Daniel J. Broderick
Federal Defender

Linda C. Harter
Chief Assistant Defender

Marc C. Ament
Fresno Branch Chief

OFFICE OF THE FEDERAL DEFENDER
EASTERN DISTRICT OF CALIFORNIA
801 I STREET, THIRD FLOOR
SACRAMENTO, CALIFORNIA 95814
(916) 498-5700 Fax: (916) 498-5710

Federal Defender Newsletter

June 2008

Edited by Benjamin Galloway, Assistant Federal Defender

JUDGE ISHII NAMED CHIEF JUDGE

Judge Garland E. Burrell, Jr. has decided to cease being chief judge. Effective June 1, 2008, Judge Anthony W. Ishii is the new chief judge of the Eastern District of California.

CJA PANEL TRAINING

The panel training sessions are suspended during the months of June, July, and August. The next training will take place in September 2008.

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 Research & Writing Specialist Rachelle Barbour at the Sacramento office 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 Kurt Heiser 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.

CLIENT CLOTHING & FOOTWEAR

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.

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. Tapia-Romero **Date:** 05/01/08 **Case Number:** 05-50121 **Summary:** The Ninth Circuit (T. Nelson joined by Beezer and Gould) affirms a sentence for being an illegal alien found in the U.S. after deportation where the district court correctly concluded that the cost to society of imprisoning a defendant is not a factor to be considered in determining the appropriate length of a defendant's term of imprisonment under 18 U.S.C. sections 3553(a) and 3582(a). Defendant argued that cost was a factor to be considered; the court stated that it was not for an Article III court to decide to save the system money. On appeal, the Ninth Circuit agreed, stating that 3553 does not allow or require such consideration. Defendant had argued that the "need for rehabilitation" and "the kinds of sentences available" would permit such consideration.

US v. Chapman **Date:** 05/06/08 **Case Number:** 06-10316, 06-10610 **Summary:** The Ninth Circuit (Wardlaw joined by Hawkins and O'Scannlain) affirms the dismissal of an indictment against defendants after the prosecution admitted that it had failed to meet its obligations to disclose over 650 pages of documents to the defense where: 1) the Double Jeopardy Clause did not bar the government's appeal under the circumstances; but 2) the district court did not abuse its discretion in dismissing the indictment as the government egregiously failed to meet its constitutional obligations under Brady and Giglio, and committed flagrant prosecutorial misconduct justifying dismissal; and 3) further, there was no abuse of discretion in finding that a retrial would substantially prejudice defendants. The Ninth Circuit concludes: "This is prosecutorial misconduct in its highest form; conduct in flagrant disregard to the United States Constitution; and conduct which should be deterred by the strongest sanction available."

US v. Mendoza **Date:** 05/08/08 **Case Number:** 06-50447 **Summary:** This is a new opinion relating to a dismissal for a Sixth Amendment speedy trial violation (eight year delay between the indictment and arrest). The original opinion was withdrawn and this one issued. The Ninth Circuit (T. Nelson joined by Paez and a concurrence by Bybee) find that the defendant was living openly in the Philippines, and that the government had plenty of information and leads to inform him that he was facing charges. The defendant did not know that he was facing these tax evasion charges. Under Barker, his constitutional speedy trial rights were violated. Bybee concurs because of precedent, but he is troubled that a defendant can supposedly run but since he did not hide, assert speedy trial.

US v. Pete **Date:** 05/08/08 **Case Number:** 06-10390 **Summary:** A conviction for second degree murder on an Indian reservation, felony murder, and conspiracy to commit murder, is affirmed where: 1) the entire period from the time defendant filed his "Motion to Recall the Mandate" on December 23, 2004, up until the Supreme Court denied his certiorari petition on June 20, 2005, was excludable; and 2) thus, the Speedy Trial Act (STA) was not violated and a motion to

dismiss the indictment was properly denied.

US v. Caruto **Date:** 05/12/08 **Case Number:** 07-50041 **Summary:** The Supreme Court in Doyle found a due process violation if the prosecutor commented on the defendant's silence. The question here is whether the prosecutor could argue omissions in defendant's post-arrest statement before invoking her Miranda rights. The Ninth Circuit (Wilken, D.J., joined by Graber and Berzon) held that the prosecutor could not. The defendant was arrested coming cross the border with cocaine in the gas tank. She at first waived her Miranda rights and made a statement that she had lent her car, and had just gotten it back, and was going to drive it to Los Angeles. After seven minutes or so, she then invoked her Miranda rights. At trial, the agent who took the post-arrest statement acknowledged changes in his notes and cross-outs. The defendant testified and was cross examined on inconsistencies. There were also corroborating witnesses to her version. In closing, the prosecutor hammered on omissions in her post-arrest statement, and the inconsistencies with her trial testimony, implicitly commenting on her invocation of silence. This was a due process violation. It was not harmless given the focus on her credibility. The Ninth Circuit's holding is an extension of Doyle and finds support in precedent. A very good case for buttressing Miranda and Doyle.

US v. Crandall **Date:** 05/13/08 **Case Number:** 06-50592 **Summary:** The convictions for fraud were affirmed in this real estate scheme of fraudulently converting apartments to condos by backdating the apartment building as a stock-cooperative. The Ninth Circuit though (Holland joined by Farris and Smith) vacated the sentence because the guidelines for loss were misapplied. The Ninth Circuit discussed various options, from intended loss, to actual loss, and could not come up with any one way because all loss measurements had problems (after all, the purchasers still had the apartments to live in or rent out). The Ninth Circuit stated that it was not readily apparent how the district court should value loss, but that it could not use a straight "loss of goods" in this case.

US v. W.R. Grace **Date:** 05/15/08 **Case Number:** 06-30192 **Summary:** In an en banc decision, the Ninth Circuit (Fisher) upheld a district court's discretion, pursuant to Fed. R. Crim. P. 2 and 16, and its inherent authority, to order disclosure of the government's witness list and to hold the government to it. The court can do so to allow for orderly trial. The Ninth Circuit therefore joins other circuits that have so held. The Ninth Circuit also spent a lot of time discussing whether the government could appeal the district court's order interlocutorily by only citing the barest of justifications ("not for delay" and "substantial proof" is material) under 3731. The Ninth Circuit decides that following the sparse language, so long as it is certified by the US Attorney, is good enough. Concurring in judgment, Hawkins, Pregerson and Wardlaw would require more than the government's "say so."

US v. Perez **Date:** 05/16/08 **Case Number:** 07-10289 **Summary:** A person on supervised release had a right to cross-examine the laboratory technician who tested a urine sample containing an illegal drug, where: 1) a test report itself stated the sample was "dilute"; 2) the evidence presented showed the person on supervised release did not have an opportunity herself to dilute nor add a substance to the sample; and 3) the result of the urinalysis was critical to support a finding that the person on supervised release had possessed or used illegal drugs. The circuit court emphasizes that it does not hold

that a releasee always has a right to cross-examine the technician who tested a urine sample.

US v. Dallman **Date:** 05/19/08 **Case Number:** 05-30349 **Summary:** This is a relevant conduct case. The defendant came across the Canadian-US border with duffel bags of marijuana tied together, and with two other co-defendants also with duffel bags. The border patrol spotted the defendant, and he got tangled up in the bags and was arrested, as were his two companions. For relevant conduct purposes, all the marijuana brought by all defendants were lumped together (three bags full). The court considered it a joint undertaking. The defendant appealed, and the Ninth Circuit (Gould joined by Canby and Bea) agreed. The determination by the court that all three were acting in concert was not erroneous. The district court, however, committed error in giving the guidelines a presumption of reasonableness. The Ninth Circuit, under plain error review, held that the defendant's substantive rights were not affected based on the court's reasoning in support of the sentence imposed, and the fact that the court declined to give an aberrant behavior departure, and did give a minor role adjustment.

US v. Vasquez-Landaver **Date:** 05/21/08 **Case Number:** 07-50226 **Summary:** This is the latest pronouncement by the Ninth Circuit on duress defenses. It arises in the context of a 1326 prosecution. The defendant gave pretrial notice that he was going to mount a duress defense, and would testify that he left El Salvador because the police had it in for him. He was the subject of extortion by a particular officer, who was then arrested and convicted for the threats. The officer was killed in prison and his comrades vowed to get defendant. The defendant then came to the United States via a smuggler because he feared for his life in any country but the U.S.. The court granted the government's pretrial motion to preclude an expert on El Salvador, and refused to give an instruction. In a subsequent pretrial ruling, the court precluded the defendant from even testifying about duress as irrelevant. He was convicted and sentenced to 90 months (the plea would have been to 48). On appeal, the 9th (Ikuta joined by Wardlaw and Gould) affirmed the conviction and sentence. The Ninth Circuit stressed that duress requires a threat, a well-grounded belief it would be carried out, and a lack of reasonable opportunity to escape. Here, the defendant had opportunities to seek escape aside from coming to the U.S. (where he had a lengthy record), and the threats were not well grounded. The Ninth Circuit held that a prima facie case was not made. U.S. v. Moreno, 102 F.3d 994 (9th Cir. 1996). As for the sentence, the Ninth Circuit held it to be reasonable. The court was aware of the 3553 factors, and did not need to go through each one, and the Ninth Circuit found no vindictiveness from the court because the defendant went to trial (the defendant even got acceptance).

US v. Fernandez **Date:** 05/27/08 **Case Number:** 06-50595 **Summary:** Where the government reasonably and in good faith concludes that the target of a wiretap surveillance has adopted a new alias, it may continue to intercept such target's conversations without violating the minimization requirement of 18 U.S.C. section 2518(5).

US v. Santana **Date:** 05/27/08 **Case Number:** 07-50190 **Summary:** Defendant had a supervised release detainer awaiting him while in state custody. His state release day came and went, and he stayed in state custody for four months before he appeared in the district where the petition to revoke had

been filed. The district court expressed concern with the delay but found no prejudice. The Ninth Circuit (Gibson joined by O'Scannlain and Graber) affirmed, holding that a motion for relief under due process required unreasonable delay and prejudice, and none was put forward here. Although no prejudice was required in Mendoza, with an eight-year delay between indictment and arrest, that differed in extent between four months and eight years, and there was a distinction between speedy trial rights for trial and for supervised release. The latter requires, at least within the four month range, prejudice. As for the argument that Apprendi requires proof in SR proceedings, the Ninth Circuit said supervised release is not governed by the Sixth Amendment right for jury.

US v. Marler **Date:** 05/29/08 **Case Number:** 07-30181 **Summary:** A sentence imposed following defendant's guilty plea to being a felon in possession of a firearm is affirmed where his prior sentence for escape was not "related" to his robbery conspiracy sentence for purposes of calculating his criminal history score under U.S.S.G. section 4A1.2. Although escape is deemed to be a continuing offense for some purposes, here the two offenses were not related in any other way and were discrete, dissimilar offenses.

US v. Giberson **Date:** 05/30/08 **Case Number:** 07-10100 **Summary:** Denial of defendant's motion to suppress evidence of child pornography found on his personal computer, which led to his conviction for receipt of child pornography, is affirmed where: 1) in this case, where there was ample evidence that documents authorized in a warrant could be found on defendant's computer, officers did not exceed the scope of the warrant when they seized the computer; and 2) searches of the computer were pursuant to valid warrants and reasonable. However, the sentence is vacated and remanded pursuant to a claim that the district court erred when it sentenced him for both receipt and possession of child pornography, as the sentencing was multiplicitous.

US v. Hinkson **Date:** 05/30/08 **Case Number:** 05-30303 **Summary:** In an appeal from convictions for solicitation of murder of federal officers, the Ninth Circuit (W. Fletcher joined by Hug) reverses and orders a new trial. The government used as a key witness the person the defendant allegedly solicited for the murders. It turns out that the witness was a liar and forger. The witness said he was a Korean war veteran, and other fabrications, when he was not. The Ninth Circuit said this made his testimony suspect, and that the denial of a new trial motion was an abuse of discretion. In dissent, McKeown argues that the district court weighed and balanced the evidence, and his decision to deny the trial should be affirmed, although she would go so far as to allow a remand for further fact-finding as to when the government knew of the fabrications.

HABEAS CASES

Brown v. Farwell **Date:** 05/05/08 **Case Number:** 07-15592 **Summary:** "The prosecutor's fallacy" occurs when the prosecutor confuses source probability of DNA with random match probability. That is, a 1 in 10,000 probability of a random DNA match is NOT equated to a 1 in 10,000 chance that the sample did not come from the defendant. Petitioner was convicted of sexual assault on a child. There was conflicting circumstantial evidence, and real questions of eyewitness identification. The state's expert gave testimony that stated that petitioner's guilt was 99.99967%, and downplayed the matching of petitioner's four

brothers. The state admitted error in prior proceedings but tried to backtrack at argument. The Ninth Circuit affirmed the district court's granting of the petition (Wardlaw joined by Hawkins). The Ninth Circuit focused on the Jackson standard of a rational jury versus a reasonable jury, and that an analysis was lacking of the elements and evidence in the state supreme's court's decision. O'Scannlain dissented, arguing that the state supreme court's application of Jackson and federal law was reasonable, and that the evidence had to be viewed in the light most favorable to the state, and here there was circumstantial evidence, and some weight should be given to DNA.

Woods v. Carey **Date:** 05/12/08 **Case Number:** 05-55302 **Summary:** In habeas proceedings arising after petitioner was convicted of second degree murder and unlawful use of a firearm, dismissal of the habeas petition as barred as successive under 28 U.S.C. section 2244(b) is vacated and remanded with instructions that the district court construe petitioner's pro se petition as a motion to amend the habeas petition that was still pending before the district court at the time this new petition was filed.

Miller v. Blacketter **Date:** 05/12/08 **Case Number:** 06-36090 **Summary:** The Ninth Circuit (O'Scannlain joined by Graber and Callahan) affirm the denial of a petition asserting that petitioner's right to counsel of choice was denied. The petitioner had committed a number of robberies, given a statement, and was looking at a lot of time. On the day of trial, he asked trial court to continue trial so that he could hire another lawyer. His father was willing to put up the money. The court inquired into the relationship between petitioner and appointed counsel, reviewed motions that counsel filed, and when faced with a 30-day continuance, denied the motion. The Ninth Circuit here held that the state court did not abuse its discretion in balancing the right to counsel against concerns of fairness and scheduling as set forth by the Supremes Court in Gonzalez-Lopez.

Correll v. Ryan **Date:** 05/14/08 **Case Number:** 03-99006 **Summary:** Denial of petition for writ of habeas corpus is reversed and the case remanded for a new penalty hearing where defendant was constitutionally entitled to the presentation of a mitigation defense, but did not have an opportunity to offer mitigating evidence. (Amended opinion on denial of rehearing en banc)