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Federal Defender Newsletter

April 2021

REMOTE CJA PANEL TRAINING

The Federal Defender Services Training Division continues to provide excellent remote training for CJA counsel.

Upcoming trainings include:

April 7: Fundamentals of Federal Criminal Defense - Successful Storytelling at Sentencing

April 14: Fundamentals of Federal Criminal Defense - Workshop, Applications of Drug Guideline §2D1.1 and Criminal History Guidelines §§4A1.1-4A1.2 (repeats on April 21, 2021)

April 28: Fundamentals of Federal Criminal Defense - The Categorical Approach: A Primer

April 30: Defense Strategies to Challenge Personality Disorder Diagnoses

All training may be accessed from fd.org with your CJA username and password. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself.

The Federal Defender Training Division also provides a **telephone hotline** with guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

NACDL also offers excellent remote training, including self-study videos, relevant to federal criminal defense practice.

COVID-19 NEWS

Keep up with all the COVID-19 information affecting your federal practice by ensuring your email address is up-to-date with the Federal Defender's Office. You should be receiving weekly emails about how coronavirus is impacting our district and jails. If you need to update your email address, please notify Kurt.Heiser@fd.org.

CJA Representatives

Kresta Daly, Sacramento, (916) 440.8600, kdaly@barth-daly.com, is our District's CJA Representative. The Backup CJA Representative is Kevin Rooney, (559) 233.5333, kevin@hammerlawcorp.com.

2018 Sentencing Guidelines **Still in Effect**

The Sentencing Commission did not pass any amendments last year; therefore the 2018 Sentencing Guidelines (Red Book) are still the operative guidelines.

Sacramento Duty Contact at Marshal's Office

Please email USMS.CAE-PRL@usdoj.gov or call the Marshals cellblock number at 916-930-2026, for any Sacramento duty matters, including interview requests.

WELCOME NEW SACRAMENTO AFD: HOOTAN BAIGMOHAMMADI

Please join us in welcoming Hootan Baigmoammadi (pronounced *who-TAN Bag-moe-HAH-mah-dee*) to our Sacramento Trial Unit.

Hootan comes to us after a bit over a year in México City studying Spanish. Before his return to learning, for several years, Hootan was an Assistant FPD in our Federal Public Defenders of San Diego office (Southern California) and, before then, was with the Contra Costa County Public Defender. He is no stranger to our Office, being a graduate of our law student intern misdemeanor clinic program. In Southern California, Hootan saw and challenged the insanity of criminalizing immigration both in San Diego and El Centro, and counts among his successes a motion challenging a stop at an illegal Border Patrol checkpoint in a mandatory minimum case.

As with many in our Office, he looks forward to bicycling along the American River. And he is our next step in hiring lawyers from Jerome Price's and Tina Sinha's law school graduating class.

TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno: Peggy Sasso,
peggy_sasso@fd.org
or Karen Mosher,
karen_mosher@fd.org
Sacramento: Lexi Negin,
Lexi_negin@fd.org

SUPREME COURT

In Torres v. Madrid, No. 19-292, the Supreme Court held that the police's application of physical force to the body of a person with intent to restrain **is a seizure** even if the person does not submit and is not subdued. Ms. Torres' case is a civil case where police officers shot her and she managed to drive herself to a hospital. She later sought damages from the officers under 42 U.S.C. §1983, arguing the officers used excessive force against her and the shooting constituted an unreasonable Fourth Amendment seizure. The District and Circuit Courts held "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." The Supremes reversed their decisions.

NINTH CIRCUIT

US v. Aruda, No. 20-10245 (4-8-21)(Per curiam w/Wardlaw, Gould, & Owens). In a Compassionate Release appeal, for a motion filed by a defendant under the First Step Act, the Ninth Circuit holds that the USSG's 1B1.13 is not an "applicable policy statement." The USSC's policy statement sets forth various limiting factors, but does not apply to defendant-initiated motions. The Ninth Circuit vacates and remands the district court's denial because it was based on the policy statement. The Ninth Circuit's opinion joins five other circuits in so holding.

US v. Lucero, No. 19-10074 (3-4-21)(Bumatay w/Bade & Marquez; partial dissent by Bade). This case involved a criminal prosecution for violating the Clean Water Act by knowingly discharging pollutants "into water." The defendant alleged dumped dirt on dry land. However, through complex statutes and definitions, dry land can qualify as water under the

Act. The Act requires the Government to prove that the defendant knew that he was discharging material “into water.” The jury instructions failed to set forth the intent element. The matter was remanded for a new trial.

and reimburse the CJA. The revised form also includes a memo explaining not simply how to complete the form, but also who might access its information and when.

This case holding may apply to some marijuana grow cases on federal land where the government charges depredation of natural resources.

US v. Rundo, No. 19-50189 (3-4-21)(per curium w/Fernandez, Paez, & Tigar; partial concurrence and dissent by Fernandez). The Anti-Riot Act, 18 U.S.C. § 2101, prohibits various means of inciting a riot, including organizing, urging, or encouraging it. The Defendants challenged the statute under the First Amendment. The Ninth Circuit holds that statutory elements of organizing, urging, and encouraging the riot are unconstitutionally overbroad under the First Amendment. Urging, encouraging, promoting, and organizing a riot are not susceptible to a limiting construction, and, thus, each one runs a risk of punishing mere advocacy, which is protected speech. These can be severed from the underlying Act, which also extends to conduct not constitutionally protected.

NEW CJA 23 FINANCIAL AFFIDAVIT FORM

Attached is the Court’s revised official *Financial Affidavit* (CJA23) form for deciding whether a person qualified for court-appointed counsel. The revised form better reflects the income, assets, and financial obligations the court must consider when deciding a person’s ability to retain counsel or when appointing counsel under the *Criminal Justice Act*, including whether a person might be able to contribute to the representation’s costs



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS


HONORABLE ROSLYNN R. MAUSKOPF
Director


WASHINGTON, D.C. 20544

March 29, 2021

MEMORANDUM

To: Judges, United States Court of Appeals
Judges, United States District Courts
United States Magistrate Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts of Appeals
Clerks, United States District Courts
Chief Probation Officers
Chief Pretrial Services Officers
Senior Staff Attorneys
Circuit CJA Case-Budgeting Attorneys
Circuit Librarians

From: Judge Micaela Alvarez 
Chair, Judicial Conference Committee on Defender Services

Judge Roslynn R. Mauskopf 

RE: REVISED CJA 23 FINANCIAL AFFIDAVIT FORM (**INFORMATION**)

The Criminal Justice Act, 18 U.S.C. § 3006A (“CJA”), requires each district court, with the approval of the judicial council of the circuit, to place in operation a plan for providing representation and other defense services to any financially eligible person. 18 U.S.C. § 3006A(a). A person is “financially unable to obtain counsel” within the meaning of 18 U.S.C. § 3006A(b) if the person’s net financial resources and income are insufficient to obtain qualified counsel. *Guide to Judiciary Policy*, Vol. 7A, Chapter 2, § 210.40.30(a). The CJA 23 Financial Affidavit assists courts throughout the country in determining an individual’s financial eligibility for the appointment of counsel under the CJA.

At its December 2020 meeting, the Defender Services Committee approved revisions to the CJA 23 Financial Affidavit, consistent with its responsibility to review and modify forms used by courts in administering the CJA and related statutes. The revisions were prompted by the need to better support the collection of information about an applicant's financial resources, (consistent with the *Guide to Judiciary Policy* regarding what may or may not be taken into consideration as part of the inquiry about financial eligibility), and to simplify the form by using plain language and removing unnecessary questions.

The Committee also approved a new set of instructions to accompany the CJA 23 Financial Affidavit. While other CJA forms contain thorough instructions for their use, the previous version of the CJA 23 Financial Affidavit did not. The new instructions contain pertinent policies from the *Guide to Judiciary Policy* for determining financial eligibility, and provides guidance to courts for how to resolve conflicts between an individual's Fifth and Sixth Amendment rights when a person presents a colorable claim that disclosure to the government of a completed financial affidavit would be self-incriminating.

Attachment

cc: CJA Panel Attorney District Representatives

FINANCIAL AFFIDAVIT

IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT, OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN THE UNITED STATES DISTRICT COURT COURT OF APPEALS OTHER (*Specify Below*)

IN THE CASE OF

_____ V. _____

FOR _____
AT _____

LOCATION
NUMBER

PERSON REPRESENTED (*Show your full name*)

CHARGE/OFFENSE (*Describe if applicable & check box→*) Felony
 Misdemeanor

- 1 Defendant - Adult
- 2 Defendant - Juvenile
- 3 Appellant
- 4 Probation Violator
- 5 Supervised Release Violator
- 6 Habeas Petitioner
- 7 2255 Petitioner
- 8 Material Witness
- 9 Other (*Specify*) _____

DOCKET NUMBERS

Magistrate Judge _____

District Court _____

Court of Appeals _____

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

INCOME & ASSETS	EMPLOYMENT	Do you have a job? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES , how much do you earn per month? _____ Will you still have a job after this arrest? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown																		
	PROPERTY	Do you own any of the following, and if so, what is it worth? <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 30%;"></th> <th style="width: 20%; text-align: center;">APPROXIMATE VALUE</th> <th style="width: 50%; text-align: center;">DESCRIPTION & AMOUNT OWED</th> </tr> </thead> <tbody> <tr> <td>Home</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Car/Truck/Vehicle</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Boat</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Stocks/bonds</td> <td>\$ _____</td> <td>_____</td> </tr> <tr> <td>Other property</td> <td>\$ _____</td> <td>_____</td> </tr> </tbody> </table>		APPROXIMATE VALUE	DESCRIPTION & AMOUNT OWED	Home	\$ _____	_____	Car/Truck/Vehicle	\$ _____	_____	Boat	\$ _____	_____	Stocks/bonds	\$ _____	_____	Other property	\$ _____	_____
		APPROXIMATE VALUE	DESCRIPTION & AMOUNT OWED																	
Home	\$ _____	_____																		
Car/Truck/Vehicle	\$ _____	_____																		
Boat	\$ _____	_____																		
Stocks/bonds	\$ _____	_____																		
Other property	\$ _____	_____																		
CASH & BANK ACCOUNTS	Do you have any cash, or money in savings or checking accounts? <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES , give the total approximate amount after monthly expenses \$ _____																			

OBLIGATIONS, EXPENSES, & DEBTS	How many people do you financially support? _____		
	BILLS & DEBTS	MONTHLY EXPENSE	TOTAL DEBT
	Housing	\$ _____	\$ _____
	Groceries	\$ _____	\$ _____
	Medical expenses	\$ _____	\$ _____
	Utilities	\$ _____	\$ _____
	Credit cards	\$ _____	\$ _____
	Car/Truck/Vehicle	\$ _____	\$ _____
	Childcare	\$ _____	\$ _____
	Child support	\$ _____	\$ _____
	Insurance	\$ _____	\$ _____
	Loans	\$ _____	\$ _____
Fines	\$ _____	\$ _____	
Other	\$ _____	\$ _____	

I certify under penalty of perjury that the foregoing is true and correct.

SIGNATURE OF DEFENDANT
(OR PERSON SEEKING REPRESENTATION)

Date

Instructions for CJA Form 23 Financial Affidavit

In every type of proceeding where appointment of counsel is authorized under 18 U.S.C. § 3006A(a) and related statutes, the United States magistrate judge or the court shall advise the person of their right to be represented by counsel and that counsel will be appointed if the person is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent the individual.

Determination of eligibility for representation under the CJA is a judicial function, however the court may designate court employees to obtain or verify the facts relevant to the financial eligibility determination. Employees of law enforcement agencies, including the United States Attorney's Office, should not participate in the completion of the financial affidavit or seek to obtain information concerning financial eligibility from a person requesting the appointment of counsel. When practicable, employees of the federal public defender office should discuss with the person who indicates that he or she is not financially able to secure representation the right to appointed counsel and, if appointment of counsel seems likely, assist in completion of the financial affidavit.

Counsel must be appointed if the person seeking representation is "financially unable to obtain counsel." 18 U.S.C. §3006A(b). (While courts often use "indigency" as a shorthand expression to describe financial eligibility, indigency is not the standard for appointing counsel under the Criminal Justice Act.) In determining whether a person is "financially unable to obtain counsel," consideration should be given to the cost of providing the person and his or her dependents with the necessities of life, the cost of securing pretrial release, asset encumbrance, and the likely cost of retained counsel. The initial determination of eligibility must be made without regard to the financial ability of the person's family to retain counsel, unless their family indicates willingness and ability to do so promptly. Any doubts about a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time. For additional guidance, see the [Guide to Judiciary Policy, Volume 7A, Guidelines for Administering the CJA and Related Statutes \(CJA Guidelines\)](#).

The CJA Form 23 is not a required statutory form. It is an administrative tool used to assist the court in appointing counsel. When a colorable claim is asserted that disclosure to the government of a completed CJA 23 would be self-incriminating, the

court may not adopt an unconditional requirement that the defendant complete the CJA 23 before his application for appointment of counsel will be considered. To do so may place the defendant in the constitutionally untenable position of having to choose between his Sixth Amendment right to counsel and his Fifth Amendment privilege against self-incrimination. Two approaches that courts have taken to resolve these competing concerns are: (i) through *in camera* examination of the financial affidavit, which then would be sealed and not be made available for the purpose of prosecution, or (ii) through an adversarial hearing on the defendant's request for appointment of counsel, during which the court would grant use immunity to the defendant's testimony at the hearing.

Pursuant to Judicial Conference policy, financial affidavits seeking the appointment of counsel should not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access. If the financial affidavit is docketed it should be filed under seal. See, [Guide to Judiciary Policy, Vol. 10, §340, Judicial Conference Policy on Privacy and Public Access to Electronic Case Files \(March 2008\)](#) and [Administrative Office of U.S. Courts Information Bulletin on Revised Judicial Conference Privacy Policy \(May 2008\)](#).

For questions on the use of this form or instructions, please contact the Defender Services Office, Legal and Policy Division at 202-502-3030.

FINANCIAL AFFIDAVIT

IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT, OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN THE UNITED STATES DISTRICT COURT COURT OF APPEALS OTHER *(Specify Below)*

IN THE CASE OF _____

_____ V. _____

FOR _____
AT _____

LOCATION NUMBER

PERSON REPRESENTED *(Show your full name)*

CHARGE/OFFENSE *(Describe if applicable & check box→)* Felony Misdemeanor

- 1 Defendant - Adult
- 2 Defendant - Juvenile
- 3 Appellant
- 4 Probation Violator
- 5 Supervised Release Violator
- 6 Habeas Petitioner
- 7 2255 Petitioner
- 8 Material Witness
- 9 Other *(Specify)* _____

DOCKET NUMBERS
Magistrate Judge
District Court
Court of Appeals

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

INCOME & ASSETS	EMPLOYMENT	Do you have a job? <input type="checkbox"/> Yes <input type="checkbox"/> No		
		IF YES, how much do you earn per month? _____		
		Will you still have a job after this arrest? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown		
	PROPERTY	Do you own any of the following, and if so, what is it worth?		
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		Boat \$ _____	_____	
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		Other property \$ _____	_____	
	CASH & BANK ACCOUNTS	Do you have any cash, or money in savings or checking accounts? <input type="checkbox"/> Yes <input type="checkbox"/> No		
		IF YES, give the total approximate amount after monthly expenses \$ _____		
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	BILLS & DEBTS	MONTHLY EXPENSE	TOTAL DEBT	
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	Loans	\$ _____	\$ _____	
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Other	\$ _____	\$ _____		

I certify under penalty of perjury that the foregoing is true and correct.

SIGNATURE OF DEFENDANT
(OR PERSON SEEKING REPRESENTATION)

Date