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# Federal Defender Newsletter

## May 2019

### CJA PANEL TRAINING

Fresno: May 21, 5:30-6:30 pm  
Tim Watkins, Administrative Office of the  
U.S. Courts, will speak on "Strategies for  
Managing ESI Discovery"  
Jury room, Fresno federal courthouse

Sacramento: May 22, at 5:00 p.m.  
Tim Watkins, Administrative Office of the  
U.S. Courts, will speak on "Strategies for  
Managing ESI Discovery" in the jury room  
of the Sacramento federal courthouse

David Torres shares: Tim is an excellent  
trial lawyer from Boston and served as co-  
counsel with Federal Public Defender  
Miriam Conrad and Death Penalty Learned  
Counsel Judy Clarke in defending  
Dzhokhar Tsarnaev, the alleged Boston  
Marathon Bomber.

### 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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### 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.

*Little Red Rules Book*® 2019 Edition is  
now available for purchase at the same price  
as last year:

#### *Credit Card Online Ordering:*

Here is the link for online ordering:

<https://fdewi.directfrompublisher.com/>

### 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).

## IMMIGRATION LEGAL SUPPORT

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

## INTERESTING PODCASTS

- *The 3<sup>rd</sup> Chair's D.E.S.K., Dialogue, Education, Strategy, and Knowledge:* Defender Services Office Training Division (DSOTD) podcast designed to provide valuable information and inspiration for federal criminal defense practitioners. Topics will include substantive federal criminal law subjects, from sentencing to mental health, to trial skills. Sign into [fd.org](http://fd.org). <https://www.fd.org/training-division-podcasts>

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

- *The GEN WHY Lawyer: Discovering the Y of Law:* 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.
- *Conversations with People Who Hate Me:* Host Dylan Marron deliberately interviews people with whom he disagrees 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.

## SUPREME COURT

### Preserving Knowledge of Status in 18 U.S.C. § 922(g)(1)-(9) cases

AFPD Rosemary Cakmis argued ***Rehaif v. U.S.***, No. 17-9560, in the Supreme Court, on April 23, 2019 (cert granted January 11, 2019).

The issue is whether “knowingly violates” in 18 USC 924(a)(2) applies to the prohibited status element in 922(g)(1)-(9). In this case, Rehaif, a UAE citizen who overstayed his student visa, was convicted under § 922(g)(5)(A) for unlawful possession of a firearm and ammunition by an “alien” who is “illegally or unlawfully in the United States.” The district court instructed the jury that the government was not required to prove Rehaif knew he was “illegally or unlawfully in the United States.”

See Transcript:

[https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/17-9560\\_1bn2.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-9560_1bn2.pdf).

**Be sure to raise and preserve this in**

**any § 922(g) case where you could contest knowledge of status.** Examples discussed at oral argument:

- § 922(g)(5)(A): defendant on a student visa may not know he was dismissed from school or that his school was decertified;
- a dreamer brought here as a child may never have been told he was not a citizen;
- under § 922(g)(1), a plea or sentencing transcript or judgment may
  - not show the court advised the defendant that he was convicted of a crime punishable by more than one year, or
  - as in *Games-Perez*, show the judge told the defendant the offense was **not** a felony;
- a person alleged to have a controlled substance addiction under § 922(g)(3) may not truly know he is addicted (whatever the definition of addicted);
- a defendant prosecuted under § 922(g)(8) may not know all the details of the restraining order stated in the statute.

Ms. Cakmis argued, without any pushback, that the error cannot be harmless because the judge excluded evidence the defendant did not know he was here unlawfully. Note that harmless error review applies to a court's failure to instruct on an element **only when** the defendant was permitted to introduce argument and evidence bearing on the element but failed to contest it. *Neder v. U.S.*, 527 U.S. 1, 15, 17 & n.2, 19 (1999).

According to Justice Kavanaugh's statement of the law (p.45 - to which the government agreed), every (non-jurisdictional) element requires a culpable state of mind unless Congress says otherwise:

JUSTICE KAVANAUGH: That's the whole point, right? Congress is all over the place in terms of mens rea. . . . Old statutes, new statutes. And that's why this Court, for a long time, has started with a presumption of mens rea for every element of the offense. Congress could override that, but the presumption exists for all the elements. Whether Congress put in a -- a mens rea for one element and there are three others, or whether Congress put in no mens rea at all, we apply the mens rea. Is that a correct statement of the law?

MR. KEDEM: That is.

Briefs. [https://www.supremecourt.gov/DocketPDF/17/17-9560/89331/20190222155834806\\_17-9560ts.pdf](https://www.supremecourt.gov/DocketPDF/17/17-9560/89331/20190222155834806_17-9560ts.pdf) and [https://www.supremecourt.gov/DocketPDF/17/17-9560/96293/20190412135543165\\_17-9560rb.pdf](https://www.supremecourt.gov/DocketPDF/17/17-9560/96293/20190412135543165_17-9560rb.pdf).

## NINTH CIRCUIT

US v. Monique Lozoya, No. 17-50336 (4-11-19)(M. Smith w/Settle; partial concurrence and dissent by Owens). The case concerns the proper venue for a simple assault (class B) that occurred on a flight from Minneapolis to Los Angeles. Somewhere over the Great Plains, the defendant, in a middle seat, grew annoyed with the jostling from the seat behind her. She confronted the passenger when he left the seat and there may or may not have been intentional physical contact. About a month after the incident, the defendant faced a violation notice for a class B misdemeanor. She subsequently was charged with an Information. At a bench trial, with various witnesses, the court convicted the

defendant of simple assault under 113(a)(4). A Rule 29 acquittal based on venue was denied. On appeal, the Ninth Circuit found that venue was violated and deemed venue improper in California Central. The proper venue was where the charged offense occurred: somewhere before the flight entered California Central District airspace. US v. Rodriguez-Moreno, 526 U.S. 275 (1999) clearly states that to ascertain venue, a court must look at the charged conduct and the location it took place. The interstate commerce requirement for the assault, moreover, does not transfer to venue. The Ninth Circuit recognizes issues with exact location but states that modern technology and witnesses can prove venue. It also says that Congress could fix the statute easily by making venue proper where the flight landed.

ex post facto violation, even under plain error review.

US v. Rodriguez, No. 17-10233 (4-24-19)(Berzon w/Friedland; dissent by Cardone). The Ninth Circuit addresses “whether uncontested drug quantities in a court-adopted [PSR] constitute specific drug quantity findings that bind district courts in subsequent ... sentence reduction proceedings.” It holds that “without an explicit and specific drug quantity finding by the original sentencing judge, drug quantities in an adopted PSR are not binding in 3582(c)(2) proceedings.”

US v. Wijegoonaratna, No. 17-50255 (4-26-19)(Gould w/Nguyen & Owens). The Ninth Circuit vacated the fraud sentence in part because of an ex post facto error. The prosecutor charged seven separate counts of healthcare fraud. Each count is treated separately. The prosecutor could have charged it as a continuing offense; they did not. As such, most counts were under the 2010 guidelines and one count under the 2016. The court used the 2016 guidelines for all the counts, which was an