U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 8, 2008

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, D.C. 20515

Re: United States v. Bernard Lenwood Waybright, No. CR 08-16-M-DWM (D. Mont.)

Dear Madam Speaker:

Pursuant to 28 U.S.C. 530D, I am writing to advise you that on December 8, 2008, the Solicitor General determined not to appeal the decision of the district court in the above-referenced case. A copy of the decision is enclosed.

In 2004, the defendant was convicted in West Virginia state court of sexual abuse in the second degree, which required him to register as a sex offender in West Virginia, pursuant to the Sex Offender Registration and Notification Act (SORNA). 42 U.S.C. 16913. In 2007, the defendant traveled to Montana, where he stayed for weeks at a time, surrendering his West Virginia driver's license and obtaining a Montana license. He subsequently was charged in a two-count indictment with failing to register as a sex offender in Montana, in violation of SORNA, 18 U.S.C. 2250(a). See Slip op. 5-6.

The defendant moved to dismiss the indictment, asserting multiple legal grounds for dismissal. The district court rejected all of the defendant's arguments except one. As relevant here, the court rejected the defendant's challenge to 18 U.S.C. 2250(a), which makes it a federal crime for a sex offender who is required to register under SORNA to travel in interstate commerce and then fail to register. The court held that Section 2250(a) was a lawful exercise of Congress's authority under the Commerce Clause, because that provision "requires sex offenders to use the channels of interstate commerce or travel in interstate commerce before subjecting them to criminal penalties." Slip op. 11-12. The district court held that Congress exceeded its Commerce Clause power, however, by enacting the registration requirement in 42 U.S.C. 16913, because that provision requires all sex offenders to register regardless of whether they travel in interstate commerce. See Slip op. 16-22. In so holding, the court relied in part on a concession at oral argument by government counsel that Section 16913 could not be upheld under the Commerce Clause alone. Id. at 21. The court also concluded that neither the Necessary and Proper Clause nor the Spending Clause could sustain Section 16913. See id. at 22-28.

Accordingly, based on its conclusion that Section 16913 was unconstitutional, and because it concluded that proof of a requirement to register under that provision was a necessary predicate to a conviction under Section 2250(a), the district court dismissed the indictment. See id. at 3.

The Department has defended the constitutionality of 42 U.S.C. 16913 and 18 U.S.C. 2250(a), and it will continue to do so. For example, on September 2, 2008, the Solicitor General authorized an appeal to the Eleventh Circuit in United States v. Powers, No. 07-CR-221 (M.D. Fla. Apr. 18, 2008), and United States v. Buckius, No. 08-CR-52 (M.D. Fla. Apr. 18, 2008), to defend the constitutionality of SORNA's criminal prohibition. In light of the non-precedential value of the district court's decision here, however, as well as the fact that the government counsel's concession in the district court regarding the Commerce Clause argument might limit the grounds on which the government can appeal and therefore increase the possibility that this case, if appealed, might result in adverse appellate precedent, the Solicitor General determined not to authorize an appeal in this case to the Ninth Circuit. The risk of such an adverse precedent is heightened by the fact that the government did not argue in the district court that the defendant, who himself traveled in interstate commerce before failing to register, should not be permitted to bring a broad, facial challenge to the registration requirement on the theory that it is constitutionally deficient for failing to include an interstate commerce nexus requirement. The government will defend the constitutionality of SORNA in district courts within the Ninth Circuit and in the Ninth Circuit itself in an appropriate future case, and the government anticipates such a case will be before that court in the near future (which provides another reason not to invite an adverse ruling in this case, given the problems discussed above). If an appeal had been authorized in this case, the government's brief would have been due on December 8, 2008.

Please let me know if we can be of further assistance in this matter.

Sincerely,

Rebecca Jacobsen

for Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosure