



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

JEROME PRICE
Chief Assistant Defender

DAVID HARSHAW
CHU Chief

ERIC KERSTEN
Fresno Branch Chief

RACHELLE BARBOUR, Editor
Assistant Federal Defender

Federal Defender Newsletter

February 2022

REMOTE CJA PANEL TRAINING

The Federal [Defender Services Office - Training Division \(fd.org\)](#) continues to provide excellent remote training for CJA counsel. Upcoming trainings include:

January 31 to February 8:

GRIT: A Workshop to Energize, Elevate and Educate Women in Public Defense

February 2:

Fundamentals of Federal Criminal Defense - Defending Federal Drug Prosecutions: What You Need to Know

February 8:

Celebrating Black History Month with The Honorable Tanya S. Chutkan

February 16:

Fundamentals of Federal Criminal Defense - Workshop: Applications of Criminal History Guidelines §§4A1.1 – 4A1.2

February 16:

Evidence Webinar Series: Part Two - The Busy Lawyer's Guide to Hearsay

February 24:

Chemistry 102 for Lawyers: Understanding Common Chemistry Terms, Analytical Methods, and More

You can register for and access all fd.org training with your CJA username and password, as well as sign up 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.

The Federal Defender Training Division also has a **telephone hotline** offering guidance and information for all FDO staff and CJA panel members: 1-800-788-9908.

[National Association of Criminal Defense Lawyers \(nacdl.org\)](#) and [NAPD \(publicdefenders.us\)](#) (which all CJA lawyers qualify to join) also offer excellent remote training, including self-study videos relevant to your criminal defense practice.

CONGRATULATIONS TO FRESNO SUPERIOR COURT JUDGE CHARLES LEE!

Governor Newsom named Charles Lee to the Fresno County Superior Court bench! We thank him for his years of work for his clients, our Office, and justice as an Assistant Federal Defender, the Fresno Branch Supervisor, and our Office's Senior Litigator. We wish him the best in his new career!

CJA Representatives

Kresta Daly, Sacramento,
(916) 440.8600, kdaly@barth-daly.com
is our District's CJA Representative.
Our Backup CJA Representative is
Kevin Rooney, Fresno, (559) 233.5333,
kevin@hammerlawcorp.com.

EASTERN DISTRICT OF CALIFORNIA COVID-19 NEWS

The Court's operations continue to be impacted by the COVID-19 pandemic. Many criminal calendars continue to be remote. Our Magistrate Judges issued an order requiring all individuals appearing for in-person hearings be fully vaccinated. [GO 638 MJ Pol. Vaccinations](#) The Court's website has a link for counsel to provide vaccination proof.

<https://www.caed.uscourts.gov/caednew/in dex.cfm/covid-19-vaccination-submission/>

Individuals not fully vaccinated may arrange for a remote appearance.

9th CIRCUIT COVID-19 NEWS

The Ninth Circuit announced that, due to the COVID-19 pandemic, oral arguments will continue as fully remote appearances at least through February 28, 2022. [Covid-Updates.pdf](#) Once in-person oral arguments resume, counsel must be fully vaccinated and submit proof no later than 10 days prior to their argument date. Unvaccinated counsel must present argument by video.

The Court continues to accept and encourage questions be sent by email to: questions@ca9.uscourts.gov.

CAE & COVID Updates

Keep up with all the COVID-19 information affecting your federal practice by ensuring your email address is up to date with the Federal Defender's Office. You should be receiving regular emails about how coronavirus is impacting our District and jails. If you need to update your email address, please notify Kurt_Heiser@fd.org.

2018 Sentencing Guidelines Still in Effect

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

TOPICS FOR FUTURE TRAINING SESSIONS

Know a good speaker for the Federal Defender's panel training program? Want the office to address a particular legal topic or practice area? Email suggestions to:

Fresno: Peggy Sasso, peggy_sasso@fd.org
or Karen Mosher, karen_mosher@fd.org

Sac: Megan Hopkins,
megan_hopkins@fd.org

Sacramento Duty Contact at Marshal's Office

Duty calendars in Sacramento continue to be held on Zoom. Please email USMS.CAE-PRL@usdoj.gov or call the Marshal cellblock number, (916) 930.2026, for any Sacramento duty matters, including interview requests.

SUPREME COURT

Hemphill v. New York, No. 20-637, 1-20-22 (Sotomayor, J.)

Held: Admitting Morris' plea allocution transcript violated Hemphill's Sixth Amendment right to confront the witnesses against him.

A jury convicted Hemphill of the 2006 Bronx death of David Pacheco Jr., who was killed by a stray bullet. His defense was someone else was responsible: Police originally identified Morris as Pacheco's shooter and charged Morris with his murder. At Morris' trial, Morris pleaded guilty to a different charge -- possession of a different firearm than the one used in Pacheco's killing. Years later, police charged Hemphill with Pacheco's killing. Hemphill offered evidence Morris was originally identified as Pacheco's shooter. Morris was unavailable to testify so, over Hemphill's confrontation objection, the government admitted Morris' plea allocution to the other weapon.

NINTH CIRCUIT

US v. Tat, No. 19-50034 (10-21-21) (Graber, Miller, & Hillman). The 9th vacates a false entry in bank records conviction because the entries were not false. They were true: money went in and money came out. Further, entries of cashier's checks were accurate; the structuring may have had a nefarious purpose (money laundering) but that is a different offense than 18 USC § 1005.

US v. Franklin, No. 20-30136 (11-23-21) (Boggs w/Murguia; Berzon concurring). The 9th considers what standard to use in reviewing a codefendant's unsworn hearsay testimony used to increase a defendant's USSG offense level. Reviewing almost a half century of Guidelines jurisprudence, the 9th fashions a two-factor test: (1) whether the statement is "procedurally reliable;" or (2) whether the statement is "substantively reliable." "Procedural reliability" cannot put the burden on the defendant to prove a negative - the defendant must have an opportunity and means to challenge the statement. "Substantive reliability" requires the statement be reliable or consistent enough with other statements to indicate probable truth. "Procedural reliability" is reviewed *de novo*. "Substantive reliability" is more factual and is reviewed for "clear error."

NOTE: Keep this in mind for your many cases where the PSR recommends sentencing increases based on allegations that are neither procedurally nor substantively reliable.

US v. Reyes, No. 20-50016 (11-26-21) (Collins w/Hurwitz; Higginson concurring). The 9th vacated and remanded for resentencing regarding supervised release conditions. At sentencing for importation of drugs, the court imposed, without notice, a special TSR condition for suspicionless

police searches. Defense counsel attempted to object, but the court cut them off. This was enough to preserve the record. Advance notice of TSR conditions **must** be given.

US v. Turchin, No. 10464 (1-3-22) (Collins w/Wardlaw; Fernandez concurring and dissenting). The 9th reverses and vacates convictions for fraud under 18 USC § 1028(a)(1) and conspiracy under § 371 concerning production of identification documents. The government failed to establish the requisite jurisdictional nexus to commerce when making fraudulent state drivers' licenses. The jury instruction was in error because it refers to "United States" as the national government and not to the individual States.

Sanders v. Davis, No. 17-16511 (1-13-22) (Paez w/McKeown; dissent by Miller). The 9th finds ineffective assistance of counsel in a capital sentencing phase and remands. This is even though Sanders instructed trial/sentencing counsel not to mount an argument for life without parole at his penalty phase. The majority concluded that counsel's minimal mitigation investigation caused counsel to fail to adequately inform Sanders of his possibilities at sentencing, so counsel's advice Sanders was deficient. The majority also found prejudice from this failure as Sanders, with full knowledge, likely would have allowed presenting mitigation and there was a reasonable likelihood one juror might have changed their mind and not imposed death.

Congratulations to CJA panel attorney Nina Rivkind and her co-counsel, CHU AFD Sam Sweeney.

US v. Lonich, No. 18-10298 (1-10-22) (Bress w/Hurwitz & Corker). In a complex fraud appeal, the 9th vacated and

remanded this fraud case sentence because the record did not support a guideline adjustment for the failed financial institution involved in the loans.

US v. Ponce, No. 21-30009 (2-11-22) (Christen w/McKeown & Bade). The 9th vacates denying a petition for early termination of supervised release. The district court erred by using the incorrect standard of “exceptional or extraordinary circumstances.” The correct standard allows far greater discretion to grant terminating supervision when an offender is doing well, employing phrases like “conduct of the defendant” and “in the interests of justice.”

US v. Saini, No. 19-50196 (1-24-22) (Bennett w/Bybee & Bataillon). An “intent to defraud” under 18 USC § 1029(a)(3) and (4) requires “an intent to defraud and cheat.” This means the government must prove the defendant had the intent to deprive a victim of money or property by deception. This reading is supported textually and is unambiguous.