



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

LINDA C. ALLISON
Chief Assistant Defender

KELLY S. CULSHAW
CHU Chief

CHARLES J. LEE
Fresno Branch Chief

RACHELLE BARBOUR, Editor

Federal Defender Newsletter

August 2017

Save the Dates for CJA PANEL TRAINING

Sacramento: Wednesday, September 20, Rebecca Grace (Graceful Films) on Sentencing Videos

Fresno: Tuesday, September 19, Kristine Fox from the Ninth Circuit on Current Case Budgeting Procedures

16TH ANNUAL GOLF TOURNAMENT

The annual golf tournament will take place on **October 6, 2017** at **1:00 p.m.** with a modified shotgun start. All skill levels are welcome. Cost for the tournament is \$80.00 per person and includes 18 holes, range balls, cart, dinner, and prizes! Please join us at Woodcreek Golf Course, 5880 Woodcreek Oaks Blvd., in Roseville. Contact Melvin or Henry for more information at (916) 498-5700 melvin_buford@fd.org or henry_hawkins@fd.org.



NEW EASTERN DISTRICT CJA PLAN

The Court has issued General Order No 582 updating the Criminal Justice Act Plan for our district.

<http://www.caed.uscourts.gov/caednew/assets/File/GO%20582.pdf> It incorporates changes Kurt Heiser and Scott Cameron previously discussed at panel trainings. It is otherwise very similar to our previous plan.

The Ninth Circuit directed each district to update its plan, and our district is one of the first to get that accomplished thanks to the work and advocacy of Scott and Kurt.

Welcome to New Fresno AFD Hope Alley!

Please join us in welcoming Hope Alley as the newest AFD in the Fresno Office. Hope joins us in early September after having clerked for the Honorable Sharon Gleason, District Court of Alaska. During her time at UC Davis law, Hope demonstrated a strong commitment to indigent criminal defense, spending one summer at the Colorado Public Defender's Office where she successfully tried a DUI case and the jury acquitted her client on all counts. Many of you know Hope from the time she spent as an intern at our Sacramento office. She also participated in the immigration clinic during her third year at King Hall. The Fresno office is excited to have Hope Alley join us in the near future.

PODCAST TRAINING

The Federal Defender's Office for the Southern District of West Virginia has started a training podcast, "In Plain Cite." The podcast is available at <http://wvs.fd.org>. The podcast may be downloaded using iTunes.

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.

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 Ben Galloway, ben_galloway@fd.org.

CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or snc@snc-attorney.com, is our District CJA Panel Attorneys' Representative handling questions and issues unique to our Panel lawyers. David Torres of Bakersfield, (661) 326-0857 or dtorres@lawtorres.com, is the Backup CJA Representative.

NINTH CIRCUIT OPINONS

Petrocelli v. Baker, No. 14-99006 (7-5-17)(Fletcher w/Friedland; concurrence by Christen). The Ninth Circuit granted capital sentencing relief, finding that the State had committed Estelle error -- the State prosecutor used a psychiatrist as an expert to evaluate the petitioner for competency and the psychiatrist (1) failed to give Miranda warnings; (2) did not notify defense counsel of the interview; and (3) testified at sentencing as to future dangerousness.

Grant v. Swarthout, No. 13-55584 (7-7-17)(Reinhardt w/Tashima & Paez). This is an equitable tolling case. As petitioner's one-year period for filing under AEDPA neared its end, he asked for forms to file his federal petition. The prison delayed, and he filed late. The State then said that he should have been more diligent. The Ninth Circuit said he was diligent, and that the petitioner has the full year in which to file. The petition should be regarded as timely due to equitable tolling.

US v. Smith, No. 16-10160 (8-10-17)(Thomas w/Murguia & McCalla). The Ninth Circuit affirms the district court's order denying intervention by private parties seeking recovery of fraudulent proceeds. Specifically, the Ninth Circuit holds that a criminal forfeiture action does not constitute an "alternate remedy" to a civil qui tam action by a private party (termed a relator) under the False Claims Act, entitling a relator to intervene in the criminal action and recover a share of the proceeds under 31 USC § 3730(c)(5).

US v. Castillo-Mendez, No. 15-50273 (8-21-17)(Paez w/Reinhardt & Tashima). The Ninth Circuit reverses an attempted illegal reentry conviction and remands for a new trial due to an erroneous supplemental jury instruction on the requisite mental state. Specifically, the defendant raised an "official restraint" defense, arguing that he only came across the border because of fear that smugglers, who were watching, would harm him. He intended to turn himself in. The government presented evidence that he was actually hiding. The jury asked what the definition of official restraint was. The court then erroneously defined it. The court should have explained that the government must prove specific intent to enter free from official restraint. If the jury then asks for clarification, the court should explain that official restraint is only relevant as part of the defendant's mens rea. The definition could read: "you must find that the defendant had the specific intent to enter free from official restraint, which means to enter without being detected, apprehended, or prevented from going at large within the United States and mixing with the population." (p. 19)

The below is reprinted here with Carl Reiner's permission. It originally appeared July 9, 2017, in the *New York*

Times – Sunday Edition.
Thank you, Mr. Reiner.

Carl Reiner: Justice Kennedy, Don't Retire

By CARL REINER JULY 7, 2017
BEVERLY HILLS, Calif. —

Dear Justice Anthony Kennedy,

I would like to start with congratulatory wishes on your forthcoming 81st birthday.

As someone who has almost a decade and a half on you, I can tell you this: It may well be that the best part of your career has just begun. As a nonagenarian who has just completed the most prolific, productive five years of my life, I feel it incumbent upon me to urge a hearty octogenarian such as yourself not to put your feet up on the ottoman just yet. You have important and fulfilling work ahead of you.

When I turned 81, I had finished "Ocean's Eleven" and was gearing up for "Ocean's Twelve" while also writing another book, which led me to a cross-country book tour.

I know what it means to be your age. I know the problems that come with the journey. But these are not ordinary times, and you, sir, are anything but an ordinary man.

The country needs justices like you who decide each case with fairness and humanity, and whose allegiance is to the Constitution of the United States of America, not to a party line. You have always voted your conscience, and defended the rights and liberties of all our citizens.

I'm sure you've considered the various options, as we all do when we reach a certain age. After all, although our lives are different, I'm sure there are similarities. I get up in the morning, and if I'm not in the obits, I eat breakfast. You get up, meet with your clerks and engage with them in spirited discussion about the constitutional ramifications of the important cases at hand. I engage in spirited discussion with my publisher about the release order of my next three books.

You have lunch and I have lunch. You return to your chambers and I to my desk. At day's end, you go home to ponder the important decisions you will

be making tomorrow. I go downstairs and join my friend Mel in front of the television, and we ponder out loud how many steps Vanna White will take when walking over to the letter board tonight after leaving Pat Sajak's side. (F.Y.I., it is usually six, sometimes seven, rarely eight, but never nine.)

Imagine if you retired from the bench. What would your days be like? Here's a scenario: You revisit your carefree years, rent a red Volkswagen and travel through Europe, stopping in Paris for coffee and a croissant on the Champs-Élysées, then on to the Amalfi coast, where you'll sail to the waterfalls of Marmorata and the Emerald Grotto.

How would you feel, while reading your newspaper, seeing a headline that read "Roe v. Wade Overturned"? Do you see how this could ruin a good meal? A good life? A great country?

I believe I've made my case. It's now 1 a.m., and I am going upstairs to my computer to tweet out my thought of the day, because I can. I have the freedom to do that because of people like you who are committed to protecting our liberties and our Constitution.

I thank you, as all our fellow citizens will.

Respectfully,

Carl Reiner

Carl Reiner is a director, writer, producer and actor whose most recent credits include the HBO documentary "If You're Not in the Obit, Eat Breakfast" and the book "Too Busy to Die."

LETTER FROM THE DEFENDER

So what is it which makes our guts tighten when we hear a rumor that Justice Kennedy is not interviewing potential law clerks for the Supreme Court term after next. Is it simply that we prefer no change, especially these days when every headline (or tweet) has us shaking our heads in disbelief, wondering "Could it get any worse?" Well, when that change may happen on the Supreme Court – "YES!" we think, it could.

However, as recently as August 15th, to paraphrase Mark Twain, reports of Justice Kennedy's retirement may have been greatly exaggerated. At a Kennedy law clerk reunion in June, the Justice said "there has been a lot of speculation about a certain announcement from me' before declaring with a wink that the bar was staying open late."ⁱ

And Senator Chuck Grassley of the Senate Judiciary Committee told Reuters "(e)videntially (a Supreme Court vacancy is) not going to happen."ⁱⁱ

Maybe, if you are breathing easier, this is a decent time to review Justice Anthony Kennedy's work on the Court and ask (to paraphrase now-Senator Al Franken), "What does this mean to me?"

The media emphasizes how we've had a Kennedy court for a while, with Justice Kennedy, a moderate justice, sometimes siding with the four more liberal-considered justice, sometimes siding with the four most conservative-considered justices. For issues recently decided by 5-to-4 margins with Justice Kennedy in the majority and this coming term's accepted cases, issues as LGBTQ and environmental protections, *Roe v. Wade*, affirmative action, gerrymandering, fair housing, and presidential abuses of power are said to hang in the balance.

Keep in mind - for every *Obergefell*ⁱⁱⁱ and *Windsor*^{iv}, every *Planned Parenthood*^v and *Whole Women's Health*,^{vi} there is a *Citizen's United*^{vii} Justice Kennedy authored or voted in the majority.

The same holds for the cares of criminal defendants and their lawyers: With a *Graham v. Florida*^{viii} and a *Freeman v., US*,^{ix} there is also a Tommy Thompson, the last person executed by California less than 3 months after Justice Kennedy wrote the majority opinion reversing and remanding a Ninth Circuit recall of its own mandate (after denying petition for rehearing and *en banc* review) which halted Tommy's execution. The Supreme Court in Justice Kennedy's authorship required the Ninth to reinstate its reversal of the district court's grant invalidating Tommy's death sentence.^x

Still, Supreme Court justices rarely go beyond the limited issues their *certiorari* accepted cases raise, either in public or within their court opinions. For instance, the first time I heard Justices Scalia and Breyer speak, they had their sound bites consistent with the positions they had taken in cases already decided. And Justice Kennedy, the first time I heard him speak publicly which was at a Ninth Circuit Judicial Conference, discussed the anniversary and history of the Magna Carta, not a matter likely to come before the Court any time soon.

Justice Kennedy, however, in concurring with the majority in *Davis v. Ayala*, felt compelled to write *dicta*, responding to oral argument information "that, since being sentenced to death in 1989, Ayala has

served the great majority of his more than 25 years in custody in 'administrative segregation' or, as it is better known, solitary confinement."^{xi} Justice Kennedy observed the Supreme Court 127 years ago defined "that, even for prisoners sentenced to death, solitary confinement bears 'a further terror and peculiar mark of infamy."^{xii} "Years on end of near-total isolation exact a terrible price," including prisoner side-effects like anxiety, panic, withdrawal, "incapab(ility) of processing external stimuli," obsessive fixation generally on something intensely unpleasant, and "obsessional thinking, agitation, irritability."^{xiii} Once released from solitary

confinement, these inmates manifest "continued intolerance of social interaction."^{xiv} Statements above and beyond, and perhaps opening the door to changing the horrific practice of solitary confinement.

So, Mr. Reiner, thank you for speaking up and encouraging Justice Kennedy to not throw away his youth and stay on with our Supremes. Better, and hopefully increasing better, the devil we know.

~ Heather E. Williams, FD-CAE

ⁱ S.M., *Justice Kennedy will take centre stage during the Supreme Court's upcoming term*, THE ECONOMIST (8/15/2017).

ⁱⁱ Richard Cowen, *Senator Grassley not expecting imminent Supreme Court vacancy*, REUTERS (8/11/2017).

ⁱⁱⁱ *Obergefell v. Hodges*, 576 U.S. ____ (2013)(2015), finding the 14th Amendment requires states license marriages between two people of the same sex and recognize such marriages when licensed and performed out-of-state.

^{iv} *US v. Windsor*, 570 U.S. ____ (2013), finding the Defense of Marriage Act (DOMA) unconstitutional.

^v *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), reaffirming *Roe v. Wade*.

^{vi} *Whole Women's Health v. Hellerstedt*, 579 U.S. ____ (2016), ruling a state cannot place restrictions on delivering abortion services which create an undue burden for women seeking an abortion.

^{vii} *Citizens United v. FEC*, 558 U.S. 310 (2010): organizational campaign spending is protected free speech.

^{viii} 560 U.S. 48 (2010), where Justice Kennedy authored the opinion holding a juvenile could not be sentenced to life without possibility of parole for a non-murder offense.

^{ix} 564 U.S. 522 (2011), where Justice Kennedy wrote for the plurality that defendants with Fed.R.Crim.Proc. 11(c)(1)(C) pleas specifying a particular sentence could be eligible for relief under 18 U.S.C. § 3582(c)(2) when there is a retroactive Guideline amendment passed which would lower the defendant's sentencing range.

^x *Calderon v. Thompson*, 523 U.S. 538 (1998).

^{xi} 576 U.S. ____ (2015).

^{xii} *Id.*, citing *In re Medley*, 134 U.S. 160, 170 (1890).

^{xiii} *Id.*, referring e.g. to Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U.J.L. & Pol'y 325, 331-333 (2006).

^{xiv} Grassian at 333.