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Federal Defender Newsletter
December 2010

CJA PANEL TRAINING
There will be no CJA Panel Training this month. Training will resume the third week of January. Enjoy the holiday season!

IN MEMORIAM
Alister McAlister, defense attorney, former state assembly member, and long-time member of the CJA panel passed away at his home near Wilton on November 8, 2010. He was 80 years old. He is survived by five children and 14 grandchildren.

HOLIDAY PARTY
The annual Holiday Party will be on Friday, December 10 from 3:00 to 7:00 p.m. at 801 I Street. Everyone is invited, including spouses, friends, and children. There will again be a children's area with holiday crafts.

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 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.

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 Dawn at 498-5700.

NOTABLE CASES
US v. Cruz-Rodriguez, No. 09-40500 (5th Cir. 11-2-10) The Fifth Circuit considers whether a violation of California Penal Code section 422 (criminal threats) merits a 16-level increase under § 2L1.2. It holds that because it is possible under the California law for a person to be convicted without proof of the threatened use of physical force against a person, it does not constitute a crime of violence under categorical analysis.

US v. Grob, No. 09-30262 (11-10-10)(Wardlaw with Gould and Mills, Sr. D.J., C.D. Ill). The Ninth Circuit holds that a Montana criminal mischief conviction is like disorderly conduct, and meets the requirements not to be counted as a criminal history prior under USSG § 4A1.2(c). The defendant had been convicted of cyberstalking. The district court counted the conviction, placing the defendant in Criminal History Category III. The Ninth Circuit vacates and remands for new sentencing for procedural error in counting the prior. In holding that the "mischief" was like disorderly, the Ninth first notes that criminal mischief is not listed in the enumerated offenses that do not count as criminal history. If the mischief offense is like one of the enumerated offenses, then would not count. In comparing mischief with disorderly conduct (an enumerated offense), the Ninth Circuit applies application note 12 of the Guidelines, which states that the court should use a "common sense" approach. The test considers (1) a comparison of punishments; (2) the perceived level of seriousness; (3) the elements of the offense; (4) the culpability involved; and (5) whether the offense indicates a likelihood of recurring criminal conduct. Using this test, the Ninth Circuit determines that mischief is very much like disorderly conduct and accordingly should not be counted as criminal history.

US v. Johnson, No. 09-50292 (11-29-10)(Strom, Sr. D.J., D. Neb. with Fisher and Bybee). In a crack cocaine case, the district court imposed conditions against gang association and wearing gang colors -- all permissible -- but crossed the line with the condition that defendant not associate with people who associate with gang members. Although the review was for plain error, the Ninth Circuit concluded this was far too overbroad, vague, and violative of due process and the First Amendment. The condition swept in people who may have social contact only with gang members, family members of gang members, and even a person like a probation officer. Other conditions could permissibly achieve the same end of restricting gang affiliation and involvement.

US v. Lightfoot, No. 09-30063 (11-30-10)(Fernandez, with B. Fletcher and Bybee). The Ninth Circuit holds that an appeal waiver does not bar reconsideration of a reduced guideline range as a result of a retroactive application. The defendant had plead guilty to felonies, one of which was distribution of crack. The plea had the now pervasive appeal and collateral attack waiver. The Ninth Circuit reasoned that the waiver was inapplicable because it was not considered, nor anticipated, and ambiguous. The Ninth Circuit agreed with the Fifth Circuit on this.

Maxwell v. Roe, No. 06-56093 (11-30-10)(Paez, with Pregerson and Mahan, D.J., D. Nev.). A series of killings of homeless men in the later 1970's led to the killer being dubbed "the Skid Row Stabber." The petitioner was arrested and charged capitally with ten murders. The only real evidence was his palm print on a park bench close to one of the killings, and there was evidence was that he frequently hung out by that bench. Other evidence was disputed or unclear (like shoe prints). The identifications were inconclusive. However, there was an infamous L.A. jailhouse snitch who said that petitioner had confessed. The state courts later agreed that the informant was a liar, but decided that he had not lied this time. The Ninth Circuit first found that the petition was timely and not barred by AEDPA. Any delay was tolled because of the voluminous record and length of time of the process. The Ninth Circuit then found that the informant had lied, and that it was unreasonable to conclude that he did not. His lies were all over the record, and they violated due process. The lies were not harmless. The Ninth Circuit also found violations of Brady by the state as to the plea deal with the informant, and these were not harmless. The petition must be granted.

US v. Rivera-Gomez, No. 08-10480 (12-6-10). Congratulations to our own AFD Doug Beevers for the win in this published decision! The Ninth Circuit (Ikuta, with Berzon, Goodwin, concurring) holds that the district court erred in holding that as a matter of law a prior conviction for resisting arrest could not be relevant conduct for an illegal reentry offense even if it occurred "in the course of attempting to avoid detection or responsibility" under § 1B1.3. If the resisting arrest conviction was relevant conduct, it could not add criminal history points, and instead should be addressed through offense level calculations. The Ninth Circuit vacated the sentence and remanded the case to the district court.