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Federal Defender Newsletter

January 2019

CJA PANEL TRAINING

Sacramento: January 16th at 5:00 p.m. in the jury room of the Sacramento courthouse: Professor Irene Jo on "Representing the Difficult or Mentally Ill Client." Ethics CLE credits likely.

Fresno: Fresno panel training for January has been cancelled in light of the government shutdown.

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
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CJA Representatives

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

CJA Online & On Call

Check out www.fd.org for unlimited information to help your federal practice. You can also sign up on the website to receive emails when fd.org is updated. CJA lawyers can log in, and any private defense lawyer can apply for a login from the site itself. Register for trainings at this website as well.

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

IMMIGRATION LEGAL SUPPORT

The Defender Services Office (DSO) collaborated with Heartland Alliance's National Immigrant Justice Center (NIJC) to provide training and resources to CJA practitioners (FPD and Panel lawyers) on immigration-related issues. Call NIJC's Defenders Initiative at (312) 660-1610 or e-mail defenders@heartlandalliance.org with questions on potential immigration issues affecting their clients. An NIJC attorney will respond within 24 business hours. Downloadable practice advisories and training materials are also available on NIJC's website: www.immigrantjustice.org.

CHANGE TO FEDERAL DEFINITION OF "MARIJUANA"

Sec. 12619 of the "Agricultural Improvement Act of 2018" changed the federal definition of Marijuana in 21 U.S.C. § 802(16) to explicitly exclude hemp. It also modified the definition of tetrahydrocannabinols (THC) in 21 U.S.C. § 812(c) to exclude THC from hemp. The bill was passed on Dec. 12 and signed by the president on Dec. 20.

Therefore, to the extent that a state statute uses the older federal definition of marijuana, those statutes are now overbroad because they do not exclude hemp. Further, if you have a client charged with possession of marijuana, or a supervision violation this may affect those proceedings.

It appears that 21 U.S.C. § 802(16), which defines marijuana federally, should now read as follows (new language in red):

(A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term 'marihuana' does not include—

(i) hemp, as defined in section 297A of the Agricultural Marketing Act of 1946; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such

mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

For reference, Section 297A of the Agricultural Marketing Act of 1946, states: "The term 'hemp' means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta 9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."

Thanks to ACLU attorney Sean Riordan and National Lawyers Guild attorney Khaled Alrabe for bringing this to our attention.

INTERESTING PODCASTS

- *The 3rd 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, to
- 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 log-in credentials, simply click the link above and enter your username and password. If you have questions about access to www.fd.org,

please email

fdorg_help@ao.uscourts.gov.

- *The GEN WHY Lawyer: Discovering the Y of Law*: interviews with lawyers on how to build a meaningful life and fulfilling legal career.
- *First Mondays*: about the Supreme Court, co-hosted by former Court law clerks.
- *The Moth*: storytelling at its best.
- *Ear Hustle*: podcast from inside San Quentin Prison. Governor Brown recently commuted one of the inmate co-hosts Earlonne Woods' sentence. <https://www.atthelectern.com/mass-commutation-of-death-sentences-unlikely-but-governor-brown-is-likely-to-continue-giving-some-lwop-murderers-a-shot-at-parole/> He was released at Thanksgiving and plans to continue with Ear Hustle.
- *Conversations with People Who Hate Me*: Host Dylan Marron deliberately interviews people who he disagrees with and who disagree with him and who he is.
- *Criminal*: no description really needed, is there?
- *Code Switch*: Helping with the delicate, minefield of today's race and identity issues.

FIRST STEP ACT

December 2018 saw Congress pass the First Step Act. While we're still absorbing the Act to discern which clients can receive which benefits, here are some highlights:

- Revisiting possible reduced sentences for crack cocaine convictions, even after Crack 1 and 2. The Sentencing Commission identified 12 California Eastern District defendants eligible for possible immediate release, but there may exist many more. For questions in this, please contact AFD David Porter, 916.498.5700,

David_porter@fd.org.

- Requiring Bureau of Prisons (BOP) to notify an inmate's family and most recent lawyer of an inmate's diagnosis with a terminal illness. If BOP fails to apply to the sentencing court for the inmate's compassionate release, the court can appoint counsel to assist the inmate with a motion. For questions, contact AFD Ann McClintock, 916.487.5700, ann_mcclintock@fd.org.
- Changing the days of good time credits earned from "beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term," to "of up to 54 days for each year of the prisoner's sentence imposed by the court,"
- Inspiring, in return for additional good times credits (but only if the inmate does not have certain convictions [and they are numerous]), participation in various BOP programs.

In January, the California Eastern District Court entered General Order 595 allowing for appointed counsel to review and apply for relief under the First Step Act for indigent inmates.

NINTH CIRCUIT

US v. Sineneng, No. 15-10614 (12-4-18)(Tashima w/Berzon & Hurwitz). The 9th holds that the offense of encouraging and inducing an alien to remain in the US is unconstitutionally overbroad as it violates the First Amendment. The two counts under 8 USC 1324(a)(1)(A)(iv) and 1324(a)(1)(B)(i) cover a substantial amount of protected of First Amendment speech and activity. As the Court held, "At the

very least, it is clear that the statute potentially criminalizes the simple words – spoken to a son, a wife, a parent, a friend, a neighbor, a coworker, a student, a client – ‘I encourage you to stay here.’ The statute thus criminalizes a substantial amount of constitutionally-protected expression. The burden on First Amendment rights is intolerable when compared to the statute’s legitimate sweep.”

US v. Landeros, No. 17-10217 (1-11-19)(Berzon w/Rawlinson & Watford). The 9th reverses denial of a suppression motion. The 9th holds that police cannot extend a lawfully-initiated car stop because a passenger refuses to identify himself, absent a reasonable suspicion that the person has committed a criminal offense. A traffic stop can only be extended to conduct an investigation into matters other than the original traffic violation if the officers have reasonable suspicion of an independent offense. The stop here was for a traffic citation. It ended. The items found in the search of the car must be suppressed.

US v. Hall, No. 17-10422 (1-11-19)(per curiam w/Gould, Berzon, & Block). The defendant and his son were both convicted of fraudulent criminal conduct. A special condition of SR was that the defendant (father) was only “permitted to have contact with [his son] only for normal familial relations but is prohibited from any contact, discussion, or communication concerning financial or investment matters except matters limited to defendant’s own support.” Defendant objected. The 9th sustained the objection, and reversed this condition. The 9th finds limiting contact to “normal familial relations” is unconstitutionally vague; “what is a normal family?” asks the 9th. The concern with engaging in further fraud or illegal activities

is covered with the condition forbidding illegal activities and other conditions regarding financial dealings.

US v. Valencia-Mendoza, WL 149827 (9th Cir. Jan. 10, 2019), the Ninth Circuit held that to determine whether an offense is “punishable by a term of imprisonment exceeding one year” under 2L1.2, the court must consider the “actual maximum term” that *this* defendant could have received under Washington state’s binding guidelines rather than the statutory maximum a hypothetical defendant could have received.

UNITED STATES SUPREME COURT

United States v. Stitt, ___ U.S. ___ (17-765, 12/10/18). *Stitt* addresses 18 U.S.C. § 924(e)(2)(B), the “Armed Career Criminal Act’ (ACCA), a federal three strikes sentencing enhancement linked to felon in possession of a firearm, 18 U.S.C. § 922(g).

Here, the Court looks at “burglary,” listed in 18 U.S.C. § 922(e)(2)(B)(ii) among the predicate offenses triggering ACCA. First addressed in *Taylor v. United States*, 495 U.S. 575 (1990), the Court created the “elements test” to determine if a prior Missouri burglary conviction would trigger a fifteen year minimum prison sentence under ACCA. The Court noted the modern ‘burglary’ definition under most state statutes is broader than the common law definition, which was (1) breaking and entering (2) a dwelling (3) at night (4) with the intent to commit a (5) felony. *Id.*, at 593. The Court expanded from the common law to today’s “generic burglary,” with elements of (1) an unlawful or (2) unprivileged entry (3) into, or (4) remaining in, a (5) building or (6) other structure with (7) the intent to commit a crime. *Id.*, at 598. “Generic burglary” became the standard the Court used in *Taylor* and later cases to

determine if a specific prior state conviction was a “burglary” under ACCA.

Stitt looked at Tennessee and Arkansas burglaries. Tennessee’s “aggravated burglary” is “burglary of a habitation” that could include (1) any structure, including . . . mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons, and (2) any “self-propelled vehicle that is designed or adapted for the overnight accommodation of person and is actually occupied at the time of the initial entry by the defendant.” Arkansas’ burglary of a “residential occupiable structure” includes “a vehicle, building, or other structure (A) where any person lives, or (B) which is customarily used for overnight accommodation of persons whether or not the person is actually present.”

A unanimous court through Justice Breyer finds the Tennessee statute falls within *Taylor’s* generic version of burglary for burglary’s element under the Model Penal Code and in several state statutes say burglary is meant to protect buildings or structures, including vehicles intended for lodging. Looking to the Congressional intent of ACCA, the Court says burglary was viewed as an inherently dangerous crime because it “creates the possibility of a violent confrontation between the offender and the occupant, caretaker, or some other person who comes to investigate.” It can occur within a tent, vehicle, mobile home, or camper customarily used for lodging where the confrontation risk is greater.

In *Stitt’s* companion case, *Sims*, he Court finds Arkansas’ statute could be construed to cover vehicles not intended for habitation, such as a car inhabited by a homeless person.

CERT. GRANTED

Cert. was granted in:

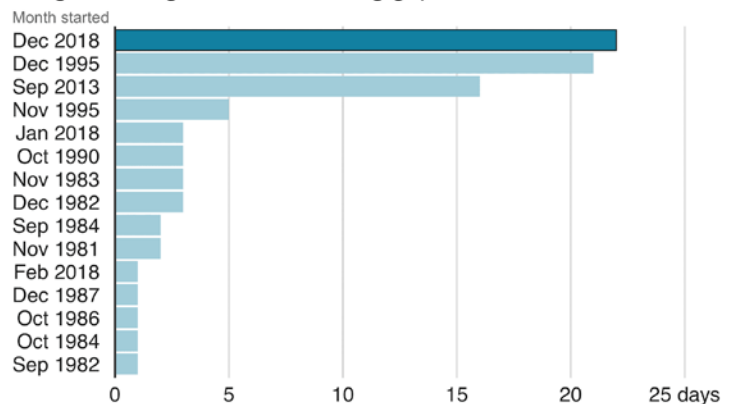
US v. Rehaif (17-9560). The Court will decide whether the “knowingly” provision of 18 USC 924(a)(2) applies to both the possession and status elements of an offense under 922(g), or whether it applies only to the possession element. The petitioner is a citizen of the UAE who overstayed his student visa. He was convicted under 922(g)(5) for unlawful possession of a firearm and ammunition by an undocumented immigrant. At trial, the court instructed the jury that the government is not required to prove that the defendant knew that he was “illegally or unlawfully in the United States” at the time he possessed the firearm and ammunition.

US v. Davis (18-431). The Court will review the 5th Circuit’s decision that 18 USC § 924(c)’s residual clause is unconstitutionally vague.

www.ca5.uscourts.gov/opinions/pub/16/16-10330-CR0.pdf

The current shutdown is the longest ever

Length of US government funding gaps since 1980



Source: Congressional Research Service



CJA Panel lawyer Toni White invites all to attend this.

I am not writing about one of my panel clients but wanted to touch base on something else.

I have a nonprofit that rehabilitates ex-offenders called Ascend. We provide services to clients of Sacramento county probation and the California workforce association. We are an outcome-measured CBT, psychology and law education program.

We have a small grant from California Workforce that has room for a handful of ex-offenders that are in a good place to get some services and be part of an employer networking event we are doing. I am wondering if you have anyone on your caseload or know anyone that has a client that you think would benefit from this? It is a really cool opportunity.

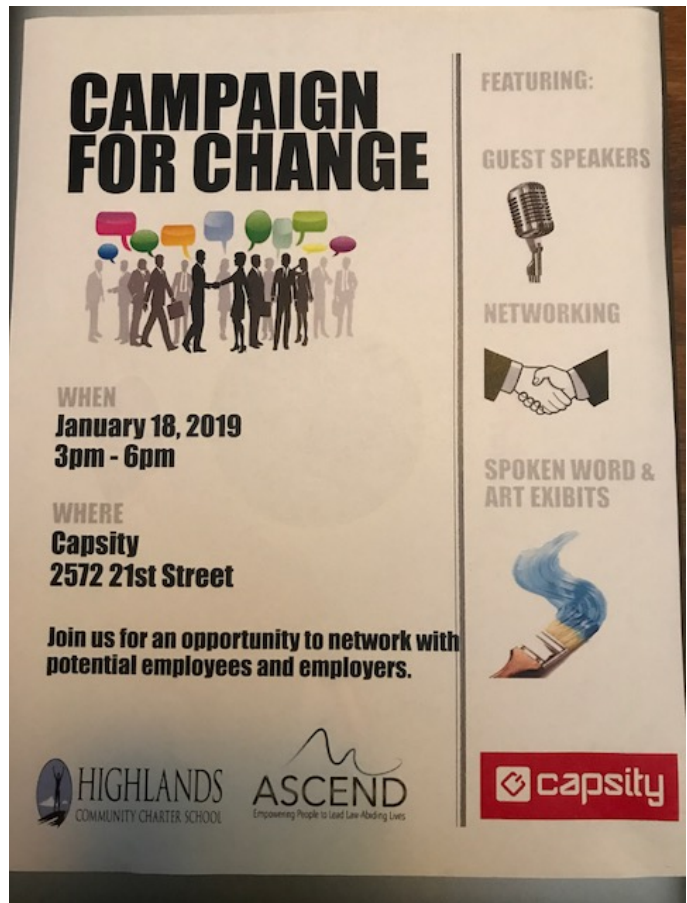
We have our first event this Friday which is set up to allow ex-offenders to network with employers. Friday's event is designed to educate employers about the benefits of hiring people with prior convictions and about the reality of what leads to people getting caught up in the system.

We have a prior Ascend student presenting. He used to be one of the biggest drug dealers in Sacramento. After getting enrolled in our program, we helped him get into college where he began getting straight As.

Years later he now owns a skate shop business with two locations that has about \$500,000 in income. He is now obviously a felon friendly employer and an example of what happens when the power of effective rehabilitation meets the resilience of the human spirit. :-)

Last I heard, I think our event planning staff had arranged for food in addition to the art exhibits and presentations.

Take care,
Toni White



Jack C. Roberson, Deputy Chief U.S. Probation Office, CAE, invites our legal community to the **OPEN HOUSE** of Sacramento's new Day Reporting Center, which our clients may be using for support while on probation or supervised release.



Open House

You are cordially invited to attend our initial Open House at the Sacramento Day Reporting Center

Thursday, January 17, 2019
4:00PM - 6:00PM

7000 Franklin Blvd Suite 1230
Sacramento, CA 95823

Please join us at our new Day Reporting Center, meet program participants, staff and learn more about the evidence-based services and technology provided at the center.

Refreshments and tours of the facility will be provided

Please RSVP by **January 9th** to:
Shaney Gray
shgray@geogroup.com



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