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JUNE 2002

Federal Defender Newsletter

IMPORTANT ANNOUNCEMENTS

PANEL TRAINING

There is no CJA panel training scheduled for this month and July.

INCREASE IN PANEL ATTORNEY HOURLY RATE

The FY 2002 judiciary appropriations bill includes funds to support a rate of $90 per hour in all judicial districts for private "panel" attorneys accepting appointments under the Criminal Justice Act (CJA), 18 U.S.C. §3006A. The new CJA panel attorney rate of $90 will apply to in-court and out-of-court work performed on or after May 1, 2002. This includes that portion of work performed on or after May 1, 2002, in representations where the appointment of CJA counsel occurred prior to that date.

NINTH CIRCUIT GUIDELINES CONFERENCE IN SOUTH LAKE TAHOE

The Eastern District of California and the District of Nevada will host the Ninth Circuit Guidelines Conference on August 28-30 in South Lake Tahoe. Topics will include immigration, sex offenses, criminal history, relevant conduct and grouping. A panel will discuss plea agreements, and presentations on Victim Impact Statements and Bureau of Prisons programs will be offered. The conference will be held at the South Lake Tahoe Embassy Suites. For more information, please contact:

Bruce Vasquez, Training Coordinator
Phone: 559-498-7214
Fax: 559-498-7241

Contact Person in Sacramento:

Karen Meusling, Sup. Probation Officer
Phone: 916-930-4321

ONLINE RESEARCH AVAILABLE

The District Court library in Sacramento has a computer available for Lexis and/or Westlaw research, including Shepard's. No charge! The Court librarian, Bobbi Murray, will be happy to give you access to the computer, but for detailed online research and "how to" questions, please call Leigh Opferman at 916-498-5700.

Also, if you are a member of the National Association of Criminal Defense Lawyers, you are entitled to a discounted research package with Lexis/Nexis. Please call 1-866-836-8116 and mention discount code D-E148.

2002 FEDERAL PRISON GUIDEBOOK IS NOW AVAILABLE

A must have resource! The book is now available to our panel at a discounted price of $20.00 per copy plus $3.95 shipping. Order from www.alanellis.com and you must note on the order form that you are on the panel for the Eastern District of California. If you would like to take a look at the book before ordering, please feel free to stop by our office.

FEDERAL DEFENDER CLIENT CLOTHES CLOSET IN SACRAMENTO

The clothes closet is currently filled to capacity, and no further donations are needed at this time. As always, our closet is available to serve your clients' clothing needs. If you would like to borrow clothes for trial use, please contact Gigi Ramirez or Cricket Fox at the Sacramento office.

SUPREME COURT UPDATES

Supreme Court Cert. Grants

Supreme Court to Determine Whether a Sex Offender Registration Law Violates Procedural Due Process If The Defender Is Not Given an Opportunity to Be Heard In Order to Determine the Likelihood of Current Dangerousness Before Being Included in the Registry

Connecticut Dept. of Public Safety v. Doe, No. 00-1231 - On May 20, 2002, the Supreme Court granted certiorari in a Second Circuit case in which the court of appeals affirmed the U.S. district court's holding that the sex offender registration law violated Doe's right to procedural due process, but was not ex post facto. The court of appeals also affirmed the district court's issuance of a permanent injunction which prohibited the Dept. of Public Safety from disseminating or disclosing information in the registry to the public. The court of appeals held that Doe and members of the due process class are entitled to a hearing to prove if they are currently dangerous before being included in the information released to the public. (Case below: Doe v. Public Safety, 271 F.3d 38 (2nd Cir. 2001).

Supreme Court Decisions

A Suspended Sentence Which May Result In Deprivation of Liberty May Not Be Imposed If The Defendant Was Not Offered and Provided Assistance Of Counsel

Alabama v, Shelton, No. 00-1214 decided May 20, 2002 - The defendant was convicted of misdemeanor assault without assistance of counsel. The trial court suspended the 30-day jail term and placed him on unsupervised probation for two years. The defendant appealed on Sixth Amendment grounds. The Alabama Court of Criminal Appeal affirmed. The Supreme Court of Alabama reversed, holding that a suspended sentence constituted a term of imprisonment. Upon the grant of a writ of certiorari, the United States Supreme Court in a 5-4 opinion, held that a suspended sentence may result in deprivation of liberty and cannot be imposed unless the defendant had been offered and provided assistance of counsel. The court reasoned that the invocation of the defendant's suspended incarceration would not be merely a penalty for violating probation, but was rather a prison term imposed for the offense of which the defendant was convicted without the assistance of counsel. The Supreme Court affirmed the judgment vacating the defendant's suspended sentence.

NINTH CIRCUIT DECISIONS

Ninth Circuit Holds That Security Guard Is Not in a Position of Trust

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002) - The defendant used his position as a security guard at K-Mart to help facilitate the robbery of the store. At

sentencing, pursuant to U.S.S.G. §3B1.3. the district court added a two-level increase for abuse of a position of trust. On appeal the defendant argued, inter alia, that his sentence was improperly enhanced. The Ninth Circuit found that, although the defendant satisfied the first prong of U.S.S.G. §3B1.3 -- he facilitated the offense -- his position as a security guard was not a "position of public or private trust within the meaning of §3B1.3. The court determined §3B1.3 does not apply simply because an employee has breached an employer's trust; otherwise, every inside job would result in an enhancement and the functional analysis would be superfluous. The court partially reversed the sentence due to the inapplicability of the abuse of trust enhancement and remanded the case to the district court.

NOTEWORTHY DECISIONS FROM OTHER FEDERAL COURTS

A Defendant Facing Revocation of Supervised Release is Entitled to Exculpatory Evidence in Possession of the Probation Office

United States v. Dixon, 187 F.Supp. 2d 601, (S.D. W. Va. 2002) - Prior to the defendant's revocation hearing the defendant filed a discovery motion, which included a request for exculpatory material within the ambit of *Brady v. Maryland*, 373 U.S. 83 (1963). In granting the defendant's motion, the district court opined that the defendant should have access to all evidence in the probation officer's file that would be offered against him. The district court determined that "unlike the disclosure of evidence against the defendant, favorable evidence is not as likely to come into defendant's possession in due course." The court developed a procedural process to help strike a balance between the defendant's interest in receiving favorable information with the practical considerations of the revocation proceedings:

(1) the defendant must make a request by written motion for favorable evidence well in advance of the hearing;

(2)once the motion is timely filed, the probation officer will review the file and extract from it any material satisfying the following prerequisites:

> (a) material information that is either directly exculpatory or of value in impeaching a witness who will testify; and
>
> (b) information is material only if it reasonably could be expected to result in non-revocation occurs;

(3) once extracted from the file, the probation officer should submit the information to the court for final review and possible disclosure to counsel for both parties.

The district court determined that the above process would take into account the defendant's valid interest in bringing to the court's attention evidence in mitigation of sentence and it would not place an unreasonable burden upon the supervising probation officer.

States May Not Keep Limitations Defense in Reserve While Litigating Claim that Habeas Petition is Second or Successive

Robinson v. Johnson, 283 F.3d 581 (3rd Cir. 2002) - Whether it is possible for a state to waive its limitations defense under the AEDPA was an issue of first impression for the Third Circuit Court of Appeals. Accordingly, the Third Circuit found that "a state waives the statute of limitations defense in a federal habeas corpus by failing to raise it as soon as practical." The Third Circuit determined that the AEDPA limitations period is subject to equitable modification such as tolling and is also subject to other non-jurisdictional equable considerations, such as waiver. Therefore, under the AEDPA, affirmative defenses should be treated the same as affirmative

defenses in other contexts. If the affirmative defense is not pleaded in the answer, it must be raised at the earliest practical moment thereafter. The Third Circuit stated that this rule applies even if the state's initial position in litigation is that the petition is a second or successive one and is therefore due to be dismissed in absence of permission from the court of appeals for the petitioner to file it.

A Defendant Convicted Under 18 U.S.C. §924(o) Cannot be Sentenced Under 18 U.S.C. §924(c)

United States v. Stubbs, 279 F.3d 402 (6th Cir. 2002) - The defendant was charged with and pleaded guilty to violating 18 U.S.C. §924(o). At sentencing the district court, pursuant to U.S.S.G. 2K2.1(c) and U.S.S.G. 2X1.1, found that the substantive offense was a violation of 18 U.S.C. §924(c). The defendant appealed his sentence arguing that the court erred when it sentenced him pursuant to §924(c). The government argued that under the cross-reference provisions of the guidelines the defendant's sentence was proper. The Sixth Circuit held that the defendant was improperly sentenced under §924(c). The Sixth Circuit stated that since the defendant was not charged with a violation of §924(c), the government could not broaden the scope of the indictment without an amendment by the grand jury. The Sixth Circuit determined that the end result ran contrary to the fundamental principles of due process and the defendant's Sixth Amendment right to notice through indictment by a grand jury. The Sixth Circuit vacated the defendant's sentence and remanded for re-sentencing.

Officer Must be Aware of Release Condition In Order to Justify Warrantless Search of Home

People v. Black, Cal.Ct.App., No. F033914 (3/22/02) - Police officers were investigating a fire at the defendant's apartment, which he shared with the co-defendant. While investigating the fire, the officers found evidence of drug and firearms offenses during a warrantless search. The officers were unaware, prior to the search, that the defendant was subject to a condition of release that required him to submit to warrantless searches. The California court of appeal, held that police officers who are unaware that a defendant is subject to a condition of release that requires that he submit to warrantless searches, may not rely on the search condition to justify a warrantless search of a residence that the defendant shares with another person. The court of appeal determined that the search was not conducted pursuant to a known search clause, and was not motivated by a warrant exception, rehabilitative, reformative, or legitimate law enforcement or probation purposes. The court noted that allowing the state to validate warrantless searches, after the fact, by means of showing a sufficient connection between the residence and any number of occupants, would encourage the police to engage in facially invalid searches with increased odds that justification could be found later. The potential for abuse would be especially high in high crime areas where the police suspect probationers may live. The court of appeal concluded that "while society generally has an interest in having all probative evidence before the court, in circumstances, such as these, the knowledge first requirement is appropriate to deter future police misconduct and to effectuate the Fourth Amendment's guarantee against unreasonable searches and seizure." The court of appeal remanded for a new hearing on the defendant's motion to suppress.

A Downward Departure Based on an Extraordinary Physical Impairment Is Permitted by the United States Sentencing Guidelines

United States v. Jimenez, 2002 U.S.Dist.Lexis 2744 (S.D.N.Y 2002) - Generally, a downward departure based on a defendant's physical condition is not relevant in determining whether a sentence should be outside the applicable guidelines. However, a downward departure based on a defendant's extraordinary physical impairment is permitted by the Guidelines, if

the defendant is so incapacitated that the ordinary purpose of incapacitation, deterrence, and rehabilitation do not justify the expense of extended incarceration, some lesser degree of punishment is permissible.

False Statement May Not Be Used To Obtain Waiver of Miranda Rights

Jackson v. Litscher, 194 F.Supp.2d 849 (E.D.Wis. 2002) -Pursuant to 28 U.S.C. §2254, petitioner sought a writ of habeas corpus challenging his conviction in state court for conspiracy to possess cocaine with intent to deliver. Petitioner's motion to suppress his confession was denied. Petitioner argued that his rights under the Fifth and Fourteenth Amendments were violated when, after receiving his Miranda warning, he requested counsel and was misinformed that counsel was not then available. The district court held that the petitioner's waiver was involuntary. Accordingly, the district court found that the critical factor was that the defendant's confession was precipitated by the officer's false statement about whether a lawyer could be provided at the interrogation. The district court determined that misinformation or trickery that distorts the meaning of the interrogation warnings prescribed by Miranda cannot induce a valid waiver of those rights. The district court held that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will show that the accused did not waive his privilege. The district court granted the petition for a writ of habeas.

Statute of Limitations Is Waived By State's Failure to Timely Raise It

Scott v. Collins, 286 F.3d 923 (6th Cir. 2002) - Petitioner appealed the dismissal of his habeas corpus petition as barred by the one-year statute of limitations imposed by 28 U.S.C. §2244(d) by the district court. The district court ordered the state to file a return of writ addressing the issue of whether the petition was time-barred under 28 U.S.C. §2244(d)(1). The state's response did not allege that the writ was untimely. The district court dismissed the petition as untimely. The Court of Appeals held that the petitioner's noncompliance with Section 2244(d) is not a jurisdictional defense; instead the statute of limitations is an affirmative defense. Therefore, it must be pleaded by the state to avoid waiver. The court noted that the statute of limitations is governed by Fed.R.Civ.P. 8(c)'s requirement that a party raise an affirmative defense in the first responsive pleading to avoid waiving it and the state's failure to raise it was a significant point, especially in light of the district court's order commanding the state to file a return of writ including an allegation as to whether the petitioner's claims were time barred. The court further held that the district court erred in sua sponte dismissing the petition for untimeliness despite the state's failure to act. The court noted that Rule 4 of the Rules Governing Section 2245 Cases permits a district court to dismiss a habeas petition sua sponte as an initial matter. The rule indicates that if the district court does not summarily dismiss the case, it must order the state to either file an answer or take another appropriate action. However, the rule does not give a court continuing power to dismiss sua sponte after it has ordered the state to file an answer. The court stressed that the power of Rule 4 expired when the district court ordered the state to file an answer or take appropriate action. The Court of Appeals remanded the case to the district court for consideration of the merits of the petition.

Federal Material Witness Statute Does Not Apply to Grand Jury Proceedings

United States v. Awadallah, S.D.N.Y., No. 01 Cr. 1026 (SAS,4/30/02) - The defendant, on the basis of an affidavit signed by an FBI Agent, was arrested as a material witness for a grand jury investigation of the September 11th terrorist attacks. The defendant was not arrested based on probable cause to believe that he committed any crime. The defendant was held as a material witness in a grand jury investigation. The defendant argued that he was merely a cooperating witness being

detained illegally under an abusive application of the material witness law. The prosecution argued that its power to detain him was authorized under 18 U.S.C. §3144. The district court held that the defendant was being held illegally. The Court determined that the 18 U.S.C. §3144 only allows for a witness to be detained until his testimony may be secured by deposition in the pretrial, as opposed to the grand jury context. The court explained that §3144 premises detention on an affidavit filed by "a party" and there are no parties to a grand jury investigation. Additionally, §3144 references to criminal proceedings cannot apply to grand jury proceedings when it is interpreted in the context of other language in §3144 and the federal rules. The defendant's grand jury testimony was suppressed and the indictment filed against the defendant was also dismissed.

Second Circuit Holds That Ban on Computer and Internet Access Imposed Greater Deprivation Than Necessary

United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002) - The defendant pled guilty to receiving child pornography. At sentencing the district court included a condition of supervised release that prohibited the defendant from using a computer or the internet without the approval of his probation officer. On appeal the defendant challenged the imposition of the condition regarding computer use. Although the Second Circuit found that the condition was reasonably necessary, it also determined that the condition inflicted a greater deprivation on the defendant's liberty than was reasonably necessary. The Court determined that the total ban on internet prevented legitimate use of the internet access and that a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of the computer hard drive, removable disk or the defendant's premises. The condition was vacated and the case was remanded.

One Who Commits A Crime to Avert Harm to Third Party May Assert Duress Defense

United States v. Haney, 287 F.3d 1266 (10th Cir. 2002) - The defendant was convicted of possessing escape paraphernalia while an inmate at a federal prison. While in prison the co-defendant was warned that a race war was brewing and that the co-defendant was a target. The co-defendant decided to attempt to escape from prison. The defendant assisted the co-defendant in collecting escape paraphernalia. The trial court instructed the jury on the duress defense as to the co-defendant but refused to give the instruction as to the defendant. The trial court determined that the duress defense was, as a matter of law, unavailable to him. On appeal the defendant argued that the district court erred in not permitting him to raise a defense of duress. The Tenth Circuit held that the trial court's refusal to give the instruction was reversible error. Accordingly, the Tenth Circuit found that the defense of duress can be applicable to situations in which the defendant asserts that he acted to prevent a greater harm to a third party. The third party does not have to be a member of the defendant's family. The court explained that the defense is defined not by a special relationship between the alleged lawbreaker and the beneficiary third party, but by the nature of the crime committed and the benefit to the third party. The court determined that the evidence was sufficient to permit a jury to find that all the elements of the duress defense were met in this case. The court reversed the defendant's conviction and remanded for further proceedings.