



**Winning Strategies:
Drugs, Guns, and Violent Crimes**

**Administrative Office of the U.S. Courts
Defender Services Office Training Division**

**Westin San Diego
400 West Broadway
San Diego, CA 92101
December 6-8, 2018**

Draft Agenda (rev. 10/10/2018)

Thursday, December 6, 2018

- 7:30 – 8:30 a.m. Registration & Continental Breakfast**
- 8:30 – 8:45 a.m. Welcome and Opening Remarks**
Shereen Charlick, *Interim Executive Director, Southern District of California Community Defender, San Diego, CA*
Jami Ferrara, *Panel Representative for the Southern District of California, San Diego, CA*
Craig Crawford, *Attorney Advisor, Defender Services Office Training Division, Washington, DC*
- 8:45 – 9:45 a.m. Plenary 1: “Predictive Policing” and Defense Use of Police Data**
Hanni Meena Fakhoury, *Assistant Federal Defender, Northern District of California, Oakland, CA*
- “Predictive policing” tools are all the rage for police departments nationwide. But are these tools the next step to a future out of “Minority Report”? Or just an effective marketing pitch? This presentation explores “predictive policing” tools and the law governing police use of these technologies. This presentation also gives an overview of how defense attorneys can use the rapid expansion of police big data as a sword in pretrial motion practice.
- 9:45 – 10:00 a.m. Break**

10:00 – 11:00 a.m.

Concurrent Sessions – 1

1. **The same but different: A look at defending violent charges in Indian Country**

James Loonam, *Assistant Federal Defender, District of New Mexico, Albuquerque, NM*

A presentation on the unique aspects of representing Native clients charged with violent crimes in Indian Country.

2. **Combatting Penalty Enhancements Where Death or Serious Bodily Injury Results from the Use of a Controlled Substance**

George Couture, *Attorney Advisor, Training Division, Defender Services Office, Washington, DC*

Deaths from drug overdoses have exploded in recent years, especially for opioids. The minimum and maximum statutory sentence a defendant faces may be increased if a drug offense resulted in death or serious bodily injury. This session provides an overview of the statutes at play in death and injury cases. The discussion will focus on issues of causation and toxicology that are relevant to understand and investigate for trial and sentencing.

3. **The Nuts and Bolts of Federal Firearms Law**

Richard Ely, Esq., *Richard O. Ely II, P.L.L.C., Houston, TX*

Don't show up to your next "gun fight" with the wrong weapon! A look at common, and very uncommon, defenses when your client is charged with a firearm's offense. Common legal issues will be discussed with an additional look at defense possibilities from a gun enthusiast's intense point of view. Additionally, the presentation addresses sentencing issues pursuant to 18 U.S.C. § 922(g)(1) prosecutions and the corresponding sentencing guidelines under USSG §2K2.1.

4. **Navigating the Drug Guideline: Getting Around with Departures and Variances**

Rosie Brown, *Sentencing Resource Counsel, Greenville, SC*

This session will walk you through a typical drug case and assist you in identifying guideline issues and developing cogent arguments for departures and variances. We will discuss the

guideline, its commentary, the effects of other related guideline provisions, and its regulatory history, as well as identify resources to support constitutional and policy-based challenges that may be raised at sentencing.

5. **Trial Strategies in RICO Cases**

Jack H. Cunha, Esq., *Cunha & Holcomb, Boston, MA*

This session will discuss strategies for pre-trial litigation to prepare for trial in as well as strategies for in-trial litigation in RICO cases. This will include a discussion of pre-trial motions, expert witnesses, jury instructions and motions in limine as well as a discussion of pertinent RICO case law.

11:00 – 11:10 a.m. **Break**

11:10 a.m. – 12:10 p.m. **Concurrent Sessions - 2**

1. **The Government’s Increasingly Aggressive Game of “Hide the Witness”: What Can We Do?**

Daniel Stiller, *DStillerLLC, Milwaukee, WI*

Way back in 1954, the Supreme Court acknowledged the “informant’s privilege,” allowing the government to withhold the identities of behind-the-scene tipsters. More than a half-century later, that game has changed. Often invoking concerns about witness safety, the government is now concealing the names of even eyewitnesses to the charged crime. And sensitive to witness safety, our courts are inclined to aid-and-abet that concealment. What can we do? The federal rules regarding what is due, when, are fuzzy, and local discovery practice varies from district-to-district. So this program doesn’t promise one-size-fits-all answers. And it’s not about early production of witness lists. Instead, it hopes to diagnose a problem: the government’s sometimes unconstitutional interference with the defense function. Acknowledging a difference between all that what we want and what we truly need, this program envisions a within-session dialog about getting what we need.

2. **Checkpoints and the 4th Amendment: What Can Defense Lawyers Do?**

Walter Goncalves, *Assistant Federal Public Defender, District of Arizona, Tucson, AZ*

The presentation will provide a little history behind checkpoints, mostly focusing on developments leading up to *United States v. Martinez-Fuerte*, 428 U.S. 566 (1976), the Supreme Court case cementing their presence along the border but also along the interior. Litigation tips and strategies will focus mainly on 4th amendment issues, including a discussion of dog sniffs. Time will also be devoted to challenging the legality of checkpoints—whether the checkpoint is primarily devoted to immigration enforcement or some other law enforcement purpose.

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12:10 – 1:30 p.m.

Lunch – On Your Own

1:30 – 2:30 p.m.

**Plenary 2: The Government Had My “Wires” Tapped:
Litigating Title III Wiretap Challenges**

Gail Shifman, *Shifman Group, San Francisco, CA*

In this era of persistent hacks and little, if any, privacy of your data, where does Title III wiretapping fit in? It now seems quaint that the Supreme Court stated in its landmark case which led to the enactment of the current wiretapping statutes, “[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices.” *Berger v. United States*, 388 U.S. 41, 63 (1967). Wiretap litigation is a complex, multi-layered process. Questions arise regarding the unique discovery production obligations of the government in these cases as well as questions about whether the government properly sought, minimized, maintained and sealed the recordings. Did they seek proper extensions for the continued interception of the electronic recordings? And, of course, was there probably cause and ‘requisite necessity’ to seek the interceptions? These issues and how to litigate them will be discussed.

2:30 – 3:30 p.m.

Plenary 3: The Categorical Approach – A Primer

Jayme Feldman, *Visiting Attorney Advisor, Defender Services Office, Training Division, Washington, DC*

“I love the categorical approach!” – said no federal practitioner (or court), ever. The categorical approach has been a thorn in our sides since it was created by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990). From the Armed Career Criminal Act, to Section 924(c); from the career offender guideline, to child pornography sentencing enhancements, the categorical approach cannot be avoided. But while it may be here to stay, this analytical framework has proven to be one of our greatest tools to achieve substantive relief for our clients. In this interactive presentation, attendees will work through each step of the categorical and modified categorical approach analyses. The presentation will place particular emphasis on post-*Mathis* issues of statutory divisibility and the use of *Shepard*-approved documents. Attendees will leave this session with a greater comfort in employing the categorical approach, will be able to identify common missteps and opportunities for advocacy, and will perhaps even leave with some fondness for the framework so many have grown to hate.

3:30 – 3:40 p.m.

Break

3:40 – 4:40 p.m.

Concurrent Sessions – 3

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3. **Combatting Penalty Enhancements Where Death or Serious Bodily Injury Results from the Use of a Controlled Substance**
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4. **The Government’s Increasingly Aggressive Game of “Hide the Witness”: What Can We Do?**
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5. **Crimes of Violence & Violent Felonies: Challenges to be Made During a Time of Conflict, Chaos, & Confusion**

Craig Crawford, *Attorney Advisor, Defender Services Offices Training Division, Washington, DC*

Does it seem like nothing should qualify as a crime of violence or violent felony? You would be right. In this session, we will apply the principles discussed in the categorical approach primer to the characterization of offenses as crimes of violence or violent felonies, saving your client years in prison.

4:40-4:50 p.m.

Break

4:50-6:00 p.m.

Plenary 4: A Panel Discussion on How to Handle and Win Conspiracy Charges

Kyana Givens, *Visiting Attorney Advisor, Defender Services Office, Training Division, Washington, DC*

Michael Kennedy, *Law Offices of Michael Jerome Kennedy, PLLC, Reno and Las Vegas, NV*

James Smith, Esq., *CPLS, P.A., Orlando, FL*

The panelists will discuss various aspects of a conspiracy case, such as organizing the case, the dynamics among co-counsels, pretrial issues, and trial tactics.

6:00 p.m.

Adjourn

Friday, December 7, 2018**7:30 – 8:30 a.m.****Registration & Continental Breakfast****8:30– 9:30 a.m.****Plenary 5: Trial Strategies to Attack Cell Site Location Information, Electronic Data, and Other Electronic Surveillance**

John Ellis, Jr., Esq., *Law Offices of John Ellis, Jr., Inc., San Diego, CA*

Law enforcement's aggressive tracking of cell phones has become a powerful and widely used surveillance tool for both federal authorities and local police. Law enforcement claims that your client's location can be pinpointed with the smart phone in his pocket using historic cell site location information (CSLI). Some in law enforcement describe these devices as "the virtual biographer of our daily activities." Not so fast! Use of CSLI contains pitfalls, misleading data and misunderstood technology which may lead to erroneous conclusions by law enforcement, attorneys, and most importantly, juries. This presentation will get attorneys started on learning the lay of the land, help elucidate the issues, the technology and the problems with over-reliance on CSLI, and present strategies for attacking the reliability of law enforcement opinions as to your client's location based upon cell phone use. This presentation will also address issues involving other forms of electronic surveillance.

9:30 – 10:30 a.m.**Plenary 6: A Drug is Not a Drug. A Gun is Not a Gun. Ten Questions You Need to Ask to Lift the Veil**

Kyana Givens, *Visiting Attorney Advisor, Defender Services Office, Training Division, Washington, DC*

This session explores the concept that there are no typical or normal drug and gun cases. But there are tools which will be discussed to help expose the government's motivation to bring the case.

10:30 – 10:45 a.m.**Break****10:45 – 11:45 a.m.****Concurrent Sessions – 4****1. Attacking Search Warrants**

Jodi Linker, *Assistant Federal Defender, Northern District of California, San Francisco, CA*

Too often, challenges to search warrants are summarily rejected by the court. This session will explore creative ways to attack them, including the identification of favorable Fourth Amendment decisions.

2. ***Brady/Giglio/Motions Practice***

Craig Albee, *Federal Defender, Eastern and Western Districts of Wisconsin, Milwaukee, WI*

This session will explore ways to creatively litigate *Brady, Giglio*, and other pretrial motions.

3. **Crimes of Violence & Violent Felonies: Challenges to be Made During a Time of Conflict, Chaos, & Confusion**

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Does it seem like nothing should qualify as a crime of violence or violent felony? You would be right. In this session, we will apply the principles discussed in the categorical approach primer to the characterization of offenses as crimes of violence or violent felonies, saving your client years in prison.

4. **Dismantling the Conspiracy Charge: Pretrial Through Trial – only time this breakout is offered**

Michael Kennedy, *Law Offices of Michael Jerome Kennedy, PLLC, Reno and Las Vegas, NV*

This session will address the big issues that arise when a client is charged with being part of a conspiracy, including pretrial challenges, trial tactics, and sentencing issues.

5. **Theories of Defense in Drug Overdose Homicides**

Callie Glanton Steele, *Senior Litigator, Office of the Federal Public Defender for the Central District of California, Los Angeles, CA*

In the wake of the opioid epidemic, United States Attorneys are prosecuting “drug cases resulting in death” more like homicide cases to seek substantial sentencing enhancements. This session explores ways to investigate, develop, and present a defense that effectively addresses the prosecution's causation narrative.

11:45 a.m. – 1:00 p.m. **Lunch – On Your Own**

1:00 – 2:00 p.m.

Plenary 7: The Fourth Amendment and Third Party Doctrine after *Carpenter*

Megan Graham, *Clinical Teaching Fellow, Samuelson Law, Technology & Public Policy Clinic at U.C. Berkeley School of Law, Berkeley, CA*

Last term, in *Carpenter v. United States*, the Supreme Court continued its recent trend of recognizing that "digital is different" when it comes to the Fourth Amendment. This session will discuss the Supreme Court's recent technology-related cases with a focus on *Carpenter*, its narrow holding and broad reasoning, and doors that may now be open for successful Fourth Amendment challenges.

2:00 – 2:15 p.m.

Break

2:15 – 3:15 p.m.

Concurrent Sessions – 5

1. **Busting Bond Myths and Winning Pretrial Release**
Alison Siegler, *Director of the Federal Criminal Justice Clinic, University of Chicago Law School, Chicago, IL*

Key provisions of the Bail Reform Act are routinely misinterpreted or ignored at initial appearances and detention hearings, resulting in the improper detention of our clients. This session will include a thorough discussion of these misconceptions and will provide tools for fighting detention, beating the presumptions, filing bond motions, and obtaining release.

2. ***Brady/Giglio*/Motions Practice**
Craig Albee, *Federal Defender, Eastern and Western Districts of Wisconsin, Milwaukee, WI*

This session will explore ways to creatively litigate *Brady*, *Giglio*, and other pretrial motions.

3. **Challenging Drug Predicates**
Kara Hartzler, *Assistant Federal Defender, Federal Defenders of San Diego, Inc., San Diego, CA*

Does it seem like nothing is a crime of violence but everything is a controlled substance offense? In this session, we will share legal challenges to the characterization of offenses as controlled

substance offenses (Guidelines), felony drug offenses (851), and serious drug offenses (ACCA). More ways to save your client years, even decades, in prison.

4. **Rules of Evidence 404 and 405: How to Use Them and Not Be Abused by Them**

James Smith, Esq., *CPLS, P.A., Orlando, FL*

We spend so much of our time and effort trying to exclude evidence that we tend to forget many evidentiary rules that allow us to tell our client's side of the story. This presentation will explore how criminal defense attorneys can use the evidentiary rules to admit favorable evidence at trial.

5. **Challenging Pattern Recognition Evidence – Fingerprints & Firearm Toolmark Analysis (AKA “Ballistics”) – only time this breakout is offered**

Jack H. Cunha, Esq., *Cunha & Holcomb, Boston, MA*

This session will address how to challenge pattern-recognition evidence/examiners, focusing on attacking the assumptions made by examiners and exposing the lack of a scientific basis when claims of individualization are made. With the findings in two National Academy of Sciences (NAS) Reports, there is now authority to use when attacking such forensics. No longer can we merely accept the notion that examiners can individualize latent fingerprints and markings on bullets/casings by detecting "unique" characteristics, particularly when both are usually damaged and partial. If you cannot exclude it, where there is a lack of standards for identifying and quantifying so-called individualizing characteristics and a lack of statistical bases for declarations of a match, the jury must be taught that these "experts" are wearing the Emperor's new clothes when they subjectively declare "I know it when I see it."

3:15 – 3:30 p.m.

Break

3:30 – 4:30 p.m.

Concurrent Sessions – 6

1. **Busting Bond Myths and Winning Pretrial Release**

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cases to seek substantial sentencing enhancements. This session explores ways to investigate, develop, and present a defense that effectively addresses the prosecution's causation narrative.

4:30 – 4:45 p.m.

Break

4:45 – 5:45 p.m.

Plenary 8: DNA: Where to Start in your Case

Jennifer Friedman, *Forensic Science Coordinator, Los Angeles County Public Defender, Los Angeles, CA*

As DNA becomes a staple of the government's case we will all have to become familiar with how to investigate and challenge DNA evidence. This is the first step toward that – a DNA primer for poets, dreamers, and all others who went to law school to avoid math and science.

5:45 p.m.

Adjourn for the day

Saturday, December 8, 2018

7:30 – 8:30 a.m.

Registration & Continental Breakfast -

8:30 – 9:30 a.m.

Plenary 9: Minimizing Relevant Conduct

Fritz Scheller, *Fritz Scheller PL, Orlando, FL*

Federal practitioners know well that conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range and have an outsize influence on the defendant's sentence. This session will address tactics and techniques for minimizing a defendant's relevant conduct at sentencing.

9:30 – 9:45 a.m.

Break

9:45 – 10:45 a.m.

Plenary 10: Effective Use of Data and Experts to Litigate Race

Juval Scott, *Attorney Advisor, Defender Services Office, Training Division, Washington, DC*

Experts can help courts and juries understand the importance of race in various areas that impact clients' life experiences both

prior to and within the context of the criminal justice system. This presentation will focus on how to recognize the need for such experts and how to obtain funding for their services.

10:45 – 11:00 a.m. Break

11:00 a.m. – 12:00 p.m. Plenary 11: Ethically Investigating and Preparing Your Snitch Cross Using Social Media, Rule 17(c) Subpoenas, Cell Phone Data, and Anything Else You Can Find
Kasha Castillo, Assistant Federal Defender, Federal Defenders of San Diego, Inc., San Diego, CA

This interactive session will discuss the key Rules of Professional Conduct that should guide attorneys when collecting and using social media, subpoenas, cell phone data, and anything else you can find to destroy the government’s key witness—the snitch.

12:00 p.m. Closing Remarks
Craig Crawford, Attorney Advisor, Defender Services Office Training Division, Washington DC

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