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Federal Defender Newsletter
July 2023

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.

The local CJA Panel Training is on Summer break and will resume in September.

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

SUPREME COURT CASES

Counterman v. Colorado, No. 22-138 (6-27-23)(Kagan, J.): The Supreme Court held that, in "true threats" cases, the Government must at least prove the defendant consciously disregarded a substantial risk their communications would be viewed as threatening violence. Because the Colorado statute at issue had no "state of mind" requirement, it violated the First Amendment.

US v. Hansen, No. 22-179 (6-23-23)(Barrett, J.): For 8 U.S.C. §1324(a)(1)(A)(iv) – which criminalizes encouraging and inducing a person to violate immigration law -- to comply with First Amendment must be interpreted narrowly by incorporating 'solicitation' or 'facilitation' elements. These include the traditional element of criminal intent, even

where the statute (such as 8 U.S.C. §1324(a)(1)(A)(iv)) does not explicitly note a mens rea. Thus, the statute requires the *intentional* encouragement of an unlawful act and/or facilitation of the wrongdoer with the intent to further an offense's commission. The statute is not facially overbroad, thus the Court remanded the case for an as-applied analysis, including on the question of whether the First Amendment allows the government to criminalize encouraging civil law violations.

Mr. Hansen was represented at the Supreme Court by Esha Bhandari of the ACLU and AFD Carolyn Wiggin of this office. Former AFDs Sean Riordan and Tim Zindel deserve credit for identifying and preserving this issue at Mr. Hansen's trial.

Lora v. US, No. 22-49 (6-16-23)(Jackson, J.): In Lora, SCOTUS resolves a circuit split by deciding "a §924(j) conviction …can run either concurrently with or consecutively to another sentence." The Court focused on the limiting phrase "in this subsection" and employed "straightforward reasoning" in holding that "[s]ection 924(c)(1)(D)(ii)'s bar on concurrent sentences does not govern a sentence for a §924(j) conviction." For the Court, the separate placement of subsections (c) and (j) is instructive. "To state the obvious…, subsection (j) is *not located within* subsection (c). Nor does subsection (j) call for imposing any sentence from subsection (c). Instead, subsection (j) provides its own set of penalties." A §924(j) sentence therefore can run either concurrently with or consecutively to another sentence.

Dubin v. US, No. 22-10 (6-8-23)(Sotomayor, J.). The Supreme Court imposes reasonable, practical limits 18 U.S.C. § 1028A's reach, the aggravated identify theft statute. **This is a very important decision to review if your client is facing a section 1028A charge as it significantly narrows DOJ's prior free-wheeling interpretation of the statute.**

Focusing on the words "use" and "in relation to," the Court held "§1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal, rather than merely an ancillary feature. . . ." In general, to qualify as aggravated identity theft, the fraud using someone else's identity must be about *who* receives services, not about how or when they were provided. Because the statute applies to "thefts" of one's identity, cases where the identity belongs to a coconspirator appear to be outside its scope, based on the Court's emphasis on the "ordinary understanding of identity theft."

This undermines prior Ninth Circuit cases holding that use of a co-conspirator's name would qualify as aggravated identity theft. The Supreme Court also reiterates several times that the statute imposes a harsh mandatory two-year sentence and thus should apply to truly aggravated crimes.

Tyler v. Hennepin County, MN, N. 22-166 (May 25, 2023). The Court ruled the Government unconstitutionally retained the excess value of the plaintiff's home above her tax debt, violating the Takings Clause. Keep this in mind for forfeiture cases. Because "sanctions frequently serve more than one purpose," the Excessive Fines Clause applies to *any* statutory scheme that "serv[es] *in part* to punish." Austin v. US, 509 U. S. 602, 610 (1993) (emphasis added)." Even without emphasizing culpability, the Court has said a statutory scheme may still be punitive where it serves another "goal of punishment," such as "[d]eterrence." US v. Bajakajian, 524 U.S. 321, 329 (1998)."

Percoco v. US, No. 21-1158 (Alito, J.): Holding the Second Circuit theory that private individuals owe duty of honest services to public where the individual has a special relationship with the government and dominated and controlled government business is not a legally correct definition for honest services fraud.

Ciminelli v. US, No. 21-1170 (Thomas, J.): Rejecting Second Circuit's "right-to-control" property fraud theory, which had provided that potentially valuable economic information necessary to make discretionary economic decisions constituted property.

Cruz v. Arizona, No. 21-846 (Sotomayor, J.) Holding, in death penalty case, in exceptional cases where a state-court judgment rests on a novel and unforeseeable state-court procedural decision lacking fair or substantial support in prior state law, that decision is not adequate to preclude review of a federal question.

NINTH CIRCUIT CASES

U.S. v. Lucas, No. 22-50064 (6-14-23)(Wallace): The Ninth Circuit applied a heightened fact-finding standard (*clear-and-convincing*) to a guideline sentencing increase for a large capacity magazine under section 2K2.1(a)(4)(B). The Government conceded that an increase from 33-41 months to 63-78 months merited the "clear and convincing" standard. The Court set forth a description of *clear-and-convincing* -- "To find a fact by clear and convincing evidence, a district judge must 'have an abiding conviction that the truth of the factual contentions at issue is highly probable." – and held the Government did not meet that standard at sentencing.

Melville v. Shinn, No. 21-15999 (5-23-23) (Graber) Arizona state court convicted Petitioner and sentenced him to 18 years prison. Direct appeal confirmed his conviction. He obtained an extension of time to file for discretionary review with the Arizona Supreme Court, but decided to move on to postconviction proceedings, which he began by filing *pro se* a notice of postconviction relief while he still had time to file for discretionary review in his direct appeal. He lost in postconviction proceedings in the trial court, and the Arizona Court of Appeals affirmed the denial of his postconviction petition. He obtained an extension of time to file for rehearing of the appellate court's decision but decided not to file for rehearing or for further review with the Arizona Supreme Court. One year to the day after his petition for rehearing would have been due, he placed a *pro se* federal habeas petition in the prison mailbox. The Ninth reversed the district court's determination that time for federal habeas had expired. A combination of the extensions of time and the periods of statutory tolling applied. Finally, the prison mailbox rule meant the federal habeas petition was timely filed on the one-year anniversary of his state postconviction appeal extension running out.

US v. Castillo, No. 21-50054 (5-31-23)(Wardlaw): The panel concluded USSG § 4B1.2(b) unambiguously identifies a list of crimes that does not include inchoate offenses. Because §4B1.2(b)'s definition of "controlled substance offense" is unambiguous, the Supreme Court's Kisor decision means Application Note 1 cannot expand that definition to inchoate offenses. Kisor thus overruled prior Ninth Circuit cases, Crum and Vea-Gonzales to the extent these held an inchoate offense is a "controlled substance offense" for under the Sentencing Guidelines.

From the Defender:

All, it's budget appropriations time in DC and they must be feeling the effects of the heat and humidity, because FY2024's Appropriations Committee's numbers have cuts everywhere. It not a done process yet, by any means, but this is where the *Criminal Justice* Act recipients are at currently:

FY2024 Budget Update

Defender Services (DS) Appropriation Accounts FY2023 & (proposed) FY2024

FY2023 Final Enacted	FY2024			
	DS ask	House Appropriations Comm Mark		
		Passed	Diff from DS ask	Diff from FY23
$1,382.65 million	$1,533.015 million	$1,411.116 million	- $121.899 million	+ $28,436 million (+2.1%)
		Senate Appropriations Comm Mark		
		Passed	Diff from DS ask	Diff from FY23
		$1,382.680 million	-$150.335 million	No difference

Senate Markup summary

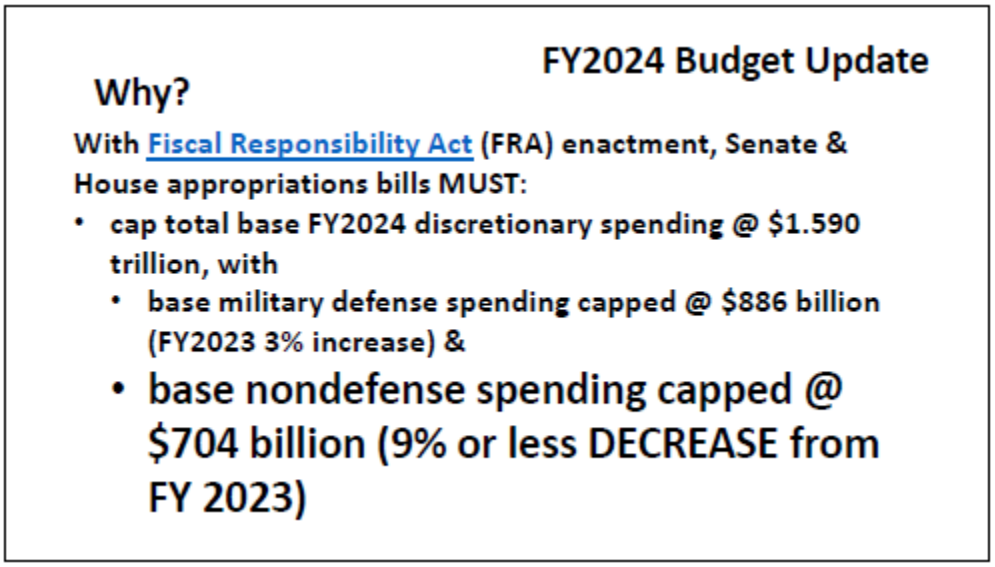
Federal Judiciary: The bill provides $8.568 billion for the federal judiciary—an increase of $106 million above the fiscal year 2023 enacted level—for operations of our nation's courtrooms, with additional funding to enhance cybersecurity within the judiciary and for IT modernization.

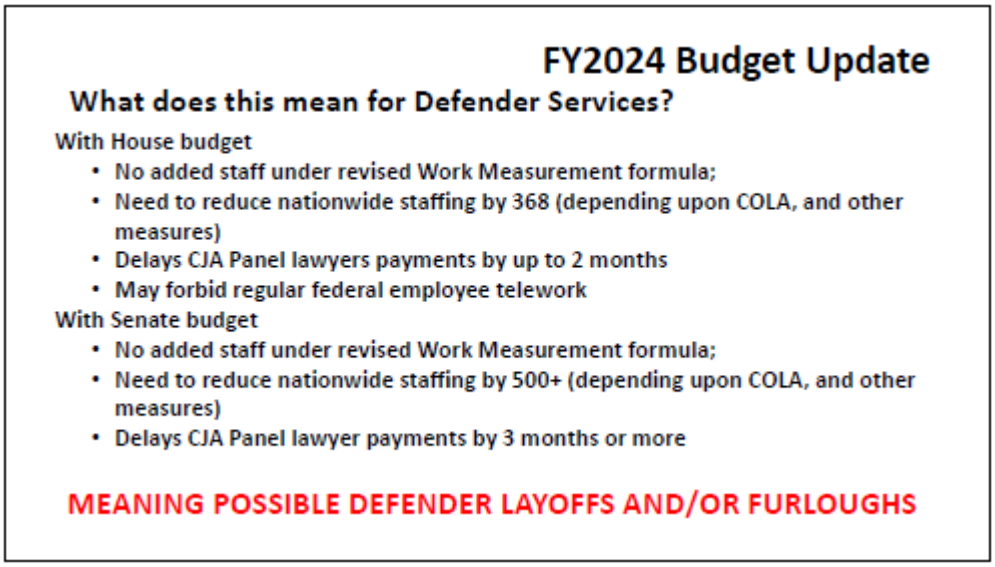
House Markup summary

The Judiciary

Provides $8.7 billion for the Judiciary, which is $110.4 million above the FY23 enacted level.

- Increased funding for the Judiciary provides resources to targeted judicial priorities.
- $782 million for court security, to ensure justices, judges, their families, and employees are protected against those that seek to harm them.





Stay tuned….and contact your Representatives and Senators!

Take care, all.

~ Heather
Heather E. Williams, Federal Defender – California Eastern