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Federal Defender Newsletter
May 2010

CJA PANEL TRAINING

Dr. Jason Roof and Dr. Jessica Ferranti with the UC Davis Medical Center, Division of Psychiatry and the Law, will be presenting "Working with the Forensic Psychiatric Evaluator: Documentary Needs and Concerns" on Wednesday, May 19, 2010 at 5:30 p.m. It will take place at 801 I St., 4th Floor, Sacramento.

Fresno CJA Panel Training will take place on Tuesday, May 18, 2010 at 5:30 p.m. at the Downtown Club, 2120 Kern Street, Fresno. The topic will be announced.

There will be no panel training sessions in June, July, or August. CJA training will resume in September. Have a great summer!

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 women's clothing and men's dress socks.

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.

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.

PROPOSED AMENDMENTS TO SENTENCING GUIDELINES

The following proposed amendments were passed by the United States Sentencing Commission on April 13, 2010. They will be transmitted to Congress and should take effect on November 1, 2010.

A court should consider these amendments now because they reflect the "Commission's current policy position ... [that] may have some influence on the judge's ultimate discretionary choice of sentence." United States v. Godin, 522 F.3d 133, 134 (1st Cir.2008) (cited in United States v. Ahrendt, 560 F.3d 69 (1st Cir. 2009). If counsel does not bring these to the court's attention now, an appellate court is unlikely to remand for consideration. See United States v. Alexander, 553 F.3d 591, 593 (7th Cir. 2009).

1. Deletion of USSG § 4A1.1(e) (recency points) From Criminal History Calculation: This amendment deletes the one or two points given to a defendant who is within two years of a prior offense, currently imprisoned, or on escape status.

2. Downward Departure for Cultural Assimilation in Illegal Reentry Cases: The amendment adds application note 8 to USSG § 2L1.2, and states that a departure may be appropriate if the defendant "formed cultural ties primarily with the United States from having resided continuously in the United States from childhood," that "those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the Untied States," and "such a departure is not likely to increase the risk to the public from further crimes of the defendant."

3. Increase in Range of Zones B & C of the Sentencing Table: Each zone is being increased by a level in each criminal history category. This means that clients with ranges of 8-14 months in CH I through IV, and 9-16 months in CH V & VI will fall within Zone B rather than C. Likewise, clients in a range of 12-18 months in all CH categories will fall within Zone C rather than D.

4. Treatment Departure from Zone C to B: This amendment clarifies USSG § 5C1.1 n.6 by giving examples of when a treatment alternative departure from Zone C to B would be appropriate for drug and alcohol abusers as well as those who are significantly mentally ill. This would enable the court to depart to a probationary sentence to provide treatment instead of incarceration.

5. Amendments to Downward Departure Guidelines: The Commission also voted to amend USSG §§ 5H1.1, 5H1.3, 5H1.4 and 5H1.11 to state that age, mental and emotional conditions, physical condition (including physique), and military service "may be relevant in determining whether a departure is warranted, if [the factor], individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."

It also amended USSG § 5H1.4 to state that "drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure," when previously it stated that this factor "is not a reason for a downward departure." It also added language stating that "[i]n certain cases, a downward departure may be appropriate to accomplish a specific treatment purpose," citing newly-revised Application Note 6 to § 5C1.1 (setting forth a departure to accomplish a treatment purpose with various restrictions

and conditions). It added identical language to § 5H1.3 regarding mental and emotional conditions: "In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 6."

NOTABLE CASES

United States Supreme Court

U.S. v. Stevens, No. 08-769 (4-20-10) Federal statute prohibiting sale and distribution of depictions of animal cruelty violates First Amendment as overbroad.

Ninth Circuit Court of Appeals

US v. Andrews, No. 09-30072 (4-7-10) (opinion by Alarcon, joined by Fernandez and Clifton on this issue). This appeal revolves around restitution. The defendant pled guilty to assault resulting in serious bodily injury. The court ordered restitution, but refused to allow the defendant's expert witness to testify regarding causation for some of the victim's mental and physical disabilities. The court could not simply adopt a social agency's determination.

Nunez-Reyes v. Holder, No. 05-74350 (4-23-10). Expunged state conviction for being under influence of methamphetamine may not be treated as 'conviction' for immigration purposes.

US v. Coronado, No. 09-50154 (5-3-10) (Schroeder with Fisher and N. Smith). The influence of Begay v. US, 553 US 137 (2008) continues. In Begay, the Supremes held that under ACCA, gross negligence is not the same as "serious potential risk of physical injury to another." The language of serious potential risk is mirrored in the firearm guideline and its use of the crime of violence definition at USSG § 4B1.2(a). Here, the defendant received an upward adjustment under the firearm guideline for being a prohibited possessor with a prior crime of violence. The defendant's prior offense was discharging a firearm with gross negligence (Cal. Penal Code § 246.3). The Ninth Circuit held that the California statute includes acting with gross negligence and does not require an intent to harm. The gross negligence required by the statute is not the same as acting with purpose, violence, or aggression. Accordingly, the sentence is vacated and remanded.

US v. Rich, No. 08-30153 (5-3-10)(O'Scannlain with N. Smith and Woole, Sr. D.J.). The defendant died while his fraud case was on appeal. Since the appellate process had not been completed, his conviction and special assessment is vacated and the indictment must be dismissed. The $10 million dollar restitution order likewise must be abated, but moneys already paid and a receivership entered into prior to conviction stay in place. The Court affirms that the principle of "abatement ab initio" prevents recovery against the estate of a fine imposed as part of the conviction and sentence, because the merits of the appeal have not been resolved.

US v. Moreland, No. 05-30541 (5-3-10) (Hug with McKeown and W. Fletcher). This is back on remand from the Supremes in light of US v. Santos, 128 S.Ct. 2020 (2008)(money laundering).The Ninth Circuit reverses the defendant's money laundering convictions on counts 26 and 27 because the jury instructions did not require that the proceeds of the crime be profits. As a result, the sentence is vacated and remanded as well. Further, the court found that government cross-examination of the defendant regarding the veracity of prosecution witnesses (in effect compelling the defendant to call a government agent a liar) was improper.

US vs. Stever, No. 09-30004 (5-4-10)(Berzon with Farris and D. Nelson). Defendant was charged with involvement in a marijuana grow on a secluded part of his mother's rural property. Defense counsel sought discovery that Mexican drug trafficking organizations had recently infiltrated Oregon, were tightly knit, had placed grows on public and private land without permission of the landowners, and were unlikely to involve unrelated landowners in the operation. The case against the defendant was circumstantial and the government refused to provide discovery although it did not deny having responsive reports supporting what the defense was saying. Likewise, the district court refused to order discovery and prevented the defendant from putting on such a defense. On appeal, the Ninth Circuit reversed the conviction. The court found that the request fell under Brady, and was part of Fed R. Crim Pro. 16, and that the trial court's denial of the defense was "deeply flawed" and violated due process. The court easily found error and prejudice. The evidence was relevant, reliable, could be introduced (citing drug experts on traffickers), and was critical.

US vs. Struckman, No. 08-30463 (5-4-10) (Berzon, joined by Farris and D. Nelson). A neighbor called about a man jumping a fence and being in a fenced-in private backyard in the middle of the day. The police respond, go to the house, and peer through and over the fence and see a man meeting the description in the call. The man is not doing anything suspicious and does not visibly possess any weapons or burglary tools. One officer jumped the fence, another smashed the padlock, and both forced the man to the ground. He immediately identified himself as a resident of the house. They police failed to verify that he lived there, rather they handcuffed him, searched him, and searched the backpack, finding a weapon and an empty magazine. The defendant was a felon. After, the district court upheld the warrantless search under Terry, the defendant went to trial and was convicted, receiving a 17 year sentence. The 9th reversed the suppression ruling, and reversed and vacated the conviction. In a comprehensive opinion, the 9th said that Terry was inapplicable because it does not apply to "in-home searches and seizures." The backyard was fully-fenced, and next to the house, and so was the curtilage. There was no probable cause for burglary because under the state statute, there was no entry into the house, or burglary tools, or attempt. Nor was there probable cause for second degree trespassing, because the police have a duty to independently investigate the report by the neighbor. They failed to follow up on the defendant's statements that he lived there and that his mother could verify it, nor did they check his identification against easily available records. Even if there had been probable cause, the government still needed exigent circumstances, which did not exist. In analyzing this issue, the court emphasized that any probable cause would have been for a very minor misdemeanor, which would not support the intrusion into the curtilage. The Ninth Circuit stresses that the Fourth Amendment protections are only available if the defendant has standing in a house/curtilage, so a real trespasser couldn't raise this issue.