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Federal Defender Newsletter
June 2017

CJA PANEL TRAINING

CJA Panel Training is on summer break. See you all in September!

Please join us on Wednesday, June 28th, 1-3pm at the courthouse Kennedy Center for a workshop on helping clients with mental health issues. All are invited, including defense attorneys, Pretrial Services and Probation employees, members of the U.S. Attorney's Office, and law clerks. The workshop will be facilitated by Marji Miller, mental health therapist at Genesis @ Loaves and Fishes Sacramento. For more information or to RSVP, please contact Crystal_Richardson@fd.org

REMEMBERING CANDACE FRY

Candace Fry, considered by her colleagues to be a consistently effective defense lawyer . . .

~ Denny Walsh, "Yuba City man gets nearly 6 years in prison for possessing weapons cache," *Sacramento Bee* (6/19/15)

Long-time Panel attorney Candace Fry passed away on May 23, 2017. Candace devoted her career to helping defendants through difficult circumstances with zeal, grace, and compassion. She was practical, had a fine wicked sense of humor, and was a superb and smart lawyer, a true believer (highest praise for an accused's defense lawyer). We will miss her wit, expertise, and genuine devotion to her clients. Outside the law, she was an artist and created beautiful paintings, collages, and works in paper. She truly appreciated all forms of art, music, dance and literature.

In the end, Candace said of her life: "It was a short run, often hugely enjoyable." Services will be private. To honor Candace, please donate to the Southside Art Center through the GoFundMe page created by her friends (https://www.gofundme.com/remembering-candace) or directly to WEAVE (www.weaveinc.org). Obituary at http://www.legacy.com/obituaries/sacbee/obituary.aspx?pid=185623300 .

Members of the panel who were close to Candace are looking for a home for her senior cat, Annie. Anyone inspired to adopt her cat, please contact kristahartesq@gmail.com.

KELLY CULSHAW IS NEW CAPITAL HABEAS UNIT SUPERVISOR

Please welcome Kelly Culshaw as our new Capital Habeas Unit (CHU) supervisor. Kelly takes over from Jennifer Mann, who had the position since 2015.

Kelly is an experienced capital appellate and habeas corpus litigator. She joined our Eastern District Federal Defender Office in 2015. Before coming to Sacramento, she worked four years for the Arizona Federal Public Defender in its CHU. FPD-Arizona's CHU is one of the busiest in the nation. There, Kelly handled capital cases in Arizona and four other states, including California. Before Arizona, Kelly was with the Ohio Public Defender for 13 years, litigating capital cases and leading that office's Wrongful Conviction Project.

Kelly honed her fighting spirit at Ohio State University. On Fridays in the fall, you will find Kelly decked out in Buckeye scarlet, gray, white, and black.

Welcome, Kelly, in your new role!

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.

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 On-Line & On Call

Check out 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. CJA lawyers can log in, and any private defense lawyer can apply for a log-in 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.

IMMIGRATION LEGAL SUPPORT

Given our current climate regarding immigration and criminal justice issues, it is more important than ever for defense attorneys to fully advise clients regarding the collateral consequences of their cases.

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.

PLEASE DONATE TO CLIENT CLOTHES CLOSET

The Federal Defender's Office maintains a clothes closet providing 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, 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.

NATIONAL DEFENDER SERVICES TRAININGS
(register at www.fd.org)

Fundamentals of Federal Criminal Defense
Houston, Texas
June 8 - June 9, 2017

Winning Strategies
Houston, Texas
June 8 - June 10, 2017

SUPREME COURT OPINIONS

Esquivel-Quintana v. Sessions, No. 16-54. In a unanimous opinion by Justice Thomas (Justice Gorsuch did not participate), the Court held that in the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of "sexual abuse of a minor" requires the age of the victim to be less than 16. It reversed the Sixth Circuit's holding that the immigrant's prior conviction under a state statute criminalizing consensual sexual intercourse between a 21-year-old and a 17-year-old (Cal. Penal Code § 261.5(c)) did not qualify as sexual abuse of a minor. According to the statutory index attached to the opinion, it appears that Arizona, New Mexico, Oregon, are among the 16 states listed whose statutory rape laws would not meet the "sexual abuse of a minor" standard.

Honeycutt v. United States, No. 16-142. (Sotomayor, J.) The Court held unanimously that under the statute governing forfeiture (21 U.S.C. § 853), a defendant may not be held jointly and severally liable to forfeit property that his co-conspirator derived from the crime but that the defendant himself did not acquire. This was a drug case where the co-defendant was assessed $200,000 in forfeiture, against the proceeds on his sales of items that contained a component used to manufacture meth. The appellant did not derive these proceeds, he was just an employee of his co-conspirator. He could not be assessed joint and several liability for the proceeds obtained by his codefendant.

IMPORTANT CERT. GRANT

The Supreme Court granted certiorari on June 5, 2017, in Carpenter v. United States, No. 16-402, to decide the question whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of a cell-phone user over the course of 127 days is permitted by the Fourth Amendment.

NINTH CIRCUIT OPINONS

US v. Sanchez-Gomez, No. 13-50561 (05/31/17) (en banc). The en banc Ninth Circuit clarified that the Fifth Amendment right to be free of unwarranted restraints applies whether the proceeding is pretrial, trial, or sentencing, with a jury or without. Before a presumptively innocent defendant may be shackled, the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom. Courts cannot delegate this constitutional question to those who provide security, such as the U.S. Marshals Service. Nor can courts institute routine shackling policies reflecting a presumption that shackles are necessary in every case. The en banc court wrote that the right to be free of unwarranted restraints has deep roots in the common law, which did not draw a bright line between trial and arraignment. The en banc court rejected the government's contention that individualized determinations are required only before shackles are used in the jury's presence, and that otherwise the right is sufficiently protected by considering generally applicable security concerns, deferring to the Marshals Service and leaving the rest to individual judges' discretion.

US v. Liew, No. 14-10367 (5-5-17)(Owens w/Schroeder & Wardlaw). This case deals with economic espionage, obstruction, and witness tampering, and involved counts of conspiracy, attempted theft, possession of misappropriated trade secrets, witness and evidence tampering, and conveying trade secrets belonging to DuPont. The trade secret was the manufacture of titanium dioxide. As the opinion states, "If you wanted to learn about the secret and lucrative world of titanium dioxide production, this was the trial for you. TiO2 is a white pigment extracted from ore and used in a wide variety of products, from paint to the filling in Oreo cookies." The jury convicted on all counts. The Ninth Circuit reversed the convictions for conspiracy to obstruct justice related to the filing of a false answer in a civil action. The "answer" about not misappropriating was close to a general denial. The conviction for witness tampering was also vacated. A statement by a defendant that witnesses should not mention anything was not exactly intimidation or threatening.

Further, the matter was remanded for in camera review of a Brady issue. The defendant argued that the prosecution should have disclosed the rough notes of the FBI's interview with a deceased co-conspirator. The defendant had the 302s; and a declaration from counsel for the co-conspirator stated that the co-conspirator denied he was ever involved in a conspiracy and that any secrets were in a box mailed by DuPont to him when he retired. He thought the materials were "valueless" and subsequently sold them to the defendant. These statements were not in the 302. The Ninth Circuit considered the allegation, supported by the declaration, to have created an inference that the rough notes contained favorable information. Such information could undermine the confidence of the verdict. The Ninth Circuit remanded so the court

could review the material in camera and to determine whether disclosure might have affected the trial's outcome.

US v. Olson, No. 15-30022 (5-15-17)(Fisher w/Paez). To be convicted for misprision of a felony, the Ninth Circuit holds that the defendant must know that: (1) the principal acted to satisfy the essential elements of the underlying felony offense; and (2) the defendant knew the conduct was a felony. This knowledge requires that the defendant knew the offense was punishable by a term of imprisonment of more than a year or death.

US v. Twenty-nine Palm Band of Mission Indians, No. 15-50419 (5-30-17)(Bybee w/Graber & Christen). This is a restitution case. The issue is whether a crime victim -- here an Indian tribe -- can appeal a restitution order under the Mandatory Victims Restitution Act (MVRA). The Ninth Circuit ruled that the Act does not confer a right to appeal upon a victim. The Ninth Circuit also concluded that due process does not confer a right. A victim who disagrees with the court's decision can have the government appeal, or seek mandamus.

US v. Orozco, No. 15-10385 (6-1-17)(Korman w/Tashima and M. Smith). The Ninth Circuit holds that the search of a tractor-trailer in Nevada was not justified under the administrative search doctrine, which allows stops and searches, initiated in furtherance of a valid administrative scheme in the absence of reasonable suspicion or probable cause. In this instance, the Ninth Circuit holds that the stop of the truck was solely done to investigate criminal activity, which violates the doctrine. As such, the denial of the motion to suppress is reversed and the evidence is suppressed even if the driver gave consent after the stop. The Nevada administrative search statute does not allow a stop and search solely as a pretext for criminal searches. As the Ninth Circuit characterized it, "the objective evidence clearly demonstrates that, but for the officers' belief that Orozco might be carrying drugs, the stop never would have happened."

LETTER FROM THE DEFENDER

The Spanish word for *handcuffs* is *esposas*, also Spanish for *wives*; *manacles* translates to *manillas (handles)*.

An in-custody defendant stands before the judge, that person who will make decisions possibly – probably affecting the course of the rest of her life. She is desperate to make a good impression, that what brought her to this courthouse was an anomaly, isolated in her life history's arc. But how can you present the best of who you are when appearing as a physical claustrophobic with a presumption of violence: "handcuffed, the cuffs are also secured to a chain wrapped around the waist, immobilizing the arms completely. . ., larger manacles are attached to the ankles to hobble, making the prisoners shuffle as he/she walk" describes San Quentin inmate Jerome Boone. Imagine T Rex arms and walking like a geisha in an outfit whose color you'd never wear in real life. How do our clients make that best and sometimes final impression when, between orange and heavy metal jewelry, it all says "incarcerated now, so must be incarcerated more." The accused should be able "to try their cases without the distraction of shackles and any attendant physical pain." *United States v. Sanchez-Gomez,* 9th Cir. Case № 13-50562 (5/31/2017), p.26.

This right to be free from unwarranted shackles no matter the proceeding respects our foundational principle that defendants are innocent until proven guilty. The principle isn't limited to juries or trial proceedings. It includes the perception of any person who may walk into a public courtroom, as well as those of the jury, the judge and court personnel. A

presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.

~ *Sanchez-Gomez*, p.24.

As you just read in our Ninth Circuit Opinions, in May's final week, *Sanchez-Gomez*' *en banc* court's ruling, authored by Judge Kozinski and citing *Deck v. Missouri*, 544 U.S. 622 (2005), said "the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom." *Id.,* p.23. In making this decision, "(c)ourts may not incorporate by reference previous justifications in a general fashion, nor may they refuse to allow defendants to make objections or create evidentiary records. And they cannot flip the presumption against shackling by requiring that the defendant come up with reasons to be unshackled." *Id*, p.23, fn.9.

Now, I must say I'm thankful for the US Marshal's courtroom presence and the role they play there. As Duty Attorney at afternoon Initial Appearances in Tucson, 10 defendants in the gallery waiting for their hearings, one disliked the news I was giving him and lunged for me. A Deputy Marshal was immediately between us. I frankly can't recall what "jewelry" the defendants wore that time – if any, but I don't think it made any difference to that person's exhibition of frustration. So, is shackling just an appearance of control, more form over substance? I certainly do **not** feel all, or even any in custody before the court should be physically bound, even after that experience.

Our Eastern District judges address shackling under Local Rule 401 (attached after). Here are some areas to address with the bench:

- The U.S. Marshal completes a *Prisoner Restraint Level* form. LR 401(c)(1)(A) (attached after). It records arrests for certain crimes but doesn't report whether clients were charged with those crimes or if client was found or pleaded guilty to those crimes.
- I understand in Fresno defense counsel routinely receive a copy of the completed *Prisoner Restraint Level* form. Not so in Sacramento. Some magistrate judges permit a copy, but you have to ask for it. Another doesn't even allow counsel to look at it, let alone get a copy. We are entitled to a copy under LR 401(c)(1)(B).
- "CRIME OF VIOLENCE"/LR 401(b)(1)(B) & (c)(1)(D)(i): We all must be well-versed in what is and is not a "crime of violence" since *Johnson v. United States, 135 S.Ct. 2551 (2015),* even in arguing for no or less shackling.

  First, LR 401(b)(1)(B)'s language defining a "crime of violence" was found to be vague and ambiguous under *Johnson,* so it goes out.

  Next, as you can see from the attached US Marshal's *Prisoner Restraint Level Form*, it mentions offenses which the court may assume are *crimes of violence*, presumed by the Bail Reform Act, 18 U.S.C. § 3142(f)(1)(A) and (g)(1), for a rebuttable presumption of detention, but not may all still qualify under *Johnson*.
- LR 401(c)(1)(D)(ii)/WEIGHT OF THE EVIDENCE AGAINST DEFENDANT: It's important to remind everyone our clients are still presumed innocent – "before a presumptively innocent defendant may be shackled." *Sanchez-Gomez*, p.22-23.

  > At the heart of our criminal justice system is the well-worn phrase, innocent until proven guilty. (cite omitted.) And while the phrase may be well-worn, it must also be worn well: We must guard against any gradual erosion of the principle it represents, whether in practice or appearance. This principle safeguards our most basic constitutional liberties, including the right to be free from unwarranted restraints. (*Deck)*
  >
  > Under the Fifth Amendment, no person shall be "deprived of

> life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has said time and again that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."

Sanchez-Gomez, p.20.

- LR 401(c)(1)(D)(iv)/ARREST CIRCUMSTANCES, INCLUDING FLIGHT TO AVOID APPREHENSION: Consider *Commonwealth v. Warren*, a 2016 Massachusetts Supreme Court decision finding

> flight [is not eliminated] as a factor in the reasonable suspicion analysis whenever a black male is the subject of an investigatory stop. (Yet), in such circumstances, flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for F[ield] I[nterrogation] O[bservation] encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus."

Finally, greater discrimination in shackling the in custody accused and the convicted improves respect of our federal courts. *Sanchez-Gomez*, p.24-25.

> *The most visible and public manifestation of our criminal justice system is the courtroom. Courtrooms are palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life. A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent. That perception cannot prevail if defendants are marched in like convicts on a chain gang. Both the defendant and the public have the right to a dignified, inspiring and open court process. Thus, innocent defendants may not be shackled at any point in the courtroom unless there is an individualized showing of need.*

As David Patton, Executive Director, Federal Defenders of New York, Inc., wrote to his court's chief judge to battle blanket shackling:

> We spend many hours with our clients in the detention facilities where they are largely stripped of their humanity. We watch them brusquely ordered to and fro, subjected to full body cavity searches whenever we visit, and lined; up with other inmates in their uniform jumpsuits as they are brought out to meet their children and other loved ones. **That same atmosphere should not pervade the courtroom.**

We defense counsel, more than anyone in this criminal process, must "protect (our client's) dignity," treat our clients "with all the humanity and gentleness" possible, appreciating "the misfortune of his present circumstances." *Sanchez-Gomez*, p.26, *citing* 2 William Hawkins, *A Treatise of the Pleas of the Crown* 434 (John Curwood, 8th ed. 1824). We, therefore, must insist our clients not appear in court "in a contumelious [abusive or humiliating] manner; as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet."

~ Heather E. Williams, FD-EDCA

RULE 401 (Fed. R. Crim. P. 43)

SHACKLING OF IN-CUSTODY DEFENDANTS

(a) Applicability. This Rule is applicable to the shackling, when advisable, of in custody defendants during criminal court proceedings convened in the Sacramento and the Fresno Courthouses.

(b) Definitions.

(1) "Crime of Violence" means:

(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(2) "Fully Shackled" means leg restraints (including waist chains), and handcuffs.

(3) "Long Cause Proceeding" means a proceeding that is expected to last at least 30 minutes, such as an evidentiary hearing.

(c) Shackling at Initial Appearance.

(1) Single Defendant Actions.

(A) Prior to the commencement of initial appearances, the Marshal shall make an individualized shackling recommendation for each prisoner. In connection with this recommendation, the Marshal shall complete a written form (Prisoner Restraint Level Form) giving the recommendation regarding the level of restraint necessary, if any.

(B) Once the Prisoner Restraint Level Form is completed by the Marshal, and as soon as practicable, it shall be given to the Judge or Magistrate Judge presiding over the initial proceeding. The Court may review the information on the Form, a Pre-Trial Service report, and any other information pertinent to shackling. The Court shall then annotate on the form its determination regarding the appropriate restraint level. Unless it is not feasible, the Form shall be distributed to the defendant's attorney and the Assistant United States Attorney prior to hearing.

(C) The attorney for either party may request that the Court modify its restraint level determination for the initial proceeding. At the end of the initial proceeding, the deputy courtroom clerk shall annotate the Court's final restraint level determination in the minutes.

(D) When making a determination on restraints, the Court shall, where information is reasonably available, consider the following as it may weigh in favor of, or against, imposition of restraints:

(i) The nature and circumstances of the offense charged, including whether the offense is a crime of violence, a federal crime of terrorism, or involves a firearm, explosive, or destructive device;

(ii) The weight of the evidence against the in custody defendant;

(iii) The history and characteristics of the in custody defendant, including: the in custody defendant's character, physical and mental condition, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and whether, at the time of the current offense or arrest, the in custody defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under federal, state, or local law;

(iv) Circumstances of the defendant's arrest, including but not limited to, voluntary surrender, or flight to avoid apprehension, resistance upon arrest, other indicia of possible flight.

(2) Multiple Defendant Actions. In an action where multiple defendants are charged, and it is likely that the action will require an appearance by multiple defendants at any proceeding, the Court shall consider the following in determining restraint levels:

(A) Those factors described in (c)(1)(D) above;

(B) The number of defendants in the action;

(C) The Marshal staffing actually available to counteract any disruption or other untoward behavior;

(D) The logistical disruption which might entail in having numerous defendants with varied restraint levels.

The Prisoner Restraint Form procedure set forth in (c)(1)(A)-(C) above shall be employed in a multiple defendant action. A determination shall be made for each defendant.

(d) Subsequent Proceedings. The Court's determination of shackling status made at the initial appearance shall continue in effect unless changed circumstances warrant a different restraint level, or a Judge determines on de novo review that a different restraint level is appropriate, giving the affected parties an opportunity to be heard. Any party may request that the court change the restraint level. Nothing herein alters the inherent power of the Judge to order up to full and immediate shackling if such an order is necessary, in the discretion of the Judge, to ensure the safety of all people in the courtroom. After the implementation of such an order, the affected parties will be afforded the opportunity to be heard within a time reasonably proximate to the shackling.

(e) Multiple Actions Proceedings. Notwithstanding any other provision of this Rule, in a proceeding in which multiple defendants in different actions are present in the courtroom at the same time, a Judge may direct, prior to the commencement of the proceeding, that all in custody defendants be restrained at the level the Judge believes appropriate. Any party may be heard to argue a different restraint level at the time that party's case is heard.

(f) Unshackling of Writing Hand. When an in custody defendant is fully shackled:

(1) At Rule 11 proceedings, the in custody defendant shall be permitted the unshackled use of the defendant's writing hand, unless the Marshal recommends full shackling for particularized reasons, and the Court adopts the recommendation.

(2) In long cause proceedings, the in custody defendant shall be permitted the unshackled use of the defendant's writing hand, unless the Marshal recommends full shackling for particularized reasons, and the Court adopts the recommendation. The in custody defendant shall remain seated at the defense table, except when giving testimony.

(g) Jury Proceedings. This Rule does not apply to trial proceedings at which a jury is being chosen or has been impaneled.

PRISONER RESTRAINT LEVEL

NAME		
CHARGES	☐ Dangerous Drug	☐ Probation Violation
	☐ Immigration	☐ Other:

U.S. MARSHAL RECOMMENDATION:

When Alone:	☐ Full	☐ Legs Only	☐ None
Multiple Defendants:	☐ Full	☐ Legs Only	☐ None

CRIMINAL HISTORY

OFFENSE	ARREST	OFFENSE	ARREST
Homicide/Manslaughter		Narcotics	
Assault/Battery		Burglary/Larceny/Theft	
Sex Assault/Child Molestation		FTA/Probation/Parole	
Kidnapping		Immigration	
Weapons (Firearms)		Extortion/Threaten/Terrorize	
Weapons (Other)		Fraud/Forgery	
Resist/Assault/Evade Officer		Conspiracy	
Escape		Traffic/DUI/Misdemeanor	
Robbery		Gang Affiliation	

COMMENTS:

JUDICIAL RULING:

When Alone:	☐ Full	☐ Legs Only	☐ None
Multiple Defendants:	☐ Full	☐ Legs Only	☐ None

Presiding Judge: _____ Date: _____