OFFICE OF THE FEDERAL DEFENDER
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700
FAX (916) 498.5710

2300 Tulare Street, Suite 330
Fresno, CA 93721-3121
(559) 487.5561
FAX (559) 487.5950

HEATHER E. WILLIAMS
Federal Defender

LINDA C. HARTER
Chief Assistant Defender

CHARLES LEE
Fresno Branch Chief

RACHELLE BARBOUR, Editor

Federal Defender Newsletter
March 2014

CJA PANEL TRAINING

Sacramento CJA Panel Training will be held on March 19, 2014 (Third Wednesday) at 5:00 p.m. in the grand jury room at the U.S. District Court, 501 I St. Defense attorney and former AUSA Courtney Linn, esq., will present on "The New Paternalism: Our Transition From a 'Seen But Not Heard' to a 'Believed Without Question' Model of Addressing Victims at Sentencing."

Fresno CJA Panel Training will be on March 18, 2014 (Third Tuesday) at 5:30 p.m. AFD David Porter will present his Annual Supreme Court Update. The training will be held in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our 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.

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

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 - Janet Bateman,
janet_bateman@fd.org,
Ann McGlenon,
ann_mcglenon@fd.org, or
Karen Mosher, karen_mosher@fd.org,
or
Sacramento: Lexi Negin,
lexi_negin@fd.org.

BOP ORIENTATION PROGRAM

Pretrial Services and BOP will be holding orientation classes in Fresno and Sacramento for defendants who are facing possible prison sentences. Each defendant is welcome to bring a family member. Defense counsel and staff are also welcome. The class will educate defendants on the BOP system, answer questions about facilities, provide insight on what to expect upon self-surrender, and assist with adjustment to prison life. The Fresno class will be held on Tuesday, April 15, 2014 from 9:30 to 11:30 a.m. The Sacramento class will be held on Tuesday, April 22, 2014 from 9:30 to 11:30 a.m. Classes are held at the pretrial services office at each courthouse.
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EASTERN DISTRICT CRIMINAL DEFENSE LISTSERV

Robert Wilson, one of our Panel lawyers, would like to test his idea for a ListServ **limited to defense counsel representing defendants in federal court here in the Eastern District**. His goal is to have a place to exchange ideas, successes, share research and experiences, as well as seek and share information on agents, experts and witnesses. If interested, please contact Mr. Wilson at rwilson@boydkimball.com. You'll be emailed an invitation to join the ListServ and receive login information.

If you participate, please keep in mind attorney-client and work product privileges, conflicts of interest, and professionalism if ever commenting on judges, prosecutors, probation and pretrial officers, agents, experts, and witnesses. Remember, never share something in an email or Listserv that you wouldn't want to hear coming from the witness stand or read in a transcript about you.

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CHANGES IN MEGACASE EXPERT & INVESTIGATOR VOUCHERING

Attached to the end of this newsletter is a February 26, 2014 Memo from Judge Catherine Blake, Chair of the Defender Services Committee, with initiatives to contain costs relating to certain services providers in megacases (*e g.* many defendants, multiple counts, computer evidence, incredible amounts of disclosure, wiretap recordings, etc.). These guidelines should be considering in budgeting your case. Pay particular attention to your own hours.

♪ NOTABLE CASES ♫

SUPREME COURT

Story v. United States, No. 13-7283. The Supreme Court granted, vacated and remanded two cases (*Story* and *Snipes v. United States*, No. 13-6733) to the 6th Circuit for further consideration in light of the position of the Solicitor General. The issue is to what extent a defendant may receive post-conviction relief from a mandatory minimum imposed based on a prior conviction that later has been held not to be a qualifying prior (see *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc)). Before the Supreme Court, the government conceded the following issues: (1) "The government agrees with petitioner that the lower courts erred when declining to issue petitioner a COA to allow him to appeal his *Simmons/Pruitt* claim that the 20-year mandatory minimum was imposed in error."; (2) "Petitioner can make a substantial showing that he was subjected to an erroneous mandatory minimum sentence and the resulting mandatory 20-year term of imprisonment violates his constitutional right to due process"; (3) *Simmons* is retroactively applicable on collateral review (without any argument that this was the wrong decision); and (4) a *Simmons* claim may allege that the person is "innocent" of the mandatory minimum where the government waived defenses.

Hinton v. Alabama, No. 13-644 (Feb 24, 2014). In this death penalty summary reversal, the Supreme Court holds that the Alabama courts misapplied Strickland v. Washington, 466 U. S. 668 (1984) and that Hinton's trial attorney rendered constitutionally deficient performance. The Court finds that it was unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure

was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000. The trial attorney failed to request additional funding in order to replace an expert he knew to be inadequate. Hinton's attorney knew that he needed more funding to present an effective defense, yet he failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants that would have revealed to him that he could receive reimbursement not just for $1,000 but for "any expenses reasonably incurred." The Court holds, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*. . . .The only inadequate assistance of counsel here was the inexcusable mistake of law — the unreasonable failure to understand the resources that state law made available to him — that caused counsel to employ an expert that *he himself* deemed inadequate." The Court remands the case for determination of prejudice.

Rosemond v. United States, No. 12-895 (3-5-14)(Kagan, J.; 7-2). This federal prosecution involved in a drug deal where one person used a gun. Factually, there was conflicting evidence concerning who used the firearm. So the government charged the defendant with violating § 924(c) or, alternatively, aiding and abetting that offense under § 2. The defendant challenges the aider and abetter jury instruction. The trial court instructed that a defendant is guilty of aiding and abetting the §924(c) offense if he (1) "knew his cohort used a firearm in the drug trafficking crime" and (2) "knowingly and actively participated in the drug trafficking crime." The Tenth Circuit affirmed. The Court reversed, holding that the defendant must not just associate himself with the venture, but also participate in it as something that he wishes to bring about and seek by his actions to make it succeed. That requirement is satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense. An active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he *knows* that one of his confederates will carry a gun. This must be advance knowledge -- meaning, knowledge at a time when the accomplice has a reasonable opportunity to walk away.

NINTH CIRCUIT

United States v. Guido, No. 12-10030 (unpublished) (O'Scannlain, Graber, and Nguyen). The Ninth Circuit reversed the defendant's convictions for theft and aggravated identity theft, holding the evidence insufficient to sustain the verdict. Proof that the defendant used the identity of another to pay taxes and then receive Social Security benefits was insufficient to prove theft. Congratulations to Assistant Federal Defenders Peggy Sasso and Jeremy Kroger who represented Mr. Guido at trial and on appeal.

United States v. Popov, No. 12-10045 (2-11-14)(Lasnik, D.J., with Reinhardt and Watford). In this Medicaid overbilling case, the Ninth Circuit remanded the defendants' sentences because of loss calculation under the guidelines. The district court used the amount billed, while the defendants argued that loss should be the amount paid out. Usually the amount invoiced sets the loss under the guideline, but that is rebuttable, especially since the defendants could argue that Medicaid never paid completely. The Ninth Circuit remanded to allow the court to sort it out.

Vosgien v. Persson, No. 12-35397 (2-13-14)(Fletcher with Silverman and Callahan). An Oregon statute concerning compelling prostitution requires the compulsion be for a third person: to be guilty, a defendant has to force someone to prostitute with a third person, not the defendant. Here, the petitioner had been convicted of compelling prostitution of minors with himself. He was also guilty of other sex crimes, such as rape and sodomy. The petitioner filed an untimely petition, but argues that "actual innocence" (the Schlup gateway) provides an exception to untimeliness. The Ninth Circuit agrees. The petitioner could not be guilty, under state law, for the offense to which he pled. The state's argument that his plea was a result of plea bargaining and thus should stand as part of a bargain was rejected because the state did not dismiss any charges as part of the plea. The petitioner had pled guilty to all nine counts.

United States v. Gonzalez-Monterroso, No. 12-10158 (2-14-14)(Ikuta with M. Smith; Wallace concurring). Here, in sentencing for an illegal reentry conviction, the issue is whether a Delaware prior for "attempted rape in the fourth degree" was a crime of violence that resulted in a +16 adjustment. The Ninth Circuit applied the categorical approach and found it was not. The state conviction focuses on "attempt" which requires a "substantial step." The federal definition also requires a substantial step. However, the state definition requires proof of an act demonstrating intent, while the federal definition requires an act that unequivocally demonstrates that the crime will take place unless interrupted by independent circumstances. The state definition is broader than the federal. Evidence of an act that shows intent is insufficient for the federal definition. Accordingly, the prior does not qualify as a crime of violence under the guideline. A modified categorical approach is not available because under Deschamps the offense is not divisible.

United States v. Garcia-Santana, No. 12-10471 (2-20-14)(Berzon with Alarcon and Zouhary, D.J.) The Ninth Circuit affirms the dismissal of an illegal reentry indictment because the prior removal order was inadequate. In the removal proceedings, the defendant was denied her right to seek discretionary review. The Ninth Circuit also holds that Nevada's conspiracy statute is broader than the federal statute. The state does not require an overt act, but the generic federal definition of "conspiracy" under 8 USC 1101 includes proof of an overt act in furtherance of the conspiracy.

United States v. Maloney, No. 11-40311 (2-28-14)(en banc order). The government concedes error and the Ninth Circuit en banc court reverses and remands. The issue was (1) whether the government had "sandbagged" the defense by raising an issue in trial rebuttal argument that had not been previously been argued in its summation; and (2) what the remedy should have been. The Ninth Circuit panel originally upheld the trial court's refusal to allow the defense a surrebuttal to the new factual arguments raised by the government for the first time in rebuttal. This is even though the AUSA admitted in oral argument before the panel that he was sandbagging the defense. The Ninth Circuit took the case en banc and heard argument in September 2013. After a "benchslapping" by the Ninth, the government conceded error and said that it would be using the video of the en banc argument to train AUSAs on the rules regarding closing argument. Noting this

concession, the Ninth Circuit granted the motion to reverse the conviction.

Clabourne v. Ryan, No. 09-99022 (3-5-14) (Clifton, with Berzon and Ikuta, JJ.). After having his first death penalty vacated, the petitioner was resentenced to death in 1997. His habeas petition challenging that sentence was denied by the district court, which only certified one issue for appeal. He appealed that issue and requested that the Ninth Circuit issue a certificate of appealability on other claims. A certificate was granted regarding two other IAC claims, which had been denied by the district court based on procedural default. After that denial, Martinez v. Ryan held that procedural default could be excused in certain circumstances. In light of Martinez, the Ninth Circuit vacates the trial court's denial of relief on one of the IAC grounds and remands for further proceedings. The lawyer at petitioner's resentencing failed to object to a confession that had been given in 1982, but was suppressible under the law as it stood in 1997. Admission of that statement violated his rights under the Fifth Amendment. The matter is remanded for the district court to consider whether cause and prejudice exist to excuse the procedural default and, if so, whether petitioner suffered prejudice from his counsel's error at the resentencing.

GILMAN WIN!

Gilman v. Brown, No. 2:05-CV-0830-LKK (2-28-14). Judge Karlton has held that two California laws affecting the parole process are unconstitutional under the Ex Post Facto clause because they improperly changed the punishment for crimes committed before the laws were enacted. Proposition 9 mandated longer periods of time between parole hearings, resulting in a risk of longer sentences for prisoners than they faced when their crimes were committed. Proposition 89 granted the governor the right to review and reverse parole already approved by the Board of Parole Hearings in murder cases. Judge Karlton found every governor since passage of the measure has abused that power by blocking a large majority of the paroles he reviewed. The judge issued an injunction blocking state enforcement of the two laws. Congratulations to AFDs David Porter, Monica Knox, and Matthew Scoble for the hard-fought victory!!

ADDRESS, PHONE OR EMAIL UPDATES

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Calvin Peebles at the same number.

CJA REPRESENTATIVE

Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, carl.faller@fallerdefense.com.

Our Back-up CJA Representative is **Scott Cameron**, 916-769-8842, snc@snc-attorney.com.

LETTER FROM THE DEFENDER

I've been listening to a № 1 Ladies' Detective Agency book on CD – *The Limpopo Academy for Private Detection* by the attorney, law professor, and marvelous author, Alexander McCall Smith. A secondary character, Fanwell, was accused of working on a stolen car so it could be sold and his boss retained a lawyer to represent him. The characters discussed this lawyer's poor reputation, describing a different representation where the lawyer was tardy to court because he forgot case papers, forgot his client's name and couldn't recall the facts of his client's case. That client blamed the lawyer for his sentence. The poor reputation was later confirmed by another lawyer who was bewildered the man ever graduated law school.

So, if we were to not commit any of those sins, would that improve our client relations, not to say our reputations? A wonderful lawyer at the Pima County Public Defender Office, Dan Grills, during their "rocket docket" to clean up the backlog of criminal trials, had a jury out in one murder case as he started trial in another client's murder case. Once he was into his opening statement, he noticed the perplexed looks on the jurors' faces, stopped, thought, and realized he was talking about another client's case. He apologized, explained the mix up and started over, correct client this time. No doubt the eventual "not guilty" verdict helped Dan's client relations in that case, but chances are, knowing Dan, they'd have been fine regardless.

That's because Dan, and so many of us, treat clients as fellow travelers on this planet, not simply the accused who likely did something to become our client. We realize nothing ever happens in a vacuum, that there were a series of events and experiences leading to the charge, to the arrest, whether the client is guilty or not.

To keep that client reputation, we can't take for granted that, while we readily understand the convoluted process of our criminal justice system, our clients may not, no matter how many times they've been through the system. Before being appointed as Defender, it was 25 years since I'd practiced law in California. I was reading a Superior Court trial transcript for my then-17 year old client charged with attempted first degree murder where the lawyers and judge used their shorthand – "additional time on the 211," "It's a 2, 3, 5 triad" – never once explaining what that all meant to the client. It's the client's hearing, the client's trial, and our job is to be sure he understands everything being said and argued.

We take the time, each meeting with the client, to first ask how she is. The client's worries become our worries. We learn who's in her family, can she read, what's her favorite sport or song or TV show or class, what did she plan to be when she grew up. We give her the chance to ask us questions – it doesn't go just one way with us giving a monologue.

Because, only by treating the client with concern and respect can you then get the answers to the harder questions: Were you abused? Did you ever go hungry? Who died in your life and how? Where did you get that gun and why? How old were you when you first used meth and how'd you get it? By caring about the whole person, you then have permission to ask, "How did that make you feel?" – the question whose answer makes one vulnerable and exposed.

Of course, showing up on time and being prepared matters, but that's the easy stuff compared with taking our time to try to connect with another human being.

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

Former Federal Defender Employees Looking for Employment

Becky Darwazeh, darwazeh1@hotmail.com: Secretarial, Legal Assistant

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 work. Bilingual Spanish/English services.

Defender Services Office Training Branch National Trainings

http://www.fd.org/navigation/training-events

UPCOMING TRAINING

SENTENCING ADVOCACY WORKSHOP
LONG BEACH, CALIFORNIA | March 06-08 2014

TRIAL SKILLS ACADEMY
SAN DIEGO, CALIFORNIA | April 27-May 02 2014

SENTENCING ADVOCACY WORKSHOP
PHILADELPHIA, PENNSYLVANIA | June 19-21 2014

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE
MINNEAPOLIS, MINNESOTA | July 31 2014

MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR
MINNEAPOLIS, MINNESOTA | July 31-August 02 2014