Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Aug. 8, 2016
Re: *United States v. Benally,* 2016 WL 4073316 (9th Cir. Aug. 1, 2016): ***Johnson / Crime of Violence****:* Great decision holds that federal involuntary manslaughter statute is not a "crime of violence"

"If it's any help, your sentence was the most e-mailed story of the week."

Players: Decision by Judge Noonan, joined by Judges D.W. Nelson and O'Scannlain. Big win by D. Arizona AFPD Dan Kaplan.

Facts: Benally was convicted of a § 924(c) charge, with a federal involuntary manslaughter (18 USC § 1112) as the underlying "crime of violence." *Id.* at *1.

Issue(s): "Joe Arviso Benally appeals a jury conviction for involuntary manslaughter under 18 U.S.C. §§ 1112 and 1153 and for using a firearm in connection with a "crime of violence" under 18 U.S.C. § 924(c)." *Id.* at *1.

Held: "We hold that involuntary manslaughter is not a 'crime of violence' and reverse the § 924(c) count of conviction." *Id.* at *1. "After *Leocal* and *Fernandez–Ruiz*, a 'crime of violence' requires a mental state higher than recklessness—it requires intentional conduct. *See Covarrubias Teposte*, 632 F.3d at 1053 ("The effect of our holdings is that in order to be a predicate offense under either 18 U.S.C. § 16 approach, the underlying offense must require proof of an intentional use of force or a substantial risk that force will be intentionally used during its commission." (*quoting United States v. Gomez–Leon*, 545 F.3d 777, 787 (9th Cir. 2008))). Involuntary manslaughter under § 1112, requiring a lesser mental state of "gross negligence," prohibits conduct that cannot be considered a "crime of violence" under § 924(c)(3). Under the categorical approach, therefore, involuntary manslaughter cannot be a "crime of violence." *Springfield*'s opposing rule is clearly irreconcilable with the reasoning and results of *Leocal* and *Fernandez–Ruiz* and is no longer good law. Benally's § 924(c) count of conviction for using a firearm in connection with a 'crime of violence" is REVERSED.' *Id.* at *4.

Of Note: In a dusty old decision, the Ninth had held that involuntary manslaughter under § 1112 *was* a crime of violence, concluding that "gross negligence" was sufficient *mens rea* for a c.o.v. *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987). Here, a mere three-judge panel concludes that *Springfield* is no longer good law – no en banc court involved. This welcome result is courtesy of our friend, *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc): a case that allows a three-judge panel to determine that Ninth caselaw is "effectively overruled" by intervening higher authority (in this case, the intervening authority was *Leocal* and *Fernandez-Ruiz*). For *Johnson* warriors, *Miller v. Gammie* is the broom three-judge panels will use to sweep out cobwebbed Ninth law. Judge Noonan's analysis is a clear and helpful guide for that housekeeping. *See Benally* at *3.

How to Use: This tip seems self-evident, but because the government is throwing everything against the *Johnson* barn door it is worthwhile to point it out. Neither *Leocal* or *Fernandez-Ruiz* discuss the *mens rea* necessary to commit a "crime of violence" for § 924(c). Instead, those cases interpret the "crime of violence" *mens rea* for 18 USC § 16. Judge Noonan undertakes the common sense analysis in *Benally*: "because the wording of the two statutes is virtually identical, we interpret their plain language in the same manner." *Id.* at *3 (footnote omitted). *Benally* teaches that *Johnson* is the hammer: the whole USC and USSG look like nails.

For Further Reading: In a bevy of briefs urging *Johnson* stays, the government has told district courts that they should look to the Ninth's *Jacob* and *Gardner* stayed SOS cases. Yep, gov't is right: that brace of cases is critical to the stay analysis. On August 1, the Ninth Circuit *lifted* the stays on both of these cases, over briefed government objection, and sent them both to the district court to get them resolved. *See Jacob v. United States*, No. 15-73302 (9th Cir. Aug. 1, 2016) (Ord.), *Gardner v. United States*, No. 15-72559, No. 15-73302 (9th Cir. Aug. 1, 2016) (Ord.). Folks are incarcerated, overserving illegal sentences, and deserve their day in court: let's get this litigation rolling. *See United States v. Castilleja*, 2016 WL 3024108 (E.D. Wa. May 5, 2016) (Ord. denying stay).