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Federal Defender Newsletter
May 2012

CJA PANEL TRAINING

The next Sacramento panel training will be Wednesday, May 16, 2012 at 5:00 pm at the jury room on the fourth floor of the federal courthouse, 501 I Street. AFD David Porter will be presenting his annual Supreme Court Review. The next Fresno CJA Panel training will be on Tuesday, May 15, 2012 at the Downtown Club, 5120 Kern St., Fresno at 5:30 p.m. The topic will be announced. Panel training will take a break during June, July, and August, and will resume in September. Have a nice summer!

MOURNING THE PASSING OF PARALEGAL WENDY WEBER

Wendy Weber, a paralegal in the Federal Defender's Office Capital Habeas Unit, passed away in April. Wendy played a big role in two recent successes: Over a three-week evidentiary hearing, Wendy kept the attorneys supplied with everything they needed from the 70,000-page record. She deserves much of the credit for the positive outcome and still more for her compassionate client- management. She also worked hundred of hours on a recent study of the California death penalty. Wendy was responsible for keeping track of thousands of probation reports requested for the study.

Wendy was only 50. She will be missed.

NEW AFD IN FRESNO

The Federal Defender office is pleased to announce that Andras Farkas has agreed to join the Fresno office as an Assistant Federal Defender, beginning on June 4. He will be taking the position of Melody Walcott, who retired in December.

Andras received his BA, cum laude, from Kalamazoo College in Michigan. While attending the University of Michigan Law School, he worked as an extern at the Habeas Corpus Resource Center in San Francisco. After graduation he joined the United States Court of Appeals for the Third Circuit in Philadelphia as a staff attorney, then worked as a law clerk for Third Circuit Judge Morton Greenberg. Since November 2011, Andras has been working for the San Francisco Public Defender's office

JUSTICE LEAGUE SOFTBALL SEASON

The Federal Defender's Office softball team is recruiting players for the upcoming Justice League softball season!! The season starts now and runs through July. If you are interested in joining us, please contact Henry Hawkins at Henry_Hawkins@fd.org for team and game information. All games are played at McKinley or Glen Hall parks in East Sacramento in the evenings.

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.

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. Major, Nos. 10-10147, 10-10148 (3-27-12) (Wallace, Noonan & M. Smith). The Ninth Circuit reverses the defendants' sentences because the district court used the wrong order of conviction to calculate the 924(c) sentences. The order in which the convictions are counted can affect the mandatory minimum sentence. When a defendant is found guilty of multiple convictions, one must be treated and the first, and the others are the "second or subsequent." The Ninth Circuit applies the rule of lenity in interpreting the statute, holding that the district court must "order the convictions so that the mandatory minimum sentence is minimized."

Wentzell v. Neven, No. 10-16605 (4-2-12)(Tashima, with Silverman and Garbis, D.J.) A habeas petition wins relief in state court, gets one count of conviction dismissed, and has his judgment amended, after a prior federal habeas was dismissed as untimely. The Ninth Circuit holds that a new federal habeas petition is a challenge to a new judgment and therefore not a second petition. There is a circuit split on this issue. The Ninth Circuit also holds that the district court erred in dismissing the petition sua sponte as untimely without notice to the State or petitioner.

United States v. Nosal, No. 10-10038 (4-10-12) (en banc). In a decision joined by eight other judges, CJ Kozinski rejects the government's interpretation of the CFAA (Computer Fraud and Abuse Act), which would have made checking Facebook at work a federal crime. The defendant argued that the statute outlawed "hacking"; the government argues that it outlawed any computer activity that "exceeds authorized access." The Ninth Circuit notes that the government's interpretation would transform the statute from an anti-hacking statute into an "expansive misappropriation statute. . . . Were we to adopt the government's proposed interpretation, millions of unsuspecting individuals would find that they are engaging in criminal conduct." As noted in the opinion, this creates a circuit split with broader interpretations by the Eleventh, Fifth, and Seventh.

United States v. Manzo (Manzo II) No. 10-35848, 10-35849, 10-35871 (4-5-12) (Gould, with Schroeder and Alarcon). In this § 2255

case, the Ninth Circuit finds IAC by trial counsel for failure to anticipate grouping of several offenses, which had a major impact on sentencing guideline calculation. The Ninth Circuit also holds that the government breached its plea agreement, and that the parties' mutual mistake as to grouping did not excuse the prosecutor's failure to abide by the agreement. This is the third Ninth Circuit published opinion this year holding that prosecutors breached plea agreements. The Ninth Circuit reverses and remands this case to the district court.

Interestingly, on direct appeal a panel of the Ninth Circuit summarily had already rejected the defendant's arguments in an unpublished decision. This panel finds that the first appellate decision -- a summary disposition in one conclusory sentence that gives the court "no hint of the reasoning supporting the decision" -- was "clearly erroneous" and therefore not binding under the law of the case doctrine.

United States v. Wilbur et al., No. 10-30185 (4-6-12)(W. Fletcher, with Reinhardt; concurrence and dissent by Rawlinson). The defendants were convicted of an eight-year conspiracy to violate the Contraband Cigarette Trafficking Act (CCTA). They sold cigarettes on the Swinomish Reservation and failed to pay state and federal taxes. On appeal, the Ninth Circuit found that there were really several conspiracies, differing in time, with a gap between them. The defenses of statute of limitations and of variances were not waived. Some charges were barred by the statute of limitations, and there was a contract with the state for some years during which no state and federal taxes were due. Accordingly, the court reverses in part and remands for resentencing.

Cross v. Sisto, No. 08-17324 (4-18-12)(Bea, with O'Scannlain and Graber). The petitioner filed a number of post-conviction challenges to his California second-degree murder conviction. One of the petitions was denied by the California Supreme Court citing only Ex parte Swain and Duvall. The district court found the petition untimely. The Ninth Circuit reverses, holding that Swain was not only concerned with untimeliness, but could also be considered, with Duvall, a pleading issue. Thus, the petition was not time-barred under the AEDPA.

Noble v. Adams, No. 08-17655 (4-19-12) (Wallace, with Nelson & Bea). The Ninth Circuit vacates the dismissal of a habeas petition and remands to the district court to determine if a four-and-a-half month delay between the denial of a petition in state superior court and the appeal was "unreasonable" under California's standard of reasonableness. California has already excused delays of longer than 60 days in some instances. The petitioner was pro se, and seemed to have been trying to amend his petition when he filed a second. The Ninth Circuit also finds that the mailbox rule clicked in to make the petitioner's mailing of the petition viable.

Meras v. Sisto, No. 09-15399 (4-23-12) (Kozinski with Gettleman, Sr. D.J. & Bea). "[The Petitioner] claims that testimony introduced during his trial violated his Sixth Amendment right to confrontation. He's probably right, but he loses anyway." This is in the first paragraph of the opinion, and pretty well sums up petitioner's plight, and fate. He was charged with robbery, burglary, and assault in state court. His first trial ended in a hung jury. At the trial, a criminalist testified about DNA analysis. At the second trial, the criminalist was busy so a supervisor testified about the lab results. The supervisor had technically reviewed the findings and signed as a reviewer. The petitioner's appeal was after Crawford but before Melendez-Diaz and Bullcoming. As a result, under AEDPA, the question is whether the state court reasonably decided the issue. The Ninth Circuit found it did under the precedent at the time, given the issues left open in Crawford, and the vigorous dissents in later cases. The Ninth Circuit writes that "We therefore have a case

here where the state court probably committed constitutional error, but we are not free to correct it."

Detrich v. Ryan, No. 08-99001 (5-2-12)(Paez, with Pregerson; McKeown dissenting). On a remand from the Supremes, in light of Pinholster, the Ninth Circuit again grants relief for IAC at the penalty phase. The Ninth Circuit holds that under AEDPA, and Pinholster, a petitioner does get an evidentiary hearing if he has satisfied all the state post-conviction exhaustion requirements and presented the evidentiary basis. Moreover, review can be de novo if the state court's determination of facts was unreasonable. The state court's reading was indeed unreasonable. Trial counsel for petitioner failed to investigate powerful mitigation evidence and failed to present striking neuropsychological evidence. The state court factually erred in finding that the neuropsychological report presented in post-conviction found the petitioner to be normal, when it was anything but.

United States v. Backlund, Nos. 10-30264, 10-30289 (4-26-12)(Fisher, with Paez & Clifton). In a prosecution involving mining on Forest Service land, the Ninth Circuit reaffirms that if a defendant has exhausted administrative remedies, he or she can challenge an administrative action in court under the APA as part of the criminal case if he or she is within the six-year time limit for doing so. The APA challenge can be presented as a defense to the criminal charge if it is within the six-year limit and has been administratively exhausted.

DISTRICT OF COLUMBIA CIRCUIT

United States v. Rodriguez, No. 10-3017 (DC Cir. 5-9-12). Rodriguez's lawyer failed to request safety-valve relief after Rodriguez truthfully debriefed. Indeed, Rodriguez's lawyer considered it inapplicable at his sentencing. "Familiarity with the Guidelines is a necessity for counsel who seek to give effective representation. When a lawyer fails to raise an applicable provision of the Guidelines, he fails to provide effective assistance." Rodriguez's lawyer was (or should have been) aware that his client had fully and truthfully debriefed and there was no objectively reasonable or strategic reason not to argue its applicability. The decrease would have reduced his Guidelines range from 78-97 months to 63-78 months. The case is remanded for resentencing.