



OFFICE OF THE FEDERAL DEFENDER

Eastern District of California

801 I Street, 3rd Floor
Sacramento, CA 95814-2510
(916) 498.5700

Toll Free: (855) 328.8339
FAX (916) 498.5710

Capital Habeas Unit (CHU) (916) 498.6666
Toll Free: (855) 829.5071 Fax (916) 498.6656

2300 Tulare Street, Suite 330
Fresno, CA 93721-2228
(559) 487.5561

Toll Free: (855) 656.4360
FAX (559) 487.5950

HEATHER E. WILLIAMS
Federal Defender

BENJAMIN D. GALLOWAY
Chief Assistant Defender

DAVID HARSHAW
CHU Chief

ERIC KERSTEN
Fresno Branch Chief

RACHELLE BARBOUR, Editor
Assistant Federal Defender

Federal Defender Newsletter

March 2021

REMOTE CJA PANEL TRAINING

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

Upcoming trainings include:

Drug Cases Resulting in Death series – Trial Litigation Strategies (next training March 9, 2021).

The Fundamentals of Criminal Defense series, geared to newer federal defense attorneys and CJA counsel (every Weds. Through May 12, 2021; next training March 10, 2021).

The Essential Role of Investigation in CJA Cases (March 10, 2021)

Pretrial Motions: Stuff to Know to Get the Discovery You Need (March 17, 2021)

The Andrea Taylor Sentencing Advocacy Workshop (March 15 to 23)

Getting the Most Out of Plea Agreements, Cooperation, and Dangers of a Proffer (March 24, 2021)

Chemistry 101 for Lawyers (March 23).

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](mailto: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.

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

NEW 9TH CIRCUIT EXCERPT OF RECORD RULES

Effective December 1, 2020, the 9th Circuit implemented new appellate rules for Excerpts of Record formatting. Summaries and examples are here, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000858, but short version is:

- Volumes are limited to 300 pages, including the Cover caption sheet and Index listing the volume's documents.
- When just submitting one volume, number pages **ER-#** sequentially starting with the caption cover page as ER-1, continuing sequentially through the Index and into the documents.
- When submitting more than one volume, create a separate pleading for the Excerpts' Index only (page numbering here not included as part of the numbering sequence in the actual volumes). Then, for Volume 1, start ER-1 for that volume's caption cover, continuing through the Index, then

starting with the Documents. Volume 2 and after will be sequential to Volume 1, again including those volumes' caption cover page and Index in ER-#s.

- Include in the volume documents in reverse chronological order, the final documents in the single volume or the final volume of multiple volumes being the Notice of Appeal and lower court Docket.

Looking at the examples will help clear up any questions.

PENDING IN SUPREME COURT

Terry v. United States: The Justices agreed to weigh in on a technical sentencing issue that has significant implications for thousands of inmates: whether a group of defendants who were sentenced for low-level crack-cocaine offenses before Congress enacted the Fair Sentencing Act of 2010 are eligible for resentencing under the First Step Act of 2018. The Fair Sentencing Act reduced (but did not eliminate) the disparity in sentences for convictions involving crack and powder cocaine, and the First Step Act made the Fair Sentencing Act retroactive. The specific question that the court agreed to decide is whether the changes made by the First Step Act extend to inmates convicted of the most minor crack-cocaine offenses.

Greer v. United States: Whether, when applying plain-error review based on an intervening decision of the Supreme Court, a court of appeals can look at matters outside the trial record to determine whether the error affected a defendant's substantial rights or affected the trial's fairness, integrity or public reputation.

United States v. Palomar-Santiago: Whether charges that a non-citizen illegally reentered the United States should be

dismissed when the non-citizen's removal was based on the misclassification of a prior conviction.

United States v. Gary: Whether a defendant who pleaded guilty to being a felon in possession of a firearm is automatically entitled to plain-error relief if the district court did not advise him that one element of that offense is knowing that he is a felon.

Wooden v. United States "Whether offenses that were committed as part of a single criminal spree, but sequentially in time, were 'committed on occasions different from one another' for purposes of a sentencing enhancement under the Armed Career Criminal Act." Mr. Wooden had sustained 10 prior burglary convictions for breaking into 10 different storage rooms at one facility during one incident. Current law in the Ninth Circuit is that the enhancement applies only when the crimes are committed under different circumstances or pursuant to different opportunities.

SUPREME COURT REVERSES 9TH CIRCUIT MARINELRENA v. BARR (Sessions/Wilkinson)

This holding is important for defense counsel when advising clients about immigration consequences to convictions, and if collaterally attacking a removal within an 8 U.S.C. § 1326(d) motion to dismiss.

In July 2019, Aracely Marinelarena convinced an *en banc* 9th Circuit to undo the Bureau of Immigration Appeal's (BIA's) denying her cancellation of removal.

California convicted Marinelarena in 2007 for felony violation of Cal. Pen. Code § 182(a)(1), conspiring to sell and transport a controlled substance, which violated Cal.

H&S Code § 11352. Her *Complaint* only listed a single specific controlled substance, heroin, being involved in the many listed overt acts.

Before, the Immigration Judge (IJ), Marinelarena argued her conviction was ambiguous as the conviction records failed to rely upon a specific controlled substance. With cancellation then denied because, in 2012, the IJ said her conviction disqualified her for cancellation of removal, Marinelarena appealed to the BIA which held she failed to meet her burden to prove the Section 132(a)(1) conviction was not disqualifying her from cancellation possibility.

The 9th *en banc*, № 14-72003 (2019), after conducting a *Taylor/Shepard* analysis, held Marinelarena's conviction was ambiguous and, therefore, did not bar cancellation of removal. The Government sought certiorari.

Just March 4, 2021, the Supreme Court decided *Pereida v. Wilkinson*.

https://www.supremecourt.gov/opinions/20pdf/19-438_j4e1.pdf It held:

Under the INA, certain nonpermanent residents seeking to cancel a lawful removal order bear the burden of showing they have not been convicted of a disqualifying offense. An alien has not carried that burden when the record shows he has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction.

On March 8, 2021, the Supreme Court reversed the 9th's *en banc Marinelarena* holding, directing the 9th to reconsider their ruling in light of *Pereida*.

Ms. Marinelarena has been in the United States without documentation since 1992.

NINTH CIRCUIT

US v. Dixon, No. 19-10112 (12-31-20)(Wardlaw w/Siler & M. Smith). The Ninth Circuit holds that it is a “search” when a police officer inserts a car key into a vehicle to determine ownership. The defendant was on supervised release, but it was unclear who owned or controlled the car. The Ninth Circuit vacated the denial of the suppression motion and remanded for a hearing to determine who owned the car. Last, the defendant was convicted of simple possession of drugs. The court had categorically denied acceptance of responsibility because he did not admit possession with intent (the jury hung on that charge). This was error. If the officer’s acts of checking the car were reasonable and constituted probable cause of ownership or control, then a resentencing is necessary on the issue of acceptance of responsibility.

US v. Grimaldo, No. 19-50151 (1-7-21)(Lee w/M. Smith & Cardone). Just because you are a felon, have a gun, and possess a quarter pound of meth for personal use doesn’t mean that having the firearm (nonoperable by the way) emboldens you to **use** drugs. The Ninth Circuit vacates the guideline adjustment for use of a firearm in furtherance of a felony, 2K2.1(b)(6)(B) and remands. The court has to explain why possessing the firearm makes it more likely you will use drugs, thereby being used “in furtherance” of the possession. The opinion pushes back on the assumption that drugs and guns are always tied together. The panel acknowledges drug trafficking might be different. Here, there has to be a factual showing or argument that ties the gun and the felony together to trigger the adjustment. The Ninth Circuit also vacates the 36-month sentence for possessing the

meth because the gov’t failed to file notice of prior drug convictions.

US v. Bruce II, No. 19-10289 (1-12-21)(Christen w/Hawkins & Gritzner). This appeal arises from a prison guard’s conviction on various charges related to smuggling drugs into the institution. Bruce raised a *Brady* claim: the prosecutor possessed information that another guard was being investigated at the time and was later charged with smuggling. Bruce’s defense was that another guard smuggled in drugs. The Ninth Circuit held that there was a *Brady* violation: the information was exculpatory; it went to the defense; it was admissible; and the prosecutor should have known. The prosecutor had even filed an ex parte in limine motion to shield the information from the defense. Unfortunately, the Ninth Circuit held that the information was not material because of the evidence submitted at trial.

Be on the lookout for strange, sealed pleadings in your cases: this case is from our district and involves an ex parte submission to the court about the *Brady* material.

Bean v. Matteucci, No. 19-35119 (1-20-21)(Paez w/Antoon; dissent by Rawlinson). This is a *Sell* issue arising from a murder prosecution in state court. The state wishes to forcibly medicate the petitioner to restore competency. The Ninth Circuit held that forcible medication to restore competency involves severe personal liberty interests cognizable in habeas, and cannot be remedied after trial. Accordingly, the habeas petition should have been considered by the District Court.

US v. Mora-Alcaraz, No. 19-10323 (1-21-21)(Schroeder w/Berzon & Mendoza). After the district court suppressed

statements for a *Miranda* violation, the government took an interlocutory appeal. The Ninth Circuit affirmed the finding of a *Miranda* violation, which arose when the police accosted Mr. Mora at a mall. The police were looking for him because of domestic disturbance allegation the previous night. They called him while he was at a mall, with his 7 year old child. He agreed to meet to “discuss” what happened. Instead of just one officer, four showed up, in two cars, separated Mr. Mora from his son, and questioned him. He made inculpatory statements. The Ninth Circuit affirmed suppression because of the police-dominated environment, and the separation of his child. The court used the factors in *US v. Kim*, 292 F.3d 969 (9th Cir. 2002): (1) the language used to summon; (2) confrontation of guilt; (3) physical surroundings; (4) duration; and (5) pressure. Using these factors, the Ninth Circuit agreed with the district court that Mr. Mora would not have felt free to end the questioning and leave the mall. Therefore, this was a custodial interrogation, and *Miranda* applied.