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# Federal Defender Newsletter

## September 2017

### CJA PANEL TRAINING

We hope that all of you had a nice summer. CJA Panel Training resumes with:

- Sacramento: Wednesday, September 20, 5:00 p.m. in the jury lounge, 4th floor of the federal courthouse, 501 I Street. Videographer Rebecca Grace of Graceful Films will present on Sentencing Videos: "And Now For a Few Brief Sentences . . ."
- Fresno: Tuesday, September 19, 5:30-6:30 in the jury room of the federal courthouse, Kristine Fox and Laura Paul from the Ninth Circuit on Current Case Budgeting Procedures.

### **Special Presentation on ACEs and the Criminal Justice System**

Please join us for a special presentation by Dr. Andres Sciolla, who will discuss Adverse Childhood Experiences (ACEs) and their impact on the human brain. ACEs is an interesting and tested means of explaining our clients' mental health and substance abuse challenges. Handout is appended to this newsletter. The training will take place on **Wednesday, September 27 from 1-3pm at the Kennedy Library and Learning Center** in the Sacramento courthouse. **Qualifies for two MCLE units.**

### 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](mailto:melvin_buford@fd.org) or [henry\\_hawkins@fd.org](mailto:henry_hawkins@fd.org).



### **SAVE THE DATE FOR P2P 2017!!**

Please save the date for Pathways to Progress 2017, on October 11, 2017 from 12:30 to 3:30 at the Kennedy Learning Center. We expect between 20-30 social service providers, training sessions, resume review services, and mock job interviews for supervisees and former offenders. Please pass this date along to clients.

## **CJA Representatives**

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

## **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](http://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](mailto: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](http://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](mailto:peggy_sasso@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\\_galloway@fd.org](mailto:ben_galloway@fd.org).

## **BRIGGS V. BROWN**

On August 24, 2017, the California Supreme Court largely upheld Proposition 66, the voter initiative designed to speed up California's death penalty in Briggs v. Brown. The Court rejected only one provision, the requirement that all state death penalty appeals be concluded within five years, reading the language as "directive" only. The most immediate impact will be seen on the twenty death row prisoners who have completed their federal court appeals.

## **NINTH CIRCUIT OPINONS**

US v. Castillo-Mendez, No. 15-50273 (8-21-17)(Paez w/Reinhardt & Tashima). The Ninth Circuit reverses a conviction for attempted illegal reentry 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, and that he intended to turn himself in. Entering with the intent to be taken into custody undermines the specific intent needed for conviction.

The jury asked for the definition of official restraint. The Ninth Circuit found error in the district court's confusing and legally inaccurate supplemental instruction. The court should have explained that the government must prove the defendant's specific intent to enter free from official restraint, whether or not the defendant actually was under official restraint. What matters is the defendant's state of mind. The Ninth Circuit suggested an instruction telling the jury it 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."

United States v. Brito, No. 15-30229 (8-22-17) (Fletcher with Fisher.) The panel reversed the denial of a motion for sentence reduction under 18 U.S.C. § 3582(c)(2) (the "drugs minus two" amendment). The district court was allowed to account for an adjustment to the original sentence given to address time spent in state custody that would not be credited toward the federal sentence. In these circumstances, U.S.S.G. § 1B1.10 permits a reduction below the bottom of the new Guidelines range, allowing the district court to carry over the four-month downward adjustment when awarding a sentence reduction under Amendment 782.

In re Zermeno-Gomez, No. 17-71867 (8-25-17)(order from Goodwin, Kozinski, & Berzon). The Ninth Circuit "unequivocally stated that a published opinion constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so." The Arizona district court considered the recent Sanchez-Gomez decision not binding precedent as the mandate had yet to issue. Sanchez-

Gomez concerns shackling of pretrial defendants and requires the district court to make an individualized decision as to shackling. The Ninth rules that Sanchez-Gomez is binding on the district court.

US v. Robinson, No. 16-30096 (8-25-17)(Bea w/McKeown & N. Smith). The Ninth Circuit concludes that the Washington crime of second degree assault is not a "crime of violence" within USSG 2K2.1(922(g)(1) felon in possession).

US v. Ocampo-Estrada, No. 15-50471 (8-19-17)(Ebel [visiting from 10<sup>th</sup> Cir.], with M. Smith, and N.R. Smith). Although California Health & Safety Code § 11378 is divisible for Taylor purposes, the government here failed to prove that a qualifying controlled substance was the basis for the prior under a modified categorical analysis. The limited class of documents that the Court could look at did not indicate which drug was at issue. The defendant's federal objection to the PSR, which stated that the prior involved meth, was not one of the limited class of documents nor an admission that methamphetamine was an element of the prior. This means that the defendant's § 851 enhanced mandatory-minimum is invalid. The defendant did not waive this issue because the district court failed to advise him correctly.

US v. D.M., No. 16-50243 (9-7-17)(Callahan w/Wardlaw & Kendall). This is a sentencing reduction case as a result of a USSG amendment. The Ninth Circuit vacates a denial of a motion to reduce a sentence and remands, holding that nothing in the Guidelines or comments precludes a court from considering various departures in the prior sentence when resentencing a defendant under USSG 1B1.10(b)(2)(B), which is an exception to

1B1.10 (sentence reduction due to amendment). Here, the defendant received departures for cooperation and for "fast track." If the court only considered cooperation in the resentencing, the guideline range would not be lower after the amendment (reducing the drug level by 2). If the fast track is considered, then it would be lower. The Ninth Circuit examines the Guidelines and comments and favors the interpretation to consider all departures applicable to the previous sentence, once substantial assistance is triggered, this approach is consistent with the purposes of treating cooperators favorably, promotes conformity, and avoids complexity and litigation. Further, this appeal is not moot. The defendant had already been released from custody but was still under SR.

US v. Barragan et al., No. 13-50516 (9-8-17)(Hurwitz w/Lipez & Bea). A prosecutor's closing argument to the jury that they should say "no more" was error. The Ninth Circuit equates this with the improper "send a message" argument. However, although there was error, it was deemed harmless.

Taniko v. Williams, No. 15-16967 (9-8-17)(Reinhardt w/Kozinski & Berg). The Ninth Circuit reversed the district court's judgment that petitioner's federal habeas was untimely. The state trial court had entered a Second Amended Judgment after a remand from the State Supreme Court. The district court had used an earlier judgment to start the timely filing period. This was error because the time runs from the judgment under which the petitioner is being held. In Magwood v. Patterson, 561 US 320 (2010), the Supreme Court reached the same conclusion.

## LETTER FROM THE DEFENDER

I have no single subject to discuss with you this month, but want to share a few items of interest I recently learned.

First, you know those PACER viewing fees paid by those outside the CJA? The American Bar Association reports the Administrative Office of the U.S. Courts earned **\$150 million** in fees just last year. [http://www.abajournal.com/news/article/federal\\_courts\\_fix\\_major\\_pacer\\_security\\_flaw](http://www.abajournal.com/news/article/federal_courts_fix_major_pacer_security_flaw) WOW! This article ends with: "The Free Law Project [who pointed out the security vulnerability] is a staunch advocate for making the documents found in PACER free to the public. They operate RECAP, <https://free.law/recap/> (PACER backwards), which is a free browser plug-in that collects downloaded documents from PACER and places them in a free-to-access public database."

Next, I've been concerned for a while that our District's detention rates seemed unreasonably high and too often tied to posting some type of bond. Our magistrate judges state a greater percentage of our defendants are released than in other districts. Maybe it was just the detention hearings I handled!?!?

With all the articles about and state government changes in bonds for misdemeanor and traffics offenses in the news, I've now looked more closely into how the practice here rates compared with other districts. My source? The Administrative Office of the US Court's FY2016 *Judicial Business Report* concerning Pretrial Services, generally the H tables.

<http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=77&t=71&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5B>

[ar%5D=&=Apply](#) The following statistics do not include immigration cases (though court decisions found immigration case defendants are eligible for release despite immigration detainers, southwest border initiatives such as Operation Streamline and Fast Track skew greatly those detention rates).

Survey says:

- Our Pretrial Services (PTS) recommended detention for 55.5% of defendants.
- More than half (53.7%) of the other district's PTS Offices recommended detention **less often** than our PTS.
- Our Court released 63.5% of our defendants in FY 2016, meaning 10% of the time, we defense lawyers were pretty darned persuasive in battling PTS' detention recommendations (and I was wrong).
- The national average was 46.3% of defendants were ordered released.
- 58.3% of our district's defendants released were released on bond. Most were unsecured bonds.

Okay, so our clients **are** generally doing better on being released here compared with the rest of the country. But here is the truly surprising statistic I found:

**Our US Attorney Office, in FY 2016, recommended detention 82.4% of the time.**

Eighty-seven (87) other US Attorney Offices recommended detention **less often than CAE AUSAs**. All the US Attorney Office in the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, and 11<sup>th</sup> Districts recommended detention less often than our District's US Attorney Office. One US Attorney Office asked for detention for the same percentage of defendants as the CAE US Attorney, and only four other offices asked for detention

more often, but not significantly more often.

I was stunned!

Final item learned: You recall the heartbreaking story from late May when two gentle souls had their throats slashed while trying to protect two women on the Portland Light Rail being berated by a white male passenger for their apparent Muslim-ness (one wore a hijab). A third protector was also stabbed. We hear more and more reports of certain people in our country who seemingly appear empowered by our current political climate to verbally and publicly attack others based upon perceived race, ethnicity, religion, sexual orientation, citizenship, economic status, gender, and gender identity. As we all too well understand, speaking up can be dangerous. Being quiet and doing nothing can be equally dangerous: As Martin Niemöller said:

*First they came for the Socialists, and I did not speak out—  
Because I was not a Socialist.  
Then they came for the Trade Unionists, and I did not speak out—  
Because I was not a Trade Unionist.  
Then they came for the Jews, and I did not speak out—  
Because I was not a Jew.  
Then they came for me—and there was no one left to speak for me.*

Philip Galanes in a recent *New York Times* column suggests, when asked about dealing with a person verbally abusing a transgender woman with a little girl at a deli:

*Tangling with angry bigots is never your go-to move. . . . Who knows how his behavior may have escalated if you challenged him?*

*Your better option is to support the [person being verbally attacked]. Walk right up to her, as if a lunatic were not screaming at her, and help her finish the transaction (or abandon it) and get her out of that deli as quickly as possible. Bag her groceries; pay for them, if she has not; squeeze her hand in solidarity. But ignore the loon. (Call 911, if you like. But the parties will probably have scattered by the time the police arrive.)*

*In my experience of irrational hatred, engaging madmen and madwomen*

*only gives them more room to seethe. Better to neutralize the ugliness by placing it alongside normal behavior: Chat calmly with the woman about the weather, and the nasty man is more likely to recede. Be like a firefighter: Get potential victims to safety first, then tackle the trash-can blaze. Walk with her until she feels safe and encourage her to report the incident to the police. The only known antidote to hatred is love.*

Courage, fellow travelers. Courage.

~ Heather E. Williams, FD-CAE

**TRIGGER WARNING:** In psychology, the term “trigger” refers to a stimulus that reminds an individual of an extremely upsetting, distressing or traumatic event or experience. The stimulus is highly personal and can be practically anything, such as a word, sound, smell, etc. If you anticipate feeling extremely upset, or distressed or re-traumatized by evoking events from childhood, please stop reading and do not answer the questionnaire below.

### ACE Questionnaire

I would like to ask you some questions about events that happened during your childhood. This information may allow you to understand better health problems that you may have, of for which you are at risk. Your answers are yours to keep, but you may want to share them with trusted others, including healthcare practitioners (e.g., your primary care provider or your therapist). This is a sensitive topic and some people may feel uncomfortable with these questions. At the end of this survey, you will find a phone number for an organization that can provide information and referral for these issues. Please keep in mind that you can skip any question you do not want to answer. However, the best way to calculate your ACE score and interpret it more meaningfully is to answer every question.

**All questions** refer to the time period *before you were 18 years of age*. Now, looking back before you were 18 years of age...

1. Was a household member depressed or mentally ill, or did a household member attempt suicide?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
2. Did you live with anyone who was a problem drinker or alcoholic, or who used street drugs?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
3. Did a household member go to prison?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point

4. Was a biological parent <b>ever</b> lost to you through divorce, abandonment, or other reason?	
Yes	1 point
No; Parents never together; Don't know/Not sure; Decline to answer	0 point
5. Was your mother or stepmother... <b>Often or very often</b> pushed, grabbed, slapped, or had something thrown at her? or <b>Sometimes, often, or very often</b> kicked, bitten, hit with a fist, or hit with something hard? or <b>Ever</b> repeatedly hit over at least a few minutes or threatened with a gun or knife?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
6. Did you <b>often or very often</b> feel that ... No one in your family loved you or thought you were important or special? or Your family didn't look out for each other, feel close to each other, or support each other?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
7. Did you <b>often or very often</b> feel that ... You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you? or Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
8. Did you <b>often or very often</b> feel lonely, rejected or that nobody liked you?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
9. Was there a period of 2 or more years when your family was very poor or on public assistance?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point

10. Did you live for 2 or more years in a neighborhood that was dangerous, or where you saw people being assaulted?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
11. Did other kids, including brothers and sisters, <b>often or very often</b> hit you, threaten you, pick up on you or insult you?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
12. Did a parent or other adult in the household <b>often or very often</b> ... Swear at you, insult you, put you down, or humiliate you? or Act in a way that made you afraid that you might be physically hurt?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
13. Did a parent or other adult in the household <b>often or very often</b> ... Push, grab, slap, or throw something at you? or Ever hit you so hard that you had marks or were injured?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point
14. Did an adult or person at least 5 years older than you <b>ever</b> ... Touch or fondle you or have you touch their body in a sexual way? or Attempt or actually have oral, anal, or vaginal intercourse with you?	
Yes	1 point
No; Don't know/Not sure; Decline to answer	0 point

Now add your "Yes" or 1-point answers: \_\_\_\_ **This is your ACE Score**

Mental Health Access Team: (916) 875-1055 or (888) 881-4881 (Monday - Friday, 8 am - 5 pm)

ACE QUESTIONNAIRE REFERENCES:

Ford ES, Anda RF, Edwards VJ, Perry GS, Zhao G, Li C, Croft JB. Adverse childhood experiences and smoking status in five states. *Prev Med.* 2011 Sep;53(3):188-93.  
 Finkelhor D, Shattuck A, Turner H, Hamby S. A revised inventory of Adverse Childhood Experiences. *Child Abuse Negl.* 2015 Oct;48:13-21.