



## OFFICE OF THE FEDERAL DEFENDER

### Eastern District of California

801 I Street, 3<sup>rd</sup> Floor  
Sacramento, CA 95814-2510

(916) 498.5700  
Toll Free: (855) 328.8339

FAX (916) 498.5710

Capital Habeas Unit (CHU) (916) 498.6666

Toll Free: (855) 829.5071 Fax (916) 498.6656

2300 Tulare Street, Suite 330

Fresno, CA 93721-2228

(559) 487.5561

Toll Free: (855) 656.4360

FAX (559) 487.5950

HEATHER E. WILLIAMS  
Federal Defender

LINDA C. HARTER  
Chief Assistant Defender

JOSEPH SCHLESINGER  
CHU Supervisor

CHARLES LEE  
Fresno Branch Chief

RACHELLE BARBOUR, Editor

# Federal Defender Newsletter

## October 2014

### CJA PANEL TRAINING

Sacramento panel training will take place on October 15, 2014 (third Wednesday) at 5:00 p.m. in the jury lounge on the fourth floor of the U.S. District Court, 501 I St. Kelly Scribner and Alex Roberts, National Litigation Support Administrator and Paralegal, will present "Strategies for Dealing with Electronic Discovery."

Fresno panel training will take place on October 21, 2014 (third Tuesday) at 5:30 p.m. The training will be held in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno. AFD Ann McGlenon will present "Litigating False Confession Cases" and CJA attorney David Torres will present "Motions to Quash Search Warrants."

### **FEDERAL DEFENDER'S GOLF TOURNAMENT**

Congratulations to the winner of the 13th Annual Federal Defenders Golf Tournament, District Judge John Mendez. Special thanks also to Dan Broderick, Emmett Mahle, Dwight Samuel, Hayes Gable, Danny Brace, and Vincent Lee!

### **ONLINE MATERIALS FOR CJA PANEL TRAINING**

The Federal Defender's Office will be distributing panel training materials through our website: [www.cae-fpd.org](http://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](mailto:lexi_negin@fd.org).

### **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](mailto:janet_bateman@fd.org),  
Ann McGlenon, [ann\\_mcglendon@fd.org](mailto:ann_mcglendon@fd.org), or  
Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org), or

Sacramento: Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org).

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Check out [www.fd.org](http://www.fd.org) for unlimited information to help your federal practice.

## Defender Services Office Training Branch

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

### UPCOMING TRAINING

#### TRAIN THE TRAINERS WORKSHOP

SANTA FE, NEW MEXICO | November 12 - November 14, 2014

### ♪ NOTABLE CASES ♪

Castellanos v. Small, No. 12-55783 (9-9-14)(Murguia, with Reinhardt and Noonan). The Ninth Circuit granted habeas Batson relief in this case, which arises from a California state murder trial against a 17-year-old defendant with some gang involvement. At trial, the state struck four Latino prospective jurors. There was a Batson challenge, and the prosecutor defended the strikes by arguing that one juror was struck because she did not have children. This was factually wrong, she did. The Ninth Circuit, conducting a comparison, found that the reason was pretextual and reversed the district court.

US v. Dreyer, No. 13-30077 (9-12-14) (Berzon; concurrence by Kleinfeld). Naval Criminal Investigative Services (NCIS) launched a nation-wide investigation to uncover online criminal activity. Specifically, the agency and agents were looking for persons file-sharing illegal pornographic images. The investigation targeted anyone, military or civilian. This civilian defendant was charged and convicted of possessing and distributing illegal images in Washington State. The Ninth Circuit granted his motion to suppress. The court held that NCIS was bound by Posse Comitatus Act restrictions that proscribed direct military enforcement of civilian laws. The NCIS provided direct

assistance in investigations, had done so despite cautions and then warning by this court, and ignored concerns by others, and the acts were done frequently. As such, suppression was an appropriate sanction under the exclusionary rule. The Ninth Circuit rejected the government's argument that since NCIS was a civilian agency, headed by a civilian, it was not part of the military chain. The Ninth Circuit concluded that the distinction is without a different given the role and mission. The Ninth Circuit's decision is especially interesting given the defendant's 18 year sentence because he had a prior conviction for the same crime. Concurring, Kleinfeld warned against the military becoming a national police force to investigate civilian crimes committed by civilians.

McMonagle v. Meyer, No. 12-15360 (9-10-14) (Duffy, D.J., with Thomas). The panel addressed AEDPA timeliness rules in the context of a California misdemeanor. The panel held that in light of the fact that a California misdemeanor cannot be directly appealed all the way up to the California Supreme Court but instead must reach that court through a habeas petition, AEDPA "finality" occurs once the California Supreme Court denies a misdemeanant's state habeas petition and the US Supreme Court denies certiorari or the 90-day period for filing certiorari expires.

Gibbs v. LeGrand, No. 12-16859 (9-17-14)(Berzon with Thomas and Tallman). The Ninth Circuit found "egregious misconduct" by petitioner's defense counsel in abandoning his client. The Ninth Circuit documented that petitioner's counsel failed to inform his client about the state court's denial of his petition and stopped communicating with petitioner when petitioner kept pressing about his federal deadlines. The Ninth Circuit



reversed the district court, holding this petition had to be considered timely.

US v. Reyes, No. 12-50386 (Bybee, with Bea and Christen). The Ninth Circuit held that it violates Rule 43 to voir dire a juror at sidebar outside a defendant's presence. Rule 43 is broader than the scope of the constitutional right to be present. "Voir dire" is a trial stage under Rule 43. The court may not question a juror outside the earshot of a defendant.

Sessoms v. Grounds, No. 08-17790 (McKeown for a 6-5 en banc majority). An en banc panel reversed, for the second time, a district court's denial of a § 2254 petition filed by a California state prisoner in this local Sacramento case. The petitioner unequivocally asked for a lawyer at the start of a police interview, so the state courts should have suppressed his statements because the police continued to interrogate him despite this request. The state courts' contrary decision led to a grant of habeas relief and a new trial. The petitioner asked, "There wouldn't be any possible way that I could have a -- a lawyer present while we do this?" He then repeated himself: "Yeah, that's what my dad asked me to ask you guys... uh, give me a lawyer." The detectives did not stop the interview as they were required to do under Edwards v. Arizona, 451 U.S. 477 (1981). The petitioner made incriminating statements which were used against him at his murder trial. The petitioner had been in jail for four days, yet conspicuously absent from the beginning of the conversation were the now-familiar Miranda warnings. Even so, the petitioner asked for a lawyer right from the beginning of the interview. Instead of giving him the Miranda warnings or terminating the interview, the detectives simply ignored his request for counsel. Worse still, they lied to the petitioner about what his alleged accomplices had

confessed to, and then told him that asking for a lawyer would do him no good. The Miranda warnings are designed to mitigate the effects of this common police subterfuge. In context, the petitioner unequivocally asked for a lawyer. The panel even commended the petitioner's father for giving him some "good advice" in that regard. The state had conceded before the state courts that admitting the petitioner's statements was not harmless, so the panel granted the writ and ordered a new trial.

## LETTER FROM THE DEFENDER

Our District Court recently issued two General Orders giving review to imposed sentences: 546 and 547.

General Order 546 appoints the Federal Defender to review sentenced drug cases for possible retroactive application of the Guidelines' 2-level base offense level reduction becoming effective November 1, 2014. If Defender determines a defendant may qualify, the Federal Defender is further appointed to represent the defendant in applying to the District Court for the reduction pursuant to U.S.S.G. Amendment 782 and 18 U.S.C. § 3582(c)(2). If a potential for conflict exists, the Defender notifies the Court for possible appointment of CJA counsel. Of course, if the defendant can afford to, counsel can be retained. Under Amendment 782, no motions for reduction can be filed before November 1, 2014, and no defendant will be released before November 1, 2015. The defendants in the Bureau of Prisons (BOP) who might benefit from such motions have been identified by the Sentencing Commission, BOP, Probation, and the defendants themselves.

Attached to this Newsletter are charts I created for easier reference of statutory penalties and calculation of the U.S.S.G. § 2D1.1 Drug Guideline drug amount offense levels effective November 1, 2014. Hope they help.

The other General Order, № 547, also appoints the Federal Defender to review, from

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requesting defendants, their potential for clemency, commutation, or pardon. However, a recent Administrative Office of the U.S. Courts General Counsel opinion concludes no statutory authority exists permitting defendants Federal Defender or CJA counsel representation for clemency petitions. Our Court, however, appoints the Federal Defender (or, when a conflict exists, CJA counsel) for filing a *Motion for Judicial Recommendation for Executive Clemency or Pardon* in cases deemed viable for eventual clemency or pardon. With the Court's recommendation and the U.S. Attorney's position as part of the decided motion, the defendant may file her own Application with the Office of the Pardon Attorney or apply to the Clemency Project 2014 for representation.

Federal Defenders in Ohio had already submitted initial applications for clients before the General Counsel decision. We recently heard the Office of the Pardon Attorney has quickly processed the applications and is already forwarding them to the President with recommendations they be granted.

**If any CJA counsel is interested in taking *pro bono* a clemency application, please contact [clemencyproject@nacdl.org](mailto:clemencyproject@nacdl.org). More information can be found at <http://www.nacdl.org/clemencyproject/>.**

Finally, thank you to everyone for your kindness, concerns, prayers, and sympathies with my recent loss. I feel quite fortunate to be a part of such an embracing, compassionate community and no words exist to fully express my gratitude. Thank you.

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

## FORMER FEDERAL DEFENDER EMPLOYEES LOOKING FOR EMPLOYMENT

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

Karen Sanders, [kvs.legaltech@gmail.com](mailto: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](mailto:lupitallanes@gmail.com), (559)  
360-4754: Secretarial and Office  
Management work. Bilingual  
Spanish/English services.