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Federal Defender Newsletter

September 2013

REMEMBERING SANDRA COKE



Federal Defender,
Eastern District of
California
employee Sandra
Coke was reported
missing in Oakland
by her teenaged
daughter late

Sunday, August 4, 2013. It was just 2 days after Sandra celebrated her 50th birthday. After a week of news reports, requests to the public for information, and friends and family canvassing Oakland neighborhoods, police confirmed a woman's body found near Vacaville was Sandra.

Sandra was with our Office since 2009 as a Capital Habeas Investigator. Her invaluable work supported our efforts on behalf of California death row clients. This was Sandra's career, from when she worked also with the California Appellate Project, the San Francisco Public Defender Office, the Equal Justice Initiative of Alabama, and later had her own private investigation office in San Francisco.

Sandra was known and will be remembered for her unrelenting and dedicated investigation. Just recently, while in our office, Sandra's work

contributed to our successful effort to overturn a wrongfully obtained 2001 Sacramento County murder conviction, giving our client a new trial.

Sandra was a compassionate, intelligent, thorough investigator. A devoted single mother and friend to her coworkers, she dedicated her work and her life to looking for the best in people, to give some explanation to why people do what they do - even the most heinous of acts, all based upon the belief that no person should be judged only by the worst act he or she committed.

We expect the legal team will do the same to defend whoever may eventually be charged. As those in our Office always expect, we hope the process is fair and just.

As we support each other, our thoughts of support go to Sandra's daughter, sister, mother, and family. Those wishing to donate to Sandra's daughter's future can donate at <http://sandracokefund.org>.

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Check out [www.fd.org](http://www.fd.org) for unlimited information to help your federal practice.

## CJA PANEL TRAINING

Fresno CJA Panel Training will resume on September 17<sup>th</sup> in Fresno (Third Tuesday each month) with a presentation by Magistrate Judge Stanley A. Boone on "Courtroom Procedures with Questions, Comments and Suggestions for General Application". Please join us at 5:30 p.m. in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno.

Sacramento CJA Panel Training will resume on September 18<sup>th</sup> (Third Wednesday) with "Tips and Tricks with Criminal History Points" presented by CJA Panel Attorney Scott Cameron. Please join us at 5:00 p.m. in the fourth floor jury lounge of the U.S. District Court, 501 I Street.

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## **ONLINE MATERIALS FOR CJA PANEL TRAINING**

The Federal Defender's Office will be distributing panel training materials through our website: [www.cae-fpd.org](http://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](mailto: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](mailto:janet_bateman@fd.org), Ann McGlenon, [ann\\_mcglendon@fd.org](mailto:ann_mcglendon@fd.org), or Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org), or Sacramento: Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org).

## **ANNUAL GOLF TOURNAMENT**

**Congratulations to Danny Brace for winning the 12<sup>th</sup> Annual Federal Defender's Golf Tournament!** Thank you for everyone who came out to play.



## **MICROSOFT WORD TRANSITION**

The District Court is on schedule to convert fully from WordPerfect to Microsoft Word on **October 2, 2013**. That means that documents sent directly to judges' chambers for the court to edit before filing must be in Word format.

If you have not yet installed MS Word, it is possible to save WordPerfect documents as Word documents, but expect glitches, especially with pleading paper documents. To convert from WordPerfect, use *Save As* and click on the arrow for *File Type* (bottom of the file list screen, bottom left hand corner) and scroll up to either MS Word 2007 (WordPerfect X5 or X6) or MS Word 97/2000/2002/2003 (earlier WordPerfect versions).

## ♪ **NOTABLE CASES** ♪

US v. Thomas, No. 11-10451 (8-8-13)(O'Scannlain, with Goodwin and N. Smith). This case involves Beny-A, a drug detection dog who, in evaluations, barely made the grade. The government provided heavily redacted "discovery" of his training. At the defendant's traffic stop, the dog acted alert and then perhaps went into detection mode at a truck with a toolbox (where marijuana was ultimately found). The Ninth Circuit criticized the government for failing to turn over the entire training file on Beny-A, and vacated the conviction. The government tried to argue that the defense at trial -- duress -- made any error harmless at the suppression hearing. The Ninth Circuit rejected this argument.

US v. Underwood, No. 11-50213 (8-6-13) (Pregerson, with Noonan and Paez). The Ninth Circuit affirmed the district court's suppression of evidence because of the lack of probable cause in a search warrant affidavit. The defendant was suspected of trafficking in drugs. A wiretap and surveillance led to a 100+ page affidavit supporting an affidavit for a search warrant. The search of the defendant's home only found a small amount of pot for personal use. The government wanted to search one more house, where packages were delivered three months previously. The federal agent had a state agent draft a search warrant affidavit for that house. The state agent copied verbatim the key portions of the prior federal affidavit, complete with the "I believe...." and "I observed....." assertions from the other agent. The district judge suppressed the evidence based on a lack of probable cause for the warrant. The Ninth Circuit affirmed, holding that the affidavit lacked probable cause and that the good faith exception did not apply. The Ninth Circuit rejected the government's attempt to use extrinsic evidence to save the affidavit, holding, "Reliance upon a bare bones affidavit is never reasonable." *Id.* at \*10.

US v. Ermoian, 11-10124 (8-14-13)(O'Scannlain, with Goodwin and N.R. Smith). An investigation by local police officers, even federally-funded ones, does not qualify as an "official proceeding" under 18 U.S.C. § 1512(c)(2), which prohibits conspiracy to obstruct justice. The defendant -- a private investigator -- was convicted of obstructing justice for his involvement in telling suspected Hells Angels that they were under police surveillance. The Ninth Circuit held that "a criminal investigation is not an 'official proceeding' under the obstruction of justice statute" and reversed the conviction. Congratulations to CJA panel attorney (and former AFD) John Balazs, who has represented Mr. Ermoian from the beginning.

US v. Sedaghaty, No. 11-30342 (8-23-13)(McKeown, with Schroeder). This was a tax fraud case that was transformed into a terrorism case. Charitable contributions supposedly intended for a mosque in Missouri were allegedly sent to terrorists in Chechnya. The Ninth Circuit reversed the conviction and remanded for a new trial and to see if evidence should be suppressed, based upon Brady violations and a search outside the warrant. The trial played out with evidence deemed classified. Summaries of that evidence were admitted at trial and Brady material on a key witness was withheld. The failure to disclose Brady

material was especially troubling to the Ninth Circuit. There was also a computer search that ranged far beyond the warrant.

US v. Evans, No. 11-30367 (8-27-13)(Paez, with Fisher). Federal Rule of Evidence 104 concerns preliminary issues of witness qualifications, existence of a privilege, and admissibility. The question here is whether Rule 104 serves a gatekeeper function, under which a judge can determine whether evidence is fraudulent and exclude it or whether the rule allows that determination subject to another substantive provision outside of 104. The case here involved a delayed birth certificate issued by Idaho in an illegal reentry case and a separate fraudulent documents case. In each case, the delayed birth certificate was key to the defense that the defendant was indeed a US citizen. The district court held a pretrial hearing, where three government witnesses cast doubt on the delayed birth certificate. The court concluded it was procured by fraud and excluded it. The Ninth Circuit vacated and remanded. The district court could not use Rule 104 by itself to exclude evidence; it had to use another substantive provision. To allow a court to act as an "umbrella" gatekeeper in this fashion would mean the court weighs and judges the evidence as a gatekeeper independent of other provisions. The evidence in this case revolved around the delayed birth certificate. The Ninth Circuit -- mindful of the due process concerns -- said the evidence must be allowed, and that Rule 403 would not bar it.

US v. Swor, No. 12-30250 (8-27-13)(per curiam with Kozinski, Berzon and Hurwitz). A fraudster introduced an investor to another fraudster: does the first fraudster owe restitution when the investors are bilked by the second? No, said the Ninth Circuit, because the introduction was not part of the fraudulent scheme. The first fraud involved a group of investors, the defendant, and a co-defendant. The defendant introduced other investors to the co-defendant, who (after the defendant ended his fraud) continued to defraud the investors in a separate scheme. The court could not order the defendant to pay restitution to the second group of investors.

US v. Eaton, No. 11-50081 (8-29-13)(Reinhardt, with Molly). Does a "thermal lance" constitute a "fire" for the purpose of a mandatory 10 year sentence? A thermal lance is a tool designed to cut through metal using extreme heat, pressurized oxygen, steel pipes, magnesium rods, a large

battery, striker plates, and a pistol-like nozzle with flickering flame or sparks. It was used to cut open an ATM. If the device is a “fire,” then using it to commit bank larceny results in a mandatory sentence under 18 USC 844(h). If it is not a fire, then the mandatory sentence does not apply. The Ninth Circuit held that it was not fire. “Fire” is not defined in the statute, but it is understood to be flames that burn in a sustained manner and not heat and sparks that were incidental to the use of the thermal lance.

US v. Flores, No. 11-50536 (8-30-13)(Paez, with Watford and Kobayashi, D.J.). Under the guidelines, do 40 mm cartridges qualify as “missiles” for a +15 enhancement under 2K2.1 and 26 USC 5854(f) because they launch from a grenade launcher? The Ninth Circuit ponders this novel issue, examines the guidelines, parses the statutory rules of interpretation, consults multiple definitions, and holds that a missile must be a self-propelled device designed to deliver an explosive. Accordingly, these cartridges were ammunition and were not missiles.

### Unpublished Appellate Victory

**Congratulations to AFDs Doug Beevers and Carolyn Wiggin** for winning in the Ninth Circuit in US v. Clark, 12-10226 (8-15-13). The panel held that a special condition of supervised release that held that the defendant could not “frequent places with material depicting and/or describing sexually explicit conduct” was overbroad because it deprived him of “more liberty than is reasonably necessary to fulfill the goals of his supervised release.” This broad condition could keep him from attending a non-sexually-explicit movie at a multiplex that also screens R-rated films and from “frequenting a local bookstore or gas station that contains an ‘adult’ section.” The Ninth Circuit suggested a way to rephrase the condition to bar frequenting any place “whose primary purpose” is to provide materials depicting sexually explicit conduct. Congratulations Carolyn & Doug!

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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

What a roller coaster month! It started out for us number crunching to see if my Office would have to lay off any additional people to meet next fiscal year’s budget in its myriad possibilities: 10% sequester during a continuing resolution? 14% or more for sequester-plus once a budget was approved? Would the Executive Committee for the Courts say all cuts are borne by the Defender Offices so there would be no CJA payment deferrals, borne by the CJA Panel so Defender Offices would have no more furloughs or layoffs, or a painful combination in a financial diet? Turns out the latter.

By time you read this, our CJA Panel, for any work done between September 1, 2013 and September 1, 2014, will be paid \$15 less per hour – a 12% pay cut for non-capital case work, an 8.4% cut for capital representations. Come mid-September, CJA voucher payments will be deferred until October 1; next year the deferrals will start September 3, 2014.

For my Office, we’ve had 2 involuntary layoffs and 3 voluntary layoffs. Temporary positions will not be renewed. Between layoffs, retirements, resignations, and death, a hiring freeze and inability to backfill empty positions, the Federal Defender, Eastern District of California Office, which began the fiscal year at 93 fulltime employees, will be only 73, a 22% staff reduction. This was after 7 furlough days between April and July, a 10% a pay period pay cut. Starting in October, we plan 9 furlough days in 4 hour a pay period increments, a 5% pay cut and a move which will save 4 to 5 additional jobs. In addition, the Office only pays for local trainings and webinars, has drastically reduced its inventory budget and regularly asks experts for fee reductions.

This is not a time of CJA versus FPD. As Benjamin Franklin said, “We must all hang together, or

assuredly we shall all hang separately.” As a unified voice to Congress, we must speak on the importance - the constitutional imperative - to fully fund indigent defense. The Criminal Justice Act will be 50 years old a year from now, in August 2014. Its health may depend on our ability to persuade our Congressional representatives. Good thing “persuasion” is what we do.

At this letter’s start, I mentioned the roller coaster, for, no sooner had the month begun, than we received word that one of our staff, Capital Habeas Investigator Sandra Coke, was missing. Her disappearance brought clarity to what is important among this budget nonsense. In the week where we hoped for the best, but feared the worst, our Office and Sandra’s family knew we were part of a community where giving and selflessness are second nature. Our thanks go to all members of our court family who supported us during the difficult weeks following her disappearance, and to those who have donated to see that her teenaged daughter will have the education and future Sandra hoped for her.

Many have offered me concern that my first several months have offered such challenges. As difficult as they have been, I am sorry all are going through these tribulations. What makes it easier is the incredible support and positive attitude my coworkers share with me. Thank you all – I’m glad to be here.

~ 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



Next pages:

*Federal Defender Office Policy concerning
Access through Federal Defender Office
resources to Confidential DMV Information for
CJA Representations (created under California
Vehicle Code § 1808.47)*



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LINDA C. HARTER
Chief Assistant Defender

MEMORANDUM

To: CJA Appointed Panel Attorneys, their Investigators and other CJA Defense Team Support Staff
From: Heather E. Williams, Federal Defender *Heather E. Williams*
RE: Federal Defender Office Policy concerning Access through Federal Defender Office resources to Confidential DMV Information for CJA Representations (created under California Vehicle Code § 1808.47)
Date: July 16, 2013

Access to DMV information is a special privilege for the Federal Defender Office. By contract with DMV, we hold a Class "A" requester account and are entitled to the same degree of DMV record access as law enforcement agencies. Our goal is to protect and maintain this privilege as this invaluable tool helps us to effectively represent our clients. We share our DMV information resources with the CJA Panel because it is our Office's obligation to help insure equity in CJA client representation and to conserve limited CJA funds.

ADVISALS TO CJA COUNSEL AND THEIR TEAMS

DMV classifies all address information as CONFIDENTIAL (California Vehicle Code [CA VC] §§ 1808.21(a), 1808.22 and 1805.25(b)). The Federal Defender Office is entitled to receive confidential address information for official purposes only. Confidential DMV information obtained through this Office is subject to certain California statutes and DMV regulations.

DISCLOSURE REDACTION

Further, if any DMV information is disclosed, all confidential address information should be redacted before disclosure to any person not authorized by DMV to receive confidential DMV address information, including disclosures to clients. There is no need to redact confidential DMV address information from DMV information disclosures to the Court, U.S. Attorney, U.S. Probation Office, or U.S. Pretrial Services, etc., since (a) these agencies all could obtain such information independently, and (b) these agencies are presumably aware of the confidential nature of such information and maintain their own policies for protecting the information's confidentiality.

RULES FOR OBTAINING AND USING DMV INFORMATION:

DMV information shall only be obtained to accomplish responsibilities under a Criminal Justice Act appointment and never for any private, personal, or other reason. Authorized use of DMV information is restricted to further a criminal defense investigation on behalf of an indigent criminal defendant in a federal criminal case appointment under the Criminal Justice Act.

Driver license photographs and DMV driver license and vehicle registration information printouts shall be handled carefully and kept in a secure, discreet manner so these documents cannot be viewed by any unauthorized person. An "authorized person" is someone who is

directly involved with you as a member of your criminal defense team appointed under the Criminal Justice Act on behalf of an federally-charged, indigent defendant; no one else is an authorized person.

Once its legitimate use has ended, all DMV driver license photographs and all other DMV information must be thoroughly DESTROYED by shredding or other similar method which prevents the material from being reproduced or identified in any physical or electronic form.

All driver license and vehicle registration ADDRESS INFORMATION is CONFIDENTIAL by statute (CA VC §§ 1808.21(a), 1808.22 and 1805.25(b)). The confidentiality of DMV address information must be protected by the recipient from any unauthorized disclosure (CA VC §1808.47). DMV confidential address information may not be disclosed to clients, client relatives or friends, witnesses, etc. Confidential address information must be completely REDACTED from any DMV materials to be shown to clients, client relatives or friends, witnesses, etc. When necessary, driver license photographs **may** be shown to clients, client relatives or friends, or witnesses, etc., but copies of driver license photographs shall not be given to and/or left with any of these persons.

Any additional DMV information disclosure to other individuals not mentioned above, who do not receive the information directly through the Federal Defender, must be made only to individuals authorized to receive the information. Subsequent recipients remain subject to these same rules and (a) must be informed by the DMV information transferor about these rules, policies and statutes, and (b) must also agree to protect and maintain the confidentiality of all confidential DMV information they receive.

POTENTIAL PENALTIES FOR ABUSING DMV RECORD ACCESS

- Any person who gets confidential DMV information for any non-official purpose or to disclose confidential DMV information to an unauthorized recipient may be charged with a misdemeanor, punishable by a jail term up to one year and a fine up to \$5,000 (CA VC § 1808.45).
- Any person who misuses, by unauthorized subsequent distribution of confidential information, DMV information obtained through the Federal Defender's Office may be subject to, in addition to other penalties in the Vehicle Code, a civil penalty up to \$100,000 (CA VC § 1808.46). Further, the Federal Defender Office's privileges to receive any future confidential DMV information may be suspended for up to five years or revoked permanently, and be civilly fined up to \$100,000 (CA VC § 1808.46). Misuse could further result in disciplinary action or prosecution under other state and federal civil and criminal statutes.

ACKNOWLEDGEMENT

I have read and understand the security policies and restrictions outlined above. I specifically acknowledge that all DMV address information is CONFIDENTIAL. I agree I will only obtain DMV information through the Federal Defender Office by following these written policies and restrictions and the statutes and regulations to which they refer. I will only use that DMV information in a manner conforming to these statutes, policies and restrictions.

Dated: _____

Signature _____
Name Printed: _____