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# Federal Defender Newsletter
## September 2021

### 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:

September 29: The Force Clause Post-Borden Part 2: Application of Borden to Cases on Collateral Review

October 18 – 26: The Andrea Taylor Sentencing Advocacy Workshop (Virtual)

October 25 - November 2: Trial Skills Workshop / Crimes Decoded: Emerging Digital Litigation Technology Strategies (Virtual)

You can access all fd.org training with your CJA username and password. 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.

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.

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 SUPERIOR COURT JUDGE BENJAMIN GALLOWAY AND NEW CHIEF ASSISTANT FEDERAL DEFENDER JEROME PRICE!

Ben Galloway became a Sacramento County Superior Court Judge in August, and we thank him for his years of work for his clients, our Office, and justice. We wish him the best in his new career!

Congratulations also to Jerome Price, our new Office Chief AFD.

### PLEASE WELCOME AFD MEGHAN MCLOUGLIN TO SACRAMENTO

Megan has been a Fresno AFD for a 1½ years, coming to us from 3 years with the Federal Public Defender – New Mexico (Las Cruces). She moves to Sacramento to join our Felony Trial Team.

### TIM ZINDEL RETIRING 9/30/2021

The Federal Defender Office is sad to announce Tim Zindel's retirement after 28 years with our Office, but happy we'll still see him around a CJA counsel. Coming to the FD-CAE from being a judicial law clerk, Tim knows everyone. He is at once the person for friendly banter with interesting conversation and a vocal thorn in one's side when he sees injustice being done. Tim has been a stellar example of what 6th Amendment representation can be. He has inspired the best in us all.

Good luck, Tim!!!

## FD-CAE AFD & ACSA POSITION OPENINGS

The FD-CAE presently is advertising at www.cae-fpd.org for applications for a:

- Fresno permanent AFD
- Fresno temporary AFD (Yosemite), and
- Assistant Computer Support Administrator.

Please forward this information to anyone you feel might be interested!

## JUSTICE DEPARTMENT BANS CHOKEHOLDS AND LIMITS NO-KNOCK WARRANTS

In this September 16, 2021 guidance, the DOJ bans chokehold use by federal agents and limits federal use of no-knock warrants. Both practices resulted in high-profile deaths in recent years. This guidance also affects local and state officers serving on federal task forces and follows a June DOJ directive to the FBI, DEA, ATF, and Marshals to develop body-camera policies requiring agents record their actions while serving warrants.

## 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 December 2021. The Court will continue to extend non-jurisdictional filing dates as needed but will now require a motion and a showing of cause pursuant to Circuit Rule 31-2.2. They encourage parties to use Form 14 in lieu of a written motion or may request a Streamlined Extension (if eligible).

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

If a party seeks an emergency stay or relief requiring immediate attention, it should file the request per the instructions set out in the Rules, by contacting the Court at emergency@ca9.uscourts.gov or (415) 355-8020.

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.

## SEEKING NINTH CIRCUIT LAWYER REPRESENTATIVES FOR THE EASTERN DISTRICT OF CALIFORNIA

Chief Judge Mueller has requested that the Federal Bar Association, Sacramento Chapter assist in the identification of six individuals to be considered for the position of Ninth Circuit Lawyer Representative for the Eastern District of California. Once the FBA has made its recommendations, the judges of the Eastern District will vote to select two representatives.

Serving as a Ninth Circuit Lawyer Representative is a distinct honor. Lawyers serve for a three-year term. For more information, visit the following link:

https://www.ca9.uscourts.gov/lawyer-representatives/

To apply, please submit your cover letter (addressed to Chief Judge Mueller) and résumé to FBA President Stephen M. Duvernay, stephen.duvernay@gmail.com, no later than 5:00 p.m. Monday, October 4, 2021.

## 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..

## 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
or 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.

## 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.

## SUPREME COURT

Caniglia v. Strom (Thomas, J.)(May 17, 2021). The Supreme Court unanimously held there is no "community caretaker" exception to the Fourth Amendment's warrant rule. This rule was enthusiastically adopted by many lower courts, but never by the Supreme Court. It certainly does not apply to searches within the home. The Supreme Court affirms that the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In this case, the police were called by the petitioner's wife to do a welfare check. Petitioner met them on the porch and denied he was suicidal. He agreed to go to the hospital in an ambulance after they disbelieved him. They then entered his home and seized his firearms.

Although law enforcement can enter private property for the limited purpose of "render[ing] emergency assistance to an injured occupant" or "protect[ing] an occupant from imminent injury," they cannot enter or rummage through a home just when they have an ostensibly non-law-enforcement purpose. *Caniglia* abrogates cases in many circuits and state courts.

Van Buren v. United States (Barrett, J., for 6:3 court)(June 3, 2021). The Supreme Court interpreted the Computer Fraud and Abuse Act (18 USC § 1030(a)(2)) which makes it illegal "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled to so obtain or alter." Here, the defendant had access, by virtue of his law enforcement position, to a database, but used it for unauthorized private purposes. The Court held the statute applies only to those who *lack* access to the information they obtain--hackers--not to those who misuse the access they legitimately have.

Borden v. United States (Kagan, J., for 5:4 court)(June 10, 2021). The Supreme Court again considered "violent felony" under ACCA, holding a crime with the recklessness *mens rea* does not have as an element "use of force *against* a person or property," and. Thus, does not satisfy the elements clause. The Ninth Circuit already held so, prior to *Borden*. See above for an upcoming FD Training Division training on *Borden*.

## NINTH CIRCUIT

US v. Ghanem, No. 19-50278 (4-12-21)(Boggs w/M. Smith & Murguia). This appeal considers where venue lies for a person extradited into the United States

from a foreign country. DHS arrest. Ghanem in Greece pursuant to a sting operation. All the acts took place overseas. While indicted in the Central District of California, Ghanem landed in the Eastern District of New York (EDNY). The Government superseded his California indictment with a new count carrying a mandatory minimum 25-year sentence. Ghanem pled guilty to all charges but this new one and went to trial. Under 18 USC § 3238, since the new charge was connected to his foreign arrest, venue should have been in the district where he was first brought: the EDNY. Ghanem failed to object to venue pretrial, saving that for a motion for acquittal after the close of the Government's case. However, he did object to an instruction, sought by the Government, that told the jury his arrest in a foreign country was "irrelevant" to determining whether venue was correct at trial. This misstated the law, the objection was preserved, and it was not harmless. Conviction and 25-year sentence reversed.

US v. Koziol, No. 19-50018 (4-13-21)(Bade w/Bea & Drain). The Ninth Circuit remands for resentencing this Hobbs Act conviction for extortion. The district court erred when it failed to use USSG § 2X1.1 which applies to "attempts" when all the steps were not completed.

US v. Do, No. 19-30138 (4-19-21)(McKeown w/Watford & Rothstein). In a road rage case on the Warm Springs Reservation in Oregon, the Government should have used the federal assault statute, rather than state law and the the Assimilative Crimes Act (ACA), 18 USC § 13(a). The ACA fills in gaps in federal criminal law in federal enclaves. There is a two-part test: Does a federal statute apply? And, if so, does the federal statute preclude state law application? Here, the federal assault statute applies to the conduct and precludes assimilation of state law. This is because (a) the federal and state statutes seek to punish approximately the same behavior; (b) the federal statute reveals an intent to occupy the field of assault; and (c) assimilating the state statute would effectively rewrite an offense defined by Congress. Conviction reversed.

Bolin v. Baker, No. 15-99004 (4-26-21)(Fletcher w/Paez & M. Smith). Ineffective assistant of counsel by petitioner's Nevada state post-conviction counsel is "good cause" for a stay and abeyance to exhaust state claims.

US v. Door, No. 19-30213 (4-28-21)(Bybee w/Collins & Soto). "*Rehaif* requires the government to prove that a defendant charged with violating [possession of body armor] knew he had a felony conviction and that the felony of which he was convicted had 'as an element the use, attempted use, or threatened use of physical force against the person or property of another. Rule 16(a)"

US v. Brown, No. 19-50250 (5-12-21)(Collins w/Baldock & Berzon). The Ninth Circuit reverses and remands the denial of a suppression motion under *Terry*. The officer contacted Brown and others in a motel parking lot, suspecting nefarious activities. The questioning was consensual. Brown was seized when the officer told him to stand up and turn around. However, the officer violated *Terry* by reaching into Brown's pocket and pulling out a package of heroin. There was no pat down or frisk for weapons. The officer just searched a pocket, which exceeded the limited scope of a *Terry* stop.

US v. Harris, 19-30202 (6-9-21)(McKeown & Paez; Graber dissenting). The Ninth Circuit vacated and remanded a sentence

for sexual exploitation. The court held that "making a list" and being in proximity of the child did not support enhancements for the defendant being a "leader" or being a "guardian." Harris, who suffered from an intellectual disability and a personality disorder, was the boyfriend of the abused child's mother, a co-defendant. The co-defendant mother admitted the abuse, but there was no evidence Harris led her into it. Harris's list of people he would like to have sexual intercourse with, which included the child, was not a directive to the mother and did not support the adjustment. Harris never took care of the child; nor was he left alone with the child. Under these facts, the adjustments for being a "leader" under USSG § 3B1.1(c) and a "guardian" under § 2G2.1(b)(5) were clear error.

US v. Charley, No. 19-10133 (6-11-21)(Bea w/Cardone; Bumatay concurring). The Ninth Circuit vacated convictions for assault. Ms. Charley was accused of striking her boyfriend with a rebar and argued self-defense. In support, she called witnesses about his prior recent assaults. The prosecutor, in rebuttal, brought up specific violence roughly two years old with other family members. On appeal, the Ninth Circuit held such rebuttal evidence to be inadmissible under FRE 404(a)(character) and 404(b)(other acts). The specific instances were really for propensity and there was no tie for 404(b). The precedent, notably *US v Bettancourt*, 614 F.2d 214 (9th Cir. 1980), states prior assaults are rarely permissible under 404(b). Such acts are more often spontaneous and quick rather than deliberative and carefully thought out.

US v. Velazquez, No. 19-50099 (6-23-21)(Paez w/Melgren; Bade dissenting). The Ninth Circuit vacates a conviction and remands for prosecutorial misconduct in closing argument. This was a drug importation case with a "blind mule" defense. "During closing argument, the government compared the reasonable doubt standard to the confidence one needs to 'hav[e] a meal' or 'travel to . . . court'—without worrying about the 'possib[ility]' that one will get sick or end up in an accident. Velazquez claims that this improper argument, and the district court's failure to cure it, caused him prejudice. We agree."

Jones v. Ryan, No. 18-99005 (6-28-21)(Thomas w/Hawkins & Christen). The Ninth Circuit granted capital habeas relief based on ineffective assistance of counsel by both state post-conviction counsel and state trial counsel. Post-conviction counsel committed IAC when they failed to seek a neuropsychological expert. Trial counsel was IAC for failure to request and develop mental health experts at the sentencing phase. The failure of both attorneys met the *Strickland* standard and was prejudicial.

US v. Lopez, No. 19-10017 (7-6-21)(Bea w/Wallace; partial dissent by Bennett). In this appeal from a conviction for attempts to commit child sex offenses, the panel held the District Court erred by admitting the Government's edited video clips of Mr. Lopez's post-arrest interrogation, while excluding the rest of the video as inadmissible hearsay. This violated the rule of completeness (FRE 106) and ran the risk that the Government's selective editing would mislead the jury.

US v. Williams, No. 20-30201 (7-16-21)(Miller w/Gould & Clifton). The Ninth Circuit considered a sentence for violating supervised release (SR). A guideline sentence for violating SR by committing a new offense is greater if the new crime is punishable by imprisonment exceeding

one year (a Grade B violation). However, if state mandatory guidelines make the maximum sentence under one year, even if the statutory maximum is greater, the mandatory guideline controls. Even though the sentencing court stated it would impose the same sentence regardless, the Ninth Circuit remanded for resentencing under the correct Grade C guideline range.

US v. Prigan, No. 18-30238 (8-16-21)(Murguia w/Boggs & Berzon). The Ninth Circuit joins six other circuits in holding a Hobbs Act robbery is not a crime of violence under USSG § 4B1.2(a).

US v. Wilson, No. 18-50440 (9-21-21)(Berzon w/Watford & Whaley). An interesting and important case regarding "private searches" and passing the information on to law enforcement. Google detected email attachments matching hash values previously identified as illegal pornography. *Without reviewing the images*, Google passed the information to NCMEC, which sent it to law enforcement. Law enforcement then looked at the images and **then** sought a search warrant based on their viewing. The private search doctrine could not save this search, because the Government went beyond what the private party did and learned new information, making this a warrantless search.

US v. Lizarraras-Chacon, No. 20-30001 (9th Cir. Sept. 23, 2021). On a Second Chance resentencing, the Ninth Circuit holds that post-sentencing changes in the law are highly relevant in the § 3553(a) analysis. This client originally faced a 20-year mandatory minimum because of a prior felony drug offense. He negotiated to get a 17-year low-end GL sentence to avoid the 20-year hit. But under a later case, Valencia-Mendoza, the prior conviction would have been too minor to count as a felony drug offense. And then, of course, the First Step Act changed the mandatory minimum.

The Ninth Circuit held:
Subsequent developments affecting a mandatory minimum are relevant, for example, to the "nature and circumstances of the offense," the "seriousness of the offense," the needs "to provide just punishment for the offense," and "to afford adequate deterrence to criminal conduct." § 3553(a)(l), (2)(A)-(B). The "seriousness of the offense," is broad and logically includes any subsequent reevaluation of sentencing issues reflected in legislation. Subsequent legislation, such as the reduction of the mandatory minimum in the First Step Act, is a legislative reassessment of the relative seriousness of the offense. Legislative changes or guideline changes do not happen in a vacuum. They represent a societal judgment that it is necessary, from time to time, to reconsider and adjust what is an appropriate sentence consistent with the goals of the criminal justice system. Congress's legislative action through the First Step Act, reducing the mandatory minimum and requiring a higher-level predicate offense reflects a decision that prior sentences were greater than necessary. Similarly, a development in the law, such as our holding in Valencia-Mendoza, is also relevant to assessing the "history and characteristics of the defendant." § 3553(a)(l). At the time of sentencing, Defendant's 2010 prior conviction was deemed a "felony drug offense." Now, under our holding in Valencia-Mendoza, the 2010 prior conviction would not qualify as a "felony drug offense."