



## OFFICE OF THE FEDERAL DEFENDER

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# Federal Defender Newsletter

## October 2019

### CJA PANEL TRAININGS

Sacramento, 5-6 pm, Sacramento Federal Courthouse jury lounge for Panel Trainings.

October 16 – CJA Jeopardy: FAQs about Resources for CJA Panel Attorneys Sharon Samek, *Attorney Advisor, Defender Services Office Legal & Policy Division, Washington, DC*

The CJA Guidelines specify how panel attorneys obtain funding for expert services and other resources to defend their clients in appointed criminal cases. This presentation will help you make sense of it all. Also helpful information for Federal Defenders.

November 20, 2019 -- TBA

Fresno, 5:30 pm, Fresno Federal Courthouse jury lounge.

October 15 – Vouch for your Voucher Sharon Samek, *Attorney Advisor, Legal & Policy Division, Defender Services Office, Washington, DC*

November 19 – Supreme Court & Ninth Circuit Review  
AFDs Ann McClintock & Peggy Sasso

### 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).

### Please Save the Dates

PATHWAYS TO PROGRESS EMPOWERMENT  
FAIR

Wednesday, November 6, 2019  
1 - 3:30 pm

Sacramento Federal Courthouse, 1<sup>st</sup> floor  
Justice Anthony M. Kennedy Library and  
Learning Center

PRESENTATION ON OPIOIDS  
Wednesday, November 12, 2019

1 – 3 pm

Kennedy Learning Center

### 9<sup>TH</sup> CIRCUIT NEW CAE CASE MANAGING ATTORNEY

With our former Case Managing Attorney Laura Paul going to the FPD-CDCA's CHU, the Eastern District's new Case Managing Attorney is Jen Naegele, an experienced California lawyer since 2004, Jen was a NDCA CJA lawyer year before her current position. You can reach Jen at 415.355.8986, [jnaegele@ce9.uscourts.gov](mailto:jnaegele@ce9.uscourts.gov)

## Goodbye & Hello: Well Wishes in Fresno!

We all congratulate several longtime FD-CAE employees on their well-deserved retirements: Branch Administrator Margaret Camacho, AFD Victor Chavez, Investigator Victor D. Gonzalez, Interpreter Delia Rivera-Stark, and Case Manager Frances Robles, who all officially retired on September 30.

With pleasure we welcome Edith Figueroa joining the Fresno FD office as our new investigator on October 28. She currently is an investigator at the Tulare County Public Defender's Office working on a number of homicide and death penalty cases. Before then, she spent a decade at the Fresno County Public Defender's Office, earning "Investigator of the Year" honors in her last two years there. Edith is a native Spanish speaker and we are excited to have her join our office.

Starting November, Fresno also welcomes Christina Corcoran as our newest AFD. Christina is with a boutique New York criminal defense firm for the past seven years working on a variety of trial and appellate level federal cases. After graduating from St. John's Law School where she was editor-in-chief for the New York International Law Review, Christina clerked for the Honorable Raymond Dearie in the Southern District of New York.

Fresno is also pleased to welcome in November Benjamin Gerson joining us to fill the term AFD position, focusing on covering the Yosemite docket. A Hofstra Law School graduate, Ben was Prof. Eric Freedman's research assistant working primarily federal habeas death penalty issues. After law school, Ben had stints with ACLU in Washington State, the Water Protector Legal Collective at the Standing Rock Sioux Reservation in North Dakota,

and, for the last several years, has been with the Legal Aid Society, Nassau County (New York), managing a large misdemeanor docket.

Please help us welcome Christina, Ben and Edith to our FD-CAE Fresno team!!

## 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.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).

## 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>

**ACCESS TO FD.ORG is limited to** Federal/Community Defender Offices staff and Panel attorneys. If you already applied and were approved for [www.fd.org](http://www.fd.org) log-in credentials, simply click the link above and enter your username and password. If you have questions about access to [www.fd.org](http://www.fd.org), please email [fdorg\\_help@ao.uscourts.gov](mailto:fdorg_help@ao.uscourts.gov).

- *The GEN WHY Lawyer: Discovering the Y of Law:* No new episodes going forward, but podcast still offers 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.
- *Ear Hustle:* podcast from inside San Quentin Prison.
- *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 had held that subsection (iv) was unconstitutionally broad under the First Amendment, US v. Sineneng-Smith, 910 F.3d 461 (2018), with Judge Tashima writing:

## NINTH CIRCUIT

US v. Collazo, No. 15-50509 (en banc review granted).

The Ninth Circuit ordered that this case be heard initially en banc after having directed the parties to file briefs on the issue of "the proper jury instruction under 21 U.S.C. § 841(b) for determining the drug type and quantity involved in a conspiracy offense." At trial, the defendants asked the district court to instruct the jury in the conjunctive, consistent with the Sentencing Guidelines, that a drug quantity attributable to an individual defendant must be both jointly undertaken in furtherance of that defendant's agreement *and* reasonably foreseeable to that defendant. The district court refused and instead instructed the jury in the disjunctive regarding coconspirator liability, i.e., whether certain drug types and quantities were either "reasonably foreseeable" to an individual defendant or "fell within the scope of his particular agreement." After oral argument, the Ninth Circuit ordered supplemental briefing. The government acknowledged it made little sense to require a conjunctive showing that a drug amount was both reasonably foreseeable and in furtherance of jointly undertaken

criminal activity to determine conspirator liability under the Sentencing Guidelines while requiring a disjunctive showing that the drug amount was either reasonably foreseeable or within the scope of a conspirator's own agreement to determine conspirator liability under the statute (21 U.S.C. § 841(b)). Please be aware of this issue in your drug cases.

US v. Schopp, No. 16-30185 (9-16-19)(Berzon w/Tashima & Fletcher). In a production of child porn case, 18 USC 2251(a), the Ninth Circuit reverses defendant's sentence and remands for resentencing. Applying a categorical approach, the Ninth Circuit concludes that the defendant's prior state convictions (Alaska) for sexual abuse and sexual assault with minors do not "relat[e] to the sexual exploitation of children." The "exploitation" has to do with visual depictions of children engaging in sexual explicit conduct and does not include conduct that lack visual depictions. As such, the prior convictions cannot serve as predicate offenses under 2251. The defendant avoided the bar of an appellate waiver because the sentence was illegal: the multiple-convictions enhancement was illegal. The error was plain.

US v. Shelby, No. 18-35515 (9-19-19)(Hurwitz w/Murguia & Zipps). The Ninth Circuit follows the categorical approach mandated by the Supreme Court in holding that first-degree armed burglary under Oregon Rev. Stat. 164.415 is not a violent crime for ACCA purposes. The Ninth Circuit has held that this statute is not a crime of violence for ACCA under US v. Strickland, 860 F.3d 1224 (9th Cir. 2017), and that it survives Stokeling v. US, 139 S. Ct 544 (2019). In Stokeling, the Court held that there was no distinction between substantial and minimal physical force. Stokeling does require some force. It does

not apply when there is no physical force. The Ninth Circuit in Ward v. US, No. 17-35563 (9th Cir. Sept. 3, 2019) noted that snatchings where there is no resistance as the robbery happens so fast that it is not sufficient to fall under ACCA's force clause. The state statute here is thus overbroad, as it allows for conviction for "no resistance" snatchings. Conviction under this statute is not a crime of violence. This is true even if there is a deadly weapon possessed. It could be possessed covertly. The statute is also not divisible. Since the district court found it to be divisible, and sentenced for force, the sentence is reversed and remanded for resentencing.

US v. Hong, No. 17-50011 (9-12-19)(Paez w/Clifton & England). In this appeal from a conviction for health care fraud, illegal remuneration, and aggravated identity theft, the Ninth Circuit reversed on the aggravated identity theft count. The Ninth Circuit held that the use of a patient's identity by a medical provider to falsely bill does not constitute a "use" of the patient's identity for purposes of aggravated identity theft. The statutes requires that the false identity be "used" by the defendant to pass himself off as someone else.

Ramirez v. Ryan, No. 10-99023 (9-11-19)(Thomas w/Clifton; Berzon concurring in the reversal). The Ninth Circuit grants relief on the procedural bar due to Martinez ineffective assistance of counsel and remands for an evidentiary hearing on the ineffective assistance of trial counsel. The Ninth Circuit held found that post-conviction representation was deficient (the State so conceded). Post-conviction counsel should have raised the ineffective assistance of counsel claim regarding trial counsel's failure "to present or pursue evidence of intellectual disability, [or] to provide relevant and potentially mitigating evidence to the psychologist.... "

US v. Valle, No. 18-50199 (10-9-19)(Friedland w/M. Smith & Bastian). In an illegal reentry sentencing, the district court concluded, as a legal matter, that the government was not required to prove continuous presence from police contact (2004) to the defendant's subsequent arrest in 2017. The court held that there was a strong inference he stayed. Thus, he was eligible for various guidelines adjustments. He received a 37 month sentence (rather than a range of 1 – 7 without adjustments). On appeal, the 9th found this inference to be error. (The government so conceded.) The government had to prove presence by *clear and convincing* evidence for the USSG § 2L1.2(b)(1), (2), and (3) increases. The 9th vacated the sentence and ordered the mandate to immediately issue because of the extremely low applicable guideline range applicable and the fact that the defendant already served 20 months. The Ninth Circuit also barred the government from arguing new evidence to support the adjustments because they already had a bite of the apple.

DEFENDER NOTE: In applying Valle, to our § 1326 practice, use caution when advising § 1326 clients during their Pretrial interviews if trying to get them out of custody and Probation interviews about admitting when they last “entered” or had “continuous presence” in the United States. The offense elements only include “found in,” not “entry into” the United States; admitting entries is not required.

Admitting an “entry” or “continuous presence” date can impact whether a prior conviction sentence ended within 10 or 15 years of client's offense date – they could be much earlier than the “found in” date, so, if admitted, could add Criminal History

points and increase client's Criminal History category. USSG §4A1.1.

Further, USSG § 2L1.2(b)(1), (2), and (3) count in their offense level enhancements only those convictions also countable under § 4A1.1.

The Government may be able to prove offense start date through some other means, but no need for our clients to be making matters worse for themselves.

If client does, you can always argue super-acceptance of responsibility as a mitigator – shouldn't be punished for being the sole evidence for the Government/Probation to get those enhancements or over-representation of Criminal History.

“Continued presence” needed for cultural assimilation is that presence after first arriving to the US and before being forcibly removed. USSG § 2L1.2, *Commentary* ¶8.

## Heather Williams

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**From:** Heather Williams  
**Sent:** Wednesday, September 18, 2019 2:36 PM  
**Subject:** FW: Sacramento USM: Attorney Log Book out/honor system in

**From:** Beloberk, Kelly (USMS) <Kelly.Beloberk@usdoj.gov>  
**Sent:** Wednesday, September 18, 2019 2:31 PM  
**To:** Heather Williams <Heather\_Williams@fd.org>  
**Cc:** Garcia, Jason (USMS) <Jason.Garcia2@usdoj.gov>; Belcher, Jared (USMS) <Jared.Belcher@usdoj.gov>  
**Subject:** Attorney Log Book

Hi Heather!

I hope all is well. I wanted to send you an email about the attorney log book for visiting prisoners here at the US Marshals Service office. Currently we have all defense counsel check in at the front window, sign the log book and exchange an ID for a visitor badge. Due to manpower issues at the front window we will be going back to a system similar to how it use to be. This will be more of an honor system unless its abused or becomes an issue. I am hoping to illicit your help in getting the word out for the new protocol. This will start Monday, September 23, 2019. The following should be followed in order to visit a client:

1. Go directly to the door leading to the interview rooms and buzz the Deputies in the cell block, let them know who you are and what prisoner you wish to see
2. Once you are let in immediately sign the log book filling in ALL requested information
3. If the Deputies do not recognize you be prepared to show them identification, there is a camera they are able to see the attorney on however the resolution is not very good and a Deputy may need to come out to visually identify the attorney
4. Sign out once you are done. This MUST be done. (This is what caused the process of checking in at the front window)

Please let me know if you can assist me in getting this out. We will be placing new signage on Monday to assist.

Thank you in advance!

Kelly Beloberk  
Supervisory Deputy U.S. Marshal  
Eastern District of California

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*Join Us!*

# **PATHWAYS to PROGRESS EMPOWERMENT FAIR!**

A Resource Fair designed for individuals who have been justice-involved, their families, and Federal Court staff

Wednesday, November 6, 2019

Robert T. Matsui United States Courthouse  
501 I Street  
Justice Anthony M. Kennedy Library and Learning Center  
Sacramento, CA 95814

**12:30pm** Registration Begins | **1:00pm** Event Begins | **3:30pm** Event Ends

### *Fair Highlights*

Success Panel Discussion | Employment Resources | Education Resources |  
Health & Wellness Info | Resume Assistance | Community Resources

### *Who Should Attend*

Federal Criminal Justice Involved Individuals and Their Families  
Federal Court Staff Members | Community Members

*\*A joint effort of the Federal Defender's Office, Federal Probation Office, and Federal PreTrial Services Office*