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Federal Defender Newsletter
October 2022

EASTERN DISTRICT OF CALIFORNIA
CJA PANEL TRAINING

Please join us for upcoming CJA Panel MCLE trainings on Zoom. Meeting codes will be emailed out prior to each training.

October 19 at 11 am – A full hour on Supreme Court Review, covering significant cases impacting criminal practice over the past year. AFD Ann McClintock is presenting.

November 16 at 11 am – A full hour on Implicit Bias and how it impacts our advocacy in and out of the courtroom, as well as our relationships with clients. AFD Doug Beevers is presenting.

CJA Representatives

Kresta Daly, Sacramento, (916) 440.8600, kdaly@barth-daly.com is our District's CJA Representative.
Our Backup CJA Representative is Kevin Rooney, Fresno, (559) 233.5333, kevin@hammerlawcorp.com.

CJA Panel Application Deadline

10/31/2022

If you want to apply to be on the CJA Panel, your application form is here: https://www.cae-fpd.org/cja_app.html

If it is time for you to renew your CJA Panel membership term, Kurt Heiser or Connie Garcia will be in touch with you.

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 **telephone hotline** offers on-call guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

The Training Division along with Sentencing Resource Counsel offer diverse, knowledgeable, and creative ideas, citations, and arguments for your

clients' unique and complicated situations. Introduction to Federal Sentencing | Defender Services Office - Training Division (fd.org)

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.

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

The Bail Reform Act of 1984, Fourth Edition

The Bail Reform Act of 1984, Fourth Edition provides an overview of the Act and related appellate case law. This new edition also reflects the federal judiciary's increasing focus on science-informed and evidence-based decision-making by including excerpts of research on risk assessment and the effects of pretrial release or detention. Additionally, it addresses the growing concern that the pretrial detention rate is too high because some defendants, especially low-risk defendants, are being unnecessarily, and possibly incorrectly, detained under the Act.

https://www.fjc.gov/content/373297/bail-reform-act-1984-fourth-edition

NEW LAWS

NEW CRIMINAL FIREARM OFFENSES

On Saturday, June 25, 2022, President Biden signed S.2938, the Bipartisan Safer Communities Act (BSCA), into law. The law created new firearms criminal offenses and significantly expanded existing penalties under Title 18, Chapter 44.

The law:

- **Raises the statutory maximum for 18 U.S.C. § 922(d) & (g) offenses from 10 to 15 years.** *See* § 12001 (BSCA at 10-11), § 12004(d) (BCSA at 17).
- **Expands the definition of "misdemeanor crime of domestic violence"** (people who have been convicted of these offenses are prohibited from possessing firearms) to include domestic violence against dating partners (defined in new 18 U.S.C. § 921(33)(C). *See* § 12005 (BCSA at 20).
- **Creates new firearms crimes, 18 U.S.C. §§ 932 (Straw purchasing of firearms) & 933 (Trafficking of firearms), punishable by 15-25 years.** *See* § 12004(a)(2) (BCSA at 16).

- **Expands the conduct, mental state, and penalties (from a statutory maximum of 10 years to 15 years) for §§ 924(h) & (k).** (§ 12004(e) & (f)) (BCSA at 17-18).

MARIJUANA POSSESSION PARDONS

On Thursday, October 6, 2022, President Biden indicated he is issuing a blanket pardon to all people convicted of federal law simple marijuana possession (21 U.S.C. § 844). According to news reports, the pardons will be accomplished through an administrative process to be developed by the Justice Department and will cover citizens and LPRs. President Biden also indicated the administration will be moving rapidly to consider rescheduling marijuana from Schedule I.

SUPREME COURT

US v. Taylor, No. 20-1459 (6/21/22).

In a 7-2 win for the defense, the Court held that an attempted Hobbs Act robbery is not a "crime of violence" under 18 USC § 924(c). This is because "to win a case for attempted Hobbs Act robbery the government must prove two things: (1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) the defendant completed a "substantial step" toward that end.

The Court held that neither element satisfies the requirement for "crime of violence" that the defendant used, attempted to use, or even threatened to use force against another person or his property."
https://www.supremecourt.gov/opinions/21pdf/20-1459_n7ip.pdf

Concepcion v. US, (20-1650) (6/27/22).

The Court held that *First Step Act of 2018*, § 404(b), 132 Stat. 5222, allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence.
https://www.supremecourt.gov/opinions/21pdf/20-1650_3dq3.pdf

Xiulu Ruan v. US (20-1410) (6/27/22).

The Court held, for the crime of prescribing controlled substances outside the usual course of professional practice, (21 USC § 841), the mens rea "knowingly or intentionally" applies to the statute's "except as authorized" clause.
https://www.supremecourt.gov/opinions/21pdf/20-1410_1an2.pdf

NINTH CIRCUIT

US v. Jackson, No. 19-10070 (2/3/22) (Owens w/Fletcher & Bade).

The 9th Circuit reverses a kidnapping conviction and applies a new kidnapping test. As a matter of law, the offense of kidnapping

required more than a seizure. The 9th Circuit looks at four factors: (1) duration of detention; (2) whether the duration or asportation occurred during a separate offense; (3) whether the detention or asportation is inherent in the separate offense; and (4) whether the seizure or asportation created a significant danger to the victim independent of that posed by the offense. These factors apply to kidnapping cases under 18 USC § 1201(a)(2). The Government failed to prove the kidnapping in an assault case, because the detention was not lengthy, nor was the danger or injury separate from the assault.

US v. Mendoza, No. 19-50092 (2/8/22) (Bea w/Berzon & Nguyen).

The 9th Circuit vacated conspiracy, gun, and RICO convictions and ordered judgments of acquittal. The defendant was alleged to have been a member of a California gang. He admitted prior involvement, but said he withdrew 8 years before. He acknowledged a meth addiction and argued the sporadic contacts were simply to buy drugs for his own use. For example, out of 21,000 texts/calls the government had between the gang members, only 4 involved the defendant and indicated he was a buyer for his own use. The Government lacked direct evidence of any agreement; there was also a lack of evidence presented of "prolonged and actively pursued course of drug sales" that would lead to an inference. This was true even in the light of evidence most favorable to the government.

Rogers v. Dzurenda, No. 19-17158 (2-14-22)(Gould w/Hurwitz; Statement by Hurwitz; dissent by Bennett). The 9th Circuit affirmed the granting of a writ for IAC. All agreed capital counsel was IAC in the representation of the petitioner and in raising an insanity defense. The majority granted the writ because there may have been prejudice.

US v. Wells, No. 19-10451 (3/22/22) (Wallace w/Gould; dissent by Bea).

This case involves challenges to supervised release conditions where there is a plea agreement and an appeal waiver. The appeal waiver is held not to apply to constitutional arguments against terms of supervised release.

US v. Kirilyuk, No. 19-10447 (4/1/22) (Bumatay w/Rayes; Bress dissenting).

The Guidelines' credit card multiplier ($500 per card) in USSG § 2B1.1's Application Note is non-binding under *Stinson v. US*, 508 US 36 (1993). The Note's mandatory minimum loss amount conflicts with the plain meaning of § 2B1.1's "loss."

The 9th Circuit next finds the authentication adjustment was error because the authentication was by a

private company and not a government entity.

The 9th Circuit also finds the Court imposed an illegal sentence on each count, above the statutory max.

US v. Medina-Suarez, No. 20-50294 (4/1/22) (Antoon w/Berzon & Rawlinson).

The 9th Circuit found error in the district court's refusal to instruct the jury on the lesser included offense of misdemeanor attempted illegal entry under 8 USC § 1325. Medina-Suarez was charged with the felony version for an attempted § 1325 with a prior § 1325. However, the prior § 1325 was disputed and cross-examination pointed out the lack of identifying information connecting Medina-Suarez to the prior. If properly instructed, the jury may have decided the lesser was appropriate. The conviction was vacated.

US v. Irons, No. 20-30065 (4/11/22) (Collins w/Fletcher; Watford dissents).

The defendant conceded possessing drugs with intent to distribute but contested a conspiracy and a firearm charge. As to the firearm, he argued the firearm was under the mattress for safekeeping as he would sell it back to the person whom he bought it from when that person returned from out-of-state. It was not therefore used to further drug trafficking.

Two issues of note: First, regarding a supplemental jury instruction responding to a jury note, Fed R Crim P 30(d) requires an objection be made. A prior objection, or submitted instruction, is not sufficient. Thus, review is for "plain error." Two, the error here is plain. The supplemental instruction implied that a "connection" was sufficient. This is error. Using a firearm is not just connected but must be "in furtherance." It must facilitate, advance, or promote an action. No witness saw the defendant use, brandish, or show the firearm.

US v. Davis, No. 10066 (5/13/22) (Lucero & concurrences by VanDyke and Ikuta).

The sentence was vacated and remanded in a felon in possession case. The prior – a Nevada drug offense - was categorically overbroad as a drug prior because it could have included hemp, which is no longer in the *Controlled Substance Act*. The Government conceded this issue under *Bautista* which held the same for an Arizona prior offense.
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/13/19-10066.pdf

US v. Merrell, No. 20-30183 (6-10-22)(Hurwitz w/Sung; dissent by Boggs). The First Step's amendment of § 924(c)(1) applies if a sentence imposed before passage was vacated and remanded. The

sentencing slate had been wiped clean.
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/06/10/20-30183.pdf

US v. Mathews, No. 19-56110 (6/13/22) (Forrest w/Kelly & M. Smith).

Petitioner gets relief under *Davis*, 139 S.Ct. 2319 (2019). A conviction under 18 USC § 844(i) (property-damage destruction) is not a categorical "crime of violence" for § 924c(3). The destruction could be to one's own property and not solely the property of another. A categorical approach must be applied.
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/06/13/19-56110.pdf

US v. Rodriguez, No. 21-50108 (8/17/22) (M. Smith w/Bade; concurrence by VanDyke).

The 9th remands for resentencing. In sentencing for importation, the court erred in denying a minor role adjustment by misapplying the factors set out in USSG § 3B1.2(b). In denying the adjustment, the court failed to recognize the comparison is with an average participant in a particular conspiracy or enterprise; failed to consider a recruiter's culpability in luring the defendant; failed to consider the degree of involvement in the factors; and failed to consider the totality of circumstances. Upon resentencing, as to certain factors, the 9th instructs the court to focus on the scope of defendant's knowledge of the entire criminal enterprise (which was limited); the fact he was paid a discrete amount rather than a percentage; and the receiving of instructions does not mean one plans or organizations conduct.
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/17/21-50108.pdf

US v. Carter, No. 19-10411 (8/17/22) (Bea w/Murguia & Berzon).

This is a First Step Act issue about what changes and facts can be considered in using discretion to reduce a sentence in resentencing. The 9th states *Concepcion v US*, 142 S.Ct. 2389 (2022) (see above) allows (1) district courts to examine intervening changes in the law or fact in exercising discretion in reducing a sentence; (2) the court must consider nonfrivolous arguments in exercising discretion, and so changes of fact can be considered; and (3) the court must explain its reasoning. The 9th holds *Concepcion* abrogates 9th precent in *US v. Kelly*, 962 F. 3d 470 (9th Cir. 2020).

Congrats to AFD David Porter!
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/17/19-10411.pdf

Crespin v. Ryan, No. 18-15073 (8/19/22) (Hurwitz w/Hawkins & M. Smith).

The 9th affirms a conditional grant of habeas. This presents a *Miller* claim, narrowed under *Jones v.*

Mississippi, 141 S.Ct. 1307 (2021). Petitioner was 16 when charged with a capital offense. He pled to LWOP, pre-*Miller*. The 9th held he could challenge post-conviction. The 9th then held *Miller* and *Jones* both require the court to exercise its discretion. Here, the trial court stated he had no discretion in sentencing and had to impose LWOP. The 9th rejects the State's argument that the court could have rejected the plea. Rejection is not discretion in sentencing and did not comply with *Miller*.
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/19/18-15073.pdf

US v. Ramirez-Ramirez, No. 21-10127 (8/22/22) (Paez w/Hawkins & Watford).

The 9th holds on plain error that the Sixth Amendment public-trial right applies to the phase of announcing guilt in a bench trial. The district court announced its findings of guilt about a week after the bench trial only in writing, while the defendant sat in jail. The Sixth Amendment requires findings of guilt be made in open court, even when the factfinder is the judge.
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/22/21-10127.pdf

US v. Chen, No. 20-50333 (9/14/22) (Navarro w/Rawlinson & Christen).

"We hold that a district court may consider the First Step's non-retroactive changes to sentencing law, in combination with other factors particular to the individual defendant, when determining whether extraordinary and compelling reasons exist for a sentence reduction under 18 USC § 3582(c)(1)(A)."
https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/14/20-50333.pdf