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Federal Defender Newsletter
September 2015

CJA PANEL TRAINING

Sacramento CJA Panel training will resume **September 16 at 5pm** in the Jury Lounge, 4th Floor, District Court, 501 I St. **Ninth Circuit Appellate Commissioner Peter J. Shaw** will discuss **Nuts and Bolts of Practice before the Ninth Circuit**.

Commissioner Shaw's responsibilities for the Court include adjudicating non-dispositive motions; requests for appointment, withdrawal, and substitution of counsel; and appellants' requests to proceed *in forma pauperis*. He also rules on motions, regardless of case type, seeking unusually long extensions of time to file a brief or leave to file an oversized brief. Additionally, the Court allows Commissioner Shaw to rule on some potentially case-dispositive motions, such as dismissals for failure to prosecute or lack of appellate jurisdiction.

Commissioner Shaw rules on all vouchers seeking compensation or reimbursement filed by counsel appointed under the Criminal Justice Act in criminal and habeas cases. He is responsible for deciding motions to appoint counsel in capital cases.

Commissioner Shaw monitors the quality of attorney representation in Ninth Circuit proceedings. This includes evaluating the CJA panels located throughout the Circuit and presiding over attorney disciplinary proceedings involving Ninth Circuit bar members.

Commissioner Shaw holds an important and critical role in federal appellate practice, making him the best person to answer questions anyone has about the practice. It is in any 9th Circuit practitioner's interest to attend this presentation.

Commissioner Shaw solicits questions in advance of his presentation so he can tailor his presentation to the best interests of our panel. If you have a question or particular topic you would like addressed, please forward it to Lexi_Negin@fd.org.

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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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Fresno CJA Panel training focuses on *Johnson v. United States,* which was decided on June 26, 2015.

Because it is important that everyone understands the far-reaching implications of that decision, we are devoting our first panel training session of the year to making sure everyone is up to speed on this quickly evolving area of law.

There are two options:

1) September 10, 2015 at 11 a.m.: The Federal Defender's Office in Fresno will be showing the webinar presented by the Training Division of the Federal Defenders. It features Joshua Carpenter, Appellate Chief, Federal Defenders of Western North Carolina, Inc.; and Paresh Patel, Appellate Attorney, Federal Public Defender's Office, District of Maryland. The webinar will be shown in its entirety (1 hr) in the Federal Defender's conference room.
2) September 22, 2015 at 5:30 -6:30 p.m.: The Federal Defender's Office will be showing excerpts from the webinar described above as well as provide an opportunity for live discussion and questions. LOCATION: Federal Defender's Conference Room.

Please let Peggy_Sasso@fd.org know which session you will be attending.
Note that this training is offered in lieu of the normal panel training which ordinarily would have been September 15. We will revert back to the normal schedule for the next CJA training in Fresno on October 20 at 5:30 p.m.

14th Annual Federal Defender's Golf Tournament

Join us September 18, 2014 at the **Turkey Creek Golf Club, 1525 California Route 193** in **Lincoln**. Tournament play begins at 1:00 pm with a modified shotgun start. The tournament is just $85 for golf, range balls, cart, dinner and prizes!

Questions? Playing partners? Special menu needs? Contact Henry Hawkins or Mel Buford, Federal Defender's Office, 916-498-5700. **All skill levels are welcome.**

PLEASE WELCOME AFD JEROME PRICE TO THE SACRAMENTO OFFICE

After working in the Fresno office for 3 years, AFD Jerome Price will be moving to Sacramento and joining the felony unit at the end of September. Please introduce yourselves and welcome him to Sacramento.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes panel training materials through its website: www.cae-fpd.org. We will try to post training materials before trainings to print out and bring to training for note taking. Not on the panel, but wishing training materials? Contact Lexi Negin, lexi.negin@fd.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, Andras Farkas, Andras_Farkas@fd.org, or Karen Mosher, karen_mosher@fd.org.
Sacramento: Lexi Negin, lexi_negin@fd.org or Ben Galloway, ben_d_galloway@fd.org.

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.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet that provides 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.

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 2-offense-level reduction in drug cases. In August, 19 amended judgments were filed resulting in a total time reduction of approximately 28.83 years (346 months), resulting in a taxpayer cost savings of approximately $844.575.62 and unquantifiable benefits to our clients and their families. So far 237 defendants in this district have received a reduction in their sentences under Amendment 782.

PLEASE CONSIDER JOHNSON'S IMPACT ON YOUR CLIENTS

In Johnson v. United States, No. 13-7120 (June 26, 2015), the Supreme Court held as unconstitutionally void for vagueness the residual clause of the Armed Career Criminal Act (ACCA). Johnson's impact goes far beyond ACCA cases as the unconstitutionally vague language also exists in the Guidelines at § 4B1.2(a)(2), and, therefore, impacts Guidelines calculations in other areas, such as career offender, illegal reentry, and felon-in-possession.

Please look for Johnson's application in your current and former cases. Please give Sacramento AFD Ann McClintock, ann_mcclintock@fd.org former clients' names who have no pending case who might benefit from Johnson.

♫ NOTABLE CASES ♫

US v. Willis, Jr., No. 13-30377 (7-29-15)(Ikuta with Fisher and Paez). In a Supervised Release violation, what is the approach to determining whether uncharged criminal conduct is a "Crime of Violence" for grading purposes? The Ninth Circuit adopts the straightforward categorical approach crafted by Taylor, Deschamps, and Johnson: (1) The prosecution must prove by a preponderance of evidence that the defendant committed a federal, state, or local offense. (2) The categorical approach in Taylor is used to match the offense with a federal generic crime of violence. (3) If the offense criminalizes conduct that is greater than the generic offense, is the offense divisible under Deschamps? (4) If the offense is divisible, is it a crime of violence? In this case, the district court failed to determine whether the offense of attempt or possession of a firearm was a crime of violence.

In Re: Application for Telephone Information Needed for a Criminal Investigation, Case No. 15-XR-90304-HRL-1 (LHK)(N.D. Cal.). A Northern District of California Judge that the Fourth Amendment requires the government to make a probable cause showing to obtain historical cell site location information ("CSLI.")

Rogers v. Ferriter, No. 13-35790 (Fletcher with Hurwitz and Baylson (E.D. Pa.)) --- The panel reversed the dismissal of a Montana state prisoner's § 2254 habeas petition as untimely, holding that time while the Montana Supreme Court's Sentence Review Division held an application for review in abeyance (allowing the petitioner to seek other judicial relief from his conviction or sentence) qualified for statutory tolling under 28 U.S.C. § 2244(d)(1).

United States v. Martin, No. 14-30034 (8-7-15)(Gould with Christen and Block (EDNY)). The Ninth Circuit vacated false tax return convictions based on error under Rule 404(b), and vacated the sentence imposed for those convictions as well as for tax fraud. The panel also explained how to apply the sentencing Guidelines at the eventual resentencing that will occur. The defendant owned a construction company that built guard rails on public highways. She hid income from the sale of used equipment and material, and between 2002 and 2008 ended up not paying $100,000 in income taxes. She also fraudulently obtained government contracts under tow programs designed to help small businesses owned by "socially and economically disadvantaged persons;" these contracts were worth about $3 million. At trial, the government introduced the defendant's 1996 and 1997 state tax returns, and the resulting audits, to show that she knew she had a duty to truthfully report her income. She was convicted on the tax charges and some fraud charges. Computing loss under the Guidelines, the district court applied an 18-level upward adjustment and, after a variance, imposed an 84-month sentence.

The Ninth Circuit ruled that the trial judge abused discretion by admitting information about the audits under Rule 404(b). There was no relevant connection between the state tax rules that led to the audit and the federal tax rules defendant was accused of violating. Instead, the information about the audit was intended merely to show that the defendant was a "liar who does not want to pay taxes and will cheat to avoid them" -- a theme the government emphasized in closing, and a line of thinking the evidence rules are meant to discourage. Thus the evidence was inadmissible under either Rule 404(b) or 403. This error was not harmless with respect to the tax charges, because it allowed the jury to convict based on a propensity to lie on tax forms.

Because the panel vacated the sentence it provided guidance about applying the amount-of-loss guidelines with respect to the fraud convictions. The amount of loss caused by the fraudulent awarding of contracts should be offset by the value of the services the government received under them; indeed, the defendant's company fully performed under them. Neither special rule relating to "exclusive opportunities" for particular beneficiaries, or "regulatory approval" of the contracts, applies here. The government will have another opportunity to prove the amount of loss.

United States v. Lapier, No. 13-30279 (8-7-15) (Ebel (10th Cir.) with O'Scannlain and McKeown). Because the trial judge did not instruct the jury that it had to specifically agree on which drug conspiracy the defendant had engaged in, the panel reversed the defendant's conviction for conspiracy to possess a controlled substance with intent to distribute. The defendant was selling methamphetamine that he got from a supplier with the understanding that he would repay the supplier with proceeds from selling the drug. As this relationship went on, the supplier moved into the defendant's home and began helping to package the drug for

sale. After his supplier got arrested, the defendant had to turn to a new supplier. The indictment alleged a single conspiracy covering the period of time when the defendant was buying the drug from both suppliers. Although the evidence was sufficient to sustain the conspiracy conviction, the trial judge plainly erred by failing to instruct the jury that it had to unanimously agree on which conspiracy the defendant committed -- that is, whether its conviction was based on the conspiracy with the first supplier or the second. There was genuine confusion here regarding which conspiracy the defendant was involved in, so the instruction was required to preserve the defendant's right to a unanimous verdict. (The defendant's related conviction for possession with intent to distribute remained intact.)

Shelton v. Marshall, No. 13-15707 (Reinhardt with Thomas and Christen). In Silva v. Brown, 416 F.3d 980 (9th Cir. 2005), the Ninth Circuit held that a secret deal between one of Silva's codefendants was material exculpatory evidence that should have been provided to the defense under Brady v. Maryland, 373 U.S. 83 (1963), and thus vacated the first-degree murder conviction. The petitioner here was another of Silva's codefendants, and learned for the first time about the secret deal by reading the Ninth Circuit's opinion in Silva. The petitioner was also convicted of first-degree murder with respect to the same victim as Silva had been, although he did not receive a death sentence like Silva had. Because the secret deal was similarly prejudicial to the petitioner here, the Ninth Circuit reversed the denial of an authorized second or successive habeas petition with respect to that particular conviction. Silva had been acquitted of murder with respect to the second victim here, but the petitioner here was convicted of second-degree murder with respect to her. That conviction stands, as do convictions for other crimes.

US v. Rodriguez-Vega, No. 13-56415 (8-14-15)(Reinhardt with Fernandez and Clifton). When the consequence of a guilty plea is a conviction that makes it a "virtual certainty" that the defendant will be deported or removed, the defendant MUST be advised. It is not enough to advise that it is "probable," or that there are immigration consequences; when it is explicit and clear that a conviction to a certain offense leads to removal, the lawyer must so advise the client. Failure to do so is IAC. Counsel had to inform petitioner that it was a virtual certainty she would be removed. The immigration statute lists the conviction as removable. The advice that removal was probable fell below objective standards of professionalism. It was prejudicial because the petitioner could have gone to trial or negotiated a better deal.

Crace v. Herzog, No. 13-35650 (8-14-15)(Bybee with Paez; dissent by Callahan). Even under AEDPA, the Ninth Circuit grants relief on an IAC basis for failure of the trial lawyer to submit a lesser included offense instruction. The petitioner was convicted of second degree assault; and because of priors, was sentenced to LWOP under the state's three strike program. The Ninth Circuit agreed with petitioner that trial counsel should have asked for an instruction on "unlawful display of a weapon" which would have spared him from the third strike. Here, the petitioner with obvious mental issues had run out of his house with a sword, hearing voices, and screaming for help and had a confrontation with police, which lead to his arrest and conviction. Under the facts, and even with AEDPA deference, the state supreme court's determination of facts were unreasonable.

Reyes v. Lewis, No. 12-56650 (8-14-15)(Fletcher with Bybee; concurrence by Singleton). Even under AEDPA, the Ninth Circuit grants relief because of a Siebert "two-step" interrogation procedure by the police in which they got the 15-year-old defendant to confess without Miranda warnings, and then gave him Miranda warnings to clarify the statements. The Ninth Circuit found this violated clear Supreme Court precedent, and the state court's Siebert analysis was contrary to law. The police had acted intentionally and deliberately to avoid Miranda.

US v. Montoya-Gaxiola, No. 14-10255 (8-10-15)(Kobayashi, D.J., with Paez and Clifton). The Ninth Circuit reverses a conviction for an unregistered sawed-off shotgun, 26 USC 5845(a), due to an error in the jury instruction. The trial court failed to instruct on the *mens rea* required in Ninth Circuit model criminal jury instruction 9.3. The instruction focuses on the description of an illegal weapon, in terms of length, and not the fact that defendant had to know that the shotgun's barrel was less than 18". The error was not harmless as the barrel here was 14.5 inches, and therefore not recognizably illegal.

US v. Boitano, No. 14-10139 (8-12-15)(Christen with Schroeder and Ikuta). To convict a defendant of making a false statement in a tax return in violation of 26 U.S. § 7206(1), the return must be filed with the IRS. That is, the return is sent to the IRS, which receives it and deems it filed. Such a filing is an element under circuit precedent. Here, the defendant gave false statements on tax returns to an IRS agent. The IRS agent suspected fraud and launched the investigation that led to the convictions. However, because the returns were not filed with the IRS, an element was missing.

US v. Christensen, No. 08-50531 (8-25-15)(Clifton with Fisher). This is an appeal from various RICO convictions stemming from illegal wiretaps and investigations conducted by a private investigator. There were many issues raised. The trial court excused Juror #7 because of his refusal to deliberate, or his belief in nullification, coupled with statements he supposedly made about taxes and wiretapping. He denied making these statements. The trial court erred because it never asked the juror if he could or would follow the law.

US v. Sanchez-Gomez, No. 13-50561 (8-25-15)(Schroeder with Nguyen and Zouhary). The Ninth Circuit holds that the US Marshals cannot use "economic strain" on its staff as justification for a blanket policy of full restraint for defendants who appear in court. The district court in Southern California deferred to the recommendation by the Marshals that pretrial detainees be in full restraints (five point) for every court appearance in a nonjury context: initial, hearings, and so forth. The use of shackles must be justified and was not here.

Daire v. Lattimore, No. 12-55667. The Ninth Circuit granted a California state prisoner's petition for *en banc* rehearing in a case involving the alleged failure to present mitigating evidence at a hearing under People v. Superior Court (Romero), 917 P.2d 628 (Cal. 1996), which allows a judge to impose a sentence outside of California's three-strikes sentencing scheme based on mitigating evidence.

United States v. Katakis, No. 14-10283 (8-31-15)(NR Smith with Berzon and Collins (D. Ariz.)) The Ninth Circuit affirmed the grant of a posttrial motion for judgment of acquittal, holding that the evidence presented at the entire trial was insufficient to sustain the defendant's conviction for obstruction of justice under 18 U.S.C.

§ 1519. The government suspected that the defendant and his business partner were rigging bids at foreclosure auctions. The government subpoenaed his bank records, which led the defendant to try to erase the hard drives on four computers using software called DriveScrubber. The government's investigation revealed email that was not on these computers, so it indicted the defendant for obstruction of justice under 18 U.S.C. § 1519, and bid-rigging under 15 U.S.C. § 1. (The jury convicted on bid-rigging, and he did not appeal that conviction.) The indictment was written in such a way that the government had to prove actual deletion of the emails, which meant that it had to present expert testimony about how information is deleted from a computer hard drive. The government's expert explained how these emails could have been "double-deleted," while the defendant's expert explained that this "double-deleting" process did not work as the government's expert said it did, and that in any event he could not find the emails the government alleged that the defendant had deleted in the place where the government's expert said they would be found on the defendant's computers. In its rebuttal case, the government's expert agreed with the defendant's expert. Thus, "by the time of its closing argument, the government's primary theory of the case had collapsed." The jury convicted on the obstruction count, but the trial judge granted the defendant's post-trial written motion for judgment of acquittal.

Under § 1519 and the government's theory here, the entire trial record had to contain sufficient evidence to allow the jury to conclude that the defendant actually deleted the emails. (Review is of the entire trial record because of the procedural posture of the Rule 29 motion filed in the district court.) Once the government's expert retracted his initial theory of the case and agreed with the defendant's expert, however, no reasonable juror could conclude that the defendant had used DriveScrubber to irretrievably remove the incriminating email from the computers. The government articulated what it characterized as a reasonable inference to sustain the guilty verdict, but the panel disagreed that those inferences were logically supported by the evidence. There was no evidence from which the jury could conclude that DriveScrubber had operated in the manner that the government was relying on to show actual deletion. (Indeed, in a footnote the panel suggested that this failure undermined the *mens rea* element of the crime as well.) The panel was concerned that the government's evidence of bad motive would lead the jury to overlook the gaps in the evidence of actual deletion. Nor, in light of how most email clients work, does simply pressing the "delete" key create liability under § 1519; the message does not disappear, but simply moves from one folder to another.

Wilkinson v. Gingrich, No. 13-56952 (9-3-15) (Fletcher with Paez and Berzon). The panel affirmed the grant of habeas relief to a California former perjury defendant, holding that his acquittal of speeding charges in traffic court on the ground that he was not the driver of the speeding car barred California from prosecuting him for perjury under the Double Jeopardy Clause. The petitioner here was first accused of speeding in Orange County, but convinced a traffic-court judge that he was not the driver of the car. After the hearing, he chatted with the officer who cited him. This conversation led the officer to remember the petitioner's arrogant attitude, and "six months later, nine or ten policy officers, with their guns drawn, broke down the door to execute a search warrant" at the petitioner's house. When they found the citation in the original traffic case, the

Orange County District Attorney charged the petitioner with perjury for falsely denying being the driver in the speeding case. The trial court denied his motion to dismiss on double-jeopardy grounds, and the California Court of Appeal affirmed, reasoning that whether the petitioner had testified truthfully in the traffic-court case was not something "necessarily decided" by the judge there. A federal magistrate judge and a federal district judge disagreed, finding that conclusion to be contrary to Ashe v. Swenson, 397 U.S. 436 (1970), and granted the writ. The state appealed.

There are three elements of the constitutional collateral-estoppel component of the double-jeopardy protection. The issues must first be sufficiently material to justify invoking the doctrine. Second, the issue must have actually been litigated in the first proceeding. Third, the issue must have been necessarily decided in the first proceeding. The state appellate court's mistake was in failing to recognize that the identity of the driver was a material question that was necessarily litigated in the traffic-court case. The identity of the driver was the only issue in the traffic-court case; and in the perjury case, the jury was told that it had to find that the petitioner falsely denied being the driver in order to convict him. If his statement denying being the driver was not false, then he did not commit perjury. The state appellate court's conclusion was contrary to Ashe, because double-jeopardy protection applies even if the government could have presented better evidence at a second trial, because the Double Jeopardy Clause is meant to protect against multiple trials on the same issue.

LETTER FROM THE DEFENDER

It's the moment during deliberations when a jury indicates it cannot reach a unanimous verdict (a hung jury), and the judge offers to give the *9th Cir. Crim. Jury Instruction 7.7* for a *Deadlocked Jury*, aka the *Allen* or Hammer Charge, to encourage (compel?) the jury to try again to reach an agreement.

Defense lawyers should **always** object to this. If the instruction is given, counsel should (for appeal purposes) make note on the record (a) when the jury initially began deliberations, (b) how long they had been deliberating when the court received their note, (c) what time the jury continued its deliberations after the instruction was given, and (d) what time they indicated they reached a verdict.

What new-fangled, pro-conviction idea is this? Not so new-fangled after all.

Alexander Allen

The African-American boy's leather shoes sometimes got stuck in the mud created by the spring rains or melting snow. Fourteen year old Alexander Allen hopped from rut to rut as he walked from what had been his home in Oswego, towards Coffeyville, just 20 miles away, both in Kansas Territory. To entertain himself, and keep at bay the fear of being on his own for the first time, he counted the Osage orange and redbud trees, in full white and pink bloom in the fields by the road. April, with a choir of frogs emerging from hibernation along that Kansas-Oklahoma border, brings the promise of life.

Alexander was born March 1878. In April 1892, he thought about how his father had sold the family farm to move to Oklahoma. Thought about how there was room for everything - and everyone - in that wagon, except him. No, no, he forced those thoughts away - he remembered how his father said Alexander was a man. Why else would he trust Alexander with that pistol with its fancy holster? Why else would he trust Alexander to go alone to Coffeyville,[1] find his parents' friend Albert Marks to stay with until his father came for him? Until then, Alexander would work for Mr. Marks. He hoped a wagon would come by soon and let him hitch a ride. A cold wind blew

[1] Members of the infamous Dalton Gang were captured or killed 5 months later in Coffeyville, Kansas Territory.

the redbud petals across his feet. He grabbed a few and chewed on them.

In Coffeyville

Albert Marks, an African-American Cherokee Indian, owned a restaurant by the railroad tracks in Coffeyville and had a farm on Cherokee Nation land in Oklahoma, 3 to 4 miles south of Coffeyville.[2] He agreed to let Alexander work for him at the farm, while letting him stay in the back room at the restaurant. Marks later said Alexander did well, except he seemed fascinated with a gun he kept in a satchel.

On Thursday, May 12, Marks' son, twelve year old James, and Alexander were riding near Marks' farm. They had been told to look for some escaped horses belonging to their neighbor Morgan. Their search crossed paths with Philip Henson, a white teen about 17 or 18 years old, and his two cousins, George, age 14, and Willie Erne, age 13. (George later recalled this happened May 4.)

Henson took an immediate dislike to Alexander. Maybe the young man was showing off before his cousins or maybe he was just mad that his family left Missouri, then his father's stable burned down, so his father ended up training horses for - working for - for the Indian Morgan, a black Indian, to boot. Maybe it was that Alexander and James were on horseback and had shoes, and Henson and his cousins were barefoot and walking.

Henson threatened and cursed at Alexander. He followed them, throwing sticks at them. Henson promised, "We'll be over Saturday to settle with you!" James later remembered the three shouting "they would kill 'that nigger' the first chance they got."

When asked by Morgan, on whose land the Ernes and Hensons were living, what had happened to his horses, George claimed Alexander was a liar. Willie told Morgan they only told Alex where he could find the horses.

[2] This meant Marks was likely a freed black slave of the Cherokee. After the Civil War, in which the Cherokee fought for the South, the tribe offered their freed slaves citizenship in the Cherokee Nation. Many of these former slaves traveled as part of the Tribe on the Trail of Tears to Oklahoma. Only a Cherokee Indian could own land on the Reservation.

Saturday May 14, 1892

Once the sun was up Saturday morning, May 14, Marks asked his 11 year old son Harvey and Alexander to take a horse and carriage to the farm to make sure the hog pen was in good repair. Alexander, chilled by the memory of Henson's and the Ernes' threats, wedged his daddy's pistol and holster in his waistband before they left.

Henson, George, and Willie had forgotten all about their braggadocio two days earlier. Saturday was the day to go fishing and they wanted to catch frogs as bait. Each pulled a thin willow branch from a tree and stripped bark off to make switches. Thin, strong, and flexible, one could snap the switch like a whip on the frog's head and knock it unconscious to grab it. They laughed and jostled each other as they went through Morgan's germinating wheat field to the pond at the bottom of the hill, the pond feeding the hog pen on neighbor Marks' land next door.

As they passed the fence to Marks' land, the three recognized Alexander working the hog pen on the other side. Alex and Harvey later said that Henson and the Erne boys came through the fence, said they came to kill Alex. Henson hit Alex on the head with his willow switch and the two wrestled. Henson threw Alex to the muddy ground and held him down. While Alex was unable to move, George hit him on the arm with another stick. Wriggling around, Alex managed to loose the pistol from its holster and shot at Henson, who ran through the fence and collapsed just the other side. Or you could believe George and Willie, as the jurors later did, that Alex took that gun out of his hip pocket holster, climbed through that fence towards them, saying George had told people Alex lied. That Alex hit Henson with his left hand and pulled out the pistol, but Henson grabbed the gun and shot it into the ground, then dropped the gun. That Alex, humiliated, then lunged for it, aimed angrily and shot Henson two times, then shot George once or twice in the arm.

The shot ringing in his ears, Alex ran off. He and Harvey took the cart they came in, galloping through town to the restaurant. Alex ran to his cot, grabbed his bag, told Marks to tell his father he loved him, and ran off.

The Marshals' investigation found Henson's body 30 to 35 steps from the fence, following a single set of shod footprints from the fence to Henson's body and blood. They saw Henson was barefoot, and learned the Ernes were also. Henson's face was bruised.

U.S. Marshals arrested adolescent Alex a few days later. He wore the same shoes he wore walking from Oswego to Coffeyville. He had a noticeable bruise on his left arm and the gun had 3 empty cartridges; Alex said he fired once towards Henson - the other two were fired hunting rabbits for food as he fled.

Allen on trial

U.S. Marshals held Alex at Fort Smith, Arkansas. Since the killing, charged as First Degree Murder, happened in Indian Territory, the United States District Court, Western District of Arkansas, had jurisdiction. The sole judge there was Judge Isaac Parker, the "Hanging Judge."

Alexander Allen was not tried as a juvenile. His jury trial began February 13, 1893, and it was said "he snarled and sulked, cursed and fought, rejected kindness, and answered punishment with more defiance." Judge Parker gave long, rambling jury instructions and advised the jury on the lesser included offense of manslaughter and of self-defense. The jury found 14 year old Alex "guilty" and Judge Parker sentenced him to hang.

Because the trial was in Indian Territory, the appeal went directly to the United States Supreme Court. His lawyer was the well-known Supreme Court lawyer Augustus Hill Garland.

Garland was born in Tennessee in 1832. His family moved to Arkansas when he was just 1 year old, and he considered that "home" for the rest of his life. Seeking more education, he attended first St. Mary's College, then graduated from St. Joseph's College in Kentucky in 1849, at age 18. He studied law and was admitted to the Arkansas bar in 1853. He was first admitted to practice before the United States Supreme Court in 1860. Then came the Civil War.

A Union delegate to the Arkansas State Convention, Garland voted against the Ordinance of Succession passed in 1861. He served as Arkansas' representative in the Confederate Congress from 1861 to 1865. At the close of the Civil War, he reapplied to practice before the Supreme Court. However, Congress, in 1862 and 1865, had passed an Act requiring attorneys applying to practice before the Supreme Court take a loyalty oath, that the applicant had "never voluntarily borne arms against the United States [or] given . . . aid, countenance, counsel, or encouragement to persons engaged in armed hostility" against the interests of the United States. Garland could not take that oath.

So he petitioned, along with two others similarly situated, to be permitted to practice before the Supreme Court. "These three cases – *Milligan, Garland,* and *Cummings* – are the first batch of decisions from the Supreme Court upholding claims of 'civil liberties' under the Constitution," but only narrowly so, by a 5 to 4 decision.

Thereafter, Garland was elected Arkansas' United States Senator in 1867, and its governor from 1874 to1876. Reelected to the U.S. Senate in 1876, he served until being offered, and accepting, the Cabinet post of Attorney General offered by newly-elected President Grover Cleveland in 1885. As Attorney General, Garland argued before the Supreme Court many times during Cleveland's first term.

Once Cleveland lost reelection, Garland returned to Arkansas and private practice. It was from here he took up Alexander Allen's appeal to the Supreme Court.

On December 4, 1893, the Supreme Court reversed Alex's conviction, choosing not to rule on the issue of his youth and instead, after discussion of "the philosophy of the mental operations," "the substitution of abstract conceptions," and "metaphysical considerations proceeding from the court," the Court found the jury instructions for self-defense and "heat of passion" (necessary for finding manslaughter) were in error.

In 1894, Alex was tried a second time. This time, Judge Parker gave a different, yet still rambling self-defense jury instruction, commenting on various interpretations of the testimony. Again, Alex was convicted of First Degree Murder and, again, Judge Parker sentenced him to die.

On his second direct appeal to the United States Supreme Court, in April 1895, his conviction was again remanded for a new trial due to an error in the jury instruction.

Alex, finally an adult in 1896, was retried a third time. Despite all the death sentences "Hanging Judge" Parker imposed, he was something of an innovative jurist. He was the first judge in the country to pay for jury service, $3 a day. While it is not much less than jurors get most places today (plus gas mileage), at the time it was more than many made at whatever they did - or did not do - for work. Bailiffs would find Parker's jurors playing cards or just talking about anything other than the trial, to stretch the deliberations into days. Then, eventually, they would report they could not reach a unanimous decision. That is what Alex's third jury did – they said they required "further instruction."

Judge Parker was frustrated with his juries continually doing this. So Judge Parker gave "quite lengthy" instruction to Alex's jury, borrowing from Massachusetts and Connecticut cases:

> *The conclusions reached by eleven men are to be relied on rather than the conclusions of the twelfth man, whose means and opportunities for reaching a right judgment are the same as those of his fellows; that each member of a jury should always convince himself that twelve wiser, more intelligent, and impartial men than he and his fellows cannot be found in the country; that any conclusion to be reached by them is very apt to be a right conclusion; and that, therefore, they should be very careful to agree, if possible, in the conclusion reached, and that one juror should not consider that the eleven associated with him are pig-headed, obstinate, and impracticable because they are not of his opinion.*

Alex was again found "guilty" of First Degree Murder and Judge Parker again sentenced him to hang.

This time, the United States Supreme Court upheld the conviction, finding the jury instruction directing the jury to return to its deliberations was lawful. And they affirmed Alex's death sentence on December 7, 1896.

Some suspected, after Alex was sentenced three times to hang and once his final conviction was affirmed, the Supreme Court and the District Attorney petitioned then-President Grover Cleveland to commute Alex's sentence to life. More likely, however, it was Garland, his first appellate counsel and Cleveland's former Attorney General, who persuaded Cleveland, then in his second presidential term, to grant commutation.

Death, Then Life

Alexander Allen was sentenced to serve his time at the Columbus Penitentiary. No record has been found of what happened to him afterward.

Judge Parker died 20 days before the last Supreme Court decision in Alex's case. By time of his death, he had sentenced 160 defendants to hang – more than half had their convictions reversed, with 16 being acquitted after a new trial. Most of the others were convicted instead of manslaughter or their sentences were also commuted to life in prison.

Garland eventually published a book in 1898 entitled *Experience in the Supreme Court of the United States with Some Reflections and Suggestions as to that Tribunal.* Nothing is mentioned of his Civil War years. He continued to practice law until he died in January 1899, the only person to have died arguing in the well before the Supreme Court.

While enlisting Ivan Pfalser, a genealogist in Southeast Kansas, into helping me research this case, he introduced me to Dixie Barnard, George & Will Erne's niece. She had never heard of the Allen case nor her uncles' involvement in it. She did report:

~ George Erne lived out his years first running a general store in Coffeyville, then working as a farmer and trucker. Dixie vividly remembers visiting his home as a girl. It was a log cabin with compacted hard dirt floors. The family was so poor they offered beans to guests and George's daughters used white flour as make-up. George died in 1938 at age 60.

~ Will went on to become a prominent member of the Coffeyville community, a civic leader and member of the Chamber of Commerce. He owned the local Rose Hill

Dairy and he would ride with his wife at front of local parades. Will died in 1958. When interviewed by the local newspaper, Will liked to recall that, as a teenager, he and Will Rogers rode herd together in Oklahoma. One of their favorite pastimes was hunting frogs.

Resources

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