



## OFFICE OF THE FEDERAL DEFENDER

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# Federal Defender Newsletter

## May 2018

### CJA PANEL TRAINING

**Sacramento** CJA Panel Training will be on Wednesday May 16, 2018 at 5:00 p.m. in the jury room at the federal courthouse, 501 I St. AFD Hanni Fakhoury, from the Federal Defender's Office for the Northern District of California, will present on "21<sup>st</sup> Century Surveillance: Predictive Policing."

**Fresno** CJA Panel Training will be on Tuesday, May 15, 2018 at 5:30 p.m. in the jury room at the federal courthouse. Callie Glanton Steele, Senior Litigator for the Federal Defender's Office in Los Angeles, will present on "Getting the Most out of Plea Agreements, Cooperation, and Navigating the Dangers of a Proffer."

### 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](mailto:peggy_sasso@fd.org)  
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### CJA Representatives

David Torres of Bakersfield, (661) 326-0857, [dtorres@lawtorres.com](mailto:dtorres@lawtorres.com), is our District's CJA Representative. The Backup CJA Representative is Kresta Daly, (916) 440.8600, [kdaly@barth-daly.com](mailto:kdaly@barth-daly.com).

### CJA Online & On Call

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 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. Register for trainings at this website as well.

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.

### IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail [defenders@heartlandalliance.org](mailto:defenders@heartlandalliance.org) with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: [www.immigrantjustice.org](http://www.immigrantjustice.org).

## SUPREME COURT

At the end of April, the Supreme Court consolidated and granted the government's cert petitions in United States v. Stitt (Sixth Circuit) and United States v. Sims (Eighth Circuit). The cases consider whether the enumerated offense of "burglary" in the ACCA includes burglary of a nonpermanent or mobile structure that is adapted for someone to stay in overnight.

The ACCA's definition of a "violent felony" includes an enumerated list of generic offenses—including "burglary." 18 U.S.C. § 924(e)(2)(B)(ii). In deciding whether a defendant's prior conviction for burglary qualifies for the enhancement, a court compares the burglary statute of conviction with the generic definition of burglary. Only if the statute of conviction (or, for divisible statutes, the offense specified by Shepard documents) consists of elements that are the same as, or narrower than, generic burglary, does the prior offense qualify for enhancement under the ACCA.

The petitioners had prior convictions for residential burglary in Arkansas (Sims) and Tennessee (Stitt), both of which define the offense to include mobile structures like cars adapted for overnight accommodation. The courts of appeals in both cases found that the defendant's prior conviction did not qualify because the statutes covered burglary of a vehicle, while language in several Supreme Court cases including Shepard and Mathis had demonstrated that the generic definition of burglary excluded vehicles. The Government argued on cert that the Supreme Court's precedent excluding vehicles has wrongly constrained the generic definition making it inconsistent with prevailing practice, and thus not generic.

In Sessions v. Dimaya, the Supreme Court affirmed the Ninth Circuit and hold the residual clause in 18 U.S.C. 16 unconstitutionally vague. Justice Kagan delivered the opinion of the Court along with Ginsburg, Breyer and Sotomayor. Gorsuch wrote a separate concurrence. The case itself was an immigration proceeding in which the petitioner was challenging his pending deportation for an aggravated felony. The definition of aggravated felony in the Immigration and Nationality Act includes crimes of violence defined by § 16(b). 8 U.S.C. § 1101(a)(43)(F).

Section 16(b) defines "crime of violence" as any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This now-invalidated definition is identical to the commonly-used residual clause in § 924(c)'s prohibition on possessing a firearm in the course of a crime of violence.

The Court described its holding as a "straightforward application" of the "straightforward decision" in Johnson v. United States, 135 S.Ct. 2551 (2015). The Court identified two features which it said had controlled the Johnson decision striking down the ACCA's residual clause in § 924(e)(2)(B), and which it determined applied with equal force to the similar language in § 16(b). First, both statutes require that the assessment of the risk posed focus on the "ordinary case" of an offense, rather than the particular facts of a particular case. As it had in Johnson, the Court stressed the problematic nature of this inquiry, especially because judges are given no guidance as to how to determine what constitutes the ordinary case. Second, both statutes contain an ill-defined risk threshold—"substantial risk" in § 16(b),

and “serious potential risk” in § 924(e)(2)(B). While the Court, as it had in Johnson, stressed that qualitative standards may well pass constitutional muster in the general course, such a standard was fatally vague where combined with the already vague ordinary case inquiry.

## NINTH CIRCUIT

US v. Espinoza-Valdez, No. 16-10395 (5-7-18)(Friedman w/Bybee; dissent by Rawlinson). This is a "scout" case that ends with the conspiracy to import and conspiracy to distribute marijuana being dismissed.

A "scout" case refers to a practice of drug traffickers to place several individuals on mountaintops who monitor law enforcement movements. The scouts communicate with backpackers via radio. Here, the government raided a mountaintop and caught the defendant. He had a radio, batteries, provisions, and other evidence of drug trafficking (special shoes and so forth). The defendant had been apprehended months previously backpacking. What the government didn't have was evidence regarding with whom he conspired, the object of the conspiracy, any agreement, or what had occurred with others. The government used solely expert testimony to explain the structure of the trafficking, role, and possible amounts. The Ninth Circuit reversed for insufficiency of evidence. It reasoned that while it was probable he was a scout, more was needed than an expert "profiling." The risk of profiles are too great, and the actual evidence of an agreement for a conspiracy was nonexistent.

## U.S. SENTENCING COMMISSION MEETS THE 21<sup>ST</sup> CENTURY?

The U.S. Sentencing Commission has embraced new technology (sort of) and created an app version of the *Guidelines Manual*

<https://www.ussc.gov/guidelines/introducing-guidelines-app> and <https://guidelines.ussc.gov/>.

This includes calculators for:

- Drug Equivalency <https://guidelines.ussc.gov/de>;
- Drug Quantity <https://guidelines.ussc.gov/dol>; and
- Guideline ranges <https://guidelines.ussc.gov/grc>.

Before you get your hopes up that this might be a step-by-step application so you don't miss any of those “I never thought of that” or “I never realized that” Guideline sections which might apply to your client – it isn't. It just saves to the weightlifting routine you came to count on from lugging the *Guidelines Manual* around to jail and court.

There may be hope, however:

*Sentencing.us* A free U.S. Federal Sentencing Guidelines calculator  
<http://www.sentencing.us/>

We haven't test driven this yet, but it seems intuitive and may be a good starting point. HOWEVER, it's based upon the Nov. 2015 *Guideline Manual*, so you'll need to double check the most current version to make sure nothing's changed.

Let us know if these work for you