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Federal Defender Newsletter

August 2013

CJA PANEL TRAINING

Regular panel training is on summer break until September 17th in Fresno (Third Tuesday each month) and September 18th (Third Wednesday each month) in Sacramento. Have a great summer!

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### FEDERAL DEFENDER'S OFFICE 12<sup>th</sup> ANNUAL GOLF TOURNAMENT



Please join us for the **Federal Defender's Office 12<sup>th</sup> Annual Golf Tournament** on August 23<sup>rd</sup> at the Empire Ranch Golf Club, 1620 E. Natoma Street, in Folsom. The goal of the tournament is to sponsor goodwill and positive interaction among various members of the state and federal courts. Registration starts at 12:30 p.m. Fee is \$90 per golfer. All fees go to golf, food, and prizes. Modified shotgun start is at 1:30 p.m. There will be individual scores, a team scramble, and prizes for the longest drive and closest to the pin. Food is a buffet style lunch of tri-tip or chicken. **Please contact Henry Hawkins at (916) 498-5700** to special order salmon or veggie lasagna. Also please provide him your foursome information or your handicap for individual scoring.

### AFD FRANCINE ZEPEDA APPOINTED FRESNO COUNTY SUPERIOR COURT JUDGE

On July 12, 2013, California Governor Jerry Brown appointed Fresno Branch Chief **Francine Zepeda** to the Fresno County Superior Court bench. Francine has been an AFD in the Fresno office since 1991. A graduate of U.C. Hastings



Law School, Francine fought for the indigent as a Fresno County assistant public defender and an attorney at California Rural Legal Assistance. She will begin her new position on August 5, 2013.

We wish her the best and thank her for her decades of hard work for the Federal Defender's Office!

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CLIENT CLOTHES CLOSET

Do you need clothing for a client going to trial or for a client released from the jail? Are you interested in donating clothes to our client clothes closet or money to cover the cost of cleaning client clothing? If so, please contact Katina Whalen at 498-5700.

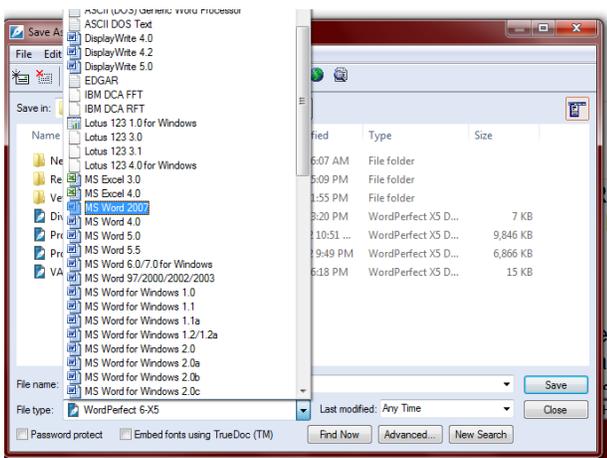
MICROSOFT WORD TRANSITION

The District Court is on schedule to convert fully from WordPerfect to Microsoft Word on **October 2, 2013**.

That means that documents sent directly to judges' chambers for the court to edit before filing must be in Word format. The documents we have identified as falling in that category include proposed orders, juror questionnaires, and jury instructions.

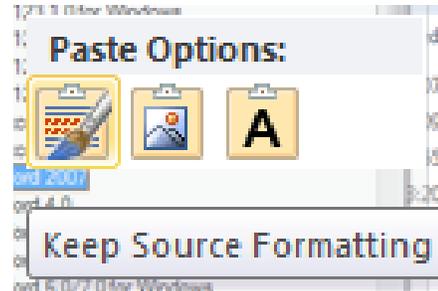
The Federal Defender is working with the court Information Technology staff to create a Word template for proposed orders and will share the final version with defense counsel once it is complete.

If you have not yet installed MS Word, it is possible to save WordPerfect documents as Word documents, but expect glitches, especially with pleading paper documents. To convert from WordPerfect, use *Save As* and click on the arrow for *File Type* (bottom of the file list screen, bottom left hand corner) and scroll up to either MS Word 2007 (WordPerfect X5 or X6) or MS Word 97/2000/2002/2003 (earlier WordPerfect versions).



Cutting and pasting between WordPerfect and Word documents can also work if you

right click where you want to insert text and pick *Keep Source Formatting*.



As for learning Word, the program itself comes with step-by-step instructions under *File>Help* and has a helpful Support forum. <http://support.microsoft.com/ph/939> YouTube has how-to videos. The Sacramento Public Library occasionally offers free classes. <http://www.saclibrary.org/Home/Events/> under Technology Instruction. Legal Office Guru <http://legalofficeguru.com/> has excellent tips geared to the WordPerfect user forced to work in Word.

But nothing beats putting your hands on keyboard and mouse and trying things out.

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**TOPICS FOR FUTURE TRAINING SESSIONS**

Do you know a good speaker for the Federal Defender's panel training program, or would you like the office to address a particular legal topic or practice area? Email your suggestions to Janet Bateman, [janet\\_bateman@fd.org](mailto:janet_bateman@fd.org), Ann McGlenon, [ann\\_mcglenon@fd.org](mailto:ann_mcglenon@fd.org), or Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org), for Fresno or Lexi Negin (Sacramento) at [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org).

## ♪ NOTABLE CASES ♪

US v. Huizar-Velazquez, No. 11-50237 (7-2-13) (Kleinfeld, with McKeown and Quist, D.J.). The Ninth Circuit reverses a sentence and remands for wrong use of a guideline provision. The defendant was convicted of dumping wire hangers on the US market by having them falsely stamped as "Made in Mexico" (NAFTA) rather than declaring them to have been made in China. The court used the bribery guideline -- 2C1.1 -- instead of the smuggling guideline -- 2T3.1. No bribery took place here; just smuggling. The court also vacated the restitution and forfeiture amounts and questioned the district court's assessment of loss, noting, "The court cannot merely defer to the government expert witness's calculation."

US v. Morales, No. 12-10069 (7-2-13) (Ikuta, with McKeown and Callahan). The defendant was convicted of alien smuggling. At trial and on appeal, she challenged the introduction of a field encounter form (a Field 826) concerning the status of aliens found in the truck. She objected on confrontation and hearsay grounds. The Ninth Circuit first holds that the form was non-testimonial under the Confrontation clause, but should not have been admitted under a hearsay exception for business or public records. It was not a business record, but a government record, and it did not qualify as a public record, because it did not describe governmental activities and it contained statements of third parties who are not government employees. The statements might have come in as "statements against interest" by the aliens if they were unavailable, but the district court had held that the government failed to show that they were unavailable.

US v. White Eagle, No. 11-30352 (McKeown with Ripple [7<sup>th</sup> Cir] and Nguyen). A BIA employee on an Indian reservation participated in a fraudulent scheme involving loan applications. The Ninth Circuit affirms her bribery and concealment convictions, as the defendant got a benefit from her actions and tried to cover up the

offenses. However, counts of conspiracy, theft, and public acts affecting a personal fiscal interest all were reversed. These crimes simply did not fit the defendant's actions or the time frame when she acted on improper loans.

US v. Botello-Rosales, No. 12-30074 (7-15-13) (per curiam; Pregerson, Wardlaw, and M. Smith on panel). The Ninth Circuit reversed the denial of a motion to suppress statements made to police based on defects in the Spanish-language *Miranda* warnings. The issue is entirely one of translation of the word "free" -- Spanish has one word for "free" as in free beer and another for "free" as in free speech. The *Miranda* warnings require the first sense, but the officer used the word for the second sense. The word used by the officer - "libre" - made it seem like the right to appointed counsel was contingent on a lawyer's availability or a prior request. This was an "affirmatively misleading advisory" that did not accurately convey the substance of the *Miranda* warnings, see California v. Prysock, 453 U.S. 355 (1981). Prior correct warnings in English could not cure this constitutional infirmity.

US v. Garcia, No. 11-30348 (7-19-13)(W. Fletcher with Fisher and Quist, Sr. D.J.). The Ninth Circuit holds that its model instruction for involuntary manslaughter No. 8.110 is flawed because it permitted the jury to convict the defendant in this case without finding gross negligence, an essential element of the offense. Here, the shooting occurred on an Indian reservation, and the defendant, charged with first degree murder, argued self-defense: that the victim started a fight, and he thought the victim had a weapon, having seen him with one earlier. The jury acquitted on first and second degree murder, and voluntary manslaughter, and convicted on involuntary. Accordingly, the error was not harmless. The Ninth Circuit also held that the court erred in excluding evidence of the defendant's knowledge of the victim's violent past acts, and erred in precluding impeachment of witnesses with Facebook photos showing the victim with a sawed off shotgun.

US v. Flores-Cordero, No. 12-10220 (7-25-13) (Schroeder with Callahan and Vance, Sr. D.J.). The Arizona resisting arrest statute, 13-2508(A)(1), is not a crime of violence under the categorical approach. The Ninth Circuit effectively overrules Estrada-Rodriguez v. Mukasey, 512 F.3d 517 (9<sup>th</sup> Cir. 2007) as subsequent state decisions indicate that even a minor scuffle can fall under that statute, and thus, it is overbroad. Because the statute is not divisible, Deschamps v. US 113 S.Ct 2276 (2013) bars a modified categorical approach.

Aguilar v. Woodford, No. 09-55575 (7-29-13)(Fletcher with Pregerson and Bennett, D.J.). In this murder case the only issue was the identity of the shooter. A dog purportedly identified the petitioner as having sat in a Volkswagen tied to the shooting. Accordingly, the track record of mistakes by that dog had to be disclosed under Brady. It was not even though the state had previously stipulated to the dog's mistakes in a different trial. The error was not harmless: the eyewitness identification was weak and there was evidence pointing to another culprit.

US v. Lira, No. 11-30324 (8-2-13)(Christen, with Tashima and M. Smith). This case demonstrates the impact of Alleyne v. US, 133 S.Ct. 2151 (2013). The Ninth Circuit vacates a 120 month sentence for use of a firearm in a drug trafficking offense because the required facts were determined by the judge by a preponderance of the evidence rather than by a jury beyond a reasonable doubt. Alleyne requires the latter.

US v. Flores, No. 12-30078 (8-2-13)(Alarcon, with Gilman and Ikuta). The Ninth Circuit vacates and remands a lengthy drug sentence because the sentencing court failed to make factual findings on whether an involved codefendant was actually a minor when she became involved in the conspiracy. The defendant received a two-level adjustment upwards because of the involvement of a minor.

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ADDRESS, PHONE OR EMAIL UPDATES

We want to be sure you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the e-version of the newsletter or attachments, please call Kurt Heiser, (916) 498-5700. Or if you receive a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Calvin Peebles at the same number.

ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office will be distributing panel training materials through our website: www.cae-fpd.org. We will try to post training materials **before** the trainings for you to printout and bring to training for note taking. Any lawyer not on the panel, but wishing training materials should contact Lexi Negin, lexi_negin@fd.org.

CJA REPRESENTATIVE

Panel lawyers: Your CJA representative is Carl Faller, (559) 226-1534, carl.faller@fallerdefense.com.

Letter from the Defender



After last month's downer letter, I wish I could be more up-beat, more encouraging.

But I can't.

Since our last newsletter, one Assistant Defender resigned because she couldn't financially afford the furloughs we had and the proposed furloughs starting in October.

Anticipating continued sequestration cuts through the first part of Fiscal 2014 and considering the attorney-to-staff ratio I have to maintain, I have laid off 4 legal support staff, two involuntarily, two who have volunteered. A few who are being laid off have asked we contact the Panel as they are

looking for employment. Their contact information follows my letter.

There is some good news for our Panel: CJA Lawyers, you and your compatriots across the U.S., haven't been filing as many or as much in the way of vouchers by this moment this Fiscal Year, so your payment deferrals will likely be less than the 15 days previously expected.

Because the Defender Office must now do more work with fewer employees, the Panel will now have to do some tasks we did as a favor to the Panel. This means, **starting September 1, 2013, panel lawyers will need to CM/ECF their own expert, investigator, paralegal, and other legal support vouchers.**

We will add to the CJA Panel portion of our website the forms and instructions need for Panel lawyers to do these filings on their own.

~ *Heather E. Williams*
Federal Defender, Eastern District of California

Former Federal Defender-CAE Employees Looking for Employment

Becky Darwazeh, darwazeh1@hotmail.com:
Secretarial, Legal Assistant

Yvonne Jurado, yvonneee@live.com,
(916)230-0483: Paralegal, Secretarial,
Legal Assistant, CJA voucher
preparation and filing

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