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Federal Defender Newsletter

April 2023

CALIFORNIA EASTERN DISTRICT CJA PANEL TRAINING

April 19, 2023: Panel Training by Zoom at 12:15 p.m. Link will be provided by email. Investigator Lisa Gara will present a clinical approach to mitigation in criminal cases. This includes early identification of mitigation issues and developing reports supported by evidence-based research. With more than 35 years' experience working in the federal court and a masters in forensic psychology, Ms. Gara has a unique understanding and perspective on how to effectively gather mitigation based on the individual client and the importance of a multi-lateral approach in presenting that information to the court.

May 17, 2023: Panel Training by Zoom at 12:15 p.m. will focus on long term effects of traumatic brain injury and its forensic implications. Merriam Young, with Godoy Medical Forensics, will present on TBI and discuss how its long-term effects may impact clients and cases.

REMOTE CJA PANEL TRAINING

The Federal Defender Services Office - Training Division (fd.org) continues to provide excellent remote training for CJA counsel. You can register for and access all fd.org training with your CJA username and password. You can also sign up to receive emails when fd.org is updated.

The Federal Defender Training Division also has a **telephone hotline** offering guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

National Association of Criminal Defense Lawyers (nacdl.org) and NAPD (publicdefenders.us) (which all CJA lawyers qualify to join) also offer excellent remote training, including self-study videos relevant to your criminal defense practice.

CJA Representatives

District's CJA Representative: Kresta Daly, Sacramento, (916) 440.8600, kdaly@barth-daly.com. Backup CJA Representative: Kevin Rooney, Fresno, (559) 233.5333, kevin@hammerlawcorp.com.

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
Sac: Megan Hopkins, megan_hopkins@fd.org

NEW SENTENCING GUIDELINE AMENDMENTS ON THE WAY

On April 5, 2023, the Sentencing Commission voted to adopt proposed amendments to send to Congress. Unless Congress enacts law to modify or disapprove the amendments, they will go into effect November 1, 2023. Several of the amendments are favorable to our clients and attorneys should consider raising these issues in pending sentencings.

Criminal History: The Commission promulgated three ameliorative amendments. **First**, the Commission eliminated status points in most cases (the +2 that apply if a person committed the instant offense under a criminal justice sentence). A +1 status point applies *only* in cases where a person already receives 7 or more criminal history points.

Practice Tip: Object to the application of status points between now and November 1 and ask for variances in anticipation of this rule. The Commission's research confirms that status points serve no predictive value. And these points do not otherwise further the purposes of sentencing.

Second, the Commission created a new guideline at §4C1.1 which provides a -2 offense level reduction for "certain zero-point offenders."

Practice Tip: Ask for variances for clients who have zero criminal history points and who would be otherwise eligible for this reduction between now and November 1. Remember, a person only needs zero criminal history points, *not* zero criminal history to qualify. So, people with old, minor, or tribal convictions, and other arrests may qualify for this reduction.

Relatedly, the Commission amended §5C1.1 application note 4 to advise that a sentence other than imprisonment is "generally appropriate" if a person is in Zone A or B of the sentencing table and gets the §4C1.1 reduction. It also advises that a departure, including to a sentence of non-imprisonment, may be appropriate for a person in any sentencing zone if they qualify for §4C1.1 and the guideline range overstates the gravity of the offense.

Practice Tip: Ask for non-prison sentences for anyone who qualifies for §4C1.1 regardless of sentencing zone. For example, a person with zero criminal history points may be in Zone C or D because of a drug offense. There are many recognized reasons why the drug guidelines overstate the gravity of the offense.

Third, the Commission added to its examples of instances where a §4A1.3 downward departure for overrepresentation of criminal history may be appropriate to include persons who receive criminal history points from a conviction for the simple possession of marijuana.

Practice Tip: Request a downward departure in any case where a person received criminal history points for a prior conviction for the simple possession of marijuana.

Acceptance of Responsibility: The Commission clarified that the government should not withhold the motion for the §3E1.1 third level for reasons other than having to prepare for trial. The Commission defined what constitutes preparing for trial narrowly to include things like preparing witnesses, in limine motions, voir dire, jury instructions, witness and exhibit lists. It clarified that pretrial proceedings (including discovery and suppression motions) are ordinarily not preparing for trial and anything post-trial (like sentencing litigation) is *not* considered preparing for trial.

Safety Valve: The Commission updated §5C1.2 so that it mirrors §3553(f) as amended by the FSA. The Commission also updated §2D1.1 and §2D1.11 to make the -2 reduction for persons who are safety-valve eligible contingent on a person meeting the criteria as written in §3553(f).

Letter from the Defender

On March 27, 2023, the Federal Defender-California Eastern Office (FD-CAE) with the American Civil Liberties Union (ACLU) argued before the US Supreme Court *US v. Helaman Hansen*, Case No. 22-179. <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-179.html>

Then-Assistant Federal Defenders (AFDs) Tim Zindel and Sean Riordan represented Mr. Hansen at trial before our District Court. The Government alleged Mr. Hansen committed multiple violations of mail and wire fraud with his business idea

to assist immigrants on a path to citizenship thru adult adoptions by US citizens (Note: this is not possible under current laws). Before trial, the Government superseded their charges, adding 2 charges of 8 USC §1324(a)(1)(A)(iv): “encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law”, further alleging Mr. Hansen did this for financial gain, providing punishment if ‘guilty’ for up to 10 years prison. AFDs Riordan and Zindel argued the statute violated the 1st Amendment and lacked language that the “encouraging/inducing” jury instruction needed “intentionally” added – all denied. The jury convicted Mr. Hansen of all counts and the District Court sentenced him to concurrent multiple 20 year terms, concurrent with the two §1324 10 year terms.

AFD Carolyn Wiggin represented Mr. Hansen at the 9th Circuit which affirmed all convictions but the 2 §1324 counts, reversing on those, finding §1324(a)(1)(A)(iv) criminalization of “encouraging or inducing” violated the 1st Amendment. Mr. Hansen prevailed in *en banc* review, but with a sizable dissent. SCOTUS accepted the Govt’s cert petition last fall.

In the 9th Circuit appeal, the ACLU wrote a wonderful amicus brief (Vera Eidelman, ACLU). Once the Supreme Court accepted certiorari, the FD-CAE asked the ACLU and Jeffrey Fisher, Stanford Law School, to join with us in the briefing. The ACLU brought Esha Bhandari, David Cole, Cecilia Wang, Anand Balakrishnan, and Elizabeth Gyori to their team. Ms. Wiggin decided Mr. Hansen’s interests would best be served by someone arguing for him with greater knowledge of 1st Amendment law, and that ‘someone’ was Ms. Bandari from ACLU.

Ms. Bhandari’s argument March 27 was poised, articulate, thoughtful, responsive, and persuasive. Argument: https://www.supremecourt.gov/oral_arguments/audio/2022/22-179 (transcript here https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-179_h3ci.pdf) Four women sat at Mr. Hansen’s Supreme Court Counsel Table: Federal Defender – CAE Heather Williams, AFD Carolyn Wiggin, and Esha Bhandari and Cecilia Wang from ACLU. <https://www.instagram.com/p/CqYc3R9O3ju/?igshid=YmMyMTA2M2Y=> The Court will render a decision within the next few months.

Bravos and the Federal Defender’s heartfelt thanks to those at the ACLU, Jeff Fisher, and the many, many law professors, law students, and attorneys who helped to moot our arguments.

Here is the ACLU’s pre-argument press release:

<https://www.aclu.org/press-releases/aclu-federal-defenders-office-argue-to-supreme-court-that-first-amendment-protects-speech-that-merely-encourages-undocumented-persons-to-remain-in-us>

and SCOTUSblog’s

[**Does the Federal Law That Prohibits Encouraging or Inducing Unlawful Immigration Violate the First Amendment?**](#)

"On Monday, in *United States v. Hansen*, the Supreme Court will consider whether 8 U.S.C. §1324(a)(1)(iv), the federal law that criminalizes 'encouraging or inducing' unlawful immigration, violates the First Amendment’s guarantee of free of speech. The case will have potentially significant effects on immigration enforcement. But it may have an even bigger effect on First Amendment law, with significant implications for dissent, incitement, solicitation and aiding and abetting liability,

and social media regulation.... On appeal, the **U.S. Court of Appeals for the 9th Circuit** held that Section 1324(a)(1)(iv) violates the First Amendment. It vacated Hansen's convictions on those two counts only and remanded for resentencing."

Take care, friends. Apologies to those to whom we owe thanks who I forgot to include in this email.