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Federal Defender Newsletter

Summer 2020

CJA PANEL TRAINING

We will continue to create remote training opportunities ourselves, and to publicize training provided elsewhere. We do not expect to meet in person for months. Accordingly please keep an eye on your emails for opportunities as they arise.

Expect an invitation soon to *No One Needs to See My Nostril: Improving Your Zoom Court Presentations*.

COVID-19 NEWS

Keep up with all the COVID-19 information affecting your federal practice by ensuring that 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.

CJA Representatives

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

2018 Sentencing Guidelines Still in Effect

The Sentencing Commission passed no amendments this year. Therefore the 2018 Sentencing Guidelines (Red Book) are still the operative guidelines.

Duty Contact Sacramento Marshal Office

Email USMS.CAE-PRL@usdoj.gov or call the Marshal cellblock number, 916-930-2026, for any Sacramento duty matters. If you have an interview request, please send an email providing your contact information and telephone number for the call. The cellblock deputy will respond with a time for your interview and will call you on the provided number. If you have a pressing matter, call Supervisor Kelly Beloberk at 916-930-2055.

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

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.

COVID AND OUR SAN QUENTIN CLIENTS

In June, California Department of Corrections and Rehabilitation (CDCR), transferred inmates from other prisons into San Quentin to reduce numbers in the other prisons. COVID came into San Quentin with them and has infected, as of July 30, 2020:

Inmate cases: 2,168 Confirmed with 983 tested in last 14 days; 383 Active Inmate Cases, 53 Released While Active, 1,713 Resolved, 19 Deaths

Staff cases: 258 Confirmed; 86 returned to work.

Among the 19 dead inmates are four of our death row clients: Manny Alvarez, Jeffrey Hawkins, John Beames, and Johnny Avila.

Words cannot convey the grief, frustration and anger over representing these each unique individuals, who we came to know by more than their convictions, and how avoidable their deaths by COVID were.

WELCOME TO NEW ASSISTANT FEDERAL DEFENDERS

Jaya Gupta started in our Fresno Office in April. She came to us from the Federal Public Defender – Nevada and their Capital Habeas Unit. Before then, Jaya was in private practice in Los Angeles (she considers California home) as a “litigation associate.” In Jaya’s case, that meant excellent and creative writing and brainstorming in complicated and, in one case, high publicity matters. We look forward to her bringing that all to our court and clients. And she’s your go-to person for Medieval English literature.

Meghan McLoughlin, also in our Fresno Office since May, was with the Federal Public Defender – New Mexico (Las Cruces). There, her cases were unlawful entries and reentries of undocumented immigrants, drug importations and possessions with intent to distribute, firearms, child pornography, and felony crimes off the area Native American reservations. Meghan also brings extensive research and writing experience from clerking for U.S. District Court, Las Cruces District and Magistrate Judges. If you need to know more about Carnatic Music and Yoga, Meghan is your person.

Sam Sweeney joined our Sacramento Capital Habeas Unit in June, making the long move from private practice the East Coast. However, Sam’s experience with post-conviction death sentences represents most of his lawyering experience, primarily through the Capital Post-Conviction Project of Louisiana and our Philadelphia CHU. In his move to Sacramento, Sam joins longtime friends and looks forward to experiencing the California dream.

LAWYERING IN THE AGE OF COVID

These resources may be helpful as you try to practice during these challenging COVID times. As always, try to stay home, limit your contact with others outside your home, and, when you leave your home, wear a cloth mask, try to socially distance yourself from others by a 6 foot radius, and wash your hands completely for 20 seconds with soap and warm water or with a 70% or more alcohol hand sanitizer.

- The District Court's COVID Trial Committee provided proposals for conducting a jury trial during COVID. Those proposals are attached. We understand the judges will decide on a case-by-case basis how to apply them, if at all.
- CARES Act as it relates to the courts (attached);
- CAE General Orders related to implementing the CARES Act and address the pandemic starting with General Order 610, <http://www.caed.uscourts.gov/caednew/index.cfm/rules/general-orders/general-orders-601-650/>;
- The Administrative Office of the US Courts also created a report on holding juried hearings during the pandemic. https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf
- NACDL's *Criminal Court Reopening and Public Health in the COVID-19 Era*, <https://nacdl.org/getattachment/56802001-1bb9-4edd-814d-c8d5c41346f3/criminal-court-reopening-and-public-health-in-the-covid-19-era.pdf>
- Bureau of Prisons information about COVID in its facilities (there are concerns of undertesting) <https://www.bop.gov/coronavirus/index.jsp>
- For the latest Centers for Disease

Controls (CDC) COVID information, start here:

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

- And for fascinating extra information, on COVID, these podcasts/video casts (look at older episodes because, trust us, we missed a lot!):
 - *Podcast-19* from FiveThirtyEight, <https://fivethirtyeight.com/tag/podcast-19/>;
 - *This Week in Virology (TWIV)* from the National Institute for Health, <http://www.microbe.tv/twiv/>.

Stay well, everyone!

SUPREME COURT

Andrus v. Texas, No. 18-9674 (June 15, 2020). At Mr. Andrus's capital trial, his defense counsel failed to present any evidence of his "grim" childhood, recounted by the per curiam Court with horror in the first few pages of the opinion. The Court holds that this was clearly deficient performance and remands for a determination of prejudice.

Ramos v. Louisiana, No. 18-5924, 2020 WL 1906545 (Apr. 20, 2020). A jury must be unanimous. The Supreme Court invalidated the Louisiana system, which allowed for Mr. Ramos to be convicted by a verdict joined by only 10 of 12 jurors. The Supreme Court reversed a 1972 case that held that the federal jury unanimity requirement did not apply to state proceedings.

As SRC Davina Chen wrote about this opinion, "In *Ramos*, Justice Gorsuch pens another beautiful opinion about why the Sixth Amendment right to jury trial in felony cases, as incorporated against the States under the Due Process Clause of the Fourteenth Amendment, requires jury unanimity to convict. Gorsuch writes

especially powerfully about the fact that it's undisputed that the history of the non-unanimous jury shows it was specifically designed to diminish the power of African Americans on juries. It's worth a read for that reason alone."

An interesting question Davina points out is whether Louisiana and Oregon (which also permitted non-unanimous guilty verdicts) convictions are still "convictions" for recidivist provisions at all. The argument is that the priors do not comport with the Sixth Amendment jury trial right, a necessary aspect of using them to increase statutory minimums and maximums.

The Supreme Court will be deciding in Edwards v. Vannoy, No. 19-5807, whether Ramos applies retroactively to cases on federal collateral review.

Kelly v. U.S., No. 18-1059 (May 7, 2020). Wire fraud or federal-program fraud requires that the defendant intend to obtain money or property. These defendants – who manipulated the toll lanes on the George Washington Bridge – did not intend to obtain money or property and therefore were not guilty of fraud. Although we are unlikely to have clients who try to shut down a local bridge for political advantage, keep this in mind as it narrows the ambit of federal fraud prosecutions.

Cert was granted in Van Buren v. United States, No. 19-783. The question presented in Van Buren is whether a person who is authorized to access information on a computer for certain purposes violates the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2), if he accesses that same information for a different, non-authorized purpose. There is a circuit split - the Ninth Circuit has held

that a violation occurs only if the user accesses information that he is not authorized to access at all. Van Buren was a police officer who turned to a friend to borrow money. The friend asked, in return, that Van Buren run the license plate of a local stripper, to confirm before asking her out that she wasn't an undercover officer. Van Buren ran the plates in an official database that he was authorized to access "for law-enforcement purposes." Unfortunately for Van Buren, it was all a set-up. The friend was working with the FBI and Van Buren was charged with violating the Computer Fraud and Abuse Act. Van Buren argues that Congress intended the Computer Fraud and Abuse Act to target hackers and that applying the law more broadly based on the user's improper purpose would criminalize, for example, law students who use their Westlaw accounts, which are for educational use only, for personal purposes or during their summer internships, as well as the millions of employees who use their office computers every year to participate in March Madness, including office pools that involve money.

NINTH CIRCUIT

Milam v. Harrington, No. 19-55213 (3-25-20) (Hurwitz w/Tashima & Friedland). This is an equitable tolling case. The Ninth Circuit vacates the dismissal of a habeas petition and remands. Petitioner's family retained one attorney, and then subsequently another, to represent him in habeas. Each retained counsel blew deadlines. The state moved to dismiss the federal petition as untimely, and it was granted, despite the argument for equitable tolling. The Ninth Circuit held that the district court erred in (1) categorically finding that retained counsel obviated equitable tolling; and (2) that "true

abandonment” by counsel was required. As for the first claim, the petitioner raised his severe mental illness, which could have well contributed to his not being able to pursue his claims, or even track his petitions.

US v. Ray, No. 18-50115 and US v. Bacon, No. 18-50120 (4-28-20) (Per Curiam; concurrence by Wardlaw). An expert in an insanity case does have not to state an ultimate opinion as to whether a defendant is legally insane because the jury decides that. The opinion still has to meet the *Daubert* requirements of being founded on science and reliable. Because the court used the wrong legal standard – abuse of discretion – in assessing the ultimate medical opinion (insanity) rather than whether it was reliable and relevant, a new trial is required rather than a limited remand to see if the expert’s opinion meets the reliability and *Daubert* gatekeeper standards.

US v. Baldon, No. 18-10411 (4-21-20) (Bennett, Lee, & Piersol). This is a categorical guidelines decision involving California’s carjacking statute, Penal Code section 215. The defendant pled guilty to being a prohibited felon with a firearm. The sentencing court adjusted the sentence upwards for a prior crime of violence: the state carjacking. The Ninth Circuit held it was not a crime of violence. The state statute is overbroad. It criminalizes “threat to property” in carjacking and not simply threat to the person. The state defines its carjacking more broadly than USSG 4B1.2(a)(1) by not limiting fear solely to persons. The offense is also not a match with the enumerated offenses.

US v. Jaycox, No. 19-10077 (6-16-20) (Restani w/Hawkins & Paez). The Ninth Circuit reverses a sentencing enhancement in a receipt of child porn

conviction. The defendant has a California prior of sex with an under-18-year-old at least three years younger than the defendant. The district court found that this prior conviction fit an enhancement for abusive sexual conduct and so increased the mandatory minimum and maximum. The court did depart downward from the guidelines to a 240-month sentence. The Ninth Circuit held that this prior conviction was not a categorical match with the federal sexual abuse statutes as the sex with a minor could be consensual. The Ninth Circuit distinguishes *US v. Sullivan*, 797 F.3d 623 (9th Cir. 2015), where the conduct was with a minor under 16, and the perpetrator 21 or older. In this instance, the conduct could involve a minor just shy of 18 and a perpetrator just over 21. This is not a categorical match; nor does it fall under the “relating to” language which broadens the approach beyond the element to element match. The conduct is still possibly non-abusive as the courts have analyzed it.

Congratulations to Sacramento trial AFD Jerome Price and appellate AFD Carolyn Wiggin for this victory on behalf of their client and similarly charged cases!

US v. Grey, No. 18-50328 (9th Cir. May 27, 2020)(Tashima w/Harpool, D.J.). The Ninth Circuit upholds a suppression order when LA Deputy Sheriffs’ “assisted” in serving an administrative inspection warrant, but had as their “primary purpose” gathering evidence in support of a criminal investigation. Grey is an important decision on the motives of law enforcement for administrative searches (including the oft-abused “inventory searches.”).

US v. Moran-Garcia, No. 19-50134 (7-23-20)(Kleinfeld w/Nguyen & Pauley). The defendant was caught in boat, with others, 6 miles off of San Diego. The city’s

twinkling lights could be seen. He was charged with attempted illegal reentry in the Southern District of California. The Court denied the Rule 29 motion for failure to prove venue, and denied a jury instruction because Rule 29 decided the issue.

The government argued that venue existed 12 miles out to sea. This was wrong (“The government attorney gave bad counsel to the district court.”) The State’s County of San Diego extends “three English miles,” and so the Southern District of California only extends to the border of San Diego County. Second, the government argued that venue was a legal matter. It is not an element of the offense, but it is a jury question with constitutional dimensions. The government must prove it by a preponderance. The court erred in not giving the instruction. The government raised harmlessness on appeal, arguing that San Diego was clearly the destination of the boat. Well, says the 9th, up the coast. It is not completely absolutely certain that the boat was headed for the Southern District of California. One could argue, infer, and prove by a preponderance, but it is not harmless. The argument that venue is proved because it is where the defendant first appeared is colorable. However, the evidence was never presented to the jury. The conviction is vacated and remanded with instructions to dismiss without prejudice.

US v. Obagi, No. 18-50170 (7-17-20)(Owens & Molloy; dissent by Bumatay). The Ninth Circuit finds a *Brady* violation, vacates the convictions, and remands. The defendants were on trial for mortgage fraud. The government’s case featured a cooperating witness, bolstered by three other purportedly unsullied witnesses who corroborated. After the close of evidence, a fellow prosecutor came into the courtroom

and informed the AUSA that one of the corroborating witnesses had been given immunity in a separate mortgage fraud proceeding, and had lied, taken bribes, and was still subject to state prosecution. After much deliberation, the district court instructed the jury to disregard the entire testimony of the Brady witness. On appeal, the Ninth Circuit reverses for a Brady violation. It finds it material, and that the curative instruction to disregard the testimony was insufficient. The bell could not be unring. Timely disclosure would have also aided defense counsel; and possibly reframed the case.

US v. Luong, No. 16-10213 (7-17-20)(W. Smith w/Rawlinson & Bybee). A Hobbs Act appeal. The Ninth Circuit vacated and remanded the sentence as to whether the defendant should get acceptance of responsibility because trial challenges were to jurisdiction and other legal aspects.

US v. Bocharnikov, No. 19-30163 (7-27-20)(Bybee w/VanDyke; concurrence by Chhabria, D.J.). The Ninth Circuit reversed the denial of a suppression motion for inculpatory statements. The issue was whether a second interview, and confession, was tainted by the illegality of the first due to a *Miranda* violation. The defendant was arrested (in his home) without a warrant. Without *Miranda* warnings, handcuffed, in boxer shorts, surrounded by three sheriffs, the police questioned the defendant about aiming a laser at aircraft. He admitted he did, not thinking it would shine that far up. He gave up the laser. Then, nothing happened. A month later, the County Sheriff turned the matter over to the FBI. Eight months later, the FBI, concerned with the no *Miranda* warnings at the first interrogation, conducted a second interview. The agent, and later his partner, went to the

defendant's house, and spoke to him on the street. The agent started by saying this was a "follow up" to the first interview. The government conceded there were *Miranda* and other violations during the first interview. The Ninth Circuit found no attenuation under *Brown v. Illinois*, 422 U.S. 590 (1975). There is a three part test: (1) time span; (2) intervening circumstances; and (3) flagrancy of the misconduct. Although an eight month separation was lengthy, the key was the agent's stating that his second interview was a "follow up," thereby connecting the second interview to the first. Further, no intervening circumstances arose. No *Miranda* warnings were ever read: the first or the second time. The defendant could have assumed that all was well. The second statement must be suppressed.



Eastern District Court of California COVID-19 Prescreening Questionnaire

Our employees' and jurors' safety remain the Court's overriding priority. The Chief Judge is monitoring the COVID-19 Pandemic closely and will coordinate juror reporting based on current recommendations from the Centers for Disease Control and local and national health authorities.

To prevent the spread of COVID-19 and reduce its potential risk, we are using this screening questionnaire. Your answers are important to help us take precautionary measures to protect you and everyone in our courthouse. Please complete and submit the questionnaire ONLINE by following the steps on the reverse side of this questionnaire. If you cannot complete and submit it online, please return the questionnaire in the postage paid envelope at your earliest convenience, but postmarked no later than **Saturday, May 30, 2020**. Please note that we will not share your answers to this questionnaire with anyone outside the Court. Thank you for your time.

| | | | | |
|------------------------|--|---|---|--|
| NAME: | | | | |
| PARTICIPANT NO. | | PHONE NO: | | |
| 1 | Have you traveled outside the United States within the last 14 days? | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 2 | Have you been diagnosed with or had close contact with anyone diagnosed with COVID-19 within the last 14 days? | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 3 | Because of COVID-19, have you been asked or had close contact with anyone asked to self-quarantine by any doctor, hospital, or health agency within the last 14 days? | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 4 | Have you experienced any cold or flu-like symptoms in the last 14 days (including fever, cough, sore throat, respiratory illness, vomiting, or difficulty breathing)? | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 5 | Would you like to be considered for excuse from or deferral of jury service because you are over age 65 or a person of any age with an underlying medical condition or are taking a medication that puts you at a higher risk of developing serious health complications from COVID-19? (See description list on reverse of the paper) | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 6 | Would you like to be considered for excuse from or deferral of jury service because you live with or provide direct care for a vulnerable person (see description list on reverse of this paper), or do you work in the medical or first responder fields? | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 7 | Would you like to be considered for excuse from or deferral of jury service because you have children at home or a vulnerable person to care for who require your direct supervision due to school, daycare or in-home caregiver closures? Note: Only answer YES if NO ONE else your household to provide care during your jury service. | YES <input type="checkbox"/> | NO <input type="checkbox"/> | |
| 8 | In light of COVID-19 and the ongoing pandemic, for your safety, the court will mandate adherence to proper social distancing and may require masks be worn by all court staff and participants, including jurors. How comfortable are you traveling to the courthouse and potentially serving as a juror at this time? | | | |
| | <input type="checkbox"/> Comfortable | <input type="checkbox"/> Somewhat comfortable | <input type="checkbox"/> Somewhat uncomfortable | <input type="checkbox"/> Not comfortable |

If you answer "yes" to any of the above questions, the court's jury staff will contact you regarding your jury service status. If you have any questions, please submit them via email to jury@caed.uscourts.gov.

I declare under penalty of perjury that all answers are true to the best of my knowledge and belief.

Signature: _____ Date: _____

Instructions for Completing the COVID-19 Screening Questionnaire ONLINE

1. Visit the Court's secure website at www.gud.uscourts.gov
2. Click on the **eJuror** button on the upper right side of our homepage
3. Enter the following information:
 - 9-digit **Participant Number** (located on the top of the first page of this letter)
 - The first three (3) letters of your last name
 - Your date of birth
4. Click the **Login** button
5. Complete the COVID-19 Screening Questionnaire
6. Review your responses on the **Review Your Answers** page and make any necessary edits
7. Scroll to the bottom of the page and click the **Confirm** button to submit your questionnaire
8. A confirmation message will appear indicating that your questionnaire has been successfully processed. If you do not see the confirmation screen, the Court has not received your questionnaire. If you provided your email address, a confirmation will also be sent to you by email.

eJuror Tips

- All fields marked with a red asterisk (*) must be completed
- Do not use the "Back" or "Forward" buttons on your internet browser. Only use the navigation buttons on the eJuror screens to move between pages of the online questionnaire
- The eJuror system will time-out after twenty (20) minutes of inactivity
- If your eJuror session times-out, you must wait 30 minutes to log back in to complete your questionnaire.
- Court staff are not able to unlock your eJuror session. Please wait 30 minutes and try logging in again

WHO IS COVID-19 VULNERABLE?

This Court considers the Centers for Disease Control (CDC) guidelines for who is vulnerable or at a higher risk of developing serious health complications from COVID-19. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html> These include:

- People 65 years and older;
- People who live in a nursing home or long-term care facility;
- People of all ages with underlying medical conditions, particularly if not well controlled, including:
 - People with chronic lung disease or moderate to severe asthma;
 - People who have serious heart conditions;
 - People who are immunocompromised
 - ~ Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications);
 - People with severe obesity (body mass index [BMI] of 40 or higher);
 - People with diabetes;
 - People with chronic kidney disease undergoing dialysis; and/or
 - People with liver disease.

The following is a proposal for how the United States District Court for the Eastern District of California can hold criminal jury trials during the COVID-19 epidemic while the Court's existing General Orders are in effect.

This proposal is based on our knowledge of COVID-19 to date. As more information about the virus its communicability, questions of possible re-infection, and reliable tests for learning who has the virus and, thus, can infect others comes out, the solutions proposed here may need modifying, deletion or supplementation.

Contents

No table of contents entries found.

General Precautions

A face covering is required to enter the courthouse and must be worn in common areas and private areas where a social distance of six feet cannot be maintained. This requirement pertains to all people entering the building including building staff, attorneys, and court security officers. Floor decals will be placed at six-foot intervals at the entrance of the courthouse to assist with proper distancing while waiting to enter the courthouse and proceed through screening. Hand sanitizer stations are offered near the jury scanning counter. *CODIV-19 symptom questions may be asked prior to entry or a list of symptoms may be posted, that if experiencing, would preclude anyone from entering the courthouse. *

Elevators should hold no more than two people at a time to maintain social distancing. A family, or group of people who have socially isolated together during the pandemic, can safely take the elevator together. People waiting to use the elevators should keep a distance of six feet apart as marked by the floor decals.

As for **public restrooms**, no more than two people should be in the public restroom at a time. People waiting to use the restroom should distance six feet apart in the courtrooms' main hallway where a 6- foot radius can be maintained.

The Clerk's Office and Federal Defender's Office recommend that court will be held for half days, 9am to 1pm. The shorter period decreases daily exposure time and eliminates the need to consider lunch arrangements for jurors. The US Attorney's Office would prefer the trial judge have discretion to hold court for half or full days. Full days would decrease the number of court days on which jurors are exposed and the number of trips by jurors between the courthouse and their residences.

Jury Venire Call

As the Court mails citizens notice for jury service, the court will include:

- A letter from the judge addressing COVID-19 concerns and current courthouse protocols in place to keep jurors, staff and trial participants safe.
- The COVID-19 jury questionnaire.

Our jury administrators will defer or excuse prospective jurors, as is the current practice, as responses are received by the Court. Because COVID-19 status may change and symptoms may be present after the COVID-19 questionnaire has been submitted, an automated phone call will ask that prospective jurors contact the court if any answers to the COVID-19 questionnaire have changed closer to their reporting date.

Trial Begins- Jury Selection

Coming into the Courthouse

As prospective jurors arrive at the courthouse, they will be required to wear a face cover and proceed through screening. *COVID-19 symptom questions may be asked of them or they may read a list of symptoms that if experiencing, would preclude them from entering the courthouse. *

A jury administrator will be in the lobby to assist prospective jurors with social distancing in the elevators, allowing two at a time, as marked by the floor decals.

The prospective jurors will maintain social distance and stand on floor decals, while waiting to check in outside the jury assembly room. Once in the jury assembly room, the prospective jurors will remain masked and sit six feet apart. At this time the prospective jurors should again answer the COVID-19 questionnaire. *GSA will provide a hand sanitizer station outside the jury assembly room. *

Coming in for Voir Dire

The jury administrator will escort the prospective jurors to the courtroom, ensuring social distancing in the elevators. Two prospective jurors may occupy a public elevator at any one time, while four prospective jurors may occupy the freight elevator. The trial participants, the trial judge, and the witnesses may generally be unmasked when they are **socially** distanced in the courtroom, but at times may need to be masked (for example, when conferring at sidebar). During voir dire prospective jurors should be unmasked, but once empaneled jurors should be allowed to be masked during the trial.

NOTE: The FDO objects to face coverings for jurors during voir dire and during the trial. The FDO has no objection to a no-glare clear face shield. The Court recommends allowing jurors to

wear face coverings after voir dire during trial. The USAO does not have an issue with the jurors wearing face coverings after empanelment.

Prospective jurors will be called into the ceremonial courtrooms for voir dire, and seated with social distancing in the jury box, in a row of chairs in front of the jury box, and in the audience sections. Seating will be staggered, with a six-foot clearance radius around each juror. Using seating in all audience sections, it is possible to seat approximately 40 venire members in the Sacramento ceremonial courtroom, and it is possible to seat 30 venire members in the Fresno ceremonial courtroom with appropriate social distancing. Available seats will be marked to ensure appropriate distancing. One or two rows of seating in the audience section furthest from the jury box may be reserved for the public and press during jury selection. Other members of the public who wish to observe jury selection will be able to watch a live video feed of the proceedings from an additional courtroom.

The remaining jury venire members will be seated in a courthouse location with social distancing, where they can follow the voir dire by live video feed. The overflow room in Sacramento will be the jury assembly room on the 4th floor. The overflow room in Fresno will be the courtroom adjacent to the ceremonial courtroom. If additional jurors need to be called from the venire to replace prospective jurors in the ceremonial courtroom who were removed for cause or by peremptory challenge, the additional jurors can be brought in from the other courthouse location where they have been following the voir dire by video. Once the jury is empaneled, public observers for the remainder of the trial will be able to sit in the marked chairs in the courtroom audience section.

The Court will ask excused venire members to contact the Court if, within two weeks after being in the courthouse, they test positive for COVID-19 or had contact with someone before their court attendance who since tested positive for COVID-19.

During trial, the Court should ask the sitting jurors daily, at the outset of proceedings, if any of their answers on the COVID-19 questionnaire have changed. Before releasing the jurors to go home at the trial day's end, the Court should ask the jurors to call, not come to court, the next trial day if they are not feeling well or learn they have been exposed to someone who is positive for COVID-19.

NOTE: Defense counsel will ask their client, daily, the same COVID-19 questions that the judge is asking the jury.

Trial

Courtroom Logistics

Once the jury is empaneled, the 12 jurors and at least 2 alternate jurors may be seated with social distancing in the ceremonial courtrooms. The jurors will be seated in three rows with

staggered seating: the two rows of the jury box and a row of chairs placed in front of the jury box. In Sacramento, the two alternates can be seated to the side of the jury box. In Fresno, the two alternates can be included in the row in front of the jury box.

NOTE: If more than 2 alternate jurors are requested, reconfiguration of the courtroom may be necessary.

In the Sacramento ceremonial courtroom, the prosecution table will stay where it is, near and perpendicular to the jury box, with an additional table placed next to it, furthest from the jury box, to extend seating. The front row of chairs in the audience section nearest the jury box would be roped off for use by the government. Defense counsel table will be two tables end to end facing the jury box, with the marshals seated at the wall behind defense counsel table.

In the Fresno ceremonial courtroom, the prosecution table will be kept perpendicular to the jury box but will need to be moved several feet in the direction away from the jury box and placed adjacent to the other table perpendicular to the jury box. The defense counsel table will be moved a few feet to allow for a second table and will remain facing the jury. The marshals would be seated along the wall that is behind the defense counsel table.

In Fresno, the first row of the audience section closest to the jury box will need to be closed off to ensure social distancing. The first row of the audience section nearest counsel tables could be roped off for use by the parties, if needed.

The remaining rows of the audience section may be used for public seating with appropriate social distancing. Of the public attending trial, members of the same family who live together do not need to be physically distant. If there are not enough seats for all those wishing to watch trial, the court will arrange an overflow courtroom with an ability to watch trial through the court's video system.

NOTE: Public seating will be first come first served. If the trial brings media attention, a number of seats will be reserved for press.

Defense counsel and their client as well as the government should observe social distancing during the trial, sitting at opposite ends of the counsel table, or six feet apart. Defense counsel request the Court read a jury instruction saying:

Typically, during trial, as you have seen on TV and in movies, the defendant and their lawyer sit next to each other during the trial. They are sitting socially distant from each other because I have ordered all, when in the courtroom, be physically and socially distant from each other during this trial. Do not read anything into the distance between them other than they are following my order.

NOTE: The FDO has requested use of interpreter headsets, on a closed line, to confer with their client. The Court IT department is looking it to this possibility.

During Trial

Opening Statements and Closing Arguments

Because the jurors are spread over a greater swath in the courtroom, counsel request they be able to move around the lectern, while continuing to practice six-foot social distancing, so they can make better eye contact and physically face the jurors.

Exhibits

Exhibits should be presented at trial either electronically or using paper exhibits presented on the overhead projector. Specific procedures for the presentation of exhibits should be left to the discretion of the trial judge.

The parties will coordinate with the courtroom deputy to ensure that the admitted exhibits are placed in an admitted exhibit binder or box to be provided to the jury once the case goes to the jury for deliberations. Jurors will be provided with gloves for their use in reviewing exhibits. Paper exhibits can be placed in plastic envelopes and passed between the gloved jurors with the plastic cleaned with a sanitizing wipe periodically. The goal is to minimize what multiple people will need to touch and look at. In some cases, it may be appropriate to provide a monitor or a TV for the jurors to see admitted exhibits.

Physical admitted exhibits, depending upon the exhibit type, can either be passed from juror to juror as described above or jurors can come forward one-by-one and view the exhibit (such as packaged drugs).

Side Bars

Side bars can take place in the ceremonial courtroom with participants masked. Alternatively, the trial judge could hold sidebars in the judge's chambers behind the courtroom, with the court reporter present to transcribe the side bar.

Jury Rooms for Breaks and Deliberations

In Sacramento, jury breaks will be in the 16th floor Judges' Conference Room, which is nearby and private. Two single restrooms are available adjacent to the conference room.

Deliberations will be in the Jury Assembly Room on the 4th floor, which is private and provides ample space and doors to an outdoor balcony for fresh air.

In Fresno, jury breaks and deliberations will be in the adjacent courtroom. The jury will enter and exit the courtroom as always through the doorway to the jury room, but the jurors will continue to the adjacent courtroom. In the adjacent courtroom, jurors will be able to be physically distant and arrange themselves as needed to deliberate. A separate restroom and a

phone to contact chambers with questions are available to them in the jury room off the adjacent courtroom.

Recesses at Night

Per CDC Guidelines, the Court will disinfect the courtroom and jury rooms each night, along with the public spaces outside the courtroom, the public restrooms, and any overflow courtroom.

Once Jurors and Alternates are Excused

Jurors should also be instructed to contact jury staff if they have symptoms within the two-week period after the trial.

1 Commissioner shall submit to the Committees on Appro-
2 priations of the House of Representatives and the Senate
3 a spending plan for such funds: *Provided further*, That
4 such amount is designated by the Congress as being for
5 an emergency requirement pursuant to section
6 251(b)(2)(A)(i) of the Balanced Budget and Emergency
7 Deficit Control Act of 1985.

8 THE JUDICIARY

9 SUPREME COURT OF THE UNITED STATES

10 SALARIES AND EXPENSES

11 For an additional amount for “Salaries and Ex-
12 penses”, \$500,000, to prevent, prepare for, and respond
13 to coronavirus, domestically or internationally: *Provided*,
14 That such amount is designated by the Congress as being
15 for an emergency requirement pursuant to section
16 251(b)(2)(A)(i) of the Balanced Budget and Emergency
17 Deficit Control Act of 1985.

18 COURTS OF APPEALS, DISTRICT COURTS, AND OTHER

19 JUDICIAL SERVICES

20 SALARIES AND EXPENSES

21 For an additional amount for “Salaries and Ex-
22 penses”, \$6,000,000, to prevent, prepare for, and respond
23 to coronavirus, domestically or internationally: *Provided*,
24 That such amount is designated by the Congress as being
25 for an emergency requirement pursuant to section

1 251(b)(2)(A)(i) of the Balanced Budget and Emergency
2 Deficit Control Act of 1985.

3 DEFENDER SERVICES

4 For an additional amount for “Defender Services”,
5 \$1,000,000, to remain available until expended, to pre-
6 vent, prepare for, and respond to coronavirus, domestically
7 or internationally: *Provided*, That such amount is des-
8 ignated by the Congress as being for an emergency re-
9 quirement pursuant to section 251(b)(2)(A)(i) of the Bal-
10 anced Budget and Emergency Deficit Control Act of 1985.

11 ADMINISTRATIVE PROVISION—THE JUDICIARY

12 VIDEO TELECONFERENCING FOR CRIMINAL PROCEEDINGS

13 SEC. 15002. (a) DEFINITION.—In this section, the
14 term “covered emergency period” means the period begin-
15 ning on the date on which the President declared a na-
16 tional emergency under the National Emergencies Act (50
17 U.S.C. 1601 et seq.) with respect to the Coronavirus Dis-
18 ease 2019 (COVID-19) and ending on the date that is
19 30 days after the date on which the national emergency
20 declaration terminates.

21 (b) VIDEO TELECONFERENCING FOR CRIMINAL PRO-
22 CEEDINGS.—

23 (1) IN GENERAL.—Subject to paragraphs (3),
24 (4), and (5), if the Judicial Conference of the United
25 States finds that emergency conditions due to the

1 national emergency declared by the President under
2 the National Emergencies Act (50 U.S.C. 1601 et
3 seq.) with respect to the Coronavirus Disease 2019
4 (COVID-19) will materially affect the functioning of
5 either the Federal courts generally or a particular
6 district court of the United States, **the chief judge**
7 **of a district court** covered by the finding (or, if the
8 chief judge is unavailable, the most senior available
9 active judge of the court or the chief judge or circuit
10 justice of the circuit that includes the district court),
11 upon application of the Attorney General or the des-
12 ignee of the Attorney General, or on motion of the
13 judge or justice, **may authorize the use of videotele-**
14 **conferencing, or telephone conferencing if video tele-**
15 **conferencing is not reasonably available, for the fol-**
16 **lowing events:**

17 (A) **Detention hearings** under section 3142
18 of title 18, United States Code.

19 (B) **Initial appearances** under Rule 5 of
20 the Federal Rules of Criminal Procedure.

21 (C) **Preliminary hearings** under Rule 5.1 of
22 the Federal Rules of Criminal Procedure.

23 (D) **Waivers of indictment** under Rule 7(b)
24 of the Federal Rules of Criminal Procedure.

1 (E) **Arraignments** under Rule 10 of the
2 Federal Rules of Criminal Procedure.

3 (F) **Probation and supervised release rev-**
4 **ocation proceedings** under Rule 32.1 of the
5 Federal Rules of Criminal Procedure.

6 (G) **Pretrial release revocation proceedings**
7 under section 3148 of title 18, United States
8 Code.

9 (H) Appearances under Rule 40 of the
10 Federal Rules of Criminal Procedure.

11 (I) **Misdemeanor pleas and sentencings** as
12 described in Rule 43(b)(2) of the Federal Rules
13 of Criminal Procedure.

14 (J) Proceedings under chapter 403 of title
15 18, United States Code (commonly known as
16 the “Federal Juvenile Delinquency Act”), ex-
17 cept for contested transfer hearings and juve-
18 nile delinquency adjudication or trial pro-
19 ceedings.

20 (2) **FELONY PLEAS AND SENTENCING.**—

21 (A) **IN GENERAL.**—Subject to paragraphs
22 (3), (4), and (5), if the Judicial Conference of
23 the United States finds that emergency condi-
24 tions due to the national emergency declared by
25 the President under the National Emergencies

1 Act (50 U.S.C. 1601 et seq.) with respect to
2 the Coronavirus Disease 2019 (COVID-19) will
3 materially affect the functioning of either the
4 Federal courts generally or a particular district
5 court of the United States, the chief judge of a
6 district court covered by the finding (or, if the
7 chief judge is unavailable, the most senior avail-
8 able active judge of the court or the chief judge
9 or circuit justice of the circuit that includes the
10 district court) specifically finds, upon applica-
11 tion of the Attorney General or the designee of
12 the Attorney General, or on motion of the judge
13 or justice, that felony pleas under Rule 11 of
14 the Federal Rules of Criminal Procedure and
15 felony sentencings under Rule 32 of the Federal
16 Rules of Criminal Procedure cannot be con-
17 ducted in person without seriously jeopardizing
18 public health and safety, and the district judge
19 in a particular case finds for specific reasons
20 that the plea or sentencing in that case cannot
21 be further delayed without serious harm to the
22 interests of justice, the plea or sentencing in
23 that case may be conducted by video teleconfer-
24 ence, or by telephone conference if video tele-
25 conferencing is not reasonably available.

1 **(B) APPLICABILITY TO JUVENILES.**—The
2 video teleconferencing and telephone confer-
3 encing authority described in subparagraph (A)
4 shall apply with respect to equivalent plea and
5 sentencing, or disposition, proceedings under
6 chapter 403 of title 18, United States Code
7 (commonly known as the “Federal Juvenile De-
8 linquency Act”).

9 **(3) REVIEW.**—

10 **(A) IN GENERAL.**—On the date that is 90
11 days after the date on which an authorization
12 for the use of video teleconferencing or tele-
13 phone conferencing under paragraph (1) or (2)
14 is issued, if the emergency authority has not
15 been terminated under paragraph (5), the chief
16 judge of the district court (or, if the chief judge
17 is unavailable, the most senior available active
18 judge of the court or the chief judge or circuit
19 justice of the circuit that includes the district
20 court) to which the authorization applies shall
21 review the authorization and determine whether
22 to extend the authorization.

23 **(B) ADDITIONAL REVIEW.**—If an author-
24 ization is extended under subparagraph (A), the
25 chief judge of the district court (or, if the chief

1 judge is unavailable, the most senior available
2 active judge of the court or the chief judge or
3 circuit justice of the circuit that includes the
4 district court) to which the authorization ap-
5 plies shall review the extension of authority not
6 less frequently than once every 90 days until
7 the earlier of—

8 (i) the date on which the chief judge
9 (or other judge or justice) determines the
10 authorization is no longer warranted; or

11 (ii) the date on which the emergency
12 authority is terminated under paragraph
13 (5).

14 (4) **CONSENT.—Video teleconferencing or tele-**
15 **phone conferencing authorized under paragraph (1)**
16 **or (2) may only take place with the consent of the**
17 **defendant, or the juvenile, after consultation with**
18 **counsel.**

19 (5) **TERMINATION OF EMERGENCY AUTHOR-**
20 **ITY.—**The authority provided under paragraphs (1),
21 (2), and (3), and any specific authorizations issued
22 under those paragraphs, shall terminate on the ear-
23 lier of—

24 (A) the last day of the covered emergency
25 period; or

1 (B) the date on which the Judicial Con-
2 ference of the United States finds that emer-
3 gency conditions due to the national emergency
4 declared by the President under the National
5 Emergencies Act (50 U.S.C. 1601 et seq.) with
6 respect to the Coronavirus Disease 2019
7 (COVID-19) no longer materially affect the
8 functioning of either the Federal courts gen-
9 erally or the district court in question.

10 (6) NATIONAL EMERGENCIES GENERALLY.—

11 The Judicial Conference of the United States and
12 the Supreme Court of the United States shall con-
13 sider rule amendments under chapter 131 of title
14 28, United States Code (commonly known as the
15 “Rules Enabling Act”), that address emergency
16 measures that may be taken by the Federal courts
17 when the President declares a national emergency
18 under the National Emergencies Act (50 U.S.C.
19 1601 et seq.).

20 (7) RULE OF CONSTRUCTION.—Nothing in this
21 subsection shall obviate a defendant’s right to coun-
22 sel under the Sixth Amendment to the Constitution
23 of the United States, any Federal statute, or the
24 Federal Rules of Criminal Procedure.

1 (c) The amount provided by this section is designated
2 by the Congress as being for an emergency requirement
3 pursuant to section 251(b)(2)(A)(i) of the Balanced Budg-
4 et and Emergency Deficit Control Act of 1985.

5 DISTRICT OF COLUMBIA

6 FEDERAL FUNDS

7 FEDERAL PAYMENT FOR EMERGENCY PLANNING AND

8 SECURITY COSTS IN THE DISTRICT OF COLUMBIA

9 For an additional amount for “Federal Payment for
10 Emergency Planning and Security Costs in the District
11 of Columbia”, \$5,000,000, to remain available until ex-
12 pended, to prevent, prepare for, and respond to
13 coronavirus, domestically or internationally: *Provided,*
14 That such amount is designated by the Congress as being
15 for an emergency requirement pursuant to section
16 251(b)(2)(A)(i) of the Balanced Budget and Emergency
17 Deficit Control Act of 1985.

18 INDEPENDENT AGENCIES

19 ELECTION ASSISTANCE COMMISSION

20 ELECTION SECURITY GRANTS

21 For an additional amount for “Election Security
22 Grants”, \$400,000,000, to prevent, prepare for, and re-
23 spond to coronavirus, domestically or internationally, for
24 the 2020 Federal election cycle: *Provided,* That a State
25 receiving a payment with funds provided under this head-