

Criminal Law



Vol. 5, No. 1

A newsletter published by the Criminal Law Section of the Oregon State Bar

February 2002

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New Legislation Affects Appeal Referrals and Filings of Appeals in Guilty Plea, No-Contest Plea, Probation Violation and Resentencing Proceedings

by Jesse Wm. Barton and Peter Gartlan
Chief Deputies, Office of Public Defense Services

House Bill 2351, passed by the 2001 Legislature and effective January 1, 2002, amends ORS 137.020(6) in ways of interest to the defense bar and the bench, but probably of lesser interest to the prosecution bar.

Under HB 2351, ORS 137.020(6) makes clear that if a defendant is eligible for representation on appeal by the Office of Public Defense Services (OPDS—formerly the State Public Defender's Office), "trial counsel shall determine whether the defendant wishes to pursue an appeal. If the defendant wishes to pursue an appeal, trial counsel shall transmit to the [OPDS] * * * information necessary to perfect the appeal."

Under HB 2351, ORS 137.020(6) also requires the OPDS to provide trial attorneys "a form prepared by the [OPDS]" for trial attorneys' use in referring cases. The OPDS has a hard-copy referral form to provide attorneys upon request. However, the preferred means of case referrals is the **Web-Based Referral Form**, found at www.opd.state.or.us/referralform.

Finally, and most significantly, under HB 2351, various statutes now prohibit the filing of a notice of appeal in a case stemming from a guilty or no-contest plea, or from a probation-violation or resentencing hearing, **unless** the notice specifies at least one colorable claim of error. The bill's legislative history defines the phrase "colorable claim of error" as "seemingly valid, genuine, or plausible claims of error or substantial and nonfrivolous claims of error." *State ex rel. Juvenile Dept. v. Balderas*, 172 Or App 223, 230, 18 P3d 434 (2001).

Essentially, a colorable claim of error occurs when: (a) there was an objection to the trial court's ruling and, **and** (b) the legal issue is reviewable on appeal. The objection requirement is self-evident. Claims that are **not** reviewable on direct appeal include: (1) the imposition of presumptive or stipulated sentences, (2) the denial of optional probation, (3) the denial of a motion to withdraw guilty or no-contest plea and (4) claims of inadequate or ineffective assistance of trial counsel.

Both the hard-copy and the web-based referral forms, provided by the OPDS, discuss and explain the colorable-claim requirement.

Finally, HB 2351 also amends ORS 137.020(5) to require the trial court to "advise the defendant of the limitations on appealability imposed by [the colorable-claims requirement]. If the defendant is not present, the court shall advise the defendant in writing of the limitations on appealability imposed by [the colorable-claims requirement]." Oregon Judicial Department staff are developing a notice of appeal rights form, reflecting HB 2351's amendments, for trial court use.

NEWS

In June of 2002, the Federal Public Defender's Office for Oregon will open a branch office in Medford, Oregon. Like the United States Attorney's Office, the Federal Public Defender's Office will now have a main office in Portland and branch offices in Eugene and Medford. The Federal Defender's Medford office will be staffed by two lawyers and an investigator. The lawyers are Denise Meyers and Don Mixon.

Ms. Meyers will be returning home, having been raised in the Medford area. Ms. Meyers is currently on staff at the University of Southern California (USC) Law School working at the Post-Conviction Clinic. She has previously clerked for now-Senior United States Circuit Judge Alfred T. Goodwin and worked for the Federal Public Defender's Office in Los Angeles.

Mr. Mixon is currently a supervisor for the Federal Public Defender's Office in Miami, Florida. Mr. Mixon hails from Texas. He has previously worked as an Assistant United States Attorney (AUSA) in Miami and was in private practice in that area.

The investigator is Allan Hallmark. Mr. Hallmark has been working as an investigator in the Portland office of the Federal Public Defender.

FEDERAL CASE NOTES

SUPREME COURT

The Ninth Circuit is wrong again. On January 15, 2002, the Supreme Court decided United States v. Arvizu, ___ U.S. ___, 2002 WL 46773 (U.S. Jan. 15, 2002)(No. 00-1519). The Supreme Court rejected the Ninth Circuit's method of reviewing a finding of reasonable suspicion by separately analyzing each supporting fact instead of looking to the "totality of the circumstances."

A border patrol agent stopped Arvizu about 30 miles north of the Mexican border and found marijuana in Arvizu's vehicle. The district court upheld the stop as based on reasonable suspicion, articulating ten supporting facts. The Ninth Circuit (per Reinhardt, J.) reversed, stating that multi-factor tests introduce "a troubling degree of uncertainty and unpredictability" into the Fourth Amendment analysis. The Ninth Circuit decided that it must "describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers" in conducting a stop. The Ninth Circuit therefore separately considered each fact supporting Arvizu's stop. It held that "[seven] of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case, and the [remaining three], singly and collectively, are insufficient to give rise to reasonable suspicion."

The Supreme Court reversed in a unanimous opinion (Rehnquist, C.J.). The Supreme Court noted that its decisions "have said repeatedly that [reviewing courts] must look at the 'totality of the circumstances' of each case," the Supreme Court held that the Ninth Circuit had erred in its "divide-and-conquer analysis." The Supreme Court then held, applying a totality of the circumstances analysis and giving "due weight to the factual inferences drawn by the law enforcement officer and District Court Judge," that the stop was supported by reasonable suspicion.

A case to watch: On December 10, 2001, the Supreme Court granted the petition for certiorari in Harris v. United States, No. 00-10666 (decision below: 243 F.3d 806 (4th Cir. 2001)), to decide an Apprendi issue.

Harris was convicted after a bench trial of using or carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). That provision provides for a minimum term of five years' imprisonment, but requires longer minimum terms in the event the firearm is brandished (seven years) or discharged (ten years). The maximum sentence is not specified. At sentencing, the district court found that Harris had "brandished" the weapon, and therefore sentenced him to the mandatory minimum term of seven years under 924(c)(1)(A)(ii). Harris appealed, arguing that (1) brandishing is an element of an aggravated offense defined by 18 U.S.C. § 924(c)(1)(A)(ii), and, as such, must be charged in the indictment and proved at trial beyond a reasonable doubt; and (2) the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), should apply to mandatory minimum sentences, and that due process prevents the enhancement of a minimum sentence under 18 U.S.C. § 924(c) unless the fact of brandishing was charged in the indictment and found beyond a reasonable doubt.

The Fourth Circuit held that brandishing is a sentencing factor, not an element of an 18 U.S.C. § 924(c) crime, and that it therefore need not be charged in the indictment and could be found by the sentencing court. The Fourth Circuit refused to extend Apprendi to factors that enhance only a defendant's mandatory minimum sentence, noting that in Apprendi the Supreme Court had refused to disturb McMillan v. Pennsylvania, 477 U.S. 79 (1986), where the Supreme Court had upheld the constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act, which provided a mandatory minimum sentence of five years upon a finding at sentencing that a defendant "visibly possessed a firearm" during the commission of certain felonies.

The Supreme Court granted certiorari to decide whether "[g]iven that a finding of 'brandishing,' as used in 18 U.S.C. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of 'brandishing' be alleged in the indictment and proved beyond a reasonable doubt?"

NINTH CIRCUIT

Peterson v. Lampert, ___ F.3d ___, 2002 WL 27602 (9th Cir. (Or.) Jan. 11, 2002). Eric Allen Peterson filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Petitioner Peterson argued in his petition that his State of Oregon conviction should be set aside based on his claim that his counsel had been ineffective in violation of the Sixth and Fourteenth Amendments of the United States Constitution. United States District Judge Garr M. King denied the petition and dismissed the action with prejudice. The Ninth Circuit affirmed. During Petitioner Peterson's exhaustion of his State of Oregon remedies, he had sought review by the Oregon Court of Appeals. He had argued in the Court of Appeals that he had received ineffective assistance of counsel under both state and federal standards. When he sought review

before the Oregon Supreme Court, he failed to directly raise the ineffective assistance of counsel claim under the federal standards. Additionally, he failed to incorporate his Court of Appeals brief by reference in which he raised that claim. (See Wells v. Maass, 28 F.3d 1005 (9th Cir. 1994)). The Ninth Circuit held “A petitioner’s failure to present an issue in his petition for review to the Oregon Supreme Court constitutes a procedural default of the issue.” Peterson, ___ F.3d ___, 2002 WL 27602 at *1. The Ninth Circuit held that since Petitioner Peterson had procedurally defaulted the ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments claim, he was barred from raising that issue in a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the United States District Court.

United States v. Amador-Leal, ___ F.3d ___, 2002 WL 21977 (9th Cir. (Ariz.) Jan. 9, 2002). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) provided that a conviction of “aggravated felony” can result in mandatory deportation of a non-citizen. Amador-Leal had entered a plea of guilty to distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). By definition, this is an aggravated felony. He attempted to withdraw his guilty plea based on the argument that the court should have advised him, under Rule 11 of the Federal Rules of Criminal Procedure, during his guilty plea that a plea of guilty to a violation of 21 U.S.C. § 841(a)(1), an aggravated felony, had the immigration consequences. The Ninth Circuit adopted the position of the First Circuit in United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000), in holding that the immigration consequences to the guilty plea were “collateral” and therefore, it was not error for the court to fail to advise Amador-Leal of the immigration consequences to his guilty plea.

Apprendi v. New Jersey Update

by Timothy Sylvester, Ore. Dept. of Justice

An article in the October 2001 newsletter summarized the then-current state of the law regarding the challenges to sentences based on the decision in Apprendi v. New Jersey, 530 US 466, 120 S Ct 2348, 147 L Ed2d 435 (2000). The following are some recent developments on that front:

In State v. Dilts, ___ Or App ___, ___ P3d ___ (Jan. 30, 2002), the Court of Appeals rejected the defendant’s Apprendi-based challenge to his 36-month upward-departure sentence based on a finding made by the sentencing court that the crime was racially motivated. The court noted Apprendi by its terms was concerned only with imposition of enhanced sentences – those beyond the statutory maximum for the underlying offense – and that the 36-month sentence was within the 60-month maximum prescribed by ORS 161.605(3).

In State v. Crain, 177 Or App 627, ___ P3d ___ (2001), the Court of Appeals refused to review the defendant’s Apprendi-based challenge to his dangerous-offender sentence, because he had failed to preserve that objection at sentencing. The court concluded that defendant’s claim did not raise a “jurisdictional” challenge to the conviction and the sentence did not constitute “plain error” within ORAP 5.45(4)(b). In short,

unless the defendant raises an Apprendi-based objection at sentencing, the Court of Appeals will not review it on appeal.

In State v. Terry, 333 Or 163, ___ P3d ___ (2001), a capital case, the defendant asserted an unpreserved Apprendi-based challenge to his death sentence by contending that the indictment was constitutionally inadequate because it did not *allege* that he committed the murder “deliberately,” even though the jury unanimously found that fact beyond a reasonable doubt. 333 Or at 184. As the Court of Appeals had done in Crain, the Supreme Court held that defendant’s claim did not raise a “jurisdictional” challenge to the conviction and sentence. *Id.* at 187. The court then rejected the defendant’s claim on the merits, noting that under Article I, section 40, of the Oregon Constitution the maximum sentence for aggravated murder “shall be death.” Consequently, “unlike Apprendi, the prescribed maximum statutory penalty for the crime of aggravated murder is death and, moreover, the jury, not the trial court, decided that defendant acted deliberately.” 333 Or at 188.

The Oregon Court of Appeals has yet to decide whether Apprendi calls into question the validity of 30-year dangerous-offender sentences imposed under ORS 161.725 *et seq.* Nor has that court decided by a published opinion whether an inmate may assert such a challenge by way of a petition for post-conviction relief despite the time-limitation and successive-petition bars in ORS 138.510(3) and 138.550(3). By way of unpublished orders, however, the court has been dismissing petitions that are barred by the one-year limitation in ORS 183.510(4), as construed in Wallis v. Baldwin, 152 Or App 295, 954 P2d 192, *rev den* 327 Or 174 (1998).

Turning to the federal courts, the Ninth Circuit has not yet resolved whether, under Teague v. Lane, 489 US 288, 109 S Ct 1060, 103 L Ed2d 334 (1989), the holding in Apprendi applies retroactively to cases on collateral review (e.g., a petition for *habeas corpus* relief under 28 U.S.C. § 2254). Other circuits, however, have held that Apprendi is not a “new rule” that applies retroactively. See, e.g., United States v. Sanders, 247 F3d 139, 146-51 (4th Cir 2001).

The Ninth Circuit very recently issued an *en banc* opinion in which it rejected an Apprendi-based challenge to a sentence imposed under the federal sentencing guidelines. United States v. Buckland, ___ F3d ___ (9th Cir Jan 18, 2002) (2002 WL 63718). The court agreed that Apprendi requires the government to plead in the indictment and prove to the jury the “drug quantity” factor that allows for the imposition of a greater sentence under the guidelines. See United States v. Norby, 225 F3d 1053 (9th Cir 2000). But the court held that that new constitutionally based pleading-and-proof requirement does not render the federal statute facially unconstitutional, because the statute does not expressly identify the fact-finder or prescribe a burden of proof. The court also held that such an error is subject to harmless-error analysis and that Apprendi does not apply to consecutive-sentence determinations, and it affirmed the defendant’s sentence on that ground.

Meanwhile, the United States Supreme Court has allowed

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review in *United States v. Harris*, 243 F3d 806 (4th Cir), cert granted (Dec 20, 2001), on the issue of whether *Apprendi* requires the government to plead in the indictment and prove to a jury a fact (“brandishing a firearm”) that would support a mandatory *minimum* sentence that is within the statutory maximum. (Note: In *State v. Wedge*, 293 Or 598, 652 P2d 773 (1982), the court held that Article I, section 11, of the Oregon Constitution requires that such a fact be alleged and proved to the jury.)

New ODAA President Will Enjoy Position

by Christopher R. Brauer, ODAA President and
Umatilla County District Attorney

What’s not to like about searching for *truth* and seeing that *justice* is accomplished? The overriding duty of a prosecutor as an officer of the court and as a locally elected state official is to “aid in arriving at the truth in every case.” *O’Neil v. State*, 189 Wis. 259 (1926). Then Attorney General Robert H. Jackson said it best at a United States Attorney’s conference back in 1940 when describing the role of a prosecuting attorney:

“The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not fractional purposes, and who approaches his task with humility.”

As I assume my role as President of the Oregon District Attorneys Association (ODAA), I aspire to do so knowing the above-cited qualities of leadership are demonstrated daily by district attorneys in our 36 Oregon counties. It takes no coaxing for me to join, as president, the executive committee of an organization so dedicated to such a right-minded philosophy.

I look forward to assisting the ODAA with its various missions. The purpose of the association is to promote the interests of the people of the State of Oregon by coordinating law enforcement, fostering solutions to common problems in the various counties, gathering and disseminating knowledge relating to the prosecution of crime and to the legal problems of the state and county government, rendering services to its members for the official benefit and for the general welfare of the people of the State of Oregon, providing an appropriate state organization representing district attorneys in both civil and criminal aspects of their official law practice, and encouraging and sponsoring uniform practices and procedures among the counties.

I am honored to serve as President of the ODAA and will work hard to preserve the integrity of an association built upon such principled dedication. Will I enjoy the position? You bet!

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