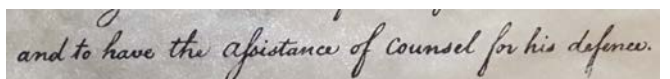
US v. Hernandez Martinez, No. 17-50026 (9-15-17)(Ikuta w/Fletcher & Barker). This is a significant illegal reentry sentencing case under the 2016 amended § 2L1.2 guidelines. The Ninth Circuit holds that the adjustment for prior sentences will depend on the sentence imposed before the first order of deportation/removal. It joins the Fifth Circuit in this interpretation. The defendant was convicted of a felony in 2003 and sentenced him to one year of custody. He was then deported. He returned without authorization, and received three years for the violation. He was then deported again. In 2016, he was in the United States again, got another state sentence (a misdemeanor) and a 1326 charge. The court applied the amended 2016 guidelines, and gave him an 8-level adjustment for the prior being more than 2 years in custody. The defendant argued in court, and on appeal, that the state conviction did not trigger the +8 enhancement because he was sentenced to only a year of prison before his first deportation. The Ninth Circuit finds that this argument was correct. The Sentencing Commission's Immigration Primer was wrong on this point.

Rodriguez v. McDonald, No. 12-56594 (9-29-17)(Lasnik w/Pregerson & Friedland).

The Ninth Circuit reverses the district court's denial of petitioner's habeas petition challenging his conviction for second degree murder. It concludes that a juvenile who invoked his right to a lawyer was clearly denied assistance of counsel. He was then badgered into confessing a murder. The recording of the interrogation leaves no doubt. Congratulations to CJA panel attorney Tony Farmani!

Hernandez v. Sessions, No. 16-56829 (10-2-17)(Reinhardt w/Wardlaw and Fernandez). A class of non-citizens detained in immigration court sued for an injunction of the cash bonds required for release. The Ninth Circuit holds "no person may be imprisoned merely on account of his poverty." The class was composed of members that were neither dangerous nor enough of a flight risk to require detention without bond. Cash bonds had been set by immigration officials, but the class members could not afford to pay them. The government did not require officials to consider financial ability and alternative non-financial conditions of release. The Ninth Circuit held that a bond determination process that does not include consideration of financial circumstances and alternative release conditions undermines the legitimate purpose of ensuring the non-citizen's appearance at future hearings. Detention of an indigent "for inability to post money bail" is impermissible if the individual's "appearance at trial could reasonably be assured by one of the alternate forms of release." Pugh v. Rainwater, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc).

LETTER FROM THE DEFENDER



and to have the assistance of counsel for his defence.

Those amazing ten words – *and to have the assistance of counsel for his defense* – from our Bill of Rights, appended to our CONSTITUTION, through the Sixth Amendment – make all the difference for anyone accused of a crime.

I recently visited the National Archives in Washington, D.C., which houses and displays original copies of our CONSTITUTION and Bill of Rights. Increasingly fading, the 228 year old Bill of Rights, if only for those amazing ten words, moved me to tears.

I was in D.C. for the surreal purpose of trying to persuade, along with the rest of our client’s legal team, the Department of Justice to **not** authorize the death penalty in prosecuting our client.

Bureau of Prisons' Quiz

Which of the below is the correct designation for an inmate who, resentenced to life from a death sentence, spent the past 16 years in solitary confinement on death row, who is a survivor of childhood sexual and physical torture, and who, at age 56, suffers multiple medical infirmities including diabetic side effects of legal blindness, neuropathy, and a gaping wound on the sole of his foot eventually requiring amputation?

- A. A grassy hilltop, bathed in sunshine, surrounded by butterflies and songbirds with unicorns grazing nearby.
- B. ADX-Florence where he will initially remain in solitary confinement while gradually being exposed to increasingly more frequent, but highly controlled general population contact, all the while with supportive counseling.
- C. General population at a maximum security prison in a unit including chronically mentally ill inmates and sex offenders who, empowered by their numbers, brag about what they did sexually to children and what they will do when they get released.

As my January 2014 newsletter explained,

counsel made all the difference for Clarence Gideon – the jury acquitted him in his represented retrial. <http://cae-fpd.org/news/jan14.pdf> Defense Counsel make a difference.

A recent *The Marshall Project* article by Alysio Santo discusses why gun rights advocates (who may tend to be conservatives) “learned to love free lawyers for the poor” over the concern that citizens are losing their right to possess guns after a criminal conviction either through no or ineffective representation. <https://www.themarshallproject.org/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor> Recently-retired federal judge Richard Posner cited as part of his reason to retire treatment by federal judges of *pro se* litigants – those who represent themselves with no lawyer: “*The basic thing is that most judges regard these people as kind of trash not worth the time of a federal judge.*” <http://www.abajournal.com/news/article/posner-most-judges-regard-pro-se-litigants-as-kind-of-trash-not-worth-the-time-of-a-federal-judge> [utm_source=maestro&utm_medium=email&utm_campaign=weekly_email](http://www.abajournal.com/news/article/posner-most-judges-regard-pro-se-litigants-as-kind-of-trash-not-worth-the-time-of-a-federal-judge?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) These are but small occasions showing the importance of those ten amazing words.

That the language “*and to have the assistance of counsel for his defense*” even made it into the Bill of Rights is frankly astounding. Whereas now 61 current U.S. senators have law degrees (with probably many being former prosecutors), our “founding fathers” fortunately included lawyers who practiced criminal defense: John Adams, Alexander Hamilton, and Aaron Burr. Adams, who represented the unpopular defense of the British soldiers in the “Boston Massacre,” years after being vice president and then president, said of his defense experience:

The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death against those Soldiers would have been as foul a

*Stain upon this Country as the Executions
of the Quakers or Witches, anciently.*

The honor of representing another, being
their voice and their protector, and holding
our government and judges to their

responsibilities, would not happen but for
those ten amazing words. I am ever in awe
of them and hope to always be affected by
their power.

~ Heather E. Williams, FD-CAE

Pathways to Progress Empowerment Fair!

Wednesday, October 11th, 2017

12:30 pm - 3:30 pm

Federal Courthouse | 501 I Street, Sacramento, 95814

Justice Kennedy Library and Learning Center, First Floor



~ A resource fair designed for Federal criminal justice involved individuals and their families ~

** Mock Interviews * Resume Assistance & Critiques * Empowering Panel Discussion*

** Community Resources, providing:*

**Education | Employment/Training Programs | Financial Literacy | Health & Wellness
Family & Children's Resources | Veteran's Resources | Advocacy/Mentoring Programs | and,
More!**

Federal Court employees are invited and encouraged to attend!

For more information: crystal_richardson@fd.org, or becky_fidelman@caep.uscourts.gov

A joint partnership of the Federal Defender's Office, Federal Probation Office, Federal PreTrial Services Office, and The Justice Anthony Kennedy Library and Learning Center