



## OFFICE OF THE FEDERAL DEFENDER

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# Federal Defender Newsletter

## August 2018

### CJA PANEL TRAINING

Please save the dates for the next CJA panel trainings (CLEs) in September at the federal courthouses. More details will be provided in the September newsletter.

**Sacramento** – Thursday, September 20, 5 pm (NOTE: different day in light of Yom Kippur), Kirk McAllister will present “Litigating Brady Violations”

**Fresno** – Tuesday, September 18, 5:30-6:30, AFD Megan Hopkins will present on Sentencing Videos

### **NEW INMATE VISITATION PROCEDURES AT MARSHAL’S LOCK-UP IN SACRAMENTO**

The procedure for getting in to see in-custody clients at the Sacramento Marshal’s Lock-Up in Sacramento has changed since June. The Marshals have informed us that in addition to signing in and out, and wearing a badge, visitors will have to leave a driver’s license or other ID at the front counter during the visit. These procedures have been adopted because attorneys were not signing in and out as needed inside the cell-block, and several of the visitor’s badges have gone missing this summer.

### KENNEDY LEARNING CENTER, SACRAMENTO

**Wed., September 26, 2018, 1-3 pm – ACEs and Resilience Presentation**, Dr. Andres Sciolla, UC Davis, Susan Jones, Resilience in Education, and Donielle Prince, ACEs Connection (CLE credit available)

**Wed., October 24, 2018, 1-4 pm – Pathways to Progress Empowerment Fair**: Resource Fair for Federal Defendants/Former Defendants, Panel Attorneys, and Court Family Presented by the Federal Defender’s Office, Federal Probation Office, Federal PreTrial Services Office, and the Justice Anthony Kennedy Library and Learning Center

### 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)  
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or Noa Oren, [noa\\_oren@fd.org](mailto:noa_oren@fd.org)

## Welcome to new AFD in CHU!

Carrie Ward will be joining our CHU in August. Carrie received her J.D. from Case Western Reserve University and her Masters of Law from the Judge Advocate General's Legal Center and School. Carrie joins our staff after honorably serving in the United States Army, where her most recent post was as Senior Defense Counsel in the largest and busiest jurisdiction in the US Army - Fort Bragg. During her service, Carrie received numerous awards and commendations, including twice receiving the Bronze Star and Meritorious Service Medal. Welcome Carrie!

## SAVE THE DATE FOR THE 17<sup>TH</sup> ANNUAL GOLF TOURNAMENT!

The 17<sup>th</sup> Annual Office of the Federal Defender Golf Tournament will take place on September 28, 2018 at the Timber Creek Golf Course, 7050 Del Webb Blvd., Roseville. Timber Creek has been voted the #1 golf course in the Sacramento. The Tournament kicks off at 1:00 p.m. with a modified shotgun start. The cost is \$85 per person, which includes golf, cart, range balls, dinner, and prizes. All skill levels are welcome with handicapped scoring and individual stroke play.



Please RSVP to Henry Hawkins ([Henry\\_Hawkins@fd.org](mailto:Henry_Hawkins@fd.org)) or Melvin Buford ([Melvin\\_Buford@fd.org](mailto:Melvin_Buford@fd.org)) by August 17 if you'll be teeing off!

### 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).

## NEW VOLUNTEER OPPORTUNITY!

Staff at the Federal Defender's Office are always searching for ways to better serve incarcerated men and women. One way we'd like to do that is to help connect incarcerated parents with their children. For that reason, we ask your help in an exciting volunteer opportunity at Folsom Prison.

It's called **Building Families Through the Arts** and, through it, we videotape incarcerated parents playing a musical instrument, singing, reciting poetry, even just reading a book, and mail their recordings to their children.

To get this program off the ground, we need the following:

- Volunteers to film prisoners at the prison (a 2-3 hour commitment, once a month);
- Volunteers to transfer the video recordings to DVDs and prepare them for mailing to the children
- Donations of new or gently used children's books we can bring to prison for parents to read aloud.

If you are interested, please email Alyssa Mack, [alysa\\_mack@fd.org](mailto:alysa_mack@fd.org), or Crystal Richardson, [crystal\\_richardson@fd.org](mailto:crystal_richardson@fd.org). All are welcome, especially those with A/V skills and capabilities.

### 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).

## NINTH CIRCUIT

Tamplin v. Muniz, No. 16-15832 (7-6-18)(Fletcher with Kronstadt (CD Cal); dissent by Hawkins):

A divided panel of the Ninth Circuit reversed the denial of a California state prisoner's § 2254 petition, holding that the trial court did not honor his right to self-representation under Faretta v. California, 422 U.S. 806 (1975), and that the state courts did not reasonably reject this claim. The petitioner was convicted in a California state court of being a felon in possession of a firearm and sentenced under California's three-strikes law to 45 years to life. The majority held that the reasons that the state habeas court advanced for denying the Faretta claim were contrary to clearly established law. The petitioner's request for self-representation was unequivocal, the majority said, identifying seven discrete requests during a critical

pretrial hearing and two direct accusations from the petitioner that the trial judge was violating his rights by forcing him to accept the assistance of counsel. The trial judge's reliance on the petitioner's lack of legal knowledge or skill was irrelevant under Faretta, because it was clear that the petitioner understood the "dangers and disadvantages" of representing himself. And because the petitioner's request was unequivocal, his supposed acquiescence in the trial judge's decision to force him to accept the public defender was also immaterial under Faretta. The state habeas court's reliance on a published decision of the California Court of Appeal was misplaced, because the opinion read Faretta out of context.

United States v. Hernandez, No. 13-10428 (7-10-18) (McKeown with Murguia; partial dissent from Rawlinson):

On this second appeal in a child pornography case, the panel remanded the case again for the limited purpose of allowing the district judge to clarify whether he denied the defendant a downward adjustment for acceptance of responsibility because he exercised his right to trial. The defendant went to trial, lost, and received a 284-month sentence for production of pornography by sexting with a teenager in a consensual relationship. The sentencing judge faulted the defendant for his apparent lack of contrition at sentencing. The judge observed that there was no remorse for "putting the victim through the agony of testifying at trial." And then he said to the defendant, "You decided to roll the dice, and it came up snake eyes. You didn't think she'd testify, and she did. You went - you wanted to go to trial, so you went to trial. And Probation rightly recommends 327 months for that." That last statement came right before the judge pronounced the sentence. Under these circumstances,

the court said, the judge ran "headlong" into the Ninth Circuit precedent that forbade judges from relying on the defendant's decision to exercise his right to trial as a basis for denying a downward adjustment for acceptance of responsibility. The panel remanded the case to give the judge an opportunity to explain that that was not what he was doing.

White v. Ryan, No. 15-99011 (7-10-18)(Nguyen with M. Smith and Murguia): The Ninth Circuit reversed the denial of a habeas corpus petition filed by an Arizona death-row prisoner, holding that he received ineffective assistance of counsel at the second penalty phase of his capital proceedings when his lawyer failed to challenge the sole aggravating factor that made him eligible for the death penalty and failed to adequately investigate and present mitigating evidence in that proceeding. The court remanded the case with instructions to grant the writ and conduct new capital sentencing proceedings in state court.

United States v. Pepe, No. 14-50095 (7-10-18)(Nguyen with Kleinfeld; dissent by Thomas): A divided panel of the Ninth Circuit vacated convictions for engaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c). The trial court instructed the jury consistent with United States v. Clark, 435 F.3d 1100 (9th Cir. 2006), which punishes those who travel in foreign commerce and thereafter engage in illicit sexual acts. After Clark, Congress amended the statute to punish those who either travel in foreign commerce or reside temporarily or permanently in foreign commerce and engage in illicit sexual acts. The court held that in light of the subsequent amendment, Clark's interpretation had been overruled.

Accordingly, the conviction, which was based on Clark, had to be vacated.

United States v. Sleugh, No. 17-10424 (7-23-18) (Berg (EDMI) with Wallace and Berzon):

The Ninth Circuit affirmed an order denying one codefendant's motion to unseal applications filed under Rule 17(c) by another codefendant for subpoenas. These applications are not subject to the common-law right of public access to court records, and on the facts of this case the codefendant did not show a special need to see the subpoena applications.

The appellant here and his codefendant (who intervened in the appeal) were charged with a drug-trafficking conspiracy in which the delivery person was killed. As part of pretrial discovery, the codefendant applied for subpoenas to obtain certain cell phone records and surveillance videos. These applications were filed ex parte and under seal as required by local rules. The codefendant then pled guilty to everything but the murder and agreed to testify against the appellant at his trial. The appellant lost at trial and received a life sentence; the codefendant got three years for his cooperation. The appellant then appealed his conviction and sentence; his efforts to investigate potential appellate arguments in that case led to the events that are the basis for this appeal. (This main appeal remains unresolved; it was stayed pending the resolution of the issue in this appeal.)

The appellant returned to the district court to ask to unseal the supporting materials attached to the codefendant's subpoenas; in light of the codefendant's cooperation, he wanted to argue that the codefendant's trial testimony was inconsistent with statements he may have made in connection with the applications for the

subpoenas. The magistrate judge who issued the subpoenas denied the request to unseal the applications, and the district court affirmed. The codefendant intervened in this appeal to protect the confidentiality of his subpoena applications.

Subpoena applications can be made under seal in criminal cases to protect a defendant's right to keep his defense strategy secret. The court agreed with the First Circuit's conclusion that this right trumps the public's common-law and First Amendment rights of access to court documents. Only a showing of special need can overcome the defendant's right, but here there was no special need. Appellate counsel's need to investigate was not enough, and the appellant did not identify any aspect of the codefendant's testimony that he believed was false. The possibility that the supporting materials might be impeaching was not relevant to the pending appeal; the materials were not in front of the jury, and the appellate court is not a fact-finding body. Plus the supporting materials predated the codefendant's decision to cooperate. This is an important case in light of the subpoena practice in our district.

Echavarria v. Filson, Nos. 15-99001, 17-15560 (7-25-18) (Fletcher with Berzon and Nguyen):

The Ninth Circuit affirmed the grant of a habeas petition and a new trial filed by a Nevada death-row prisoner, holding that the fact that he was never told that the FBI agent he was convicted of killing had previously investigated criminal conduct by the judge who presided over his trial, created an intolerable risk of bias that violated his right to due process. The petitioner deserved a new trial.

US v. Holden, No. 16-30186 (7-26-18)(Graber w/M. Smith & Korman): The Ninth Circuit vacated this fraud sentence and remanded. The record did not support the guideline enhancement for being an organizer under 3B1.1. The evidence did not support that the defendant exercised control over the co-defendant. There was also inconsistencies with whether the restitution order was due immediately or under a payment schedule.

# NEWS YOU CAN USE

## FD.ORG

IF YOU HAVEN'T VISITED FD.ORG IN A WHILE,  
HERE'S WHAT YOU'RE MISSING:

[CJA PRACTITIONER RESOURCES](#). This web page has information about eVoucher, funding, and administrative matters.

[TRAINING EVENTS](#). Here, you'll find the master schedule and registration information for all FD.ORG training events, including live seminars, webinars, as well as information about training offered by other organizations like NACDL, NLADA, and various state organizations.

[PROGRAM MATERIALS](#). Did you miss that seminar about ballistics evidence or crossing experts? Here, find agendas, handouts, and videos from most of FD.ORG's seminars.

[CRIMINAL DEFENSE TOPICS](#). Not sure you remember how to handle a *Bruton* problem? Mystified by a loss calculation? This section can help point you in the right direction. There is also a section for questions related to immigration.

[SENTENCING RESOURCES](#). There's a wealth of information here about sentencing law, strategies for dealing with specific guidelines, understanding the BOP, and developing mitigation.

[LITIGATION SUPPORT](#). Here, you can find information about Coordinating Discovery Attorneys, how to get help with technical problems (for example, opening a file on a discovery disk), and discounts for software.

[ATTORNEY HOTLINE](#). If you don't know about the Training Division Hotline, you need to. It's simple: you can call about any CJA case. You leave your contact information and a brief description of the problem you're working on. You will get a call back from a staff attorney who will talk through the issue with you, and help you with research. And it's free!

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