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Federal Defender Newsletter
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CJA PANEL TRAINING

CJA Panel training will resume in Sacramento on Wednesday, September 16, 2009 at 5:30 p.m. There will be a panel discussion on Legal Ethics led by Federal Defender Dan Broderick. Panel training will be held on the 4th floor at 801 I Street in Sacramento.

In Fresno, the topic will be Sentencing Issues, presented by Chief District Judge Anthony W. Ishii and Rick Louviere, Supervising Probation Officer, on Tuesday, September 15, 2009 from 5:30 to 6:30 p.m. at the Downtown Club, 2120 Kern Street in Fresno.

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

On Friday October 2, 2009, the Federal Defender's Office will be presenting the "2009 Non-Capital Habeas Seminar: Navigating One's Way Through the Murky Waters of Habeas" at the Delta King Riverboat in Old Sacramento from 8:00 a.m. to 4:30 p.m. Jeff Fisher will be the keynote speaker. Please contact Carolyn Wiggin at carolyn_wiggin@fd.org with any questions. Registration forms and inquiries should be sent to Debbie_Sutter@fd.org. The deadline to register is September 21, 2009.

NOTABLE CASES

Richter v. Hickman, No. 06-15614 (8-10-09 (en banc)). In an en banc decision, the Ninth Circuit (Reinhardt writing) granted the petitioner's writ on the ground of ineffective assistance of counsel. The petitioner was alleged to have committed murder in a robbery gone bad. He alleged self-defense. The case turned on circumstantial and forensic evidence. Indeed, the issue of blood -- serology, pathology, and spatter -- became a central evidentiary issue in the case. Despite this, defense counsel failed to conduct any forensic investigation whatsoever on the blood evidence. Defense counsel decided on a defense without looking at the blood evidence and without consulting any experts. If he had, expert testimony would have helped support his version of the events, and would have enabled defense counsel to cross-examine effectively, and present his own experts and evidence. Dissenting, Bybee and others argue that the majority failed to recognize the pressures faced by trial counsel (time and resources) and that he should be excused because he did present a viable coherent defense.

US v. Monghur, No. 08-10351 (8-11-09). "The Thing," said the defendant in a monitored call from the jail, was "in the green." The call was to a friend, and referenced something in a girlfriend's apartment. The police (8 of them) paid a visit, got consent to search the apartment from the girlfriend, and in the closet in a room where the defendant sometimes slept, a green plastic container was found with a firearm in it. The police seized it. The defendant entered a conditional plea and took the issue of seizure up. The Ninth Circuit (Tallman joined by Hug and Hawkins) held that the seizure violated the Fourth Amendment. Although the police had consent to search the apartment, but they did not have consent to look into sealed containers where the defendant or any other person had a reasonable expectation of privacy. There was also no exigent circumstances despite the fact that children lived in the apartment. The government argued that the defendant had consented because he knew the phones were monitored. The 9th rejected this argument because the defendant did not identify the contraband. This is different than telling a police officer that contraband was somewhere, which has been held as consent.

US v. Riley, No. 08-50009 (9th Cir. Aug. 13, 2009). The Ninth Circuit vacated a condition of supervised release that prohibited the defendant from "using a computer to access 'any material that relates to minors.'" The condition was impermissibly overbroad and imposed a far greater deprivation of liberty than reasonably necessary to achieve legitimate goals of supervised release. Because it swept so widely, it imposed a blanket ban on Riley's use of a computer, not use subject to approval by probation officer.

US v. Reyes, No. 08-10047 (8-18-09). The Ninth Circuit (Schroeder joined by Reinhardt and Pollak) vacated a conviction and remanded for a new trial based on prosecutorial misconduct in making a false assertion argument. The case was a complicated securities prosecution, with a focus on backdating stock options. Did the CEO know or did he rely on the financial department? If the financial dept knew, then the defendant's defense was bolstered; if financial didn't know, then he was responsible. The prosecutor knew that some witnesses from financial had stated that the department knew. The witnesses were high up in the management team, and had given statements to the FBI and in a

parallel civil proceeding. One government witness, far down the line, had said that the dept did not know, but she was unable to speak as to others, and later recanted. Given the special responsibilities of the government, it was misconduct to argue that the department did not know. "In representing the United States, a federal prosecutor has a special duty not to impede the truth." This was the crux of the case and the conviction had to be vacated. As for a codefendant, the Ninth Circuit agreed to vacate the sentencing because the court erred in assessing obstruction of justice points. The obstruction supposedly was her defense counsel's severance motion based on a declaration that the CEO defendant would give exculpatory testimony. When severed, the CEO wasn't called as a witness. The defense counsel said it was his decision; the court punished the client. This was error.

US v. Hector, No. 08-30271 (8-18-09). The issue is who gets to determine which conviction to vacate when a defendant has been convicted of multiplicitous offenses that violate double jeopardy. The defendant was convicted of both receipt and possession of child porn. Under Davenport, 519 F.3d 940 (9th Cir. 2008), this is multiplicitous when it involves the same images. The prosecutor wanted the court to sentence first, and then the prosecutor would dismiss one count. The court said that it should have the discretion. The defendant wanted to be sentenced for possession as opposed to receipt (the latter has a five year mandatory and a higher guideline range). The court was going to sentence on the count it felt more appropriate; the prosecutor then moved to vacate the possession and the court sentenced on receipt. On appeal, the Ninth Circuit (O'Scannlain joined by Goodwin and Fisher) reasoned that it should be the court that had the discretion. The court has the power to protect the defendant's rights and the discretion, as in plea withdrawals, to exercise it. The case is remanded for the court to exercise its own discretion.

US v. Harrison, No. 08-10391 (8-19-09). The defendant was convicted of assaulting and impeding federal officers. The issue at trial was whether he was the aggressor or acted in self-defense. The 9th (Kozinski joined by Callahan) chastised the prosecutors for vouching, implying they knew evidence of guilt, and forcing the defendant to say that government witnesses were lying. All this vouching ran afoul of black-letter law and was error, though harmless. The Ninth Circuit did reverse the second count for an erroneous jury instruction on impeding (111(a)) that didn't require an assault as required under US v. Chapman, 528 F.3d 1215 (9th Cir. 2008). Dissenting, Bybee said that he would have reversed count 1 as well. This was a credibility determination between the defendant and the officers, and the prosecutors actions were outrageous.

US v. Brandau, No. 06-10512 (8-21-09). The Ninth Circuit (Reinhardt, joined by Noonan and McKeown) confronted the practice in the Eastern District of California where every defendant faces mandatory full-body shackling at initial appearances. The judges of the district issued a general order requiring leg, waist and hand restraints on all; they then revised the order, so that unless the court determines otherwise, all initial appearances must be in leg and waist restraints -- although this applies only to the Sacramento Division. The other divisions are under the old mandatory order. The challenge was by two defendants, on relatively minor nonviolent offenses -- disorderly conduct in a national park and the other FEMA and mail false claims. Before the Ninth Circuit

could get to whether this policy makes sense across the board, it needed more facts. Given the need to determine how exactly the policy was being implemented, the Ninth Circuit remanded the case to an out-of-district judge to hold a hearing on the practices. The Ninth Circuit stated that the judges of the district might want to get counsel for representation purposes.

Crickon v. Thomas, No. 08-35250 (8-25-09). The petitioner argued that he should be allowed in the special drug abuse prevention program and be eligible for early release. The BOP categorically denied the program's early release eligibility to prisoners with certain prior convictions. Here, the petitioner had a 1970 voluntary manslaughter although he was in prison for a meth drug offense that occurred in 2000. BOP argued that such exclusions fell under the agency's wide discretion and comported with congressional intent to bar violent offenders from the benefit. The Ninth Circuit (Rawlison, joined by Paez and Jenkins) found that such rationalizations were post hoc, and that the BOP violated the APA in promulgating its rules (the distinction with violent/nonviolent pertains to the present offense). As the court summed up: "Although the BOP is afforded wide discretion in promulgating regulations governing the administration of 18 U.S.C. § 3621(e), it must comply with its obligation under the APA to articulate its rationale for exercising such discretion. The administrative record before us is devoid of any contemporaneous rationale for the BOP's promulgation of a rule categorically excluding inmates with certain prior convictions from early release eligibility."

US v. Comprehensive Drug Testing, Nos. 05-10067, 05-15006, and 05-55354 (8-26-09) (en banc). In sum, the case involves "the procedures and safeguards that federal courts must observe in issuing and administering search warrants and subpoenas for electronically stored information." Specifically, it concerns search warrants and subpoenas for drug testing information of professional ballplayers, in relation to the Balco steroid scandal. All three district judges who handled these cases below had some very harsh language for the government, repeated at length in this new decision.

The Ninth Circuit (en banc, opinion authored by C.J. Kozinski) flatly rejected "plain view" as an excuse to rummage around computer files, and created a whole series of protocols and rules to prevent the government from turning "every warrant for electronic information" into a "general warrant, rendering the Fourth Amendment irrelevant."

The Ninth Circuit set forth the following rules:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.

2. Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.

3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.

4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.

5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.