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Federal Defender Newsletter
October 2011

CJA PANEL TRAINING

Panel training in Sacramento will take place on October 19 at 5:30 p.m. at 801 I St., in the 4th floor conference room. Marcus Lawson and Josiah Roloff of Global CompuSearch will be presenting: "Computer Forensic Issues in Criminal Cases."

Panel training in Fresno will take place on October 18 at 5:30 p.m. at the Downtown Club, 2120 Kern St. The topic will be: "A Discussion with our District Judges, Presiding District Judge Anthony W. Ishii and District Judge Lawrence J. O'Neill"

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.

ANNUAL FEDERAL DEFENDER/ CJA PANEL HOLIDAY PARTY

This year's party is currently scheduled for Friday, December 9, beginning at 3:00 p.m. and going until 7:00 p.m. If anyone wishes to volunteer to help select the menu, set up, bartend, or clean up, please contact Connie Farnsworth in the Federal Defender's office.

REDUCED PRICES ON CASEMAP/ TIMEMAP/DOCPREVIEWER/TEXTMAP PRODUCTS FOR CJA COUNSEL

Due to the popularity and interest of the FDO and CJA community, LexisNexis has agreed to offer the CaseMap / TimeMap / DocPreviewer and TextMap products at a special reduced price through November 15, 2011. LexisNexis is offering CJA panel attorneys the following additional price reductions: $290.50 for the CaseMap / TimeMap / DocPreviewer license set; $97.00 for the TextMap license.

CaseMap is a fact management database application used to manage, organize and connect case facts, legal issues, key players, and documents. Reports can be easily produced to give snapshots of critical case detail including an outline of issues for the case, a fact chronology, and all supporting people, organizations, and documents in the case. TimeMap is a timeline graphing software that enables the user to create a timeline of events from critical case details. DocPreviewer is a plug-in software which allows for enhanced integration between CaseMap and Adobe Acrobat Pro or Pro Extended. TextMap is a transcript summary tool that can be integrated with CaseMap. TextMap offers

the ability to link transcripts from case depositions, examinations, and other proceedings to case exhibits and other documents. It can also be used to play video and audio that has been synched with transcript text.

After November 15, LexisNexis will still offer reduced pricing to FDOs and CJA panel attorneys: CaseMap / TimeMap / DocPreviewer for $387.50 per license set (normally $775.00) and TextMap for $161.00 per license (normally $322.00).

For CJA panel attorney inquires: contact Carolyn Winiarz at 904-373-2201 or carolyn.winiarz@lexisnexis.com for assistance and questions.

If you have any questions regarding the use of CaseMap within CJA panel attorneys' offices, please contact either Alex Roberts or Kelly Scribner of the National Litigation Support Team at 510-637-3500, or by email: alex_roberts@fd.org, kelly_scribner@fd.org.

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 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

U.S. v. Hunt, No. 09-30334 (9-1-11)(Paez and Beezer; dissent by O'Scannlain). The defendant pled guilty to attempt to possess a controlled substance with intent to distribute. At the plea colloquy, the amount or type was not made clear, nor was the specific knowledge required for attempt. This resulted in Apprendi error. It was not harmless because the defendant had always disputed the amount supposedly involved. His sentence is reduced from 15 years to 1 year.

Jackson v. Ryan, No. 10-15067 (9-1-11) (Gertner, D.J., with B. Fletcher and Thomas). The Ninth Circuit finds error in a felony murder instruction. The matter is remanded for the court to consider AEDPA and ineffective assistance issues in light of the finding.

U.S. v. Rodgers, No. 10-30254 (9-7-11) (McKeown with Schroeder; dissent by Callahan). In this automobile search case, a warrantless search was invalid because it was premised simply on probable cause to arrest a passenger. The defendant here was stopped in a high crime area driving a car with a different paint color than was stated on the car's registration. The driver (soon to be defendant) explained he painted the car, but did not yet have the money to change the registration. (In a footnote, the court notes that this was the third time the same police officer had pulled over this particular car for this reason.) The failure to update the paint color in the registration was not a crime. The driver's license was in order. His passenger appeared very young to the officer -- 12 to 13 -- and not the 19 she claimed. She also gave a name that resulted in an outstanding warrant for a person with a different birth date. However, there was nothing she said or did that indicated there was contraband in the car, or she was hiding something, or that there was a danger. The police searched anyway, and

found drugs and guns. The Ninth Circuit considered it a close question whether the car could even be stopped for reasonable suspicion, but sidestepped that issue to reverse denial of the suppression motion because there was nothing in the record to support a particularized search of the car for any contraband or evidence related to the reason to arrest the young-looking passenger. The Ninth Circuit brushed aside the officer's explanation that if the girl was 19 as she said, she of course would have had identification with her or in the car.

Sivak v. Hardison, No. 08-99006 (M. Smith with Kozinski and Thomas). In this capital habeas arising from a felony-murder conviction of a store clerk, the Ninth Circuit grants sentencing relief. The petitioner's due process rights were violated when the state used jailhouse informants who lied. One admitted he was a habitual liar on the stand; the other committed perjury as to the benefits he received for testifying. Each informant said that the petitioner was the triggerman and had been involved with the murder (there was a co-defendant). There was overwhelming evidence of the petitioner's involvement at the guilt phase, but the testimony was prejudicial at the sentencing stage. The Ninth Circuit also held that the claim was not procedurally barred, and that the petitioner had raised the issue below.

U.S. v. Santini, No. 10-50391 (9-8-11)(per curiam with B. Fletcher, N. Smith, and Gwin, D.J.) The Ninth Circuit reverses importation and possession with intent convictions and remands for a new trial. The defendant at trial argued that a traumatic brain injury made him easy to manipulate and he was unaware of the marijuana placed in his car. The government's mental health expert opined that the defendant knew what he was doing, and that his prior "extensive contacts" with the police showed similar behavior that predated the injury. On appeal, the Ninth Circuit found that this was error under Fed. Rules of Evid. 404(b) and 702. The prior contacts were not similar (simple possession, indecent exposure) and the reliability is questionable. Moreover, the expert strayed from his expertise in opining on a rap sheet, which he admitted was confusing. This testimony was also more prejudicial than probative. The error was prejudicial.

Reina-Rodriguez v. U.S., No. 08-16676 (9-13-11)(Thomas with B. Fletcher and Gertner, D.J.). The 9th remands for resentencing through the lens of U.S. v. Grisel, 488 F.3d 844 (9th Cir. 2007)(en banc). In Grisel, courts must use a modified categorical approach to determine whether a "dwelling" in a Utah burglary statute meets the Guidelines' definition of a dwelling. Here, Grisel applies retroactively, and the court must use the information and judgment to see whether the defendant's Utah burglary conviction qualifies as a burglary of a dwelling. The court cannot conduct its own sua sponte investigation into public documents.

U.S. v. Alvarez-Moreno, No. 10-10045 (9-13-11)(Berzon with Paez and Bea). In this interesting, rare double jeopardy issue, the Ninth Circuit considers whether a court after a bench trial can order a new trial absent a defendant's motion under Fed. Rule of Crim. Pro. 33, where the defendant had not properly waived his right to a jury trial in the first place. The defendant and the government set this alien smuggling case for a bench trial, and the trial proceeded before it was recognized, after verdict that the defendant had not formally waived his right to a jury trial. Defense counsel moved to vacate but did not ask for a new trial. The district court recognized the error and cut to the chase with a new trial order. Alas, cutting to the chase meant clearing procedural and constitutional hurdles which trips up the order. Double jeopardy attached with the verdict. It is up to the defendant to move for a new trial, or he can appeal (in which case the case will likely be remanded

for a new trial). Alternatively, the defendant can decide to just accept the verdict. It is up to the defendant. The case is remanded.

Trigueros v. Adams, No. 08-56484 (9-14-11)(M. Smith with D. Nelson and Bybee). The Ninth Circuit reverses a denial of a habeas petition for untimeliness. The court finds that the California Supreme Court's consideration of the petitioner's pro se writ, request for informal briefing by the state, and the subsequent denial of the petitioner's writ, can be considered a finding of timeliness by the state.

Orelwits v. Sisto, No. 09-16142 (9-22-11)(Graber with Bea; O'Scannlain concurring). The district court ordered the state to conduct a new parole hearing. The Warden appealed. Maybe the court erred in ordering the hearing; after all, the Supremes in Swarthout subsequently held that the analysis was whether some due process was followed, not the decision itself. However, the ordering of a new hearing is not a release of the petitioner. Hence, it is not a final order. There were other claims unresolved. The appeal therefore was dismissed for lack of jurisdiction.

U.S. v. Baker, No. 10-10223 (9-20-11) (Graber with Silverman and Lynn, D.J.). The Ninth Circuit reverses the misdemeanor probation condition requiring compliance with DNA collection. The district court exceeded its statutory authority in ordering it, because the condition was limited to persons convicted of "qualifying offenses" or persons "in custody." In a concurrence, Judge Graber notes the distinction in treatment of defendants on parole and probation. Defendants on probation have slightly greater expectations of privacy than parolees. The Supremes have recognized this but the Ninth Circuit continues to treat the two sentences the same. A probationer should not be subject to a suspicionless search as would a parolee under Knights. Judge Graber calls for the Court to recognize this distinction in an en banc rehearing.