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Federal Defender Newsletter
May 2015

CJA PANEL TRAINING

Sacramento panel training will take place on **Wednesday, May 20, 2015 from 5:00 to 6:00 p.m**. Former AUSA Courtney Linn, currently a partner in the Sacramento office of Orrick, Herrington, and Sutcliffe LLP, will present "Recent Asset Forfeiture, Restitution, and Money Laundering Trends and Developments." The training will take place in the jury meeting room on the 4th floor of the Federal Courthouse, 501 I St. All are welcome!

Fresno panel training will take place on **Tuesday, May 19, 2015 at 5:30 p.m.** in the Jury Assembly Room at the Federal Courthouse in Fresno. AFD Peggy Sasso will be presenting "Understanding Descamps: What Every Defense Attorney Needs to Know About the Categorical Approach."

CJA REPRESENTATIVES

Scott Cameron is our District CJA Representative for Panel members who have questions and issues unique to our Panel lawyers. He can be reached at (916) 769-8842 or snc@snc-attorney.com. Our Back-up CJA Representative has just been approved by the Court: David Torres of Bakersfield. He can be reached at (661) 326-0857 or dtorres@lawtorres.com.

NEW ELECTRONIC DISCOVERY DELIVERY FORMAT

Sean Broderick, the National Litigation Support Administrator, has provided us with the following information: DOJ is in the early stages of using a new cloud program (similar to DropBox) to distribute electronic discovery to defense attorneys. The tool is called USAfx. Although this service is available for the government to provide, individual U.S. Attorney's Offices will decide whether to use it in each district.
A number of defenders and CJA panel attorneys are now involved in a pilot program to test the system. There are three initial issues that have come up:

1. To log into USAfx, the default is a two-step process each time. First, sign in with your email address and a password. Second, you'll receive a text message verification code by cell phone. This may affect defenders and CJA attorneys who only have a personal cell phone and don't want to share it. Request alternatives if you are in this position.

2. USAfx is designed for temporary file transfer, not long term storage of documents. A file expiration date will be

displayed next to the file name – USAfx files will be deleted automatically in 60 days (or less if designated by the file owner). Thus, you should download the discovery, ensure you got it all, and save it for future use.

3. Bandwidth (which affects the time and rate it takes to download material) may be an issue. DOJ recommends this system only be used for discovery production of 5 gbs or less, with no more than 800 files. We suggest you address this (and any other issue about the new discovery system) directly with your AUSA. We also suggest you track any time delays or difficulties you have and report them to the National Litigation Support Team. Specific data from you about time delay and challenges will help us to encourage a better process.

To report issues or request assistance, please contact the National Litigation Support Team at sean_broderick@fd.org

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Check out www.fd.org for unlimited information to help your federal practice. While you're there, take the survey on the home page and have input in the redesign of the site! Please note that you can also sign up on the website to automatically receive emails when fd.org is updated. 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.

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 – Peggy Sasso, Peggy_Sasso@fd.org, Andras Farkas, Andras_Farkas@fd.org, or Karen Mosher, karen_mosher@fd.org.
Sacramento: Lexi Negin, lexi_negin@fd.org.

DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to start granting sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base Offense Level 2-level reduction in drug cases. In April, 12 amended judgments were filed resulting in a total time reduction of approximately 21.5 years (260 months). While the value of early release is inestimable for defendants, their families, and their friends, the early releases in March result in a taxpayer cost savings of approximately $634,651.74. So far 147 defendants in this district have received a reduction in their sentences under Amendment 782.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes panel training materials through its website: www.cae-fpd.org. We will try to post training materials **before** the trainings for you to print out 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.
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♪ NOTABLE CASES ♫

SUPREME COURT

Rodriguez v. United States, No. 13-9972 (13-9972)(Ginsburg, J.). From the opening paragraph: "This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."

NINTH CIRCUIT

HABEAS CASES

Molina v. Davey, 14-15078. The Ninth Circuit certified for appeal whether the district court properly denied a request to stay, including whether the district court has discretion to use the stay and abeyance procedure outlined in Rhines v. Weber, 544 U.S. 269 (2005), and Pace v. DeGuglielmo, 544 U.S. 408 (2005), to stay and hold in abeyance a habeas petition containing unexhausted claims. There is a budding circuit conflict on whether federal courts have such discretion.

McMonagle v. Meyer, 766 F.3d 1151 (9th Cir. 2014) (rehearing granted). The Ninth Circuit also granted rehearing en banc in this case. The panel held that "in the context of California misdemeanants who are required to file a state habeas petition in order to both reach the state court of last resort and fully exhaust their claim before seeking relief in federal court, finality for the purposes of AEDPA occurs once the California Supreme Court denies their state habeas petition and the United States Supreme Court denies certiorari or the 90–day period for filing a petition for certiorari expires." The state sought rehearing en banc and got it. The case will be argued in June.

CRIMINAL APPEALS

US v. Simmons, No. 11-10459 (4-3-15)(Tashima with Rawlinson and Clifton). "Escape from prison" under a Hawaii statute is not a categorical "crime of violence" for career offender purposes. Under Descamps v. US, 133 S. Ct 2276 (2013), a court must separate divisible from indivisible statutes. If divisible, a modified categorical approach can be used to look at documents to determine which elements a defendant was convicted of. Here, the Ninth Circuit considered Hawaii's second degree escape statute. The main statute was divisible into three separate offenses. The defendant was convicted of "escape from custody." However, further division or parsing of this offense was improper under Descamps, so the court could not look at documents or the plea to determine what kind of custody was at issue.

U.S. v. Urrutia-Contreras, No. 14-50113 (4-10-15) (Gettleman (N.D. Ill.), with Gould and Kleinfeld) The government has the role of recommending a revocation sentence, just like it does at the initial sentencing hearing. Here, the court sentenced the defendant on a new illegal reentry charge and a revocation. The revocation was for a SR term attached to a sentence all agreed was erroneous, and for which the defendant served more time than necessary. Defense counsel argued for a short consecutive sentence. The court moved to sentencing. When defense counsel objected, that the government should be heard on sentencing, arguably to support defendant's position, the court stated that it, not the government, sentenced. On appeal, the Ninth Circuit vacated and remanded the sentence holding that the government had a right to be heard at all sentencings, including revocations under Fed R Crim P 32.1.

U.S. v. Sahagun-Gallegos, No. 13-10095 (4-10-15) (Christen, with Noonan and Fletcher) The statements of defense counsel during a plea colloquy, with only the defendant's assent, cannot be used in a modified categorical analysis under Descamps v. United States, 133 S. Ct. 2276 (2013). This case involved an illegal reentry prosecution with an enhancement for a crime of violence. The alleged crime of violence was an Arizona aggravated assault under an overbroad statute in which intent could be simple recklessness. Under Descamps, if a statute is divisible, a

modified categorical approach applies in which the district judge can look at court documents to determine which element for which the defendant was convicted. Here, although the Arizona defense counsel stated the factual basis at the change-of-plea hearing on the prior conviction, the defendant did not agree and there was not even a reference to the divisible statute. The Ninth Circuit held that such use of the statement was plain error. The court reached this issue of plain error in order to provide guidance to the district court. It had already decided to vacate and remand the sentence because of another issue to which the government had confessed error: the withholding of the third point for acceptance of responsibility because the defendant refused a plea agreement in order to preserve his right to appeal. Previous Ninth Circuit law had allowed this, but over two years ago the Sentencing Commission changed the Guidelines to disapprove of the Ninth Circuit's approach to the issue. Many cases pending on appeal have already been remanded for resentencing based on this issue alone.

US v. Bonds, No. 11-10669 (4-22-15)(en banc per curiam). In a short *en banc* opinion, the Ninth Circuit finds that there was insufficient evidence that this very famous defendant's "rambling, non-responsive answer to a simple question" before the grand jury was material for an obstruction of justice conviction under 18 USC § 1503.

Luna v. Kernan, No. 12-17332 (4-28-15) (Watford, with Gould and Friedland). The Ninth Circuit vacated the dismissal of a California state prisoner's § 2254 petition, and remanded for further proceedings. The court held that appointed federal habeas counsel's handling of the proceedings amounted to egregious professional misconduct, an extraordinary circumstance that warrants equitable tolling of the AEDPA statute of limitations. The court then remanded to develop a record on whether the petitioner had been diligently pursuing his rights.

The petitioner is a California state prisoner convicted of first-degree murder and other crimes and serving a life sentence. The operative petition in this appeal was filed more than six years after the AEDPA limitation period expired. Appointed habeas counsel's actions undermined the petitioner's effort to timely seek review of his claims. Counsel voluntarily dismissed the habeas petition, even though there was an exhausted claim. The exhaustion of state claims went extremely slowly, and then counsel waited four years after seeing the California Supreme Court deny relief before filing in federal court, and tried to amend the petition in the closed case rather than initiating a new civil case. All the while, counsel was assuring the petitioner that his rights were being protected.

The district court appointed new counsel to represent the petitioner, who sought equitable tolling necessary to render the new petition timely. The magistrate judge did not conduct a hearing and based his decision to deny equitable tolling on only some of the written correspondence between the petitioner and his former counsel. Based on this limited set of evidence, the district court denied equitable tolling and dismissed the petition as untimely. The Ninth Circuit found that former counsel's actions amounted to "egregious attorney misconduct" rather than "garden-variety negligence," and held that extraordinary circumstances existed that prevented timely filing. It remanded for further findings on the question of diligence, because the record did not contain the full extent of correspondence between the petitioner and his former counsel and thus was not adequately developed to allow a determination about whether the petitioner was actively pursuing his right to relief during the six-year delay.

United States v. Gardenhire, No. 13-50125 (4-30-15) (Wardlaw with Paez and Ponsor (D. Mass.)). The Ninth Circuit vacated an above-Guidelines sentence imposed after a defendant's guilty plea to pointing a laser beam at an aircraft, holding that the sentencing judge failed to make any findings to support the base offense level of 18 for recklessly endangering the occupants of the aircraft under U.S.S.G. § 2A5.2. The court directed that the case be reassigned to a different district judge on remand. The defendant here was a bored

teenager living in Burbank, California, and the court called his crime a "misguided, teenage prank." His friend gave him a laser, warned him not to point it at anyone's eyes. Together they started playing with it, pointing it at parked cars, stop signs, and other objects. The defendant lived with his grandparents near the Burbank airport, and so his "playing" with the laser ultimately ended with him pointing it at two aircraft -- a seven-passenger Cessna jet and a police helicopter. The beam hit the pilot of the Cessna in the eye, temporarily blinding him, although he recovered and landed the plane safely. The police helicopter ultimately traced the source of the laser. The defendant was arrested, made statements to the FBI, and ultimately pleaded guilty to one count involving the Cessna in exchange for dismissal of the count involving the police helicopter. The presentence report used what was, in the probation office's view, the most closely analogous Guideline: U.S.S.G. § 2A5.2, interference with a flight crew. The unadorned base offense level for this crime is 9, but if the defendant recklessly endangered an aircraft then the base offense level is 18. With 3 levels off for acceptance of responsibility, his total offense level was 15, for a range of 18-24 months. The judge rejected his case for post-plea diversion and imposed a 30-month sentence, but the court of appeals granted him release pending appeal.

Because the recklessness finding doubled the applicable base offense level, it was required to be proved by clear and convincing evidence. But here the record was "devoid of evidence, let alone clear and convincing evidence, that [the defendant] was aware of the risk created by his conduct." The sentencing judge concluded from the FBI reports that the defendant intentionally aimed the beam at the aircraft, and thus knew that it could reach them (the airport was half a mile away from his house). But this did not show any awareness of the consequences of striking the aircraft -- an 18-year-old man told not to aim the beam at someone's eyes does not necessarily understand that the beam could reach the pilot of an aircraft half a mile away, and nothing in the record showed that he understood the physics behind lasers, specifically that the beam can intensify as it shines through the glass of a cockpit. Simply put, the sentencing judge made no findings that the defendant was reckless: that he was aware of the risks associated with aiming a laser beam at an aircraft. This was procedural sentencing error and harmful even though the judge said he would impose the same sentence should he get the case back on remand (and thus denied bail on appeal). The Ninth Circuit granted bail on appeal and read the sentencing court's statement as an indication that the judge would be unable to set aside his preconceived notions of the sentence that should be imposed, which is why the court directed reassignment to a different judge on remand. The opinion ends with a lament about the broad range of conduct to which § 2A5.2 applies -- from aiming a laser at an aircraft to assaulting a flight attendant to terrorist activity.