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Federal Defender Newsletter

April 2014

CJA PANEL TRAINING

Sacramento CJA Panel Training is **April 16, 2014** (Third Wednesday) at **5:00 p.m.** in the grand jury room at the U.S. District Court, 501 I St. CJA Panel Attorney Joseph Wiseman will present "There and Back Again (Almost): Renewing the Jurisdiction of Indian Tribes to Prosecute Non-Indians under the Violence Against Women Reauthorization Act of 2013."

Fresno CJA Panel Training is **April 15, 2014** (Third Tuesday) at **5:30 p.m.** Kelly Scribner, the Assistant National Litigation Support Administrator for the AO's Office of Defender Services will be presenting "Handling Electronic Discovery." The training will be held in the jury room of the U.S. District Court, 2500 Tulare St. in Fresno.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes Panel training materials through its website: www.cae-fpd.org. We try to post training materials **before** trainings for CJA lawyers to print out and bring to training for note taking. Any lawyer not on the Panel, but wishing training materials, should contact Lexi Negin, lexi_negin@fd.org.

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Check out [www.fd.org](http://www.fd.org) for unlimited information to help your federal practice.

### TOPICS FOR FUTURE TRAINING SESSIONS

Do you know a good speaker for the Federal Defender's Panel training program, or would you like the office to address a particular legal topic or practice area?

Email suggestions to:

Fresno - Janet Bateman,  
[janet\\_bateman@fd.org](mailto:janet_bateman@fd.org),  
Ann McGlenon,  
[ann\\_mcglenon@fd.org](mailto:ann_mcglenon@fd.org), or  
Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org),  
or

Sacramento: Lexi Negin,  
[lexi\\_negin@fd.org](mailto:lexi_negin@fd.org).

### **BOP ORIENTATION PROGRAM**

Pretrial Services and BOP will hold orientation classes in Fresno and Sacramento for defendants facing possible prison sentences. Each defendant is welcome to bring a family member. Defense counsel and staff are also welcome. The classes will educate defendants on the BOP system, answer questions about facilities, provide insight on what to expect upon self-surrender, and assist with adjustment to prison life.

**Fresno's class will be Tuesday, April 15, 2014 from 9:30 to 11:30 a.m.**

**Sacramento's class will be Tuesday, April 22, 2014 from 9:30 to 11:30 a.m.**

Classes are held in the Pretrial Services Office at each courthouse.

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♪ NOTABLE CASES ♪

## NINTH CIRCUIT

**United States v. Cabrera-Gutierrez, No. 12-30233** (Tashima with Collins, DJ (Ariz.); partial dissent from Callahan). The Ninth Circuit vacates the defendant's sentence for failing to register as a sex offender. His prior offense under Oregon's second-degree sexual abuse statute is overbroad as compared to the federal aggravated sexual abuse (18 U.S.C. § 2241) and sexual abuse (18 U.S.C. § 2242) statutes, because the Oregon statute makes it a crime to engage in a sexual act with people who do not actually consent, while the federal sexual abuse statute requires that the victim be either mentally or physically incapable of consenting. Moreover, Oregon's age of consent is 18, while the federal age of consent is 16. Thus the Oregon statute is overbroad, and is not divisible such that the modified categorical approach would apply to it (Descamps v. United States, 133 S. Ct. 2276 (2013).) The district court thus erred when it sentenced the defendant as a Tier III, rather than a Tier I, sex offender. See U.S.S.G. § 2A3.5(a). Finally, the Ninth Circuit remanded the case to allow the district court to award, if appropriate, a 3-level downward adjustment for acceptance of responsibility, which the government had withheld because the defendant acted to preserve his right to appeal. See U.S.S.G. § 3E1.1 cmt. 6 (2013).

**United States v. Cortes, No. 12-50137** (Silverman with Thomas and Fisher) --- This opinion cleans up some confusion about the proper jury instruction for entrapment in light of United States v. Spentz, 635 F.3d 815 (9th Cir. 2011), and

clarifies that a jury instruction on sentencing entrapment may sometimes be required in light of Alleyne v. United States, 133 S. Ct. 2151 (2013). This is a fake stash house case. Undercover ATF agents recruited the defendant and some confederates to rob a house where, they claimed 100 kilograms of cocaine were being stored. At trial, the defendant claimed entrapment, and the judge instructed the jury using the Ninth Circuit's model instruction modified (in his view) to account for Spentz by forbidding the jury from considering the large amount of drugs the defendant hoped to recover and share with his confederates. The Ninth Circuit held that the judge did not interpret Spentz correctly, because Spentz only held that the prospect of recovering contraband cannot *by itself* establish entrapment. This weakness in the jury instruction led the panel to reverse and remand for a new trial.

On remand, the issue of sentencing entrapment might arise, because the defendant had historically only been involved in transactions involving 5 or 6 kilograms of cocaine, not 100. Because the amount of cocaine involved could trigger certain mandatory minimum sentences and affects the statutory maximum sentence, the Ninth Circuit held that sentencing entrapment is a question for the jury in light of Alleyne. The panel offered a model instruction for sentencing entrapment.

**Blake v. Baker, No. 12-25522** (9th Cir. March 14, 2014)(Tashima, with Fletcher and Nguyen). In this habeas case, the Ninth Circuit holds that the Rhines standard for cause based on ineffective assistance of counsel is not any more demanding than the cause standard articulated in Martinez v. Ryan, 132 S. Ct. 1309 (2012), and that petitioner met that



standard. The panel remanded with instructions to grant the stay and abeyance to exhaust in state court and for further proceedings

**United States v. IMM (Juvenile), No. 11-10317** (3-31-14)(Reinhardt with Nelson and M. Smith). This juvenile case raises important issues regarding the interrogation of minors. The Ninth Circuit reverses and remands the conviction because the 12-year-old juvenile was questioned in custody and not given his *Miranda* rights. The case is from an Indian reservation. The defendant was 12-years-old, in special education, and emotionally troubled from an abusive home life. He alleged sexually assaulted a 7-year-old. There was no physical evidence. The defendant juvenile gave a statement after being picked up, with his mother on a Saturday morning by an armed officer 7 months after the incident. He was driven 40 minutes to the police station and placed in a small room. His mother gave consent to question him and left the room. He was questioned for an hour. He was never given his *Miranda* rights. The Ninth held that the defendant was in custody under the test laid out in *Kim*, 292 F.3d 969, based on (1) the language used to summon the individual; (2) the confrontation with evidence of guilt; (3) the physical surroundings of the questioning; (4) the duration of detention; and (5) the degree of pressure applied. His statement should have been suppressed.

**United States v. Vargem, No. \_\_\_\_\_** (3-28-14) (Sessions [visiting DJ] with Reinhardt and Thomas). Represented by private counsel, Vargem was sentenced for possession of an unregistered machine gun. The case started with a protective order against Vargem, issued after his

wife reported an assault. The protective order prohibited Vargem from having guns. Officers then learned that Vargem had 12 guns registered in his name. An officer called Vargem, told him about the protective order, and told him to surrender the guns. Officers then went to Vargem's house and saw him loading stuff into a van. Vargem drove away, the van was stopped, a pistol was discovered. A later search of Vargem's house revealed an unregistered machinegun (and 27 other guns). The district court imposed a six level adjustment under § 2K2.1(b)(1)(C) for between 25 and 99 firearms "involved in the offense." The defense did not object to the guideline calculations. On appeal, on plain error, the Ninth Circuit holds that the adjustment was wrong. Under relevant conduct rules, "offenses" include charged or uncharged offenses that "were part of the same course of conduct or common scheme or plan as the offense of conviction." Accordingly, the government argued that all 28 weapons were part of a common scheme or plan and the same course of conduct. However, Vargem was not prohibited under federal law from possessing firearms. Only one firearm was illegal. Accordingly, there was no evidence to support the conclusion that each of Vargem's other 27 firearms was also illegal. The Ninth Circuit vacates and remands the sentence: the crux of the relevant conduct analysis is the relationship to the offense of conviction. Importantly, the plain error in guideline calculation requires the sentence to be vacated even though the defendant received a large variance off the higher erroneous guideline range. There was a reasonable probability that the court would have imposed a different sentence had it known the correct range.

**United States v. Lopez, No. 12-50464** (4-2-14)(Wardlaw with Pregerson and Tallman). In this appeal from an illegal reentry conviction, the Ninth Circuit finds error in the testimony by the border patrol agent that he was sure the defendant was previously deported based on the Verification of Removal form. The agent was not qualified as an expert and did not personally see the defendant removed: his opinion on the ultimate issue violated Federal Rules of Evidence 602 and 701. (Other evidence rendered this error harmless.)

**United States v. Ward, No. 12-50536** (4-3-14)(Smith, Chief D.J., with Watford and Hurwitz). The Ninth Circuit reversed convictions on aggravated identity theft in violation of 18 USC §1028A(a)(1) for variance from the indictment. The jury instructions did not state that the jury had to find specific individuals as alleged in the indictment. The government elicited testimony at trial from other "victims" not alleged in the indictment to show that defendant in his fraud and theft of credit card information knew real persons were involved. The general nature of the instructions acted as a illegal variance to the indictment.

## ADDRESS, PHONE OR EMAIL UPDATES

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Calvin Peebles at the same number.

## CJA REPRESENTATIVE


Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, [carl.faller@fallerdefense.com](mailto:carl.faller@fallerdefense.com).

Our Back-up CJA Representative is **Scott Cameron**, 916-769-8842, [snc@snc-attorney.com](mailto:snc@snc-attorney.com).

## LETTER FROM THE DEFENDER

In the past few months' newsletters, we talked about changes in procedure for megacases: investigator, law clerk, mitigation specialists, jury consultant, and paralegal hourly range rates; retainer letters; etc.

What hasn't be discussed recently is how to go about truly corralling the megacase for defense counsel to handle the massive information in the disclosure.

 Case Budgeting Attorney: Defender Services and the 9<sup>th</sup> Circuit created as a pilot project several years ago a Case Budgeting Attorney (CBA) position. This CBA meets and consults with appointed lawyers in megacases to plan budgets for the cases: paralegals, investigators, translators, copying, transcription, experts, etc. By working with so many lawyers in so many districts, the CBA is able to compile service provider information in each category to refer to counsel. The CBA can negotiate reduced rates. Considering ethical and professional responsibilities, the CBA can assist in combining some services, always keeping in mind individual representations of independent clients. The CBA can serve as a nexus with judges who approve megacase budgets, educating and showing cost-containment was considered and possible. The Pilot Project was a success, saving millions of dollars, and, now, has been funded permanently. The Ninth's CBA, Nancy Rutledge, has just retired and her replacement will be announced within the next few months. For more information on this project, look here:

### Major Duties and Responsibilities

Work with Ninth Circuit committees, district court judges, magistrate judges, and CJA panel attorneys to develop budgets and review budgets of criminal mega-cases and



death penalty cases, including capital habeas corpus. In conjunction with counsel and the assigned judge, assist in preparation of budgets for criminal mega-cases and capital cases, addressing attorney time, paralegal time, experts, investigation, and other costs. Review cases for progress and efficiencies while comparing the initial budget and requests for modification of the budget. In cases with multiple attorneys ("mega-cases"), coordinate with defense counsel to eliminate duplication of motions and to require cooperation in discovery, coordination of investigation and pretrial needs consistent with Circuit and District Court's guidelines for such cases. Develop a panel of experts and investigators whose fees are reasonable to recommend to defense counsel. Maintain a list of service providers for translation and duplication services. Develop and maintain a central database of budget information, including expenditures, to monitor budget compliance. Provide policy and budget information to the courts and to the Administrative Office of the United States Courts. Participate in training programs to educate the courts and CJA panel attorneys on case budgeting principles, including means of cost-containment, best practices, and procedures. Assist in development of model orders for capital and criminal mega-cases. Make recommendations on the reasonableness of vouchers when requested by the courts. Work with the courts to develop specialized panels of attorneys where appropriate. Occasional travel required.

#### **Education/Experience Requirements**

**Education:** Graduation with a Juris Doctor (JD) degree (or equivalent) from a law school that has been accredited by a recognized accrediting authority, and admission to practice before the highest court of a State, Territory, Commonwealth, or possession of the United States.

**Experience:** At least five years of experience consisting of criminal defense and/or capital habeas representation including extensive experience and knowledge of billing practices and staff management. Must possess a comprehensive understanding of the dynamics and costs of the CJA system. Thorough knowledge of criminal litigation and capital habeas corpus strategies and processes is required. Ability to analyze fees and budgets, write clear and concise reports, make effective oral presentations and work

amicably and professionally with judges, the Bar, court executives and attorneys.

#### **Desirable qualifications, knowledge, skills, and abilities**

- Thorough knowledge of the Criminal Justice Act and its Guidelines as well as federal criminal law and criminal procedures as practiced in the District Courts in the Ninth Circuit
- Ability to deal persuasively and tactfully with counsel and develop creative and practical solutions to case management and budgeting issues
- Ability to work under pressure with tight deadlines
- Ability to apply existing CJA policies and procedures and recommend new principles with special emphasis given to difficult situations
- Skill in writing reports which include the analysis of a wide range of technical data and statistics
- Skill in oral presentation of complicated legal matters to judges, the Bar, and court executives
- Proficiency with computers, MS Word, Excel, and WordPerfect and ability to learn new software



The Judges also look to the **Guide to Judiciary Policy, Vol. 7, Part A, Chap. 2, § 230.26.20 Case Budgeting Procedures**, for guidance in approving funds in big cases. It says:

(a) *If a court determines that case budgeting is appropriate (either on its own or upon request of counsel), counsel should submit a proposed initial litigation budget for court approval, subject to modification in light of facts and developments that emerge as the case proceeds.*

(b) *Case budgeting forms (Forms CJA 28A — CJA 28H), together with instructions for their use, may be found on the [public judiciary website](http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx). [http://www.uscourts.gov/FormsAndFees/Forms/CourtFormsByCategory.aspx]*

(c) *Case budgets should be submitted ex parte and filed and maintained under seal.*

(d) *or general information on case budgeting principles relating to capital cases, see: [Guide, Vol 7A, § 640](#).*

It continues, saying:

§ 640 Case Budgeting

## § 640.10 Overview

Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds.

## § 640.20 Purpose and Procedures

(a) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.

(b) Case budgets should be submitted ex parte and filed and maintained under seal.

(c) Consideration should be given to employing an ex parte pretrial conference to facilitate reaching agreement on a litigation budget at the earliest opportunity.

(d) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and payments for investigative, expert, and other services.

(e) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized.

(f) Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

## § 640.30 Matters for Inclusion in the Capital Case Budget

Matters that may affect the compensation and reimbursement of counsel and payments for investigative, expert, and other services (see: [Guide, Vol 7A, § 640.20\(d\)](#)) include, but are not limited to the following:

(a) The hourly rate at which counsel will be compensated (see: [Guide, Vol 7A, § 630.10](#) and [§ 630.20](#));

(b) In capital habeas corpus cases:

The best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) for the entire case (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(c) In federal death penalty cases:

(1) Prior to prosecution decision to seek death penalty authorization:

The best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice (DOJ) determines whether to authorize the death penalty;

(2) After prosecution decision to seek death penalty authorization:

The best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(3) Death penalty not sought:

As soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed according to [§ 630.30](#);

(d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;

(e) Agreement on a date on which a subsequent ex parte case budget pretrial conference will be held;

(f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (see: [§ 660.40.10](#) and [§ 660.60](#));

(g) The form in which claims for compensation and reimbursement should be submitted (see: [§ 630.60](#)) and the matters that those submissions should address; and

(h) The authorization and payment for investigative, expert, and other services. See: [§ 660](#).

## § 640.40 Authorization for Investigative, Expert, and Other Services Prior to Submission of Case Budget

(a) Recognizing that investigative, expert, and other services may be required before there is an opportunity for counsel to prepare a case budget or for the court to approve it, courts should act upon requests for services where prompt authorization is necessary for adequate representation.

(b) Courts, in examining the case budget, may reconsider amounts authorized for services prior to the budget's approval; however, courts may not rescind prior



authorization where work has already been performed.

## § 650 Case Management in Federal Capital Habeas Corpus Proceedings

*Judges are encouraged to employ the case-management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases.*

For more forms and information on case budgeting for capital and non-capital representations, fd.org is a great resource. <http://www.fd.org/navigation/select-topics-in-criminal-defense/cja-panel-information/supporting-pages/cja-case-budgeting-worksheets> .



### **Discovery Litigation Support Law Firms:**

Some cases have so much information – TOO much information – for one lawyer to review and assimilate. There now exist law firms which focus on having lawyers review big complex case disclosure – documents, electronic evidence, audio, video - to look for the statements and facts of import to conviction and defense of the case, all done through lawyers' eyes and experience. Search the Internet using *Discovery Law Firms*.



**Software:** In our megacases, for those who want hands-on, there is software to search and organize disclosure. Some are available through Defender Services at reduced prices: CaseMap, dtSearch, TrialDirector, CaseVantage. Other programs exist, some even for free: Copernic, Adobe Pro, Summation, Digital WarRoom. Never hesitate to contact Defender Services for help in your megacase for guidance and suggestions. <http://www.fd.org/navigation/litigation-support/subsections/what-is-litigation-support> and **Alex Roberts** or **Kelly Scribner** of the National Litigation Support Team at **510-637-3500**, or by email: [alex\\_roberts@fd.org](mailto:alex_roberts@fd.org), [kelly\\_scribner@fd.org](mailto:kelly_scribner@fd.org).

Good luck with these challenging cases!

~ Heather E. Williams

Federal Defender, Eastern District of California

## **Former Federal Defender Employees Looking for Employment**

Becky Darwazeh, [darwazeh1@hotmail.com](mailto:darwazeh1@hotmail.com):  
Secretarial, Legal Assistant

Yvonne Jurado, [yvonneee@live.com](mailto:yvonneee@live.com), (916)230-0483: Paralegal, Secretarial, Legal Assistant, CJA voucher preparation and filing

Karen Sanders, [kvs.legaltech@gmail.com](mailto:kvs.legaltech@gmail.com), (916)454-2957 (h), (916)216-3106 (cell)  
Karen has over 20 years of experience as the computer systems administrator at FDO. She'll be providing legal technical and litigation support services. Hourly reasonable rates are available.

Lupita Llanes, [lupitallanes@gmail.com](mailto:lupitallanes@gmail.com), (559) 360-4754: Secretarial and Office Management work. Bilingual Spanish/English services.

### **DEFENDER SERVICES OFFICE TRAINING BRANCH NATIONAL TRAININGS**

<http://www.fd.org/navigation/training-events>

### **UPCOMING TRAINING**

#### **SENTENCING ADVOCACY WORKSHOP**

LONG BEACH, CALIFORNIA | March 06-08 2014

#### **TRIAL SKILLS ACADEMY**

SAN DIEGO, CALIFORNIA | April 27-May 02 2014

#### **SENTENCING ADVOCACY WORKSHOP**

PHILADELPHIA, PENNSYLVANIA | June 19-21 2014

#### **FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE**

MINNEAPOLIS, MINNESOTA | July 31 2014

#### **MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR**

MINNEAPOLIS, MINNESOTA | July 31-August 02 2014

### **NATIONAL ASSOCIATION FOR PUBLIC DEFENSE**

This nascent organization seeks members from both public defender offices and private attorneys who accept court-appointed criminal cases. NAPD's website offers articles and news. Annual membership is \$25 with access to frequent webinars **FREE** to members (non-members pay a nominal fee). More information can be found at <http://www.publicdefenders.us/?q=about> .