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Federal Defender Newsletter

September 2014

CJA PANEL TRAINING

Sacramento panel training will return on September 17, 2014 (third Wednesday) at 5:00 p.m. in the jury lounge on the fourth floor of the U.S. District Court, 501 I St. The panel attorneys from United States v. Charikov, et al., will be presenting lessons and strategies learned from their recent jury acquittal. Please join Toni Carbone, John Balazs, Tim Pori, and Dan Koukol for their presentation and discussion on mortgage fraud trial strategy.

Fresno panel training will return on September 16, 2014 (third Tuesday). Hanni Fakouri, esq., from the Electronic Frontier Foundation will be presenting on *Government Surveillance of Cell Sites*. The training will be held in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno.

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.

Thirteenth Annual Federal Defenders Golf Tournament

When: September 12, 2014 at 1:30 pm
(modified shotgun start)

Where: Teal Bend Golf Club, 7200 Garden Hwy, Sacramento

How Much: \$85 for golf, range balls, cart, dinner, and prizes!

For questions, playing partners, and special menu needs, please contact Henry Hawkins at henry_hawkins@fd.org! All skill levels are welcome.

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

## Defender Services Office

### Training Branch

<http://www.fd.org/navigation/training-events>

#### UPCOMING TRAINING

#### LAW & TECHNOLOGY SERIES: TECHNIQUES IN ELECTRONIC CASE MANAGEMENT WORKSHOP

TAMPA, FLORIDA | September 18 - 20, 2014

#### TRAIN THE TRAINERS WORKSHOP

SANTA FE, NEW MEXICO | November 12 - November 14, 2014

### ♪ NOTABLE CASES ♪

Nordstrom v. Ryan, No. 12-15738 (8-11-14). This appeal arises out of a state death row prisoner's civil case: when the prisoner tried to send a confidential letter — "legal mail" — to his lawyer, a prison guard actually read the letter, instead of merely scanning and inspecting the letter for contraband. Formal grievances were denied on the stated ground that the state correctional staff "is not prohibited from reading the [legal] mail to establish the absence of contraband and ensure the content of the mail is of legal subject matter." Plaintiff sued under 42 U.S.C. § 1983 alleging violations of various constitutional rights. The Ninth Circuit holds that "inspecting letters and reading them are two different things." Under the Sixth Amendment, prison officials don't have the right to read a confidential letter from an inmate to his lawyer.

Hernandez v. Spearman, No. 09-55306 (8-22-14)(Berzon with Pregerson and Amon, Chief D.J.). The Ninth Circuit holds that "the prison mailbox rule applies when a prisoner delivers a habeas petition on behalf of another prisoner to prison authorities for forwarding to the clerk of the court." A prisoner depends upon the

prison authorities when it comes to mailing or delivering court filings. The prison can monitor and check when and where it gets the filings. Here, the fact the petition was given to a "jailhouse lawyer" who delivered it should not bar the mailbox rule from working

US v. Nora, No. 12-50485 (8-28-14)(Watford with Fletcher and M. Smith). In Payton v. New York, 445 US 573 (1980), the Court held that the police cannot arrest a suspect inside his home unless the police first obtain an arrest warrant or an exception to the warrant requirement applies. Here, the defendant had a handgun on his porch. He went inside his home. The police had probable cause to believe he had the gun on the sidewalk, and thus may be guilty of a misdemeanor. The police did not obtain an arrest warrant. They ordered him out of the house, and arrested him. The Ninth Circuit rejected the government's exigency arguments, finding that it was not an emergency situation or a threat and the offense was of a minor nature. Payton was thus violated. When the police did get a warrant, they did so to look for lots of guns and lots of drugs. However, there was no evidence for lots of guns or lots of drugs, and so the cache of weapons and the drugs had to be suppressed. In addition, the court suppressed inculpatory statements.

US v. Fowlkes, No. 11-50273 (8-25-14)(Wardlaw, with Murguia; Restani dissenting). The Ninth Circuit reversed the denial of a warrantless body cavity search of the defendant after he was arrested and in jail. The Ninth Circuit described the cavity search as "brutal" and physically invasive. The defendant, suspected of drug dealing, was arrested. In booking, he was told to strip and bend over. The officers found and manually extracted contraband from a body cavity. This

violated the Fourth Amendment's guarantees against unreasonable search, and also violated the jail's own policies and procedures. The search and seizure was fought, demeaning, and without medical supervision. The evidence must be suppressed.

Wharton v. Chappel, No. 11-99016 (8-27-14)(Graber with Paiz and Fletcher). In this capital habeas appeal, the Ninth Circuit remands for an evidentiary hearing on defense counsel's failure to investigate and present mitigation offered by a family member on the sexual abuse suffered by petitioner.

US v. JDT, No. 12-10005 (8-12-14) (Alarcon with Zouhary, D.J.; concurrence by Berzon). This appeal concerns a juvenile delinquency finding and sentence. The juvenile was 10 years old and developmentally slow. He was accused of sexually abusing other young children, of roughly the same age, on a military base. The Ninth Circuit remands because the district court erred in not considering suspending delinquency considering the juvenile's youth, developmental issues, and the lifelong consequences of a sex offense conviction. The court has the ability to suspend a finding of delinquency, and on this record, the court seemed not to have been aware of its discretion, nor to have explained why it failed to exercise it under these circumstances. One other interesting issue in this case is the vagueness challenge to the statute, which does not delineate who should be considered the perpetrator or victim when the children are under 12. The Ninth Circuit holds that the statute defines an offense, and that there is prosecutorial discretion on who is the perpetrator. There is now a split with several state supreme courts on this issue.

## LETTER FROM THE DEFENDER

I've now been the Federal Defender for a little over a year. Since last we shared a year of monumental change, not just in my Office, but throughout the entire federal government, it looked as if Fiscal Year 2014 was going to be more devastating than the previous year, both in budget and personnel. Starting the Fiscal Year with a government shutdown didn't instill confidence for improvement. We planned for more furloughs and asked people to again consider early buy-outs.

But, then, a budget was passed. Astoundingly, Congress saw fit to fund Defender Services, not to pre-sequestration levels, but at least to higher than sequestration levels. We've been encouraged to hire and hope for new staff to be with us this spring. We found money for information technology improvements and are about to bring our phone system into this millennium.

For our Criminal Justice Act (CJA - private attorney court appointment) Panel, given the District's size, we got the Court's permission to add a second Panel Representative. As current representative Carl Faller is based in Fresno, Scott Cameron of Sacramento was named our secondary CJA representative. The plan is, as the position rotates every 2 to 3 years between Sacramento and Fresno, to make Scott our primary representative once Carl's term is complete and locate a secondary representative based in Fresno.

Initial concerns for the CJA Panel at Fiscal Year 2014's beginning were the sequester-gone-worse budget would require CJA payments delays of up to 6 weeks by fiscal year's end. The increased above-sequester Defender Services budget, combined with the drastic personnel cuts Defender Offices made during sequestration and a hesitancy to hire (a form of PTSD?) translate to no expected CJA Panel payment deferment.

Part of Defender Offices' hesitancy to hire, including in our own District, stems from dual Administrative Office (AO) of the U.S. Court's announcements:

- 1) AO reorganization renamed the Office of Defender Services (ODS) to Defender Services Office (DSO) and moved it from being a separate prong in the organizational chart to within the AO's newly created Department of Program Services (DPS). Further, in a believed cost-containment measure, Defender Services IT (former ODS-IDT)– who deal with attorney-client and work product privileged information – was removed from within DSO and placed within Case Management Systems Office (CMSO – don't you just love the alphabet soup of government agencies?) where courts, judges, Probation, and Pretrial could access all information. Since we ethically could not permit such access, drastic measures were considered until DSO reached a Memorandum of Understanding with CMSO and DPS to keep Defender IT separate and separately supervised by a Defender Office, while still be a part of CMSO.
- 2) Say "Work Measurement Study" around anyone within the courts these days and expect moans. As another hopeful cost-containment measure, the AO tasked its Policy and Strategic Initiatives Office (PSIO), within its Office of Human Resources (OHR), to conduct a "work measurement study" to decide and recommend an improved means of determining Defender Office budgets and staffing. District Court Clerk Offices have undergone their study; Pretrial and Probation are within theirs.

Presently, Defender Office budgets and staffing are determined by a previous statistical year (fittingly beginning April Fool's Day the year before the budgeted year) and the case weighted openings (CWOs) for each office within

that year. The "weights" were determined by a RAND study several years ago, calculating the average number of attorney hours spent on each case type (case types are the same the court use). Then the total CWOs are divided by the number of full-time Assistant Federal Defenders from the baseline statistical year and – voilà – number of lawyers we should have had last statistical year and could get permission for now. Honestly, it sort of makes sense.

Except the AO thinks there might be a better way. PSIO will use a simple linear regression formula (commonly used for determining budgets and staffing in the manufacturing sector – but we don't make widgets!), add multipliers to it (what might make any district unique) and recommend several potential budget/staffing formulae. Starting in September and continuing for two months, PSIO will collect all Defender Offices' all staff TimeKeeping data, case information, and recorded workload drivers. PSIO has also been collecting data on the myriad other factors Defender Offices cannot control (weather, U.S. Attorney staff numbers, miles to detention facilities, District Court statistics such as number of criminal cases filed, defendants filed against, time from filing to disposition) – the "multipliers."

Defender Services will know which formula the AO accepts a few months before they plan implementation – FY2016. Hence our hesitancy in hiring – we fear drastic cuts and hope to avoid repeating the furlough/layoff scenario of last year.

None of the above stops the cases from coming. Fortunately, my Office's dedicated and talented staff make the most of any situation.

As mentioned last Report, I've been so impressed by the Student Internship programs our Office sustains. Our students have real work, accomplishments and disappointments – the full defender experience. During the regular school year, Chief Assistant Federal Defender Linda Harter and Rachelle Barbour, our Research and Writing Attorney, supervise our Misdemeanor Law Student Clinic and research and writing law clerks from Pacific McGeorge School of Law. Assistant Federal Defender David Porter works with University of California – Davis Law School Professor G. Jack Chin at UC-Davis in our appellate clinic. Sacramento paralegal Tom Richardson supervises paralegal interns from University of California – Davis. Linda Humble, Sacramento investigator, supervises criminal justice interns from California State University – Sacramento. During the summer, we see undergraduate and law school student interns from around the United States for our Sacramento, Capital Habeas, and Fresno offices – student lawyers for misdemeanor cases, investigators and paralegals.

The Federal Defender supports the District Court's therapeutic justice programs in Fresno and Sacramento: the post-arrest *Better Choices* program and post-conviction Re-entry Court. These programs are shown to be cost effective, saving taxpayer money, and defendant effective, reducing recidivism. It is still my hope this District will develop a special diversion program, as well as re-entry court, for veterans, for those in or discharged from our armed forces who, but for the side-effects or after-effects of their military service, would never have become involved in the criminal justice system. We owe those who laid down their lives for our freedoms and security the opportunity and support to regain the honorable paths they followed as soldiers.

We fully support, as well, remedying the glaring absence of a Bureau of Prisons-approved halfway house or residential community corrections center. For a District which includes the capital of the 8<sup>th</sup> largest economy on the planet (yes, California), it's an

embarrassment our District has no such facility.

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

## FORMER FEDERAL DEFENDER EMPLOYEES LOOKING FOR EMPLOYMENT

Yvonne Jurado, [yvonneeee@live.com](mailto:yvonneeee@live.com),  
(916)230-0483: Paralegal, Secretarial,  
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Karen has over 20 years of experience as  
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FDO. She'll be providing legal technical  
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