

Criminal Law



Vol. 6, No. 2

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

Fall 2003

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United States Attorney's Office

By Ken Bauman

At this writing, United States Attorney, Michael W. Mosman is still waiting for his confirmation hearing before the Senate Judiciary Committee on his appointment to fill the vacancy on the United States District Court for the District of Oregon. Assistant United States Attorney (AUSA) Karin Immergut has been nominated by President Bush to succeed Mr. Mosman upon his confirmation and his taking the bench.

Recent Ninth Circuit Cases

In the March 2003 newsletter I reported on *Clark v. Murphy*, 317 F3d 1038 (9th Cir 2002). In June, the Ninth Circuit amended issued an amended opinion, 331 F3d 1062 (9th Cir 2003). Murphy was arrested at 11 a.m. and was immediately advised of his *Miranda* rights and taken to a police station for questioning. He was interviewed regarding the theft of his stepmother's car and thereafter her disappearance. The first interview terminated at 12:45 p.m. after Murphy had admitted he had stolen his stepmother's car. A second interview took place later at 4 p.m. regarding his missing stepmother. Murphy was again advised of his *Miranda* rights. During that interview, Murphy stated, "I think I would like to talk to a lawyer." The detective told him that if he wanted a lawyer he would call one but he suspected that if that happened the interview would be over. Murphy stated that he did not want a lawyer and wanted to continue with the interview. As the interview proceeded, Murphy stated "Should I be telling you or should I talk to a lawyer?" A discussion with the detective ensued regarding the detective's personal or professional opinion about Murphy getting a lawyer. Subsequently, Murphy confessed to the murder of his stepmother and convicted of second-degree murder. The Arizona trial court admitted his confession over his objection. Murphy eventually filed a petition for writ of habeas corpus under 28 USC § 2254. Under the standard set out in 28 USC § 2254(d)(1), the Arizona court's decision to admit Murphy's confession could be overturned only if the decision was contrary to, or involved in unreasonable application of current established federal law as determined by the Supreme Court of the United States. The Ninth Circuit said "[a] state court's decision involves an unreasonable application of federal law if the state court identifies the correct governing legal principles but unreasonably applies that principle to the facts of the prisoner's case." *Murphy*, 331 F3d at 1067. Unreasonable application of federal law is different from an incorrect application of federal law. Even if the federal court found that the state-court decision applied clearly established federal law incorrectly, relief is appropriate only if that application was also objectively unreasonable. The Ninth Circuit said previously that the federal court must follow a two-step inquiry. The first question is whether the state court erred at all. If the answer is yes, then the federal court must apply the standard as set forth above. *Murphy*, 317 F3d at 1044. The Ninth Circuit said that its reliance on the two-step approach set out in *Van Tran v. Lindsey*, 212 F3d

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1143 (9th Cir 2000), was overruled by the Supreme Court in *Lockyer v. Andrade*, 538 US __, 123 S Ct 1166(2003). The new Ninth Circuit opinion in *Murphy* said that “to the extent Van Tran and our subsequent precedent requires a two-step consideration of habeas petitions, such precedent has been overruled. Our own independent consideration of the constitutional issue is neither relevant, nor necessary to dispose of the question presented. Any independent opinions we offer on the merits of the constitutional claims will have no determinative effect in the case before us, nor any precedential effect for state courts in future cases.

We do not read the Supreme Court cases to require a two-step inquiry. The only question that matters under § 2254(d)(1), is whether or not the Arizona state court's decision is contrary to, or involved an unreasonable application of clearly established Federal law.” *Murphy*, 331 F3d at 1068-69.

For a little light reading on search and seizure read *U.S. v. Davis*, 332 F3d 1163 (9th Cir 2003). The police found a black gym bag under a bed and seized a shotgun. Davis did not rent the apartment where the gym bag was located but stayed there with one of the two renters, McMannes. The Ninth Circuit discusses “legitimate expectation of privacy” and found that Davis had that expectation. The court then discusses the consent by the second renter, Smith, to the search of the apartment and whether Smith had “actual authority” or “apparent authority” to give consent to search Davis's gym bag. The court found that Smith had neither. The Ninth Circuit suppressed the shotgun and Davis's subsequent statements as fruits of the poisonous tree.

U.S. v. Gurolla, 333 F3d 944 (9th Cir 2003), involved an appeal by three Mexican bankers who were caught in a money-laundering sting operation run by the United States Customs Service called “Operation Checkmark.” The opinion contains a good discussion of current Ninth Circuit law on the defense of entrapment. The Ninth Circuit stated that “[t]he affirmative defense of entrapment contains two elements: the government inducement of the crime and absence of predisposition on the part of the defendant. Only slight evidence will create the factual issue necessary to get the defense to the jury, even though the evidence is weak, insufficient, inconsistent, or doubtful, or of doubtful credibility.” *Gurolla*, 333 F3d at 951. The case is worth reading because of the Ninth Circuit's discussion about Ortega's sealed *ex parte* declaration offered in district court to establish that he had made a *prima facie* showing of entrapment that would entitle him to present that defense to the jury.

Prior to trial, the government filed a motion in *limine* asking the district court to prohibit defense counsel from discussing entrapment in their opening statements. The court's order went beyond the government's motion and prohibited all the defendants, except one, from presenting an entrapment defense. Ortega asked the court reconsider and supported his

request with his sealed *ex parte* declaration explaining the factual basis for his entrapment claim. The court denied Ortega's request, and Ortega filed a second sealed *ex parte* declaration. The court again held that Ortega had not made a *prima facie* showing of entrapment. Ortega was convicted.

On appeal, Ortega argued that the district court erred when it ruled that he had not made a *prima facie* showing of entrapment. In response, the government asked that it be furnished copies of Ortega's sealed *ex parte* declarations. The Ninth Circuit denied the motion. The court held that the district court had a right to consider Ortega's sealed *ex parte* declarations in deciding the issue and further held that the government was not entitled to see those declarations because it had failed to object in the district court and had failed to move in that court for disclosure of the declarations. The Ninth Circuit reasoned that because the government had not needed to see the declarations in order to argue the issue before the district court, it had no greater need to see them to argue on appeal. The moral of the opinion is never agree, always object or it may hurt you down the road. The Ninth Circuit's opinion also contains an interesting discussion of the doctrine of “outrageous government conduct” as first set forth by the *Supreme Court in United States v. Russell*, 411 US 423, 431-32 (1973). This is sometimes referred to as the “many are called, few are chosen” defense. Although a motion to dismiss based on outrageous government conduct are frequently filed they are rarely granted.

In *Rohan v. Woodford*, 334 F3d 803 (9th Cir 2003), the case came to the Ninth Circuit from the denial of a petition for writ of habeas corpus under 28 USC § 2254. Gates was convicted of murder and was sentenced to death, and that judgment was affirmed by the California Supreme Court. See *People v. Gates*, 43 Cal3d 1168 (1987). Gates developed mental problems. The district court held a competency hearing for Gates and decided that he had a mental disorder that substantially affected his capacity to cooperate with his counsel. The court held, however, “that neither due process, nor federal habeas corpus statutes require a stay, because Rohan's appointment of next friend adequately protected Gates interest. The court acknowledged that due process requires a criminal defendant be competent to stand trial. The district court viewed “that requirement did not apply to habeas proceedings, which are mere secondary and limited component of the criminal justice process.” *Rohan*, 334 F3d at 810. The court certified its decision for immediate interlocutory review. The Ninth Circuit held that Gates had a statutory right to be competent to assist his counsel in the litigation of his federal *habeas corpus* proceedings. The Ninth Circuit further held that Gates had a right to have his federal proceedings stayed until he was competent to proceed.

Criminal Cases Before the United States Supreme Court in 2003 Term

By Timothy Sylwester

United States v. Banks, 02-473 (from Ninth Circuit, 282 F3d 699): Did police officers executing a warrant to search for narcotics violate the Fourth Amendment and 18 USC § 3109, so as to require suppression of the evidence, when they forcibly entered a small apartment in the afternoon only 15-20 seconds after announcing their presence?

Groh v. Ramirez, 02-811 (from Ninth Circuit, 298 F3d 1022): The Ninth Circuit held that police officers were subject to liability under § 1983 for executing a search warrant, issued by a magistrate, that did not list the objects to be searched and seized, even though the supporting application and affidavit adequately had done so. (1) Were the officers entitled to qualified immunity? (2) Did the officers' conduct violate the Fourth Amendment?

Fellers v. United States, 02-6320 (from Eighth Circuit, 285 F3d 721): After defendant was indicted for drug offenses, police officers went to his house and, without providing *Miranda* warnings, interviewed him regarding the crimes and elicited inculpatory statements. The officers then arrested defendant and took him to jail. After being given *Miranda* warnings there, defendant reiterated his earlier inculpatory statements. (1) Did the post-indictment, pre-arrest interview at defendant's house constitute interrogation under *Miranda*? (2) If so, must his statements at jail, elicited after the waiver, be suppressed as a result?

Maryland v. Pringle, 02-809 (805 A2d 1016): When a police officer finds drugs and a roll of currency in the passenger compartment of a vehicle containing multiple occupants, all of whom deny ownership, does the Fourth Amendment prohibit the police from arresting all occupants of the vehicle?

Arizona v. Gant, 02-1019 (43 P3d 188): When the police arrest person while he already is outside his vehicle, does the automobile exception (*New York v. Belton*) authorize a search of the vehicle, or was it necessary that the suspect was aware of the police before he got out of the vehicle?

United States v. Patane, 02-1183 (from 10th Circuit, 304 F3d 1013): Does a police officer's failure to provide a suspect *Miranda* warnings require suppression of physical evidence derived from the suspect's otherwise voluntary statement?

Illinois v. Lidster, 02-1060 (779 NE2d 855): May the police conduct a checkpoint to investigate a crime committed a week previously at which the officers briefly stop all motorists and hand out flyers and seek witnesses?

Missouri v. Seibert, 02-1371 (935 SW3d 700): Does the rule in *Oregon v. Elstad*, which held that providing *Miranda* warnings and then requestioning the arrestee usually will

remove the taint of an earlier unwarned interrogation, apply when the officer intentionally failed to provide warnings?

Crawford v. Washington, 02-9410 (54 P3d 656): (1) Does the Confrontation Clause permit admission of a custodial statement elicited from a possible accomplice if that statement "interlocks" with the defendant's custodial statement? (2) Should the Court reconsider *Ohio v. Roberts* and hold that the Confrontation Clause absolutely prohibits admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

Banks v. Cockrell, 02-8286 (from Fifth Circuit, 48 Fed Appx 104): Issues presented in a § 2254 *habeas corpus* proceeding in a capital case from Texas: (1) Is petitioner's *Brady* claim barred by procedural default and lack of prejudice? (2) Should a claim of ineffective assistance of counsel for failing to present mitigating evidence be evaluated with respect to each item separately, rather than cumulatively? (3) Does FRCP 15(b) apply to *habeas corpus* proceedings?

Baldwin v. Reese, 02-964 (from Ninth Circuit, 282 F3d 1184): Issue presented in a § 2254 *habeas corpus* proceeding in a case from Oregon (on state's petition): Did the petitioner adequately alert the state supreme court that he was asserting a federal-law claim, in order to exhaust that claim for federal-court review, when he failed to cite a specific provision of the federal constitution or any case that resolved that issue based on federal law?

Notice of Annual Meeting

The Executive Board of the Criminal Law Section will be having its Annual Meeting on October 10, 1993, from 3 p.m. to 5 p.m. at the offices of the Oregon State Bar, 5200 S.W. Meadows Road, Lake Oswego, Oregon 97035. Among the agenda items is the approval of officers for the coming term. The slate of proposed officers is: Chair: Lindsay Partridge; Chair-Elect: Daniel Ousely; Secretary: Rebecca Duncan; Treasurer: Ken Bauman.

APRIL 2004 CLE

Reserve this date on your calendar: The 2004 Criminal Law Section CLE will be held on Friday, April 30, 2004. Once again, it will be held at the Spirit Mountain Casino, Grande Ronde, Oregon.

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