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Federal Defender Newsletter

May 2008

Edited by Benjamin Galloway , Research & Writing Specialist

OFFICE UPDATE: *TWO ATTORNEYS REDESIGNATED*

The Federal Defender Office in Sacramento is pleased to announce that Ben Galloway has been selected take over Ned Smock's AFD position, and that Rachelle Barbour will be redesignated as a permanent Research and Writing Attorney.

Ben received his BA from UC Berkeley and his law degree from Santa Clara. He worked as an Assistant Public defender with the Santa Clara County Public Defender's office and the Sacramento County Public Defender's office. He also worked for Topel and Goodman in San Francisco. Ben has been with our Sacramento Office as a Research and Writing Attorney since October 2007. Ben is also proficient in Spanish.

Rachelle received her BA and JD from University of Michigan. She was a Legal Research Attorney for the San Francisco Superior Court, the California Supreme Court, and the California Judicial Council. In 1999, Rachelle joined our office as a Research and Writing Attorney. She was appointed an Assistant Federal Defender in 2001.

NEW AFD AND NEW RESEARCH & WRITING ATTORNEY IN SACRAMENTO

The Federal Defender is also pleased to announce the two latest attorney hires for the Sacramento office.

Michael Petrik will join us as the Research and Writing Attorney. Michael received his BA from Princeton and his JD from State University of New York at Buffalo. He worked as an Assistant Federal Defender in the San Diego office for three years, followed by one year as a civil litgator at Brobeck, Phleger & Harrison. Michael returned to the Federal Defenders of San Diego in 1999, as a trial attorney for three years, then as a supervising attorney for 5 years.

Lauren Cusick will be joining us as an AFD in mid-June. Lauren also received her Bachelor's degree with honors from Princeton and her JD from NYU, where she was a senior articles editor for the Review of Law and Social Change. While in law school, Lauren clerked for the Innocence Project, the Federal Defender's office in New York, and the D.C. Public Defender Service. For the past three years, she has worked as an Assistant Public Defender in Miami, Florida.

JUDGE MENDEZ CONFIRMED

Sacramento Superior Court Judge John A. Mendez has been confirmed by the U.S. Senate as Sacramento's newest federal judge. Congress has authorized six full-time judges for the district, and Mendez fills the only vacant seat. The 52-year-old Mendez was appointed to the Superior Court by Gov. Gray Davis in June 2001. He has served as a trial judge and juvenile court judge. He also did two stints with the U.S. Attorney's Office in the San Francisco-based Northern District of California, and has been in private practice in two Sacramento and three San Francisco firms.

NINTH CIRCUIT E-MAIL NOTIFICATION

Problems have been reported with the Ninth Circuit's shift to notification by e-mail. If you have a case set for oral argument, you should regularly check the Ninth Circuit Pacer to see if there have been any changes.

The Ninth Circuit pacer link has changed: https://ecf.ca9.uscourts.gov/

CJA PANEL TRAINING

- The next Sacramento panel training will be held on Wednesday, May 21, 2008 at 5:30 p.m. at 801 I Street in the 4th floor conference room. The topic is case budgeting.

- The Fresno Office's May 3rd sentencing seminar was cancelled. The rescheduled date and time will 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.

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. Horvath **Date:** 04/9/08 **Case Number:** 06-30447 (order) **Summary:** This is an order denying rehearing en banc. The panel decision reversed a conviction for a material misstatement under 1001 to a probation officer in the PSR. The panel had held it was not material because the probation officer was required under Fed. R. Crim. P. 32 to state the defendant's version or statements. The dissents argue that the probation officer is not just a conduit but assesses statements and that it plays into sentencing. It also points out that the Ninth Circuit is now in conflict with the Fourth Circuit on this issue.

US v. Vasquez-Ramos **Date:** 04/10/08 **Case Number:** 06-50553, 06-50694 **Summary:** Denial of defendants' motion to dismiss their indictments for possessing feathers and talons of bald and golden eagles and other migratory birds without a permit in violation of the Bald and Golden Eagle Protection Act (BGEPA), and the Migratory Bird Treaty Act (MBTA), is affirmed where, pursuant to prior circuit precedent which remains binding, the prosecutions did not violate the Religious Freedom Restoration Act (RFRA).

US v. Sullivan **Date:** 04/11/08 **Case Number:** 06-50710, 06-50714, 07-50087 **Summary:** Defendants' convictions and sentences for mail, wire, and bankruptcy fraud, money laundering, and conspiracy to commit fraud and money laundering are affirmed over claims that: 1) the evidence was insufficient to support the convictions; 2) the government created a prejudicial variance between the indictment and proof at trial; 3) one defendant's trial should have been severed, and 4) the prosecutor engaged in misconduct.

US v. Ibrahim **Date:** 04/14/08 **Case Number:** 07-50153 **Summary:** Denial of defendant's motion for return of property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, filed at a time when no criminal charges were pending, is reversed and remanded where: 1) the district court improperly converted the motion for return of property into a motion for summary judgment, and then decided the issue in an ad hoc proceeding, under a preponderance of the evidence standard; 2) applying the appropriate standard, a genuine issue of material fact existed as to whether defendant received actual notice of the forfeiture.

US v. Rising Sun **Date:** 04/14/08 **Case Number:** 06-30614 **Summary:** The defendant murdered two women in an isolated part of the Crow Indian Reservation. Indicted on first degree murder, he subsequently pled to two counts of second degree murder, with the possibility that the sentences would run consecutively. He received two life terms, but appealed. He argued that in sentencing, the court erred in adjusting for vulnerable victim (+2 levels) and obstruction (+2). The vulnerable victim adjustment was for the murders taking place in a remote part of the Reservation; and the obstruction for the defendant threatening witnesses before the investigation started to remain silent. The district court also gave a +3 level upward departure for extreme conduct. The Ninth Circuit (Gould) reversed, holding that the record did not support the vulnerability based on remoteness. There were no facts developed that showed the victims were lured there, or had some vulnerability in the isolation that was part and parcel of, say, their job. They were just with the defendant there. The Ninth Circuit

stressed that remoteness could be a basis, but a factual basis had to be laid. As for obstruction, the 2003 Guideline had a temporal dividing line, subsequently erased, and therefore, under *ex post facto*, the obstruction occurred before an investigation started. The sentence was vacated and remanded.

US v. Perdomo-Espana **Date:** 04/14/08 **Case Number:** 07-50232 **Summary:** Defendant suffered from diabetes. This led to a stroke while he was in a federal prison. Upon his release, he was deported, with a small amount of insulin. That was soon used up, and the insulin available in Mexico proved ineffective. Defendant felt he had to return. Turned away at the POE, he tried to sneak in and was caught. He argued necessity at trial, and asked for a jury instruction. The court denied (although the court allowed defendant to testify as to why he did come back). On appeal, the issue was that jury instruction, with the question whether the necessity defense requires an objective standard. The Ninth Circuit found that it did, rather than a subjective one (which focused of the defendant's own state of mind). The giving of the instruction based on a factual basis was then resolved under an abuse of discretion standard. The Ninth Circuit affirmed the conviction.

US v. Grissom **Date:** 04/15/08 **Case Number:** 06-10688 **Summary:** A sentence for distribution of cocaine base is vacated and remanded where: 1) the government preserved its objection to the sentence calculation; 2) the district court made no relevant conduct determination, but instead made an erroneous legal determination that it was not required to take such conduct into account; and 3) it erred by refusing to consider dismissed quantities of crack cocaine in calculating the sentence.

US v. Garcia **Date:** 04/17/08 **Case Number:** 05-30356 **Summary:** Sentences imposed for drug-related offenses are affirmed primarily where the district court did not commit plain error by: 1) failing to explicitly set the maximum number of non-treatment related drug tests to which one defendant will be exposed as a condition of supervised release; nor 2) imposing a financial disclosure condition on a defendant who has been convicted of a drug trafficking offense and has a history of drug use. (Superseding opinion)

US v. Arnold **Date:** 04/21/08 **Case Number:** 06-50581 **Summary:** The Ninth Circuit decided whether offices at LAX may examine the electronic contents of a passenger's laptop without reasonable suspicion. The district court said "no." The Ninth Circuit (O'Scannlain joined by Smith and Mosman) reversed and permitted the search. The defendant was returning from overseas and going through Customs. The Customs agent had him turn on his computer, where icons appeared titled "Kodak Memories" and "Kodak Pictures." These revealed photographs of nude women. A more thorough search revealed photos of child pornography. The district court suppressed, finding that search was without reasonable suspicion. The Ninth Circuit overturned, holding that reasonable suspicion was not required at the border, that the computer was not damaged, and that the computer was not like a human mind, but closer to a closed container.

US v. Shi **Date:** 04/24/08 **Case Number:** 06-10389 **Summary:** A foreign national who forcibly seizes control of a foreign vessel in international waters may be subject to the jurisdiction of the U.S. when such vessel is intercepted by federal authorities. The foreign national's conviction and sentence for seizing

control over a ship by force, and performing an act of violence likely to endanger the safety of the ship, is affirmed over challenges regarding: 1) the district court's jurisdiction; 2) the sufficiency of the indictment; 3) the admissibility of a statement to an agent; 4) the admissibility of letters seized from defendant's bunk; and 5) the constitutionality of his sentence.

US v. Aguila-Montes **Date:** 04/28/08 **Case Number:** 05-50170 **Summary:** Defendant won the overly-broad categorical war, but lost his own modified battle when it came to determining, under the Guidelines, whether California's residential burglary statute was a crime of violence. The Ninth Circuit has already held that the state burglary statute broadens the Guidelines' generic category of burglary because the entry need not be unlawful or unprivileged. Rodriguez-Rodriguez, 393 F.3d at 857. Left undecided, and for another day, was whether the statute, encompassing liability as an accessory after the fact, was overbroad. This would happen if aider and abettor liability stretched to cover an accessory. Unfortunately for the defendant, under a modified categorical approach, he had plead guilty to a count that had facts that admitted unlawfully entering a dwelling house. The offense was a crime of violence under the Guidelines, but only because the plea proved it.

US v. Mara **Date:** 04/28/08 **Case Number:** 07-30102 **Summary:** One can lose acceptance for continued criminal acts, even if unrelated to the plea of conviction. Here, defendant plead guilty to being a felon-in-possession. While awaiting sentencing, he got into a fight in jail. This altercation led the court to determine that the defendant had failed to accept responsibility, and so he lost the two points. The Ninth Circuit had previously held that continued criminal conduct related to the offense plead to could lead to denial of acceptance; this goes a step further, and allows for denial even if the continued criminal conduct is different in nature, character or degree. The Ninth Circuit aligns with eight of the nine circuits that have considered this. The only conflict is with the Sixth Circuit. See U.S. v. Morrison, 983 F.2d 730 (6th Cir. 1993).

US v. Stoterau **Date:** 04/29/08 **Case Number:** 07-50124 **Summary:** In this case, defendant plead to transporting child pornography after an investigation and charges revolving around pandering and internet sex photos of an underage boy. The court gave an adjustment for "commission of a sexual act." He received a 151 mos. and 5 years of SR. This was appealed, arguing that it does not fall within the charge, and the numerous conditions of supervised release, covering sex testing, polygraphs, controls on who he meets, post office boxes, and even receipt of so-called pornography. The Ninth Circuit (Ikuta joined by Gould and Wallace) affirmed virtually all the sentence. The Ninth Circuit upheld the adjustment for a sex act because of "relevant conduct." The sentence was also upheld as reasonable and that the court fully explained its reasoning under 3553 by mentioning the factors and saying the factors were considered as well as the Guidelines' reasoning seemed appropriate. As for the many conditions of SR, the Ninth Circuit allowed polygraphing, explaining that Fifth Amendment protections still existed (immunity would have to be given), which leads to the question of whether it really can be used, or whether an invocation of the Fifth would lead to a violation of not undergoing sex therapy. The Ninth Circuit also upheld Abel testing, despite its Daubert failings. The many conditions imposed were supposedly to help "sex counseling and therapy." The Ninth Circuit did vacate the condition against pornography, because of vagueness.

Choe v. Torres **Date:** 04/29/08 **Case Number:** 06-56634 **Summary:** The Ninth Circuit (Kozinski joined by Rawlison and Baer) upheld the extradition of a Korean businessman on one count of bribery of a public official. The Ninth Circuit vacated one count due to lack of probable cause (the magistrate's order had no findings of facts supporting that count). The Ninth Circuit also found that the offense -- bribery -- was recognized by both the US and Korea. There was no statute of limitations issue because the petitioner had secretly and illegally fled the jurisdiction.

US v. Medina **Date:** 04/29/08 **Case Number:** 05-30477, 05-30482 **Summary:** Dismissal, without prejudice, of defendant's indictment for drug-related offenses based on excessive pretrial delays is affirmed where: 1) although he established a one-day error in the district court's Speedy Trial Act determination, the error was harmless; 2) other than that error, the calculation of the number of days excludable under the Speedy Trial Act was proper; and 3) there was no abuse of discretion in dismissing the indictment without prejudice.

HABEAS CASES

~~Richter v. Hickman~~ **Date:** 04/09/08 **Case Number:** 06-15614, 06-15776 **Summary:** In habeas proceedings arising after petitioners were jointly convicted of murder, attempted murder, robbery and burglary, denial of habeas relief is affirmed over claims that: 1) they received ineffective assistance of counsel at trial in violation of Strickland; 2) the prosecution suppressed exculpatory evidence at trial in violation of Brady; 3) trial counsel failed to engage in "meaningful adversarial testing" in violation of Cronic; and 4) the trial court violated one petitioner's Eighth Amendment right to a jury trial and Fourteenth Amendment right to due process by providing an incorrect or inaccurate answer to a question of law posed by the jury to the trial court.