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# Federal Defender Newsletter

## November 2019

### CJA PANEL TRAINING

#### SACRAMENTO:

November 20, 2019, 5-6 pm

U.S. District Court (Sacramento)  
Jury Lounge

AFD Ann McClintock will present the  
*Supreme Court and Ninth Circuit Review*.

December 18, 2019, 5-6 pm

U.S. District Court (Sacramento)  
Jury Lounge

David Mann will present on *Substance Abuse in the Legal Profession: Prevention, Detection, and Treatment*.

Mr. Mann served as a San Francisco Deputy Public Defender before becoming a solo criminal defense practitioner. He personally struggled with addiction and substance abuse and achieved sobriety in 1998. Presently, he is the Northern California consultant to **The Other Bar**, a statewide organization of recovering attorneys, judges, and law students. <https://otherbar.org/> **This presentation qualifies for California Bar required "attorney competence" credit.**

#### FRESNO,

November 19, 2019, 5:30-6:30 pm

U.S. District Court (Fresno) Jury Lounge.  
AFDs Ann McClintock & Peggy Sasso present the *Supreme Court & Ninth Circuit Review*.

### ADDRESSING THE OPIOID CRISIS THROUGH INNOVATIVE PRACTICES

Wednesday, November 12, 2019, 1-3pm,  
Justice Anthony Kennedy Library and Learning Center, Sacramento Federal Courthouse.

**Dr. Aimee Moulin**, an Associate Professor at UC Davis, Department of Emergency Medicine and Psychiatry, is part of a team leading the way in providing one-on-one treatment to those experiencing opioid addiction. Dr. Moulin co-founded ED-BRIDGE, a program through the Substance Abuse and Mental Health Services Administration (SAMHSA) State Targeted Response to the Opioid Crisis Grant to the California Department of Health Care Services (DHCS).

**Severine Winter** is a Community Liaison with MedMark/BAART. BAART Programs and MedMark Treatment Centers, BayMark Health Services companies, provide outpatient, medication-assisted treatment and substance use counseling for Opioid Use Disorder (OUD). Severine specializes in bridging community resources and the treatment services provided by BAART programs and MedMark Treatment Centers.

Email [crystal\\_richardson@fd.org](mailto:crystal_richardson@fd.org) for more information or register at <https://www.eventbrite.com/e/addressing-the-opioid-crisis-through-innovative-practices-tickets-80966664473>

## 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).

## 2018 Sentencing Guidelines Still in Effect

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

## 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)  
or Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org)  
Sacramento: Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org)

## CJA Online & On Call

Check out [www.feddefender.org](http://www.feddefender.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.

## **FD-CAE RECOGNIZES** **CHU AFD HARRY SIMON**

The Federal Defender will honor CHU AFD **Harry Simon's** contributions at the Sacramento FBA's *Night to Honor Service*, Thursday, November 14, 5:30 pm, Kennedy Learning Center. Bravo, Harry!

## MAGISTRATE JUDGES

Eastern District Legal Community:

What's in a name? When it comes to United States Magistrate Judges, a lot: history, legal evolution, decision making affecting a client's life and liberty, impact on almost every case coming through our Federal Courts.

Our Court wants to educate all about Magistrate Judges. First, to clarify, their proper title is **Magistrate Judge**.

Some people, into attorneys, might be getting it wrong: The term "Magistrate" does not replace "Judge," so "Magistrate Smith" is not correct. "Magistrate" by itself is not a title nor a federal judiciary court type, so "Magistrate Court Judge" is also wrong.

Address your Magistrate Judges as "Judge." In court, you can refer to "Judge Smith" and, in documents, you can refer to "U.S. Magistrate Judge Smith."

As an aside, our Article III judges are **District Judges** - just that. **District Court Judges** include District Judges and Magistrate Judges.

Our Court is not trying to be overly formal, but the language is significant to U.S. Magistrate Judges nationally. And we certainly don't wish to harm our clients' positions by not showing the respect due our judges, starting with using their correct titles.

Attached to this newsletter is a pamphlet explaining more about our magistrate judges. As for magistrate judge duties, look at Fed.R.Crim.Proc. Rule 59 and EDCA Local Rules 300-305 (civil), 400(c), 420, 422-423.1, and within other local rules, and General Orders 34, 38, 40, 61, 76, 85, 139, 262 (civil duties), 559, and 574 (except where they are superseded by current Local Rules).

## NEW FACES AT THE FD-CAE

Welcome to our two new Fresno AFDs, Christina Corcoran and Ben Gerson, and new to Sacramento fresh from Fresno, Megan Hopkins.

Christina, former law clerk for EDNY District Judge Raymond J. Dearie, becomes an AFD after several years as an associate in Clayman & Rosenberg LLP, a New York City criminal defense boutique firm, where she gained expertise in SEC litigation. Translation: Christina is not intimidated by math!

Ben, also a New Yorker, was with Nassau County Legal Aid handling a variety of cases and worked during law school at the Cyrus R. Vance Center for International Justice and carries expertise in refugee and asylum claims. While Ben aspires to be a capital habeas lawyer, he will handle our Yosemite dockets as well as Fresno cases.

Fresno knows Megan as a creative and determined defense advocate. We're happy to have her up north now (though our waistlines may not survive her culinary skills).

## INTERESTING PODCASTS

- *The 3<sup>rd</sup> Chair's D.E.S.K., Dialogue, Education, Strategy, and Knowledge:* Defender Services Office Training Division (DSOTD) podcast designed to provide valuable information and inspiration for federal criminal defense practitioners. Topics will include substantive federal criminal law subjects, from sentencing to mental health, to trial skills. Sign into fd.org. <https://www.fd.org/training-division-podcasts>

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- *The GEN WHY Lawyer: Discovering the Y of Law:* interviews with lawyers on how to build a meaningful life and fulfilling legal career.
- *First Mondays:* about the Supreme Court, co-hosted by former Court law clerks.
- *The Moth:* storytelling at its best.
- *Ear Hustle:* podcast from inside San Quentin Prison.
- *Conversations with People Who Hate Me:* Host Dylan Marron deliberately interviews people with whom he disagrees and who disagree with him and who he is.
- *Criminal:* no description really needed, is there?
- *Code Switch:* Helping with the delicate, minefield of today's race and identity issues.
- *70 Million:* documents how locals are addressing the role of jails in the broader criminal justice system.

## SUPREME COURT

The Court granted the government's certiorari petition asking whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional. The Ninth Circuit held subsection (iv) was unconstitutionally broad under the First Amendment, US v.

Sineneng-Smith, 910 F.3d 461 (2018), with Judge Tashima writing:

instructions. Failure to do so is structural error requiring automatic reversal of the conviction.

## NINTH CIRCUIT

United States v. Schopp, 938 F.3d 1053 (2019): Predicate “exploitation” priors for the production of child porn must themselves involve the production of child pornography. Sexual assault or abuse of minors don’t count as federal predicates. Further, sentencing reversal was granted *despite* an express appellate waiver in the plea agreement.

United States v. Thornhill, 2019 WL 5152584 (9th Cir. Oct. 15, 2019). This appeal is about the interplay of FRE 414 (permitting evidence of similar crimes in child molestation cases), FRE 403 (the “probative v. prejudicial” balancing test) and United States v. LeMay, 260 F.3d 1018 (9th Cir. 2001) (explaining how these rules interact). The 2001 *LeMay* opinion set out five factors used to determine admissibility. The fifth factor is “the necessity of the evidence *beyond the testimonies already offered at trial*.” In *Thornhill*, the district judge didn’t wait to hear the testimony offered at trial. Instead, it ruled the prior admissible *before* any witnesses testified. Judge N.R. Smith, in a compelling concurrence, expresses his “concern” with the majority’s “casual disregard” of the “non-discretionary language” of *LeMay*. The concurrence explains that child molestation priors are the easiest for the government to get in, yet they have a “profound impact” on juries. Because of the jury antipathy these priors evoke, it is particularly important that a district judge balance the admission of a child molestation prior against the testimony the jury has already heard.

US v. Becerra, No. 17-30050 (Sept. 23, 2019). A District Judge must read jury

## The Role of Magistrate Judges

United States Magistrate Judges have a broad range of responsibilities. The evolution of the role of Magistrate Judges is demonstrated by the fact that they handled over one million matters in the Federal District Courts in 2010. District Judges who have chaired the committee charged with administration of the Magistrate Judges' system in the United States call Magistrate Judges "an indispensable resource" who are "fundamentally important" to the federal judicial system because they "perform critical duties to ensure the timely adjudication of both civil and criminal cases" filed in federal courts. While their duties may vary with the specific needs of each District Court, Magistrate Judges handle a wide array of federal civil and criminal cases nationwide.

*A sampling of the judicial functions performed by Magistrate Judges demonstrates the potential breadth of their authority:*

- Presiding at civil jury trials by consent of the parties and entering judgments;
- Presiding at criminal misdemeanor jury trials and imposing sentences;
- Presiding at initial appearances, bond hearings, arraignments and other pretrial proceedings in federal felony cases;
- Handling pretrial case management in complex civil cases;
- Conducting mediations and settlement conferences;
- Hearing and determining pretrial motions;
- Handling summary judgment and other case-dispositive motions and administrative appeals, such as Social Security determinations;
- Reviewing prisoner suits collaterally attacking convictions or complaining of conditions of confinement; and
- Issuing arrest and search warrants.

## An Historic Overview

The United States Magistrate Judge system evolved from the United States commissioner system established in 1793. Congress conducted an exhaustive examination of the commissioner system in 1965, during which witnesses overwhelmingly favored overhauling the system and enhancing the position. After hearings, Congress enacted legislation which replaced the position of "commissioner" with what is now that of "Magistrate Judge." As a result of that legislation, Magistrate Judges became judicial officers entrusted with expanded jurisdiction that authorizes them to handle a wider range of proceedings in civil and criminal cases.

*Since that time Congress has passed further amendments to:*

- Authorize Magistrate Judges to try any civil case with consent of the parties and to order the entry of final judgment;
- Expand trial jurisdiction of Magistrate Judges to all federal misdemeanors;
- Require that Magistrate Judges be selected and appointed in accordance with regulations promulgated by the Judicial Conference of the United States;
- Expand Magistrate Judges' civil and criminal contempt authority;
- Give Magistrate Judges plenary authority in Class B and C misdemeanor cases without consent of the defendant; and
- Give Magistrate Judges authority to sentence juvenile defendants to terms of imprisonment in misdemeanor cases.



## United States Magistrate Judges

Their Function  
and Purpose  
in Our  
Federal Courts





## Understanding the Function and Purpose of United States Magistrate Judges

In America's federal trial courts, justice is administered by life-tenured District Judges, and by judges who serve fixed terms: United States Magistrate Judges and United States Bankruptcy Judges.

This brochure illuminates the function and purposes of United States Magistrate Judges – independent judges who serve federal District Courts by conducting a wide range of judicial proceedings to help assure efficient disposition of the civil and criminal caseloads of the United States District Courts in cases, or parts of cases, assigned to them. In 2011, there were 527 full-time Magistrate Judges and 41 part-time Magistrate Judges in the United States.

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## Title and Manner of Addressing a United States Magistrate Judge

- The official title of these judges is “United States Magistrate Judge.”
- To be consistent with the position's judicial role and official title as prescribed by law, a United States Magistrate Judge should be addressed, orally and in writing, as “Judge.”
- Although some state courts have a judicial officer called a “magistrate,” that title as applied to a United States Magistrate Judge is obsolete. Because the word “magistrate” is merely descriptive of the type of judge, to address a Magistrate Judge simply as “Magistrate” is akin to improperly addressing a Lieutenant Colonel as “Lieutenant,” or a Bankruptcy Judge as “Bankruptcy.”

## Answers to some Commonly Asked Questions

**Q.** *What are the standards for selecting a United States Magistrate Judge?*

- A.** To be appointed as Magistrate Judge, an individual must:
- have been a member in good standing of the bar of the highest court of a State, District, Territory or Commonwealth of the United States for at least five years;
  - be determined by the appointing District Court to be competent to perform the duties of the office;
  - have actively practiced law for at least five years;
  - be unrelated to a judge of the appointing court; and
  - be selected under standards promulgated by the Judicial Conference of the United States, including screening by a Merit Selection Panel.

**Q.** *What's the difference between a District Court and a “magistrate judge's court”?*

- A.** There is no “magistrate court.” Both District and Magistrate Judges preside in United States District Courts created under Article III of the Constitution.

**Q.** *How do civil litigants request trials before Magistrate Judges?*

- A.** All parties must consent, and the case must be officially transferred by the District Judge. Forms are available from the clerk of court and on District Court websites.

**Q.** *Are a party's rights affected when litigants consent to have a Magistrate Judge bear a case?*

- A.** No. Consenting to jurisdiction of a Magistrate Judge does not eliminate substantive or procedural rights litigants would otherwise have before a District Judge. For example, parties retain their right to a jury trial and direct appeal to a United States Court of Appeals.

**Q.** *Do Magistrate Judges handle many civil jury cases?*

- A.** Yes. In 2010, Magistrate Judges entered judgments in 12,470 civil cases in the United States District Courts. When all parties consent, Magistrate Judges may conduct civil jury or bench trials and enter final judgments in civil cases of any type or size.

**Q.** *Do Magistrate Judges handle many criminal cases?*

- A.** Yes. Magistrate Judges may conduct trials and dispose of all petty offense cases, and in 2010 Magistrate Judges terminated 116,983 misdemeanor and petty offense cases. With consent of defendants, a Magistrate Judge may preside in Class A misdemeanor cases, including conducting jury trials. Although Magistrate Judges do not preside at felony trials, they are authorized to conduct preliminary and post-conviction proceedings in felony cases.