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Federal Defender Newsletter
July 2014

CJA PANEL TRAINING

Panel training in Fresno and Sacramento is on summer vacation! Sacramento panel training will return on September 17, 2014 (third Wednesday) at 5:00 p.m. in the jury lounge at the U.S. District Court. Fresno panel training will return on September 16, 2014 (third Tuesday).

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website: www.cae-fpd.org. We will try to post training materials **before** the trainings for you to printout 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.

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 - Janet Bateman,
janet_bateman@fd.org,
Ann McGlenon, ann_mcglenon@fd.org, or
Karen Mosher, karen_mosher@fd.org, or
Sacramento: Lexi Negin, lexi_negin@fd.org.

Check out www.fd.org for unlimited information to help your federal practice.

Defender Services Office
Training Branch National Trainings
http://www.fd.org/navigation/training-events

UPCOMING TRAINING

FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE
MINNEAPOLIS, MINNESOTA | July 31-August 01, 2014

MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR
MINNEAPOLIS, MINNESOTA | July 31-August 2, 2014

LAW & TECHNOLOGY SERIES: TECHNIQUES IN ELECTRONIC CASE MANAGEMENT WORKSHOP
TAMPA, FLORIDA | September 18 - 20, 2014

♪ NOTABLE CASES ♫

UNITED STATES SUPREME COURT

Riley v. California, No. 13-132 (6-25-14) (Roberts, J.). A unanimous Supreme Court held that officers must generally secure a warrant before searching digital information on a cell phone seized from an individual who has been arrested. As the court explained: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to

carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant." Riley is a must-read in any search incident to arrest case as it confines that often-expanded category to physical objects and limits its use to those situations for which it was originally formulated: physical evidence and officer safety.

NINTH CIRCUIT

US v. Goldtooth, No. 12-10570 (6-12-14)(Noonan, with Thomas and Berzon). The Ninth Circuit reverses two convictions for insufficiency of evidence on crimes of aiding and abetting robbery and attempted robbery, both arising from the Navajo Indian reservation. The evidence in a light most favorable to the government is that defendants and others approached teenagers in the middle of the night, identified as gang members, surrounded the teenagers while holding weapons, and then asked the teenagers if they "had anything." The teenagers said "no" and they were patted down. The teenagers had a smart phone and a wallet, but neither was taken. As the gang was leaving someone snatched a pouch of tobacco from the teenagers. The Ninth Circuit reversed the convictions because there was insufficient evidence for an attempted robbery conviction. The defendants never asked for money or anything of value; the concern seemed to be for weapons. As for aiding and abetting robbery of the pouch, aiding and abetting required specific intent and knowledge of the plan. There was no evidence that it was anything but a spontaneous snatching. No individual defendant was identified as having done it. The Ninth Circuit also holds that attempted robbery is a specific intent crime.

US v. Biter, No. 11-15463 (6-16-14)(Wallace, with McKeown and Gould). On appeal from a denial of habeas, the Ninth Circuit finds that the prosecutor improperly argued to the jury (but it was harmless.) In this murder case, the prosecutor in closing argued that reasonable doubt was "something that makes you feel comfortable," and jurors would have a hard time explaining an acquittal to a neighbor or feeling comfortable with the verdict. The Ninth Circuit holds that this was improper and error.

US v. Aguilera-Rios, No. 12-50597 (6-17-14)(Berzon, with Pregerson and Murphy). The Ninth Circuit holds, in this illegal reentry case, that the California state firearms statute (Penal Code 12021(c)(1)) is not a categorical match for the federal firearm aggravated felony under immigration law. The defendant had been removed by the government based on that prior conviction. The California statute under does not have an antique firearm exception, and California does prosecute offenses involving antique firearms.

Moncrieffe v. Holder, 133 S.Ct 1678 (2013) (which was filed while this appeal was pending) requires that the categorical approach be used in immigration cases. The removal order, which took defendant's green card ostensibly because he had a qualifying firearm crime, was invalid and the illegal reentry conviction must be reversed. The Ninth Circuit also held that (1) the defendant could raise this new argument in the circuit, through a substitute opening brief, (2) there was no waiver of the claim by failing to raise it in the district court, and (3) Moncrieffe applies retroactively.

US v. Jackson, No. 13-50215 (6-18-14) (Reinhardt with Noonan; concurrence by Murguia). The Ninth Circuit reverses a misdemeanor conviction and a $150 fine. The defendant was prosecuted because he may not have had an identification card of the proper design for his work at a maintenance center for the Marine Corps in violation of 18 USC § 701. The defendant seems to have kept losing his "yellow card" which is different from an official government I.D. The yellow card was used for quick identification, for convenience, and the design seemingly kept changing. At trial, the defendant argued that a functionary at the center made up a card to give him; the government alleged he made it himself. There was no evidence presented of what the design was, or who issued it, and what it should look like. For this reason, no rational fact-finder could convict beyond a reasonable doubt. For all of you working on federal misdemeanors, the Ninth Circuit affirms how important this was to the defendant: **"Fortunately for him and the justice system, Mr. Jackson had the benefit of the Federal Public Defender system, which effectively exposed the obvious holes in the government's case."**

US v. Torres Pimental, No. 12-50038 (Pregerson, with Fisher and Daniel, Sr. D.J.). The McNabb-Mallory rule requires a defendant to be brought before a judicial officer within 48 hours unless certain exceptions or hardships are found. The government here arrested the defendant on Friday and failed to bring him to a magistrate until the following Tuesday. The magistrate was 17 miles, a mere 22 minutes away, and was available for an appearance that afternoon. The defendant, who invoked on Friday, later confessed on Sunday, while being driven by law enforcement. The government argued that the delay was excused by the holiday weekend, its need to complete investigation, and the availability of space for the defendant. The Ninth Circuit rejected those arguments and ordered that the statement should have been suppressed. It vacated the conviction and remanded.

US v. Tillman, No. 13-10131 (6-30-14) (McKeown with Wallace and Gould). "This case highlights the tension between judicial efforts to control costs of appointed counsel, the defendant's constitutional right to have counsel appointed, counsel's reliance on timely payment of Criminal Justice Act ('CJA') vouchers, and the delays often present in processing vouchers for payment." In this case, the trial court removed counsel, imposed sanctions, and reported him to the state bar because of his expressed concerns about delayed payments of his vouchers. This was a potential death penalty case that had been pending for five years.

Counsel had been "learned counsel," and DOJ eventually had declined to seek death. Counsel submitted an interim voucher that had not been paid. Counsel sent an email saying that he may have to suspend work on the case. This led to an exchange where the court accused counsel of acting unethically and violating local rules. Counsel explained that he would not act unethically and would continue to represent his client. Counsel pointed out that the court should pay the pending vouchers pursuant to judicial policy. This resulted in a status hearing, where the court expressed concern about billings and costs. Counsel's request for expert and investigative assistance was granted. However, counsel could not assure the court that there would not be an IAC issue. This lay outside his control, although he would work hard on the case.

Subsequently, the court issued an order removing counsel, sanctioning him, and reporting him to the bar. An interlocutory appeal followed.

The Ninth Circuit held that it did not have jurisdiction, at this point, to review the substitution of counsel. The defendant still could raise that issue on appeal if there is a conviction. However, it granted mandamus jurisdiction on the sanctions issue and reversed. It found that CJA counsel had acted appropriately, and that the subject raised was one in which discussion was critical. There was no "extortion" of the court; nor was there a concerted effort by bar members to wear down DOJ and increase expenses and delay proceedings. There was no unethical behavior or violation of rules. The trial court clearly erred. The sanctions were vacated and reversed.

The Ninth Circuit stated, "Lawyers do not have a ready 'toolkit' for their profession. Instead, their professional reputations are the essence of their livelihood. Reputations matter—to the court, to clients, to colleagues, and to the public. In a specialized arena, such as criminal defense, the professional circle is even more circumscribed. Appointed lawyers representing indigent clients in federal cases rely on public funds which, in turn, are controlled in part by the judiciary. To be sure, the judiciary and the lawyers have an obligation to be stewards of CJA funds. But this oversight should not trade off with the rights of clients. Nor should such supervision ignore the practical reality that inordinate delays in processing CJA vouchers stretch lawyers to their economic limits."

US v. Lopez-Chavez, No. 11-50277 (7-3-14)(Reinhardt with Kozinski and Clifton). The Ninth Circuit reverses an illegal reentry conviction because of ineffective assistance of counsel (IAC) in the underlying immigration proceeding. The defendant's state conviction was for possession of marijuana with intent to deliver under Missouri Revised Statute 195.21. The state statute covered conduct that is both a felony and a misdemeanor under federal law. At that time, the circuits were split on whether it would only count as an aggravated felony if it was punishable as a federal felony. The Seventh Cir. adopted this rule while the defendant's immigration proceeding was pending. The Supremes subsequently adopted this approach in Lopez. Defendant's immigration counsel failed to argue that the state conviction was not an aggravated felony, despite the circuit split, and the unsettled nature of the issue, and the fact that the Seventh hadn't yet ruled. Then, even though counsel reserved the right to appeal, he failed to. The defendant, who had received 90 days jail with work release and five years of probation on his prior could have had relief. The district court denied the due process challenge. The Ninth Circuit reversed. It was clear, to the Ninth, that a competent immigration lawyer would have spotted the issue, and even minimal research would have revealed that the BIA followed the circuit precedent on the issue (prior to Lopez).

LETTER FROM THE DEFENDER

I was fortunate the last week in June to return as faculty to the National Criminal Defense College (NCDC) in Macon, Georgia, my 14th year as faculty. The experience is unique, exhilarating, exhausting, inspiring, and reminds me how much the defense bar has accomplished, and how far we still have to go.

The experience is unique because, while we meet a hundred new people there, I don't have to explain once how I can represent those guilty people.

I look forward to seeing old friends and meeting our students, all criminal defense lawyers - some fresh from law school and others practicing for decades. I am reminded that the best way to repay the time, effort and patience of those who mentored me is to mentor others. And I remember that, though I am teacher and coach, I learn more from those open to learning, willing to extend themselves and push the borders.

The days are exhausting, like being in trial. Nine hours of classes and practice, 1-2 hour faculty meetings, then preparation for the next day's work, capped by catching up on office emails, leave approvals, etc.

Finally, while we share our successes, we commiserate with our frustrations. It used to be that defense counsel rarely made an opening statement; we now appreciate the power of primacy and telling our clients' stories earlier in trial. The lawyer who made the record for James Batson (who, at the time, had more courtroom experience than that lawyer) attended NCDC the summer before Batson's three trials, making the record that won the Supreme Court case.

But there is the other side, where there is no progress but seemingly Sisyphean slipping. When I attended NCDC in 1991, another student in my section was a public defender in New Orleans. He told of his 100 client felony caseload where clients were not even appointed counsel until 60 days into their case and detention. Over the years, the South's public defenders were burdened with oppressive caseloads, hundreds of open cases at a time, and judges in postage-stamp counties denying experts and continuances. Now the cost-containment device of many defendants and too few public defenders to represent them has spread North – a young public defender from New Jersey reported she had 140 felony cases open as she headed to Macon.

ABA Formal Ethics Opinion 06-441 notes that a lawyer's ethical obligations in representing indigent criminal defendants are challenged when excessive caseloads interfere with competent and diligent representation. Arizona case law presumes ineffective assistance of counsel when 12 month felony representation exceed 150 cases, misdemeanor and juvenile cases at 300 and appeals at 25. *Arizona v. Smith*, 140 Ariz. 355 (1984). And California state public defenders have not been immune from excessive caseloads, resulting in conflicts of interest (*In re Edward S.*, 173 Cal.App.4th 387 (2009)), and ineffective assistance of counsel (*People v. Jones,* 186 Cal.App.4th 216 (2010)).

Our brethren in other parts of the country and our own state can use our support when they stand before their courts, their budget committees, their bureaucrats, and say, "I must move to withdraw because I cannot be the effective assistance of counsel guaranteed by our Constitution if I am required to represent this defendant along with the hundred plus other felony defendants – or the 5 capital clients – or the 200 juveniles I represent now."

Reach out when you can – mentor when you can.

~ Heather E. Williams
Federal Defender, Eastern District of California,

Former Federal Defender Employees Looking for Employment

Becky Darwazeh, darwazeh1@hotmail.com: Secretarial, Legal Assistant

Yvonne Jurado, yvonneee@live.com, (916)230-0483: Paralegal, Secretarial, Legal Assistant, CJA voucher preparation and filing

Karen Sanders, kvs.legaltech@gmail.com, (916)454-2957 (h), (916)216-3106 (cell) Karen has over 20 years of experience as the computer systems administrator at FDO. She'll be providing legal technical and litigation support services. Hourly reasonable rates are available.

Lupita Llanes, lupitallanes@gmail.com, (559) 360-4754: Secretarial and Office Management work. Bilingual Spanish/English services.