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Federal Defender Newsletter

June 2019

CJA PANEL TRAINING

CJA Panel training is on summer break!
We look forward to seeing you in
September!

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.

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
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Little Red Rules Book® 2019 Edition is now available for purchase at the same price as last year:

Credit Card Online Ordering:

Here is the link for online ordering:
<https://fdewi.directfrompublisher.com/>

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 3rd Chair's D.E.S.K., Dialogue, Education, Strategy, and Knowledge:* Defender Services Office Training Division (DSOTD) podcast designed to provide valuable information and inspiration for federal criminal defense practitioners. Topics will include substantive federal criminal law subjects, from sentencing to mental health, to trial skills. Sign into fd.org. <https://www.fd.org/training-division-podcasts>

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- *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.
- *Conversations with People Who Hate Me:* Host Dylan Marron deliberately interviews people with whom he disagrees 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.

SUPREME COURT

The Supreme Court granted cert last week in Holguin-Hernandez v. United States, No. 18-7739, which asks whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of the sentence. After serving a sentence of 24 months for possession with intent to distribute marijuana, Holguin-Hernandez, who was then on supervised release, violated the terms of his release by committing a drug-trafficking offense and failing to report to Probation upon reentering the United States. He was sentenced to 60 months for the new drug-trafficking offense before he was sentenced for the supervised release violations. The violation guidelines were 12 to 18 months. He argued for a concurrent sentence or, alternatively, a consecutive sentence below the guideline range, citing factors under section 3553(a), including that the 60-month sentence for the underlying drug offense was more than twice the length of his last sentence and would provide sufficient deterrence, the nature and circumstances of the offense, and his personal history and characteristics. The court imposed a sentence of 12 months for the violation, to be served consecutively to the 60-month sentence for the drug offense. After the court pronounced sentence, Holguin-Hernandez did not state any further objections. On appeal, the Fifth Circuit applied plain error review and affirmed the 12-month sentence for the supervised release violation because Holguin-Hernandez failed to formally object after the sentence was pronounced. Holguin-Hernandez seeks application of the abuse of discretion, reasonableness standard to his supervised release sentence based on Rita, Gall, and Kimbrough. *The government agrees that a formal objection*

is not required for the abuse of discretion standard to apply, but argues that the Fifth Circuit's decision was reasonable under that standard.

NINTH CIRCUIT

US v. Bain, No. 17-10107 (6-11-19)(Tashima w/M. Smith & Piersol). The Ninth Circuit reverses a plea to armed bank robbery, vacates the sentence, and remands. The Ninth Circuit concludes that defendant's inadvertent placing of a closed pocket knife on a bank counter, while he was pulling a plastic bag out of his pocket, did not constitute "use" of a dangerous weapon. The error was plain and affected substantial rights.

US v. Brown, No. 17-30191 (6-5-19)(McKeown w/Gaitan; concurrence by Friedland). The Ninth Circuit suppresses evidence for an illegal stop. The police received an anonymous tip that a black man was carrying a gun, and a description of what he was wearing. The call came from a YWCA. The police spotted the defendant, who is African-American. The police car slowly followed him, and then Brown ran. The police caught up with him, and upon a Terry stop, found a gun. Further searching disclosed drugs. The 9th suppressed for lack of reasonable suspicion. There was no indication that illegal activity was taking place, or that threats were being made, or that a crime occurred. The defendant did flee when the police spotted him. The Ninth Circuit would not let flight by itself be a determining factor given the lack of other indicia.

Quotable lines: *The Metro officers who stopped Brown took an anonymous tip that a young, black man 'had a gun'—which is presumptively lawful in Washington . . . And Given that racial dynamics in our society—along with a simple desire not to*

interact with police—offer an "innocent" explanation of flight, when every other fact posited by the government weighs so weakly in support of reasonable suspicion, we are particularly hesitant to allow flight to carry the day in authorizing a stop.

U.S. v. Graves, No. 16-50276 (5-30-19). The Ninth reverses a man-min life sentence after it finds that an alleged Section 851 prior does not survive a categorical analysis. The prior was for "inmate drug possession" under California Penal Code section 4573.6. The Ninth Circuit held that the state law is indivisible and criminalizes controlled substances that are not regulated under federal law. Importantly, the Ninth Circuit does not buy the District Judge's "belts and suspenders" approach to sentencing: stating that the trial court would impose life even if this was not a man-min term. The Ninth Circuit remands for a fresh sentencing hearing.

Kayer v. Ryan, No. 09-99027 (5-13-19)(Fletcher w/Friedland; partial dissent by Owens). Note: This is an Az FPD-CHU case. The Ninth Circuit granted sentencing relief for IAC in this capital habeas. The Ninth Circuit found error in the Arizona Supreme Court's requirement of a nexus between mitigation and the offense, but deemed it harmless. Relief was given on the mitigation representation as investigation. The investigation did not begin soon enough; no relationship was established with the client; and the extent of the mental impairment mitigation was not developed.