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Federal Defender Newsletter

December 2006

Edited by Tara I. Allen, Research & Writing Specialist

IMPORTANT ANNOUNCEMENTS

FEDERAL DEFENDERS OFFICE HOSTS HOLIDAY PARTY

On December 8, 2006, from 3:00 pm to 7:00 pm, the Federal Defenders Office will host its annual holiday party. The party will take place at 801 I Street, 3rd floor, Sacramento, California.

CRIMINAL CALENDAR UPDATE

Judge Shubb's Calendar: Effective January 8, 2007, Judge Shubb will hear his Criminal Calendar on Mondays at 8:30 a.m.

NEW FEDERAL RULES TAKE EFFECT DECEMBER 1, 2006

The following is a summary of new federal rules that take effect December 1, 2006. For the complete text of rules go to http://www.uscourts.gov/rules.

■ CRIMINAL RULES

Criminal Rule 5 (Initial Appearance) (allows the government to transmit certain documents to the court by reliable electronic means).
Criminal Rule 6 (Grand Jury) (technical amendment implementing the Intelligence Reform and Terrorism Prevention Act of 2004).
Criminal Rule 32.1 (Revoking or Modifying Probation or Supervised Release) (allows the government to transmit certain documents to the court by reliable electronic means).
Criminal Rule 40 (Arrest for Failing to Appear in Another District) (expressly authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who not only fails to appear but also violates any other condition of release).
Criminal Rule 41 (Search and Seizure) (allows the government to transmit certain documents to the court by reliable electronic means).
Criminal Rule 58 (Petty Offenses and Other Misdemeanors) (eliminates a conflict between the rule and Criminal Rule 5.1 concerning the right to a preliminary hearing and clarifies the advice that must be given to a defendant during an initial appearance).

■ EVIDENCE RULES

Evidence Rule 404 (Character Evidence Not Admissible to Prove Conduct; Exceptions;

Other Crimes) (clarifies that evidence of a person's character is never admissible to prove conduct in a civil case).
Evidence Rule 408 (Compromise and Offers to Compromise) (resolves conflicts in case law about statements and offers made during settlement negotiations admitted as evidence of fault or used for impeachment purposes).
Evidence Rule 606 (Competency of Juror as Witness) (clarifies that juror testimony may be received only for very limited purposes, including to prove that the verdict reported was the result of a clerical mistake).
Evidence Rule 609 (Impeachment by Evidence of Conviction of Crime) (permits automatic impeachment only when an element of the crime requires proof of deceit or if the underlying act of deceit readily can be determined from information such as the charging instrument).

■ APPELLATE RULES

Appellate Rule 25 (Filing and Service) (authorizes courts to adopt local rules requiring electronic filing).
New Rule 32.1 (Citing Judicial Dispositions)
(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.
(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.
Please note that new Appellate Rule 32.1(a) applies only to unpublished opinions issued on or after January 1, 2007.)

Note: This summary of new federal rules was provided by David Beneman, Federal Public Defender, Portland, Oregon.

NO CJA PANEL TRAINING IN DECEMBER

There will be no panel training in December. The next panel training for the Federal Defender's Office in Sacramento will be held January 2007. The next panel training in Fresno will take place Tuesday, January 16, 2007 at 5:50 PM at the Downtown Club, Kern Street. The topic is to be announced.

TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, if you would like the office to address a particular legal topic or practice area, or if you would like to be a speaker, please e-mail your suggestions to AFD Melody Walcott at the Fresno office at melody_walcott@fd.org or Senior Litigator AFD Caro Marks at the Sacramento office at caro_marks@fd.org, or AFD Rachelle Barbour at rachelle_barbour@fd.org.

CLOTHES CLOSET

The Clothes Closet is available to all AFPD and panel attorneys. It contains suits, shoes, socks, and shirts that clients can wear for court appearances. We also have some clothes that can be given away when necessary. Donations are greatly appreciated.

If you take borrowed clothes to the jail or U.S. Marshal's Office for your clients, please be sure to put either your name/phone number or our name/phone number on the garment bag so that the facility will be sure to contact us for pickup of the items.

See Becky Darwazeh at the Sacramento Office or Nancy McGee at the Fresno office to make arrangements to pick up or drop off clothes.

ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive the 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 Cynthia Compton 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.

NINTH CIRCUIT OPINIONS

NOTE: Portions of the case summaries are excerpted from the Ninth Circuit Opinion Summary Report.

CRIMINAL CASES

ARIZONA OFFENSE OF DISCHARGING A FIREARM AT A RESIDENTIAL STRUCTURE WAS NOT A CRIME OF VIOLENCE UNDER EITHER THE CATEGORICALLY OR MODIFIED CATEGORICAL APPROACH

United States v. Martinez-Martinez, 06-10015, 2006 WL 3290418 (11-14-2006)

The panel reversed the district court's enhancement of a sentence under U.S.S.G. § 2L1.2(b)(1)(A)(ii) based on the defendant's prior state-court conviction under Arizona Revised Statutes § 13-1211 for discharging a firearm at a residential structure, and remanded for resentencing. The panel held that because § 13-1211 applies even without some occupant feeling threatened by the attack against the structure, a violation of § 13-1211 is not categorically a "crime of violence" under § 2L1.2(b)(1)(A)(ii). The panel also held that the judicially-noticeable documents tendered by the government to the district court were, under the modified categorical approach, insufficient to show unequivocally that the defendant was convicted under the generic definition of a "crime of violence."

SENTENCE VACATED WHERE DEFENDANT DID NOT KNOWINGLY RECEIVE AND POSSESS PORNOGRAPHIC IMAGES FOUND IN HIS COMPUTER'S CACHE FILES

United States v. Kuchinski, 05-30607, 2006 WL 3392641 (11-27-2006)

The panel affirmed the defendant's conviction but vacated the sentence imposed by the district court following the defendant's guilty plea to possession of child pornography and bench-trial conviction of receipt of child pornography. The panel rejected the defendant's contention that once the government entered into a plea agreement, it was absolutely bound to the agreement's terms, even before the district court accepted the agreement. The panel also rejected the defendant's contention that Fed. R. Crim. P. 11(a)(2), which requires government consent to a conditional guilty plea, violates the separation of powers doctrine.

The panel explained that because the Double Jeopardy Clause does not prohibit the government from prosecuting greater and lesser-included offenses in a single prosecution, and because the defendant was not punished separately for the two counts, the panel rejected the defendant's double jeopardy attack on his trial for receipt of child pornography.

The panel determined however that it would

be improper for judgment to be entered on both counts if, as it seems, the counts were based on the same acts. The appellate court instructed the district court to revisit this question on remand and, unless some considerations not presently apparent require otherwise, to vacate the conviction on one of the counts without prejudice to reinstating it should the other count later fall on either direct or collateral review.

The panel also rejected the defendant's contention that the separation of powers doctrine is violated by Section 401(n) of the PROTECT Act under which the composition of the Sentencing Commission need not include any judges. Because the district court made it clear that it considered the Sentencing Guidelines to be advisory and exercised its discretion, the panel explained that it need not resolve in this case whether PROTECT Act Section 401(a)'s removal of discretion from the sentencing judges in the area of crimes against children violates a defendant's right to due process.

Further, the panel held that, in calculating the defendant's offense level under U.S.S.G. § 2G2.2(b)(6), the district court improperly considered child pornography images in the defendant's computer's cache files, which the defendant neither controlled nor knew the existence of. Judge Fernandez wrote: "Where a defendant lacks knowledge about the cache files, and concomitantly lacks access to and control over those files, it is not proper to charge him with possession and control of the child pornography images located in those files, without some other indication of dominion and control over the images. To do so turns abysmal ignorance into knowledge and a less than valetudinarian grasp into dominion and control."

HABEAS CASES

PETITION GRANTED AND IMMIGRATION MATTER REMANDED TO BIA WHERE GOVERNMENT FAILED TO ESTABLISH THE BASIS OF PETITIONER'S PRIOR CONVICTION AND FOR DETERMINATION OF WHETHER PETITIONER'S NEW OFFENSE QUALIFIED AS AGGRAVATED FELONY FOR REMOVAL PURPOSES

Nath v. Gonzales, 05-16557, 467 F.3d 1185 (11-3-2006)

The panel granted a petition for review from the Board of Immigration Appeals' denial of a motion to reopen. As a threshold matter, the panel concluded that 8 U.S.C. § 1252(a)(2)(B)(i) did not deprive the Court of jurisdiction to review the denial, where the motion to reopen sought to terminate removal proceedings, a form of relief not provided by any of the enumerated provisions listed in § 1252(a)(2)(B)(i), and where the motion to reopen amounted to a request for new relief.

On the merits, the panel held that the BIA erred by placing on petitioner the burden to prove that his first controlled substance conviction was vacated for substantive, non-immigration related reasons. The panel held that the record does not establish the basis of the state court's action, and the government therefore failed to carry its burden of proof as to the reasons the state set aside the first conviction. The panel also held that the BIA erred in using conviction documents from the vacated offense to conclude that petitioner's second drug conviction was for the same deportable offense. The panel remanded for the BIA to analyze the nature of petitioner's second offense. The panel noted that the BIA will need to reconsider the new offense in light of two cases recently argued before the Supreme Court, Lopez v. Gonzales, 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (U.S. 2006) (No. 05-547) and Toledo-Flores v. United States, 149 Fed. Appx. 241 (5th Cir. 2005), *cert. granted*, 126

S. Ct. 1652 (U.S. Apr. 3, 2006) (No. 05-7664). The panel also noted that the BIA will need to consider the effect of California's new drug statute requiring mandatory probation of first offenses for nonviolent drug offenders, California Penal Code § 1210.1.

HABEAS RELIEF GRANTED WHERE TRIAL COUNSEL'S REQUEST FOR A JURY INSTRUCTION IN CAPITAL MURDER CASE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICIAL

Lankford v. Arave, 99-99015, 2006 WL 3198656 (11-07-2006)

The panel reversed the district court's denial of Mark Lankford's capital habeas petition. In this pre-AEDPA case, the panel held that trial counsel provided ineffective assistance by requesting jury instructions on accomplice testimony that were correct under federal law but clearly in error under Idaho law, and that the error was not harmless.

Mark's brother, Bryan, agreed to testify for the prosecution to avoid receiving the death penalty. Trial counsel requested that the jury be instructed that it could convict based on the uncorroborated testimony of an accomplice. The district court found, and the panel agreed, that trial counsel was ineffective for requesting a jury instruction that was an incorrect statement of state law—one that made it easier for the jury to convict Mark—and there was no tactical reason to make such a request. The forensic evidence overwhelmingly indicated that either or both of the Lankford brothers committed the murders, but it was Bryan's testimony alone that implicated Mark. As such, the panel held Mark was prejudiced by counsel's ineffectiveness. The panel declined to address Mark's remaining issues, but noted the evidence presented in Mark's other ineffective assistance of counsel claims supported his theory that it was Bryan who committed the murders.