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Federal Defender Newsletter
October 2020

FD-CAE CJA PANEL TRAININGS RESTART BY ZOOM

Please join our office on **Wednesday, October 21, 2020 at 11:00 a.m**. on Zoom for a training by AFD Rachelle Barbour on *Coordinating State and Federal Sentences*. Panel members will receive an email with the zoom and MCLE information.

Wednesday, October 21, 2020, 1:30pm-3pm

"Understanding the Pair of ACEs and Its Influence in the Juvenile and Adult Criminal Justice Systems"

Lisa Frederiksen returns, providing her ACEs presentation to our defense bar and support. Lisa is excited to partner with our Office to provide a series of training events on Adverse Childhood Experiences, Brain Science, and how trauma impacts the adults we serve within the criminal justice system. Lisa has presented to our Office, our court family, and the Reentry Collaborative on a number of occasions. We invite all interns/law clerks, investigators, paralegals, and staff members to attend. Lisa's presentations are dynamic and informative, providing a wealth of information useful to us in our work.

Wednesday, October 28, 2020, 10am-11:30am

"CHU Investigation/Case Study Presentation"

Please join Erika Feyereisen, MSW and FD-CAE CHU investigator, as she discusses Investigation in the Capital Habeas world and how Social Work values and practices inform the profession. She will then walk us through the progression of a particular client's case to illustrate how a narrative can be developed utilizing these practices. Erika's presentation is gives practical information as she gives us a glimpse of the important work our CHU investigators fulfill.

October 14 & 15, 2020: A*ddressing Racial Bias Issues in Federal Court*

The Northern District of California Federal Practice Program is presenting a symposium on racial bias issues as they relate to federal practice. The panels will focus on the role that race and racial prejudice play in the workplace, sentencing, jury selection, and in access to justice in civil litigation. We will hear from judges and other experts regarding their experience, research, groundbreaking case law, and changes to procedure. Our symposium will conclude with a conversation with The Honorable Thelton E. Henderson (hosted by The Honorable Haywood S. Gilliam, Jr.) The symposium will take place via Zoom on two mornings,

October 14-15, 2020. Cost: $20. MCLE: 4 Hours of California CLE (including Elimination of Bias). Register at: https://northerndistrictpracticeprogram.org/events/addressing-racial-bias-issues-in-federal-court/

FEDERAL DEFENDER TRAINING BRANCH, www.fd.org

October trainings:

October 15: 10:00 -12:15 PST

Webinar: The Racist Origins of Illegal Reentry (and How to Challenge Them in Your 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.

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.

COVID-19 NEWS

Keep up with all the COVID-19 information affecting your federal practice by ensuring your email address is up-to-date with the Federal Defender's Office. You should be receiving weekly emails about how coronavirus is impacting our district and jails. If you need to update your email address, please notify Kurt_Heiser@fd.org.

CJA Representatives

David Torres of Bakersfield, (661) 326-0857, dtorres@lawtorres.com, is our District's CJA Representative. The Backup CJA Representative is Kresta Daly, (916) 440.8600, kdaly@barth-daly.com.

2018 Sentencing Guidelines Still in Effect

The Sentencing Commission did not pass any amendments this year, therefore the 2018 Sentencing Guidelines (Red Book) are still the operative guidelines.

Sacramento Initial Appearance 2:00 p.m. Calendar Client Interviews at Marshal's Office

Please email USMS.CAE-PRL@usdoj.gov or call the Marshals cellblock number at 916-930-2026, for any Sacramento initial appearance or 2:00 p.m. calendar matters, including interview requests.

Lerdo Jail Attorney-Client Calls

From AFD Peggy Sasso: If your client is in quarantine at Lerdo Jail, guards will arrange attorney calls from the inmate's pod on the regular jail phones. The attorney's number being called should be cleared in advance by Lerdo so the inmate is not charged **and** the call is not recorded. PLEASE CONFIRM AT THE OUTSET OF YOUR CLIENT CALL THAT HE/SHE WAS NOT PROMPTED TO PAY FOR THE CALL. If the inmate was prompted to pay, the system didn't work right. Your client should immediately hang up and notify the housing officer so the no-pay issue can be addressed.

SPEEDY TRIAL RIGHTS AND COVID

The 6th Amendment's and 18 U.S.C. § 3161's speedy trial provisions still exist, especially for in-custody defendants. At least one of our District Court judges ordered charges dismissed without prejudice and denied the government's request for excluded time, and despite our court's General Orders, 611, 621, 614 and 618 allowing for excludable time based upon specific findings. *U.S. v. Shiekh*, Case № 2:18-cr-00119-WBS.

The speedy trial decision is our client's: in- or out-of-custody and it is specifically excluded from the CARES Act.

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

NINTH CIRCUIT

US v. Litwin, No. 17-10429 (8-27-20)(Bress w/Gould & Christen). Fraud and conspiracy convictions, resulting from a lengthy trial, are reversed and remanded due to the improper dismissal of a juror during deliberations. The district court dismissed Juror #5 ostensibly because of malice towards the judicial system and a refusal to deliberate. This occurred 3 hours into deliberations after a 36-day trial. The record did not support the dismissal even if there was anger at the court and confusion over jury instructions. The Ninth Circuit was sympathetic with the court, but concluded that the removal was too soon, and without a sufficient justification or record. The error was structural.

US v. Valencia-Lopez, No. 18-10482 (8-19-20)(Bennett w/Hawkins; dissent by Owens). The Ninth Circuit vacated and remanded convictions for transportation and importation of marijuana. The defendant, a truck driver, argued he acted under duress. He said that the cartel forced him by threats to his family to transport 6000 kilos of marijuana. Over objections (pretrial and trial), the Government called an agent to testify as an expert that the cartel does not operate that way and would never entrust this amount of drugs to a coerced driver. Admission of the testimony was error and was not harmless. The Ninth Circuit held that the district court did not properly fulfill its gatekeeping role under *Daubert* for two reasons: (1) it qualified an agent as an expert without explicitly finding that his proposed testimony about the likelihood of coercion was reliable, and (2) a "more important reason," it admitted the agent's testimony despite the government establishing no reliable basis for his expert testimony about the likelihood of duress in Mexico. The agent, in testifying that the chance that cartel would operate this way was "[a]lmost nil, almost none," was without basis or expertise. The agent lacked experience and methodology to reach this conclusion. The trial court could not just say it goes to the weight; the court must perform the *Daubert* reliability gatekeeper function. The errors were not harmless.

US v. Swenson, No. 18-30215 (8-19-20)(M. Smith w/Bress; partial dissent by N. Smith). This is a garnishment case. Under MVRA, the gov't garnished the Social Security funds of a spouse of a defendant convicted of wire fraud. The Ninth Circuit tells the Government it can't. The funds belong to spouse in a separate account. Even under state community property law, the defendant had no property rights to spousal Social Security because the federal Social Security Act preempted state law.

Kipp v. Davis, No. 16-99004 (8-19-20). The Ninth Circuit held that introduction of an unadjudicated murder/rape in a murder/rape capital prosecution violated petitioner's due process rights as the offenses were too dissimilar to be considered a pattern.

US v. Fuentes-Galvez, No. 18-10150 (8-10-20)(Sessions w/Fletcher & R. Nelson). The Ninth Circuit reversed and remanded a conviction and sentence for egregious errors in the change of plea. The defendant plead guilty to illegal reentry, 8 USC § 1326. The Ninth Circuit held that the Rule 11 change of plea hearing and colloquy was truncated, incomplete, and plain error. The magistrate judge failed to adhere to the requirements of Rules 11(b)(1)(D), (E), (G), (M) and Fed R Crim P 11(b)(2). The magistrate judge omitted standard Rule 11 inquiries while combining others. The court critically failed to ask about the defendant's competency or understanding, whether the plea was knowingly and voluntarily given, whether he was under the care of a physician or taking medications, or whether he understood his attorney or was satisfied with counsel. The court did not discuss the guidelines, clearly inform the defendant of certain constitutional rights, or that counsel could be with him at trial. The court further did not address whether his plea resulted from force or threats. The magistrate court accepted the plea, and recommended to the court to accept it. The court accepted the plea, but rejected the sentencing agreement for guideline errors. The district court then rejected a revised plea. The defendant then pled without an agreement. The district court did not engage in a colloquy about the plea to the charge. The court sentenced him to 42 months, a sentence a year longer than top of the guidelines range.

The Ninth Circuit held that the change of plea lapses were prejudicial. Specifically, it questioned the voluntariness, because the defendant had little schooling, a history of mental health disorders, including PTSD, depression, and anxiety. He also had medical ailments. There was a reasonable probability that the errors affected his decision to plead guilty. The Ninth Circuit rejected the government's arguments that court did ask if the plea was voluntary and the defendant said "yes."

US v. Oriho, No. 19-10291 (8-10-20)(Tallman w/Siler & Hunsaker). The defendant was charged with fraud. The money was allegedly sent to banks in Africa. Pretrial, the court ordered the defendant to repatriate the funds "out of Africa" to preserve the funds for potential forfeiture. On interlocutory appeal, the Ninth Circuit vacates the order to repatriate as violating the 5th Amendment right against self-incrimination. By forcing the defendant to repatriate the funds, basically under a restraining order, the Government was violating the 5th Amendment right against self-incrimination. The order would force the defendant to identify and demonstrate his control over untold funds in bank accounts unknown to the government. The protections of the 5th amendment extend to the repatriation for forfeiture.

US v. Bundy, No. 18-10287 (8-6-20)(Bybee, with Fletcher and Watford). The district court dismissed the prosecution with prejudice due to *Brady* violations. The Government began disclosing information under *Brady* days into the trial. The district court dismissed with prejudice after a series of hearings. The Ninth Circuit affirmed that the district court could properly dismiss the indictment under its supervisory powers. The record amply supported the district court's conclusion that the defendants suffered substantial prejudice in not being able to prepare for trial fully. Flagrant misconduct by government agencies in failing to make exculpatory information known was appropriately imputed to the prosecution. Moreover, flagrant government misconduct need not be intentional. It is enough that

the agencies acted with reckless disregard for the prosecution's constitutional obligations. The prosecution deliberately withheld facially exculpatory evidence that directly negated the government's theory at trial. The dismissal with prejudice was appropriate as lesser sanctions would not fully address the damage caused by the government's misconduct.

US v. Garcia, No. 19-10073 (9-10-20)(Wardlaw w/Siler & M. Smith). The Ninth Circuit suppresses evidence. The police conducted a warrantless search of a home, handcuffed the defendant, took him outside, and then ran his record. The police then learned he was on supervision. So, they went back into the house, searched it, and found drugs. The police tried to justify the first search for supposedly safety of others. The Ninth Circuit first found no rationale for the safety of others. It remanded on an attenuation theory. It now holds that the evidence must be suppressed. A supervised release search condition is not an attenuating circumstance that would save a bad search.

US v. Qazi, No. 18-10483 (9-17-20)(Hunsaker w/Cook & Wardlaw). The defendant, pro se, challenges the indictment charging him as a prohibited possessor of a firearm for failure to contain an essential element. The Ninth Circuit agrees that under Rehaif v US, 139 S. Ct. 2191 (2019)(knowledge of felony status), the indictment omitted the knowledge requirement. Under circuit precedent, US v. Du Bo, 186 F.3d 1177 (9th Cir. 1999), the indictment must be dismissed as structural error. The Ninth Circuit notes that the pro se defendant, challenged the indictment pre-*Rehaif* broadly for failing to state all the elements. If he had counsel, the challenge would likely not have occurred under precedent at the time.

US v. Ramirez, No. 18-10429 (9-25-20) (Wardlaw with Thomas). Another suppression of evidence by the Ninth Circuit on an appeal from a conditional guilty plea. The FBI had a warrant to search a home and any car registered to the defendant that was at the home. Under Michigan v. Summers the agents had no authority to seize the defendant because he was not at the residence when they arrived. Agents used deceit to seize and search the defendant by luring him to the home. They falsely claimed to be responding to a burglary to get him to come home. They then got incriminating statements and evidence from him. This violated the Fourth Amendment. Balancing the Government's justification for its actions (none) against the intrusion into the defendant's Fourth Amendment interests (great), the panel concluded that the government's conduct was clearly unreasonable. Moreover, the Government failed to carry its burden to show that the defendant's incriminating statements – made after he knew the true purpose of the agents – were not obtained through the exploitation of the original illegality.

Here's a notable quote from this opinion, with great application:

> "[A] private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations."

United States v. Ramirez, 2020 U.S. App. LEXIS 30635, *17-*18 (9th Cir. 2020)*(quoting SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 316 (5th Cir. 1981)).

Congratulations to Fresno AFD Peggy Sasso and former Fresno AFD Erin Snider who was trial-level counsel.

Ford v. Peery, No. 18-15498 (9-28-20)(Fletcher w/Molloy; dissent by R. Nelson). The Ninth Circuit grants a habeas writ. In a first-degree murder case, the state prosecutor, in rebuttal closing, argued that the presumption of evidence no longer applied because the defendant had a fair trial, got to cross examine, and could present evidence. Defense counsel objected, but was overruled by the court. In Darden v. Wainwright, 477 US 168 (1986), the Court held that such statements amounted to prosecutorial misconduct in violation of due process. Applying the test of various factors established in Hein v. Sullivan, 601 F.3d 897 (9th Cir. 2010), the panel here concluded that the misstatement was prominent; the court failed to correct; and defense counsel did not invite such error nor could respond; the evidence itself was not overwhelming: it was circumstantial and problematic. Further, the jury had deadlocked. So, the Ninth Circuit found a due process violation. As for AEDPA, the panel held that it was an unreasonable application of Chapman and harmlessness. The state court had failed to even consider Darden.