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# Federal Defender Newsletter

## *March 2008*

*Edited by Benjamin Galloway , Research & Writing Specialist*

### *DAVID PORTER WINS DISTRICT'S FIRST RELEASES AFTER CRACK COCAINE RETROACTIVITY VOTE*

On December 11, 2007, the Sentencing Commission agreed to allow prisoners serving crack cocaine sentences to seek sentence reductions that went into effect on November 1. On February 12, 2008, Judge Shubb sided with AFD David Porter and ordered the release of Vernon Leon Watts (of US v. Watts 519 U.S. 148) over the government's objection. On February 26th, Judge Jensen released Anthony Cannon. On March 3rd, David won the release of ten others, with orders signed by Judges Wagner and Ishii. David has moved on to cases of inmates who will be eligible for release later this year and next year.

### *IN-CUSTODY CLIENT ISSUES? E-MAIL THE MARSHALS*

The Sacramento Division of the U.S. Marshals Service, Eastern District has a new e-mail account set up to receive, respond to, and track prisoner issues including medical problems and housing/security needs. The Marshals ask that inquiries and requests be e-mailed to them before they are addressed in open Court. Their hope is that this procedure will provide a more effective means to address prisoner issues in a timely manner. The e-mail address is: usms.cae-pmi@usdoj.gov

### *RDAP FOR FELONS IN POSSESSION, OR WITH GUN BUMP*

On February 20, 2008, the Ninth Circuit issued an opinion in Arrington v. Daniels, __ F.3d __, 2008 WL 441835 (9th Cir. Feb. 20, 2008), that expands the group of federal prisoners eligible to earn time off of their sentence by successfully completing a residential substance abuse program. Under 18 U.S.C. § 3621(e)(2)(B), the Bureau of Prisons ("BOP") may reduce by up to one year the prison term of an inmate convicted of a nonviolent felony if the prisoner successfully completes the BOP's residential substance abuse treatment program, the 500-hour Comprehensive Residential Drug Abuse Program known as "RDAP." In 2000, the BOP promulgated 28 C.F.R. § 550.58(a)(1)(vi)(B), which categorically excludes from early release any person whose "current offense is a felony.... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives[.]" Under this regulation, persons who were convicted under 18 U.S.C. §

922(g), as well as drug defendants who got the two-level guideline gun bump, could not get a sentence reduction for successfully completing the substance abuse treatment program. The Ninth Circuit held that the BOP did not follow the Administrative Procedures Act in passing this regulation because it did not provide a rational basis for the exclusion of these persons from early release, and therefore the regulation is invalid.

■ ***Arrington's Impact***

What does the Arrington decision mean for current and former clients? Any person who was excluded from eligibility for a sentence reduction under the regulation and who has completed the RDAP program should now be eligible for a sentence reduction, at least if they are doing time within the Ninth Circuit. In the Ninth Circuit Blog, Northern District Assistant Federal Defender Steve Kalar reports that one attorney in the BOP counsel's office suggested that these prisoners should immediately file an "Administrative Remedies Request" or "COP-OUT" form to seek an earlier release date. Steve also notes that for new cases, defense attorneys who have not pushed § 922(g) clients to discuss drug addiction in PSR interviews, or sought RDAP referrals from the sentencing judge, because these clients could not get time off for successful completion of the program may want to rethink this approach. At least for now these individuals are eligible for the time off, and, as Steve points out, it is much harder to get into the program without documentation of addiction in the PSR and a RDAP recommendation from the sentencing judge reflected in the order of judgment and commitment.

If you know of individuals who may benefit from the Arrington decision and need legal assistance, please contact Assistant Federal Defender Carolyn Wiggin.

## *TWO ASSISTANT FEDERAL DEFENDER POSITIONS TO BE AVAILABLE IN THE FRESNO OFFICE*

The Office of the Federal Defender for the Eastern District of California is now accepting applications for Assistant Federal Defenders in the Fresno Division. These positions will be open in May and June, 2008. These are full-time positions with federal salary and benefits based on qualifications and experience. The positions will remain open until filled.

Applications should be sent to:

Attention: Personnel
Office of the Federal Defender
Eastern District of California
801 I Street, 3rd Floor
Sacramento, CA 95814

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

## *CJA PANEL TRAINING*

■ The next Sacramento panel training will be held on Wednesday, March 19, 2008 at 5:30 p.m. at 801 I Street in the 4th floor conference room. The topic is Bias In The Federal System And Federal Courtroom. Basim Elkarra, Executive Director of the Sacramento Valley Office of the Council on American-Islamic Relations (CAIR-SV) and Wazhma Aziza Mojaddidi, Esq. will be presenting.

■ The next Fresno panel training will be held on Tuesday, March 18, 2008 at 5:30 p.m. at the Downtown Club, 2120 Kern Street, Fresno. The topic is Defending Federal Sex Offender Registration Cases. Marc Ament, Fresno Branch Chief, and Samya Burney, Research/Writing Attorney will be presenting.

### *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. Jennings** **Date:** 02/04/08 **Case Number:** 06-30190 **Summary:** A conviction and sentence for being a felon in possession of a firearm and possession of a firearm with an obliterated serial number is affirmed in part and vacated in part where: 1) certain challenged evidence was properly held to be admissible as defendant did not suffer a violation of his Fourth or Fifth Amendment rights; but 2) he did not qualify for a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA) as he had not suffered three prior convictions for "violent felonies" within the meaning of 18 U.S.C. section 924(e)(2)(B). Here, the Ninth Circuit (Tashima joined by Berzon) vacated and remanded the sentence because one of the Washington State priors, attempted eluding of a police car, is not categorically a violent felony under the ACCA's catch-all of "conduct that presents potential risk of physical injury to another," as it lacks any element of actual or potential risk of harm to another or a mental state of such. Dissenting, O'Scannlain argued that the Supreme Court has effectively overruled Ninth Circuit precedent on this issue in

Duenas-Alvarez, 127 S.Ct 815 (2007) and James, 127 S. Ct. 1586 (2007). He also argued that previous Ninth Circuit precedent (Kelly, 422 F.3d at 893) was wrongly decided in that it posits an "all or nothing" approach to the categorical analysis and is at odds with all the other circuits.

**US v. Murphy** **Date:** 02/20/08 **Case Number:** 06-30582 **Summary:** In a prosecution for drug-related offenses, denial of a motion to suppress evidence seized as a result of two searches is affirmed in part and reversed in part where police followed suspected meth producers back to a storage unit where they knew the defendant was living. The unit was rented by another suspect. The police knocked on the door, and the defendant greeted them with a metal pipe in hand. The police ordered him to drop the pipe, which he did. The police claimed to have then seen a meth lab. The police conducted a sweep. After waiting a couple hours, the police then did another search, supposedly with the consent of the renter of the storage unit (the other suspect). The Ninth Circuit (Reinhardt joined by Goodwin and Smith) upheld the first search under the protective sweep exception, because the police did not know if the other suspect was hiding in the unit. Plain view however still requires a warrant, or other exception. The Ninth Circuit held that the search two hours later was not proper because the defendant was living at the unit, and had an interest that he shared with the renter. Under Randolph, the consent of the nonresident co-owner could not trump the objection of the resident /defendant. The Ninth Circuit also stressed that there is no hierarchical standing recognized here. An owner as opposed to resident is not the same as a parent/child or differing military ranks. This is an important vindication of Randolph.

**Arrington v. Daniels** **Date:** 02/20/08 **Case Number:** 06-35855 **Summary:** The Bureau of Prisons (BOP) violated section 706(2)(A) of the Administrative Procedure Act (APA) when it promulgated a regulation categorically excluding from eligibility for early release under a particular statute, those whose "current offense is a felony...[t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives[.]" This case is discussed in detail above.

**US v. Turvin** **Date:** 02/26/08 **Case Number:** 06-30551 **Summary:** In a prosecution for drug and firearm-related offenses, the Ninth Circuit (Wallace and Noonan) reversed an order suppressing evidence obtained from a search of defendant's vehicle where: 1) the conclusion in US v. Mendez, 476 F.3d 1077 (9th Cir. 2007), that officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop applied because the officer's question and request for consent to search did not unreasonably prolong the duration of the stop; and 2) consequently, the stop was at all times a lawful detention and defendant's voluntary consent rendered the search legal. Dissenting, Paez argued that unrelated questions can be asked only if there is a reasonable basis; the officer can't just ask about anything and everything.

**US v. Garro** **Date:** 02/28/08 **Case Number:** 06-50513 **Summary:** The defendant was convicted of wire fraud, money laundering, and tax evasion. At sentencing, the defendant got 135 months, which was a three level departure from the guidelines. The Ninth Circuit rejected arguments against the adjustments for sophistication, obstruction of justice (testimony), use of another (secretary), and the burden of proof. On that issue, the Ninth Circuit held that the clear and convincing standard is appropriate if there is uncharged conduct, but here the defendant was sentenced on the convicted counts.

Moreover, this was a plain error review. Finally, the Ninth Circuit found the sentence reasonable after section 3553 considerations.

**US v. Barsumyan** **Date:** 02/28/08 **Case Number:** 07-50251 **Summary:** In a case involving a scheme to manufacture counterfeit credit cards, a sentence imposed following defendant's guilty plea to possession of device-making equipment is affirmed in part as to the sentence and a condition of supervised release requiring defendant to report to a probation office should he be deported and reenter the country. However, the sentence is vacated in part as to a condition of supervised release imposing a restriction on "access[ing] or possess[ing] any computer or computer-related devices in any manner," as such a sweeping and indefinite condition was unwarranted under the circumstances.

## HABEAS CASES

~~**Gonzales v. Knowles**~~ **Date:** 02/06/08 **Case Number:** 06-17054 **Summary:** The Ninth Circuit (Cowen -- visiting -- joined by Smith over a dissent by Hawkins) affirmed the denial of a habeas petition. The petitioner was serving a 16 year child sex sentence in California. He had received a stiffer sentence but his appointed lawyer on appeal won a new sentencing. Petitioner sought to have that lawyer appointed for the resentencing because the lawyer knew the case, and had worked up extensive mitigation. The state trial court said "that's not how we do things around here" and appointed a lawyer with no familiarity with the case, despite the desired lawyer's willingness to work for the county's appointed rate. The sixth amendment gives counsel, but not counsel of choice, and here the judge's decision was not unconstitutional. The new lawyer received a lengthy letter from the old one, detailing what mitigation was out there. The new lawyer did nothing. The courts all said that was "fine," and if there was something to be done, well, it was harmless. Dissenting, Hawkins wondered why a policy of "that's not how we do it around here" should trump the advantages of an experienced counsel familiar with the case. Hawkins stressed that an evidentiary hearing should have been held on the IAC claim.

**Harris v. Carter** **Date:** 02/08/08 **Case Number:** 06-35313 **Summary:** Dismissal of a petition for a writ of habeas corpus as untimely is reversed and remanded where petitioner was entitled to equitable tolling on the AEDPA's one-year statute of limitations. Petitioner is serving a state LWOP sentence for murder. He appealed his sentence, and when that became final, filed a timely state petition, and then subsequently untimely ones. The Ninth Circuit's precedent had been that even untimely state petitions tolled AEDPA's one year statute of limitations. The Supreme Court reversed in Pace, holding that untimely state petitions are not properly filed. The petitioner's federal claim was timely under the Ninth Circuit's precedent, but barred by Pace. The State argued that petitioner was now time-barred. The Ninth Circuit, joining the Tenth Circuit, invoked equitable tolling, since the petitioner had relied upon established clear precedent, and had not been negligent or tactical. Equity demanded tolling, and so the Ninth Circuit let him proceed.

**Anderson v. Terhune** **Date:** 02/15/08 **Case Number:** 04-17237 **Summary:** Denial of a petition for writ of habeas corpus from a conviction for special circumstances murder is reversed where: 1) a state court's conclusion, that petitioner's invocation of his right to remain silent was ambiguous, was an unreasonable application of Miranda and based on an unreasonable determination of

the facts, particularly in light of petitioner's declaration, "I plead the Fifth"; 2) further, construing an officer's statement, "Plead the Fifth? What's that?", as asking what petitioner meant was also an unreasonable determination of the facts; and 3) the errors were not harmless.

**Cook v. Schriro** **Date:** 02/20/08 **Case Number:** 06-99005 **Summary:** The Ninth Circuit affirmed the denial of a petition in a capital case. The petitioner represented himself, and the Faretta waiver was knowing and proper. Bad things flowed as a result, such as his failure to preserve most trial and sentencing issues. The petitioner's attempt to raise IAC in the appellate context was also denied. The Ninth Circuit held that the prosecutor's rebuttal was proper, and did not comment on silence. Lastly, there was no evidence to support the giving of a second degree jury instruction.