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Federal Defender Newsletter
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CJA PANEL TRAINING

There will be no panel training sessions in July or August. CJA training will resume in September. Have a great summer!

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

NOTABLE CASES

United States Supreme Court

Carachuri-Rosendo v. Holder, No. 09-60 (6-14-10).
In a unanimous decision, with Justice Stevens writing for the court, the Supreme Court ruled that a second or subsequent crime of possession of drugs is not an aggravated felony under 8 USC § 1101(a)(43) when the underlying state conviction is not based on the fact that there was a prior conviction. The petitioner in this case, a lawful permanent resident who has lived in the United State since he was five years old, was seeking discretionary relief

from deportation after he committed two very minor misdemeanor drug possession offenses in Texas. Though it could have, Texas did not convict him on the second possession offense as a recidivist. Parsing the "maze of statutory cross-references" at issue, the Court rejected the Fifth Circuit's "hypothetical" approach, which would find a state drug offense an "aggravated felony" if the individual could have been charged as a recidivist, even though he was not. In the process, the Court discussed the meaning of "felony" and "aggravated," and stated that it was "wary" of the government's reading of the English language. It also pointed to the fact that the decision to seek a recidivist enhancement lies within the prosecutor's discretion, which was not exercised here. It ultimately rejected the government's position that the mere possibility, no matter how remote, that a 2-year sentence might have been imposed in a federal case is a sufficient basis for concluding that a person convicted of only state misdemeanors who was not charged as a recidivist has been "convicted" of an "aggravated felony."

Of special interest, the Court noted that a comparable federal defendant would be looking at probably six months under the Guidelines, and that "the Government has provided us with no empirical data suggesting that 'even a single eager Assistant United States Attorney' has ever sought to prosecute a comparable federal defendant as a felon. The Government's 'hypothetical' approach to this case is therefore misleading as well as speculative."

Holland v. Florida, No. 09-5327 (6-14-10). In a 7-2 vote, with Justice Breyer writing for the majority, the Court reversed the Eleventh Circuit's decision that the petitioner's case did not constitute "extraordinary circumstances" for purposes of equitable tolling under the AEDPA. This was not a claim of "garden variety" attorney negligence, but attorney misconduct. In this case, the attorney missed the filing deadline and failed to communicate with the petitioner. The majority rejected the district court's finding that the petitioner had not acted diligently, as the record showed that he had diligently pursued his rights by writing his attorney, providing research, repeatedly asking that the attorney be removed from his case, and finally filing his own federal habeas petition on the day he found out the filing period had expired. It also rejected the Eleventh Circuit's rigid *per se* rule for "extraordinary circumstances," which it found to be difficult to reconcile with general equitable principles and because it fails to recognize that sometimes an attorney's unprofessional conduct can be so egregious that it constitutes extraordinary circumstances warranting equitable tolling.

Skilling v. United States, No. 08-1394 (6-24-10). The Court, in a main opinion by Justice Ginsburg, holds unanimously that the "honest services" fraud statue covers only bribery and kickback schemes. Three Justices would have ruled that the honest services statute is unconstitutional: Scalia, Thomas, and Kennedy.

Black v. United States, No. 08-876 (6-24-10). The Court unanimously vacates and remands, again in an opinion by Justice Ginsburg, holding that the opinion in Skilling on the scope of the honest services law renders the jury instructions in this case on that law incorrect. The Court states that "a criminal defendant [] need not request special interrogatories, nor need he acquiesce in the Government's request for discrete findings by the jury, in order to preserve in full a timely raised objection to jury instructions on an alternative theory of guilt."

Magwood v. Patterson, No. 09-158 (6-24-10). The Court held that when a criminal defendant succeeds in having his original sentence overturned, a later habeas petition challenging his new sentence should be treated as a first petition (not as a "second or successive" petition), even if it raises grounds that could have (but were not) made against the original sentence. Writing for himself and Justices Stevens, Scalia, Breyer, and Sotomayor, Justice Thomas explained that under the text of the federal habeas statute, when a prisoner is resentenced and appeals the new sentence, he is challenging a different judgment than was challenged in his prior habeas petition.

Sears v. Upton, No. 09-8854 (6-29-10). Over the objection of four Justices, the Court issued a summary decision in a highly unusual death penalty case, in which the defense attorney had sought to win favor with the jury by portraying the individual's childhood as stable, loving, and "essentially without incident" as a way to show that a death sentence would devastate the individual's family, who were shocked and dismayed by the crime. But, the Court concluded, that strategy backfired, and prosecutors used that background evidence. suggesting that the individual had led a "privileged" life, in their closing argument and obtained a death sentence. A majority of the Court said that the defense lawyer's choice of that theory led to a completely inadequate investigation of a childhood that was immersed in parental abuse, and the youth had suffered head injuries that doctors deemed significant enough to impair his capacity.

McDonald v. City of Chicago, No. 08-1521 (6-28-10). The U.S. Supreme Court ruled that the right to keep and bear arms for self-defense applies to state and local governments as well as the federal government. The opinion by Justice Alito (joined by three justices) called self-defense a "basic right" and the "central component" of the Second Amendment. It repeatedly described Second Amendment rights as "fundamental." Justice Alito concluded that the Second Amendment is incorporated regarding the states through the Due Process Clause. Five justices agreed that the Second Amendment applies to state and local government. Justice Thomas would have incorporated the amendment through the privileges and immunities clause.

Ninth Circuit Court of Appeals

Cooke v. Solis, No. 06-15444 (6-4-10). The Ninth Circuit (Reinhardt, with Wardlaw, and M. Smith) applied the standard announced in Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010 (en banc), and held that in denying parole, the California Board of Prison Terms must make a finding of "some evidence" of current dangerousness in addition to the circumstances of the inmate's original offense. Findings made without any evidentiary support are unreasonable, and violate the federal right to due process. The Ninth Circuit held that each of the Board's findings on current dangerousness lacked any evidentiary basis, and remanded the case to the district court with instructions to grant the inmates write of habeas corpus.

United States v. Laurienti, No. 07-50240 (6-8-10). The Ninth Circuit (Graber, with Silverman and Scullin, D.J.) held that the district court erred by selectively offsetting some gains but not others when determining the amount of loss on stocks bought in a fraudulent scheme. All the gains should have been offset for each particular victim. Further, by using the amount of loss each stock suffered, the district court failed to account for market forces that also contributed to the decrease in stock value

during the relevant time. The Ninth Circuit noted that although it does not require mathematical precision, the loss calculation for this securities fraud scheme was illogical, and thus not reasonable. The case was remanded for resentencing.

United States v. Bonds, No. 09-10079 (6-11-10)(Schroeder joined by Reinhardt; dissent by Bea). The Ninth Circuit considered hearsay in this government appeal of the district court's decision from the Barry Bonds steroids/perjury case. The district court had precluded statements under hearsay that supposedly linked Bonds with steroids use. The statements were from Bonds' trainer, who delivered samples to a lab employee, saying that the samples came from Bonds. The Ninth Circuit agreed with the district court, because the residual exception under Fed. Rule of Evid. 807 was only for exceptional circumstances, and this was not exceptional. Moreover, the testimony of the trainer about the source may not have been trustworthy. Further, the statements made by the trainer were not authorized by Bonds, and hence did not fall under Fed. Rule of Evid. 801(d)(2)(C). Finally, the statements were not made within the scope of employment. The trainer was not an agent, but an independent contractor.

United States v. Navarro, No. 08-50365 (6-11-10)(Kleinfeld joined by Tallman and Trager, D.J.). This appeal from a conviction for importing and possession with intent of drugs involves a duress issue and a grand jury charge. Both are interesting. The defendant argued at trial that he acted under duress. He was being tested by the cartel and was threatened. The defendant has the burden with duress. In closing the government argued that there was no evidence of threat. The objection was that the government was requiring an express threat, when the law allows an implied threat. The Ninth Circuit agreed that duress, and indeed all threats, can be both express and implied (for the latter, "Do this. I have a bomb."). As for the grand jury, the district court charged the grand jury with an instruction that stated that the government had to provide exculpatory evidence and that the prosecutor was credible and trustworthy. The Ninth Circuit stressed that the exculpatory charge was wrong. The government may have a DOJ policy to present such evidence, but policies may change; there is no legal requirement to do so. Regarding the credibility instruction, the Ninth Circuit surveyed the few Grand Jury cases, and held that when there is a verdict of guilt, errors regarding probable cause disappear. However, if presented before a verdict, and ruled upon, the court has to consider under Bank of Nova Scotia whether such error had substantially led to an improper indictment.

Howard v. Clark, No. 08-55340 (6-15-10)(Gertner, D.J. joined by Kozinski and D. Nelson). The defendant was accused of shooting at two victims. He allegedly murdered one and injured the other. The defendant said he was innocent, and wasn't there. One witness on the stand said that she couldn't identify him. (The police detective said that she had identified him in a photo line up, which was contested. The prosecution argued gang intimidation). The jury convicted the defendant of first degree after lengthy deliberation and saying that they were hung. The victim that lived would have said that the defendant was NOT the shooter. Unfortunately, the trial lawyer never interviewed him nor called him. The Ninth Circuit reversed and remanded for an evidentiary hearing on prejudice on ineffective assistance of counsel. The Ninth Circuit emphasized how important the victim-witness would have been, and how powerful that testimony would have been.

The interview of him could have lead to more evidence and an even more potent cross examination on others.

United States v. Batson, No. 09-50238 (6-21-10)(Canby with Hall and O'Scannlain). The Ninth Circuit considers whether the court can order restitution for title 26 (IRS) offenses. The answer is "yes" but only for the count of conviction if it is not for a conspiracy or scheme. The defendant plead guilty to aiding and abetting one fraudulent tax return. She was fined and ordered to pay almost a million dollars if restitution. The restitution for the single count was around 12,500 dollars. The Ninth Circuit held that the court can order restitution as a condition of probation or supervised release, but that is limited to just the count of conviction.

United States v. King, No. 50665 (6-25-10)(Gwin, D.J., with Nelson and Gould). This is an appeal from a supervised release revocation proceeding. The Ninth Circuit upheld the condition not to associate with felons, but finds that such a condition is narrowed by the mens rea of knowing the persons are felons.