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Federal Defender Newsletter
October 2010

CJA PANEL TRAINING

The next Sacramento CJA panel training will be on October 20 at 5:30 at 801 I Street, 4th Floor. Assistant Federal Defender Lexi Negin will be presenting a lecture on the Basics of Defending Federal Sex Offense Cases. The next Fresno CJA panel training will be on October 19 at 5:30 at the Downtown Club, 2120 Kern Street, Fresno. Federal Defender Dan Broderick will present on Wiretap Cases.

WINNERS OF THE SEVENTH ANNUAL JUSTICE GOLF TOURNAMENT

Thank you to everyone who came out to golf at the CJA panel tournament on September 17 at El Macero County Club in Davis. The winners of the tournament were Magistrate Judge Dale A. Drozd and Janet Vine. Congratulations to the winners!

2010 EASTERN DISTRICT CONFERENCE

This year's Eastern District Conference will be held Friday, November 5 through Sunday, November 7 at the Ritz Carlton, Lake Tahoe. The conference rate for the hotel is $195 per night (plus $25 resort fee, $26.90 in taxes, and $35 for parking). The conference registration fee is $180 and includes Saturday and Sunday breakfast, Saturday lunch, and the Friday welcoming reception. You can obtain registration materials on line on the Eastern District web page. Registration deadline is October 15, 2010.

NEW AFD'S IN SACRAMENTO

Two attorneys will be joining the Federal Defender office in Sacramento in the next two months:

Courtney Fein will be replacing Lauren Cusick, who has joined the Federal Defender office in San Diego. Courtney grew up in Sacramento. She was an Honors English graduate at UC Berkeley and played in the marching band. She attended the University of Wisconsin Law School, where she was the articles editor of the Wisconsin Women's Law Journal. While in law school she worked at the Legal Defense Clinic, the Wisconsin Innocence Project, and at the Monroe County Public Defender's office in Key West, Florida. For almost four years, Courtney has worked as an Assistant Public Defender in Los Angeles County. Courtney will be joining our office on October 11.

Matt Scoble will be joining our office on November 8. Matt graduated from UC Davis with a degree in comparative literature. He subsequently attended the University of Denver College of Law. After law school, he worked as an area defense counsel and circuit defense counsel in the U.S. Air Force for 6 years. During this time, he defended the largest child pornography case in Air Force history. For the past five years, Matt has worked as an assistant public defender with the Sacramento County Public Defender's office. Matt just obtained a not guilty verdict last week on a first degree murder charge in the highly-publicized killing of a state correctional officer. Matt has completed extensive training and is an expert in DNA litigation. He has also presented CLE seminars on courtroom technology, defending sexual offenses, and jury selection.

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.

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.

SPECIAL DEALS ON SOFTWARE FOR CJA PANEL ATTORNEYS

Sean Broderick, National Litigation Support Administrator, has announced that LexisNexis provides reduced pricing for the CaseMap suite of software to all CJA Panel Attorneys. The current undiscounted price for the software is $775, but through October 31, 2010 LexisNexis will reduce the price to $290.50 per license. If CJA panel attorneys purchase the software, they will not have to pay any annual maintenance fees as long as the purchases are made under the national CJA contract and they continue to serve on the CJA panel. If you are interested in this offer, please contact Paul Brady with LexisNexis at 904-373-2174 or paul.brady@lexisnexis.com. If you have questions regarding the use of CaseMap, please contact the National Litigation Support Team at 510-637-3500 or alex_roberts@fd.org or kelly_scribner@fd.org.

Sean has also announced that ISYS Search Software has agreed to provide all CJA panel attorneys in the United States with a free license of its enterprise search tool. Valued at $99 per seat, this special version of the software is being offered only to CJA panel attorneys, enabling them to index and search through their local data collections. ISYS Personal Edition allows users to quickly and efficiently search electronic computer files. The software allows legal teams to search through discovery, create brief banks, and assist in basic organization of data. As electronic discovery in federal criminal matters continues to grow in volume as well as in the variety of formats, ISYS is a useful tool for CJA panel attorneys who are faced with the daunting task of organizing and searching through their case material. Please fill out and submit the form available at http://www.cae-fpd.org/ISYS_Form.pdf to obtain download instructions and an activation code for the

free copy. If you have any questions regarding the utilization of ISYS, please contact either Alex Roberts or Kelly Scribner (members of the NLST) at 510-637-3500, or by email at alex_roberts@fd.org or kelly_scribner@fd.org. We plan to schedule a hands-on training on this software in a few months in Sacramento.

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

U.S. v. Munoz-Camarena, No. 09-50088 (9-3-10)(Per curiam with B. Fletcher, Pregerson, and Graber). The Supremes in Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) held that a second or subsequent conviction for simple possession does not qualify as an aggravated felony when the state conviction is not based on the prior conviction. Prior to Carachuri-Rosendo, the district court in this 1326 appeal had treated the defendant's prior state drug possessions as being equivalent to the federal recidivist statute and therefore added 8 levels for a prior aggravated felony. This resulted in an erroneous guideline calculation and the sentence must be vacated and remanded. The Ninth Circuit rejected the government's argument that the sentencing guideline error was harmless (based on the district court's statement that it would sentence the defendant to the same term regardless). The court emphasized the need for the district court to start with the right calculation, and then assess the sentencing factors.

Thompson v. Runnel, No. 08-16186 (9-8-10) (Berzon with Goodwin; Ikuta dissenting). The police interrogated the petitioner about a murder without the Miranda warnings, lied to him, and then gave him the warnings after he was exhausted and emotionally distraught. They then made him walk through the confession. In these habeas proceedings, the State of California argued that since Seibert wasn't decided yet the petition should be dismissed. The Ninth Circuit disagreed. First, petitioner raised the Fifth Amendment issue and preserved it. Besides, the police were conducting a policy to evade the rule set forth in Elstad, and the giving of Miranda after the confession, but before the second set of statements, was also ineffective. The statements were undoubtedly prejudicial.

Delia v. City of Rialto, No. 09-55514 (9-9-10) (Bennett, D.J., with Goodwin and Rawlinson). A warrantless compelled search of a home – secured by city employers requiring an employee to enter his home and retrieve and display evidence to public view – violated the employee's rights under the Fourth Amendment.

U.S. v. Bennett, No. 06-50580 (9-10-10) (Wardlaw with Kleinfeld; dissent by Callahan). A wholly owned subsidiary of a bank, that even issues mortgages like a bank, is not a bank, under 18 USC § 1344 because it is not a financial institution s defined. This corporation, Equicredit, did not have any deposits or assets insured by the FDIC. However, Equicredit was 100% owned by BofA, which is a financial institution as defined and did have deposits insured by the FDIC. The problem is that the defendant defrauded Equicredit with bad mortgages in a property flipping scheme and is now prosecuted for bank fraud under §

1344 which requires insured assets. The Ninth Circuit held that the fact a subsidiary corporation is 100% owned by a bank which falls under the § 1344 definition does not make the subsidiary a bank. It has a separate independent existence. The Ninth Circuit holds this as a tenet of 100 years of corporations law. There was fraud, but it is not prosecutable under § 1344.

US v. Espinoza-Morales, No. 09-50267 (9-10-10)(Paez with B. Fletcher; dissent by Walter, D.J.). This § 1326 appeal decides whether a prior conviction for sexual battery and for penetration with a foreign object under California Penal Code § 289(a)(1) is a "crime of violence" for 2L1.2 purposes. Using the categorical analysis, and then a modified categorical analysis, the Ninth Circuit finds that it is not. The focus is on whether the elements of the offense all require force or violence. They do not because, as discussed in prior precedent, the duress or restraint might be by words only, or by fraud. The "penetration" by itself does not require additional force than what is stated in the sexual battery. Under a modified categorical approach, the abstract of judgment and information do not provide enough information to show that the defendant used or attempted to use force. Likewise, the unpublished state court appellate opinion did not establish that the jury necessarily convicted the defendant of conduct that would amount to a crime of violence. The facts of the crime were not relevant to a purely legal issue on the Vienna Convention. Accordingly, the sentence was vacated and remanded for resentencing on the original record. Importantly, the Ninth Circuit rejected the contention that the defendant should be resentenced on an open record. It found that the government submitted evidence to attempt to support the adjustment, that the evidence was insufficient to meets its burden, and in light of that failure the Ninth declined the give the government a “second bite at the apple.”

US v. Comprehensive Drug Testing, Inc., No. 05-10067 (9-13-10)(en banc)(per curiam opinion with concurrence by Kozinski, partial concurrences and dissents by Bea, Callahan, and dissent by Ikuta). This en banc decision considers the seizure by warrant of the drug testing records in a highly publicized baseball steroid case and the district courts' suppression/return decisions. The problem with electronic seizures, as the per curiam opinions states, is that there is no way to be sure exactly what an electronic file contains without somehow examining its contents. The government efforts to locate particular files will require examining other files. The solution, under an updating of Tamura, is for the government to foreswear the plain view doctrine, and other possible exceptions, in their digging around electronic data authorized by a warrant. Kozinski, concurring, lays out his detailed test for how a magistrate should proceed with a search warrant.

U.S. v. Waters, No. 08-30222 (9-15-10)(Tashima with Fisher and Berzon). The Ninth Circuit reverses and remands arson convictions because the trial court let in anarchist literature that was of doubtful relevance and was not balanced under FRE 403. The Ninth Circuit also reversed on the ground that the court failed to inquire or instruct the jury as to the publicity on the case. This was a prosecution of alleged radical environmentalists who burnt down buildings wrongly associated with genetic testing. After much investigation and dead ends, a cooperator pointed at the defendant. There were problems with the identification and corroboration. The defendant argued that she was not involved, and that she did not agree with the radicals' tactics. She mounted a character defense. A folder of anarchistic writings was introduced as

supposedly coming from the defendant, although that as questionable. The Ninth Circuit wondered about its probative value, whether it could be shown defendant had read them, and the dangers of associating what one reads with the charge. The Ninth Circuit also found abuse of discretion in the court not allowing in defendant's documentary, made at that time, which advocated peaceful protest. If the trial court let in the anarchist writings, it should have let the video in. The trial court also erred in failing to make adequate inquiries into what the jury may have heard and read when, as the jury began to deliberate, another terrorist arson was being reported amidst great publicity. This case, together with Curtin, marks the Ninth Circuit as greatly disfavoring the introduction of one's reading materials, demands a high linkage, and requires the court to review each and every page to do a 403 balancing.

US v. Moreland, No. 05-30541 (Hug, with McKeown and W. Fletcher). On remand from the Supremes, the Ninth Circuit holds that two money-laundering counts must be reversed. The defendant was convicted on numerous fraud counts for a pyramid/Ponzi scheme. He was also convicted of two counts of money laundering for plowing some profits back into the scheme. The Supremes in Santos held this was not money-laundering, and the Ninth Circuit on remand agrees in this instance. The Ninth Circuit remands for resentencing.

Powell's Books Inc. v. Kroger, No. 09-35153 (9-20-10) (McKeown, with Fernandez and Paez). The Ninth Circuit holds that statutes criminalizing the distribution of "sexually explicit material" to minors are unconstitutionally overbroad under the First Amendment by including significant amount of material not obscene to minors.

Souliotes v. Evans, No. 08-15943 (9-20-10) (McKeown, with Hall, partial concurrent/dissent by Zilly). In this habeas case, the Ninth Circuit holds that the statute of limitations for an actual innocence claim does not require the defendant to use maximum diligence possible in uncovering the factual bases of the claim, just "reasonable" diligence.

US v. Ruiz-Gaxiola, No. 08-10378 (9-24-10)(Reinhardt with Kozinski and Timlin, D.J.). This is a Sell involuntary medication issue. Ruiz suffered from a rare mental disorder that is extremely difficult to treat. The government wanted to administer antipsychotic medication involuntarily to Ruiz in order to further its interest in prosecuting him for a serious criminal offense by rendering him competent to stand trial. The Ninth Circuit affirmed Ruiz's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." The Supreme Court, in Sell, 539 US at 180, resolved the conflicting interests by establishing four conditions that must be satisfied for the government to administer antipsychotic drugs involuntarily to a non-dangerous criminal defense. A failure to meet any of the four is fatal to the government's request. Under Sell, an involuntary medication order by the district court cannot be issued unless the government proves 1) "that important governmental interests are at stake"; 2) "that involuntary medication will significantly further those concomitant state interests"; 3) "that involuntary medication is necessary to further those interests;" and 4) "that administration of the drugs is medically appropriate." The government has the burden of establishing the facts necessary to allow it to prevail on its request by clear and convincing evidence. It failed to do so. The Ninth Circuit held that the government experts from Butner were sloppy, misinformed, and made misstatements as to

how to treat the defendant's delusions. The defense witness, by contrast, was knowledgeable and convincing. The magistrate court and district court erred in finding that medication would further government interests because it is not really known how to treat these delusions, and whether medication would actually work. Lastly, there would be long term effects on the defendant. As a result, the Ninth Circuit reversed the Sell order.

US v. Isaac Ramos, No. 09-50059 (9-24-10)(Wardlaw with Reinhardt and Trott). The defendant, facing a § 1326 charge, collaterally attacked the prior deportation order. He argued that DHS and the IJ violated this due process rights and violated their own applicable regulations in removing him through the stipulated removal program under 8 USC 1229a(d), 8 CFR § 1003.25(b). The Ninth Circuit agreed that there were violations. First, the waiver of appeal was invalid because it was not knowing or voluntary. The defendant did not have counsel; it was not explained; and he may not have understood the language. Second, the stipulated removal hearings violated his due process right to counsel under the Fifth Amendment by requiring him to waive it. His waiver moreover was not valid. The Ninth Circuit also found that the IJ violated the agency regulations by failing to insure the waiver to a removal hearing was voluntary, knowing and intelligent. Yet, with all these violations, the Ninth Circuit finds the errors harmless as to this defendant.

Rossum v. Patrick, No. 09-55666 (9-23-10)(Gertner, D.J., with Nelson and Reinhardt). The Ninth Circuit remanded for an evidentiary hearing on an IAC claim. The petitioner was convicted of killing her husband by poison. The poison was fentanyl, which is a synthetic opiate. The motive: she worked in the San Diego Medical Examiner's Office and was having an affair with a co-worker. The evidence was circumstantial, but the odd fact was that the amount of poison was so high that it was impossible for the victim to have lived for several hours. Yet, the forensic evidence was that he did. Indeed, he had complained, supposedly, of feeling ill earlier on the day of his demise, and he was taking other medication that, acting together, could have caused his death. The defendant raised the issue that the fentanyl could have been planted. The affair was an open secret, and the autopsy samples were left unsecured for 36 hours before the ME office sent them out to another lab (afraid of a conflict of interest). Someone could have contaminated the samples for a variety of reasons. The one way to know for sure would have been to test the samples for metabolites. Such a test would determine if the poison was in the system or planted. Defense counsel failed to ask for such a test, even though it was really the only defense in the case. The defendant was convicted and given a LWOP sentence. The Ninth Circuit ordered an evidentiary hearing on the IAC claim, and ordered the district court to allow testing of the samples and of testing for blood on the victim's clothes, which the petitioner said was not hers.

U.S. v. Briggs, No. 09-30108 (9-27-10)(Tashima with Fisher and Berzon). The defendant was caught up in plans to rob stash houses. Unfortunately for him, the "masterminds" of the plan were ATF operatives. The defendant was charged with drug, guns, conspiracy, and escape counts. He pled, and received 320 months in prison. On appeal, the Ninth Circuit vacated the sentence and remanded. The district court did err in giving the firearm adjustment because the defendant did not possess a weapon; he planned on using one in the robbery but it never was used.

U.S. v. Sipal, No. 08-10300 (9-30-10)(Hug

with Bea and Edmunds, D.J.). In 2005, the defendant was sentenced for possession of crack and being a felon in possession. With 23 criminal history points, he was facing a range of 210 to 262 months. However, the sentencing was under Booker. As such, the court took into account the defendant's low IQ and small amount of crack (18 grams) and imposed a sentence of 144 months (concurrent with a 120-month sentence for the felon-in-possession charge). Subsequently, the Sentencing Commission retroactively amended the crack cocaine guidelines. The defendant then sought further reduction of his sentence under 18 U.S.C. § 3582(c)(2). The district court concluded that it did not have jurisdiction to reduce the sentence under § 3582(c)(2) because the sentence resulted from a discretionary application of the § 3553(a) factors and not a departure from the Guidelines range. The 9th remanded for further proceedings because the district court did not determine whether reducing the sentence would be consistent with the policy statements issued by the Commission -- particularly U.S.S.G. § 1B1.10(b)(2)(B), which says that for sentences imposed after applying the statutory sentencing factors, a "further reduction generally would not be appropriate." However, because "[b]y stating that the policy statement is 'generally' not applicable this leaves discretion with the district judge to determine its applicability." It left open the question whether the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." See United States v. Leniear, 574 F.3d 668, 673 (9th Cir. 2009). The district court has to determine on remand whether it now has discretion and then proceed to whether it wishes to exercise it.