



OFFICE OF THE FEDERAL DEFENDER

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Federal Defender Newsletter

January 2016

CJA PANEL TRAINING

The Sacramento CJA panel training will resume on Wednesday, January 20, 2016 at 5:00 p.m. in the jury lounge on the 4th floor of the federal courthouse, 501 I St. Alan Ellis, the author of The Federal Prison Guidebook, will present on "Everything You Ever Wanted to Know About the BOP" in a conversation with David W. Dratman, Esq.

The Fresno CJA panel training will resume on Tuesday, January 12, 2016 from 5:00 to 7:00 P.M. in the jury assembly room at the federal courthouse. Colette Tvedt, the Indigent Defense Training and Reform Director at the National Association of Criminal Defense Lawyers in Washington D.C. will speak on "Motions Practice in Complex Drug Cases" with a special emphasis on topics related to racial profiling and the use of canines. (Please note the date and time change. There will be no February panel training.)

THANK YOU!!



Thanks for making the Annual Holiday Party the best yet!! The food was great, and the company was even better. We appreciated everyone who donated money, goods, and time to make the party such a success!

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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 automatically receive emails when fd.org is updated.

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.

### CJA APPLICATION & REAPPLICATION DEADLINE

Panel Selection Committees will be reviewing CJA Applications and Reapplications in the next few months.

We are striving to increase our Panels' diversity and ask current Panel members to reach out to and encourage dedicated defense counsel in our communities to apply for our Panels.

Applications can be found at [http://www.cae-fpd.org/cja\\_app.html](http://www.cae-fpd.org/cja_app.html).

### ONLINE MATERIALS FOR CJA PANEL TRAINING

The Federal Defender's Office distributes panel training materials through its website: [www.cae-fpd.org](http://www.cae-fpd.org). We will try to post training materials before trainings to print out and bring to training for note taking. Not on the panel, but wishing training materials? Contact Lexi Negin, [lexi.negin@fd.org](mailto:lexi.negin@fd.org)

## 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.fed.org>. The podcast may be downloaded using iTunes.

## DRUGS-2 UPDATE

Starting November 1, 2014, the Sentencing Guidelines permitted courts to start granting sentence modifications based upon the Guidelines' retroactive application of an across-the-board Base Offense Level 2-level reduction in drug cases.

In December 2015, 30 amended judgments were filed resulting in a total time reduction of approximately 57 years.

While the value of early release is inestimable for defendants, their families, and their friends, the early releases in December resulted in a taxpayer cost savings of approximately \$1,659,860. So far, 342 defendants in this district have received reductions in their sentences under Amendment 782.

## PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet that provides court clothing to your clients. We are in dire need of court-appropriate clothing for women. Please consider donating any old suits, or other appropriate professional clothing to the client clothes closet.

## CJA REPRESENTATIVES

Scott Cameron, (916) 769-8842 or [snc@snc-attorney.com](mailto: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](mailto:dtorres@lawtorres.com), is the Backup CJA Representative.

## NEW & IMPROVED WEBSITE

Check out our updated website – same URL <http://www.cae-fpd.org/>.

If you notice any typos or misinformation, please contact Mark Lie, [mark.lie@fd.org](mailto:mark.lie@fd.org). Suggestions for content? Let Mark know.

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Eastern District of California

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**Announcements**  
Announcements pertaining to the U.S. Court of Appeals for the Ninth Circuit  
• [Change in Process for Submitting Requests of Release](#)  
Date published: 10/30/2015  
• [View Appellate Case Statistics](#)  
Date published: 04/29/2015  
• [Appellate Practice Guide](#)  
Date published: 08/26/2014

### The Office of the Federal Public Defender

The Office of the Federal Defender for the Eastern District of California is authorized under Title 18 U.S.C. § 3025A, the Criminal Justice Act, to provide legal representation to persons financially unable to retain counsel in federal criminal and related proceedings. Representation includes counsel and investigative, expert and other services.

Members of the Federal Defender's Office share a commitment to excellence and a passion for justice in representing indigent people accused of a myriad of federal criminal offenses. We provide quality legal representation and/or advice to individuals financially unable to employ counsel in federal criminal cases and related matters in the federal courts. We handle a wide range of cases including felonies, misdemeanors, appeals, non-capital habeas matters and capital habeas matters. We are advocates for our clients – we want our legal system to be fair to all. Our mission is to exceed the expectations of our clients every day by providing the highest caliber of legal counsel and advice.

### Our Services

The Federal Defender Office for California's Eastern District strives to:

- Provide vigorous and high quality representation to indigent defendants in Federal Court;
- Foster and promote the high standards and ideals required by the Bill of Rights and the Criminal Justice Act;
- Ensure justice in the federal courts is administered to all persons on a fair and equal basis; and
- Advance the effectiveness of the federal legal system through excellence in legal scholarship, on-going education, and training the criminal defense bar.

The information supplied on this website is for informational purposes only and should not be relied upon to make legal decisions. Interacting by e-mail or otherwise through this site does not create an attorney-client relationship with the Federal Defender's Office for the Eastern District of California or any of the

## 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),  
Andras Farkas, [Andras\\_Farkas@fd.org](mailto:Andras_Farkas@fd.org), or  
Karen Mosher, [karen\\_mosher@fd.org](mailto:karen_mosher@fd.org).  
Sacramento: Lexi Negin, [lexi\\_negin@fd.org](mailto:lexi_negin@fd.org) or  
Ben Galloway, [ben\\_d\\_galloway@fd.org](mailto:ben_d_galloway@fd.org).

## NATIONAL DEFENDER SERVICES TRAININGS

### WINNING STRATEGIES SEMINAR

SAN ANTONIO, TEXAS | January 28 - January 30, 2016

[REGISTER HERE](#)

[DRAFT AGENDA](#)

[FINANCIAL ASSISTANCE APPLICATION](#)

### FUNDAMENTALS OF FEDERAL CRIMINAL DEFENSE SEMINAR

SAN ANTONIO, TEXAS | January 28 - January 28, 2016

[REGISTER HERE](#)

[DRAFT AGENDA](#)

[FINANCIAL ASSISTANCE APPLICATION](#)

### LAW & TECHNOLOGY SERIES: ELECTRONIC COURTROOM PRESENTATION WORKSHOP

HOUSTON, TEXAS | February 04 - February 06, 2016

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[DRAFT AGENDA](#)

[FINANCIAL ASSISTANCE APPLICATION](#)

### ANDREA TAYLOR SENTENCING ADVOCACY WORKSHOP

SAN DIEGO, CALIFORNIA | March 03 - March 05, 2016

[REGISTER HERE \(WAIT LIST ONLY\)](#)

[DRAFT AGENDA](#)

## **CERTS GRANTED**

The Supreme Court has granted certiorari in Betterman v. Montana, No. 14-1457, to address this question: "Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case."

## ♪ NOTABLE CASES ♪

Garcia v. Long, No. 13-57071 (12-21-15) (Bybee with Fisher and Foote, D.J.) The Ninth Circuit affirms the district court's granting of habeas relief, even under AEDPA's deference, for a Miranda violation. When the petitioner, asked by law enforcement, if he wanted to speak, said "no," it was plain and simple: no. There was no ambiguity or need to clarify. "No" means "no."

US v. Cisneros-Rodriguez, No. 13-10645 (12-23-15)(Fletcher with Christen). The Ninth Circuit holds that the ICE agent who conducted the defendant's administrative removal proceeding violated her due process rights when he told her that an attorney would be of no help. She was, despite the state drug conviction that made her an aggravated felon, facially eligible for a U-visa, which is a form of hardship relief. The Ninth Circuit found prejudice because the defendant possibly could have obtained relief in 2010 when the hearing took place.

Mckinney v. Ryan, No. 09-99018 (12-29-15)(en banc)(Fletcher writing the majority opinion). In an en banc decision, the Ninth Circuit reverses a death sentence and remands because the Arizona state supreme court applied an unconstitutional legal standard in reviewing death sentences. The unconstitutionality was the court's requirement of a casual nexus between mitigation and the offense in violation of Eddings v. Ryan, 455 U.S. 104 (1982). In so ruling, the Ninth Circuit overruled its precedent in Schad v. Ryan, 671 F.3d 708 (9th Cir. 2011), which barred an assumption of unconstitutionality absent a clear indication of application of the wrong standard. The Arizona Supreme Court followed its erroneous unconstitutional standard for fifteen years.

Here, the unconstitutional casual nexus was applied to the petitioner's PTSD. The

state court refused to apply the PTSD as a nonstatutory mitigator. This refusal was counter to clear constitutional law under Eddings. The error had a substantial and injurious effect on the sentence, and thus was prejudicial within Brecht v. Abrahamson, 507 U.S. 619 (1993).

US v. Lloyd, No. 12-50499 (12-4-15)(Rosenthal (S.D. Tex.) with Berzon and Clifton). The Ninth Circuit holds that a prosecution witness who testified like an "expert" under FRE 702 (but whom had not been disclosed as an expert), fell afoul of the lay witness limitations of FRE 701. A lay witness may not testify to opinion based on speculation, hearsay, or interpret unambiguous, clear statements. The lack of notice dooms the conviction even if the witness would have otherwise qualified as an expert.

US v. Navarrette-Aguilar, No. 14-30056 (12-28-15)(Paez with, Fisher and Ikuta). The Ninth Circuit reversed in part a conviction for heroin trafficking. The reversal related to findings that more than one kilogram of heroin was distributed. There was insufficient evidence to support such a finding, and the district court erred in finding so based on speculation that the conspiracy would have eventually distributed a kilo. The kilo amount, which invoked a mandatory minimum was an element, not just a sentencing factor, and therefore reversal was required.

Mcdaniels v. Kirkland, No. 09-17339 (12-24-15)(en banc)(Friedland writing and concurrence by Ikuta, joined by Tallman Callahan). The Ninth Circuit remanded to the original panel a Batson claim. The en banc court found that in 2003, a court did not have to undertake a comprehensive juror comparison in a Batson challenge, if not requested by counsel. Only in Miller - El, in 2005, did the Supremes conduct a comparative analysis. A federal court, in

assessing habeas claims under AEDPA and after Pinholster, can consider evidence that was available to the state court (such as a comparative juror analysis) even if the state court failed to conduct such a comparison.

## *Letter from the Defender*

### **BEFORE SENTENCING, THE PRIORS**

In every client's case, we learn our clients' histories. While their personal histories are really the most damaging, our system makes their prior (could there be any other kind?) convictions what governs how much prison time they face if convicted in our case.

Because priors exercise that heavy control over client sentences, in every case we should be getting copies of (1) the final charging document – complaint, information, indictment, (2)(a) plea agreement and minute entry for the plea hearing or (b) minute entry for verdict(s), (3) sentencing minute entry and judgment of conviction, and (3) any probation or parole revocation dispositions. If you're dealing with a statutory prior enhancement, once you know what conviction the client had you can find out the precise offense elements and whether they match, require less, or go beyond a like federal offense. One of the latter? That prior may not qualify to enhance.

***Johnson v. United States***, the June 2015 Supreme Court decision, recognized the ambiguity in defining a "crime of violence" (intentional or knowing conduct, not recklessness or negligence) under the residual clause: an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." So do we recognize it in any prior referencing 18 U.S.C. § 16(b), start giving a closer look at Armed Career Criminal Act (18 U.S.C. § 924(a)), Career Offender (U.S.S.G. §§ 4B1.1 and 4B1.2), guidelines for **firearm or ammunition receipt, possession, or transportation (U.S.S.G. § 2K2.1) and probation or supervise release violation grades (U.S.S.G. § 7B1.1)**, illegal reentry (8 U.S.C. § 1326(b)(2))

– keep an eye on *Dimaya v. Lynch*, accepted by the 9<sup>th</sup> for rehearing, and § 924(c).

Then we have a category of priors we Californians call “**wobblers**” – offenses which can be treated as either a felony or misdemeanor. Other states have them too; Arizona, for instance, has Class 6 undesignated or “open-ended” convictions, and, for a couple of years, marijuana possession convictions could not get any jail time, raising a question whether they were even criminal convictions. And *United States v. Simmons*, 649 F.3d 237 (4<sup>th</sup> Cir. 2011)(*en banc*) changed what constitutes a North Carolina felony conviction and some are no longer felonies. These are federal sentencing game changers. It’s worth calling public defenders in other states to see if your client’s low-level felony might actually be declared a misdemeanor.

May not be much we can do about the other states’ convictions, but filing ancillary proceedings in California to reduce our client’s exposure – priceless. Courtesy of Legal Services for Prisoners with Children, here’s the approach to take in reviewing your client’s California priors for misdemeanor adjustment (apologies for the laundry lists) and even dismissals. Entry is retroactive to the sentencing date for Prop 47 adjustments.

1. Does client have any of the following Prop 47 eligible convictions?

| Penal Code sections:                                                                                                        |                                                                                                    |
|-----------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|
| With value < \$950:                                                                                                         | <ul style="list-style-type: none"> <li>• 470</li> </ul>                                            |
| <ul style="list-style-type: none"> <li>• 459 (2<sup>nd</sup> degree: commercial burglary &amp; shoplifting only)</li> </ul> | <ul style="list-style-type: none"> <li>• 471</li> <li>• 472</li> <li>• 475</li> </ul>              |
| <ul style="list-style-type: none"> <li>• 459.5</li> </ul>                                                                   | <ul style="list-style-type: none"> <li>• 484, 484(f), 484e(a),(b) &amp; (d), 484g, 484h</li> </ul> |
| <ul style="list-style-type: none"> <li>• 473</li> </ul>                                                                     | <ul style="list-style-type: none"> <li>• 496</li> </ul>                                            |
| <ul style="list-style-type: none"> <li>• 476(a)</li> </ul>                                                                  | <ul style="list-style-type: none"> <li>• 503</li> </ul>                                            |
| <ul style="list-style-type: none"> <li>• 487, 487a, 487b, 487c, 487d, 487g, 487h, 487i, 487j</li> </ul>                     | <ul style="list-style-type: none"> <li>• 504, 504a, 504b</li> <li>• 505</li> </ul>                 |
| <ul style="list-style-type: none"> <li>• 490.2</li> </ul>                                                                   | <ul style="list-style-type: none"> <li>• 506, 506a</li> </ul>                                      |
| <ul style="list-style-type: none"> <li>• 666 petty theft with a prior</li> </ul>                                            |                                                                                                    |
| Health & Safety Code sections:                                                                                              |                                                                                                    |

| Penal Code sections:                                                                        |
|---------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• 11350</li> <li>• 11357</li> <li>• 11377</li> </ul> |

If “yes,” go to #2.

2. Does client have any of the following disqualifying all Penal Code section convictions?

|                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• 187</li> <li>• 191.5(a) &amp; (b)</li> <li>• 192(c)(3)</li> <li>• 205</li> <li>• 206</li> <li>• 207 if intent to commit PC</li> <li>• 261, 262, 264.1, 286, 288, 288a, 289</li> <li>• 209(a) &amp; (b)</li> <li>• 209.5</li> </ul>                                                                                                          | <ul style="list-style-type: none"> <li>• 217.1(b)</li> <li>• 218</li> <li>• 219</li> <li>• 220</li> <li>• 236.1(b) &amp; (c)</li> <li>• 243.4</li> <li>• 245(d)(3)</li> <li>• 261(a)(1),(2),(3),(4), &amp; (6)</li> <li>• 262</li> <li>• 264.1</li> </ul>                                                                    | <ul style="list-style-type: none"> <li>• 266</li> <li>• 266c</li> <li>• 266h(b)</li> <li>• 266i(b)</li> <li>• 266j</li> <li>• 267</li> <li>• 269</li> <li>• 272</li> <li>• 273ab</li> </ul>                                                                                                                                    |
| <ul style="list-style-type: none"> <li>• 285</li> <li>• 286(c)(1) &amp; (2)(A),(B) &amp; (C), &amp; (3), (d)(1),(2) &amp; (3)</li> <li>• 288(a), (b)(1) &amp; (2)</li> <li>• 288.2(a) &amp; (b)</li> <li>• 288.3</li> <li>• 288.4</li> <li>• 288.5 &amp; (a)</li> <li>• 288.7(a) &amp; (b)</li> <li>• 288a(b)(1) &amp; (2), (c)(1) &amp; (2)(A), (B) &amp; (C), &amp; (d)</li> </ul> | <ul style="list-style-type: none"> <li>• 289, 289(a)(1)(A), (B) &amp; (C), &amp; (2)(C),(d),(h) &amp; (j)</li> <li>• 311.1</li> <li>• 311.2(b),(c) &amp; (d)</li> <li>• 311.3</li> <li>• 311.4</li> <li>• 311.10</li> <li>• 311.11</li> <li>• 314.1</li> <li>• 314.2</li> <li>• 368(d) &amp; (e)</li> <li>• 451.5</li> </ul> | <ul style="list-style-type: none"> <li>• 647(a)</li> <li>• 647.6</li> <li>• 653f(b) &amp; (c)</li> <li>• 664/187</li> <li>• 664/191.5</li> <li>• 664/any 209(c)</li> <li>• 667(e)(2)</li> <li>• 4500</li> <li>• 11418(a)(1), (b)(1) &amp; (2)</li> <li>• 12022.53(d)</li> <li>• 18745</li> <li>• 18755(a) &amp; (b)</li> </ul> |

| Military & Veteran Code                                                                  |
|------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• 1670/1672(a)</li> <li>• 1671/1672(a)</li> </ul> |

If “No,” go to #3.

3. Has client finished his/her Prop 47 California conviction sentence? If “Yes,” file the paperwork in the county of conviction.

Look also for possible wobblers under Cal.Pen.Code § 17(b). Need a list of wobblers

to see if client ended up with a misdemeanor, not a felony? Look here:

[http://www.recordgone.com/california\\_felony\\_wobblers.htm](http://www.recordgone.com/california_felony_wobblers.htm)

Also, some California convictions, pursuant to Cal.Pen.Code §§ 1203.4, 1203.4a, and 1203.41, might now qualify for **dismissal**:

If it was:

- A misdemeanor or felony with probation only? File for dismissal under § 1203.4.
- A misdemeanor or infraction with county custody of less than a year and/or a fine (no probation)? File for dismissal under § 1203.4a.
- A felony with county jail time of more than 1 year? File for dismissal under § 1203.41.

UNLESS:

- Client is still on probation, parole or other supervision? If “Yes,” not eligible under each section until sentence completed.
- Client is currently serving a sentence or charged with a crime (including outstanding charges or warrant)? If “Yes,” not eligible under each section until sentence completed.
- Client went to prison? If “Yes,” not eligible under any section.
- Client had a conviction under Cal.Pen.Code §§ 261.5 (felony), 286, 288(a), 288.5, 289, or misdemeanor convictions under Cal.Veh.Code §§ 2800, 2801, 2013, 42002.1? If “Yes,” not eligible under §1204.3(b).
- Client had conviction under Cal.Veh.Code §§ 2800.2, 2800.3, 12810, 14601, 14601.1, 14601.2, 14601.3, 14601.5, 20001, 20002, 21651(b), 22348(b), 23109(a) & (c), 23109.1, 23152, 23153, 23103, 27360, 27360.5, 31602, and Cal.Pen.Code §§ 191.5(b) and 192(c)? If “Yes,” discretionary dismissal possible under § 1203.4(c).
- Client successfully finished probation without incident or terminated early? If “Yes,” on a misdemeanor or infraction case, and Client passed a full year afterward without incident, possible mandatory dismissal. If, while on probation, Client was arrested or had a

FTA or bench warrant, discretionary dismissal.

- Client conviction with felony sentence of year or more county jail under Cal.Pen.Code § 1170(h), discretionary dismissal.
- Client owes any fines, fees or restitution? If “Yes,” no mandatory §§ 1203.4 or 1203.4a dismissal, but maybe discretionary dismissal.

A lot to review, but more than worth it for your client. Happy laundry list checking!

~ Heather E. Williams, FD-CAE