

JUN 30 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DANNY JOSEPH FABRICANT,

Defendant - Appellant.

Nos. 13-50191

13-50271

D.C. No. 2:03-cr-01257-RSWL

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Submitted June 25, 2014**

Before: HAWKINS, TALLMAN, and NGUYEN, Circuit Judges.

In these companion appeals, federal prisoner Danny Joseph Fabricant appeals pro se from the district court’s order denying filing of his application for an order requiring DNA testing under 18 U.S.C. § 3600, and from the district

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

court's order denying his ex parte request for discovery. In Appeal No. 13-50191, we remand. We dismiss Appeal No. 13-50271 for lack of appellate jurisdiction.

In Appeal No. 13-50191, Fabricant contends that the district court erred when it refused to file his application for DNA testing on the ground that the case was closed. We agree. As the government concedes, section 3600 provides a post-conviction remedy. *See* 18 U.S.C. § 3600(a). Despite the government's request that we nevertheless affirm because the application fails on its face, we instead remand to the district court with instructions to file the application and consider it on the merits in the first instance.

In Appeal No. 13-50271, Fabricant challenges the district court's order denying his ex parte request for discovery. We dismiss the appeal for lack of appellate jurisdiction. *See Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1490 (9th Cir. 1989) (discovery orders are not final appealable orders under 28 U.S.C. § 1291).

Appeal No. 13-50191 REMANDED with instructions; Appeal No. 13-50271 DISMISSED.