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Federal Defender Newsletter
August 2016

CJA PANEL TRAINING

Panel training is on summer break until September! Sacramento will be on Wednesday, September 21; Fresno will be on Tuesday, September 20. Topics will be announced in the September newsletter. Please mark your calendars.

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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.

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 or Ben Galloway,
ben_d_galloway@fd.org.

PATHWAYS TO PROGRESS EMPOWERMENT FAIR

The Federal Defender's Office has partnered with the United States Probation Office to host the first ***Pathways to Progress Empowerment Fair*** at the U.S. District Court's Kennedy Learning Center in Sacramento on September 20 from 1-4 p.m. This resource fair is for federal formerly-incarcerated individuals and their families, but federal pretrial defendants are welcome too. Participants can connect there with service providers and resources, thus empowering participants to make positive changes in their lives.

We will host over 20 service providers focusing on *Housing Rights Education, Career and Job Development, Literacy/GED Services, Healthcare Education*, *Veterans Resources*, and other services who will share their knowledge and resources with this community.

Lawyers: Please encourage your clients to attend this informative, supportive, and empowering event. More information will follow in the coming weeks.

For more information, please contact **Crystal Richardson**: crystal_richardson@fd.org or **Becky Fidelman**: becky_fidelman@caep.uscourts.gov . Flyer is attached.
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2016 Annual Federal Defender Golf Tournament

Location: Auburn Valley Golf Club
8800 Auburn Valley Road
Auburn, CA 95602

Date: September 23, 2016

Time: 1:00 p.m. Shotgun start

Cost: $80.00, includes green fee, range balls, meal, and prizes

Questions? Playing partners? Special menu needs? Please contact Melvin Buford to sign up: Melvin_Buford@fd.org, 916-498-5700. **All skill levels are welcome.**

Our 2015 Champion was Janet Vine.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet providing 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.

Defending a Federal Criminal Case, 2016 Edition, is now available for purchase at http://fdsdi.directfrompublisher.com/. To take advantage of a discounted rate, please enter "CJADiscount" in the "Coupon Code" window in your shopping cart. This will reduce the purchase price from $399 for the public to $279 for FDOs/CDOs/CJA attorneys and U.S. Courts. Shipping is free for all orders within the continental U.S. The code will be valid through August 31, 2016.

COURTS' ADMINISTRATIVE OFFICE RECOMMENDATIONS FOR PROTECTING COOPERATING CLIENTS

Attached is the AO's Committee on Court Administration and Case Management's June 30, 2016 memo recommending to district and circuit courts procedures to help protect cooperating clients. These include ways to prepare court dockets to ensure filings don't obviously indicate cooperation.

Chief Judge Lawrence O'Neill reports our district's judges discussed the Memo and decided each judge must make his or her individual decision based on each case, the presentation by counsel, and the request brought before him or her. Our court doesn't plan to implement as a district any interim policy.

PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at http://wvs.fd.org. The podcast may be downloaded using iTunes.

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.

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.

NATIONAL DEFENDER SERVICES TRAININGS

MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR
NEW ORLEANS, LOUISIANA
August 11 - August 13, 2016

LAW & TECHNOLOGY SERIES: TECHNIQUES IN ELECTRONIC CASE MANAGEMENT WORKSHOP
NEW ORLEANS, LOUISIANA
September 22 - September 24, 2016

INTERESTING INFORMATION ON-LINE

***TED Talks* - Adam Foss:** A Prosecutor's Vision for a Better Justice System, http://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system

SUPREME COURT CASES

On June 27, 2016, the Supreme Court granted a writ of *certiorari* in Beckles v. United States, No. 15-8544. The case presents the question of whether *Johnson v. United States*, 135 S. Ct. 2551 (2015)—which deemed the residual clause definition of "crime of violence" in the ACCA unconstitutionally vague—also applies to the residual clause definition of "crime of violence" contained in U.S.S.G. § 4B1.2(a)(2). In addition, the questions presented ask whether *Johnson* applies retroactively to collateral review cases challenging a sentence enhanced pursuant to U.S.S.G. § 4B1.2(a)(2), and whether possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*.

The schedule for October oral arguments has been posted. SCOTUSBlog tells me that the second oral argument is *Shaw v. US* which raises an issue regarding what the intent in fraud cases requires: whether a federal law prohibiting bank fraud requires proof of both a specific intent to deceive a bank and an intent to cheat the bank. I have raised and lost this issue (incorrectly and unfairly I might add) in the Ninth Circuit because it has a model jury instruction that defines the intent to defraud as the "intent to deceive or cheat." It should require both. If you have a fraud case going to trial, preserve this issue.

NOTABLE NINTH CIRCUIT CASES

US v. Pimentel-Lopez, No. 14-30210 (7-15-16)(Kozinski, with Fletcher and Fisher). This is an important sentencing case arising out of a drug case where the jury made a special finding that the drug quantity was less than 50 grams. The court made sentencing findings that the actual amount was 4.5+ kg and sentenced the defendant to 240 mos -- the stat max – based on the kilograms, rather than a range of 63-78 months for an amount less than 50 grams.

The Ninth Circuit vacated and remanded for resentencing. The Ninth Circuit held that the district court was not entitled to make a drug quantity finding in excess of what the jury found by special verdict. In so holding, the Ninth Circuit stated that *Apprendi* and its progeny were not relevant – the issue did not concern raising the stat max or finding facts not explicitly found. Rather, the jury's special findings were that the drug quantity was less than 50 grams. The Ninth Circuit looked to *Mitchell v. Prunty*, 107 F.3d 1337, 1339 n.2 (9th Cir. 1997), overruled on other grounds by *Santamaria v. Horsley*, 133 F.3d 1242 (9th Cir. 1998)(en banc), which noted that special findings are disposition of the questions put to the jury.

The jury's special verdict here settles the issue. Unlike other circuits (1st, 7th, 8th and 10th), the Ninth Circuit held that a court cannot find a greater quantity than the special verdict for purposes of sentencing. The jury here not only acquitted the defendant of having a greater than 50 gram amount, but explicitly found that it was less than 50 grams. The court could of course depart from the range of the drugs found. And, if a jury does not make specific findings, or set an upper boundary, the court can find a greater amount. Here, though, the jury specifically spoke as to the upper limit, and acquitted on any higher amount.

The Ninth Circuit also held that the court was clearly erroneous in imposing an organizer enhancement. The statements relied upon by the court were not reliable.

This case calls for counsel to start considering special verdicts in appropriate cases where the findings would set an upper boundary.

US v. Torres, No. 14-10210 (7-14-16)(Murguia with Wardlaw and Fletcher). The Ninth Circuit remanded for resentencing because the government conceded on appeal that it believes *Johnson* applies to the Sentencing Guidelines. The defendant had pled guilty in a conditional plea, allowing him to appeal a suppression issue. On appeal, addressing a sentencing issue, as to whether *Johnson* applies to the guidelines (same language in the residual clause), the government conceded the issue. The Ninth Circuit assumed, without holding, that *Johnson*'s holding nullifies § 4Bl.2(a)(2)'s identically worded residual clause. The Ninth Circuit therefore accepted the government's concession that the district court sentenced the defendant pursuant to a provision in the guidelines that is unconstitutionally vague. This renders the sentence "illegal," and therefore the waiver in his plea agreement did not bar this appeal. *See Bibler,* 495 F.3d at 624.

Jones v. Harrington, No. 13-56360 (7-22-16)(Bybee with Kozinski). The police interrogated petitioner for hours about a gang killing. Petitioner finally said: "I don't want to talk no more." The police followed up, and then continued interrogation, which led to incriminating statements. The statements were the linchpin of the state's case. Convicted, petitioner appealed, only to have the state courts find that his statement was ambiguous, based on statements made after petitioner said: "no more." The district court denied the claim. The Ninth Circuit though found that the statement should have ended the questioning. The majority of the panel held that the statement, "I don't want to talk no more," was clear. The questioning had to stop at that point. No clarification was needed or permitted. As to prejudice, the prosecutor used the subsequent statements extensively in its case, and arguments. The statements formed the "backbone" of the state's case. As such, the unconstitutional statements were prejudicial. The case was reversed and remanded.

Curiel v. Miller, No. 11-56949 (7-25-16)(en banc)(Murguia; Reinhardt concurring and Bybee concurring). In an en banc opinion, the Ninth Circuit found the state petitioner's federal habeas timely under AEDPA because the California Supreme Court, in denying the petition, cited precedent dealing with deficient pleading. Thus, it can be taken as being decided on its merits, and not denied for being untimely.

US v. Lustig, No. 14-50549 (7-29-16)(Friedland with Motz, D.J.; concurrence by Watford). The police searched cell phones in a defendant's pockets and car ostensibly incident to arrest, two years before the Supreme Court required a warrant in *Riley v. California*. The Ninth Circuit held that the good faith exception allowed the search of the cell phones in his pockets, but that the warrantless searches of cell phones found in the car was unconstitutional. The Ninth Circuit held that a harmless error inquiry is required under Fed R Crim P 11(a)(2). Under that standard, the government has to prove that the error did not contribute to the defendant's decision to plead guilty. (He had entered a conditional plea.) The government did not meet that standard here. The case was remanded to allow the defendant an opportunity to withdraw his plea.

US v. Alvarez, No. 11-10244 (8-1-16)(Rawlinson with Nelson and Ikuta). This is an appeal from an involuntary manslaughter conviction arising on the Navajo Reservation. The Ninth Circuit held that the court abused its discretion when it admitted the unauthenticated Certificate of Indian Blood to meet the jurisdictional element of "Indian status." The proponent of the certificate was not a member of the tribe. FRE 902(1) allows certain entities to issue self-authenticating documents, but the list does not include Indian tribes. The conviction is vacated and remanded.

US v. Benally, No. 14-10452 (8-1-16)(Noonan with Nelson and O'Scannlain). The Ninth Circuit reversed an 18 U.S.C. § 924(c) conviction for use of a firearm in a "crime of violence" arising from an involuntary manslaughter conviction. The Ninth Circuit concluded that under *Leocal*, and the categorical approach, involuntary manslaughter cannot be a "crime of violence" as the mental state only requires gross negligence.

LETTER FROM THE DEFENDER

Killing for Murder – Why California Should Abolish Its Death Penalty

"We are killing a human being, and this is as violent a thing as a society can do."
~ 9th Circuit Judge Alex Kozinski

During the Vietnam War era, I attended a summer music camp in Michigan, where, in the cabin's common bathroom, there was graffiti reading: "Fighting for peace is like f**king for virginity." I think of that when I consider the death penalty: Killing for murder is like f**king for virginity.

California again has an opportunity, in passing Proposition 62/*Death Penalty Initiative Statute*, to erase our death penalty.[i] The Democratic Party, as part of this year's election platform, calls for abolishing the death penalty as "a cruel and unusual form of punishment," whose application "is arbitrary and unjust," where "[t]he cost(s) to taxpayers far exceed() those of life imprisonment."[ii] "It does not deter crime."[iii] Supreme Court dissenters Justices Breyer and Ginsburg, in the 2015 5-to-4 *Glossip* decision, questioned the death penalty's 8th Amendment constitutionality for defects of "(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays … undermin(ing any) … penological purpose," citing also abandonment of death sentences in most of the U.S.[iv] Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, harshly criticized current lethal injection processes, where states looking to kill resort to the black market to buy drugs which **might or might not** kill humanely, exposing death row defendants "to what may well be the chemical equivalent of being burned at the stake."[v]

Removing any possible death penalty for state and federal crimes is an economic, progressive, and humanitarian move.

California's Legislative Analyst's Office, reviewing Proposition 62, estimates abolishing California's death penalty will save California taxpayers $150 million annually, considering the costs of prosecuting and defending death sentence cases, considering even a potential death sentence and including appeals once death is imposed.[vi] It costs more to house a condemned inmate – for increased security solely due to the sentence imposed and one inmate per cell. Considering, in California alone, it costs about $9600 to educate one public school student, think what death penalty-related money could do per person in education, medical and mental health treatment, housing, fighting poverty, when improving lives in each of those areas could actually reduce crime!

There are so many, too many myths about the death penalty in the United States and in California: that state killing of certain murder convicts is cost effective and saves money; that it helps victims by bringing closure; that prosecutors fairly choose who should face death and jurors and judges fairly impose death sentences. I have never had a client charged with murder who told me, "And then, before I pulled the trigger, I thought, 'This state and the federal government could try to give me the death penalty if I kill this person; well let me think about this." Never, because it doesn't happen: death does not deter murder.

Most, if not all people on death row suffer from mental illness; some from extreme forms of psychosis, schizophrenia, substance use and abuse. Many are minorities or uneducated, or were raised in poverty, neglect, and abuse. Our Office has represented clients whose families have totally abandoned them, or whose childhoods are memorialized in a single faded school class picture or in report cards noting "can't concentrate or falls asleep in class," "clothing is dirty," or "cannot contact parent." Each provides at least one mitigating circumstance warranting the mercy of a life sentence over death. It takes an effective, experienced lawyer representing the client to tell that story.

Unfortunately, not all death penalty possible defendants get that constitutionally-required lawyer representation. Along with abolishing the death penalty should also be federal removal of AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. § 2254(d)), part of that Clinton Era/"tough on crime" legislation politicians are now gradually unraveling because of its injustices. We need to reinstate what 9th Circuit Judge Alex Kozinski calls the "federal court safety-value" on our Constitution's habeas corpus process, that "final safeguard for the relatively rare but compelling cases where state courts . . . allowed . . . miscarriage(s) of justice."[vii] In addition to California's 700-plus death row inmates, the average sentence being served by a California Department of Corrections inmate is 54 years. The fallibility of our jury system, the extreme power and discretion of prosecutors on **who** and **what** to charge, and the persistence of racial and ethnic prejudice in our "justice" process are regularly questioned with actual innocence death row and other crime inmate exonerations and case dismissals through DNA and other evidence. We must keep open and expand our federal habeas review process, not shrink it, for those and other cases where justice did not occur.

The United States federal government is among the minority of countries on our planet with the death penalty in law and in practice, along with only one other first world country, Japan. To be a member of the European Union, a country cannot have the death penalty for any crime. Nineteen states in our country, plus the District of Colombia, do not have the death penalty.[viii] It's time for California to join that honorable list.

U.S. Supreme Court Justice Anthony Kennedy in a 5-to-4 decision (a majority unchanged by Justice Scalia's death) took what science continually learns about human psychology and sociology to find unconstitutional the arbitrary Florida intellectual disability numbers (a 70 IQ or less, you live –more than 70, look no further forever) as creating "an unacceptable risk that persons with intellectual disability will be executed."[ix] Former Justice John Paul Stevens firmly believes the death

penalty should be abolished, opining we cannot count on the Supreme Court to find the death penalty unconstitutional, but must look to "legislative repeal and abolition by ballot initiative," just as California is doing through Proposition 62.[x]

Government prosecutors include and encourage victim family participation throughout what can be years of the death-penalty trial, appeal, and habeas process. They seemingly use victim families to meet any district attorney's or individual prosecutor's belief that **this** defendant deserves to be killed for the murder committed. Sister Helen Prejean meets with many victim families. She explains how she sees victim families follow cases for years, how "[t]hey wait and wait, reliving the crime over and over again with the hope that they will find "closure" when the killer dies," [xi] sentiments Judge Kozinski echoed. But, she observes, the execution "still . . . would never fill the void in their lives." Sister Prejean sees growing numbers of victim families speaking out against capital punishment.

Finally, there is the great "What If." What if the guilty verdict is wrong and an innocent person is convicted for a crime she or he truly did not commit. "[E]xonerations show a dangerous lack of reliability for what is an irreversible punishment" – death.[xii] For all these, any move to evict the death penalty from California's and America's landscape is a just and human move.

~ Heather E. Williams
Federal Defender, California Eastern

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[i] And in defeating Proposition 66/*Death Penalty Procedures Initiative Statute*, already referred to in some circles as Prop. 666, which hopes to speed up the killing process.

[ii] 2016 Democratic Party Platform, July 21, 2016, p.16. https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf

[iii] *Id.*

[iv] *Glossip v. Gross,* 576 U.S. ___ (2015) (J.Breyer dissent).

[v] *Id., (*J.Sotomayor dissent). With Justice Scalia's death, those justices from *Glossip* now number four to four concerning *Glossip*'s issues.

[vi] http://www.lao.ca.gov/BallotAnalysis/Proposition?number=62&year=2016

[vii] Hon. Alex Kozinski, *Preface: Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc, p.xli (2015).

[viii] National Coalition Against the Death Penalty, http://www.ncadp.org/map.

[ix] *Hall v. Florida*, 572 U.S. ___ (2014).

[x] Robert M. Sanger, *Justice Stevens and the Future of the Death Penalty*, CACJ FORUM, Vol.43, No.1, p.16 (3/2016).

[xi] Moni Basu, *'Dead Man Walking' nun: 'Botched' executions unmask a botched system*, CNN (8/6/2014). http://www.cnn.com/2014/08/06/us/executions-dead-man-walking-nun/index.html

[xii] 2016 Democratic Party Platform, July 21, 2016, p.16.