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Federal Defender Newsletter

April 2008

Edited by Benjamin Galloway , Research & Writing Specialist

ASSISTANT FEDERAL DEFENDER POSITION AVAILABLE IN THE FRESNO OFFICE

The Office of the Federal Defender for the Eastern District of California is now accepting applications for the position of Assistant Federal Defender in the Fresno Division. This is a full-time position with federal salary and benefits based on qualifications and experience. The position will remain open until filled.

Applications should be sent to:

Attention: Personnel
Office of the Federal Defender
Eastern District of California
2300 Tulare Street, Suite 330
Fresno, CA 93721

or applications may be sent via e-mail CAE_HR@fd.org. No telephone calls or faxes please.

SUPREME COURT ACTION: NINE CASES TO WATCH

The Supreme Court recently granted certiorari in nine cases involving criminal defense issues. As always, ensure that these issues are raised and preserved in cases pending decision by the Court.

Arizona v. Gant No. 07-542 (cert granted Feb. 25, 2008). The Court will entertain yet another case involving the automobile exception to the Fourth Amendment's warrant requirement. It granted cert to decide whether, under New York v. Belton (1981), police may conduct a warrantless search of a car if its recently arrested occupant poses no threat to officer safety or preservation of evidence. The Supreme Court of Arizona held that they may not in State v. Gant, 162 P.3d 640, 642 (Ariz. 2007).

United States v. Hayes No. 07-608 (cert granted Mar. 24, 2008). The Court will resolve a question of statutory construction, granting cert to determine whether, to qualify as a "misdemeanor crime of domestic violence" under 18 USC § 922(g)(9), the offense must have as an element a domestic relationship between the offender and the victim. The Fourth Circuit Court of Appeals held that it does. United States v. Hayes, 482 F.3d 749 (4th Cir. 2007).

Oregon v. Ice No. 07-901 (cert granted Mar. 17, 2008). Continuing its series of cases involving sentencing, the Court granted cert

to determine whether, the Sixth Amendment, as construed in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant. The Oregon Supreme Court held that it does. State v. Ice, 170 P3d 1049 (2007).

Melendez-Diaz v. Massachusetts No. 07-591 (cert granted Mar. 17, 2008). The Court also granted cert to consider whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in Crawford v. Washington (2004). The Appeals Court of Massachussetts held that it is not. Commonwealth v. Melendez-Diaz, No. 05-P-1213 (unpublished memorandum and order), reported at 870 N.E.2d 676 (July 31, 2007).

Herring v. United States No. 07-513 (cert granted Feb. 19, 2008). The Court granted cert to determine whether the exclusionary rule should apply to evidence seized incident to an arrest unlawful under the Fourth Amendment due to erroneous information negligently provided by another law enforcement agency. The Court of Appeals for the Eleventh Circuit held that it should not. United States v. Herring, 492 F.3d 1212 (11th Cir. 2007)

Giles v. California No. 07-6053 (cert granted Jan. 11, 2008, to be argued April 22, 2008). The Court granted cert in this case, for argument this term, to determine the question whether criminal defendants forfeit their Sixth Amendment Confrontation Clause claims upon a showing the defendant caused the unavailability of the witness or upon a showing the defendant's actions were undertaken specifically to prevent the witness from testifying. The California Supreme Court held the defendant in People v. Giles, 152 P.3d 433 (Cal. 2007), forfeited his right to confront his ex-girlfriend when he killed her under the rule of forfeiture by wrongdoing.

HABEAS CASES

Chrones v. Pulido No. 07-544 (cert granted Feb. 25, 2008). The Court granted cert to decide whether, on habeas review, the Ninth Circuit erred in granting relief by deeming an erroneous jury instruction to constitute structural error requiring reversal because the jury may have relied upon it. Opinion below: Pulido v. Chrones, 487 F.3d 669 (9th Cir. 2007).

Waddington v. Sarausad No. 07-772 (cert granted Mar. 17, 2008). The Court granted cert to decide whether, on federal habeas review, courts must accept state court determinations that jury instructions fully and correctly set out state law with regard to accomplice liability. Opinion below: Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007).

Jimenez v. Quarterman No. 07-6984 (cert granted on Mar. 17, 2008). The Court also granted cert in this pro se case to determine the question [as stated by the petitioner] whether a certificate of appealability should have issued pursuant to Slack v. McDaniel, 529 U.S. 473, 482 (2000) on the question of whether pursuant to 28 U.S.C. § 2244 (d)(1)(A) when through no fault of the petitioner, he was unable to obtain a direct review and the highest state court granted relief to place him back to his original position on direct review, should the one-year limitations begin to run after he has completed that direct review resetting the one-year limitations period? Opinion below: Jiminez v. Quarterman, No. 06-11240 (5th Cir. May 25, 2007).

CJA PANEL TRAINING

■ The next Sacramento panel training will be held on Wednesday, April 16, 2008 at 5:30 p.m. at 801 I Street in the 4th floor conference room. The presenter will be Captain Scott Jones, Commander of the Sacramento County Mail Jail.

■ The next Fresno panel training will be held on Tuesday, April 15, 2008 at 5:30 p.m. at the Downtown Club, 2120 Kern Street, Fresno. The topic is and presenter are to be announced.

TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, if you would like the office to address a particular legal topic or practice area, or if you would like to be a speaker, please e-mail your suggestions to AFD Melody Walcott at the Fresno office at melody_walcott@fd.org or Senior Litigator AFD Caro Marks at the Sacramento office at caro_marks@fd.org, or AFD Rachelle Barbour, also in Sacramento, at rachelle_barbour@fd.org.

ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive the newsletter. If your address, phone number or email address has changed, or if you are having problems with the email version of the newsletter or attachments, please call Cynthia Compton at (916) 498-5700. Also, if you are receiving a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

REQUEST FOR CLOTHING & FOOTWEAR DONATIONS

The clothes closet is available to all AFDs and panel attorneys. It contains suits, shoes, socks, and shirts that clients can wear for court appearances. We also have some clothes that can be given away when necessary. Donations are greatly appreciated.

Currently, the Sacramento Office has an ***immediate need for women's clothing and footwear*** for clients who are released from the jail with no street clothes. Please contact Becky Darwazeh to make arrangements to drop off clothing.

If you take borrowed clothes to the jail or U.S. Marshal's Office for your clients, please be put either your name/phone number or our name/phone number on the garment bag so that the facility will contact us for pickup of the items. Please note that you do not have to pay for the cleaning of any items used. The district court has graciously arranged for funds to pay the cleaning costs.

See Becky Darwazeh at the Sacramento Office or Nancy McGee at the Fresno office to pick up or drop off clothes.

NINTH CIRCUIT OPINIONS

CRIMINAL CASES

US v. Mendoza **Date:** 03/03/08 **Case Number:** 06-50447 **Summary:** A conviction for subscribing to a false income tax return is reversed and remanded due to a violation of defendant's Sixth Amendment speedy-trial right where, despite defendant's departure to the Philippines, an eight-year delay between defendant's indictment and arrest was a result of the government's negligence and

prejudice is presumed.

US v. Rodriguez **Date:** 03/10/08 **Case Number:** 07-10217 **Summary:** The "clear statement" rule of Davis v. US, 512 U.S. 452, 462 (1994), applies only after the police have already obtained an unambiguous and unequivocal waiver of Miranda rights. Prior to obtaining such a waiver, however, an officer must clarify the meaning of an ambiguous or equivocal response to the Miranda warning before proceeding with general interrogation.

US v. Lewis **Date:** 03/13/08 **Case Number:** 05-10692 **Summary:** In a case involving a conspiracy to violate federal wildlife and importation law, defendant's second conviction following a decision dismissing without prejudice defendant's indictment for violation of the Speedy Trial Act (STA) is reversed and remanded for the district court to review the entirety of the pre-trial delay suffered by defendant and to make specific findings as to which periods were excludable under the STA.

US v. Davis **Date:** 03/19/08 **Case Number:** 06-10527 **Summary:** The Ninth Circuit remanded to strike a conviction on one count, and to determine, under US v. Ameline, 409 F.3d 1073 (9th Cir. 2005), whether the sentence would have been different if the court had advisory rather than mandatory guidelines before it. The district court struck count four, stated that the sentence would not have been different, and then proceeded to increase substantially the sentence on a different count. The sentence imposed on defendant following the limited remand was vacated and remanded with instructions.

US v. Soto **Date:** 03/19/08 **Case Number:** 07-30011 **Summary:** The defendant requested an instruction that the jury not draw an adverse inference from his refusal to testify. The court denied his request because it wasn't made a week before trial, as the court required. The Supreme Court requires a no adverse inference instruction if requested. Here, the Ninth Circuit found that the refusal to give such an instruction was error, but not structural, and under a prejudice analysis, the refusal here was harmless. This is a per curiam (Canby, Graber and Gould), in which Graber and Gould both concurred.

US v. Davenport **Date:** 03/20/08 **Case Number:** 06-30596 **Summary:** The offense of possessing child pornography is a lesser included offense of the receipt of child pornography. Judgment sentencing defendant for receiving and possessing child pornography is vacated and remanded where his simultaneous conviction for both receipt and possession of child pornography violates the Fifth Amendment's prohibition on double jeopardy.

US v. Gianelli **Date:** 03/20/08 **Case Number:** 07-10233 **Summary:** An order reinstating a 2001 "Order Imposing Payment Plan" on defendant, aimed at collecting the remaining amount of restitution owed from his sentence for mail fraud, is affirmed where defendant waived the right to appeal the amount of the restitution order by failing to timely file a direct appeal. Because the Victim Witness Protection Act (VWPA) does not express the intent that the federal government will be bound by state statutes of limitations in the enforcement of restitution judgments, and because neither that Act nor any other federal statute limits the time for enforcement of restitution judgments under the VWPA, the government may enforce against defendant the VWPA restitution judgment at any time.

US v. Carty **Date:** 03/24/08 **Case Number:**

05-10200, 05-30120 (en banc) **Summary:** In an important en banc decision, the Ninth Circuit (Rymer) considers whether there should be a presumption of reasonableness for a guidelines sentence in the wake of Rita, Gall and Kimbrough. Considering the sentencing framework after those cases, the advisory nature of the Guidelines, and the fact that no 3553(e) sentencing factor outweighs any other, the Ninth Circuit declines to embrace a presumption. The Ninth Circuit recognizes that a Guideline sentence will usually be reasonable, but that stating there is a presumption imports "baggage" of an evidentiary nature when, on appeal, and in light of the non-binding nature of the Guidelines, serves no purpose. The opinion lays out the steps a court should follow, emphasizing the need for correct procedure to be followed by substantive review. The standard is abuse of discretion as to reasonableness. As for the cases, the Ninth Circuit affirms the sentences on both as reasonable. Still, the opinion is a clear indication of the tremendous discretion the sentencing court now enjoys.

US v. Anderson **Date:** 03/25/08 **Case Number:** 07-50145 **Summary:** Imposition of a three-year term of supervised release after revocation of a 90-day term of supervised release is affirmed over defendant's claim that the district court's authority to reimpose a term of supervised release under 18 U.S.C. section 3583(e) (1993) was limited to the duration of the revoked term.

US v. Crawford **Date:** 03/28/08 **Case Number:** 06-30205 **Summary:** A 210 month sentence for crack distribution is affirmed where: 1) the disparity between sentences for powder and crack cocaine did not actually affect defendant's sentencing level, thus Kimbrough v. United States, 128 S. Ct. 558 (2007) was inapplicable; 2) the district court neither misapprehended the sentencing framework nor adopted a presumption of reasonableness; 3) the court applied sentencing factors appropriately; and 4) the court correctly determined that defendant qualified as a career offender.

HABEAS CASES

~~**Manta v. Chertoff**~~ **Date:** 03/11/08 **Case Number:** 07-55353 **Summary:** Dismissal of a petition for a writ of habeas corpus seeking relief from a grant of a request for extradition based on foreign charges of fraud is affirmed over claims that the district court erred in concluding that: 1) a treaty's requirement of "dual criminality" was satisfied; 2) there was competent evidence to support a finding that petitioner was the individual Greece sought for extradition; and 3) competent evidence supported a probable cause determination.

Harrison v. Ollison **Date:** 03/20/08 **Case Number:** 06-55470 **Summary:** Dismissal of petitioner's 28 U.S.C. section 2241 habeas petition for lack of jurisdiction is affirmed where petitioner did not establish that his petition was a legitimate section 2241 petition brought pursuant to the escape hatch of section 2255, and thus the circuit court lacked jurisdiction under section 2241 to hear the appeal.

Whaley v. Belleque **Date:** 03/24/08 **Case Number:** 06-35759 **Summary:** Denial of a pro se habeas petition as procedurally barred is remanded for consideration on the merits where, under Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990), the state was judicially estopped from making its argument for procedural default in federal court. Having argued in a state appeals court that petitioner's claims were moot, and, as a result having obtained a dismissal of his claims, the state could not now oppose his petition for

relief on the theory that the claims were not moot, and that, therefore, he failed to exhaust an available state remedy.

~~**Harvest v. Castro**~~ **Date:** 03/27/08 **Case Number:** 05-16879 **Summary:** A district court can modify a conditional grant of a writ, even after the time for its relief has lapsed, but it must be done under Fed R Civ P. 60. Here, the petitioner was granted relief from his first degree murder conviction. The petitioner's Sixth Amendment rights were violated when the court admitted an accomplice's statement. The writ ordered petitioner's release unless the state lessened the conviction to second degree or retried the petitioner within sixty days. The state's attorney general got the order, and filed it away. They never notified the district attorney of the county where the case was tried. After the time lapsed, the state moved for a modification. The district court granted. The Ninth Circuit (Tashima) held that the court did have jurisdiction, even after the 60 days lapsed, because of equity. The court still retained jurisdiction. The jurisdiction is controlled though by Fed R Civ P 60. Yet, under Rule 60, the state was out of luck: this wasn't a mistake by the court; there wasn't a change in law; and the catch-all didn't apply. The district court is reversed, and the petitioner is released. The state, though. could rearrest and retry him.