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Federal Defender Newsletter
November 2010

CJA PANEL TRAINING
The next Sacramento CJA panel training will be on November 17, 2010 at 5:30 at 801 I Street, 4th Floor. Attorneys from the Federal Defender's Office will present on the 2010 Amendments to the Sentencing Guidelines. There will be a focus on the effect of the Fair Sentencing Act on crack cocaine cases. The next Fresno CJA panel training will be on November 16, 2010 at 5:30 at the Downtown Club, 2120 Kern Street, Fresno. The topic and speaker will be announced.

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. Please save the date.

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.

FEDERAL DEFENDER SWEATSHIRTS
If you want to rock the holiday season in a very warm, stylish, and comfortable FDO sweatshirt, please use this link and get your order in by November 12, 2010:
http://www.cae-fpd.org/SweatshirtOrderForm2010.pdf

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, 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 button down shirts, solid color socks, and garment bags.

NOTABLE CASES

Cortez-Guillen v. Holder, No. 09-72358 (10-5-10)(Bea, with Hawkins and McKeown). Under its plain text, state offense of "coercion" is not federal "crime of violence" under categorical approach where threat that instills fear in victim may be nonviolent.

Graves v. Arpaio, No. 08-17601 (10-13-10)(B. Fletcher, Clifton, and Bea, per curiam). Pre-trial detainees taking psychotropic medications may not be housed in high temperature areas (above 85 degrees) which increase risk of heat-related illness. Likewise, the sheriff must provide food that meets for exceeds the Department of Agriculture's Dietary Guidelines.

Earp v. Cullen, No. 08-99005 (10-19-10)(Tallman, with Farris and Nelson). The district court erred in permitting a witness to invoke her privilege against self-incrimination without determining basis for invocation. This deprived the petitioner of a full and fair hearing.

U.S. v. Mitchell, No. 08-50429 (10-20-10)(Goodwin with Canby; concurrence by O'Scannlain). The Ninth Circuit clarifies that "even in cases where a defendant is being sentenced under the Guidelines as a career offender, the sentencing court may depart downward to account for the disparity between treatment of crack cocaine and powder cocaine in the Guidelines." The district court varied by 43 months on this basis; the defendant wanted an even shorter sentence. The Ninth Circuit found that the prior convictions qualified him as a career offender, but nonetheless, the sentencing court could vary based on the crack differential. The Ninth Circuit broadly holds that after Kimbrough a judge can vary from any guideline based on policy differences with the guideline. The resulting amount was not unreasonable.

U.S. v. Berry, No. 08-35002 (10-22-10). A district court may reach the merits of an untimely evidence-based motion to vacate a conviction under 28 U.S.C. § 2255 by treating it as a motion for new trial under Fed. R. Crim. Pro. 33 where government waives objection to timeliness.

In re Gonzales, No. 08-72188 (10-20-10)(Reinhardt with Berzon and M. Smith). The Ninth Circuit grants a petition for mandamus and orders a competency hearing to determine if the petitioner can assist counsel in his capital habeas proceeding. The district court had held that the proceedings were record based, and resolvable as a matter of law. The Ninth Circuit reversed, holding that under Nash v. Ryan, 581 F.3d 1048 (9th Cir. 2009), even a habeas appeal that is record-based and resolvable as a matter of law can benefit from communication between counsel and client.

Williams v. Ryan, No. 07-99013 (10-26-10)(Schroeder with Berzon; partial concurrence and dissent by Ikuta). This is a Brady case. The petitioner was convicted of capital murder of his former girlfriend and given a death sentence. There was an alleged confession to a present girlfriend, but little else in the way of physical evidence due to the remote location of the killing. Two years after the sentence, the state turned over letters written by an inmate to a detective that contained information that petitioner paid another man to commit the murder. There was evidence that connected this other man to the murder. The first question is whether the letters were Brady material. If they were Brady, the second question is which stage of the case they affected. All three judges would find that the letters were Brady as to sentencing, and a writ should be issued. The majority went further, holding that the Brady violation concerning another alleged perpetrator went to guilt, and that an evidentiary hearing was

required to develop the record on whether it necessitated a new trial.

U.S. v. Vela, No. 08-50121 (10-26-10)(Canby with Rawlinson; dissent by N. Smith). The defendant was found "Not Guilty by Reason of Insanity" of assault on a federal officer in violation of 18 USC § 111. The Ninth Circuit holds that there is a right of appeal from this disposition because it is a final order.

Teposte v. Holder, No. 08-72516 (10-26-10)(Gould, with O'Scannlain and Ikuta). A California conviction for shooting at inhabited vehicle requires only reckless intent under California law, and is not categorically a "crime of violence" subjecting defendant to removal.

Smith v. Mitchell, No. 04-55831 (10-29-10)(per curiam: Pregerson, Canby and Reed, D.J. D. Nev.). This is a remand (again) from the Supreme Court asking the Ninth Circuit to reconsider its holding that, under Jackson, no rational trier of fact could have found the defendant guilty in this shaken baby prosecution. The case has come back twice before. The Ninth Circuit, this third time, still says that taking all the evidence in the light most favorable to the state, and assuming the jury was rational, the evidence simply didn't prove guilt.

US v. Krane, No. 10-30247 (10-29-10)(Thomas with M. Smith and Ezra, D.J. D. Hi.) This was an interlocutory appeal of a subpoena in a tax fraud case. A third-party investment group got served with a subpoena that ordered it to turn over materials that it asserted were protected by the attorney-client privilege. The court said they were not privileged. The third-party appealed to the Ninth Circuit, which considered whether the Perlman rule (allowing interlocutory appeals by a disinterested third-party custodian of records) still survives after the Supremes Court's decision in Mohawk Industries. The Ninth Circuit holds that the third-party appeal is still allowed. Post-judgment appeals are usually sufficient to protect rights and privileges of parties. Perlman deals with disinterested third parties, who are not motivated to litigate or face contempt charges. With that distinction made, the Ninth Circuit finds the issue moot because the defendants pled guilty.

U.S. v. Lazarenko, No. 08-10185 (11-3-10). In the absence of exceptional circumstances, a defendant cannot be ordered to pay restitution to a co-conspirator in the crime. Even though the applicable victim restitution statutes set forth a definition that does not exclude co-conspirators, the Ninth Circuit finds that Congress could not have intended to involve courts in redistributing funds among wholly guilty co-conspirators. Finding that a literal application of the plain text leads to absurd results, the Ninth Circuit adopts a general rule that an order of restitution to a co-conspirator is a fundamental error in the judicial proceedings.

U.S. v. Wright, No. 08-10525 (11-4-10)(M. Smith with Hogan, Sr. D.J.; concurrence by Hug). This is a child pornography case that went to trial and is now appealed. Defendant was arrested and charged with numerous counts related to the images. Defendant said he didn't know they were on his computer and pointed at his roommate, who had motive, opportunity, and intent. Upon arrest, defendant made some equivocal statements that the court let in. Defendant also argued for greater access to discovery. At trial, the prosecutor committed misconduct in argument and came close in other spots. As for the roommate, the court kept out 404(b)evidence that went to the roommate's expertise, motive, intent, and other damning stuff (i.e. the roomate's on-line identity was "Presumed Innocent."). The jury acquitted on most counts, but found the defendant guilty of possession of child porn under 18 USC 2252A(a)(1) and (a)(5)(B).

On appeal, the Ninth Circuit reversed the conviction for 2252A(a)(1) because the photos did not travel interstate; the transportation was all intrastate (the images never went over state lines). The statute has since been expanded to include interstate means of transportation, but here, the jurisdictional element was not met. On the other count, the Ninth Circuit remanded, finding that the district court failed to make the necessary factual finding regarding whether the defendant was or out of custody, asked for counsel, and was coerced when he made his statements. Further, the Ninth Circuit acknowledged error by the government in argument but said that defense counsel's rebuttal to it was so effective that it was harmless. As for the 404(b) evidence, the Ninth Circuit stressed that a witness need not testify for 404(b) to be introduced.