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Federal Defender Newsletter
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CJA PANEL TRAINING

There will be no panel training sessions in June, July, or August. CJA training will resume in September. Have a great summer!

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 women's clothing and men's dress socks.

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.

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

United States Supreme Court

Graham v. Florida: LWOP for Juveniles
The Supreme Court held that the Eighth Amendment prohibits a sentence of life without the possibility of parole for juveniles convicted of offenses other than homicide. Justice Kennedy, writing for Justices Stevens, Ginsburg, Breyer and Sotomayor, for the first time extended the framework for a categorical challenge under the Eighth Amendment to a sentence to a term of years (as opposed to death). The Court found that although thirty-nine jurisdictions permit LWOP sentences for juveniles who commit

offenses other than homicide, in practice the sentences are infrequently imposed, thereby permitting it to conclude that "a national consensus has developed against it." The Court based this finding, in part, on a study submitted by the respondent juveniles that it independently supplemented in order to answer criticisms by the state.

Unsurprisingly, the opinion has a number of useful arguments in support of mitigated sentences for juveniles. For example, the Court upheld its findings in Roper that juveniles are less culpable than adult offenders as shown by "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds." It goes further, however, noting that people who do not kill or intend to kill also have relatively diminished culpability, and that life without parole sentences "share some characteristics with death sentences that are shared by no other sentences," including the fact that it is "a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence."

Perhaps most useful, however, is the Court's analysis of a sentence of LWOP for a non-homicide juvenile offender against the four purposes of sentencing: retribution, deterrence, incapacitation and rehabilitation. Defense counsel can use the analysis as a roadmap for sentencing memoranda in every case. More salient features of the opinion include (1) the Court's reminder that "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender;" (2) its acknowledgment that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense;" (3) its conclusion that deterrence is not sufficient to justify the "grossly disproportionate" sentence of LWOP for an offender with a "diminished moral responsibility;" (4) its similar conclusion that "[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity," and that incapacitation is an inadequate justification for an LWOP sentence where the characteristics of the defendant raise a question as to whether the offender is in fact incorrigible; and (5) its notation that people sentenced to LWOP "are often denied access to vocational training and other rehabilitative services that are available to other inmates," which is true for many adult offenders serving time in BOP custody.

Although each of the Court's points is specifically directed toward juvenile offenders, they can and should be applied to other offenders with reduced culpability facing disproportionately severe sentences.

Justice Stevens separately concurred, joined by Justices Ginsburg and Sotomayor. Chief Justice Roberts concurred in the judgment, and Justices Thomas, Scalia, and Alito dissented.

United States v. O'Brien, No. 08-1569 (5-24-10).

The Court held that, under the federal statute that criminalizes using or carrying a firearm in relation to a crime of violence or a drug trafficking crime and that authorizes a 30-year mandatory minimum sentence if the firearm was a machine gun, the fact that the firearm was a machine gun is an offense element that must be charged in the indictment and proved to the jury beyond a reasonable doubt. The Court notes that the "dramatic, sixfold increase" in the mandatory

minimum between a 924(c) with a regular firearm and one with a machine gun "strongly suggests a separate substantive crime." Further, "[t]he immense danger posed by machine guns, the moral depravity in choosing the weapon, and the substantial increase in the minimum sentence provided by the statute support the conclusion that this prohibition is an element of the crime, not a sentencing factor." Thomas concurred in the judgment reiterating his view that factors that increase a mandatory minimum should be treated as elements of the offense.

Carr v. United States, No. 08-1301 (6-1-10). The Court held that SORNA does not apply by its terms to sex offenders whose interstate travel occurred before the Act went into effect on July 27, 2006. The Supreme Court reversed the Seventh Circuit's decision upholding a conviction based on pre-Act interstate travel. The Court construing the terms of § 2250 – its text, verb tense, and grammatical structure – as "forward-looking" only. The Court also determined that the elements - requirement to register, travel, failure to register – were sequential.

Justice Scalia concurred, joining most of Justice Sotomayor's opinion except for the part in which the Court examines the Act's legislative history in support of the Court's construction. In his view, the terms of the statute are unambiguous, so reference to legislative history is unnecessary.

With this statutory construction, the Court avoided deciding whether the statute violates the Ex Post Facto Clause. The decision offers a rich discussion of verb tense and grammar in the context of legislative enactments. The Court pointedly noted that it was not deciding whether SORNA applies to persons whose convictions for sex offenses occurred before SORNA was enacted in July 2006, as required by the AG's February 2007 "interim" rule, or whether that rule was properly promulgated under the APA, which are questions that have also created a conflict in the circuits. Because Carr traveled and failed to register before SORNA was enacted, the Court had "no occasion to consider whether a pre-SORNA sex offender whose travel and failure to register occurred between July 2006 and February 2007 [the date of the interim rule] is subject to liability under § 2250."

Ninth Circuit Court of Appeals

Maxwell v. Roe, No. 08-55534 (5-20-10)(Paez with Pregerson and Noonan). The petitioner had a history of mental illness, exhibited strange and bizarre behaviors during trial, and even attempted suicide. The trial court still thought he was feigning and refused to hold a competency hearing. This refusal, in light of the evidence, was unreasonable. A defendant has the due process right not to be tried nor convicted while incompetent. The state courts failed to see if he was competent. As such, because twelve years has elapsed, the remedy is for a new trial rather than trying to look back and make a competency determination.

Congratulations to AFD Allison Claire for the win!

Uppal v. Holder, No. 07-72614 (5-21-10). Analysis of assault conviction as crime involving moral turpitude must show elements of statute meet case law definition of crime.

Lunberry v. Hornbeak, No. 08-17576 (5-25-10)(Noonan joined by M. Smith, and concurrence by Hawkins). A cold case, false confessions, and a possible "other suspect" all lead the 9th to reverse a denial

of a habaes and grant relief. The petitioner's husband was murdered in 1992, and she was found at a mall with kids. There was evidence pointing to drugs and a drug deal, but nothing came of it. Years later in 1991, the case was reopened. The police interviewed petitioner quite forcefully, and after denying shooting her husband, she eventually said "yes" she did it. She then recanted. A defense expert opined that it was a false confession. However, the defense never called the expert. The trial court precluded evidence of another suspect, including a confession. The Ninth Circuit granted relief on the preclusion of the other's suspect's "confession" under Chambers. This violated the established due process rights to present a defense. Hawkins concurs to state that he would find IAC because of the failure to call the defense expert on false confessions.

Taylor v. Sisto, No. 09-15341 (5-25-10)(Noonan joined by Berzon; dissent by Ikuta). The Ninth Circuit grants a petition on a conviction for assaulting a peace officer. The relief was granted on a voir dire issue: the state trial court gave a preinstruction to the prospective jurors in which he told them to take their past experiences with how people act, behave, and why, their opinions, plus biases and prejudices, and place them in a box and to not bring them into the courtroom. The image of the box came up repeatedly during voir dire, in which jurors kept saying that they had trouble not referring to their past experiences. The problem with this is that it rendered the jurors automatons The state courts deemed the preinstruction "odd" but found no error. The Ninth Circuit did. The Ninth Circuit reasoned that jurors had to bring in their life experiences, and an instruction forbidding them not to make reference to their own backgrounds was wrong. A defendant was entitled to jurors with a range of diversity of experiences.

Congratulations to CJA panel attorney (and CCAP staff attorney) Deanna Lamb for the victory.

Pearson v. Muntz, No. 08-55728 (5-24-10). The Ninth Circuit (per curiam, by Reinhardt, Berzon, and Milan Smith), held that the district court properly determined that state court's decision approving governor's decision to reject parole was unreasonable application of “some evidence” test.

US v. Orozco-Mesa, No. 09-50192 (5-26-10)(Canby joined by Gould and Ikuta). In an illegal reentry prosecution, the government introduced a certificate of nonexistence of record (CNR) to show that there was no record that the defendant had sought or had been granted permission to reenter the US. The introduction of the CNR violated the defendant's confrontation rights under Crawford and under Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) (lab tech affidavit). The government conceded error. The Ninth Circuit found it harmless.

US v. Blinkinsop, No. 09-30120 (10-27-10)(Goodwin with Hawkins and N. Smith). The defendant pled guilty to receiving child pornography and received a 97 month sentence (bottom of the guidelines) and numerous special conditions of supervised release. On appeal, the Ninth Circuit vacated two of the SR conditions and remanded the conditions to the district court. The conditions related to a bar on the use of a computer and contact with children. The complete bar on computers violates US v. Riley, 576 F.3d 1046 (9th Cir. 2009) and must be amended. The contact with children does not take into account defendant's request to attend his own children's school activities. This barring condition can be amended to include

safeguards in such circumstances.

U.S. v. Castro, No. 09-50164 (6-4-10). The Ninth Circuit (Goodwin, joined by Canby and Fisher) held that lewd or lascivious act on child of 14 or 15 years by defendant over ten years older (Cal. Penal Code § 288(c)(1)) is not crime of violence under the reentry guideline. For the purpose of the sentencing guidelines, a crime of violence includes "sexual abuse of a minor." The Ninth Circuit held that § 288(c)(1) is broader than the generic offense of sexual abuse of a minor. Applying the categorical approach, the Ninth Circuit determined that federal law required "abuse" which means conduct that causes "physical or psychological harm in light of the age of the victim in question." Section 288(c)(1) is "broader than the generic crime because it criminalizes conduct that does not necessarily constitute abuse." That section does not expressly include physical or psychological abuse as part of the crime, nor does it address conduct that is per se abusive. Nor does the conduct prohibited by § 288(c)(1) necessarily meet an alternative definition set forth in Estrada-Espinoza because it does not require a sexual act as defined in 18 U.S.C. § 2243. The Ninth Circuit did not consider a modified categorical approach because the government did not request it.