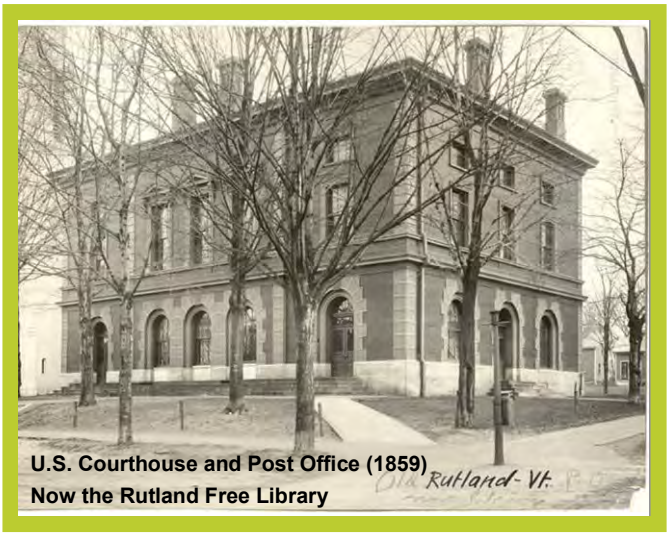
THE DEFENSE POST

October 1, 2012



U.S. Courthouse and Post Office (1859)
Now the Rutland Free Library

Upcoming Events

October 4, 2012—4:00 p.m.
Hands Lecture "Why political systems change: the case of Vermont" by Prof. Frank Bryan, presented by Second Cir. Comm. on History, Commemorative Events and Civic Education at Paramount Theater in Rutland.

October 5, 2012—10:00 a.m.
For the first time, the Second Circuit will sit in Vermont. Oral argument will be held at the historic and recently renovated court house in Rutland (151 West Street). Cases include *U.S. v. Aguiar, et al.*

October 12, 2012
VTACDL Fall CLE—Middlebury Inn (www.vtacdl.com)

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Introduction

On March 18, 1963, we'll reach the 50th anniversary of the Supreme Court's decision in ***Gideon v. Wainwright***, 372 U.S. 335 (1963). While the right to counsel is established as a fundamental right essential to a fair trial, the work to ensure justice for the accused is a daily challenge – and honor. We hope that this inaugural issue of ***The Defense Post*** will assist you in your work. Please be aware that the Federal Public Defender Office stands ready as a resource for federal criminal defense practitioners – in trials, hearings, sentencings and appeals, as well as trainings. We look forward to working with you. Keep up the good fight. *Excelsior*!

Michael L. Desautels, Federal Public Defender

I. Supreme Court Developments

In addition to continuing to limit the application of the most serious penalties to juveniles in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012) (holding mandatory life sentences for juvenile offenders to be unconstitutional under the Eighth Amendment), the Supreme Court also used the First Amendment to invalidate the Stolen Valor Act, 18 U.S.C. § 704(b), which prohibits false representations regarding awards of decorations or medals authorized by Congress for the Armed Forces. In ***United States v. Alvarez***, 132 S.Ct. 2537 (2012), the Supreme Court concluded that § 704(b) was a content based restriction on speech that was not sufficiently narrowly drawn and for which Congress had not shown a compelling government interest. In reaching this decision, the Supreme Court rejected the government's arguments that false statements are not protected by the First Amendment and that the provision was necessary to protect the integrity of the system of military honors.

The Supreme Court's recent opinion in ***United States v. Jones***, 132 S.Ct. 945 (2012), is also likely of interest to practitioners. In ***Jones***, the Supreme Court concluded"[t]hat the Government's installation of a GPS unit on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id*. 949. For the Justices in the majority, it was the physical invasion of an individual's property that was crucial to the decision: "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

II. Second Circuit Developments

Potentially of greatest interest is the Second Circuit's decision in ***United States v. Beardsley***, --- F.3d ----, 2012 WL 3641933 (2d Cir. 2012). In ***Beardsley***, the Second Circuit joined the First, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits when it concluded that the modified categorical approach should only be used where the state statute in question is divisible:

> Under existing Supreme Court precedent, the modified categorical approach is appropriate only where a statute is divisible into qualifying and non-qualifying offenses, and not where the statute is merely worded so broadly to encompass conduct that might fall within with the definition of the federal predicate offense . . . as well as other conduct that does not. Where a statute of prior conviction is merely broad, but does not comprise separate offenses, some of which qualify as federal predicates and others of which do not, we conclude that § 2252A(b)(1) limits sentencing courts to the traditional, strict categorical approach.

Id. at *5. This limitation is of potentially significant benefit because it limits the circumstances under which the district court can look to the underlying conduct to determine whether a prior conviction qualifies as a predicate offense. For example, as ***Beardsley*** notes, the federal child pornography statutes provide for mandatory minimum sentences where the defendant has been convicted of a state offense "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." One relatively common Vermont conviction seen in the federal courts occurs under the state's lewd and lascivious conduct statute, 13 V.S.A. § 2602. The courts have concluded that a conviction under this statute does not categorically constitute "abusive sexual conduct involving a minor or ward." And, the statute is not divisible. Therefore, under the Second Circuit's recent decision in ***Beardsley***, a sentencing court should not apply the modified categorical approach and should not look to the underlying conduct.

U.S. Courthouse and Post Office (1870) in Burlington
Destroyed by fire in 1982

Welcome and Fond Farewells

We bid a fond farewell to Liz Melcher, who started law school at Suffolk University this fall and wish Sarah DeGray the best at her new enterprise, www.revindoor.com.

We also welcome Kelly Murphy as our senior legal assistant and Robert Rieske as our paralegal. Kelly Murphy previously worked for the City of South Burlington and Robert Rieske is a recent graduate of Pace University School of Law.

United States v. Mason,
(2d Cir. Sept. 4, 2012)

"[W]e conclude that the district court misinterpreted the [lawful sporting purposes exception in § 2K2.1(b)]. The district court did acknowledge the correct "purpose of possession" standard in passing, but from the court's initial framing of the inquiry, the court erroneously narrowed the inquiry to the question whether Mason could prove that he had actually used each firearm for a lawful sporting purpose."

III. Supreme Court Term Ahead

Several cases that will be heard starting this week stand out on the Supreme Court's docket.

The Court will review two decisions of the Florida Supreme Court in ***Florida v. Jardines*** and ***Florida v. Harris***; both cases test the Fourth Amendment limits of a drug dog's sniff. In ***Florida v. Jardines***, a tip from a "crime stopper" brought a canine unit to the front porch of Jardine's house where "Franky," the dog, quickly alerted to the presence of illegal drugs. Thereafter, when the authorities executed a search warrant, they found a sizable marijuana grow operation.

Second Circuit Developments (cont.)

The Supreme Court will review the question of when the modified categorical approach should be applied when it considers the Ninth Circuit's decision in ***United States v. Descamps***, 466 Fed.Appx. 563 (9th Cir. 2012).

In ***United States v. Mason***, --- F.3d ----, 2012 WL 3799661 (2d Cir. 2012), the Second Circuit concluded that the district court erred when it narrowed the lawful sporting purposes exception in § 2K2.1 and focused the inquiry exclusively on the actual use of the firearms. "Instead, as other courts considering this question have concluded, the relevant inquiry is the broader question whether, in the totality of the circumstances, a defendant possessed firearms with the intent to use them for a lawful sporting purpose."

Another case that may be of some interest to Vermont practitioners is ***McGarry v. Pallito***, 687 F.3d 505 (2d Cir. 2012). In ***McGarry***, the Second Circuit *reversed* the district court's order dismissing a Vermont pretrial detainee's suit under the Thirteenth Amendment. In his suit, the detainee claimed that officials at the Chittenden Regional Correctional Facility had subjected him to involuntary servitude when he was forced to work in the prison laundry on pain of being sent to the "hole." The Second Circuit explained that the Thirteenth Amendment was not limited to conditions akin to chattel slavery and thus reached the conditions pled by the plaintiff: "compelled work in a laundry for up to 14 hours a day for three days a week doing other inmates' laundry." *Id.* at 514. Nor, because the law regarding involuntary servitude was well established, had the defendants established that they were entitled to qualified immunity.

Looking to ***Kyllo v. United States***, 533 U.S. 27 (2001), the Florida Supreme Court concluded that the use of a drug detection dog in these circumstances constituted a search for which a warrant was required.

In ***Florida v. Harris***, the Supreme Court will review a decision of the Florida Supreme Court in which that court concluded that, standing alone, a drug detection dog's alert to a motor vehicle does not establish probable cause. Rather, the state had to establish the dog's reliability by showing how the particular dog was trained, what was done to satisfy an expert that the dog was adequately trained, how the dog had actually performed in "alerting" to drugs in other situations, and how well trained and how experienced was the dog's police handler. Other courts have reached similar conclusions and this is an issue worth considering in cases involving drug detection dogs. *See* ***United States v. Cedano-Arellano***, 332 F.3d 568, 571 (9th Cir. 2003) (per curiam), ***State v. Foster***, 252 P.2d 292, 298 (Or. 2011) ("We agree with the parties that, in determining whether police had probable cause to search based on the alert of a drug-detection dog, the analysis requires an individualized inquiry into the reliability of the particular dog involved.").

In addition, the Supreme Court will review the Second Circuit's decision in ***United States v. Bailey***, 652 F.3d 197 (2d Cir. 2011), in which the Second Circuit joined the Fifth, Sixth, and Seventh Circuits and extended ***Michigan v. Summers***, 452 U.S. 692 (1981), to "authorize[] law enforcement to detain the occupant of premises subject to a valid search warrant when that person is seen leaving those premises and the detention is effected as soon as reasonably practicable."

Also notable is ***Missouri v. McNeely***, in which the Court will consider whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream. The Missouri Supreme Court, in ***State v. McNeely***, 358 S.W.3d 65 (Mo. 2012), concluded that such an intrusion was not warranted.

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October 1, 2012

Sentencing Guideline Amendments

On November 1, 2012, the Sentencing Commission's 2012 amendments will take effect barring Congressional action. Of note is the Commission's determination that possession of chemical precursors is a potentially less serious offense than distributing, exporting, importing, or possessing a listed chemical and should therefore be eligible for safety valve treatment. Fraud has also been much on the Commission's mind and a number of the amendments deal with mortgage fraud and other frauds in the news of late. The amendments also resolve a circuit split regarding whether driving while intoxicated counts in the criminal history computation (it will now always count). The text of the amendments, along with the Sentencing Commission's rationale, is available at the Commission's website, http://www.ussc.gov/. A summary of the amendments is available at the Office of Defender Services website, http://www.fd.org/docs/latest-news/Proposed_Amend_Guidelines_2012.pdf.

Congratulations To

David McColgin, for a motion to dismiss granted in *United States v. Mullins* (Interim Rule implementing SORNA violated the Administrative Procedures Act).

William Kraham, for a motion to suppress granted in *United States v. Ramos*.

Mark Kaplan and David McColgin, for a motion to suppress granted in *United States v. Harris*.

Michael Desautels, for an acquittal in *United States v. Safady* (alien smuggling).

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