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Federal Defender Newsletter
September 2008

CJA PANEL TRAINING

For the Sacramento panel, on September 17, 2008 at 5:30 p.m., Rachelle Barbour will be speaking on "Deconstructing the Sentencing Guidelines." Panel training is held at 801 I Street, 4th floor, in the old courtroom. For the Fresno panel, on September 16, 2008 at 5:30 p.m., USPO Hubert Alvarez will be speaking on "Probation's Successful and Productive Re-entry Employment Program" at 2120 Kern St.

NINTH CIRCUIT ECF TRAINING

On September 11, 2008 from 10:00 to 11:00 a.m., AFD Ann McClintock is presenting a training on the Ninth Circuit's new electronic case filing system. The training is being held at the Federal Defender's Office, 801 I Street, in the 3rd floor large conference room. The training will be repeated from 2:00 to 3:00 p.m. as well. A future training will also be scheduled. Please contact Ann regarding training and invite anyone in your office who files documents with the Ninth Circuit to attend.

EASTERN DISTRICT CONFERENCE

The annual Eastern District Conference will be held November 14-16 at the Napa Valley Marriot Hotel and Spa. The deadline to make hotel reservations is October 14, 2008. In addition to the usual program, the district dinner this year
will take place at the Clos Pegase Winery and will include a wine tasting, reception, and tour of the winery's art collection.
If you are interested in attending and have not received an invitation, please contact Barbara Wilson, Judicial Asst. to Chief Judge Ishii in Fresno at 559-499-5660 or Marie Heltzel in Sacramento at 916-930-4115.

NEED FOR ADDITIONAL QUALIFIED CJA PANEL ATTORNEYS

As many of you know, due to the number of multi-defendant cases this fiscal year, there has been an increase in CJA panel appointments. Several current panel members are unable to accept new appointments. If you know of qualified, experienced defense counsel who might be interested in joining the federal CJA panel,

please encourage them to apply and to begin attending monthly panel meetings.

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 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.

CLIENT CLOTHING & FOOTWEAR

The clothes closet is available to all AFDs 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 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.

UNITED STATES SUPREME COURT OPINIONS

Cuellar v. United States, 128 S. Ct. 1994 (6-2-08). The Supreme Court reversed the money laundering conviction in a unanimous decision written by Justice Thomas, holding that the statute under which petitioner was convicted requires proof that the transportation was "designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds. § 1956(a)(2)(B)(i). Although this element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that a defendant concealed the funds during their transport.

Indiana v. Edwards, 128 S. Ct. 2379 (6-19-08). The decision, written by Justice Breyer, held that "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

Greenlaw v. United States, 128 S. Ct. 2559 (6-23-08). The defendant filed a direct appeal of his sentence; the government did not appeal the district court's failure to make two sentences under 18 U.S.C. §

924(c) – a 5-year sentence and a 25-year sentence – consecutive to each other and to other counts. The appellate court nevertheless remanded for imposition of the enhanced sentence, finding that the effect of the error was not "speculative." The Supreme Court reversed, in a 7-2 decision written by Justice Ginsburg. The Court held that, absent a government appeal or cross-appeal, a court of appeals does not have the power to sua sponte raise a defendant's sentence, even if it is to correct a plain error.

NINTH CIRCUIT OPINIONS

CRIMINAL CASES

U.S. v. Juvenile male, 528 F.3d 1146 (6-12-08). In a per curiam decision (Berzon, Ikuta, and Singleton), the 9th remands a disposition for violations of section 5033. Here, the juvenile was arrested in an alien smuggling operation, and supposedly said he was an adult. This led to various hearings and delays as the defendant struggled to prove he was a juvenile. He finally succeeded with the help of the Mexican Consulate and certified documents. Because of the delay, the timing and procedural safeguards of the juvenile act were violated in every conceivable way. The 9th remands so the district court can determine whether the violations led to the confession and whether it was harmless. Berzon concurs and dissents. She would find that there was no need for a remand as the violation was clearly harmful, and the government did not argue for harmlessness.

U.S. v. Locklin, 530 F.3d 908 (6-25-08). The 9th found an Apprendi violation in a prosecution for failure to appear. Defendant faced a felon in possession charge. He fled while the jury was being picked, and was subsequently found and brought back. He was acquitted on the felon in possession charge, but convicted on a flight charge. The government failed, however, to send to the jury what the underlying charge was, because that has an impact on the length of sentence of flight. Because the government failed to prove the underlying charge, the most the defendant can be sentenced to is one year. The conviction is affirmed; the sentence is vacated and remanded.

U.S. v. Chapman, No. 528 F.3d 1215 (6-23-08). Standing still cannot constitute an assault, although the government so argued. Defendant was approaching the POE in San Ysidro when a Border Patrol ordered him to stop and move to the sidewalk. He did stop, but did not move. The agent tried to escort him to the side but could not move him because the defendant had tensed up and stood rigid. The agent then tried to arrest him for interference, but in trying to cuff him, slipped. The agent then whacked him with a baton, to which defendant said, "hit me again." The agent did. All this resulted in a misdemeanor charge of assault under 18 USC § 111(a). There's only one problem: the act must be a simple assault for a misdemeanor. The 9th (Wardlaw joined by Thompson and Reed) held that the act of standing still was not simple assault. The conviction was vacated.

U.S. v. Harrell, 530 F.3d 1051 (6-30-08). The Ninth Circuit (Brunetti joined by Reinhardt and Fisher) order the government to return forfeited property, such as satellite receivers, smartcards, computers, hard drives and more, because they are not illegal, and have not been modified for an illegal purpose, and were not proceeds of an illegal scheme. The government had charged the defendant with pirating signals. The case was dismissed after the court granted the

defendant's suppression order. The government here failed to show that the property was altered or designed for illegal purposes. Congratulations to FPD Dan Broderick for the win.

U.S. v. Whitehead, 532 F.3d 991 (7-14-08). The Ninth Circuit (per curiam -- Kozinski and O'Scannlain) affirms a variance sentence. Defendant was accused of pirating one million dollars of DirectTV access. He went to trial and was convicted. At sentencing, the court gave acceptance and then a variance from 3 years in prison under the guidelines to probation, 1000 hours of community service, and restitution. Defendant had presented evidence of rehabilitation, family responsibilities, the offense was non-violent and not a threat, and restitution. The court stresses that the Supremes have empowered district courts. Appellate courts in reviewing sentences cannot just say that they would have given a different sentence. Here, the Ninth Circuit affirmed the variance because the district court weighed and balanced § 3553 factors, and justified its sentence appropriately.

U.S. v. Miranda-Lopez, 532 F.3d 1034 (7-17-08). 18 USC § 1028A concerns false identifications. The statute is confusing as to whether the defendant "knowingly" possessed an identification of another. That is, does the defendant need to know, as an element, that the identification he uses belongs to another? The case revolves around whether the adverb "knowingly" refers to "another person" or "possesses." The Ninth Circuit (Silverman joined by Berzon) holds that it refers to the person. This sets up a circuit split, with the 4th, 8th and 11th Circuits. The case is one of statutory interpretation and the rule of lenity.

U.S. v. Caseres, 533 F.3d 1064 (7-21-08). This is an important car search case. On appeal from denial of a suppression motion, the Ninth Circuit (Pregerson joined by Bright and Wardlaw) finds that the police can't just search a car because the defendant was arrested outside it. The Ninth Circuit finds that there was no probable cause to arrest the defendant for the traffic violations. However, there was later probable cause to arrest him for threatening an officer. The Ninth Circuit then finds the car search illegal and suppresses the evidence. The opinion goes through all the justifications the government offers -- search incident to arrest, inventory, parole -- and finds them wanting. The court keeps going back to the fact that the defendant had left the car, and was going home. The car was parked close to his house, on a residential street, and all the so-called justifications for search, close to the defendant upon arrest, or need to secure the vehicle, were not present.

U.S. v. Ruff, 535 F.3d 999 (8-1-08). The district court sentenced the fraud defendant to a year and a day with a recommendation that he serve the sentence in a specific facility to allow work release. The facility, however, could only accept someone if he was on supervised release. Less than a week later, the court held another hearing and amended its judgment to be one day imprisonment and three years SR, with a condition that he stay at the facility for a year and a day. The government appealed, arguing that the court overstepped its authority with its modification. The government argued that the court did not go through all the § 3553 factors at the second hearing, and that the sentence itself was unreasonable. The Ninth Circuit (Fisher, joined by Ikuta) disagreed and affirmed the sentence. The court held that the district judge obviously considered the § 3553 factors in its first hearing, and its second hearing was a continuation. As for reasonableness, the court upheld the sentence under the district court's discretion

articulated in Gall and by the Ninth Circuit in Whitehead.

Garcia-Aguilar v. U.S. District Court for So. Calif., et al., 535 F.3d 1021 (8-6-08). The Ninth Circuit held that a district court must accept unconditional guilty pleas. The defendants were charged with 8 USC § 1326, but the government had not specifically charged that they had been removed after conviction of a felony under § 1326(b)(2). They plead straight up to 1326 before a magistrate judge. Before sentencing, the 9th ruled in Covian-Sandoval that Apprendi applies. The government argued that the district court should not accept the plea because the colloquy incorrectly stated that the max was 20 years and not 2 years. The Ninth circuit (Kozinski, joined by McKeown and Jones) said this was disingenuous; the government failed to allege what it should have, and the defendants had the right to have their pleas accepted. The Ninth Circuit does state that these cases "show again why the ten most terrifying words in the English language may be, 'I'm from the government and I'm here to help you.'"

U.S. v. Goddard, No. 07-50402 (8-11-08). The Ninth Circuit takes up the issue of supervised release computer conditions that absolutely forbade any software change, or upgrade without express approval. The court (Rymer, joined by Hall and Kleinfeld) acknowledge that the pervasiveness of computer upgrades and packages that stream in at work would make this condition untenable and effectively bar employment. The court therefore allowed personal computer use if approved by the probation officer, and would not require prior approval for automatic or routine upgrades, deletions, updates, installations , repairs or modifications.

U.S. v. Straub, No. 07-30182 (8-15-08). The Ninth Circuit (Bybee, joined by D. Nelson and Kleinfeld) held that for a defendant to compel use immunity the defendant must show that: (1) the defense witness's testimony was relevant; and (2) either (a) the prosecution intentionally caused the defense witness to invoke the Fifth Amendment right against self-incrimination with the purpose of distorting the fact-finding process; or (b) the prosecution granted immunity to a government witness in order to obtain that witness's testimony but denied immunity to a defense witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial. The opinion though takes an important step in recognizing that the government cannot tip the scales with its immunity waiver.

U.S. v. Craighead, No. 07-10135 (8-21-08). When does in-home questioning by police become custodial for Miranda purposes? The Ninth Circuit (Bybee joined by Thomas and Block), held that Miranda warnings should have been given and suppressed the defendant's statements, stressing the value the Constitution places on a home (litany of "house" rights in the Constitution) and the fact that Defendant really had no where to go, with his house crawling with law enforcement, in a confined space. The court set out the following factors to consider: (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated by others; and (4) whether the suspect was told he was free to leave.

U.S. v. Gamba, No. 06-35021 (8-28-08). The Ninth Circuit (M. Smith, joined by Goodwin and Fisher) hold that counsel, and not the client, can make the decision to

have a magistrate judge preside over closing arguments. The trial was set for closing argument when the trial judge had to pick up his spouse from the hospital. Counsel agreed that the magistrate judge could preside over argument, and the district judge would take over when he returned. Counsel, for strategic and tactical reasons, can consent to a magistrate judge without the defendant's personal assent.

HABEAS CASES

Belmontes v. Ayers, No. 529 F.3d 834 (6-13-08). The Ninth Circuit (Reinhardt, joined by Paez) held that the petitioner suffered IAC at the sentencing stage. Counsel failed to investigate, develop, or strategically present mitigation evidence, and instead relied on the argument that LWOP was in fact a harsher punishment than death.

Butler v. Curry, 528 F.3d 624 (6-9-08). The Ninth Circuit (Berzon joined by Hall and Graber) held that Cunningham was not new under Teague. It reversed the district court's finding, and remanded regarding the harmlessness of the error regarding the aggravating factors.

Duncan v. Ornoski, 528 F.3d 1222 (6-24-08). The Ninth Circuit (Reinhardt, joined by Gould and Paez) finds IAC in the sentencing phase of a capital case. The trial lawyers failed to test the blood sample in the room at the site of the murder. The sample was neither the victim's nor the petitioner's, which supported his contention that he was the accomplice but not the shooter. The defense at trial was that someone else had been involved in the murder and it was not petitioner. The 9th found the error harmless for guilt because of felony murder, but prejudicial for the sentencing phase, where the fact of being a trigger-man was critical.

Green v. LaMarque, No. 06-16254 (7-17-08). The Ninth Circuit (Bea, joined by W. Fletcher and Miller) finds a Batson violation when the state used its preemptories to strike all six African-American prospective jurors for reasons that were pretextual. The court stresses that a trial court cannot simply adopt the prosecutor's reasons for striking at face value, but must test them against the prosecutor's other actions. Here, white jurors with similar backgrounds -- various jobs, relatives in prison, etc -- were not stricken.

Houston v. Schoming, 533 F.3d 1076 (7-22-08). The Ninth Circuit (Larson, joined by Canby) holds that the denial of a trial attorney's motion to be relieved because of a conflict merited an evidentiary hearing. The public defender office had represented the state's star witness in a prior shooting at defendant Houston. The lawyer stated that he was conflicted -- he felt that the witness had gotten a raw deal, that he was innocent, and that there was motive in Houston now shooting back. The Ninth Circuit holds that the trial court's focus should have included petitioner's right for a conflict free counsel, and counsel's own ambivalence in turning on a former client. This deserved an evidentiary hearing.

Tilcock v. Budge, No. 07-16184 (8-15-08). The petitioner was sentenced as a habitual offender under Nevada state law. The Ninth Circuit (Graber, joined by Wallace and Ezra) finds no Apprendi error in the state court considering priors as a qualifier for habitual offender status. A qualifying prior may expose the petitioner to a habitual offender enhancement but does not mandate it. However, the Ninth Circuit does grant a remand for an IAC hearing. State counsel may have been ineffective in letting in the non-qualifying convictions, thereby tilting consideration.

McMurtrey v. Ryan, No. 03-99002 (8-21-08). The Ninth Circuit (Pregerson joined by W. Fletcher and Bybee) upholds the granting of relief to petitioner. A competency issue was raised in his ability to stand trial after shooting and killing several people. The state court denied the competency hearing, despite evidence of his memory problems, erratic behavior, and variety and quantity of medications. The failure to hold a hearing violated due process, and a competency hearing held thirteen years later was insufficient to cure the violation.

Paulino v. Harrison, No. 07-55429 (9-4-08). The Ninth Circuit (Paez, joined by Rawlinson and Conlon) affirms the granting of a petition for a Batson violation. The court had previously remanded for an evidentiary hearing, and the record indicates that the state prosecutor had no recollection now why African-American prospective jurors were struck except that it was not for racial reasons. The proffered reasons amounted to speculation.

Rodriguez v. Smith, No. 07-16014 (9-4-08). The Ninth Circuit (Rawlinson, joined by Hug and Rymer) affirms the district court's determination that BOP's categorical exercise of discretion in not considering placing inmates in residential re-entry centers until they have six months or 10% of their sentences left violates congressional intent expressed in 18 U.S.C. § 3621 that such consideration be taken after 60% of the sentence is served and that it weigh other factors. The Ninth Circuit joins other circuits in this decision.

In re Lawrence (Aug. 21, 2008) ___ Cal.4th _ _, 2008 WL 3863606. Challenges by California life prisoners to parole denials by the Board or the Governor got a boost with the California Supreme Court's recent opinion in *In re Lawrence* In a 4-3 opinion, the Supreme Court held that a court reviews such a challenge for "some evidence" that the prisoner's release would be a risk to public safety (and not simply for evidence to support the factual basis for the denial of parole, as the Attorney General had argued). The Supreme Court went on to hold that the commitment offense, even if aggravated, will not, by itself, constitute some evidence of current risk when the offense is "remote" (in time) and there is evidence of sustained rehabilitation. If the Board or the Governor has given reasons in addition to the commitment offense for denying parole, those reasons will constitute evidence sufficient to uphold the denial of parole if they are factual supported *and* are related to risk to public safety. This should prove helpful to lifers, many of whom have more than two decades in prison and are denied parole based solely on the commitment offense.

Hayward v. Marshall, CA 06-55392, involves issues surrounding how a federal court is to review challenges to parole denials; it is still pending before the en banc court in the Circuit. This week, the Circuit ordered briefing regarding the impact of the *Lawrence* decision on the issues pending in *Hayward*. Briefing will not be completed until, at the earliest, the middle of November; so it is unlikely there will be an opinion in *Hayward* before the new year. The district courts and the Circuit have stayed most habeas cases involving challenges to parole by California life prisoners, and that will probably remain the status quo until *Hayward* is decided.

CIVIL CASES WITH CRIMINAL APPLICATION

Quon v. Arch Wireless, 529 F.3d 892 (6-18-08) In a civil case, the Ninth Circuit (Wardlaw, joined by Pregerson and Leighton) holds that users of pagers have a reasonable expectation of privacy in text messages stored in the service providers networks. The court pragmatically analogizes a text message (and, by extension, e-mail) to snail mail. The "address" of a digital message (the phone number or e-mail address) is not protected by the Fourth, but the content of the message is.

Kawashima v. Mukasey, 530 F.3d 1111 (7-1-08). Though technically an immigration case, this is an important decision in the criminal context as well. The Ninth Circuit (per curiam, O'Scannlain & Leavy, Callahan, specially concurring) holds that tax fraud is not categorically an aggravated felony, because the statute does not contain an element that the fraud loss be over $10,000. Because the crime of conviction was missing that element, the court could not look at the documents of conviction to determine if the fraud loss was over $10,000.