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# Federal Defender Newsletter

## August 2010

### CJA PANEL TRAINING

There is no panel training in August. The next trainings will be September 15 in Sacramento, and September 21 in Fresno.

### CJA PANEL GOLF TOURNAMENT

This year's CJA panel golf tournament will be held on Friday, September 17 at El Macero County Club in Davis. We will start with a modified shotgun start at 8:00 a.m., that will permit everyone to finish at about the same time. Afterwards, there will be a group BBQ burger lunch. Because we are starting in the morning and El Macero is a fairly flat course, participants will have the option of riding a cart or walking with a pull cart. For those who do not have their own pull cart, the club has high wheel carts available for no extra charge. The tournament cost will be \$92 for riders and \$79 for walkers. Part of this fee will go towards the usual prizes for longest drive, closest to the pin, low net, etc. Space is limited, so please contact Henry Hawkins at the Federal Defender office (e-mail: [Henry\\_Hawkins@fpd.org](mailto:Henry_Hawkins@fpd.org)) to reserve a spot.

### MIGHTY COURT GESTURES SOFTBALL TEAM ENJOYS A SECOND UNDEFEATED SEASON

Once again, the Federal Defender/CJA Panel Softball Team completed an undefeated season, defeating teams from the Attorney General's office, Sac County PD's office, Sac County DA's office, and the U.S. Attorney's office. Last year's game against the U.S. Attorney team was a bit controversial, so this year Magistrate Judge Dale Drozd agreed to umpire the contest. His presence helped insure no controversy, and a great game by both teams. We want to thank all the CJA attorneys who offered their fan support throughout the season, and CJA Panel attorney Lorie Teichert, the team's second base person. If any other members of the panel would like to play next summer (co-ed, C or D level softball), contact investigators/ managers Mel Buford or Chuck Gillespie in the Sacramento Federal Defender office. The games are one night a week, at either 6:00 or 7:00 p.m. between middle of May and the middle of July.

## **CLIENT CLOTHES CLOSET**

If you need clothing for a client going to trial or for a client released from the jail, please contact Dawn at 498-5700 to use the client clothes closet. If you are interested in donating clothing, we could use more men's shirts and men's large size dress pants.

## **ADDRESS, PHONE OR EMAIL UPDATES**

Please help us ensure that you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the email version of the newsletter or attachments, please call Kurt Heiser at (916) 498-5700. Also, if you are receiving a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

## **TOPICS FOR FUTURE TRAINING SESSIONS**

If you know of a good speaker for the Federal Defender's panel training program, or if you would like the office to address a particular legal topic or practice area, please e-mail your suggestions to Melody Walcott at the Fresno office at [melody\\_walcott@fd.org](mailto:melody_walcott@fd.org) or Rachelle Barbour at the Sacramento office at [rachelle\\_barbour@fd.org](mailto:rachelle_barbour@fd.org).

## **NOTABLE CASES**

**U.S. vs. Brooks, No. 08-10301 (7-8-10)(Canby with B. Fletcher and Gruber).** In an interstate prostitution conviction case, the Ninth Circuit draws the distinction between two interstate trafficking of minors statutes: 18 USC 1591(a) and 2423(a). The former requires specific knowledge

that the victim was under 18; the latter does not. The former also requires that the defendant knew the victim would engage in a sex act, the former only requires intent. There is overlap between the statutes, and the distinction is fine, but the two statutes are separate. The court vacates the sentence and remands for error in the enhancement under 2G1.3(b)(1)(B), which is a 2 level adjustment for being a parent, relative or guardian or in the care or custody or control of the defendant. The Court holds that the focus of the guideline characteristic is on parent-like care and custody, and others, such as teachers or day-care providers, in a similar relationship. The relationship here, pimp to prostitute, falls outside of that. To apply the adjustment here, where the crime and guideline deal with the act, is not appropriate.

**U.S. vs. Evans-Martinez, No. 09-10098 (7-8-10)(Bea with Farris and D. Nelson).** The Ninth Circuit vacates and remands sentencing in convictions for child sexual abuse, child sexual exploitation, and witness tampering. The district court used the 120-month mandatory minimum sentence for child sex exploitation as the starting point for sentencing on the two other counts, despite the fact that they did not have the same mandatory minimum sentence, nor any mandatory minimum sentence. The court needed to distinguish between the counts.

**U.S. v. Denton, No. 09-50253 (7-9-10) (Bea, with Gould and Molloy, D.J.).** The Ninth Circuit held that the district court erred in presuming that an uncharged act, which would be punishable as a wobbler under California law, was a felony offense for purpose of calculating the supervised release violation guidelines. The district court should have exercised its discretion to decide whether the offense was a felony or misdemeanor.

Pirtle v. California Board of Prison Terms, No. 07-16097 (7-12-10) (Reinhardt, with Noonan and Fisher).

The California Board of Prison Terms' denial of parole was not supported by adequate evidence. This violated the petitioner's right to due process. The Board's characterization of the offense as exceptionally callous and especially cruel was not reflected in record of crime. The other findings were likewise not based on evidence. There was no evidence to support the Board's finding that Mr. Pirtle posed a current threat to public safety.

Congratulations to AFD Ann McClintock for the win!

Porter v. Ollison, No. 07-55305 (7-29-10)(Hart, D.J. N. Dist. Ill., with Gould and Bea). In this equitable tolling case, the Ninth Circuit considers whether there should be an evidentiary hearing to determine if counsel's actions were so egregious that the petitioner was prevented from timely filing. The question is whether the federal habeas petition was properly dismissed as untimely without responsive briefing and an evidentiary hearing. Equitable tolling might have applied based on misconduct by an attorney who resigned from the Bar while facing disciplinary proceedings for running a habeas corpus "writ mill." The Ninth Circuit vacates the district court order denying the habeas petition as untimely and remands on the ground that further factual development will be necessary before a conclusion can be made with respect to the timeliness of the petition.

U.S. v. Forrester, No. 09-50029 (7-30-10) (Smith, M., with Nelson, with Hall dissenting). The Ninth Circuit holds that the end date of a conspiracy is not relevant conduct. Because the end date of a conspiracy determines which version of the

Guidelines apply, it is subject to ex post facto analysis. Here because the end date was alleged in the indictment but not admitted in the plea agreement, the court could not use that end date to justify a higher guideline calculation in effect on that date.