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Federal Defender Newsletter
September 2010

CJA PANEL TRAINING

The next Sacramento CJA panel training will be on September 15 at 5:30 at 801 I Street, 4th Floor. Federal Defender Dan Broderick will be presenting a lecture on Ethics. The next Fresno CJA panel training will September 21 at 5:30 at the Downtown Club, 2120 Kern Street, Fresno. The topic is Detention and the Bail Reform Act.

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 men's shirts and men's large size dress pants.

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.

CJA PANEL GOLF TOURNAMENT

This year's CJA panel golf tournament will be held on Friday, September 17 at El Macero County Club in Davis. We will start with a modified shotgun start at 8:00 a.m., that will permit everyone to finish at about the same time. Afterwards, there will be a group BBQ burger lunch. Because we are starting in the morning and El Macero is a fairly flat course, participants will have the option of riding a cart or walking with a pull cart. For those who do not have their own pull cart, the club has high wheel carts available for no extra charge. The tournament cost will be $92 for riders and $79 for walkers. Part of this fee will go towards the usual prizes for longest drive, closest to the pin, low net, etc. Space is limited, so please contact Henry Hawkins at the Federal Defender office (e-mail: Henry_Hawkins@fpd.org) to reserve a spot.

ENSURING ATTORNEY-CLIENT CONFIDENTIALITY AT THE MAIN JAIL

Recent litigation in the Salyer case has disclosed the Sacramento County Main Jail's policy regarding attorney-client confidential calls. A copy of the declaration produced by the jail is attached to this newsletter. In sum, the declaration states that the jail records all inmate telephone calls, but has a system by which an inmate may speak confidentially with his or her attorney. The inmate or the attorney is "permitted to provide the Main Jail with the attorney's business telephone number so that the attorney's number can be entered into the Main Jail's telephone system. After the number is verified by the Jail as belonging to the attorney, and once the number is entered, all calls between the Main Jail and the designated telephone number are neither recorded nor monitored."

The jail has indicated that the Federal Defender's phone number has been privileged for over a decade. All panel members can request a privileged number by sending a letter on their letterhead with the bar number and office phone numbers. The jail will no accept cell phone numbers for privileged calls, but an office phone number that is privileged can forward calls to a call phone number. A new phone system will go in soon and all the previously registered privileged numbers will be transferred to the new system.

The Butte County Jail has confirmed that the Federal Defender's phone number is a confidential number in its system. Nevada County Jail has not responded to a request by the FDO.

Regarding confidential visitation, the jail has a new directive that no paralegals will be allowed in the confidential visiting booths without an attorney present. The rationale is that attorneys, doctors, and licensed investigators can be sanctioned by their licensing boards for violations of the rules, but paralegals cannot. Please keep this in mind when submitting requests for litigation support and hiring paralegals and investigators to conduct confidential communication with your clients.

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.

NOTABLE CASES

U.S. v. Maddox, No. 09-30284 (8-12-10)(Hawkins with Lucero; dissent by N. Smith). The defendant was pulled over for traffic violations. He became belligerent and was found to be driving on a suspended license and with expired tags. He ended up being arrested. Upon arrest, the officer took the defendant's key-chain with an attached closed container and placed it on the seat of the car. After the defendant's arrest, when the defendant had been secured in the police car, the officer went back to defendant's car, retrieved the key-chain, unscrewed the container, and observed what appeared to be meth. Subsequently the car was impounded and a search of a laptop container disclosed a handgun and more meth.

The Ninth Circuit held that the unscrewing of the container violated the Fourth Amendment, because it was not a search incident to arrest. The defendant was away from the car, secured, and not a threat. There was no threat visible in the car. The

key-chain container should not have been searched. The laptop container should not have been subject to a so-called inventory search because the car need not have been impounded under state law. The defendant offered to have a friend drive it away and the car was not impending anything.

U.S. v. Pineda-Duval, No. 08-10240 (8-10-10)(B. Fletcher with Canby and Graber). This is an appeal from a ten count alien smuggling conviction in which death resulted due to a roll-over. The district court refused a causation jury instruction, which would have let the defendant argue that he had not proximately caused the deaths but rather the border patrol did in its negligent employment of the spike strips used to stop the car. The defendant also argued various other evidentiary rulings. The district court also rejected defendant's argument at sentencing that he had not acted with malice aforethought (indifference to life) because he had done this before and he thought it would be safe. The Ninth Circuit found error in the court's preclusion of evidence, stressing that proximate cause has long been required for conviction. The Ninth Circuit also found error in the court's preclusion of evidence as to the training manuals of the Border Patrol. Those errors were deemed to be harmless given the weight of the evidence.

The Ninth Circuit did vacate the life sentence and remand for a new sentencing on the issue of whether there was clear and convincing evidence of the defendant acting with malice aforethought. The court failed to make clear findings as to the degree of recklessness involved and used the wrong evidentiary standard. The Ninth Circuit implied that the degree of recklessness did not meet the malice aforethought standard.

U.S. v. Alvarez, No. 08-50345 (8-17-10)(M. Smith with T. Nelson; dissent by Bybee). The Ninth Circuit holds the “Stolen Valor Act” (18 U.S.C. § 704) unconstitutional as violating the First Amendment. That statute would criminalize falsely claiming one has won the Medal of Honor. The defendant here ran for a water board commissioner seat and falsely claimed that he was a Marine, that he served in Vietnam, and that he had won the Medal of Honor. He also falsely claimed at various times that he had been a police officer, played for the Detroit Red Wings, and married a Mexican starlet.

Lying is bad, acknowledged the Ninth Circuit, but everyone does some lying. Moreover, lying, satire, or exaggeration, is part and parcel of political debate. Falsehoods are wrong, but in the cut and parry of public issues, things get said. The First Amendment recognizes this. Although certain categories of speech have no first amendment protection -- and this includes libel or defamation -- there has to be a cognizable harm or injury. There is no harm or injury here tied to the lie. The real medal winners are admired despite the lies of others. The lie opened the defendant up for ridicule and attack, as indeed happened. There is also no specific finding of intent attached to the statute, which could lead to overbroad prosecutions. To criminalize this falsity would run the risk of silencing speech (Colbert report, for example) without a direct cognizable harm. This opinion is a nice overview of the interplay between speech and criminal statutes.

U.S. vs. Rivera-Corona, No. 08-30286 (8-18-10)(Berzon with Tashima; concurrence by Fisher). The defendant had retained counsel. The retainer was depleted, and the defendant wished to change counsel and asked the court to appoint counsel prior to sentencing. The defendant complained that the retained counsel had demanded $5000 more to go to trial, and that the defendant had pled guilty because of the counsel's pressure. The district court did not inquire

into the defendant's financial state and denied the request. The court reasoned that it was at a late stage, and the defendant had said that he was satisfied with counsel at the change of plea. On appeal, the Ninth Circuit identified two constitutional rights under the Sixth Amendment: the right to have counsel and the right to effective counsel. When asked to appoint counsel, the court should only inquire into the financial status of the defendant, whether he qualifies for appointed counsel, and timeliness. There is no need to inquire into whether there was such conflict between counsel and defendant that effective representation required new appointed counsel. The Ninth Circuit reasoned that forcing an unpaid lawyer to stay on a case could lead to conscious or subconscious resentment and undermine representation. The Ninth Circuit vacated and remanded for an inquiry into the defendant's qualification for appointed counsel and for fact finding if the defendant moved to withdraw from the plea.

This is a significant case for retained counsel and CJA appointments. Retained counsel sometimes deplete the retainer, and the whole issue of whether CJA can and should be appointed is raised. This opinion seems to make clear that the court only should inquire into the financial status of the defendant, whether the status qualifies for appointed counsel, and the timeliness. The court cannot require a conflict or issues with representation.

U.S. v. Farias, No. 09-50269 (8-20-10)(Paez with B. Fletcher and Walter, D.J.). The Ninth Circuit reversed a conviction in a § 1326 case because the defendant had indicated that he wished to represent himself, the district court acknowledged his desire, but stated that there would be no continuances. The defendant had asked to represent himself in a timely manner at a pretrial conference. The district court tried to dissuade the defendant, but the colloquy was never completed. The record, as it was, indicates that the defendant's request seemingly was made in good faith, and he cited his dissatisfaction with counsel. The district court's statement that there would be no continuance in light of this was an abuse of discretion. The right to represent oneself includes the right meaningfully to prepare. The Ninth Circuit stresses that the record is bare of any indication that the request was for delay or in bad faith.

Detrich v. Ryan, No. 08-99001 (8-20-10)(Paez, with Pregerson and McKeown). The Ninth Circuit grants penalty habeas relief in this capital case. There was ineffective assistance of counsel when it came to penalty investigation and presentation in a resentencing. Trial counsel did not use a expert mitigation investigator, and the investigator used was unqualified to do a life history and produced a minimal investigation. No defense mental health expert was used, nor defense evidence presented. Counsel failed to investigate and present the extensive mental health history. This ineffectiveness was prejudicial.

Crittenden v. Ayers, No. 05-99006 (8-20-10)(Fisher, with Farris and Berzon). The Ninth Circuit grants habeas relief in this capital post-conviction challenge. The Court of Appeals ordered a remand for a hearing on a Batson issue. At trial, the state struck the only African-American prospective juror, supposedly for a reluctance to impose death. The prosecutor however kept other jurors that expressed the same concerns when it came to the death penalty. Under Batson, the petitioner has to have presented a prima facie case, which he did; and the State has to come forth with a race-neutral explanation. If time has passed, and memories have faded, the state can produce reasons that are race neutral based on the record and circumstantial evidence. The court then has to assess whether the strike

was "motivated in substantial part" by race. If race was a substantial part of the strike, then Batson relief must be given, even if other reasons exist. The case is remanded to allow the lower court, which had found that race did play a factor, to conduct such an analysis.

U.S. v. Havelock, No. 08-10472 (8-23-10)(Canby with B. Fletcher; dissent by Graber). The Ninth Circuit reverses convictions under 18 USC § 876(c), mailing threats, because the threats have to be addressed to an individual person, as reflected in the address on the mailed item. The jury cannot go inside the envelope and read the salutation or contents to find a named person. Here, the defendant was angry with the world as a result of business setbacks. He mailed packets addressed to news organizations and websites that were a hodgepodge of rants, threats, and warnings. He dropped the packets in the mail. The rants though, were mailed on the eve of the Super Bow in Glendate, Arizona, and indicated that he would shoot innocent people, slay children, and create a bloodbath at the game. Armed to the teeth with firearms (legally possessed), the defendant went to the Super Bowl site. There, he had second thoughts, called his family, and turned himself in. No one was hurt. The mail rants were read on Monday, and the defendant subsequently was charged with mailing threats and convicted.

The Ninth Circuit reversed, holding that the threats had to be addressed to a named person, and these were not. The statute specifically states that mail must be addressed to a "person" and this means a natural person. The context of the statute makes clear an individual is intended. To prove an addressee, the government cannot use as evidence the contents of the letter or packet, but must look solely at the address on the envelope.

Hurd v. Terhune, No. 08-55162 (8-23-10)(Beezer, with Pregerson and Thompson). The petitioner was charged with first degree murder of his wife. There was an ongoing divorce and the issue was whether the shot was accidental (showing her how to use the gun in case of an intruder) or premeditated murder. The first trial resulted in a hung jury. The second trial resulted in a LWOP sentence. At trial, the state court allowed the prosecutor to argue that petitioner's refusal to re-enact the shooting of his wife during police questioning was affirmative evidence of guilt. The Ninth Circuit holds that this was unreasonable application of Miranda and Doyle v. Ohio, 426 US 610 (1976). A suspect can invoke Miranda on a question by question basis, and in response to a request to act something out.

U.S. v. Kloehn, No. 06-50456 (8-30-10)(Reinhardt with Wardlaw; dissent by Trott). The defendant was on the stand for a fifth day in a complex and complicated tax evasion trial. The first trial had ended in a hung jury. In the midst of the testimony, the defendant's son, diagnosed with terminal cancer, suffered a massive seizure and "had little life expectancy left." Defense counsel asked for a two day continuance so the defendant could see his son, with whom he lived prior to trial, in Las Vegas. Despite the fact that no one questioned the gravity of the son's condition, and there was a message from the treating doctor saying "come quickly," the government opposed because the jury would be inconvenienced and lose track of the testimony. The judge denied the request without any findings. The defendant completed his testimony, and the government called an agent as a rebuttal witness. When the agent went long, defense counsel asked that the proceedings be ended for the day so the defendant could catch a plane to Las Vegas, and that he be excused for the rest of the trial. The court ended the proceedings for the day, and

excused the defendant. The son died an hour after the father arrived. The next day the court explained to the jury that the defendant could absent himself if he wanted. He was convicted. On appeal, the Ninth Circuit held that the district court abused its discretion in refusing a two day continuance. All the factors in weighing the discretion for a continuance, set out in U.S. v. Flynt, 756 F.2d 1352 (9th Cir. 1985) weighed in favor of granting a continuance, and a denial was unreasonable. The defendant was diligent, the continuance requested was short and proper, the court failed to make findings of inconvenience, and the defendant was prejudiced as it affected his ability to testify. The government did not request a harmlessness analysis, and the Ninth Circuit found it waived.

U.S. v. Kuo, No. 08-10314 (8-30-10)(Graber joined by Beezer and Fisher). The district court ordered restitution based on a formula used in the sex trafficking statute, which is the market value of prostitution and acts. However, the defendant was not convicted of this act, but of a civil rights violation under 18 USC § 241. The trafficking method of calculation, expressly designed to capture the gains from sex trafficking, could not be used as it focused on profits and not victim loss of income as required under 18 USC § 3663. The restitution cannot be disgorgement of ill-gotten profits, but must go to the making of the victim whole. The issue of restitution is therefore remanded.