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Federal Defender Newsletter
March 2011

CJA PANEL TRAINING

AFD David Porter will be presenting the Supreme Court Year in Review in Fresno and Sacramento this month. Sacramento CJA Panel Training will take place on Wednesday, March 16, 2011 at 5:30 p.m. at 801 I St., 4th floor. Fresno CJA Panel Training will take place on Tuesday, March 15, at 5:30 p.m. at the Downtown Club, 2120 Kern St.

FISCAL YEAR 2011 APPROPRIATIONS

On February 23, 2011, the Administrative Office of U.S. Courts instituted a temporary suspension in CJA panel attorney payments. This suspension was initially in place until March 7, the Monday following Friday, March 4, the end date of the current continuing resolution (CR) that is funding the federal government. It is unclear how the recent action by Congress to extend the continuing resolution will affect CJA payments. Once Congress authorizes funding, payments will begin immediately.

Panel attorneys and other service providers should continue to submit vouchers and the courts will continue to process them, including entering them into the CJA payment system.

Once Congress makes additional funding available, payments will be made in the order in which they were entered into the payment system. If Congress passes a funding bill at the House level, Defender Services would face a potential shortfall of approximately $50 million, the equivalent of approximately five weeks of panel payments. If this were to occur, the Judicial Conference would determine how this shortfall would be addressed, based upon input from judges, federal defenders, panel attorneys, and relevant Judicial Conference committees, including the Committee on Defender Services.

VISIT BY THE U.S. MARSHAL AND CHIEF DEPUTY

Albert Najera, the new U.S. Marshal for the Eastern District of California, and his chief deputy Lenny Boyer have agreed to visit the Federal Defender's office for a brown bag chat. It will be on March 17 at noon in our main conference room. Any CJA attorney who wishes to attend is certainly invited. If you have any questions to pose to Marshal Najera, but can't make the meeting, you can forward them to Linda Harter or Dan Broderick.

ADDITIONAL TRAINING

We are continuing to work out the logistics for a weekend seminar on courtroom presentations. We're hoping for a weekend in May. We are also trying to arrange for Detective James Williams of the Sacramento County High-Tech Crimes Task Force to present on computer file sharing. We'll alert everyone in advance of the date and time once we finalize those logistics.

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 (Fresno) melody_walcott@fd.org or Rachelle Barbour (Sacramento) 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

Pepper v. United States, No. 09-6822 (3-2-11). The Supreme Court held that a district court may consider post-sentencing rehabilitation at a resentencing after appellate reversal. The Eighth Circuit had previously held that courts were categorically precluded from considering such information. In the process, it excised 18 USC § 3742(g)(2) as having been invalidated by Booker. In an opinion written by Justice Sotomayor, the Court invoked 18 USC §§ 3661 and 3553(a) as the clear authority for considering post-sentencing rehabilitation, as well as the Court's sweeping language in Williams v. New York, 337 U. S. 241 (1949), now codified in §3661: "Highly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

Regarding the Commission's policy statement at USSG § 5K2.19 (which prohibits departures based on post-sentencing rehabilitation), the Court demonstrated why the Commission's policy is completely unsound and in conflict with several provisions of 3553(a).

Not only is this a great win for the consideration of post-(and pre-)sentencing rehabilitation (and every single other factor relevant to sentencing under §§ 3661 and 3553(a)), but this case stands as resounding support for deconstructing the guidelines and policy statements to show that they were not developed in the Commission's "characteristic institutional role" and constitute unsound policy. The majority said: "[O]ur post-Booker decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views. That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."

Wilson v. Knowles, No. 07-17318 (2-8-11). (Noonan, with Silverman; Kozinski, dissenting). The Ninth Circuit held that the

California courts violated Mr. Wilson's right to due process under Apprendi v. New Jersey, 530 U.S. 466 (2000). Mr. Wilson was convicted of driving under the influence with a prior felony conviction. At sentencing, the state court judge concluded the conviction was his third strike under California's so-called "three strikes and you're out" law, and sentenced him to 25 years to life. In order to conclude that this was his third strike, the sentencing judge examined two prior convictions that stemmed from a single accident. In 1993, Mr. Wilson had been convicted of gross vehicular manslaughter while driving under the influence of alcohol and causing bodily injury while driving under the influence of alcohol. The sentencing judge in the three-strikes case made three factual findings about those prior convictions that increased his sentence beyond the statutory maximum. None of those findings were necessary to the convictions: (1) Mr. Wilson personally inflicted bodily injury on one of the car's passengers; (2) the injury was great; and, (3) the victim was not an accomplice.

The majority opinion, written by Judge Noonan and joined in by Judge Silverman, concluded that these findings did not fall within Apprendi's exception for prior convictions. "[T]he kinds of disputed facts at issue here -- such as the extent of the victim's injuries and how the accident occurred . . . are not historical, judicially noticeable facts; they require a jury's evaluation of witnesses and other evidence." The majority also concluded that the error was not harmless because "[n]o court could now look at the disputed facts about an accident seventeen years ago and conclude beyond a reasonable doubt that Wilson would have been convicted of personally inflicting great bodily injury." Id. at 2411. California law has numerous felony recidivist enhancements, so many prisoners, particularly those serving three strike sentences, may be able to take great advantage of Wilson.

Congratulations to former-AFD and current CJA panel attorney John Balazs for this important win!

US v. Flyer, No. 08-10580 (2-8-11)(Thomas with Kleinfeld and Tashima). In this child pornography case, the Ninth Circuit reversed convictions on three counts: two counts for lack of jurisdiction and one count for insufficient evidence. In an undercover operation, the FBI downloaded various files of child porn through a file-sharing program. The address was traced back to the defendant. At trial, the government failed to prove for two counts of transportation of pornography that the files had traveled interstate; the files moved intrastate from the defendant to the FBI, but no evidence of crossing state lines. On count three for possession, the evidence was in the unallocated space on the computer, and the government failed to show when the files had been created, received, viewed or even possessed. The unallocated space contains trash data, and it cannot be accessed without forensic software.

U.S. v. Valdovinos-Mendez, No. 09-50532 (2-15-11)(Jarvey, D.J., S.D. Iowa with Schroeder and Tallman). In a § 1326 illegal reentry case, the 9th acknowledges that the admission of a "non-existence of record" (CNR) did violate the constitutional right to confrontation. However, the error was harmless.

U.S. v. Lynn, No. 09-10242 (2-23-11)(Gould with Schroeder and Thomas). Another child porn case presents whether there was double jeopardy here for receipt and possession of the same contraband. The court held that the government can charge receipt and possession as two distinct crimes, but it has to show that possession was of a different nature or media. Getting the contraband and keeping it in a file will not support convictions on both.