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Federal Defender Newsletter
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CJA PANEL TRAINING

Sacramento CJA Panel Training will resume on Wednesday, January 19, 2011 at 5:30 p.m. Judy Stewart, Chemistry and Toxicology Supervisor at Forensic Analytical Sciences in Hayward, will be speaking on Urine and Drug Testing. The location is 801 I St., 4th floor. Fresno CJA Panel Training will resume on Tuesday, January 18, 2011 at 5:30 p.m. The topic will be announced. The location is the Downtown Club, 2120 Kern St., Fresno.

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 or Rachelle Barbour at the Sacramento office at rachelle_barbour@fd.org.

CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, or are interested in donating clothing to the client clothes closet, please contact Dawn at 498-5700.

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.

NOTABLE CASES

Bills v. Clark, No. 08-17517 (12-8-10)(Tymkovich with Hawkins and Fisher). The Ninth Circuit, in an opinion written by a visiting Tenth Circuit judge, holds that mental impairment can justify equitable tolling in a habeas case "when a petitioner can show a mental impairment so severe that the petitioner was unable to personally either to understand the need to timely file or prepare a habeas petition, and that impairment made it impossible under the circumstances to meet the filing requirements despite petitioner's diligence." Evidence presented showed the petitioner's inability to read or write, neurological deficiencies, borderline to mild retardation, concurrent psychosis, and memory issues.

Yet, he represented himself previously, filed some challenges, and could, in one court's reasoning, have relied on jailhouse lawyers. The Ninth Circuit discusses the standard for competency, and the recognition of equitable tolling by the Supremes. It recognizes that equitable tolling, like all equitable remedies, is very case- and fact-specific. The test is two-pronged. Does the petitioner suffer from a mental impairment that caused him not to understand that he needed to file or prepare a habeas petition? Did that impairment make it impossible to meet the filing requirements under a totality of circumstances analysis? The Ninth Circuit vacated and remanded for the court to reassess under this standard.

U.S. v. Goyal, No. 08-10436 (12-10-10)(Clifton with Wallace; concurrence by Kozinski). The Ninth Circuit enters judgments of acquittal on all counts of a securities fraud and false statements case. The case involved the chief financial officer of Network Associates Inc (formerly McAfee) who used accounting methods the government alleged were improper. The Ninth Ciricuit found that the methods were not improper, the statements were not false, and that no reasonable jury could have found criminal liability for accounting practices that were widespread in the industry (such as quarter ending "buy in" deals to raise revenue projections). The opinion details the various practices in the industry and how the government overreached. Kozinski, concurring, takes the government to task for bringing the case and destroying the defendant's life, and wonders if the government had better things to do.

U.S. v. Newhoff, No. 09-30143 (12-16-10)(Kleinfeld with Tallman and Settle). The jury wants testimony read back. The trial court has the discretion to read back the testimony, but if it does it must admonish the jury as follows: all read-backs can distort, all the testimony will be read, the transcript is not evidence, the transcript does not reflect tone or demeanor, and the read-back should not be viewed in isolation. The read back should be in open court, and the court should do it. In this case, the court read back testimony, in open court, with counsel, but neglected to give an admonishment, all though he said he would. The Ninth Circuit concludes he forgot, as did counsel (for which counsel was chided). The error was plain. See U.S. v. Richard, 504 F.3d 1109 (9th Cir. 2007).

U.S. v. Alvarez-Perez, No. 09-50334 (12-22-10)(Singleton, Sr. D.J., D. Alaska, with Kozinski and Wardlaw). The defendant, charged with illegal reentry under 18 U.S.C. § 1326, waived indictment, indicated a desire to proceed under the fast-track provisions, and agreed to proceed by information. He plead "not guilty," and then set up a change of plea, only to change his mind. The government then indicted, with a different case number. The defendant again indicated a desire to plead guilty, only to again get cold feet. Setting the case for trial, the court used the arraignment date, and not the indictment date for the calculation of speedy trial time. The case was eventually tried, with counsel making a speedy trial motion orally before trial. Counsel argued that the clock started running with the indictment, and that, by calculation and tolling, the time for trial was two days over. The motion was denied. On appeal, the government, argues that the indictment had a separate number and that the date ran from arraignment. The Ninth Circuit holds that because the charges remained the same, it is more akin to a re-indictment or superseding, which inherits the STA clock. The Ninth Circuit agrees that the clock starts ticking after the indictment was handed down. Although the defendant did not object to the trial date outside the speedy trial time, it was not a waiver, because the STA is mandatory. As to moving before trial, counsel did so orally, although a written motion is better practice. Moreover, this was not a case of estoppel; counsel did not invite error. However, the dismissal is without prejudice.

U.S. v. Valverde, No. 09-10063 (12-27-10)(Reinhardt with Schroeder and Hawkins). The Ninth Circuit holds that the effective date of the retroactivity provision of SORNA is August 1, 2008, the date on which the provision fulfilled the requirements of APA and publication. An earlier date, Feb. 28, 2007, for an interim rule applying SORNA to pre-SORNA priors, is not effective because the Attorney General's justifications for waiving notice and comment time (to refute uncertainty and for public safety) were not valid upon close examination. The AG's actions were important because Congress had delegated to the AG the determination of retroactivity of SORNA to pre-SORNA sex offenders. Seven months after SORNA was enacted, the AG issued the interim rule for retroactivity, under the APA's exception clause. This was invalid. First, the uncertainty justification was undermined by the delay in issuing any interim rules, and because this exception would threaten to swallow the interim rule permanently. Second, as to public safety, there had already been a governmental delay in promulgating regulations; further, the defendant was covered by a myriad of other state registration requirements. The AG's decision was not supported and an abuse of discretion. This decision adds to the circuit split on this issue: the 4th, 7th and 11th held that the AG's interim was valid; the 6th and now the 9th have held it was invalid.

Congrats to AFD David Porter for the win!

McCullough v. Kane, No. 07-16049 (12-27-10)(B. Fletcher with Berzon; dissent by Rawlinson). The Ninth Circuit holds that the California Governor's 2004 reversal of the petitioner's parole recommendation from the board violated due process. The petitioner had been convicted of second degree murder (he smashed the skull of a man sleeping in a car and stole his money to buy drugs). In the years since, petitioner became a model prisoner and was rehabilitated. The Governor's denial of parole, despite the board's recommendation, was because of the senselessness of the crime. The issue here revolves around whether the nature of the offense, by itself, is enough. The majority finds it is not. It relied upon a state supreme court decision that stressed that just looking at the crime's facts was insufficient, because the focus should be on future dangerousness, although the nature of the crime was part of the analysis. The majority discusses the inconsistencies in the state courts' opinions and analysis. There is, moreover, a liberty interest in the reasoned application of the parole decisions.