



## OFFICE OF THE FEDERAL DEFENDER

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# Federal Defender Newsletter

## July 2015

### CJA PANEL TRAINING

**Panel Training is on Summer Vacation!!  
Enjoy your summer and see you in  
September!**

### **UPDATE SIGN-IN INFORMATION FOR E-VOUCHER SYSTEM**

The new e-voucher version will soon be directly linked to the U.S. Treasury system that issues checks. The interface should improve payment time. By late summer checks should start to arrive in the mail sooner than they do now. As a result of this link, password security is being strengthened, adding more complexity and requiring you to change your password periodically. You will be required to change your password within 30 days to comply with new password requirements.

Thereafter, your password will expire every 180 days. Passwords must be a minimum of eight characters in length and contain:

- One lower case character
- One upper case character
- One number
- One special character

Please see the attached information about how to change your password in the system.

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

You can also sign up on the website to automatically receive emails when fd.org is updated. 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.

### **ONLINE MATERIALS FOR CJA PANEL TRAINING**

The Federal Defender's Office distributes panel training materials through its website: [www.cae-fpd.org](http://www.cae-fpd.org). We will try to post training materials before the trainings for you 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](mailto:lexi.negin@fd.org)

### **CJA REPRESENTATIVES**

Scott Cameron is our District CJA Representative for Panel members who have questions and issues unique to our Panel lawyers. He can be reached at (916) 769-8842 or [snc@snc-attorney.com](mailto:snc@snc-attorney.com). David Torres of Bakersfield is the Backup-CJA Representative. He can be reached at (661) 326-0857 or [dtorres@lawtorres.com](mailto:dtorres@lawtorres.com).

## 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 – Peggy Sasso, [Peggy\\_Sasso@fd.org](mailto:Peggy_Sasso@fd.org),  
Andras Farkas, [Andras\\_Farkas@fd.org](mailto:Andras_Farkas@fd.org), or  
Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org).  
Sacramento: Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org) or  
Ben Galloway, [ben\\_d\\_galloway@fd.org](mailto:ben_d_galloway@fd.org).

## DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to grant sentence modifications based upon the Guidelines' retroactive application of an across-the-board 2-offense-level reduction in drug cases. In June 39 amended judgments were filed resulting in a total time reduction of approximately 51.6 years (619 months), resulting in a taxpayer cost savings of approximately \$1,511,447.50. So far 200 defendants in this district have received a reduction in their sentences under Amendment 782. All our best to AFD David Porter who has been shepherding this process since the Amendment. He is leaving for a temporary assignment working for the Sentencing Commission.

## **PLEASE CONSIDER JOHNSON'S IMPACT ON YOUR CLIENTS**

In Johnson v. United States, No. 13-7120 (June 26, 2015), the Supreme Court held as unconstitutionally void for vagueness the residual clause of the Armed Career Criminal Act (ACCA). The residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), made any prior conviction involving "conduct that presents a serious potential risk of physical injury to another" a "violent felony" – and,

under ACCA, any defendant prosecuted for being a felon-in-possession, 18 U.S.C. § 924(g)(1), who has 3 violent felonies, is subject to a 15-year mandatory minimum instead of a 10-year maximum.

Johnson's impact goes far beyond ACCA cases as the language held as unconstitutionally vague also exists in the Guidelines at § 4B1.2(a)(2), and, therefore, impacts Guidelines calculations in other areas, such as career offender, illegal reentry, and felon-in-possession.

Please pay attention for Johnson's application in your current cases. It immediately impacts any cases in which the government or probation seeks to use your client's prior conviction as a violent crime or a crime of violence under the residual clause. Keep in mind that clients currently on appeal and within 90 days of an appellate mandate having issues (the time within which to file a petition for writ of certiorari) may benefit from this decision.

Further, please review your past cases, especially ACCA ones, for clients who may have unlawfully received enhanced sentences based on prior convictions that now would not qualify **but for** the residual clause. Johnson likely has retroactive application for defendants sentenced under ACCA's residual clause, and may affect career offenders and undocumented reentrants still serving time. If you identify former clients who are no longer on appeal but might benefit from Johnson, please contact AFD Ann McClintock, [ann\\_mcclintock@fd.org](mailto:ann_mcclintock@fd.org), with their information.

## NOTABLE CASES

### SUPREME COURT

Elonis v. U.S., No. 13-983 (6/1/15).  
The Third Circuit's instruction, requiring only negligence with respect to the communication of a threat, is not sufficient to support a conviction under 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."

Mellouli v. Lynch, No. 13-1034 (6/1/15).  
A non-citizen's state conviction for concealing unnamed pills in his sock did not trigger removal under 8 U.S.C. § 1227(a)(2)(B)(i), which authorizes the deportation of an alien "convicted of a violation of . . . any law or regulation of a state, the United States, or a foreign country related to a controlled substance."

Brumfield v. Cain, No. 13-1433 (6/18/15).  
Because the inmate's evidence of intellectual disability satisfied the requirements of 28 U.S.C. § 2254(d)(2), he was entitled to have his claim based on Atkins v. Virginia, in which the Court held that the Constitution prohibits the execution of the mentally disabled, considered on the merits in federal court.

McFadden v. U.S., No. 14-378 (6/18/15).  
Holding: Section 841(a)(1) of the Controlled Substances Act, which makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances, requires the government to establish that the defendant knew he was dealing with a substance regulated under the Controlled Substances Act or the Controlled Substance Analogue Enforcement Act of 1986.

Kingsley v. Hendrickson, No. 14-6368 (6/22/15). To prove an excessive force claim under 42 U.S.C. § 1983, a pretrial detainee must show only that the officers' use of that force was objectively unreasonable; he does not need to show that the officers were subjectively aware that their use of force was unreasonable.

Johnson v. U.S., No. 13-7120 (6/26/15).  
**THIS IS AN EXTREMELY IMPORTANT CASE FOR FEDERAL CRIMINAL DEFENSE PRACTICE. SEE ABOVE.**  
Imposing an increased sentence under the Armed Career Criminal Act's residual clause violates due process.

### NINTH CIRCUIT

Mitchell v. Valenzuela, No. 12-55041 (7/1/15). The Ninth Circuit vacated and remanded the dismissal of a California state prisoner's § 2254 habeas petition, holding that the magistrate judge lacked the authority to rule on a motion for stay and abeyance under Rhines v. Weber, 544 U.S. 269 (2005), because it was dispositive of the claims involved in the motion and therefore had to be decided by a district judge.

Bastidas v. Chappell, No. 12-55024 (7/1/15) (Berzon with Pregerson and Wardlaw). In this companion case to Mitchell, argued before the same panel, the Ninth Circuit also vacated and remanded the dismissal of a California state prisoner's § 2254 habeas petition. The court held that denying a Rhines motion relating to claims that had **never** been presented to the state courts was also dispositive of those claims, for the same statute-of-limitations-based reasons. The court also held that the petitioner's failure to object to the magistrate judge's report and recommendation on the entire petition (which did not contain the unexhausted claims) did not waive

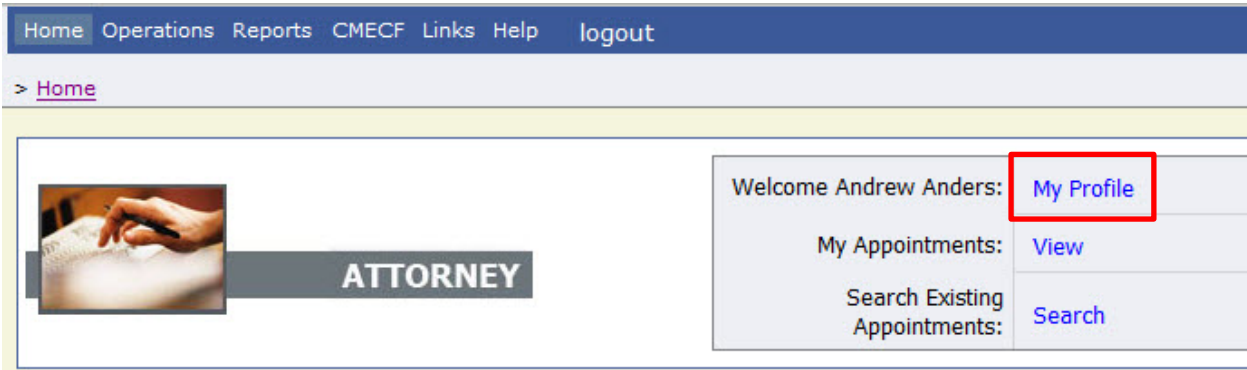
appellate review of the magistrate judge's ruling on the *Rhines* motion. Finally, the panel directed magistrate judges to expressly warn litigants that they have a right to object to magistrates' rulings if they believe that a magistrate's ruling is dispositive, such that the matter must be decided by a district judge.

United States v. Pocklington, No. 13-50461 (7/2/13) (McKeown with Kleinfeld and M. Smith) --- The Ninth Circuit held that a district court lacks jurisdiction under 18 U.S.C. § 3565(c) to retroactively revoke probation after the probation term expires if a warrant or summons is not issued during the probation term.

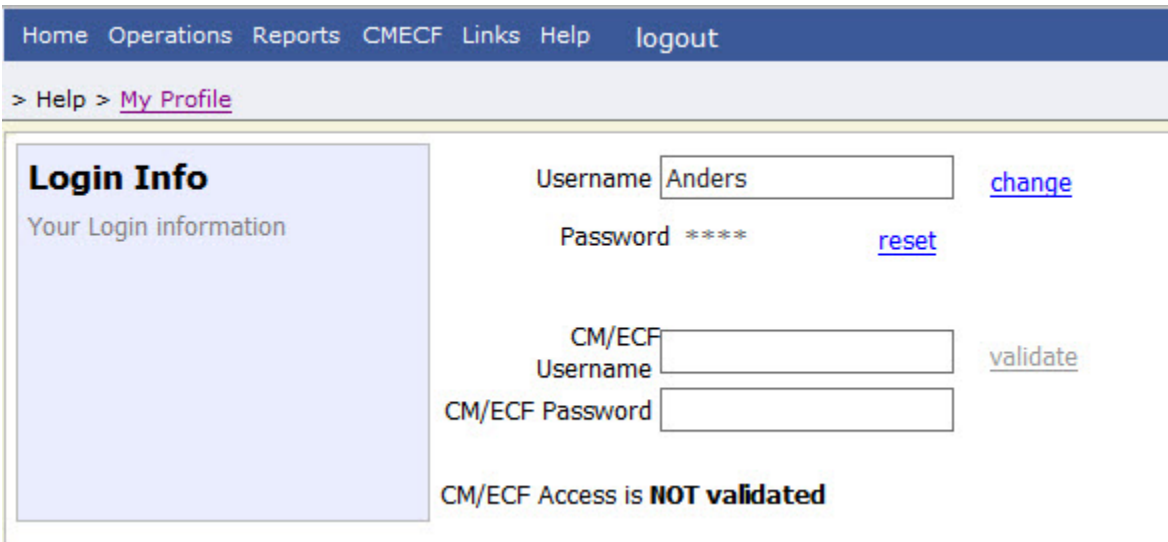
United States v. Esparza, No. 13-50033 (6/29/15) (Nguyen with Schroeder and DJ Zouhary). Esparza was stopped at a border checkpoint in a car not registered to him. Fifty kilos of the green stuff was found in hidden compartments. The car was seized by the government. The registered owner provided a "release of liability" to the DMV a month after the stop claiming she had sold the car to Esparza before the stop. At trial the government successfully admitted this document despite the fact that the owner was available and in the courthouse, but not called to testify. The defense presented evidence that the car had been sold to others not including Esparza, who was an unwitting courier. The hearsay statement by the owner was "testimonial" and therefore Esparza had the right to confront her as a witness. The use of the hearsay document at trial was error, and the conviction was vacated. *Crawford* confrontation analysis is context specific, and just because this record was a public one does not mean it was not testimonial in this context.

## Changing Your Username and Password

Your Username and Password can be accessed in your Profile. You will find a link to your Profile near the top of your Home page and can also find a link under the Help menu.



From your Profile Page, click the Edit button to the right of the Login Info.



To change your Username, type the new Username and click [change](#).

To reset your password, Click [reset](#). The screen will change to allow you to enter and confirm the new password. Click the Reset button.

