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Federal Defender Newsletter
September 2018

CJA PANEL TRAINING

Sacramento – Thursday, September 20, 5 pm (**NOTE: different day** in light of Yom Kippur), Kirk McAllister presents "Litigating *Brady* Violations," Jury Assembly Room, 501 I Street.

Fresno – Tuesday, September 18, 5:30-6:30, AFD Megan Hopkins presents "Changing the Perspective: Using Sentencing Videos to Tell Your Client's Story," Jury Assembly Room, Fresno District Courthouse.

Save the Date

Wed., October 24, 2018, 1-4 pm – Pathways to Progress Empowerment Fair: Resource Fair for Federal Defendants/Former Defendants, Panel Attorneys, and Court Family

Organized by the Federal Defender Office, Federal Probation Office, Federal Pretrial Services Office, and the Justice Anthony Kennedy Library and Learning Center. Please register using this Eventbrite link including detailed information https://www.eventbrite.com/e/the-impact-of-trauma-fostering-resilience-in-the-criminal-justice-system-tickets-49920748302. Feel free to contact Crystal Richardson crystal_richardson@fd.org for more.
We look forward to having you join us!

TRAUMA'S IMPACT: FOSTERING RESILIENCE IN THE CRIMINAL JUSTICE SYSTEM

The Justice Anthony Kennedy Library and Learning Center
Wednesday, September 26, 2018
1:00pm-3:30pm.

Please join us as we welcome our special guests, Dr. Andres Sciolla, along with Dr. Donielle Prince and Susan Jones. Our guest speakers are experts in their fields and are leading the way in educating our communities about the importance of having trauma-informed systems within our communities. Please share the invitation with your colleagues, and those within your departments.

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 Noa Oren, noa_oren@fd.org

CJA Representatives

David Torres of Bakersfield, (661) 326-0857, dtorres@lawtorres.com, is our District's CJA Representative. The Backup CJA Representative is Kresta Daly, (916) 440.8600, kdaly@barth-daly.com.

17TH ANNUAL GOLF TOURNAMENT!

The 17th Annual Office of the Federal Defender Golf Tournament will take place on September 28, 2018 at the Timber Creek Golf Course, 7050 Del Webb Blvd., Roseville. Timber Creek has been voted the #1 golf course in the Sacramento. The Tournament kicks off at 1:00 p.m. with a modified shotgun start. The cost is $85 per person, which includes golf, cart, range balls, dinner, and prizes. All skill levels are welcome with handicapped scoring and individual stroke play.

Please contact Henry_Hawkins@fd.org or Melvin_Buford@fd.org with any questions.

CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

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.

IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

INTERESTING PODCASTS

- *The GEN WHY Lawyer: Discovering the Y of Law*: interviews with lawyers on how to build a meaningful life and fulfilling legal career.
- *First Mondays*: about the Supreme Court, co-hosted by former Court law clerks.
- *The Moth*: storytelling at its best.
- *Ear Hustle*: podcast from inside San Quentin Prison. Governor Brown recently commuted one of the inmate co-hosts Earlonne Woods' sentence. https://www.atthelectern.com/mass-commutation-of-death-sentences-unlikely-but-governor-brown-is-likely-to-continue-giving-some-lwop-murderers-a-shot-at-parole/
- *Conversations with People Who Hate Me*: Host Dylan Marron deliberately interviews people who he disagrees with and who disagree with him and who he is.
- *Criminal*: no description really needed, is there?
- *Code Switch*: Helping with the delicate, minefield of today's race and identity issues.

NINTH CIRCUIT

Anderson v. Gipson, No. 16-15338 (6-15-18) (Ebel (10th Circuit) with Schroder and Gould). Petitioner appealed the denial of a habeas petition. The issue was a Pate v. Robinson claim: whether there was sufficient evidence of incompetency to compel the trial court to conduct a competency evaluation. The analysis

starts with determining whether the California state court's decision was unreasonable. The panel held that the California Court of Appeal unreasonably applied clearly established Supreme Court law in failing to hold such a hearing.

Congratulations to AFD Ann McClintock!

Lorenzo v. Sessions, No. 15-70814 (8-29-18)(Fisher, with Thomas and Bea). Methamphetamine convictions under CA Health & Safety Code sections 11378 and 11379(a) do not qualify as violations of state law "relating to a controlled substance" for purposes of immigration removal. This is because the definition of methamphetamine under California law "on its face" includes both optical and geometrical isomers, while the federal Controlled Substances Act defines methamphetamine to include only optical isomers, see 21 USC 802(14).

Keep in mind that the same logic applies to "controlled substance offense" under USSG 4B1.2 and 2K2.1. A prior conviction also may not qualify as a "felony drug offense" under 21 USC 851/802(44), based on Lorenzo's reasoning.

Kingsbury v. US, No. 16-56789 (8-21-18)(per curium: Fisher, Watford, and Friedland). This is a jurisdictional issue. The district court denied a 2255 motion. The court however did not file a judgment in a separate document. The petitioner subsequently appealed two months later. The Ninth Circuit finds the appeal is timely and it has jurisdiction because Fed. R. Crim. P. 58's requirement of a separate judgment applies to 28 USC § 2255.

US v. Fomichev, No. 16-50227 (8-8-18)(Christen w/Wardlaw & Owens). This is an appeal from a conviction for making false statements on immigration documents related to a marriage. The defendant, here on a student visa from Russia, allegedly married to secure immigration benefits. The marriage, in California in 2007, had been found valid by Homeland Security. An investigation by the IRS led to the spouse stating that it was a marriage of convenience, to secure immigration benefits. The marriage did end in divorce in 2012. However, before that, the IRS recorded conversations between the husband and wife. The district court denied a motion to suppress that recording based on the marital privilege, which expanded the "sham marriage" exception to confidential marital communications. The Ninth Circuit was uneasy with this expansion. A sham marriage may be a limited exception to the spousal testimony, but that courts should be wary of extending the exception to the other prong under FRE 501. The Ninth Circuit noted that if a marriage is irreconcilable at the time that spouses engage in marital communications, then the privilege does not exist.

US v. Bankston, No. 16-10124 (8-23-18) (Berzon, with Wallace and Callahan). The Ninth Circuit holds that California Penal Code section 211 (robbery) is no longer a crime of violence, under USSG § 4B.12 as amended in August of 2016, because it is no longer a categorical match to robbery and extortion as described in the Guidelines. Further, the Ninth Circuit affirmed that the "district court's mere statement that it would impose the same above-Guidelines sentence no matter . . . the correct calculation cannot, without more, insulate the sentence from remand, because the court's analysis did not flow from an initial determination of the correct Guidelines range."

US v. Peterson, No. 17-30084 (9-4-18)(Rayes w/Smith & Watford). The Ninth Circuit holds that Washington's first-degree robbery statute is not a crime of violence because it encompasses threats to property.

US v. Kechedzian, No. 16-50326 (9-4-18)(Fisher w/Watford & Friedland). The Ninth Circuit vacates a conviction because a prospective juror failed to state she could be impartial. The juror had been a victim of identity theft. She equivocated during voir dire and could not explicitly state she could be fair, impartial, and lay aside her biases. The district court, after an exchange where the juror said she would try to put aside her feelings, asked her to tell the court if she could not. The juror subsequently did not affirmatively respond when the court asked the panel if anyone had problems with applying the burden of proof. The Ninth Circuit granted relief for actual bias, as the juror never stated she could put aside her bias and decide impartially.

US v. Garcia-Lopez, No. 15-50366 (9-7-18)(Nelson w/N. Smith; Tallman concurring). The Ninth Circuit allows a withdrawal from a guilty plea because the change in law as to California robbery not being a crime of violence established a fair and just reason. As the panel concluded: "*Dimaya* and related Ninth Circuit cases establish that California robbery—the sole charge underlying Garcia- Lopez's illegal reentry indictment and his removal order—is not a "crime of violence" pursuant to section 16. This fundamental change in the law operates as a 'fair and just reason' to allow Garcia-Lopez to withdraw his guilty plea."

LETTER FROM THE DEFENDER

Recently, Sean Broderick, with the Defender Services' National Litigation Support Team (NLST), told me I, along with others who practice in Arizona, call the tangible information provided by the U.S. Attorney's Office "disclosure," while everyone else they work with calls it "discovery."

Then, even more recently, in meeting with prosecutors over challenges in moving cases along, I mentioned the problems with how their office gives defense counsel "disclosure." "Do you mean 'discovery?'" the prosecutor asked. "No," I said, "'disclosure,' as in you're supposed to disclose it to me, not me needing to go out and 'discover' it."

The *Merriam Webster Dictionary* defines the noun 'disclosure' as "something (such as information) that is made known or revealed," as by another. The word origin of 'discovery,' from Old French and Medieval Latin, is to "uncover, unroof, unveil, reveal," the self's action.

I cut my criminal defense teeth in Arizona state court in Tucson. Arizona Rules of Criminal Procedure Rule 15 is devoted to *Disclosure.* And while Federal Rules of Criminal Procedure, Rule 16 is entitled *Discovery and Inspection*, the Government's obligations are called *Government's Disclosure*, as is the defendant's obligation. Even our Local Rule – Criminal, Rule 440, addressing Fed.R.Crim.P. 16, is generally labelled *Pretrial Discovery and Inspection*, but subsection (a) addresses the Government's Initial Disclosure to the defense.

In *Brady v. Maryland*, after a motion for "new trial based on the newly **discover**ed

evidence that had been suppressed by the prosecution," the Supreme Court reaffirmed "non**disclosure** by a prosecutor violates due process." 373 U.S. 83, 86 (1963), citing *Mooney v. Holohan*, 294 U. S. 103, 112 (1935). "[T]he suppression by the prosecution of evidence favorable (exculpatory) to an accused upon request violates due process where the evidence is either material to guilt or to punishment, irrespective of the good or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

In fact, the prosecutor is obligated to find evidence favorable to the defendant. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). It must be disclosed even if defendant pleads. *United States v. Ruiz*, 241F.3d 1157 (9th Cir. 2001). The disclosure duty exists whether the defendant specifically requests the particular item. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Disclosure includes exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 675 (1985). The court can review any confidential information *in camera*. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

The prosecutor's duty extends to evidence possessed or known to those acting on behalf of the Government, including police. *Kyles*, 514 U.S. at 437.

What must the Government Disclose? As to the Government's own witnesses:

- The witness' plea agreement. *Silva v. Brown*, 416 F.3d 980, 986-86 (9th Cir. 2005); *Silva v. Woodford*, 279 F.3d 825 (9th Cir.), *cert. denied* 123 S.Ct. 342 (2002).
- Government money or witness payments. *Bagley*, 473 U.S. at 676, 682.
- Any agreements to not file charges. *Giglio v.United States*, 405 U.S. 150, 153-154 (1972).

And any evidence affecting the witness' credibility:

- Criminal history. *Carriger v. Stewart*, 132 F.3d 463, 480-482 (9th Cir. 1997).
- Bias. *Schledwitz v. United States*, 169 F.3d 1003, 1014-1015 (6th Cir. 1999).
- Presentence reports. *United States v. Alvarez*, 358 F.3d 1194, 1208-1209 (9th Cir. 2004); *c.f. United States v. Sherlin*, 67 F.3d 1208, 1218 (6th Cir. 1995). Also look at our Local Rule - Criminal Rule 460(b) addressing Fed.R.Crim.P. 32 and 18 U.S.C. § 3153(c).
- Witness misconduct, including drug use, prison privileges, etc. *United States v. Boyd*, 55 F.3d 239, 243-245 (7th Cir. 1995).

Concerning law enforcement witnesses:

- Personnel files. *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991); *Pitchess v. Superior Court*, 11 Cal.3d 531, 537 (1974).
- Perjury in motion hearings.
- Witness intimidation.

And the government must disclose witness impeachment to defense counsel:

- Inconsistent statements.
- Inconsistent notes.
- Inconsistent Government expert reports.

And information about other suspects (what we affectionately call SODDI – some other dude did it):

- Eyewitness contradictions or inability to identify suspect.
- Arrests or investigation of other suspects.
- Confessions of others to charged crime. *Sellers v. Estelle*, 651 F.2d1074 (5th Cir. 1981), *cert. denied* 455 U.S. 927 (1982).
- Statement of co-defendant that client is innocent of charge. *United*

States v. Yizar, 956 F.2d 230 (11th Cir. 1992).

And specifically on point in *Brady*, the government must disclose the defendant's own mitigating sentencing information. *Brady*, 373 U.S. at 87.