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Federal Defender Newsletter
December 2009

CJA PANEL TRAINING

There will be no panel training sessions this month. Happy Holidays!!

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.

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 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.

ANNOUNCEMENTS

Holiday Party

The annual Holiday Party will be Friday, December 11, 2009 from 3:00 to 7:00 p.m. at 801 I St., 3rd Floor. As always, everyone is welcome -- attorneys, staff, family members. (Yes, we'll have a kids' room again.)

Congratulations to Kurt Heiser and Ana Rivas!!

Kurt and Ana's son, Shane Manolo Heiser, was born on November 12th. Mom and baby are doing great, and Kurt is already back at work (but pretty tired)!

NOTABLE CASES

United States v. Liera, No. 07-50546 (11-4-09). In an appeal from an alien smuggling conviction, the Ninth Circuit (Pregerson, joined by Nelson and Thompson) hold that defendant's statements should be suppressed because of the delay in getting him before a magistrate. The Ninth Circuit also holds that a statement made by the mother of one of the smugglees as to the

cost of smuggling was not a co-conspirator statement and should be precluded. The errors were not harmless. The Ninth Circuit found the delay was a violation of McNabb-Mallory and 18 U.S.C. § 3501(c). This statute provides a six hour safe harbor for appearances, and allows for latter appearances if the delay is reasonable. The Supremes reaffirmed the reasonableness test recently in Corley v. United States, 129 S.Ct at 1563. The delay here was unreasonable because it was not a result of a shortage of personnel, or other exigency, but a result of a conscious decision to continue an interrogation. This was not harmless given the focus of the government on these second statements and the fact that the other evidence was not overwhelming. The Ninth Circuit also held that the statement by a material witness about what his mother said was the rate for being smuggled was hearsay because the mother was not a co-conspirator.

United States v. Ruckes, No. 08- 30088 (11-9-09). This is a fourth amendment case following Arizona v. Gant, and applying the new test for car searches at arrest. Police stopped defendant here for driving 15 miles over the speed limit. A records check indicated that he was also driving on a suspended license. As a result, the police arrested the defendant and placed him in the police car. The police then asked him if anyone could take possession of the car and drive it away. If not, the car could be impounded under state law. The defendant said he could turn the car over to his mother, but she was unavailable at this time and could not drive it away from the scene. The police then searched the vehicle as a search incident to arrest and as an inventory search. They found crack and a pistol. The Ninth Circuit (Tallman joined by M. Smith and Reavley) found that Gant prohibited the search. The arrest was for a suspended license, and the defendant, at the time of the search, was locked away in the back of a police car. However, under the doctrine of inevitable discovery, the Ninth Circuit held that an inventory search would have revealed the weapon and drugs. The Ninth Circuit does strongly caution that the inventory/inevitable discover approach is not an exception that swallows the Gant rule. Rather, the police must be careful to satisfy the requirements of an inventory search -- that is, the car in fact would have been impounded -- and that there is legal justification, and that an inventory search would have taken place. This is a case by case, car by car, approach.

United States v. Berger, No. 08-50171 (11-30-09). Ninth Circuit panel has issued an important new ruling, and created a circuit split, concerning the calculation of loss under the federal sentencing guidelines for economic frauds. The defendant was convicted of twelve counts of bank and securities fraud. The Ninth Circuit held that the district court's loss calculation approach was flawed. It also held that the civil loss causation principle of Dura Pharmaceuticals did not apply in the context of calculating loss for guideline sentencing purposes. The Second and Fifth Circuits have both expressly adopted the Dura Pharmaceuticals principle. In light of this new Berger ruling and the potential importance of this issue in many white-collar sentencing cases, it may be only a matter of time before the Supreme Court needs to get in the mix on this guideline-calculation federal sentencing matter.

United States v. Roblero-Solis, No. 08-10396 (12-2-09). To accommodate the enormous number of prosecutions for illegal entry into the United States, the district court for the District of Arizona (Tucson) adopted a procedure for the taking of pleas en masse

intended to preserve the rudiments of Fed. R. Crim. P. 11 and the constitution. One magistrate judge is assigned each week full time to the handling of these cases and that in a year the court has handled 25,000. The procedure has been in practice for at least two years and is apparently followed in several other federal courts whose districts border on Mexico. The Ninth Circuit (Noonan, joined by W. Fletcher and Duffy) held that the procedure did not meet the standard set forth in Rule 11. The Rule cannot be disregarded in the name of efficiency nor to be violated because it is too demanding for a district court to observe. The Ninth Circuit stresses that Rule 11 requires a personal addressing of the defendant. No judge, writes the court, could determine whether 50 defendants answer "yes" to questions, or stand mute, or equivocate. A medley of "Si"s do not meet the standards of Rule 11.

United States v. Mancinas-Flores, No. 08-10094 (12-2-09). The defendant wanted to plead guilty to alien smuggling (40 year sentence with allegations that hostage taking and guns involved). He had a deal, but the court cut him off when he tried to explain at the plea colloquy under Rule 11 that while he was pleading, he really wasn't guilty of the firearm charge. Without further explanation, the court ordered the trial to commence. The defendant received a life sentence after trial. The Ninth Circuit (Adelman [district court judge from the ED Wisc.] joined by Tashima, with a dissent by Rymer) remands for a new plea hearing. The argument was that the court failed to follow Rule 11. The Ninth Circuit agreed, and criticized the court for failing to disclose reasons why it was rejecting the plea. As such, the court failed to adequately exercise its discretion, and therefore abused it.

United States v. Kuo, No. 08-10314 (12-3-09). This was a prosecution for violation of civil rights arising from a conspiracy to force Chinese women into prostitution under 18 USC § 241. The victims were recruited to America Samoa, and then held hostage and forced to work as sex slaves. The victims escaped, alerted the police, and this prosecution resulted. The defendants pled guilty. In assessing restitution, the court used a calculation that attempted to disgorge the ill-gotten gains from the forced prostitution. The Ninth Circuit reversed finding that restitution for a violation of § 241 is limited by the provisions of § 3663, which does not include the ill-gotten gains. The court noted that this is due to the government's choice to pursue a civil rights prosecution instead of a human-trafficking one.