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Federal Defender Newsletter
January 2015

CJA PANEL TRAINING

Sacramento panel training will resume Wednesday, January 21, 2015 at 5:00 p.m., when CJA Panel Attorney Scott Cameron will present on 17(c) subpoenas. The training will take place at the jury meeting room on the 4th floor of the Federal Courthouse, 501 I St.

Fresno panel training will resume on Tuesday, January 20, 2015 at 5:30 p.m. at the Federal Courthouse in Fresno. Deputy Dominic Ayotte, Deputy Regional Counsel for the BOP, will present an "Overview of BOP Policies and Procedures."

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 – 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.

Check out www.fd.org for unlimited information to help your federal practice.

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DRUGS-MINUS-2-LEVELS UPDATE

Starting November 1, 2014, The Sentencing Guidelines permitted courts to start granting sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base Offense Level 2-level reduction in drug cases. Through the end of last month:

- 28 stipulated motions have been filed and granted

- resulting in a total time reduction of 54 years (658 months).

While the value of early release is inestimable for defendants, their families, and their friends, these early releases also result in a taxpayer cost savings of approximately $1,544,250 million.

28 defendants down, 504 more to go.

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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** 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.

♪ NOTABLE CASES ♫

US v. Camou, No. 12-50598 (12-11-14)(Pregerson with Fisher and Gwinnett, D.J.). A search incident to arrest ends with the arrest. It can only occur when (1) the search is of the person or immediate vicinity; and (2) the item is spatially and temporarily tied to the arrest. Here, the search of a cell phone, where child porn was found, occurred after the arrest had ended. The cell phone evidence must be suppressed.

The defendant was stopped at a checkpoint. A search of the vehicle found an illegal alien being smuggled. The defendant and his girlfriend were arrested. They were separated. They were taken to separate rooms. More intervening acts occurred. The phone was searched for phone numbers....and closed. The phone was opened and the video was searched....and closed. Photos were then examined, and child porn found. An hour and twenty minutes had gone by. This length of time, span of acts, and different places signaled the end of the arrest. The phone, where numbers if the organizer of the smuggling were listed, was not at that point incident to arrest.

The 9th also found that there were no exigent circumstances. The police had the phone. There was no immediate need or emergency. A warrant should have been requested. Likewise, the discovery was not inevitable.

The 9th suppressed.

Mann v. Ryan, No. 09-99017 (12-29-2014) (Thomas, joined by Reinhardt, with partial concurrence and partial dissent by Kozinski)
Habeas petitioner Mann was convicted and sentenced to death in Arizona state court for two murders. The Ninth Circuit reverses in part the denial of his federal habeas corpus petition. The Ninth Circuit holds that the state post-conviction court's conclusion that Mann was not prejudiced by his counsel's ineffective performance at sentencing was "contrary to clearly established federal law" because it applied the incorrect standard for prejudice: while the United States Supreme Court has clearly established that the standard for assessing prejudice from counsel's errors during the sentencing phase of a capital case is whether there is a "reasonable probability" that absent the errors the sentencer would not have imposed death, the state court required Mann to prove that it was "more likely than not" that absent the errors the sentence would not have imposed death. "The state court's application of the wrong standard renders its decision 'contrary to' clearly established federal law and removes AEDPA as a bar to relief." The Ninth Circuit, reviewing *de novo* whether counsel's performance was deficient under *Strickland*, determined that counsel's performance was, indeed, deficient, in that counsel failed to adequately investigate and present mitigating evidence at the penalty phase of the case. Furthermore, Mann was prejudiced by his counsel's deficient performance because had Mann's counsel discovered and presented available mitigating evidence "there is a

reasonable probability that Mann would have received a sentence other than death."

US v. Gladding, No. 12-10544 (12-31-14) (Bea, with O'Scannlain and Fernandez): Mr. Gladding pled guilty to one count of receipt or distribution of child pornography. He conceded that the hard drives and other electronic storage devices that contained some digital files consisting of child pornography were subject to forfeiture, but he sought return of non-contraband digital files that were on those devices. The government argued in district court that it would be too difficult to segregate contraband from non-contraband digital files, and the district court did not require the government to return the non-contraband digital files.

The Ninth Circuit clarified that under Fed. R. Crim. P. 41(g), once a defendant's seized property is no longer needed for evidentiary purposes, the defendant is presumed to have a right to the return of non-contraband property. If the government does not want to simply return the property, it bears the burden of demonstrating that it has a legitimate reason to retain the property. If the government's reason for retaining the property is that it would be "unreasonable" to require it to segregate contraband from non-contraband property, then it must submit evidence, not simply argument, establishing the difficulty or cost of segregating the property.

FORMER FEDERAL DEFENDER EMPLOYEES LOOKING FOR EMPLOYMENT

Yvonne Jurado, yvonneee@live.com, (916)230-0483: Paralegal, Secretarial, Legal Assistant, CJA voucher preparation and filing.

Karen Sanders, kvs.legaltech@gmail.com, (916)454-2957 (h), (916)216-3106 (cell)
Karen has over 20 years of experience as the computer systems administrator at FDO. She'll be providing legal technical and litigation support services. Hourly reasonable rates are available.

Lupita Llanes, lupitallanes@gmail.com, (559) 360-4754: Secretarial and Office Management. Bilingual Spanish/English

LETTER FROM THE DEFENDER

Ch-ch-ch-ch-changes,
Turn and face the strange

~ David Bowie

After a year of changes for our clients through the Sentencing Guideline's drugs-minus-2-levels resentencing opportunities and the clemency criteria for expedited review of certain defendants' cases for commutation based upon Justice's and the Sentencing Commission's changes in attitude, December and January brought more change – from the Supremes, from Congress and from our Local Rules Committee.

Effective December 1, 2014, the Supreme Court's and Congress' approved amendments to Federal Rules of Criminal Procedure and Federal Rules of Evidence.

Fed.R.Crim.Proc. Rules 5(d)(1)(F) (for felony charges) and 58(b)(2)(H) (for petty and misdemeanor offenses) require, at the initial appearance of a defendant believed to be a non-citizen, the judge advise the defendant that she "may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested," though some treaties "or other

international agreement(s) may require consular notification" even when the defendant makes no request.

Frankly, defense counsel representing non-citizen clients, in addition to knowing the client's nationality early in the case, should be asking whether or not the client wants their lawyer to contact the consulate. Some clients may not want their consulate advised, either for fear of their native government (potential amnesty claims) or because they recognize most consular employees as political appointments with political motivations in whether or not to assist. Don't be surprised to find a consulate less than thrilled to assist your client's case – an attitude brought by a "why should we help a criminal" belief. Forget presumption of innocence, a concept foreign in many countries.

Criminal Procedure Rule 12's change begins by saying a motion challenging a court's lack of jurisdiction "may be made at any time while the case is pending" (Rule 12(b)(2)); this is also reflected in the change to Rule 34 for motions arresting judgment. Rule 12(b)(3) gives what should not be for defense counsel a checklist of potential motions which **must** be made pretrial so long as counsel knows of the bases for the motion and the court can rule on the motion without a trial on the case's merits. Housekeeping and court attempts to control calendars are addressed by Rule 12(c).

Now, no longer considered as hearsay are statements a testifying declarant made previously if it's to rehabilitate the witness' credibility when attacked on "another ground" in addition to recent fabrication or recent improper influence or motive to testify. Fed.R.Evid. Rule 801(d)(1)(B)(ii). The door is now open to **all** earlier statements now for any and every witness whose credibility is attacked, and how often are they not? But remember, what's good for the goose is also good for the gander (yes the Government is the "goose" in this scenario). Should defense counsel now routinely have a third person (investigator, paralegal) present during client interviews so, should the client testify and recent fabrication be alleged in cross-examination, the third party can testify as to early consistent statements? Will that require breaching or waiving the attorney-client and work product privileges?

Moving on to solely Congressionally sourced change, in its recent passing of the federal budget to cover the remainder of FY 2015, Congress prohibited the Department of Justice from using any Fiscal Year 2015 funding "with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act, 2015, House version §538. This may result in prosecution dismissals with refilings after or continuances of defense motions to dismiss until October 1, 2015. Department of Justice, however, also includes the alphabet soup of federal law enforcement – DEA, FBI – as well as BOP. If new charges are filed once this year's funding expires and it turns out federal LEOs investigated between December 16, 2014, and September 30, 2015, is a motion to dismiss in order? Is housing sentenced defendants convicted of medical marijuana-related federal offenses

in any of the mentioned states now a "prevention" of those states from implementing their medical marijuana laws?

Finally, squeaking in under the end-of-year wire, are the amendments to Local Rule 403 regarding notices to interpreters in criminal cases. Since John Balazs' (on behalf of CJA and private counsel) and the Federal Defender's comments and objections to the proposed wording were submitted a mere 8 days before passage (and 4 of those days the court wasn't even open), as one of my lawyers observed, "Well, it did not take them long to consider our objections...." The court's concerns about paying interpreters when not really needed may be more justified now since interpreter rates increased effective this month.

Our advice on how to avoid getting sanctioned for not timely calling off an interpreter includes:

1. Pushing for the court to modify CM/ECF to automatically email the staff court interpreter all NEFs in interpreter cases, with further modification listing the type of language interpreter needed.
2. All counsel include in pleading captions a notation of language interpreter required or not, for example:

Case №:2:14-CR-00234 MCE

STIPULATION AND ORDER TO CONTINUE STATUS CONFERENCE

Present Hearing Date: 1/8/2014

Spanish Interpreter Required

3. Counsel, when emailing chambers the filed stipulation notifying of the need for an order, copy the staff court interpreter in the email.

4. The courtroom deputy email counsel, copying the staff court interpreter, when the signed order is signed

Our wonderful staff court interpreter Yolanda Riley-Portal, makes herself available to contact at yriley-portal@caed.uscourts.gov. Her office phone is 916.930.4221, mobile is 916.606.4843, which also takes text messages. In Fresno, attorneys can contact staff interpreter Becky Rubenstein at brubenstein@caed.uscourts.gov. Her office phone number is 559.499. 5611, and her work cell number is 559.476.0211.

Ms. Riley-Portal has let us know that to comply with Local Rule 403, all the attorneys have to do is include her e-mail address in the cc section of the e-mail they send the court requesting a continuance. That gives her notice to keep an eye on the case, and that is sufficient notice for her and her colleague, Becky Rubenstein. They then monitor the case to see if the judge grants the continuance or not, but attorneys' part is done when they cc Ms. Riley-Portal or Ms. Rubenstein.

Finally, rather than focusing on the deadline to cancel the interpreter, create for yourselves an earlier deadline for filing stipulated motions to continue hearings so all parties and the court have plenty of time to resolve the stipulated motion in time to cancel the interpreter.

A happy new year to everyone!

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