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Federal Defender Newsletter

October 2015

CJA PANEL TRAINING

Sacramento CJA Panel training will be held on Wednesday, **October 21 at 5pm** in the Jury Lounge, 4th Floor, District Court, 501 I St. AFD Sean Riordan will present "Bordering on Injustice: Recent Developments at the Intersection of Immigration and Criminal Law."

Fresno CJA Panel training will be held on Tuesday, **October 20 at 5:30 pm** in the Jury Room at the Fresno District Court. AFDs Jerome Price and Ann McGlenon will present "An Update from the National Forensic College 2015."

SAVE THE DATE FOR THE ANNUAL FEDERAL DEFENDER & CJA HOLIDAY PARTY



Get ready to jingle and mingle as we deck our hall for the Annual Holiday Party on Friday, **December 11** from 4 to 7 pm at 801 I Street. Please save the date!

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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](http://www.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.

### 14th Annual Federal Defender's Golf Tournament



The winner of this year's Federal Defender Golf Tournament, held September 18, 2015, at the Turkey Creek Golf Club in Lincoln, was Janet Vine with a net score of 66. Everyone had a great day of golfing and great food. Each participant walked away with a gift! Thank you to everyone who participated and played. Your fees went to a good cause to help clients charged in Federal Court.

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### 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.fd.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 September, 19 amended judgments were filed resulting in a total time reduction of approximately 37.5 years (451 months). While the value of early release is inestimable for defendants, their families, and their friends, the early releases in September result in a taxpayer cost savings of approximately \$1,100,877. So far 256 defendants in this district have received a reduction in their sentences under Amendment 782. Those who have not yet been released will reenter the community on November 1.

## The Washington Post

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October 7, 2015 Wednesday, A-SECTION; Pg.A01

### **6,000 TO LEAVE PRISON EARLY**

By Sari Horwitz

The Justice Department is set to release about 6,000 inmates early from prison - the largest one-time release of federal prisoners - in an effort to reduce overcrowding and provide relief to drug offenders who received harsh sentences over the past three decades, according to U.S. officials.

The inmates from federal prisons nationwide will be set free by the department's Bureau of Prisons between Oct. 30 and Nov. 2. About two-thirds of them will go to halfway houses and home confinement before being put on supervised release. About one-third are foreign citizens who will be quickly deported, officials said.

Cont'd at [https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html)

## **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.

## **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).

## **UPCOMING GUIDELINES AMENDMENTS ON NOVEMBER 1**

Keep in mind that new Sentencing Guideline amendments will be effective on November 1. There are significant changes to the fraud guideline, § 2B1.1, that will lower guideline ranges in most white collar cases. If the guideline on the day of sentencing is more favorable to your client than the guideline on the day of the offense, the more favorable guideline applies. For sentencings after November 1, make sure that the most favorable guideline is being applied in your case.

## ♪ NOTABLE CASES ♪

U.S. v. Flores, No. 14-50027 (12-23-15)(Wardlaw with Berzon; dissent by Pregerson). The Ninth Circuit found prosecutorial misconduct -- the prosecutor misstated the evidence and mischaracterized testimony -- but affirmed under a plain error standard.

McMonagle v. Meyer, No. 12-15360 (10-6-2015) (Nguyen for the en banc panel). The en banc panel reversed a district court's denial of a California state convict's § 2254 petition, holding that he exhausted his state-court remedies from a misdemeanor conviction. The panel further granted him equitable tolling for relying on precedent that the en banc panel overruled in the course of explaining how he had exhausted his state-court remedies, and remanded the petition for consideration of the merits of the claims.

A California state jury convicted the petitioner of two DUI crimes -- driving while under the influence, and driving with a BAC level of .08% or greater. The appellate division of the superior court reversed the second of these convictions on Confrontation Clause grounds, but affirmed the first. The defendant then asked the appellate division to certify the case for appeal to the California Court of Appeal, and when the appellate division denied certification he asked the Court of Appeal to transfer the case. The Court of Appeal denied transfer. He then filed a state habeas petition with the California Supreme Court, which denied the petition. The petitioner then filed a § 2254 petition, which the district court denied as untimely under AEDPA. According to the district court, the conviction became final when the Court of Appeal denied the petitioner's transfer request, such that he should have then petitioned for a writ of certiorari from the U.S. Supreme Court. He did not do so,

and filed his § 2254 petition more than a year after his cert deadline expired.

A three-judge panel of the Ninth Circuit disagreed with the district court's timeliness ruling. The Ninth Circuit decided to rehear the case en banc. After surveying California procedure for appellate review of a misdemeanor conviction, the court held that the conviction became final for purposes of state law when the Court of Appeal denied the transfer request. But in Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995), the Ninth Circuit had held that the state habeas petition in the California Supreme Court was a required component of the state's established process of appellate review. The Ninth Circuit held that this was incorrect in light of the California Supreme Court's decision in Marks v. Superior Court, 38 P.3d 512 (Cal. 2002). This required the Ninth Circuit to overrule Larche, and hold that a California state misdemeanor convict exhausts his state-court remedies by seeking transfer with the appropriate division of the California Court of Appeal.

Because the petitioner here was relying on Larche to exhaust his claims, the panel granted him equitable tolling of AEDPA's limitations period, and remanded the case for consideration of the merits of his claims.

Chavez-Solis v. Lynch, No. 11-73958 (10-6-11) (Bybee with Fisher and Bea). The Ninth Circuit granted a petition for review of a removal order, holding that a conviction for possession of child pornography under Cal. Penal Code § 311.11(a) is *not* an aggravated felony under 8 U.S.C. § 1101(a)(43)(I), and thus that the petitioner was not removable based on his conviction for that crime.

For purposes of the categorical analysis, the relevant metric of comparison was the federal child-pornography statute, 18 U.S.C. § 2252(a)(4)(B). The Ninth Circuit had previously held, in an unpublished decision, that California's statute was meaningfully identical to the federal one. But "new arguments" led the court to reevaluate this decision. For one thing, the California statute encompassed depictions of more kinds of sexual conduct than the federal statute, because California's statute punished depictions of any touching of a child on any part of the child's body. The government had argued that this did not make the California statute overbroad, because the petitioner was required to show a realistic probability that the state statute would be applied to prosecute someone for conduct in the overbroad area. The Ninth Circuit rejected this argument because the text of the state statute was clear, and so the reasonable-probability showing was unnecessary. Moreover, California court decisions showed that the statute would be used to target conduct in the overbroad area. And because California did not require a jury finding of a depiction of any particular type of sexual conduct in order to convict, the state statute was not divisible under Descamps, and thus the modified categorical approach was unavailable.

### 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.