



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

KELLY S. CULSHAW
CHU Chief

CHARLES J. LEE
Fresno Branch Chief

RACHELLE BARBOUR, Editor

Federal Defender Newsletter

October 2018

CJA PANEL TRAINING

Sacramento

Wednesday, October 17, 5-6 pm
AFD Ann McClintock presents a
2018 Supreme Court Roundup
Jury Assembly Room, 501 I Street.

Fresno

Tuesday, October 16, 5:30-6:30 pm
AFDs Ann McClintock, Peggy Sasso and
Erin Snider present a
*2018 Supreme Court and Ninth Circuit
Update*

Jury Assembly Room, Fresno District
Courthouse.

Free Training Provided by NACDL and Berkeley Center on Law and Technology

NACDL partners with the Berkeley Center
on Law and Technology to sponsor a two-
day seminar

*It's Complicated: Combatting the
Surveillance State in Criminal Proceedings*
in Berkeley, CA, on November 29-30. The
seminar covers everything from device
searches and body cams, to facial
recognition, AI, and the third-party doctrine
after *Carpenter*. Register and find the full
program agenda at

[https://members.nacdl.org/event-
details?id=fc180ed2-001f-4bbe-a4fe-
d69cbb5461f7](https://members.nacdl.org/event-details?id=fc180ed2-001f-4bbe-a4fe-d69cbb5461f7).

Wed., October 24, 2018, 1-4 pm
Pathways to Progress



Empowerment Fair

Organized by the Federal Defender Office,
Federal Probation Office, Federal Pretrial
Services Office, and the Justice Anthony
Kennedy Library and Learning Center.

All federal court staff and panel attorneys
are invited to meet the community
agencies supporting our District Court's
pretrial and sentenced defendants, and to
hear uplifting stories from our panel of
former offenders. **ENCOURAGE YOUR
CLIENTS & THEIR FAMILIES TO
ATTEND!!** Our community providers are
ready to inform you of the great resources
they can offer to the federal court client
population.

We look forward to you joining us!

For more information feel free to contact
Crystal Richardson

crystal_richardson@fd.org.

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
or Noa Oren, noa_oren@fd.org

CJA Representatives

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

CJA Online & On Call

Check out 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 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.

INTERESTING PODCASTS

- *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. Governor Brown recently commuted one of the inmate co-hosts Earlonne Woods' sentence. <https://www.atthelectern.com/mass-commutation-of-death-sentences-unlikely-but-governor-brown-is-likely-to-continue-giving-some-lwop-murderers-a-shot-at-parole/>
- *Conversations with People Who Hate Me*: Host Dylan Marron deliberately interviews people who he disagrees with 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.

NINTH CIRCUIT

Martinez v. Cate, No. 15-16433 (9-11-18)(Tashima w/Thomas & Christen). The Ninth Circuit granted a state habeas petition and ordered a new trial for a Miranda/Edwards violation. The detective pressured the petitioner and did not honor his request for counsel.

US v. Franklin, No. 17-30011 (9-13-18)(Berlin w/Thacker & Hurwitz). The Ninth Circuit held that Washington's broad accomplice liability statute renders its drug trafficking law broader than generic "federal drug trafficking" and hence the prior is not a serious drug offense" under

ACCA. The Ninth Circuit follows the interpretation used in Valdivisa-Flores, 876 F.3d 1201 (9th Cir 2017) for “aggravated felonies.”

US v. Gray, No. 18-30022 (10-3-18)(per curiam w/ Leavy, Hawkins, & Tallman). Based on a finding of procedural error, the Ninth Circuit vacated a 20-month sentence for violation of supervised release and remanded. The defendant admitted to a series of violations before a magistrate judge. The magistrate took the admission and recommended a 5-month sentence. The defendant asked for less. The recommendation went to the district court. The district court, without a hearing or notification, rejected the sentence recommendation and imposed 20 months. The sentence was based on factual assertions by the probation officer that in phone calls from the detention center, the defendant failed to really accept responsibility.

The Ninth Circuit held that the defendant had a right to address the allegations and to allocate. The defendant did not waive his right by his proceeding before the magistrate. The defendant did not expect a fourfold increase from 5 to 20 months.

LETTER FROM THE DEFENDER

Last month, the Judicial Council of the United States (JCUS) met and voted on the Interim Recommendations of the *Cardone Report*, a first step in undoing negative impacts on federal court-appointed criminal defendant representations.

As a reminder, the *Cardone Report* is the culmination of years of investigation, research, and work done by the Ad Hoc Committee to Review the Criminal Justice

Act (CJA) Program. <https://cjastudy.fd.org/> Originally passed in 1964 following *Gideon v. Wainwright* and pushed for by then-U.S. Attorney General Robert Kennedy, Title 18 U.S.C. § 3006A *Adequate representation of defendants*, commonly known as the CJA, allowed for an appropriation “to the United States courts” to pay defense counsel, where “[p]ayments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.” Its 1970 amendments created the Federal Public Defender and Community Defender Offices under the same appropriations.

The CJA first review happened in the 1990s with the review committee led by Judge Edward C. Prado. The 1993 *Prado Report’s* conclusion was “the federal defense program required greater administrative independence.” The ultimate independence it recommended – a “Center for Federal Criminal Defense Services” – required Congress legislate such a Center and either amend Section 3006A or repeal it and pass new legislation. This did not happen for many reasons.

While further CJA reviews were intended every 5 to 10 years, this most recent review resulting in the *Cardone Report*, is only the second such review.

In 2015, Supreme Court Chief Justice John G. Roberts, Jr., appointed the Committee members, designating Texas Western’s District Judge Kathleen Cardone its chair, and assigning the task to review the CJA. That they did for the next 2 years, taking testimony – written and spoken, most publicly but some behind closed doors and sealed – in 7 cities around the United States, each for several days, from lawyers – Panel lawyers; Federal and Community

Defenders; case budgeting, discovery, CJA Supervisory attorneys; district and magistrate judges; law professors, representatives of several criminal defense organizations and U.S. Attorney Offices,; and others integral to federal criminal defense practices.

<https://cjastudy.fd.org/public-hearings>

From our Eastern District, the Honorable Carolyn K. Delaney, then-Panel Representative Scott Cameron, and I all testified in San Francisco.

The Cardone Committee's conclusion is "Congress should create an autonomous Entity [to manage indigent defendant representations in federal court, one] not subject to judicial oversight and approval." *Cardone Report*, p.x. As legislation may take years to pass, if it ever does, the Cardone Committee made many Interim Recommendations to remedy the impacts on the Defender Services Office, Federal Defender and Community Defender Offices, and CJA Panel lawyers by the Administrative Office of the U.S. Courts' (AO's) reorganization in 2013; to achieve greater Defender Office and CJA Panel lawyers training, diversity, hiring or selection and retention; and to improve indigent client representations. *Cardone Report*, p.xxxvi *et seq.*

The Defenders requested the Defender Services Committee (DSC), our voice within the AO, present all recommendations to the Executive Committee for implementation. As the DSC considered Cardone's recommendations, so did the AO's Executive Committee, its Committee on Audits and Administrative Office Accountability, its Committee on Budget, its Committee on Information Technology, and its Committee on Judicial Resources. With all this input, in mid-September 2018, the JCUS approved immediate

recommendations to AO Director James Duff.

Two he acted upon immediately:

- The *Cardone Report* is now available to the public on the Court's website The *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act* http://www.uscourts.gov/sites/default/files/2017_report_of_the_ad_hoc_committee_to_review_the_criminal_justice_act-revised_2811.9.17.29_0.pdf and at <https://cjastudy.fd.org/> in a very user-friendly format; and
- Returning the Defender Services Office (DSO) to an independent office within the AO (where it was before the 2013 reorganization placing it as an Office within the Department of Program Services), reporting at the executive level. DSO will also be included in the AO's Legislative Council.

Other Interim Recommendations accepted (thought some with some modifications from the *Cardone Report's* original form) are:

Interim Recommendation #8 (as modified): The Cardone Committee has identified several problems relating to voucher cutting. The Judicial Conference should:

a. Adopt the following standard for voucher review—voucher cuts should be limited to mathematical errors, instances in which work billed was not compensable, was not undertaken or completed, and instances in which the hours billed are clearly more than what was reasonably required to complete the task.

b. Provide, in consultation with DSC, comprehensive guidance concerning what constitutes a compensable service under the CJA.

Interim Recommendation #11: A federal public or community defender should be established in every district which has 200 or more appointments each year. If a district does not have enough cases, then a defender office adjacent to the district should be considered for co-designation to provide representation in that district.

Interim Recommendation #14 (as modified): Modify the work measurement formulas, or otherwise provide funding, to: reflect the staff needed for defender offices to provide more training for defenders and panel attorneys, and support defender offices in hiring attorneys directly out of law school or in their first years of practice, so that the offices may draw from a more diverse pool of candidates.

Interim Recommendation #15: Every district should form a committee or designate a CJA supervisory or administrative attorney or a defender office, to manage the selection, appointment, retention, and removal of panel attorneys. The process must incorporate judicial input into panel administration.

Interim Recommendation #17: DSO should regularly update and disseminate best practices.

Interim Recommendation #18: DSO should compile and share best practices for recruiting, interviewing, and hiring staff, as well as the selection of panel members, to assist in creating a diversified workforce.

Interim Recommendation #19:

All districts must develop, regularly review and update, and adhere to a CJA plan as per JCUS policy.

Reference should be made to the most recent model plan and best practices. The plan should include:

a. Provision for appointing CJA panel attorneys to enough cases per year so that these attorneys remain proficient in criminal defense work.

b. A training requirement to be appointed to and then remain on the panel.

c. A mentoring program to increase the pool of qualified candidates.

Interim Recommendation #20: FJC and DSO should provide training for judges and CJA panel attorneys concerning the need for experts, investigators and other service providers.

Interim Recommendation #21: FJC and DSO should provide increased and more hands-on training for CJA attorneys, defenders, and judges on e-discovery. The training should be mandatory for private attorneys who wish to be appointed to and then remain on a CJA panel.

Interim Recommendation #22: While judges retain the authority to approve all vouchers, FJC should provide training to them and their administrative staff on defense best practices, electronic discovery needs, and other relevant issues.

Interim Recommendation #23: *Criminal e-Discovery: A Pocket Guide for Judges*, which explains how judges can assist in managing eDiscovery should be provided to every federal judge.

Interim Recommendation #25: Circuit courts should encourage the establishment of CHUs where they do not already exist and make Federal Death Penalty Resource Counsel and other resources as well as training opportunities more widely available to attorneys who take these cases.

Interim Recommendation #28: Modify work measurement formulas to:

a. Dedicate funding — that does not diminish funding otherwise available for capital representation — to create mentorship programs to increase the number of counsel qualified to provide representation in direct capital and habeas cases.

b. Reflect the considerable resources capital or habeas cases require for federal defender offices without CHUs.

c. Fund CHUs to handle a greater percentage of their jurisdictions' capital habeas cases.

Interim Recommendation #29: FJC should provide additional judicial training on:

a. The requirements of § 2254 and § 2255 appeals, the need to generate extra-record information, and the role of experts, investigators, and mitigation specialists.

b. Best practices on the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General.

Interim Recommendation #30: Adequately fund and staff the National Information Technology Operations and Applications Development Branch to control and protect defender IT client information, operations, contracts, and management.

Interim Recommendation #31: Increase staff and funding for the National Litigation Support Team, as well as increased funding for contracts for Coordinating Discovery Attorneys to be made available throughout the United States.

Interim Recommendation #32: Create new litigation support position(s) in each district or at the circuit level, as needed, to assist panel attorneys with discovery, evaluation of forensic evidence and other aspects of litigation.

The remaining recommendations have not been denied, but merely deferred to later JCUS meetings.

We Defenders do not expect all recommendations to be implemented, though we strongly support their

implementation, as well as hoping the Interims approved already be modified to as originally recommended. For instance, that CJA vouchers be considered "presumptively reasonable," language removed from the approved iteration). And to place Defender IT offices, such as NITOAD, and responsibilities, such as eVoucher, back within DSO and not within Program Service's Case Management Support Office where we have continued risks of the Judiciary, probation and Pretrial accessing attorney-client and work product privileged FPD and CJA Panel lawyer information.

Cardone gave us grand steps in a direction to provide better client representation and to provide due process to lawyers who fight for the due process of others. But to travel this path will take some time.