

Criminal Law



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News from the Federal Courts

by *Kenneth C. Bauman*

Attorney General John Ashcroft issued directives to the Bureau of Prisons (BOP) in December 2002 requiring them to comply with statutes and regulations regarding the housing of federal inmates. The BOP will no longer follow a sentencing judge's recommendations that a white-collar criminal commence the service of his or her sentence at Community Correction Centers (CCC). The result will be that a majority of white-collar criminals will begin their sentences, like every other federal prisoner, at a federal institution designated by the BOP. Additionally, the BOP will follow 18 U.S.C. § 3624(c), which requires that most federal inmates be transferred to a CCC during the last 10% of their sentence, but not to exceed six months. The BOP had interpreted this statute to give them the authority to transfer inmates to a CCC for the last six months of their sentence regardless of the length of the inmates sentence. In the future, the BOP will transfer inmates to a CCC only for the last 10% of their sentence but not more than six months.

On January 21, 2003 the Supreme Court again reversed the Ninth Circuit. The issue in *U.S. v. Recio*, __U.S.__(2003) (2003 WL 139612), was the Ninth Circuit's holding that a conspiracy ends as a matter of law when the government frustrates the objective of the conspiracy. No other circuit followed that rule. This rule frustrated undercover drug investigations. The Supreme Court said that the essence of the crime of conspiracy was "an agreement to commit an unlawful act (or a lawful act by unlawful means). That agreement is a distinct evil, which may exist and be punished whether or not the substantive crime ensues." The Supreme Court held that a conspiracy does not automatically terminate simply because the government, unbeknownst to some of the conspirators, has defeated the object of the conspiracy. As an example, where the object of a conspiracy is to possess with the intent to distribute and distribute illegal drugs, the seizure of those illegal drugs by law-enforcement officers does not automatically end the conspiracy.

On January 23, 2003 the Ninth Circuit issued an opinion in *Clark v. Murphy* __F.3d__ (9th Cir. 2003) (2003 WL 187216). Murphy was arrested at 11 a.m. on May 23, 1991. He was immediately advised of his Miranda rights and taken to a police station in Phoenix, Arizona, for questioning. Murphy was interviewed regarding the theft of his stepmother's car and thereafter her disappearance. The first interview terminated at 12:45 p.m. after Murphy had admitted he had stolen his stepmother's car. A second interview took place later that afternoon at 4 p.m. regarding Murphy's missing stepmother. Murphy was again advised of his Miranda rights. During the questioning about his missing stepmother Murphy stated, "I think I would like to talk to a lawyer." The detective questioning Murphy told him that if he wanted a lawyer he would call one but he suspected that if that happened the interview would be over. Murphy stated that he did not want a lawyer

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and wanted to continue with the interview. As the interview proceeded, Murphy stated "Should I be telling you or should I talk to a lawyer?" A discussion with the detective ensued regarding the detective's personal or professional opinion about Murphy's getting a lawyer. Subsequently, Murphy confessed to the murder of his stepmother. Murphy was tried and convicted of second-degree murder. The Arizona trial court allowed his confession to be admitted into evidence over his objection. Murphy's case came to federal court when he filed a petition for writ of habeas corpus under 28 U.S.C. § 2254(d). Under the standard set out in 18 U.S.C. § 2254(d)(1), the Arizona court's decision to admit Murphy's confession can be overturned only if it resulted in a decision that was contrary to, or involved in unreasonable application of, current established federal law as determined by the Supreme Court of the United States. The Ninth Circuit said, "[a] state court's decision involves an unreasonable application of federal law if the state court identifies the correct governing legal principles but unreasonably applies that principle to the facts of the prisoner's case." Unreasonable application of federal law is different from an incorrect application of federal law. Even if the federal court found that the state court decision applied clearly established federal law incorrectly, relief is only appropriate if that application was also objectively unreasonable. After the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), the Ninth Circuit said that the federal court must follow a two-step inquiry. The first question is whether the state court erred at all. If the answer is yes, then the federal court must apply the standard as set forth above. The Ninth Circuit found that because a reasonable police officer would not have understood Murphy's statement to be an unambiguous and unequivocal request for counsel, his confession was admissible. Murphy also argued in his habeas corpus proceeding, that his confession was involuntary because he was held over five hours in a six-by-eight foot locked, windowless room. The Ninth Circuit said that this was just one factor, out of many, that constituted the totality of the circumstances surrounding Murphy's questioning. Under the totality of the circumstances in that case, Murphy's confession was voluntary.

U.S. v. Dominguez, ___F.3d___ (9th Cir. 2003) (2003 WL 139527), involved collateral attack on prior convictions used to enhance the criminal history of a federal defendant. The Ninth Circuit held that the sentencing court had improperly placed the burden of proving the validity of prior convictions on the government. The Ninth Circuit said "a defendant must prove the invalidity of a prior conviction by a preponderance of the evidence. A defendant cannot carry this burden merely by pointing to a silent, or ambiguous, record."

In *Kelly v. Small*, ___F.3d___ (9th Cir. 2003) (2003 WL 115206), was a habeas corpus proceeding under 28 U.S.C. § 2254 filed by a inmate convicted in California. The inmate raised eight claims for relief in his petition. The Ninth Circuit found that the inmate had exhausted all of his available state court remedies with regard to six of his eight claims for relief but that he had failed to exhaust all of his available remedies as to two. The Ninth Circuit refers to this as a "mixed petition." The Ninth Circuit reversed the district court's dismissal of the inmate's petition because he had failed to exhaust all of his state court remedies with regard to all of his claims. The Ninth Circuit returned petition to the district court with instructions to offer the inmate the opportunity either to dismiss the two unexhausted claims and proceed on the merits of the other six claims or stay the petition at the dismissal of the unexhausted claims and allow him to exhaust his state court remedies and then move to add them to his petition and proceed onto the merits on all of his claims.

In *U.S. v. Vesikuru*, 314F.3d 1116 (9th Cir. 2002), involved an "anticipatory" search warrant. The court stated that the execution of a anticipatory search warrant is conditioned upon the occurrence of a triggering event. If the triggering event does not occur, probable cause for search is lacking. The condition precedent need not be set forth within the four corners of the search warrant itself. The Fourth Amendment's particularity requirement is satisfied if (1) an affidavit setting forth the triggering event for the search accompanies the search warrant at the time of the search and (2) the search warrant officially incorporates that accompanying affidavit. In *Vesikuru*, the affidavit accompanied the search warrant at all relevant times. Additionally, the agents read the affidavit in conjunction with reading the search warrant. The Ninth Circuit stated that its case law requires only that suitable words of incorporation be set out in the search warrant. The Ninth Circuit quoted the following as a possible example of a statement of incorporation in a search warrant, "The attached affidavit is incorporated herein by reference as if fully set forth below."

In *U.S. v. Alaimalo*, 313 F.3d 1188 (9th Cir. 2002), the issue before the Ninth Circuit was an inmate's allegation in a Motion to Correct, Vacate or Set Aside Judgment under 28 U.S.C. § 2255 that his counsel had been ineffective. Alaimalo claimed that his lawyers had been ineffective because they had failed to contest the warrantless entry into his home and the subsequent search. The Ninth Circuit found that there was probable cause and exigent circumstances to enter Alaimalo's home, therefore, his attorneys could not have been constitutionally ineffective for failure to challenge the warrantless search.

Appellate Courts Struggle With Merger Issues

by Timothy A. Sylwester

In *State v. Lucio-Camargo*, 186 Or App 144 (2003), the Oregon Court of Appeals struggled to harmonize the decisions by the Oregon Supreme Court on the issue of merger of convictions and sentences under ORS 161.067 when the defendant commits the same crime more than once in the same criminal episode. In a series of decision stretching back to *State v. Crotsley*, 308 Or 272, 779 P2d 600 (1989), and *State v. Tucker*, 315 Or 321, 845 P2d 904 (1993), and most recently to *State v. Barrett*, 331 Or 27, 10 P3d 901 (2000), and *State v. Barnum*, 333 Or 297, 39 P3d 178 (2002), the supreme court has attempted to provide a roadmap for determining when, and under what circumstances, separate convictions for the same or similar crimes must be merged under ORS 161.067 for purposes of either conviction or sentence.

In *Barrett*, the court held that separate convictions for alternative theories of aggravated murder based on the death of a single victim should result in a single judgment of conviction for aggravated murder and sentence, but with the judgment reflecting all the various determinations of guilt on those charges. 331 Or at 36-37. In *Barnum*, the defendant was convicted on two charges of first-degree burglary based on a single entry into a residence but with the separate intents to commit theft and arson. The court concluded that the defendant properly was convicted on both burglary charges but that the evidence failed to establish a "sufficient pause" between those offenses to justify separate sentences under ORS 161.067(3). 333 Or at 303.

Following *Barnum*, the court of appeals reached the same result in *State v. McCloud*, 184 Or App 659, 56 P2d 692 (2002), in a case in which the defendant was convicted on two counts of first-degree sexual abuse based on the defendant's separate touchings of a single victim during a single criminal episode. The court concluded that, under ORS 161.067(3) and *Barnum*, the sentencing court properly entered separate convictions but only a single sentence.

In *Lucio-Camargo*, the defendant was convicted on two counts of first-degree burglary for a single entry into a residence but with the intent to assault two different victims. The sentencing court entered two convictions and separate sentences, but ordered him to serve those sentences concurrently. The court of appeals discussed at length the supreme court's series of merger decisions and concluded that they appear "to be at odds" with each other and thus leave that court "in a quandary in light of the applicable statutes and the court's previous precedents." (186 Or App at 153-54). The court ultimately concluded that, like *Barrett* but unlike *Barnum*, the appropriate result was that "the trial court should have entered only one conviction and sentence on the burglary counts." 186 Or App at 156.

In evaluating whether merger of separate convictions arising from a single criminal episode is appropriate in some form, three fundamental principles apply. First, if the convictions are based on separate statutory provisions that each require proof of an element that the other does not, then merger is precluded by ORS 161.067(1). See *Crotsley*. Second, if the convictions are based on crimes against different victims, then ORS 161.067(2) precludes merger. Third, if the convictions are based on the statutory provision but arise from separate acts by the defendant against the same victim, then the question under ORS 161.067(3) becomes whether the facts show that there was a "sufficient pause" between the acts "to afford the defendant an opportunity to renounce the criminal intent." If not, then separate convictions may be appropriate but only a single sentence.

We're on the Web!

The OSB Criminal Law Section website, www.osberim.homestead.com, aims to give you quick and easy access to criminal-law information, from CLE announcements to links to court opinions. Please take a moment to check out the site. You'll find:

- **CLE Information**

- A description of the upcoming April 2003 CLE
- A downloadable and printable registration form
- A link to Spirit Mountain Casino, the CLE location, for lodging information and driving direction

- **Section Information, including past newsletters**

- **Downloadable Criminal Law Forms**

- Plea Petition forms
- Waiver of Counsel forms
- Judgment forms

- **Links to Useful Sites**

- Oregon Courts, including a direct link to new appellate opinions
- Oregon Legislature
- Criminal law research sites, including Cornell University's searchable archive of United States Supreme Court Opinions
- Criminal Law Organizations

We hope to make the site a useful tool for you. If you have comments or questions, please contact at Rebecca Duncan at <rebeccaduncan@attbi.com>.

The OSB Criminal Law Section Presents:
16th Annual Seminar

Contemporary Issues in Criminal Justice

Friday, April 11, 2003
Spirit Mountain Casino
Grand Ronde, Oregon

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■ Keynote Address

by The Honorable Anna Brown, U.S. District Court

■ Appellate Update:

“Throw away your advance sheets”

*with Jesse Wm. Barton, Attorney at Law, Salem;
Timothy A. Sylwester, AIC Appellate Division, DOJ;
Jennifer Lloyd, Asst. Solicitor General, DOJ*

■ Legislative Update

with ODAA & OCDLA representatives

■ Break Out Sessions

CSI in Oregon: Reality vs. TV

with Criminalist Jennifer Zeppa, OSP Forensic Lab

Addressing Diversity Issues During Voir Dire

with Angel Lopez, Portland and Terri Wood, Eugene

Laying an Evidentiary Foundation

*with Timothy A. Sylwester, AIC Appellate Division, DOJ;
Anne Fujita Munsey, Deputy Public Defender, Office of
Public Defender Services*

Learning the Latest Requirements for Child Abuse Reporting

*with Sarah Morris, deputy district attorney, Marion County;
A representative of Dept. of Human Services-Child Welfare*

■ Ethics panel discussion

Reasonable Minds Disagree: Should you be able to interview jurors after a trial

*with The Honorable Edward Jones, Multnomah County
The Honorable Daniel Murphy, Linn County
Michael Dugan, Deschutes County District Attorney
Carolyn Alexander, Asst. Attorney General, DOJ Trial
Division, Criminal Defense Attorney, to be announced*

Regular registration: \$185

Criminal Law Section Members: \$160

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Oregon Opinions in Your E-Mail Box!

The Criminal Law Section is launching a new e-mail project for section members. When the Oregon Court of Appeals or Supreme Court issues an opinion in a criminal case, you will receive an e-mail containing the court's summary of the opinion and a hyperlink to the court's on-line opinion itself.

The e-mail project will cover criminal cases including: direct appeals, post-conviction appeals, juvenile-delinquency appeals, habeas corpus, and mandamus cases.

The benefit of the e-mail project is that the criminal cases are selected out from the others issued and are sent directly and promptly to you.

The e-mails will be sent to section members who have an e-mail address on file with the Bar and will start in March 2003. If you do not have an e-mail address on file with the Bar, but would like to receive the e-mails, please contact Rebecca Duncan at <rebeccaduncan@attbi.com>.