OFFICE OF THE FEDERAL DEFENDER
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700
Toll Free: (855) 328.8339
FAX (916) 498.5710
2300 Tulare Street, Suite 330
Fresno, CA 93721-2228
(559) 487.5561
Toll Free: (855) 656.4360
FAX (559) 487.5950
Capital Habeas Unit (CHU) (916) 498.6666
Toll Free: (855) 829.5071 Fax (916) 498.6656

HEATHER E. WILLIAMS
Federal Defender
LINDA C. ALLISON
Chief Assistant Defender
JENNIFER M.C. MANN
CHU Supervisor
CHARLES J. LEE
Fresno Branch Chief
RACHELLE BARBOUR, Editor

Federal Defender Newsletter
September 2016

CJA PANEL TRAINING

The Fresno CJA panel training will be held on September 20, 2016 at 5:30 p.m. in the jury room at the Fresno District Courthouse. Susan Leff, Attorney at Law, San Francisco, will present "Cross-Examining and Impeaching Police Officers."

The Sacramento CJA panel training will be on Wednesday, September 21, 2016 at 5:00 p.m. in the jury lounge on the 4th floor of the federal courthouse, 501 I St. AFD Lexi Negin will be presenting "Changes to the Federal Sentencing Guidelines and Other Helpful Practice Tips."

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.

Sacramento: Lexi Negin,
lexi_negin@fd.org or Ben Galloway,
ben_galloway@fd.org.

PATHWAYS TO PROGRESS EMPOWERMENT FAIR

The Federal Defender's Office has partnered with the United States Probation Office to host the first ***Pathways to Progress Empowerment Fair*** at the U.S. District Court's Kennedy Learning Center in Sacramento on September 20 from 1-4 p.m. This resource fair is for federal formerly-incarcerated individuals and their families, but federal pretrial defendants are welcome too. Participants can connect there with service providers and resources, thus empowering participants to make positive changes in their lives.

We will host over 20 service providers focusing on *Housing Rights Education, Career and Job Development, Literacy/GED Services, Healthcare Education*, *Veterans Resources*, and other services who will share their knowledge and resources with this community.

Lawyers: Please encourage your clients to attend this informative, supportive, and empowering event. More information will follow in the coming weeks.

For more information, please contact **Crystal Richardson**: crystal_richardson@fd.org or **Becky Fidelman**: becky_fidelman@caep.uscourts.gov .

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to automatically receive emails when fd.org is updated

2016 Annual Federal Defender Golf Tournament

Location: Auburn Valley Golf Club
8800 Auburn Valley Road
Auburn, CA 95602

Date: September 23, 2016

Time: 1:00 p.m. Shotgun start

Cost: $80.00, includes green fee, range balls, meal, and prizes

Questions? Playing partners? Special menu needs? Please contact Melvin Buford to sign up: Melvin_Buford@fd.org, 916-498-5700. **All skill levels are welcome.**

Our 2015 Champion was Janet Vine.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet providing court clothing to your clients. We are in dire need of court-appropriate clothing for women. Please consider donating any old suits, or other appropriate professional clothing to the client clothes closet.

PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at http://wvs.fd.org. The podcast may be downloaded using iTunes.

The Federal Defender Training Division also provides a telephone hotline with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or snc@snc-attorney.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857 or dtorres@lawtorres.com, is the Backup CJA Representative.

NATIONAL DEFENDER SERVICES TRAININGS
(register at www.fd.org)

Race in The Federal Criminal Court: Strategies In Pursuit Of Justice
Atlanta, Georgia
September 8 - September 10, 2016

Law & Technology Series: Techniques in Electronic Case Management Workshop
New Orleans, Louisiana
September 22 - September 24, 2016

Non-Capital Mitigation Skills Workshop
St. Louis, Missouri
October 13 - October 15, 2016

Train the Trainers Workshop
Atlanta, Georgia
November 2 - November 4, 2016

SUPREME COURT CASES

If you have a fraud case going to trial, preserve this intent element issue in light of Shaw v. US, which will be argued before the Supreme Court in October. The case concerns whether a federal law prohibiting bank fraud requires proof of both a specific

intent to deceive a bank and an intent to cheat the bank. The current Ninth Circuit model jury instruction defines the intent to defraud as the "intent to deceive or cheat." It should require both – "deceive **and** cheat." If you have a fraud case going to trial, preserve this issue.

NOTABLE NINTH CIRCUIT CASES

Munoz Santos v. Thomas, No. 12-56506 (7-28-16)(*en banc* by Bybee). In an en banc decision, the Ninth Circuit held: "Evidence that a statement was obtained by coercion may be treated as 'explanatory' evidence that is admissible in an extradition hearing." This extradition case concerned a request by Mexico for the petitioner. The petitioner was alleged to have kidnapped and held hostage a family, with a resulting death. Extradition requires a court to determine if probable cause is met. A federal court cannot engage in a mini trial nor weigh and assess credibility. It can allow "explanations" that go to the meeting of the competency of evidence.

Here, suspects and witnesses presented credible evidence that inculpatory statements were products of torture. The evidence as to torture "explains" the evidence presented. Under the Constitution, due process bars coerced statements. Coerced statements are unreliable. A court can properly consider this as to the competency of evidence presented and whether there is probable cause.

US v. Thomson, No. 13-50235 (7-28-16)(Bennett, Reinhardt, and Wardlaw). This is an appeal from a tax fraud case involving a tax preparer who filed false returns. 18 USC § 1546(a) makes it an offense to misuse visas, permits, and other immigration documents. The Ninth Circuit holds this statute does not apply to non-immigration documents, such as US passports. Thus, two counts must be reversed. The Ninth Circuit also vacated the sentence and remanded because of guideline errors: the court erred in using the wrong guideline book (2011 rather than 2008); in using relevant conduct from another case, where there was no conviction, as the conduct was not sufficiently "related"; and in finding that tax returns were a means of identification.

US v. Pridgette, No. 14-30223 (8-5-16)(Kozinski). Here, the government confessed error on a sentencing appeal, where two prior criminal convictions received two points each instead of one because the PSR reflected a jail term longer than was actually served. Having conceded error, the government would seek to introduce different evidence to support the longer sentences. The Ninth Circuit ruled it could not, because the government had its bite of the sentencing apple: it put on proof, argued, and tried but failed to prove facts. It may not add facts on remand. This case provides a useful summary of when a sentencing remand is closed or open. The opinion surveys the law. As a general matter, the sentencing remand is on an open record unless where additional evidence would not change the outcome; or where there was *a failure of proof after a full inquiry into the factual question at issue*. US v. Matthews, 278 F.3d 880, 885 (9th Cir. 2002)(*en banc*). Here, there was such a failure of proof.

US v. Benally, No. 14-10452 (8-5-16)(Noonan, with Nelson and O'Scannlain). The Ninth Circuit extends good mens rea requirements for crimes of violence, from 18 USC § 16 to § 924(c) cases. Here the defendant was convicted of involuntary manslaughter and use of a firearm during a "crime of violence" under § 924(c). Defense counsel objected to a

jury instruction that the involuntary manslaughter was a “crime of violence” for the § 924(c) count. The district court gave the instruction anyway, even though the case it depended on had been abrogated by cases holding that reckless crimes are not “crimes of violence” under § 924(c). The court vacated the § 924(c) conviction and its mandatory 10-year consecutive sentence.

US v. Alvirez, No. 11-10244 (8-1-16)(Rawlinson, with Nelson and Ikuta). The Ninth Circuit holds that Indian tribal documents, used to prove that a defendant is an “Indian” under the Indian Major Crimes Act, 18 U.S.C. § 1153, are not self-authenticating under Fed. Rule of Evidence 902(1). Indian tribes are not among the governmental entities that Rule 902(1) identifies are able to issue self-authenticating documents.

US v. Herrera-Rivera, No. 15-50141 (8-12-16)(Silverman). The Ninth Circuit found plain error in an obstruction of justice guideline adjustment. The district court based the adjustment on the defendant’s trial testimony, which was "tenuous" at best. To impose the adjustment the district court had to also explicitly find that the testimony was willful and material. It failed to do so. This affected the defendant's substantive right, even where the court varied downward. This was plain error.

Hardy v. Chappell, No. 13-56289 (8-11-16)(Bastian, D.J.). Thirty five years ago, in a state capital trial, the State's key witness testified that the petitioner committed the gruesome murders. It turns out, now, that the witness was the one who probably committed the killings. At trial, defense counsel had failed to investigate, failed to give an opening, failed to put on a case, and generally was ineffective. The California Supreme Court found deficient performance, but held that other evidence rendered it harmless. The Ninth Circuit disagreed. Under AEDPA it held that the conclusion was unreasonable and the error was prejudicial. The state court's conclusion was contrary to clearly established federal law.

Washington v. Ryan, No. 05-99009 (8-15-16)(en banc by Christen). The Ninth Circuit reversed the court's denial of a Rule 60(b) motion and remanded to allow the petitioner to file an appeal. This is a convoluted case, with a day late miscalendared appeal, a mistake by the court clerk, and equitable considerations.

US v. Mendoza-Padilla, No. 15-10051 (8-16-16)(Tallman, Clifton, and Ikuta). Manslaughter as defined by the Florida Supreme Court does not constitute a "crime of violence" under USSG § 2L1.2. Florida manslaughter only requires a mens rea of negligence and is broader than the generic contemporary manslaughter. The statute is not divisible and so the modified categorical approach does not apply. The case is remanded for resentencing.

US v. McIntosh et al, No. 10117 et al (8-16-16)(O'Scannlain, Silverman, and Bea). These are 10 consolidated interlocutory appeals and mandamus petitions raising the issue whether defendants may invoke the Congressional rider to the Controlled Substances Act that prevents DOJ from spending funds to prevent states' implementation of medical marijuana laws. The Ninth Circuit finds that the rider does bar prosecutions where the defendants' acts comply with state law. The cases are remanded for hearings on that issue.

Congrats to AFD Andras Farkas of our Fresno office.

Alvarez v. Lopez, No. 12-15788 (8-30-16)(Kozinski). The Ninth Circuit granted habeas relief for a tribal court conviction because under the Indian Civil Rights Act (ICRA) tribes cannot deny defendants the right, upon request, for a jury trial. The Gila River Indian Community denied the petitioner that right when it failed to inform him that he needed to request a jury. The balancing test of Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) found that petitioner's interest in fair treatment outweighed the Community's procedural interests. The denial of a jury right was structural and required automatic reversal.

LETTER FROM THE DEFENDER

In the 1968, in *Terry v. Ohio*, a case with African-American codefendants and an 8-to-1 decision, Chief Justice Earl Warren, former California governor, wrote for the majority, "The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, . . . will not be stopped by the exclusion of any evidence from any criminal trial."

Just this last June, in the 5 to 3 decision of *Utah v. Strieff*, the Supreme Court found, despite an unconstitutional stop, a warrant discovery and subsequent search discovering contraband did not require exclusion. In dissent, Justice Sonia Sotomayor wrote,

> But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, *The New Jim Crow* 95–136 (2010). For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, *e.g.,* W. E. B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015).
>
> . . .
>
> We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. See L. Guinier & G. Torres, *The Miner's Canary* 274–283(2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

After 48 years, since nothing else has stopped the "wholesale harassment," maybe it's time to exclude evidence.

***Terry* Stop**

The Stop

Cleveland Police Detective Martin McFadden called himself a door rattler and that's what he was doing that Halloween afternoon in 1963. There wasn't any glory in it, walking around downtown Cleveland, rattling business doorknobs, checking to see who was open, who was closed. It certainly didn't call upon him to use his 39 years of police experience, or the experience he gained off-duty as actress Mae West's bodyguard whenever she visited Cleveland. But he liked the people he met downtown, at least most of them.

It had already been raining most of the day and, after weeks of unseasonably warm weather, it was downright cold. Despite the holiday, not many people were out around 2:30 p.m., which was one reason the two men caught his attention. The major factor, first distinguishing factor noted in McFadden's report, making him truly suspicious they were plotting robbery - they were "colored" men.

As McFadden later testified, he watched the men from store doorway about 300 to 400 feet (a football field's length or more) away from the two men. "I get more purpose to watch them when I seen their movements," McFadden swore.

One after the other, they separately walked the 200 feet down Huron Road from Euclid Avenue to the United Airlines office, then rejoining the other, back and forth three times. Once he saw them talk to Carl Katz, an older white man and known gambler, who then walked west down Euclid away from the two men.

As the detective watched the two men another five minutes, McFadden saw them walk west on Euclid, meeting Katz in front of Zucker's Store for Men, talking.

Detective McFadden decided to stop the three. Identifying himself as a police office, he told them to keep their hands out of their pockets since they wore overcoats due to the cold wet weather. He searched 31 years old John Woods Terry first, finding in his inside left topcoat pocket a .38 automatic Beretta, one bullet chambered and six in the clip. Richard D. Chilton, 32 years old, in his right front pocket, carried a .38 revolver with five bullets loaded. Katz had no weapon, but McFadden arrested him long with Terry and Chilton to "be checked out by Robbery."

Terry was born May 1932 in Memphis, Tennessee, the youngest of seven children. His mother Lillian died giving birth to him. John, his father, remarried soon after, having four more children with his new wife. This put Terry lost, right in the middle. His father worked as an orderly in the Veteran's Hospital, while the family grew peanuts, sweet potatoes, and peaches. Despite their poverty, Terry's sister, Mae Stewart, remembered they were the first family in the neighborhood with electricity. Terry dropped out of school in the 11th grade. At 19 years old, Terry joined the military. Stationed to fight in the Korean War, he became addicted to heroin while there, the monster on his back for the rest of his life. He moved to Cleveland after his discharge, because his older sister Mae now lived there.

Chilton was 5 years younger, born in Pennsylvania, with a reputation as a pool hustler and a card shark.

Cleveland Police Detective Martin McFadden wrote a one page police report about what he saw, what he thought, what he found, and changed 4th Amendment Constitutional history. He wrote he was concerned, based upon his experience, the behavior he saw was the two men were casing the jewelry store to rob it.

The Motion

Terry's sister, Mae, knew a local Black lawyer, Louis Stokes, who agreed to represent both men. Stokes, 38 years old and a graduate of Western Reserve University and Cleveland Marshall Law School, noted that, when he graduated from law school, there were no black attorneys. "I wouldn't have been hired then to take out the trash at the law firm I'm presently with," he observed decades later.

With both Terry and Chilton charged with carrying concealed weapons, Stokes argued McFadden had no reasonable suspicion to stop the men **except** they were Black, essentially raising unlawful racial profiling (though it was not called that back then) as the stop's true basis – the stop happened in white neighborhood. Stokes argued the Fourth Amendment's guarantee against unreasonable searches and seizures and that the moment Det. McFadden stopped Terry and Chilton, then patted them down, looking for weapons, they had been "seized" and unlawfully searched. As McFadden testified, based upon his many years of police experience and working downtown, he thought the two were "casing a job, a stick-up," and he worried "they may have a gun." The judge denied the motion to suppress the guns finding McFadden's suspicion of the two reasonable. Reuben Payne, one of the Cuyahoga County Attorney Office few black lawyers, asked for the case having heard about the stop issue, to try to minimize any race arguments.

Chilton testified at his trial that he and Terry were looking for a pawn shop to pawn the guns. The parties stipulated the judge could consider the testimony in Chilton's trial as the testimony against Terry. Chilton and Terry were convicted together. As Chief Justice Earl Warren observed:

> After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial

> judge considered the two cases together, rendered the decisions at the same time, and sentenced the two men at the same time.

The judge sentenced Terry and Chilton to one to three years in prison. They were paroled well before any appellate arguments.

The Appeals

Stokes followed their convictions with joint appeals. In February 1966, the Ohio Eighth District Court of Appeals affirmed the judge's denial of the motion to suppress and upheld the convictions in separate opinions, yet never mentioned the defendants' race. The next step was to petition the United States Supreme Court for a writ of certiorari. When Stokes filed the papers, it was *Chilton and Terry v. Ohio.*

While their Supreme Court cases were pending, in June 1967, Chilton and three others went into the Columbus, Ohio, Fountain Drug Store – robbery was the plan. After owner Robert Bender was shot in the eye, he "managed to shoot and kill Chilton," hitting him "in the head, chest and through the heart." The Supreme Court case was now *Terry v. Ohio.*

December 1967 was the first time Louis Stokes argued before the Supreme Court. Future judge and co-ACLU lawyer Jack Day, who found out Stokes had done Terry's trial, his Ohio appeals and, now, the Supreme Court briefing and argument all *pro bono*, helped Stokes, giving "financial and legal help."

But it was all about timing, following both President Kennedy's and Dr. King's assassinations, and a time of anti-war protests and race riots, Students for a Democratic Society (SDS) and the Blank Panthers. On June 10, 1968, in an eight to one decision with Justice William O Douglas dissenting, the U.S. Supreme Court also affirmed the denied suppression motion and Terry's conviction. Chief Justice Warren said,

> There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly, and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

While Terry's and Chilton's "colored" race is never addressed within the factors McFadden noted and considered in stopping the men, the majority opinion does observe, "The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, . . . will not be stopped by the exclusion of any evidence from any criminal trial."

After the Supreme Court opinion, law enforcement needed "reasonable suspicion" to do what came to be known as a *Terry* "stop and frisk." Many pushed to call it a McFadden stop, honoring Det. McFadden's actions which led to law enforcement's, and not a defendant's, favorable case law. That probably would have been fine with Terry and his family.

The Rest

Drug addiction and his occasional crimes committed to support it plagued Terry for the rest of his life. Mae, whose "baby brother, John meant the world to her," described his life as "one catastrophic episode after another." Mae, who in the 1970s went from being president of the East Cleveland Commission when it became the East Cleveland City Council, making her its first mayor, tried "to . . . rescue . . . the brother she just couldn't save." That translated to posting his bail using her

house as collateral, and letting him live with her when he had nowhere else. Eventually, years of Terry's drug abuse and living rough wrecked him to where he was dying. Mae moved him to the Sunny Acres home, visiting him every day until his death from a brain hemorrhage in March 1985 at age 53.

Stokes had two more cases before United States Supreme Court. The first he won simply on the briefs. Stokes' brother Carl was the first African-American elected to the Ohio legislature. Carl wanted to run for the United States Congress. The Ohio Legislature passed a bill approving gerrymandered district lines, which reduced numbers of black voters in the district Carl lived. Carl asked the NAACP to fight the gerrymandering and, at that time, his brother Louis worked with the NAACP, so he took on the case. Between the court lawsuit upholding the redrawn districts and any appellate decision, Cleveland elected Carl its first African-American mayor. When the court of appeals upheld the redrawn lines, it was directly appealed to the United States Supreme Court. They overruled the gerrymandering solely on the written briefs.

Carl no longer wanted to run for Congress, but he persuaded brother Louis to run. Stokes won and was in the United States House as Representative from 1968 to 1999. During that time, Rep. Stokes chaired the House Ethics and House Intelligence Committees. He served on the Select Committee on Assassinations of President John F. Kennedy and Dr. Martin Luther King, and on the Iran-Contra Panel Investigation Committee. Along with Representative John Conyers, they pushed for fifteen years to pass Martin Luther King Day as a national holiday. Rep. Stokes knew Dr. King and had helped to register voters with him.

For over 30 tear, Ebony Magazine named Rep. Stokes among its Top 100 Most Influential Black Americans. Upon retiring from Congress, Rep. Stokes worked as a lobbyist, splitting his time between Ohio and the District of Columbia. When he died of cancer in 2015 at 90, Rep. Stokes' wife of 55 years, his four children and seven grandchildren survived him. An important, but only a part of Louis Stokes' legacy.

Resources:

Emily Langer, *Louis Stokes, first black U.S. congressman from Ohio, dies at 90*, The Washington Post, (8/19/2015). https://www.washingtonpost.com/politics/louis-stokes-first-black-us-congressman-from-ohio-dies-at-90/2015/08/19/85bfe282-4673-11e5-846d-02792f854297_story.html.

Mae Stewart, Crusader for the Underdog, www.clevelandsenior.com/people/mstewart.htm (10/13/2005).

Phone call on August 4, 2004, with the Honorable Louis Stokes, retired United States Representative.

State v. Terry, 5 Ohio App.2d 122 (1966).

Karl Turner, *A Lawman's Legacy*, The Plain Dealer Sunday Magazine, p.17 (10/26/2003).

Terry v. Ohio, 392 U.S. 1 (1968).

Special thanks to Dennis Terez.