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Federal Defender Newsletter
July 2012

CJA PANEL TRAINING

Panel training is on summer break during July, and August, and will resume in September. The next panel training is September 19, 2012. Have a nice summer!

INQUIRIES INTO THE PLEA BARGAINING PROCESS

The U.S. Attorney's office has decided to alter what AUSAs say at trial confirmation hearings regarding plea offers in response to the U.S. Supreme Court opinions in Missouri v. Frye and Lafler v. Cooper. U.S. Attorney Ben Wagner indicated that the AUSAs would be putting on the record that a plea offer had been made and presumably that it was rejected. Under Rule 11(c)(1) a federal court cannot participate in plea discussions. There does not appear to be any reason for the defense to say anything other than you are confirming for trial. Anything other than a statement that you are aware of your ethical duties with respect to plea offers from the government would implicitly or explicitly reveal confidential client communications and violate Rule 11. So far it is unclear what if anything the judges plan to do when the AUSAs make their statements. This issue is being discussed at the July 11 judges' meeting and the judges have asked Ben Wagner, Dan Broderick, and Francine Zepeda to attend. We'll let you know of any action taken.

ANNUAL FEDERAL DEFENDER/CJA PANEL GOLF TOURNAMENT

The annual Federal Defender/CJA Panel Golf tournament will be held this year at The Ridge in Auburn California on Friday, August 31 with a 1 p.m. shotgun start. This is the Friday before the Labor Day weekend, so we're hoping that the people who might be tempted to duck out of work early (taking leave, of course) will decide to start the weekend off with a little golf. As always, golfers of every size, shape, handicap, and gender are all invited, as are all members of the court family (judges, AUSAs, defense investigators, federal and county defense attorneys, U.S. Marshals, Probation, Pre-trial, Court staff, etc.) and their significant others and friends. We are not sure regarding price (we're still working out the menu), but it will be less than $100 and will include golf, range balls, cart, dinner and a chance for various prizes. If you are interested in playing, contact Henry Hawkins at henry_hawkins@fd.org. He needs to know your handicap/index and any people you'd like in your foursome.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website - www.cae-fpd.org. If a lawyer is not on the panel, but would like the

materials, he or she should contact Lexi_Negin@fd.org.

JUSTICE LEAGUE SOFTBALL SEASON

The FDO's softball season is in full swing. You still have time to join us during the remainder of the Justice League softball season!! Please come out to play on Thursday evenings at either McKinley Park or Glen Hall Park. Contact Henry Hawkins at Henry_Hawkins@fd.org for the schedule.

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 Debra Lancaster at 498-5700. If you are interested in donating clothing or money to cover the cost of cleaning client clothing, please contact Debra.

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 Charles Lee (Fresno) at charles_lee@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

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

United States v. Wing, No. 11-30017 (6-21-12)(Moskowitz, D.J., with McKeown; dissent by Tallman). In considering whether a court can revoke a second term of supervised release on the basis of newly discovered violations that occurred the first term, the Ninth Circuit concludes the district court lacked jurisdiction under 18 USC § 3583(e)(3). The Ninth Circuit concludes that a future term of supervised release cannot be violated for conduct during past terms. In reaching this conclusion, the court undertakes an extensive review of the supervised release statutory scheme.

United States v. Grant, No. 11-50036 (6-11-12)(June 11, 2012)(Berzon, with Thomas & Wardlaw).

The Ninth Circuit closely reads an affidavit for a search warrant and concludes that it lacks probable cause to search the defendant's house. with a close read of PC for a search warrant. Along the way, the court's analysis is of use to other cases: A mere match to a general description (thin, African-American male) does not provide probable cause. It is speculative to conclude that a person who possesses a murder weapon would have retained it for six months. Because evidence can be moved or disposed of, an affidavit must support an inference (through a continuing pattern, for example) that it is presently in the residence to be searched. A family or gang affiliation does not provide probable cause of involvement in another person's crime. Probable cause cannot be based on a negative: for example, that the murder weapon was not found elsewhere, did not support probable cause that it would be in the defendant's home. Similarly, a suspect's statement that another person is not involved in a crime does not provide probable cause that they are.

The Ninth Circuit also explains why the warrant issued on the insufficient affidavit does not satisfy the good faith exception for the searching officers. It discusses when a warrant affidavit is so "lacking in indicia of probable cause" that no officer could rely on it. Here it was: "The relevant gun was never known to be anywhere near Grant or Grant's house, and the person who may have visited

Grant was also not known ever to have been anywhere near the gun." The Ninth Circuit concludes, "A reasonable officer would know that probable cause is not supplied by stating everything one knows about a particular item one would like to find to solve a murder case, if the mass of facts simply does not plausibly connect the place searched to the item sought."

United States v. Castillo-Marin, No. 10-10549 (7-3-12)(Timlin, D.J., with Fisher; concurrence by Rawlinson). When it comes to a categorical analysis of a prior conviction, looking solely to the probation report is not enough. The Ninth Circuit vacates a 16-level adjustment in an illegal reentry case, under plain error review, when the court relied only on the PSR's description of the offense to determine whether it met the crime of violence definition. Looking at the underlying state conviction (New York Penal Code § 120.10(4)) for Attempted Assault Second Degree, the Ninth Circuit concludes that it is overbroad because it doesn't require intent to injure. On remand, the government can seek to introduce judicially cognizable pleadings or colloquies that could prove that the prior is a crime of violence.