Appellate Defenders Issues

A Publication of Appellate Defenders, Inc.

JANUARY, 2005

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Notes From The Director
by Elaine A. Alexander

Best wishes to all readers from me and ADI as one year ends and another begins. This column discusses some news, offers some reminders, and notes some odds and ends that have come to our attention over the last few months.

Paul Bell Fellowship awarded to Christian Buckley and Kevin Sheehy

I am always delighted to announce the winner of the annual Paul Bell Fellowship, which recognizes promising newer panel attorneys and sends them to the annual National Legal Aid and Defender Association Appellate Training Seminar in New Orleans - a four-day intensive workshop on the basics and nuances of appellate practice. This year my delight is even greater - in fact, double - because we have the unprecedented situation of two winners:

★ *Christian Buckley* joined the panel earlier this year. He is a 2001 graduate of University of California at Los Angeles School of Law. He worked on many appeals, both criminal and dependency, while in school and so came to the panel with an unusually high level of experience. He was with civil firms in the employment law area before applying to the panel.

★ *Kevin Sheehy* also joined the panel this year. He is a 1974 graduate of Rutgers (Newark). He was a judicial clerk with the New Jersey superior court and a federal district court in California, where he was the pro se case attorney and handled numerous habeas corpus matters. His practice was primarily civil until he joined the panel. He has had several scholarly publications.

Staff attorneys working with Christian and Kevin have commented that both are "a great advocate" and "an excellent asset to the panel." They have shown, not only exceptionally high promise, but also strong commitment and downright enthusiasm for this work. We are lucky to have them, and I think their experience at the NLADA seminar will make them even more valuable members of the panel.

"Unsung Hero": Panel attorney Rich Pfeiffer honored

I personally want to mention another award right here, although we have a separate article on it in this newsletter. This award has been bestowed on one of ADI's own -- panel attorney *Rich Pfeiffer*. It is the prestigious Loren Warboys Unsung Hero, conferred by the Youth Law Center, a public interest law firm headquartered in Washington, D.C. Characteristically, Rich tells us credit for the award belongs to others. Although we honor him all the more for his modesty, as I told him in an E-mail, his achievements are anything but modest. So, "read all about it" in this newsletter!

Wende-Sade C. reviews

Staff attorneys have asked me to remind panel attorneys about the need for thorough review and presentation of an independent case when submitting it for a *Wende* or *Sade C.* review:

The panel attorney should read the entire record, list all potential issues, and research those that might reasonably bear fruit.

The submission to the staff attorney should include not only the record, but a statement of the case and facts, a description of issues considered and rejected, and the results of research on those issues.

The panel attorney also should take care to augment the record to include material that might be relevant. It wastes time and delays cases for a staff attorney to start reviewing the record for issues, only to find the record is incomplete.

These steps will facilitate the staff attorney's review of the case and help ensure no substantial points are overlooked.

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Ineffective assistance of counsel claims "fallback" style

In the last issue of this newsletter I discussed the general topic of ineffective assistance of counsel and its basics - use of correct standards, which usually dictates filing a habeas corpus petition rather than raising the issue on appeal; communication with trial counsel about the reasons for the suspect action or inaction; and consultation with ADI before filing. These are imperative when ineffective assistance of counsel is being raised as a separate substantive issue.

Very often, however, the issue is raised as a fallback answer to an anticipated claim of waiver, invited error, or other procedural problem, such as trial counsel's failure to object. After arguing the merits of the alleged error and its prejudice, appellate counsel typically will answer potential waiver problems by arguing there was no waiver - for instance, the objection was made substantially even if not perfectly; or it was unnecessary given the nature of the issue; or it would have been futile. At that point it is a common practice for appellate counsel to take the fallback position that if the issue has been waived, trial counsel's failure to object amounts to ineffective assistance of counsel. This is often done at the end of the argument or in a footnote, in a cursory manner.

Judges have told us they do not like such a practice and that ineffective assistance of counsel issues should be raised fully or not at all. I agree with them and suspect that most panel attorneys do, too. Theoretically, cursory treatment "just for the record" is poor practice. Nevertheless we all realize (including those judges) that (a) protecting the client's interest in having an issue decided on the merits sometimes requires an allegation of ineffective assistance of counsel and (b) raising such an argument by means of a full-scale habeas corpus investigation and petition in every applicable case would not be cost-effective. Not infrequently the specter of ineffective assistance of counsel prompts the court to decide the substantive issue on the merits. (E.g., *People v. Coffman* (2004) 34 Cal.4th 1, 82; *People v. Williams* (1998) 61 Cal.App.4th 649, 657, and cases cited.) So we hold our noses and tolerate the fallback argument.

Of course, *Strickland* standards still govern, and it must be credible to argue that the trial attorney could not conceivably have had a reasonable tactical purpose for not objecting. If there are obvious possible reasons for trial counsel's action, the appropriateness of an ineffective assistance of counsel argument is dubious.

The fallback argument does not require all of the precautions I mentioned in the last newsletter. At this stage, at least, habeas corpus is not contemplated. Although as a matter of courtesy trial counsel should be notified the argument is being made, it is not necessary to contact ADI in order to insert it in the brief.

Although some abbreviations of the usual process are permissible, counsel still should take care to present the ineffective assistance of counsel issue sufficiently to ensure the court will consider it and to preserve it for later proceedings. California Rules of Court, rule 14(a)(1)(B) provides each brief must "state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority." *The brief should state relevant facts, offer analysis and argument, and present authority. Further, the issue should be identified in a subheading, as required by rule 14. It should not be buried in the argument nor raised in a footnote*, or else the court might refuse to consider it, and then the issue will have been waived. (*People v. Ladd* (1982) 129 Cal. App. 3d 257, 262; see *People v. Baniqued* (2000) 85 Cal. App. 4th 13, 29.)

AIDOAC claims audits: a routine and random procedure, not an ominous sign of impending doom

This is just a reminder that claims are audited by the Appellate Indigent Defense Oversight Advisory Committee on a *random* basis. They are not chosen because someone thinks there is something wrong with them. Some attorneys get rather panicky when they hear a claim of theirs has been picked for audit, fearing the committee suspects something. That is not the case at all.

The attorney may also fear they are likely to be required to pay back some money to the state. While that does happen occasionally, in the vast majority of cases the claim comes out clean. And sometimes the committee decides to repay money cut by the project recommendation.

In a few of the audited cases, the committee may not be satisfied the project's recommendation was justified and may ask it for further explanation. More often than not, that is enough. If the committee decides the attorney was overpaid, the Administrative Office of the Courts will make arrangements for repayment - either in one lump sum or in installments, and by direct payment or by deduction from future claims. If the committee makes an adjustment in the attorney's favor, the project will submit a supplemental claim on the attorney's behalf; no further action by the panel attorney is necessary.

New juvenile rules of court

The Judicial Council has approved a revision of the rules governing juvenile delinquency and dependency appeals. The revision are effective January 1. They are available on the Web at <http://www.courtinfo.ca.gov/rules/amendments/jan2005.pdf>. We will be doing our usual chart of significant changes in the rules.

Meanwhile, for our district, counsel should be aware that the old "fast track" rules - 39.1A, 39.2, and 39.2A, for termination of rights cases in the state (including Division Two) and *any* dependency appeal in Divisions One and Three - are now combined into one rule, 37.4. Since a few of the provisions of those three old rules were inconsistent with one another, there have been substantive changes in one court or another. Our chart will point those out; meanwhile, after January 1, double-check the rules when handling a dependency case. (The Appellate Advisory Committee comments do not point out all of the changes.)

Best wishes from me and the entire ADI family for a wonderful New Year!

EXHAUSTING STATE REMEDIES

by Howard C. Cohen

California defendants have increasingly turned to the federal courts for post-conviction relief. Although an appointment in the Court of Appeal does not extend to federal habeas corpus, appellate counsel for the defendant should take all necessary steps to preserve appropriate federal issues, since exhaustion of state remedies is a prerequisite for federal habeas corpus. (28 U.S.C. § 2254; *Ex parte Royall* (1886) 117 U.S. 241, 250-253 [6 S.Ct. 734, 29 L.Ed. 868]; see also *O'Sullivan v. Boerckel* (1999) 526 U.S. 838 [119 S.Ct. 1728, 144 L.Ed.2d 1].) To ensure exhaustion of state remedies, appellate counsel must carefully "federalize" appropriate issues and must present the federal claims explicitly in both the Court of Appeal briefing and the petition for review to the California Supreme Court. Failure to do so could cost the client the opportunity for federal review.

1. Adequate identification and presentation of a federal claim: state the factual bases for the claim, explicitly cite federal constitutional provisions and other federal authority, and explain how the facts constitute a violation of those provisions

The argument must set forth the *factual bases* giving rise to the federal issue in sufficient detail to permit the court to understand and evaluate the issue in the particular case. Asserting a violation of a federal constitutional right is inadequate in a factual vacuum. "A thorough description of the operative facts before the highest state court is a necessary prerequisite to satisfaction of the [exhaustion] standard." (*Kelly v. Small* (9th Cir. 2003) 315 F.3d 1063, 1069.)

The argument must also state the *specific federal legal basis* for the claim. This includes citation of the federal constitutional provisions relied on, decisions of the United States Supreme Court supporting the argument, and any other relevant federal authorities. (*Gray v. Netherland* (1996) 518 U.S. 152, 162-163 [116 S.Ct. 2074, 135 L.Ed.2d 457] [claim must include reference to a specific federal constitutional guarantee as well as a statement of the facts entitling petitioner to relief]; *Picard v. Connor* (1971) 404 U.S. 270, 278 [92 S.Ct. 509, 20 L.Ed.2d 438].) It also includes articulation of a federal legal theory explaining why the facts amount to a violation of those federal provisions.

Limiting an argument to state evidentiary law is insufficient, even though the state law may have federal constitutional implications. Citation to state cases that discuss or apply federal law is likewise inadequate. (*Casey v. Moore* (9th Cir. 2004) 386 F.3d 896, 912, fn. 12; *Castillo v. McFadden* (9th Cir. 2004) 370 F.3d 882; *Peterson v. Lampert* (9th Cir. 2003) 319 F.3d 1153 [petition for review referring solely to state constitutional provisions on ineffective assistance of counsel does not exhaust remedies on that federal issue].)

The federal constitutional provision relied on should be *cited* – for example, the "due process of law (U.S. Const., 14th amend.)" or "the right to confront witnesses under the Sixth Amendment of the federal Constitution." Making vague references to "due process" or a "fair trial" or "the right to present a defense" does not apprise the state court of the federal nature of a claim and does not satisfy the fair-presentation prong of the exhaustion requirement. (*Anderson v. Harless* (1982) 459 U.S. 4, 7 [103 S.Ct. 276, 74 L.Ed.2d 3] [exhaustion requirement not satisfied by mere circumstance that "due process ramifications" might be "self-evident"]; *Shumway v. Payne* (9th Cir. 2000) 223 F.3d 982, 987 [it is not enough to make "naked reference . . . or a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim"]; *Hiivala v. Wood* (1999) 195 F.3d 1098, 1106; *Johnson v. Zenon* (9th Cir. 1996) 88 F.3d 828, 830-831; compare *Wilcox v. McGee* (9th Cir. 2001) 241 F.3d 1242, 1244 [federal claim preserved when reliance in the state court was almost entirely on state law but conclusion and petition for review argued both state and federal constitutional violations].)

Merely *citing* provisions of the federal Constitution is insufficient unless that citation is linked to a theory of federal law connecting the operative facts of the case to the constitutional provisions. In *Castillo v. McFadden*, *supra*, 370 F.3d 882, the defendant challenged a videotape of his interrogation on state evidentiary grounds in the trial court. In the Oregon Court of Appeals, the last sentence of his brief asserted "the gross violations of Appellant's Fifth, Sixth, and Fourteenth Amendment rights requires [sic] that his convictions and sentences be reversed and that he be granted a new trial consistent with due process of law." The Ninth Circuit found this "conclusory, scattershot citation of federal constitutional provisions" inadequate (*id.* at pp. 889-890):

> Castillo . . . left the Arizona Court of Appeals to puzzle over how the Fifth, Sixth, and Fourteenth Amendments might relate to his three foregoing claims . . . . Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.

Thus the brief should not only *assert* that the facts amounted to a federal constitutional violation, but also should *argue* that point. Citation to relevant federal case law, especially decisions of the United States Supreme Court, is valuable in this effort.

2. Exhaustion in Court of Appeal: raise the federal issue in the opening brief and make sure the court addresses the federal claim in its opinion

The defendant must fairly present the federal claims to the Court of Appeal in the first instance, as well as to the California Supreme Court. In other words, the defendant may not wait to federalize a claim for the first time in a petition for review. (*Castille v. Peoples* (1989) 489 U.S. 346, 351 [103 L. Ed. 2d 380, 109 S. Ct. 1056].) In *Baldwin v. Reese* (2004) 541 U.S. 27 [124 S.Ct. 1347, 158 L.Ed.2d 64], the court stated:

> Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, thereby giving the State the

> opportunity to pass upon and correct alleged violations of its prisoners' federal rights. To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim.

(Internal quotation marks and citations omitted.)

In *Casey v. Moore*, *supra*, 386 F.3d 896, the defendant alleged unlawful use of hearsay and prosecutorial misconduct in the intermediate appellate court, but relied on state law and state cases and did not mention the federal constitutional right of confrontation or due process or refer to federal law. In his petition for review to the state supreme court, however, he did specifically cite these federal provisions. The Ninth Circuit held the federal issues were not properly exhausted.

To exhaust state remedies properly and protect against possible default, counsel must ensure the Court of Appeal opinion expressly acknowledges and addresses the federal issue. If it does not and counsel fails to call the omission to the court's attention in a petition for rehearing, the California Supreme Court may well decline to consider it on procedural policy grounds. (See Cal. Rules of Court, rule 28(c)(2).) In that situation there is a risk the federal courts would consider the issue procedurally defaulted.[1]

3. Requirement that issue must be properly presented to the California Supreme Court: explicitly identify the federal issue, describe the operative facts, and cite federal constitutional provisions and federal authority in the petition for review itself

Exhaustion requires an issue be presented to the state's highest court in which relief is available under state law. (*O'Sullivan v. Boerckel*, *supra*, 526 U.S. 838.) Therefore a petition for review in the California Supreme Court must be filed if the issue is to be pursued in federal court. (*Roberts v. Arave* (9th Cir. 1988) 847 F.2d 528.)

The petition must include explicit reference to federal constitutional provisions and other federal authorities and a description of all the operative facts giving rise to the federal claim. It should indicate how the issue was raised and resolved below. It should comply strictly with the requirements of the California Rules of Court, including rule 33.3 if an abbreviated petition is filed.

The petition for review *itself* must present the issue in adequate federal form as to both citation of federal law and recitation of the operative facts. Incorporation by reference is prohibited by California Rules of Court, rule 28.1(e). To present the issue adequately to the California Supreme Court, it is not sufficient to present only the facts supporting the claim, nor to rely on the Supreme Court's opportunity to read the Court of Appeal opinion discussing the claim, nor to incorporate by reference briefing in the lower court. (*Baldwin v. Reese*, *supra*, 541 U.S. 27 [state high court's opportunity to review the lower court's opinion raising federal issue is insufficient presentation of federal issue to high court, which is not required to review lower court opinion][2]; *Picard v. Connor*, *supra*, 404 U.S. 270, 275, 277 [92 S.Ct. 509, 30 L.Ed.2d 438]; *Kibler v. Walters* (9th Cir. 2000) 220 F.3d 1151, 1153; *Gatlin v. Madding* (1999) 189 F.3d 882, 887-889 [incorporating constitutional claims by reference in petition for review is inadequate because of Cal. Rules of Court, rule 28.1(e)].)

Rule 33.3 of the California Rules of Court permits an abbreviated petition for review when the sole intention is to exhaust state remedies. The petition need not begin with a statement of the issues presented for review or explain how the case presents a ground for review under rule 28(b). It must have the words "Petition for Review to Exhaust State Remedies" on the cover, must comply with rule 28.1(b)(3) through (5), and must state it presents no grounds for review under rule 28(b) and is filed solely to exhaust state remedies for federal habeas corpus purposes. It must also contain a brief statement of the underlying proceedings, including the conviction and punishment, and the factual and legal bases of the claim.[3] These must be sufficiently developed to comply with normal exhaustion requirements – stating the factual bases for the claim, the specific federal constitutional provisions involved, and a legal theory as to how the facts constitute a violation of those provisions.

4. Conclusion

Counsel need to be attentive to the possibilities for federalizing issues, be familiar with all requirements, and take care to exhaust state remedies when appropriate. It is poor practice to hope the federal courts are lax or lenient in their application of the exhaustion rules or that the state courts will "rescue" counsel from inadequate presentation of a federal issue. Conscientious attention to proper federalization from the very first can and usually will make all the difference.

Endnotes

1 Conversely, if the state courts actually rule on a federal issue not adequately presented in the briefing or petition for review, that may constitute exhaustion. (*Castille v. Peoples*, *supra*, 489 U.S. 346, 351; *Sandgathe v. Maass* (9th Cir. 2002) 314 F.3d 371, 376-377; *Greene v. Lambert* (9th Cir. 2002) 288 F.3d 1081, 1088 [when federal claim was made for first time in a request for reconsideration in state high court, and court amended opinion in a manner that did not appear to be based on procedural default, petitioner successfully exhausted state remedies].) Counsel obviously should never rely on such a remote possibility.

2 *Baldwin* came from Oregon. In California, the opinion of the Court of Appeal must be attached to the petition for review. (Cal. Rules of Court, rule 28.1(b)(4).) However, counsel should not count on that as a substitute for proper presentation of the issue in the body of the petition for review itself. The continuing validity of *Kelly v. Small*, *supra*, 315 F.3d 1063, 066-1069, which held the discussion of federal issues in the Court of Appeal opinion was adequate because it could be "presumed" the California Supreme Court consulted that opinion, may be questioned in light of *Baldwin* ["ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so"]. There is no reason for counsel to take a chance on that matter.

3 A discussion of rule 33.3 and exhaustion of state remedies is on the ADI Web site.

CRAWFORD UPDATE

by Beatrice C. Tillman

In *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354, 158 L.Ed.2d 177], the Supreme Court held the admission of out-of-court "testimonial" hearsay statements against a criminal defendant violates the Confrontation Clause of the Sixth Amendment if the declarant is unavailable to testify at trial and the defendant had no previous opportunity to cross-examine the declarant. A key issue in any *Crawford* analysis is whether the out-of-court statement is "testimonial." If a statement is "*non*testimonial," *Crawford* does not apply, and established hearsay rules are considered to determine the admissibility of nontestimonial hearsay statements.

This article provides a short synopsis of how courts have been deciding the issue of "testimonial statements." It is neither intended as a comprehensive analysis of whether the erroneous admission of testimonial statements was prejudicial in specific cases, nor does it include federal or other states' decisions on the subject. In any *Crawford* analysis, the determination of whether a statement is "testimonial" requires a case-specific, fact-based inquiry. Currently, this is a dynamic, evolving area of the law. The California Supreme Court has yet to decide any cases, but has granted review in several cases – *People v. Adams* (2004) previously published at 120 Cal.App.4th 1065, review granted October 13, 2004 [S127373]; *People v. Cage* (2004) formerly 120 Cal.App.4th 770, review granted October 13, 2004 [S127344]; *People v. Ochoa* (2004) formerly 121 Cal.App.4th 1551, review granted November 17, 2004 [S128417]; *People v. Giles* (2004) formerly 123 Cal.App.4th 475, review granted December 22, 2004 [S129852]; *People v. Jiles* (2004) formerly 122 Cal.App.4th 504, review granted December 22, 2004 [S128638].

Because the court in *Crawford* did not provide a comprehensive definition of the term "testimonial," it has been left to appellate courts to determine what statements are testimonial. The court did provide some guidance that "testimonial" applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford v. Washington*, *supra*, 124 S.Ct. at p. 1374.) As to the definition of "interrogation," the court stated, "[w]e use the term 'interrogation' in its colloquial, rather than any technical legal, sense." (*Id.* at p. 1365.)

The court also provided three possible formulations for determining whether an out-of-court statement is testimonial: 1) "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," 2) "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and 3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford v. Washington*, *supra*, 124 S.Ct. at p. 1364.)

Statements made to police officers provide an extensive field of inquiry because of the diverse methods and purposes of police interviews. In some cases, statements made to police officers by victims have been held to be testimonial when the statement was "knowingly given in response to structured police questioning." (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1401-1402 [child victim's statement to police made during initial investigation of crime report]; see also *People v. Pirwani* (2004) 119 Cal.App.4th 770, 785 [recorded statement to police knowingly given in response to structured police questioning is testimonial] and *People v. Lee* (November 29, 2004, No. B166204) __ Cal.App.4th__ [2004 D.A.R. 14197, 14199; 2004 Cal.App. Lexis 1995, *10-*11; 2004 Cal. Daily Op. Service 10438] [same].)

Videotaped statements to police have been held to be testimonial, and Evidence Code section 1380 has been found unconstitutional, because it made admissible, at trial, testimonial statements to law enforcement officials by unavailable witnesses, *without* giving the accused an opportunity to cross-examine. (*People v. Pirwani*, *supra*, 119 Cal.App.4th 770, 774-775.) A victim's written declaration attached to an application for a temporary restraining order that stated the defendant had threatened to kill her was found to be testimonial. (*People v. Pantoja* (2004) 122 Cal.App.4th 1, 7-9, opn. mod. 2004 Cal.App. Lexis 1685, mod. corrected 2004 Cal.App. Lexis 1695.) However, the court in *Pantoja* did not reach the constitutional question and decided the case on statutory grounds finding the declaration inadmissible under Evidence Code section 1370, because there was no showing the statement was made under circumstances indicating its trustworthiness. (*Id.* at pp. 10-13.)

Even if a victim is not being "interrogated" in a technical sense, statements made to police or investigators when they are acting in an investigative and/or prosecutorial capacity may be testimonial. In *People v. Sisavath*, *supra*, the court found the child victim's videotaped statement during an interview conducted by a "forensic interview specialist" and attended by the prosecutor and prosecution investigator was testimonial. (*People v. Sisavath*, *supra*, 118 Cal.App.4th at p. 1402.) The court relied on one of the formulations articulated in *Crawford* and found the statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Ibid.*) Similarly, in *People v. Harless* (December 20, 2004, No. H026885) ___ Cal.App.4th___ [2004 D.A.R. 15101, 15104-15105; 2004 Cal.App. Lexis 2185, *26], the court found the child victim's statements to the examining medical doctor, the district attorney's investigator, and a child abuse interview specialist were testimonial. Recently, review was granted in *People v. Ochoa* (2004) formerly 121 Cal.App.4th 1551, 1562, review granted November 17, 2004 [S128417], where the court had held that a victim's statements are testimonial based on officers' involvement in the production of testimonial evidence to be used against the defendant in a criminal prosecution.

Oftentimes, a single case will contain more than one out-of-court statement. Each

statement must be analyzed to determine whether it is testimonial. A recent case illustrates this point. In *People v. Kilday* (2004) 123 Cal.App.4th 406,411, the female victim made three statements. The victim's first statement was made to two male police officers when they responded to the report of an injury. Because the victim was reluctant to speak to the officers, they called a female officer "to come over and talk to [the victim]," since they "certainly needed to get a more detailed statement." (*Ibid.*) The second statement was made to the female officer about an hour after the first statement. (*Id.* at pp. 411-412.) The victim's third statement was a tape-recorded interview in the victim's hotel room to "obtain a complete taped statement from her." (*Id.* at p. 412.)

The *Kilday* court found the third statement was clearly testimonial because it was knowingly given, recorded, and the product of structured questioning. (*People v. Kilday, supra,* 123 Cal.App.4th at p. 419.) The court also found the second statement testimonial, because although it was obtained in the hotel lobby and not recorded, under the totality of the circumstances, the court concluded the female officer was "acting in an investigative capacity to produce evidence in anticipation of a potential criminal prosecution." (*Id.* at pp. 419-420.) The court held, however, the victim's first statement was *not* testimonial, because it was analogous to statements obtained by police dispatched to the scene following a 911 call. (*Id.* at p. 421, citing *People v. Corella* (2004) 122 Cal.App.4th 461.)

In *People v. Corella, supra,* 122 Cal.App.4th at pages 464-465, the court held the victim's statements to a 911 operator that her husband hit her and the victim's accusations repeated to police and medical personnel who responded to the 911 call were not testimonial. In *People v. Caudillo* (2004) 122 Cal.App.4th 1417, modified, November 2, 2004 [2004 Cal.App. Lexis 1849; 2004 Daily Journal D.A.R. 13470], the court analyzed case authority, including New York cases dealing with 911 calls, and concluded the anonymous 911 call reporting "men with guns" and describing defendant and his car, was not testimonial. (*Id.* at pp. 1430, 1437-1440.) Contrary to these cases, in a recent case granted review, the Court of Appeal had found a victim's brief statements to the police responding to an emergency call and additional statements at a continued interview at the hospital to be testimonial. (*People v. Adams* (2004) formerly 120 Cal.App.4th, 1065, 1068, 1074, review granted October 13, 2004 [S127373].)

The Supreme Court has granted review in another case as well, *People v. Cage* (2004) formerly 120 Cal.App.4th 770, review granted October 13, 2004 [S127344]. In *Cage,* the victim made three successive hearsay statements. The first statement was made to a police officer at the hospital, the second statement was made to a doctor at the hospital, and the third statement was made to the same police officer at the police station. (*People v. Cage, supra,* formerly 120 Cal.App.4th at pp. 772-773.) The court had found the statement at the police station clearly testimonial and the statement to the doctor at the hospital clearly not testimonial. However, the court had held "the [first] statement to the police officer at the hospital was not testimonial because the interview was not sufficiently analogous to a pretrial examination by a justice of the peace; among other things, the police had not yet focused on a crime or a suspect, there was no structured questioning, and the interview was informal and unrecorded." (*Id.* at p. 773.)

Thus, one can discern that whether an initial police interview is testimonial has spawned controversy. Some decisions interpreting *Crawford* have construed an initial police interview as producing testimonial statements and other courts have concluded informal statements to police about a crime that has just occurred are not testimonial within the meaning of *Crawford*.

Some courts have held certain statements made to friends or acquaintances are not testimonial and, therefore, would be analyzed under the appropriate hearsay exception rules rather than under the *Crawford* analysis. (*People v. Pirwani, supra,* 119 Cal.App.4th at pp. 787-790 [mentally ill victim's statement made to case worker's supervisor was not testimonial, but was inadmissible because it was not a spontaneous declaration under Evidence Code section 1240].) In *People v. Cervantes* (2004) 118 Cal.App.4th 162, 166-167, the defendant made statements to a longtime friend who came to visit his home a few days after the crime in which he confessed and inculpated two others. The court held the statements were not testimonial because when the statements were made the defendant had no reasonable expectation the statements would be used at a later trial. (*Id.* at pp. 173-174.) Since the court found the statements were not testimonial, it applied the rules governing admissibility of nontestimonial statements. Based on the totality of the circumstances, the court found the statements admissible because they were trustworthy and fell within the declaration against penal interest exception. (*Id.* at pp. 175-177.)

In some cases, courts have not decided whether the statement is "testimonial" but have assumed it was testimonial to reach their decision. For example, in a case recently granted review, the court had held the defendant forfeited his Confrontation Clause arguments through his own wrongdoing. A few weeks before defendant killed his girlfriend, the girlfriend had told officers investigating a domestic violence report that defendant had threatened to kill her. Without deciding whether the victim's statements were testimonial, and assuming they were, the court had found the defendant was barred from asserting a Confrontation Clause objection under the doctrine of forfeiture by wrongdoing. (*People v. Giles* (2004) formerly 123 Cal.App.4th 475, 483, review granted December 22, 2004 [S129852].) In another case recently granted review, the court had found the victim's statement, made an hour before she died that her husband stabbed her, was properly admitted. (*People v. Jiles* (2004) formerly 122 Cal.App.4th 504, 509, review granted December 22, 2004 [S128638] with further action deferred pending resolution of related issue in *People v. Giles* [S129852].) Like *Giles*, the court in *Jiles* did not decide whether the statement was testimonial, but assuming that it was testimonial, the court adhered to the reasoning in *Crawford* that a dying declaration might be admissible under equitable principles. (*Id.* at p. 511.) Without deciding whether the victim's "dying declaration" was testimonial, the California

Supreme Court recently held that admission of the victim's "dying declaration" did not violate the Sixth Amendment's confrontation clause. (*People v. Monterroso* (December 13, 2004, No. S034473) ___ Cal.4th ___ [2004 D.A.R. 14707, 14711-14712; 2004 Cal. LEXIS 11763, *30-*36].)

Because the application of *Crawford* is in its early stages and the law is still developing, it cannot be predicted with any certainty how courts will decide which statements are testimonial. Since the California Supreme Court has granted review in several cases, appellate counsel should be vigilant in raising *Crawford* issues. Moreover, since *Crawford* is based on federal constitutional principles, in addition to California cases, federal circuits' and other states' authority should be considered when presenting appellate arguments.

ANOTHER HURDLE FOR WRITS OF HABEAS CORPUS

by Leslie A. Rose

When can a writ of habeas corpus be filed? The California Supreme Court has declared another procedural bar in the case of *In re Seaton* (2004) 34 Cal.4th 193, modified at 2004 Cal. LEXIS 9245 (September 29, 2004). In *Seaton*, the defendant was sentenced to death after his murder conviction, and his automatic appeal was affirmed. Subsequently, he sought a writ of habeas corpus, challenging his conviction on many grounds and argued that whether a claim can be raised in a habeas corpus proceeding depends upon the nature of the claim, not on whether or not the claim was raised below at trial. Citing *In re Harris* (1993) 5 Cal.4th 831, 834, the defendant contended that even if not raised at trial, claims of constitutional error which are "clear and fundamental" and "strike at the heard of the trial process" can be raised on habeas corpus.

In a five-justice majority opinion, the Supreme Court rejected the argument, finding the defendant's approach would circumvent the main purpose of the forfeiture rule, which is "to encourage prompt correction of trial errors and thereby avoid unnecessary retrials." (*In re Seaton*, *supra*, 34 Cal.4th at p. 200.) The court summarized related habeas cognizability rules:

The "***Waltreus Rule***" (*In re Waltreus* (1965) 62 Cal.2d 218, 225) precludes a habeas corpus petitioner from raising a claim that was raised and rejected on appeal. (*In re Seaton*, *supra*, 34 Cal.4th at p. 199, and as modified, 2004 Cal. LEXIS 9245, *1.)

The "***Dixon Rule***" (*In re Dixon* (1953) 41 Cal.2d 756, 759) states that "certain types of claims may not be raised on habeas corpus if they should have been, but were not, raised on appeal." (*In re Seaton*, *supra*, 34 Cal.4th at p. 199, and as modified, 2004 Cal. LexisS 9245, *1.)

The "***Harris Rule***" (*In re Harris* (1993) 5 Cal.4th 813, 834) provides that neither the *Waltreus* rule nor the *Dixon* rule barred a claim of constitutional error that "'is clear and fundamental, and strikes at the heart of the trial process.' (Citation.)" (*In re Seaton*, *supra*, 34 Cal.4th at p. 199.) "*Harris* does indeed allow a convicted defendant to file a habeas corpus petition raising claims of fundamental constitutional error even when those claims were previously rejected on *appeal*, or when the defendant did not, but should have, raised them *on appeal*. But *Harris* said nothing about allowing a defendant to raise such claims in a *habeas corpus* proceeding when no objection was made at *trial*." (*Ibid*., emphasis original.)

And now the "***Seaton Rule***"—claims, even those concerning fundamental constitutional error, cannot be raised in a state habeas proceeding unless raised first at trial. (*In re Seaton*, *supra*, 34 Cal.4th at p. 200.) The court reasoned that to permit such claims on habeas would defeat the general forfeiture rule barring appellate review of claims not raised first at trial. (*Ibid*.)

The court, however, acknowledged that a defendant may still have recourse on habeas review if counsel's failure to object at trial fell below an objective standard of reasonableness, i.e., ineffective assistance of counsel occurred, or if the claim depends substantially on facts that the defendant did not know and could not reasonably have known at the time of trial, e.g., if the defendant did not know and could not have reasonably have discovered that the prosecution failed to disclose material exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215,]. (*In re Seaton*, *supra*, 34 Cal.4th at p. 200.) However, the court further cautioned that this "exception applies only when the later discovered facts are essential to the claim. A habeas corpus petitioner may not avoid this procedural bar by relying on facts that, although newly learned, add nothing of substance to what the defense knew or should have known at the time of trial. (Citation.)" (*Id*. at pp. 200-201.)[1]

The court also added a footnote, "for the sake of clarity," perhaps as a signal to federal courts reviewing federal habeas corpus petitions, explaining why its orders disposing of habeas corpus claims will not mention the petitioner's failure to raise the claim at trial. (*Id*. at. p. 201, fn. 4.)[2]

Justice Werdegar concurred but stated there was no reason to announce that the new procedural bar applied to fundamental constitutional claims, because the defendant's claims did not meet that high standard. (*In re Seaton*, *supra*, 34 Cal.4th at. pp. 208-209 (conc. opn. of Werdeger, J.)) "To announce that a new rule will have no exceptions is far too easy when the facts of the case at hand do not offer a serious test of the rule's fairness and wisdom." (*Id*. at p. 209.)

Justice Brown concurred and dissented, describing the majority as "formulating a quintessential form-over-substance rule." (*In re Seaton*, *supra*, 34 Cal.4th at. p. 208 (conc. & dis. opn. of Brown, J.))

> I have previously expressed my view that "creating a Byzantine system of procedural hurdles, each riddled

> with exceptions and fact-intensive qualifications, only undermines . . . the goals they purport to serve: integrity of judgments, finality, and comity." (Citations.) Since, at least in the capital context, the court's internal practice generally ensures full merit review irrespective of procedural bars (citation), consideration of possible defaults can only delay finality and invite disregard in the federal courts given the difficulty in determining whether we invoke them with sufficient regularity. (Citation.)

(*Ibid.*)

Justice Brown's observations appear to be apt, when one reviews how the *Seaton* majority analyzed each of the four claims brought by the defendant. As to each claim, the court first determined whether the claim (1) could have been brought up, or objected to, at trial, and (2) the claim involved facts or evidence discovered after trial. Once the court ruled on each claim, that is, whether or not the claim could properly be raised on habeas corpus, the court then looked to see if trial counsel was ineffective. As to all the claims raised by the defendant, the court found the claim barred either by failure to raise the issue below or by lack of merit as to the claim itself, and hence finding no ineffective assistance of counsel. The painfully lengthy analysis now required by *Seaton* does seem to resemble a "Byzantine system of procedural hurdles."

(Footnotes)

1 The court did not address whether the new *Seaton* Rule would bar a state habeas court from considering a claim of lack of fundamental jurisdiction.

2 The footnote (*In re Seaton, supra*, 34 Cal.4th at. p. 201, fn. 4, italics original) explains:

> " . . . . [W]hen an opinion of this court bars a claim on direct appeal because it was forfeited by the defendant's failure to object at trial, and we thereafter bar the identical claim in a habeas corpus petition because it was raised and rejected on appeal, we reaffirm our holding on direct appeal that the claim was forfeited. Accordingly, in such instances there is no need to also state, as a separate ground for rejecting the habeas corpus claim, that the defendant forfeited the claim by failing to raise it at trial, and our orders will not do so. [¶] . . . . What we mean when we invoke the *Dixon* bar is that the claim is based on the appellate record, and thus was fully cognizable on appeal insofar as it was preserved at trial. Hence, we need not engage in the sometimes complex and time-consuming task of determining separately whether a claim was forfeited at trial by failure to object before concluding, under *Dixon*, that the proper means, if any, of obtaining review of the claim was by direct appeal."

Panel Member Honored As "Unsung Hero"

On December 13, 2004, the Youth Law Center awarded panel member, Rich Pfeiffer, with the Loren Warboys Unsung Hero award. The Youth Law Center is a public intere st law firm whose mission is to end abuse and maltreatment of children in the nation's foster care and justice systems, and to ensure that these children are connected to families and communities. The Center engages in advocacy, including public education, policy advocacy, training, technical assistance, and litigation activities, seeking to ensure that children in state custody live free of abuse and dangerous conditions, are treated fairly and not subjected to discrimination, and receive the support and services they need to become healthy and productive adults.

Each year, the Youth Law Center presents the Loren Warboys Unsung Hero award to individuals who have made exemplary contributions to improve the lives of at-risk youth in the child welfare and juvenile justice systems. Loren Warboys joined the staff of the Youth Law Center in 1979 and became Managing Director in 1994. He was a nationally recognized expert on education and mental health services for children in the juvenile justice system and succumbed to leukemia in December 1999. To honor his memory, the Youth Law Center has established the Loren Warboys Memorial Fund and the Unsung Hero Awards. The "Unsung Hero" award is the highest honor awarded by the Youth Law Center. ADI panel member, Rich Pfeiffer was one of five individuals from across the country to receive the 2004 Youth Law Center's highest award.

Richard Pfeiffer is an attorney in Orange County who has championed the rights of children and families in the child welfare system. Unafraid to challenge the system or take on challenging cases, he handles appellate cases and has represented numerous children, youth and families – on a pro bono or reduced fee basis — in an effort to provide them with needed services and family supports, as well as to halt discriminatory practices. For example, he represented the foster parents of some of the Youth Law Center's named plaintiffs in an Adoption Assistance Act case against California (filed in 1997) where the county agency retaliated against the foster parents for filing complaints about means-testing and not receiving adoption assistance. He ultimately won the case on appeal for the foster family, and the appellate court noted in its opinion how the county had improperly removed children from their family. In another case, he successfully represented siblings, who were split up in foster care, in order to get them placed together. Mr. Pfeiffer also volunteers with several organizations, including the Center for Community Reconciliation in Orange County.

"All five of this year's honorees share the struggle to support and uplift our nation's most vulnerable children and youth," said Carole Shauffer, Executive Director of the Youth Law Center. "We applaud their strong commitment to ensuring that children in the foster care and juvenile justice systems are treated humanely and fairly and receive appropriate services and support."

The four other 2004 Loren Warboys Unsung Heroes honorees are Kenneth E. Barnes, Sr. (Washington, DC); Reverend Norman Copeland (Los Angeles, CA); Richard Rosenbaum (Fort Lauderdale, FL) and Scott Stitham (Novato, CA).

MEET THE NEWEST JUSTICES IN THE FOURTH APPELLATE DISTRICT

JUSTICE RAYMOND IKOLA

by Howard C. Cohen

When one enters the chambers of Justice Raymond Ikola in Santa Ana, one is instantly displaced to other locales. The walls of his chambers are adorned with exquisite photographs (taken by the justice himself) of many of California's beautiful county courthouses, and as you sit across from his desk, one cannot help but imagine being transported to Ann Arbor, home of the justice's alma mater. His screensaver displays University of Michigan football images, and the blue Michigan helmet with the gold wings is unmistakable. (Take a look at his photograph in the Daily Journal, October 1, 2004, page 1; note his computer and coffee cup.)

The justice indeed hails from the Michigan, and much of his renowned intellect and judicial temperament are the product of his family (both his parents were educators, his mother an elementary school teacher and his father a junior high principal) and his upbringing in the upper Midwest. It was when he was a senior in high school in Michigan that the Soviet Union launched Sputnik which triggered an American response, encouraging youth to enter the fields of science and mathematics, a pursuit which he followed, earning a bachelor's and master's degree in electrical engineering – though even then he had a "hunch" he would enjoy being a lawyer.

After gaining his degrees, he began working for RCA in New Jersey, during which time the company awarded him a Fellowship that allowed him to pursue a doctorate in electrophysics part-time in Brooklyn. However, he eventually became "bored" with this pursuit, and no sooner had he achieved his doctorate, than he decided to follow his hunch of several years earlier. In the meantime, his family had relocated to California which prompted him to apply to Hastings in the Bay Area. Though he envisioned settling in the Bay Area, a chance (and enjoyable) interview with (and subsequent job offer from) an eight-person firm from Santa Ana launched his a legal career.

His association with the firm blossomed rapidly. He was older than the others, which lent him an especial maturity. He particularly enjoyed the exposure to the courtroom. While other recent law graduates in other firms may have been consigned to more menial tasks, he tried 18 cases in his first two years.

After a very successful civil litigation career, he sought a judicial appointment after encouragement by Bill Wenke, a former partner, and was appointed to the Orange County Superior Court. He served in a variety of functions (civil panel, high impact trial team, appellate division, and complex civil litigation panel) and was the recipient of number of awards, having been recognized amongst the best of the trial judges by trial practitioners. Later, at the suggestion of his wife, he sought appointment to the appellate bench, although, as the appointee of a Republican governor to the superior court, he thought his chances were remote. But after 16 years of Republican appointments to the superior court, the pool of potential appointees acceptable to the new Democratic administration was somewhat limited. His application process was somewhat naive, however, since he submitted very few supporting letters. Time passed without any hint of interest, until the Legal Appointments Secretary telephoned, requesting Judge Ikola to submit additional supporting letters. Months then passed until his appointment as an appellate justice finally occurred.

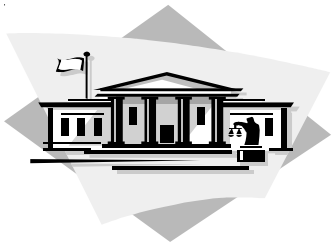
In his experience as both a trial and appellate judge, he has noted that attorneys who are good tend to be very, very good and stand out. The justice has observed that the average appellate attorney is better than the average trial attorney; appellate briefs are generally very good; criminal cases tend to raise certain issues repetitively while civil cases have a much wider range and scope of issues. As a practitioner, he had handled some appeals and thus came to the appellate judiciary with an understanding and familiarity with appellate standards.

He reads appellate briefs in substantive cases with a great deal of interest. While he does not believe that oral argument is necessary in every case, still, in most cases, oral argument can be very important and offers the only occasion for counsel and the court to engage in dialogue. He has noted that there are very few waivers of oral argument in civil cases, while there are comparatively more waivers in criminal cases.

Although Justice Ikola has been on the appellate bench only for two years, his reputation – perhaps a continuation of his reputation as a trial judge – is excellent. Appellate practitioners have noted a rare combination of great intellect *and* a sensitivity to the litigants, though some may be intimidated by his intellect, which cuts to the heart of the case. Still, on the bench, he is unfailingly polite.

Perhaps the best praise comes from a practitioner who has described the justice as "an appellate justice's justice." This comment is not mere flattery, and appellate counsel who have occasion to argue before him should be fully prepared in the nuances of his/her case and be just as prepared to enjoy the experience.

On a personal note, his personal interests, in addition to his photography of county courthouses, include computer programming, classical music, and spending time with his family (especially his grandchildren!).



JUSTICE JEFFREY KING

by Carmela F. Simoncini

The Court of Appeal's gain was the trial court's and plaintiff's bar's loss when Justice Jeffrey King was appointed to sit as an associate justice in the Fourth District Court of Appeal, Division Two, in Riverside, California.

Justice King is truly a San Bernardino County "son" and may have inherited the law gene from his father, John Lewis King, a longtime San Bernardino County attorney. The same gene appears to have been passed to his three children, who have demonstrated similar interests in studying law. Justice King received his Bachelor's degree from University of Redlands and went on to attend McGeorge School of Law, as did his then-future wife, Pamela Preston King. After admission to the bar in 1976, Justice King engaged in a successful civil law practice, primarily as a plaintiff's attorney.

Most of Justice King's legal practice focused on lawsuits arising from products liability, negligence, and dangerous conditions involving public property. He also represented governmental entities in litigation. He has tried numerous cases, some lasting several weeks. Among the most memorable of such cases was a medical malpractice case based on a breast augmentation procedure which left the plaintiff a vegetable. Another major win related to a bifurcated liability trial of a vehicular accident, which resulted in death and serious injuries to vehicle occupants when one car crossed the freeway divider after a tire blowout, hitting an oncoming vehicle head on. He has also handled lawsuits relating to failure to warn of hazardous conditions, such as one case in which a sheriff's helicopter crashed when it ran into electrical wires that did not have markers, and another involving an accident resulting a driver attempting to over-correct after his tires went off the pavement to a soft shoulder which was not properly marked, leaving the driver a quadriplegic.

In addition to his law practice, Justice King's sense of civic duty led him to become involved in local politics. After Rancho Cucamonga became incorporated in 1977, he served on the Rancho Cucamonga Planning Commission for three years, between 1981 and 1984, during the last two of which he acted as chairman. He also served on the Rancho Cucamonga City Council from 1984 through 1988 and was elected mayor of the city in 1986.

Justice King loves litigation, especially the law and motion aspects, where there are meaty legal issues to analyze and resolve. However, the grind of the increasingly contentious adversarial process has had its toll on him. In 1995 he was appointed to the trial court bench by Governor Pete Wilson. It was here that he had his first intensive exposure to the criminal law process, presiding over a criminal calendar for a year before being receiving a civil assignment. This experience served him well when he was elevated to the Court of Appeal by Governor Gray Davis in 2003.

Currently, Justice King receives assignments on all manner of cases in the Court of Appeal. Although he prefers the type of issues raised in civil cases, he has enjoyed participating in cases involving *Miranda* issues, as well severance issues. Transitioning to the Court of Appeal, he was most surprised by the size of the caseload and notes there is a marked change in dynamics from the trial bench. The isolation experienced by some appellate justices who have left active litigation has not been a problem for Justice King, since reading is one his favorite pastimes, the new position provides plenty of reading.

Justice King enjoys oral argument, which he feels has been improved by the tentative opinion process adopted by Division Two of the Fourth District. He feels that oral argument is only as good as all of the participants, and he notes that some cases–and some attorneys–bring out interaction.

Regarding the briefing process, Justice King understands the needs of criminal defense attorneys to raise certain issues in order to preserve federal review and avoid claims of ineffectiveness, but he does feel that over-inclusion of non-meritorious issues tends to make a brief lose some credibility. Nevertheless, he gives each case his full attention and has no regrets about leaving a lucrative plaintiff-P.I. practice for more public service because the work is stimulating, and he is surrounded by congenial colleagues.

Volunteers In Parole, Inc. Annual Awards Luncheon

Friday, January 28, 2005, 11:30am to 1:30pm
Tom Ham's Lighthouse on Harbor Island

On January 28, 2005, attorneys, judges, and government officials will join with California Youth Authority parolees and their families at Tom Ham's Lighthouse in celebration of Volunteers In Parole, Inc.'s Thirtieth Anniversary Awards Luncheon. State Bar President John Van de Kamp, San Diego County Bar Association President Wells Lyman, California Youth Authority Director Walter Allen III, and Youth and Adult Correctional Agency Secretary Roderick Hickman will be among the honored guests in attendance. Superior Court Judge Margorie Woods and the Honorable Norbert Ehrenfreund (retired) will serve as co-Masters of Ceremonies .

Volunteers In Parole, Inc. began its San Diego County program in 1975 as a way to ease the process of reentry into society for newly released parolees. Through VIP, young parolees are assigned to local attorney volunteers. The subsequent attorney-parolee "match" provides the parolee with a friend and advisor for the duration of the difficult parole period. The Awards Luncheon serves to honor all of the attorney volunteers and the parolees they mentor in the VIP program.

Receiving the "Outstanding Attorney Volunteer" award will be Chris Pierson. "Outstanding Match" awards will be presented to Attorney Jeff Landes and his parolee partner Michael Muro as well as to Leslie Abrigo and her parolee partner Mayra Alaniz. "Outstanding Achievement" awards will be presented to CYA parolees Tai Quach and Sarah Schaeffer. Ken Duffield will receive the "Outstanding Parole Agent" award. "Special Recognition" awards will be given to the San Diego Legal Aid Society and in the memory of Mr. Pierson's parolee partner, Carlos Hopper. For more information please contact Jim Pauley at **(619) 220-5348**.