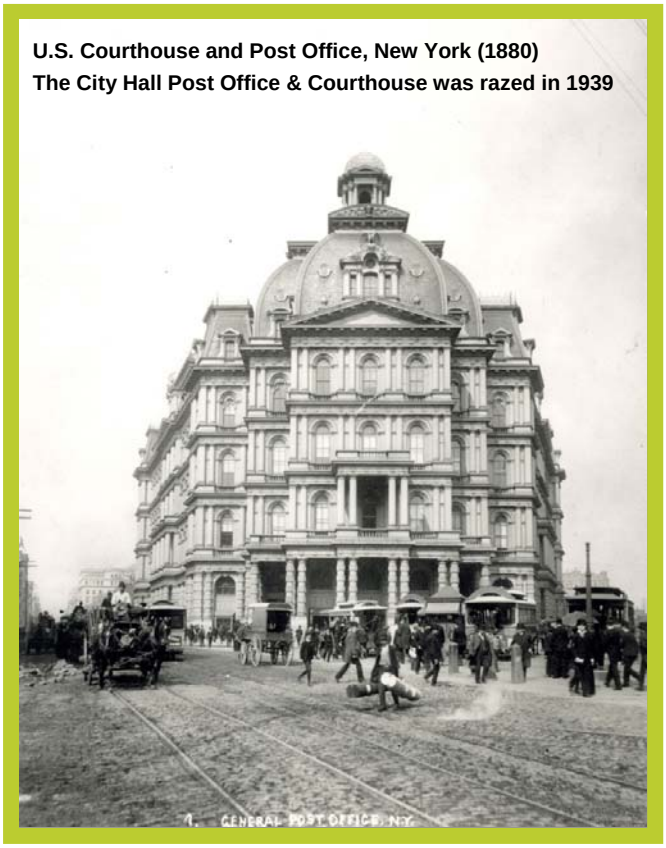

U.S. Courthouse and Post Office, New York (1880)
The City Hall Post Office & Courthouse was razed in 1939

Practice Alert

Local Criminal Rule 16(i)(2) requires that the government and the defense exchange witness names and other information "relating to issues to be raised at the sentencing hearing" "*[o]n the day objections to the draft presentence report are due*." Of late, this rule has been strictly applied to exclude late-disclosed information offered by both the government as well as the defense. Although the exact boundaries of the obligation are not clear, the strict application of the rule suggests this deadline deserves careful monitoring.

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Introduction

We include here some valuable information about searches of computers, especially in child pornography cases. Be aware that the files "seen" by law enforcement might not actually have been on your client's computer (*see* Percolating Issues, p. 2). Also, we need to remind clients about the pitfalls of their cyber-popularity when they post information on Facebook (*see* Social Networking, p. 2). And while the categorical approach likely causes your eyes to glaze over, this analysis is crucially important for challenging prior convictions and fighting enhancements in current charges. The Supreme Court will be weighing in on when the "modified categorical approach" may be used—as opposed to the categorical approach (below).

Keep up the good work. *Vigilantia sempiterna*!

Michael L. Desautels, Federal Public Defender

Supreme Court Preview

The Supreme Court recently heard arguments in ***Descamps v. United States*** (no. 11-9540), a case in which it may provide some clarity as to when it is appropriate to apply the modified categorical approach—which permits a limited examination of the facts regarding the predicate conviction—as opposed to the categorical approach—which limits a court to the text of the statute of conviction.

Descamps was convicted of being a felon in possession of a firearm and the application of the Armed Career Criminal Act ("ACCA") turned on whether a prior California burglary conviction was a crime of violence. The California statute of conviction defines burglary as being the entry into certain structures "with intent to commit grand or petit larceny or any felony." Cal. Penal. Code § 459. The provision only requires an intent to commit an unlawful act and is therefore broader than the generic federal definition: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." ***Taylor v. United States***, 495 U.S. 575, 598 (1990). Because the California statute was broader, the district court and the Ninth Circuit both applied the modified categorical approach to determine whether Descamps' burglary conviction actually involved an unlawful or unprivileged entry.

When the modified categorical approach is applied, the Supreme Court has identified a limited category of documents beyond the text of the statute that can be consulted; specifically, the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." ***Shepard v. United States***, 544 U.S. 13, 16 (2005). Based on the plea colloquy, the district court determined, and the Ninth Circuit agreed, that Descamps' conviction did involve an unlawful entry and therefore applied ACCA. (cont.)

FROM THE INVESTIGATOR'S DESK

BEWARE: SOCIAL MEDIA HAS BECOME THE NEW JAIL PHONE CALL RECORDING

The Government has long been monitoring calls placed from jails to get dirt on our clients. Now, it is monitoring their Facebook pages as well. Facebook remains the granddaddy of all the social networking sites. It currently claims a total of 168,000,000 registered users in the United States alone. The takeaway is this: the odds are tremendously high that our clients (and potential witnesses as well) have Facebook pages. Facebook users aren't distinguishable on the basis of race or ethnicity, class, or socio-economic condition. Nor does Facebook distinguish on the basis of common-sense and good taste.

Clients regularly post about their case. They routinely take photos of themselves in compromising situations. Sometimes, these pictures include drugs. Sometimes they include money. Sometimes they feature the holy trinity of drugs, money, and guns! In many recent cases in our district, the Government has turned over images and posts from our clients' accounts. In most situations, the Government has accessed these posts because our clients have not used any of the privacy settings offered by Facebook. The photos and posts are there for the taking, no subpoenas necessary.

Therefore, at the Federal Defender Office, we are taking proactive steps to avoid being surprised by our clients' social networking activities and I recommend you do the same for your clients. As soon as possible, you need to have a frank discussion with your clients about what social networking sites they use. Ask them if they have activated/utilized any privacy settings. If they are like most people, they will look at you blankly and say, "what's a privacy setting"?

If your client is released from custody you should suggest that they lock down their account and beg them not to post about their case. Nothing. Ever. Ask your client if they are "friends" with any of the witnesses or codefendants in their case and naturally warn them about reaching out to these individuals across this platform. Ask your client if they have posted pictures that might be incriminating so you can be prepared for any repercussions. (At this point, there are unsettled ethical issues around the topic of telling a client to remove photos and posts from their account, so I will not wade into that at this time). (cont.)

Percolating Issues

In several cases, defendants in this district have challenged the search warrants in their child pornography prosecutions. These challenges are based on the fact that in at least some cases involving peer-to-peer networks, government agents have relied on purported matches between files on the defendant's computer and files in the government's child pornography database. Typically, the government investigation has involved an agent conducting a key-word search for child pornography on a peer-to-peer network and then downloading the suspected child pornography. For example,

> On December 19, 2007, an FBI Special Agent, working undercover, used peer-to-peer network software to view lists of videos and images stored on Collins's computer. The agent downloaded and viewed three images that appeared to be child pornography. On March 6, 2008, agents executed a federal search warrant at Collins's residence in Anaheim, California.

United States v. Collins, 684 F.3d 873, 878 (9th Cir. 2012). The government has automated the process of searching for child pornography and it maintains a database of IP addresses at which suspected child pornography has been found on peer-to-peer networks. Secure hash algorithms ("hash value") reduce a file's contents to a single hash value that should be unique to any individual file; peer-to-peer networks rely on these hash values to track files. Along with the IP addresses tracked by the government, a list of the hash values of suspected or known child pornography files at each IP address is also maintained. (cont.)

Second Circuit Developments

In ***Young v. Conway***, 698 F.3d 69 (2d Cir. 2012), the Second Circuit affirmed the district court's decision to grant Rudolph Young's petition for a writ of habeas corpus. Young was convicted by a New York state court of robbery and burglary. On appeal, his conviction was reversed because the police lacked probable cause to conduct the lineup at which Young had been identified. Because the lineup was the first point at which the victims had identified Young—and because the victims had previously been unable to identify Young from photographs—the trial court conducted a hearing to determine whether the witness had an independent basis for her testimony apart from the lineup.

Ultimately, the trial court found that there was an independent basis for the testimony and at a retrial Young was again convicted.

The district court concluded (and the Second Circuit agreed) that the decision to admit the testimony was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Instead, the district court ruled that all of the factors (see below) identified by the Supreme Court in ***United States v. Wade***, 388 U.S. 218 (1967), weighed against a conclusion that there was an independent basis for the testimony:

> (1) the victim's prior opportunity to observe the alleged criminal act; (2) any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification prior to the lineup of another person; (4) a photographic identification of the defendant prior to the illegal lineup; (5) the victim's failure to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the lineup identification.

Notable in the Second Circuit's opinion is the extent to which it relied on research documenting how unreliable eyewitness testimony can be and the fact that the research was brought to the panel's attention by the Innocence Project in an amicus brief. Among other things, the panel concluded that the research demonstrated:

> First, as the amicus curiae observes, even "subtle disguises can . . . impair identification accuracy." . . . . Second, the scientific literature indicates that the presence of a weapon during a crime "will draw central attention, thus decreasing the ability of the eyewitness to adequately encode and later recall peripheral details." . . . . Third, high levels of stress have been shown to induce a defensive mental state that can result in a diminished ability accurately to process and recall events, leading to inaccurate identifications. . . . Fourth, social science research indicates that people are significantly more prone to identification errors when trying to identify someone of a different race, a phenomenon known as "own-race bias."

(cont.)

Percolating Issues (cont.)

In at least some cases, the government's probable cause showing has relied on a match between the hash value of a file located on a suspect's computer and the hash value of known child pornography in the government's database. Although the affidavit recites that the agent has viewed the contents of the file, the agent has actually viewed only the file in the government's database, rather than the actual file from the suspect's computer.

While hash values can be a highly reliable signature of sorts, it is notable that the typical peer-to-peer software does not compute the hash value for files that are downloaded until the computer is rebooted. Instead, the peer-to-peer program on the downloading computer accepts the hash value provided by the peer and the hash value of the complete file being downloaded is immediately recorded on the downloading computer. In this way, the downloading file is tagged with the hash value of the completed file being transferred. Because the program does not re-compute hash values until the computer is rebooted, a computer will contain a list of the hash values of completed files even where the files themselves are incomplete, partial, empty, corrupted, or have been deleted. In addition, these incomplete, partial, empty, corrupted and deleted files are visible on the peer-to-peer networks, and the hash values are found by the government's software (until the computer is rebooted).

Defendants have thus challenged the search warrant because the agents did not take any steps to examine the particular files thought to be on the defendant's computer and because the purported match may actually be to files that are incomplete, partial, empty, corrupted and deleted. Attorneys in the Office of the Federal Public Defender have filed motions to suppress on this issue. *United States v. Neale*, no. 12-cr-37 (motions available on request).

Supreme Court Preview (cont.)

Unlike most other circuits, the Ninth Circuit has allowed recourse to the modified categorical approach even where the statute of conviction is not divisible. *Compare* ***United States v. Aguila–Montes de Oca***, 655 F.3d 915, 944 (9th Cir. 2011) (en banc), *with* ***United States v. Beardsley***, 691 F.3d 252, 274 (2d Cir. 2012) ("We therefore join the majority of our sister circuits in adopting a divisibility requirement for application of the modified categorical approach . . . . Under such a rule, courts should 'depart ... from the formal categorical approach only where the language of a particular subsection of a statute invites inquiry into the underlying facts of the case' because the statute 'contains disjunctive elements, some of which are sufficient for conviction of the federal offense and others of which are not.'"). ***Descamps*** presents an opportunity for the Supreme Court to clarify whether the Second or Ninth Circuit has correctly decided how much modification of the categorical approach can be permitted. Reports from SCOTUSBlog of the oral argument suggested that the Justices were frustrated with the muddle of the modified categorical approach.

In 2011, the Supreme Court held that an individual may raise federalism claims as a defense in a criminal prosecution. ***Bond v. United States***, 131 S.Ct. 2355 (2011). Bond raised these federalism challenges in defense to a prosecution for acquiring, transferring, receiving, retaining, or possessing a chemical weapon, a provision that was added to implement the Chemical Weapons Convention. The Third Circuit explained that the prosecution was based on the following conduct:

> [W]hile Bond was employed by the chemical manufacturer Rohm and Haas, she learned that her friend Myrlinda Haynes was pregnant and that Bond's own husband was the baby's father. Bond became intent on revenge. To that end, she set about acquiring highly toxic chemicals, stealing 10–chlorophenoxarsine from her employer and purchasing potassium dichromate over the Internet. She then applied those chemicals to Haynes's mailbox, car door handles, and house doorknob.

United States v. Bond, 681 F.3d 149, 151 (3d Cir. 2012). On remand, the Third Circuit rejected any attempt to limit the reach of the federal government's power to implement—via the Necessary and Proper clause—a valid treaty and explained instead that it was bound by ***Missouri v. Holland***, 252 U.S. 416 (1920). Among other things, the Supreme Court will consider whether the principles of federalism place any limit on the authority of the federal government to enact legislation to implement a valid treaty. (cont.)

Second Circuit (cont.)

* * * *

> Here, the Innocence Project has directed us to scientific research indicating that such prior identifications may taint subsequent in-court identifications due to a phenomenon known as the "mugshot exposure effect," or "unconscious transference," whereby a witness selects a person in a later identification procedure based on a sense of familiarity deriving from her exposure to him during a prior one . . . . In addition, where, as here, a victim identifies the defendant during an identification procedure prior to her in-court identification, her memory can be tainted by the "mugshot commitment effect": having identified that person as the perpetrator, she becomes attached to her prior identification.

The Second Circuit rejected New York's argument that habeas relief was barred by the Supreme Court's decision in ***Stone v. Powell***, 428 U.S. 465, 494 (1976), that "'where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.'" ***Young***, 698 F.3d at 85 (quoting ***Stone v. Powell***). The Second Circuit concluded that the rule in ***Stone*** was prudential and not jurisdictional. Because New York failed previously to raise this claim, the Second Circuit refused to consider it. The Second Circuit vacated as premature that portion of the district court's opinion which barred Young's retrial.

In ***United States v. Daley***, 702 F.3d 96 (2d Cir. 2012), the defendant, Courtney Daley, was convicted of illegal reentry following deportation in violation of 8 U.S.C. § 1326. Daley moved to dismiss the indictment pursuant to § 1326(d) and the government conceded that there was procedural error because the removal occurred *in absentia* and the parties agreed that the only issue was whether the removal was fundamentally unfair. The district court rejected the § 1326(d) collateral challenge because it concluded that there was no reasonable probability that Daley would have obtained relief if he had received notice of the hearing and therefore the removal was not fundamentally unfair. (cont.)

Social Media (cont.)

There is a potentially positive side to the existence of easily accessible Facebook pages. Just as our clients can post items that hurt their case, so too can government witnesses, both civilian and law enforcement. If you are headed to a hearing, you will most likely know the names of the witnesses scheduled to be called in your case. Do some background investigation yourself! At the very least, take a few minutes to run the names through the Facebook search engine and see what you find. You may be pleasantly surprised to find some nuggets that will make a difference! Feel free to contact Andrew Bartnick (andrew_bartnick@fd.org) with questions.

Second Circuit (cont.)

In support of this conclusion, the district court relied on Daley's several prior convictions, including his Hobbs Act robbery conviction that occurred during his immigration proceedings.

When it affirmed the district court's ruling, the Second Circuit rejected Daley's reliance on ***United States v. Scott***, 394 F.3d 111 (2d Cir. 2005), a case that rejected reliance on post-removal occurrences—or "ex post data"—as support for denying a § 1326(d) challenge. In ***Scott***, at least one of the defendant's prior convictions was sustained *after* the entry of the removal order. In Daley's case, all the convictions, including the Hobbs Act robbery conviction, were established before the removal order was entered. While the Hobbs Act conviction did not become final until after the removal order, Daley plead guilty to the offense several months before the removal hearing. In these circumstances, the Second Circuit concluded that there were no compelling reasons to reject the district court's determination.

Supreme Court (cont.)

In ***United States v. Kebodeaux***, the Supreme Court will review a decision of the Fifth Circuit, sitting en banc, that reversed Kebodeaux's SORNA conviction. The majority of Fifth Circuit judges reversed the conviction because "Congress has no Article I power to require a former federal sex offender to register an intrastate change of address after he has served his sentence and has already been unconditionally released from prison and the military." ***United States v. Kebodeaux***, 687 F.3d 232, 234 (5th Cir. 2012) (en banc). The Supreme Court will consider both whether Kebodeaux was under any federal duty to register and whether Congress has the authority to provide for criminal penalties for failure to register for someone who completed his federal criminal sentence before SORNA was enacted.

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