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Federal Defender Newsletter
June 2009

Robert J. ("Bob") Peters

We are greatly saddened to report that CJA panel member, Bob Peters, passed away on Tuesday, June 9. Bob had been a well-respected and well-liked member of the federal and county criminal defense bar for decades. He will be sorely missed. Memorial services are still in the planning stages, but we will circulate a general e-mail once we receive notification. In the meantime, our deepest condolences go out to all of Bob's family, friends, and associates.

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 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 CJA PANEL TRAINING

CJA Panel Training in Fresno and Sacramento will resume in September. Have a nice summer!

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

Non-Capital Habeas Seminar

Please save the date: On October 2, 2009, the Federal Defender's Office will be presenting the "2009 Non-Capital Habeas Seminar: Navigating Through the Murky Waters of Habeas" at the Delta King in Old Sacramento. Jeff Fisher will be the keynote speaker. Please contact Carolyn Wiggin at carolyn_wiggin@fd.org with any questions.

Forensic Evidence Training
Mark your calendars for Friday, July 10, 2009 at 11:30 A.M. to 1:00 P.M.
Kenneth Moses will present a training seminar on forensic evidence.
Kenneth Moses has over forty years of experience in forensic evidence. He established the Crime Scene Investigations Unit of the San Francisco Police Crime Laboratory in 1983 and was instrumental in the installation of automated fingerprint systems throughout the United States. His experience includes examination of a wide variety of physical evidence and expert testimony. Over the years, he has worked with the defense, with local, state, and federal agencies, and with Innocence Projects in New York, Texas, California, and Illinois. He has been active in national efforts to establish professional standards in forensic science. Mr. Moses currently
serves in private practice as director of Forensic Identification Services in San Francisco.

The session will be held at the Office of the Federal Defender, 801 I Street, Fourth Floor Conference Room. Defense attorneys, investigators, and paralegals are welcome. You are invited to bring your lunch to this event. Please email Lissa Gardner at Lissa_Gardner@fd.org to confirm that you will be attending.

Public Comments and Hearing on Death Penalty Procedure
The California Department of Corrections and Rehabilitation (CDCR) is collecting public comments on their revised lethal injection process. This process is a step toward resuming executions in California. Any member of the public may comment on any aspect of the proposed regulations. Written comments may be submitted by mail, fax, or email. They must be received by June 30, 2009 at 5:00 p.m.

Comments should be directed to:
Mr. Timothy Lockwood, Chief, Regulation and Policy Management Branch, CDCR
P.O. Box 942883, Sacramento, CA 94283-0001, Email: rpmb@cdcr.ca.gov or Fax: (916) 255-5601

A public hearing will be held to receive comments about the proposed regulations concerning the lethal injection process in California. After the hearing, anti-death penalty activists will proceed to the Capitol to share their views with elected officials. Free buses/carpooling from Oakland and San Francisco will be available. For more information please contact Stefanie at stefanie@deathpenalty.org or call Death Penalty Focus at 415-243-0143.

Hearing Date and Place:
Tuesday, June 30th, 9am to 3pm
Department of Health Services
The Auditorium, 1500 Capitol Ave.
Sacramento, CA 95814

CLIENT CLOTHING & FOOTWEAR

The clothes closet is available to all AFDs and panel attorneys. It contains court clothing that clients can wear for 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 put either your name/phone number or our name/phone number on the garment bag so that the facility will contact us for pickup of the items. Please note that you do not have to pay for the cleaning of any items used. The district court has graciously arranged for funds to pay the cleaning costs.

See Becky Darwazeh at the Sacramento Office or Nancy McGee at the Fresno office

to pick up or drop off clothes.

NOTABLE CRIMINAL CASES

Supreme Court:

In Bobby v. Bies, No. 08-598, the court decided that a state prisoner who was sentenced to death before Atkins v. Virginia outlawed the death penalty for mentally retarded defendants, and who was found at the time to have a level of mental retardation that had "some weight" in mitigation of his crime, may now be subjected to an Atkins proceeding to determine whether his level of mental impairment allows his execution.

In Abuelhawa v. United States, No. 08-192, the court held that a person's use of a telephone to arrange a misdemeanor purchase of illegal drugs does not violate the provision of the Controlled Substances Act that makes it a felony to "facilitat[e]" felony drug distribution, 21 U.S.C. §843(b).

Ninth Circuit:

United States v. Amezcua-Vasquez, No. 07-50239 (6-1-09). The Ninth Circuit (Canby joined by Kleinfeld and Bybee) reverses a within-guidelines illegal reentry sentence as substantively unreasonable under Section 3553(a). The court held that the defendant's illegal reentry sentence was substantively unreasonable, because Guideline Section 2L1.2 does not mitigate the sentence based on age of priors. The defendant had been in this country for almost sixty years. He had become a permanent resident in 1957. In 1981, he was convicted of aggravated assault in a gang-related bar fight. His four year sentence was suspended, but his probation was eventually revoked and he served a couple of years in prison. He was removed to Mexico in 2006 at the age of 51. He was caught in the U.S. two weeks after his removal. At sentencing for illegal reentry after removal, he was determined to be an aggravated felon and got 52 months. The Ninth Circuit stressed that under these specific circumstances, the court's sentence failed to give due weight to the section 3553 factors. The seriousness afforded the 16 level adjustment was unreasonable given the staleness of that conviction, which was not an aggravated felony back in 1981. The sentencing court could consider the nature of the prior and the criminal history, but had consider its age.

United States v. Begay, No. 07-10487 (6-1-09).) The Ninth Circuit (Reinhardt, Hug, and concurrence by Bright) vacated the defendant's first degree murder convictions for insufficient evidence and issued an order to show cause against the prosecutor for misciting the record. The case involved two murders on an Indian reservation. The defendant exchanged words with the driver and passenger of a stopped car, walked back to his car, got a shotgun and proceeded to fire through the driver's side, killing the driver and the passenger. On appeal, defendant argued that no evidence was produced to show premeditation. The evidence presented by the government was that the defendant was "pretty drunk." Other offenses (i.e. second degree murder) were equally plausible. The Ninth Circuit agreed and vacated the murder convictions. The Ninth Circuit criticized the government heavily for arguing premeditation by describing the defendant as acting "calmly" and "methodically" with absolutely no evidence to support this.

United States v. Maness, No. 06-30607 (5-19-09). The 9th considers the issue of self-representation at resentencing. The court should have allowed the defendant to represent himself at the resentencing. This was error, but harmless.

United States v. Price, No. 05-30323 (5-21-09). This is a strong opinion on the prosecutor's obligation to disclose Brady material. The defendant was convicted of being a felon in possession of a gun found under the driver's seat of a car in which he was a passenger. The key piece of evidence against the defendant was testimony by a witness that she had seen the defendant with a gun in his waistband 15 minutes prior. This witness, by all accounts, had little regard for truth and honesty. She had a lengthy history of run-ins with the police and criminal convictions. None of this was disclosed to defense counsel despite a request. The witness was attacked at trial for faulty perception and memory, but the Brady material was not discovered until after the trial (it was disclosed in defendant's brother's case). The Ninth Circuit (Reinhardt, joined by Goodwin and Pregerson) was aghast at the Brady violation. A prosecutor has the responsibility to check with law enforcement for such information. "Under longstanding principles of constitutional due process, information in the possession of the prosecutor *and* his investigating officers that is helpful to the defendant, including evidence that might tend to impeach a government witness, must be disclosed to the defense prior to trial. It is equally clear that a prosecutor cannot evade this duty simply by becoming ignorant of the fruits of his agents' investigations." The error was prejudicial. The conviction is vacated and the matter remanded for a new trial.

United States v. Nguyen, No. 07-30197 (5-15-09). Crawford and confrontation are issues in this appeal involving conspiracy to transport stolen property, transportation of the property, and conspiracy for money laundering. The offenses arose from a scheme to misbrand ultrasound probes and to defraud the supplier. The government had a FBI agent testify about statements made by a witness and possible coconspirator during interrogation. This was a Crawford violation, and was still hearsay even if the statements were elicited by counsel of the codefendant. The Ninth Circuit (Gould and Beezer, Callahan dissenting) found this to be prejudicial. The Ninth Circuit also found error in the conviction for misbranding because the jury instructions lacked the element of materiality.

United States v. Osazuwa, No. 08-50244 (5-7-09). This is an interesting opinion concerning the interplay between FRE 608 (specific instances of untruthfulness) and FRE 609 (prior convictions). The Ninth Circuit (Graber joined by Pregerson and Wardlaw) holds that 608 only refers to specific acts that have not resulted in a felony conviction. The case involved an inmate, on the cusp of release, supposedly getting into a fight with a guard. The guard said the defendant picked the fight after being ordered to change clothes. The defendant said the guard came in with an attitude and was so angry that he lost his balance, grabbed defendant's shirt, and both men fell. There were no other witnesses. At trial, the prosecutor used the facts underlying the defendant's 2003 bank fraud conviction to impeach him about lying about the scuffle. The district court let it in under 608. The 9th weighed the two constructions, and concluded that it would be unfair to restrict cross under 609, only to let it in under 608. The 5th, 8th and 10th Circuits also hold that 608 only applies to specific instances not resulting in a felony conviction. Thus, the 9th holds "that Rule 608(b) permits impeachment only by specific acts that have not resulted in a criminal conviction. Evidence relating to impeachment by way of criminal conviction is treated exclusively under Rule 609...."

Under Rule 609, the details should have been precluded, and may not include collateral details of the crime of conviction. A defendant doesn't "open the door" by providing a truthful answer to a direct question under 609. Given the issues of credibility, the error was prejudicial and not harmless.