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Federal Defender Newsletter
September 2012

CJA PANEL TRAINING

Panel training will resume in Sacramento on Wednesday, September 19th at 5:00 p.m. in the jury lounge of the federal courthouse, 501 I St. The topic will be "The Ethics of Representing Non-Citizen Criminal Defendants Charged in Federal Court: The Impact of Recent Caselaw on your Federal Practice" presented by attorneys Mary Waltermire and Johnny Walker from the Law Offices of Schoenleber & Waltermire.

Panel training in Fresno will resume on Tuesday, September 18th at 5:30 to 6:30 p.m. The topic will be “Ethics and Incompetence” presented by Trial and Habeas Counsel Tivon Schardl. The location will be announced.

PLEASE JOIN US FOR A GOOD-BYE PARTY FOR AFD ALLISON CLAIRE

In November, AFD Allison Claire will be leaving the office to become Sacramento’s newest magistrate judge. In recognition of her years of hard work for the Capital Habeas Unit, please join us on November 2nd from 3:00 to 5:00 p.m. at our Sacramento office to wish her the best in her new position.

SAVE THE DATE FOR FEDERAL DEFENDER DAN BRODERICK’S RETIREMENT PARTY AND ANNUAL FDO/CJA HOLIDAY PARTY

Our boss is retiring and going out in style at the annual FDO/CJA Holiday Party. Please save December 7, 2012 to wish Dan a fond farewell.

AFD TIM FOLEY RETURNING TO PRIVATE PRACTICE

Tim Foley, an Assistant Federal Defender in the Capital Habeas Unit since 2004 is also planning to leave the Federal Defender office at the end of September and return to private practice. Tim will be concentrating on state and federal trials, appeals, and habeas.

SAVE THE DATE FOR SAFD DENNIS WAKS’ RETIREMENT PARTY

Dennis Waks will be retiring after 24 years with the Office of the Federal Defender. Please save Friday, November 9th for Dennis’ retirement party at the California Auto Museum. More information will be provided as we get closer to the date.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website - www.cae-fpd.org. If a lawyer is not on the panel, but would like the materials, he or she should contact Lexi_Negin@fd.org.

CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, or are interested in donating clothing to the client clothes closet, please contact Debra Lancaster at 498-5700. If you are interested in donating clothing or money to cover the cost of cleaning client clothing, please contact Debra.

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 Samya Burney (Fresno) at samya_burney@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

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. Bustamante, No. 11-50075 (8-7-12) (B. Fletcher with Wardlaw; dissent by Mendez, D.J.) In this 1326 case, the prosecution used an affidavit filed from the Philippines in 1975 purporting to substitute for an original or actual birth certificate to prove that the defendant was born in the Philippines. This violated the Confrontation Clause. The affidavit had been prepared specifically for an investigation by the Air Force into the defendant's citizenship. The defendant had served in that branch and was honorably discharged. The bedrock principles of Crawford and Confrontation required the opportunity for cross-examination on this key evidence.

U.S. v. Turner, No. 11-10038 (8-7-12) (Mckeown with Noonan; dissent by N. Smith). The government moved for civil commitment of the defendant after he completed his criminal sentence. After a five-year wait for a hearing, the court held that he could not be civilly committed because the government had not proved he was a danger. In the meantime, he had moved for termination of his term of supervised release. The Ninth Circuit held that his term of supervised release had terminated during the five-year period, because he was not being held criminally, but under a civil statute. The Ninth Circuit examined various statutory provisions that define "imprisonment" and "release" and also applied the rule of lenity. The critical issue was that the five-year confinement was civil in nature and followed Turner's release from his term of criminal imprisonment. Accordingly, the three year term of supervised release began upon the end of his criminal sentence and fully ran during the five-year period.

Congratulations to AFD Ben Galloway!

U.S. v. Acosta-Sierra, No. 10-50575 (8-15-12) (Nelson, with Gould and Ikuta). In this long and thorough opinion, the Ninth Circuit reviews the elements of federal assault and reverses the defendant's conviction on the ground that the district court in this bench trial read several elements out of the statute.

Aguilar-Turcios v. Holder, No. 06-73451 (8-15-12)(Paez, with Fletcher; Bybee, dissenting). A legal permanent resident used a military computer to access child pornography. He suffered a military conviction for failing to obey a lawful order. The government argued in removal proceedings that this prior was for the aggravated felony of possession child pornography. However, the military conviction did not "necessarily rest" on the facts regarding child pornography, and therefore under the modified categorical approach the prior was not an aggravated felony for immigration purposes.

Sessoms v. Runnels, No. 08-17790 (8-16-12) (en banc)(opinion by B. Fletcher). The Ninth Circuit holds that when an individual who is in custody for questioning and has not yet been given Miranda warnings says "there wouldn't be any possible way that I could have a lawyer present while we do this" and "that's what my dad asked me to ask you guys . . . uh, give me a lawyer," he has invoked his right to counsel. Accordingly, his resulting statements should have been suppressed.

Congratulations to CJA Attorney Eric Weaver!

U.S. v. Dreyer, No. 10-50631 (8-21-12) (Reinhardt, with Wardlaw; Callahan, dissenting). At the age of 63, defendant became afflicted with frontotemporal dementia. His behavior changed abruptly, he divorced his wife of 17 years, and withdrew from his family. At the age of 66, despite having no criminal history, he became embroiled in a controlled substance conspiracy. He was a psychiatrist and began providing prescriptions of oxy and hydrocodone to patients outside his practice. At the age of 73, he was sentenced to 120 months in prison. He was unable to allocute at his sentencing because of his dementia. The court had received three expert reports diagnosing his condition. Despite this no one questioned his competence. The Ninth Circuit holds that the district court erred in failing sua sponte to order a competency hearing despite a record that raised a genuine doubt. It vacates his sentence and remands for the district court to hold an evidentiary hearing on competency.

U.S. v. Pineda-Doval, No. 11-10134 (8-27-12)(B. Fletcher, with Canby; dissent by Graber). The Ninth Circuit again reverses the district court for imposing ten life sentences in an illegal smuggling case where death resulted. The deaths occurred as a result of roll-over when the vehicle swerved to evade a spike strip. In applying a cross reference to second degree murder, the district court reasoned that the defendant should have known that such tragedies could happen and displayed little remorse. The Ninth Circuit held that there was no basis for applying the cross-reference, as the defendant did not act with malice aforethought or extreme recklessness. On remand, the Ninth Circuit ordered the court not to apply the cross-reference and to have a full resentencing with an opportunity for allocution.

U.S. v. Bailey, No. 11-50132 (8-27-12)(B. Fletcher, with Kleinfeld; dissent by M. Smith). The defendant was convicted of two counts of securities fraud. The government introduced under FRE 404(b) an SEC complaint filed a year before the alleged fraudulent issuance of stock and charging a similar act. The prosecution used the prior complaint to bolster the "wilfulness" requirement of the offense. The defendant on appeal argued that introduction of the complaint was error. The Ninth Circuit agreed. The court held that the requirements of FRE 404(b) were not met. The prosecution did not introduce facts or actual acts to show knowledge; it merely introduced the complaint and settlement.

There needed to be more. Moreover, a settlement of a civil complaint could be for a variety of reasons. The error was not harmless, because this was a close case and intent was a key issue.

Ayala v. Wong, No. 09-99005 (8-29-12)(Reinhardt with Wardlaw; dissent by Callahan). The defense made a Batson challenge after the state, in this capital prosecution, used all its peremptory challenges to strike all prospective African-American and Hispanic jurors. The court found that a prima facie case had been made, and then granted the state's request for an in camera hearing as to the justifications. The Ninth Circuit reversed the district court and granted the writ. It held that exclusion of counsel from the hearing was error, violated the Constitution, ran counter to precedent, and was prejudicial. The reasons on the record for excluding jurors seemed not to be valid and were not applied to other non-minority seated jurors. Counsel could have challenged some of the reasons and would have made a record.

U.S. v. Vasquez-Cruz, No. 11-10467 (8-30-12)(Ikuta with Hug and Rawlinson). The Ninth Circuit holds that courts need not follow the Sentencing Commission's amendment 741, which would require a court to follow a three-step approach: first a guideline calculation, then a consideration of departures, and only then variances. The amendment is at best a suggestion to the district court, but has no force with an appellate court, where the focus is on the overall reasonableness of the sentence. The Ninth Circuit continues to embrace the post-Booker world, where variances have supplanted departures, and the focus is on the reasonableness of a sentence, and not the anachronistic three-step approach suggested by the Commission.