L'AMI DE L'AVOCAT

"The Lawyer's Friend"

FEDERAL CRIMINAL LAW UPDATE:
A Newsletter of recent notable Supreme Court and Fifth Circuit Cases

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[1] The Office of the Federal Public Defender published a newsletter, "Champions of Liberty" in the past. This newsletter contains a new format and will be released quarterly or biannually, depending on the amount of relevant changes in the case law.

SEARCH AND SEIZURE:

A DEFENDANT CANNOT CHALLENGE A PRETRIAL RESTRAINING ORDER TO PRESERVE THE AVAILABILITY OF FORFEITABLE PROPERTY.

Kaley v. United States, SCOTUS, February 25, 2014

- The Government may seize assets before trial that a defendant intends to use to pay an attorney, so long as probable cause exists "to believe that the property will ultimately be proved forfeitable."
- When challenging the legality of a pre-trial asset seizure under 21 U.S.C. § 853(e)(1), a criminal defendant who has been indicted is not constitutionally entitled to contest a grand jury's determination of probable cause to believe that he committed the crimes charged.
- PRACTICE TIP: Although you cannot challenge the probable cause that the crime was committed, you can challenge whether the assets seized are sufficiently related to the alleged crime..

TAKING A DNA CHEEK SWAB OF ARRESTED PERSONS IS NOT A FOURTH AMENDMENT VIOLATION.

Maryland v. King, SCOTUS, June 2, 2013

- Treating the resolution of unsolved crimes as a legitimate part of routine police station "booking" procedures, SCOTUS upheld the power of government at all levels to take DNA cheek swab samples from every person legally arrested for a "serious" new crime.
- The past actions of a suspect, the Court majority ruled, is a part of the profile that police may constitutionally begin to assemble at the time of arrest for a separate "serious" offense.
- PRACTICE TIP: Arrest must be for a "serious" offense to justify the intrusion of a DNA cheek swab.

AN ANONYMOUS TIP TO 911 ABOUT A RECKLESS DRIVER, WITH LICENSE PLATE NUMBER, CREATES ENOUGH REASONABLE SUSPICION (*TERRY*) TO CONDUCT A TRAFFIC STOP.

Navarette v. California, SCOTUS, April 22, 2014

- An anonymous person called the 911 emergency line to say that a driver had run her off the road and described the truck and reported its license plate number. Police used that tip to pull over the defendant's vehicle, which led to the discovery of drugs.
- The Court held that these facts led to sufficient reasonable suspicion to conduct a *Terry*-stop despite the tip being anonymous because:
  (1) The fact that the tipster had used 911 added to its reliability, because new technology allows police to identify such callers, and hold them responsible for false reports.
  (2) The fact that the tipster had described a near-accident was enough to lead police to conclude that the other driver may have been drunk.
  (3) The suspicion of drunken driving, with the hazards it poses for the traveling public, justified police in stopping the suspected driver even though the police observed no erratic driving. The fact that there was no erratic driving was not proof that the driver was not drunk.
- Scalia Dissent: "The Court's opinion serves up a freedom-destroying cocktail"
- PRACTICE TIP: The immediate danger of drunk driving seemed to drive this decision. Absent drunk driving concerns, argue that an anonymous tip is not sufficient reasonable suspicion.

IN DWI INVESTIGATIONS, THE NATURAL DISSIPATION OF ALCOHOL IN THE BLOODSTREAM DOES NOT CONSTITUTE AN EXIGENCY IN EVERY CASE SUFFICIENT TO JUSTIFY CONDUCTING A BLOOD TEST WITHOUT A WARRANT.

Missouri v. McNeely, SCOTUS, April 14, 2013

- None of the Court's four opinions — a majority, two separate opinions supporting the result, and one dissenting opinion — said that officers investigating drunk-driving cases must always obtain a warrant.
- But the majority did say that the Constitution does not allow police to get a blood sample without ever having to obtain a warrant, in any case (as the dissenting opinion suggested). So that sets up the case-by-case approach, suggesting that getting a warrant very likely would remove the doubt.
- PRACTICE TIP: This decision leaves open the ability to challenge all DWI blood tests taken without a warrant.

DRUG-SNIFFING DOGS ARE RELIABLE AND CAN BE USED BY POLICE TO SEARCH A CAR WHEN THE DOG ALERTS TO THE PRESENCE OF DRUGS.

Florida v. Harris, SCOTUS, February 13, 2013

- SCOTUS affirmed the reliability of drug-sniffing dogs and established that an alert by a drug-sniffing dog establishes probable cause to search a vehicle.
- A dog alert, however, is still subject to challenge under the "reasonable prudent person" test, which is a common sense review of all of the facts about the dogs alert.
- You can still challenge the dependability of the training evidence and to test whether the police handler might have "cued" the dog to make an alert.
- PRACTICE TIP: Challenge the dog's training and challenge the alert. Request the police surveillance video.

A DOG SNIFF AT THE FRONT DOOR OF A HOUSE WHERE THE POLICE SUSPECTED DRUGS WERE BEING GROWN CONSTITUTES A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT.

Florida v. Jardines. SCOTUS, March 26, 2013

- Drug-sniffing dogs cannot be used to create probable cause to enter a residence.

IF THE REMAINING OCCUPANT CONSENTS TO A SEARCH AFTER THE OBJECTING OCCUPANT WAS REMOVED, THE CONSENT IS VALID.

Fernandez v. California, SCOTUS, February 25, 2014

- Police were in the area because of reported gang activity. The police heard screaming and fighting and knocked on an apartment door. A woman opened the door and the police observed that her face was red and she had a large bump on her nose. Defendant also appeared and told the police they had no right to enter his apartment. Defendant was arrested for assaulting the woman.
- One hour later, the police returned and the woman consented to a search of the apartment, which resulted in weapons and evidence linking him to an armed robbery.
- The Court's decision in *Georgia v. Randolph* (547 U.S. 103) held that the consent of one occupant is insufficient to authorize police to search a premises if another occupant is present and objects to the search.
- *Randolph* does not apply when an occupant provides consent well after the objecting occupant has been removed from the premises.
- PRACTICE TIP: The police could not, however, remove your client from the premises without a valid reason just to get consent of the remaining occupant. Removal of the defendant in this case was okay because he was lawfully removed.

TO DETAIN AN OCCUPANT OF THE PREMISES DURING THE EXECUTION OF A SEARCH WARRANT, THE OCCUPANT MUST BE WITHIN THE IMMEDIATE VICINITY OF THE PREMISES.

Bailey v. United States, SCOTUS, February 19, 2014

- Here, officers saw the defendant leaving the property shortly before they planned to execute the search warrant and detained him, a mile away, and found a key in his pocket, which was used to search the premises.
- *Michigan v. Summers* (452 U.S. 692) held that officers executing a search warrant are permitted "to detain the occupants of the premises while a proper search is conducted," in that case, someone who was walking down the front steps when the officers arrived.
- Detention of the occupants is limited to the immediate vicinity of the premises to be searched and does not apply when a recent occupant of the premises was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.
- PRACTICE TIP: *Where* your client was located when the search warrant was executed is relevant if he was detained.

THE GOVERNMENT DOES NOT COMPLY WITH MONITORING MINIMIZATION REQUIREMENTS FOR WIRETAPS WHEN IT LISTENS TO NEARLY ONE HOUR OF NON-CRIMINAL CONVERSATION PRIOR TO CRIMINAL STATEMENT BEING RECORDED.

United States v. Richard North, 11-60763, October 24, 2013

- The government was monitoring the defendant's cell phone pursuant to a warrant. The agents intercepted and monitored a phone call where the first hour was innocent discussion between the defendant and his girlfriend, and then turned to discussion about hidden drugs in the defendant's car.
- Electronic surveillance must "'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.'
- Until the very end of the conversation, nothing of the conversation was criminal in nature or referenced the smuggling activities. Under these circumstances, it was not objectively reasonable for agents to listen in for nearly one hour to a conversation between the target and an innocent person that did not turn to criminal matters until the last few minutes.
- PRACTICE TIP: If your client was subject to ongoing surveillance, challenge whether that surveillance was conducted in such a way to minimize the interception of innocent conversations.

SUPPRESSION OF STATEMENTS:

IN A VOLUNTARY INTERVIEW, DEFENDANT MUST EXPRESSLY INVOKE HIS RIGHT TO REMAIN SILENT OR THE SILENCE CAN BE USED AS EVIDENCE OF GUILT.

Salinas v. Texas, SCOTUS, June 17, 2013

- Defendant voluntarily accompanied officers to the police station and answered questions about a murder. He was not under arrest and was not in custody. He answered almost all of the officer's questions, but remained silent when the officers asked if shotgun casings found at the scene would match his gun. Prosecutors used his silence as evidence of guilt at the trial.
- Merely keeping quiet when police ask damaging questions is not claiming a right to silence. If an individual is voluntarily talking to the police, he or she must claim the Fifth Amendment right of silence, or lose it; simply saying nothing won't do, according to the ruling.
- A witness's constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.
- PRACTICE TIP: There is no key phrase that must be uttered. The Alito opinion said that there was no formal way an individual had to use to invoke his Fifth Amendment right– just something more than silence.

THE GOVERNMENT VIOLATES *DOYLE* WHEN IT USES A DEFENDANT'S SILENCE AFTER ARREST AS EVIDENCE OF GUILT IN CLOSING STATEMENTS.

United States v. Andaverde-Tinoco, 12-40472, December 17, 2013

- Defendant was caught on the U.S. bank of the Rio Grande by border patrol and tried for a violation of § 1326. At trial, the defendant testified that he was only on the U.S. side of the river because he had just been stopped in his vehicle on the Mexican side of the river by armed men who robbed him and subsequently ordered him to cross the river or be shot. The defendant did not mention this fact when he was arrested.
- *Doyle v. Ohio* (426 U.S. 610) established that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause."
- Government violated *Doyle* when it made statements in closing that the defendant "doesn't say anything about the alleged robbery" when he was arrested and "the defendant was right there, he said nothing."
- THIS CASE WAS NOT REVERSED BECAUSE COUNSEL FAILED TO OBJECT TO THE *DOYLE* VIOLATIONS AT THE TRIAL COURT
- PRACTICE TIP: Once your client is arrested, his silence is presumed to be an invocation of his Fifth Amendment right to remain silent. But you must object at trial if the government uses the silence against your client.

PLEA AGREEMENTS:

DISTRICT COURT IMPROPERLY ENGAGED IN PLEA NEGOTIATIONS WHEN IT TOLD "WAR STORIES" TO A DEFENDANT ABOUT SIMILAR DEFENDANTS WHO TURNED DOWN SIMILAR PLEAS AND GOT SIGNIFICANTLY LONGER SENTENCES.

United States v. Hemphill, 13-50267, May 2, 2014

- During the pretrial conference, the judge urged the defendant to plead guilty when he learned there was a plea offer for a stipulated 7 year sentence. The judge tried to convince the defendant to take the offer by telling a "war story" about a similar defendant, with similar facts, who was offered a 7 year deal, but went to trial and got 35 years.
- The morning of trial the plea offer was lowered to 5 years and the judge again urged the defendant to take the plea by telling another "war story" about a similar defendant who took the plea deal and was now out of prison. Although Hemphill had been adamant throughout that he wanted a trial, he accepted the plea.
- The judge's comments prior to the defendant accepting the plea agreement were coercive and were reversible error. Conviction vacated and remand to a different judge.
- PRACTICE TIP: the judge should not make comments to a defendant about the merits of a pending plea offer prior to the defendant accepting the plea.

GOVERNMENT BREACHED A PLEA AGREEMENT WHEN IT ARGUED FOR A SPECIFIC OFFENSE CHARACTERISTIC THAT WAS HARSHER THAN THE ONE IT AGREED TO RECOMMEND IN THE PLEA AGREEMENT.

United States v. Purser, 12-20542, March 25, 2014

- Government agreed in a plea agreement that it would recommend certain specific offense characteristics under U.S.S.G. § 2B1.1 to the U.S. Probation Office.
- Government breached that plea agreement when it objected to the PSR and argued that a different specific offense characteristic should apply–one that was harsher than the enhancement agreed to in the plea agreement.
- The government withdrew the objection, but Probation was not bound by the plea agreement and maintained the harsher enhancement.
- This case was "cured" because the district court rejected the harsher enhancement and applied the one referred to in the plea agreement.
- PRACTICE TIP: Obviously, AUSAs have the authority to bargain for specific guidelines recommendations in plea agreements. Remember that Probation is never bound by the plea agreement, instead use Rule 11(c) if you want guarantees.

DEFENDANT SHOULD BE ALLOWED TO WITHDRAW GUILTY PLEA WHEN HER LAWYER FAILED TO ADVISE HER ABOUT DEPORTATION CONSEQUENCES OF THE PLEA (*PADILLA*).

United States v. Urias-Marrufo, 13-50085, February 28, 2014

- A *Padilla* claim, when sufficiently presented during a motion to withdraw a guilty plea, compels the court to permit the defendant to withdraw the guilty plea.
- PRACTICE TIP: Always remember to discuss immigration consequences with your client prior to pleading guilty.

A GENERAL APPEAL WAVIER IN A PLEA AGREEMENT ALSO WAIVES THE RIGHT TO APPEAL A RESTITUTION ORDER.

United States v. Keele, 12-10551, January 7, 2014

- A general appeal waiver in a plea agreement also implicitly waives the right to appeal a restitution order.
- PRACTICE TIP: A general waiver, however, does not bar review of a claim that the restitution exceeded the statutory maximum, at least where the plea agreement included language reserving the right to appeal a sentence above the maximum

APPEAL WAIVERS IN SENTENCING AGREEMENTS ARE ENFORCEABLE JUST AS WAIVERS IN PLEA AGREEMENTS ARE ENFORCEABLE.

United States v. Walters, 12-30571, October 10, 2013

TRIAL ISSUES:

APPLY "MODIFIED-CATEGORICAL APPROACH" TO MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE TO DETERMINE PROHIBITED PERSON UNDER § 922(G)(9).

United States v. Castleman, SCOTUS, March 26, 2014

- Defendant had a prior conviction for "intentionally or knowingly causing bodily injury to the mother of his child."
- Lower courts reasoned that prior conviction shouldn't qualify as a requisite "misdemeanor crime of domestic violence" for purposes of being a prohibited person under § 922(g)(9) because causing bodily injury doesn't necessarily involve the use of physical force (think poison).
- SCOTUS rejected this argument and held that "violence" doesn't mean "force." Castleman's state conviction for misdemeanor domestic assault qualifies as a "misdemeanor crime of domestic violence" for purposes of possessing a firearm under 18 U.S.C. § 922(g)(9).
- PRACTICE TIP: Pretty much any domestic violence conviction makes one a prohibited person under § 922(g)(9).

THE GOVERNMENT ESTABLISHES THAT A DEFENDANT AIDED AND ABETTED A § 924(C) VIOLATION BY PROVING THAT THE DEFENDANT ACTIVELY PARTICIPATED IN THE UNDERLYING DRUG TRAFFICKING OR VIOLENT CRIME WITH ADVANCE KNOWLEDGE THAT A CONFEDERATE WOULD USE OR CARRY A GUN DURING THE CRIME'S COMMISSION.

Rosemond v. United States, SCOTUS, March 5, 2014

- For purposes of "aiding and abetting" liability under 18 U.S.C. § 924(c), which prohibits "us[ing] or carr[ying] a firearm "during and in relation to any crime of violence or drug trafficking crime," the government must show that the defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission.
- PRACTICE TIP: Make sure the government is put to this onerous burden of establishing your client's *advance* knowledge that his partner would use or carry a gun during the crime.

ANY FACT THAT INCREASES THE MANDATORY MINIMUM IS AN "ELEMENT" OF THE CRIME THAT MUST BE SUBMITTED TO THE JURY.

Alleyne v. United States, SCOTUS, June 17, 2013

- Defendant was convicted of using or carrying a firearm in relation to a crime of violence in violation of 18 U. S. C. § 924(c)(1)(A)(i) which carries a 5 year mandatory minimum sentence.
- The PSR alleged and the district court agreed that the defendant had actually "brandished" the firearm, despite the jury verdict form finding only that he "used or carried" the firearm.
- Brandishing increases the mandatory minimum sentence to 7 years under § 924(c)(1)(A)(ii)
- Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an "element" of the crime that must be submitted to the jury.
- PRACTICE TIP: Now, each element that increases a mandatory minimum must be specifically found by the jury. Make sure your jury verdict form is sufficient.

THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL FOLLOWING A COURT-DIRECTED ACQUITTAL, EVEN IF THE ACQUITTAL WAS ERRONEOUS.

Evans v. Michigan, SCOTUS, February 20, 2013

- The Double Jeopardy Clause bars the retrial of Lamar Evans, whose arson prosecution was dismissed by a Michigan trial court at the close of the state's evidence after the prosecution failed to prove an element that the trial judge had mistakenly ruled to be part of the underlying offense.

ATTEMPTING TO COMPEL A PERSON TO RECOMMEND THAT HIS EMPLOYER APPROVE AN INVESTMENT DOES NOT CONSTITUTE "THE OBTAINING OF PROPERTY FROM ANOTHER" UNDER THE HOBBS ACT.

Sekhar v. United States, SCOTUS, June 26, 2013

- This case involved an attempt to compel a New York State lawyer to recommend that his employer approve an investment for the New York Common Retirement Fund (NYCRF). Defendant threatened to expose lawyer's extramarital affair if the lawyer did not recommend the state make the investment.
- The Court explained that the common law tradition of extortion, as well as the "genesis of the Hobbs Act," requires that the property alleged to have been extorted must "be transferable" — that is, capable of passing from one person to another. That is because the text of the Act defines extortion as "the obtaining of property from another."
- Whatevermight be said about the advice that the general counsel rendered, it cannot be considered "obtainable property" under the Hobbs Act. An employee's "yet-to-be-issued recommendation [cannot] be called obtainable property, and less so still a yet-to-be-issued recommendation that would merely approve (but not effect) a particular investment."
- PRACTICE TIP: A lawyer's recommendation is not "property" subject to extortion.

A DEFENDANT BEARS THE BURDEN OF PROVING A DEFENSE OF WITHDRAWAL FROM CONSPIRACY.

Smith v. United States, SCOTUS, January 9, 2013

- A defendant charged with criminal conspiracy must carry the burden to prove that he withdrew from the conspiracy: the Due Process Clause does not require the government to prove the absence of withdrawal beyond a reasonable doubt.
- The defendant carries this burden whether the withdrawal merely terminates his liability for the post-withdrawal acts of his confederates, or whether it occurred outside the statute-of-limitations period, creating a complete defense to the charge.
- PRACTICE TIP: Withdrawal is an affirmative defense; the burden is on you to prove withdrawal.

EVEN WHEN A DEFENDANT TAKES THE STAND AND ADMITS TO COMMITTING THE OFFENSE, A DISTRICT COURT CANNOT TELL THE JURY TO "TO GO BACK AND FIND THE DEFENDANT GUILTY."

United States v. Salazar, 13-20162, May 2, 2014

- Against the advice of counsel, defendant testified in his own defense and admitted each element of the offense on cross-examination. Because of the overwhelming guilty, the judge made the comment during jury instruction for the jury "to go back and find the defendant guilty."
- The defendant's Sixth Amendment right to a jury was infringed by the court directing the jury to return a guilty verdict. Confessing on the stand is not the equivalent of a guilty plea and is not a waiver of the Sixth Amendment right to a jury.

TESTIMONY BY FEDERAL AGENT ABOUT MEANING OF DRUG SLANG ADMISSIBLE AS LAY TESTIMONY UNDER FED. R. EVID. 701.

United States v. Akins, 12-40515, March 25, 2014

- Government called Secret Service agent to discuss the meaning of code words used be defendants in wiretapped recordings.
- Testimony was properly admitted as *lay testimony* under Fed. R. Evid. 701 because it was based on the agent's own perception–here, his reading of the wiretap transcripts and involvement in this particular investigation.
- "A witness who provides only lay testimony may give limited opinions that are based on the witness' perception and that are helpful in understanding the testimony or in determining a fact in issue, but the witness may not opine based on scientific, technical, or other specialized knowledge."
- PRACTICE TIP: Make sure the witness deduced the meaning of the code words through his/her investigation *in this case*, not rooted in some sort of expertise.
- THERE IS A CIRCUIT SPLIT ON THIS ISSUE: PRESERVE FOR CERT
  See 15 Loy. J. Pub. Int. L. 117-152 (2013)

THEFT OF GOVERNMENT FUNDS VIOLATIONS CAN BE AGGREGATED TO REACH FELONY AMOUNTS, BUT CANNOT BE CHARGED AS SEPARATE FELONIES AFTER AGGREGATION.

United States v. Lagrone, 13-10049, February 18, 2014

- Lagrone stole $880 in stamps in each of two post offices.
- Theft from the United States, in violation of 18 U.S.C. § 641, is a felony if $1,000 or more, misdemeanor otherwise.
- Court previously held that each distinct taking of funds is a separate violation that can support multiple counts. *U.S. v. Reagan*, 596 F.3d 251
- The government can aggregate the separate takings to reach the $1,000 threshold for a felony, but cannot charge two felony counts.
- PRACTICE TIP: The amounts matter in individual instances of theft.

IF THERE ARE TWO EQUAL EXPLANATIONS—ONE FOR GUILTY, ONE FOR INNOCENCE—THAT IS NOT ENOUGH FOR A POST-VERDICT JUDGMENT OF ACQUITTAL.

United States v. Smith, 12-60988, January 13, 2014

- Evidence showed that someone downloaded child pornography to Smith's computer during a time when Smith, his girlfriend, and his male roommate regularly used the computer. Girlfriend's employment records eliminated her as a suspect and the roommate denied any knowledge. The file names were such that the user would have known the files were child porn.
- Jury convicted Smith and the district court entered a post-verdict judgment of acquittal finding "it is just as likely that the roommate downloaded the child pornography as Smith did."
- Circuit reversed, finding sufficient evidence for the jury to conclude beyond a reasonable doubt that Smith was in knowing possession of the child pornography. The district court applied the wrong standard.
- PRACTICE TIP: The Circuit placed weight on the fact that the roommate's testimony was that he did not download the files and did not know much about computers, whereas Smith did not testify in his own defense.

THE GOVERNMENT VIOLATES *CRAWFORD* WHEN IT INTRODUCES AN AFFIDAVIT OF A DECEASED PERSON CREATED IN A SEPARATE CRIMINAL INVESTIGATION.

United States v. Duron-Caldera, 12-50738, December 16, 2013

- Defendant asserted a derivative citizenship defense to a § 1326 charge. The government introduced, over objection, an affidavit of his maternal grandmother, now deceased, in connection with a 1968 criminal investigation. The affidavit refuted the defendant's argument for derivative citizenship.
- Introduction of the affidavit violated the defendant's Sixth Amendment confrontation rights (*Crawford*). The affidavit was *testimonial* because it was created for later use at a criminal trial (the 1968 investigation).
- PRACTICE TIP: Whether an affidavit of a deceased person is testimonial depends on whether it was created for later use at a criminal trial.

JURY INSTRUCTIONS:

DEFENDANT'S GOOD FAITH MISUNDERSTANDING OF THE TAX CODE NEED NOT BE OBJECTIVELY REASONABLE.

United States v. Montgomery, 12-20741, March 28, 2014

- Although ignorance of the law or a mistake of law generally does not provide a defense to criminal prosecution, that is not so with regard to federal tax offenses. Willfulness must also be proven.
- The Jury instruction for a tax offense's "willfulness" must clarify that a defendant's good-faith misunderstanding of the law *need not* be objectively reasonable.

SENTENCING: NON-GUIDELINE ISSUES:

WHEN THE BANK FORECLOSES ON A HOME THAT WAS THE SOURCE OF MORTGAGE FRAUD, THE DEFENDANT GETS AN OFFSET IN HIS RESTITUTION AMOUNT FOR THE MONEY THE BANK RECEIVES IN THE FORECLOSURE SALE, NOT THE VALUE OF THE HOME AT FORECLOSURE.

Robers v. United States, SCOTUS, May, 5, 2014

- Defendant was guilty of wire fraud related to a mortgage. The bank foreclosed on the home with the fraudulent mortgage. Defendant argued that because the bank possessed the stolen "property" (i.e. the home), he was entitled to an offset in his restitution for the value of the home.
- When a defendant obtains money by fraud, no money is returned until the bank actually gets money for the sale of the home. "Property" returned, for purposes of restitution, "refers to the property the banks lost, namely, the money they lent, not to the collateral the banks received (the home)."
- PRACTICE TIP: Make sure the bank moves quickly to sell the home and receives as much as possible in the sale, all of which benefits your client. Better yet, advise client to sell home and not allow foreclosure.

EACH INDIVIDUAL FOUND GUILTY OF KEEPING AND VIEWING IMAGES OF A CHILD PORN MUST PAY THE VICTIM RESTITUTION THAT IS MORE THAN A "TRIVIAL" SUM, BUT CANNOT BE REQUIRED TO PAY FOR ALL THAT THE VICTIM HAS LOST.

Paroline v. United States, SCOTUS, April 23, 2014

- This case sets out the "guideposts," not a "rigid formula," for a district court to determine the amount of restitution to a specific victim in possession/receipt/distribution child porn cases.
- There would have to be proof that "a victim has outstanding losses caused by the continuing traffic in the images," with such losses to potentially include items such as those listed in the federal law: medical services, physical and occupational therapy, transportation, temporary housing, child care, lost income, and attorneys' fees and court costs.
- Next, the judge can take into account a variety of factors on "relative cause" for each individual convicted:
  (1) the number of past individuals who contributed to the victim's losses;
  (2) a prediction about the number of future individuals who might be found to have contributed;
  (3) estimates of the number of individuals overall involved in causing the harm (many of whom would never be caught);
  (4) whether the individual facing restitution in a specific case made more copies and handed them out;
  (5) whether that individual had any role in producing the pictures in the first place;
  (6) how many images that individual possessed; and
  (7) "other facts relevant to the [convicted individual's] relative causal role."
- PRACTICE TIP: Litigate this issue if you receive notice from a victim/lawyer asking for restitution. Put the government to its burden of establishing the actual losses of the victim and the relative cause of your client's actions.

SENTENCING COURTS MAY NOT APPLY THE MODIFIED CATEGORICAL APPROACH TO A FEDERAL DEFENDANT WHEN THE CRIME OF WHICH THE DEFENDANT WAS PREVIOUSLY CONVICTED HAS A SINGLE, INDIVISIBLE SET OF ELEMENTS.

Descamps v. United States, SCOTUS, June 20, 2013

- The district court used the modified categorical approach to use a California burglary conviction to reach ACCA. CA burglary does not include the element of unlawful or unprivileged entry, it encompasses crimes such as shoplifting.
- SCOTUS held that the district court can only look beyond the statute (Modified Categorical Approach) in a "narrow range of cases," when the state statute lists multiple, alternative elements, one of which could be ACCA.
- "Whether Descamps did break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." "We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over."
- PRACTICE TIP: It does not matter what your client actually did in the commission of the previous crime if the statute clearly does not provide an element of the federal burglary.

TO BE LIABLE FOR THE PENALTY ENHANCEMENT FOR DEATH CAUSE BY A DRUG, THE BUT-FOR CAUSE OF THE DEATH MUST BE THE DRUG DISTRIBUTED BY THE DEFENDANT AND THAT FACT MUST BE DETERMINED BY THE JURY.

Burrage v. United States, SCOTUS, January 27, 2014

TAPIA VIOLATIONS ABOUND!

United States v. Wooley, 12-31085, January 21, 2014

- Thus, this circuit's relevant precedent distinguishes isolated references to rehabilitative opportunities from a district court's repeated emphasis on a defendant's perceived need for treatment. Additionally, we have repeatedly found that a court's express reference to the proper statutory factors does not necessarily cure *Tapia* error if a review of the record reveals that the court's consideration of the defendant's need for rehabilitation was the "dominant factor" in the court's imposition of the sentence.

United States v. Garza, 706 F.3d 655

- *Tapia* applies in revocation hearings.

THE DISTRICT COURT MAY CONSIDER EVIDENCE OF COOPERATION UNDER § 3553(A) REGARDLESS OF WHETHER THE GOVERNMENT FILES A §5K1.1 MOTION.

United States v. Robinson, 12-60841, January 24, 2014

- The district court may consider cooperation as a part of the § 3553(a) factors in absence of a § 5K1.1 motion.
- PRACTICE TIP: The judge does not need a §5K1.1 motion in order to impose a lower sentence on the basis of cooperation. In cases where the AUSA refuses to file a motion for cooperation, argue your own in your sentencing memo.

SENTENCING: GUIDELINE ISSUES:

THE CONSTITUTION'S EX POST FACTO CLAUSE PROHIBITS FEDERAL COURTS FROM SENTENCING A DEFENDANT BASED ON GUIDELINES THAT WERE PROMULGATED AFTER HE COMMITTED HIS CRIMES, WHEN THE NEW VERSION OF GUIDELINES PROVIDES A HIGHER SENTENCING RANGE THAN THE VERSION IN PLACE AT THE TIME OF THE OFFENSE.

Peugh v. United States, SCOTUS, June 10, 2013

- This opinion surveyed the post-*Booker* law and concluded that, while now advisory, "common sense indicates that … this system will steer district courts to more within-Guidelines sentences." Although judges have more discretion after *Booker*, "the [Guidelines] range is intended to, and usually does, exert controlling influence."
- PRACTICE TIP: Make sure to compare the Guidelines Manual in effect on the date of offense with the Guidelines Manual in effect on the date of the sentencing.

FAILURE TO REGISTER IS NOT A "SEX OFFENSE" UNDER THE SENTENCING GUIDELINES.

United States v. Segura, 12-11262, March 21, 2014

- Failure to register as a sex offender (18 U.S.C. § 2250(a)) is not a crime perpetrated against a minor and, therefore, does not trigger the *mandatory* life term of supervised release under § 5D1.2(b)(2).
- The court can still, however, impose a life term of supervised release for failure to register because the statute (18 U.S.C. § 3583(k)) provides a statutory supervised release range of 5 years to life. The proper guidelines range for supervised release, however, is 5 years, not life.

DEFENDANT DOES NOT HAVE TO BE PERSONALLY INVOLVED IN THE IMPORTATION OF DRUGS TO RECEIVE 2 POINT ENHANCEMENT FOR IMPORTATION UNDER THE SENTENCING GUIDELINES.

United States v. Foulks, 13-10399, March 11, 2014

- "[A] defendant need not be personally involved in the importation of illegal drugs to receive an enhancement under § 2D1.1(b)(5); it is enough for the government to show that the drugs were imported."

A "TIME SERVED" SENTENCE STILL COUNTS TOWARDS THE TOTAL SENTENCE OF IMPRISONMENT FOR CRIMINAL HISTORY CALCULATIONS.

United States v. Fernandez, 13-50131, February 24, 2014

- We know that a sentence suspended or stayed does not count towards the "sentence of imprisonment" under § 4A1.1(a),
- A time-served "credit" noted in a prior sentencing order cannot be suspended. The period credited serves as the measure for assessing criminal history points in accordance with § 4A1.2(b)(2) of the Sentencing Guidelines when the prior sentence is otherwise suspended.

A DEFENDANT DOES NOT HAVE TO KNOW THAT HIS P2P SOFTWARE IS SHARING HIS CHILD PORNOGRAPHY IN ORDER TO RECEIVE THE 2 POINT ENHANCEMENT FOR DISTRIBUTION.

United States v. Baker, 12-10834, February 12, 2014

- § 2G2.2(b)(3)(F) provides a 2 point enhancement "[i]f the offense involved [] [d]istribution" of child pornography where the distribution is not to minors or for something of value."
- § 2G2.2(b)(3)(F) does not contain a *scienter* requirement, so the enhancement applies regardless of whether the defendant knew the child pornography was being distributed by his P2P software.

ATTEMPTING TO POSSESS FIREARMS DOES NOT TRIGGER THE § 2K2.1(B)(1) ENHANCEMENT FOR NUMBER OF FIREARMS.

United States v. Hagman, 12-51093, January 27, 2014

- Defendant actually possessed one pistol and pled guilty to being a felon in possession of a firearm. At sentencing, the government attempted to attribute 12 more firearms to him because the defendant attempted to broker a deal between a gun store owner and someone who possessed 12 guns that were stolen from the store.
- Under § 2K2.1(b)(1), a defendant's offense level is based upon the number of firearms associated with his crimes of conviction, but only counts those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed.
- In order to apply the § 2K2.1(b)(1) enhancements, the government must prove by a preponderance of the evidence that the guns here obtained, unlawfully possessed, or unlawfully distributed.
- Here, the government did not prove the enhancement because the defendant did not possess the stolen guns and *attempted* possession of a firearm by a convicted felon is not a crime.

THE AMOUNT OF LOSS IN A MORTGAGE FRAUD CASE MUST BE BASED ON THE DEFENDANT'S CONDUCT AND CRIMINAL ACTS MUST ACTUALLY CAUSE THE LOSSES.

United States v. Benns, 12-51038, January 21, 2014

- Defendant was convicted of defrauding a bank in a loan modification application. At sentencing, the loss about was derived using relevant conduct of many foreclosure properties that were owned by the defendant, even though those properties were unrelated to the property with the fraudulent loan modification application.
- In order to attribute losses as relevant conduct in a fraud offense, evidence of the defendant's conduct must be introduced and an explanation of how such conduct satisfied the elements of some criminal offense must be made by the district court or probation officer.
- PRACTICE TIP: Make sure relevant conduct includes how such conduct satisfied the elements of some criminal offense.

IN A CHILD PORNOGRAPHY CASE, THE 2 POINT VULNERABLE VICTIM ENHANCEMENT APPLIES WHEN THE VULNERABLE CHARACTERISTIC IS NOT ALREADY INCORPORATED IN THE GUIDELINE.

United States v. Ramos, 11-51232, January 8, 2014

- U.S.S.G. § 3A1.1(b)(1) provides a 2 point enhancement if defendant knew or should have known that a victim of the offense was a vulnerable victim.
- In order to apply this enhancement, the children must be especially vulnerable compared to other children because they are unable to walk or resist or are infants or toddlers.
- "The inquiry should focus on whether the factor that makes the person a vulnerable victim is incorporated in the offense guideline."
- PRACTICE TIP: Make sure the probation office explains why the vulnerable victim enhancement is *not already* encompassed by other enhancements, i.e. sadistic-conduct enhancement.

A DISASSEMBLED FIREARM, WITH NO AMMUNITION, FOUND IN A BEDROOM WITH DRUG MANUFACTURING MATERIALS IS ENOUGH TO TRIGGER THE 4 POINT ENHANCEMENT FOR POSSESSION OF A FIREARM IN CONNECTION WITH ANOTHER FELONY.

United States v. Alcantar, 12-10909, October 7, 2013

- Agents discovered drug-manufacturing materials, including Ziploc bags with cut corners, digital scales, a cutting agent, and a measuring cup with cocaine residue, along with a dismantled 12-gauge shotgun in the defendant's bedroom. Defendant pled guilty to felon in possession.
- The defendant was properly given a 4 point enhancement pursuant to § 2K2.1(b)(6)(B), based on the use or possession of a firearm in connection with another felony offense, namely, the state charge of possession of cocaine with the intent to deliver.

APPEAL:

A LAWYER IS INEFFECTIVE FOR FAILING TO CONSULT WITH CLIENT ABOUT APPEAL, EVEN IF THERE IS AN APPEAL WAIVER.

United States v. Bejarano, 12-10952, March 11, 2014

- If a defendant demonstrates that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed, the lawyer is ineffective.
- *This applies even where a defendant has waived his right to direct appeal and collateral review.*

SUPERVISED RELEASE VIOLATIONS:

A SPECIAL CONDITION MUST BE REASONABLY RELATED TO THE GOALS OF SUPERVISED RELEASE.

United States v. Salazar, 12-50695, February 24, 2014

- Here, the defendant was being revoked where the underlying offense was a SORNA violation. The district court imposed a special condition forbidding the defendant from purchasing, possessing, or using any sexually stimulating or sexually oriented materials.
- The district court must explain, on the record, why this special condition is reasonable related to the statutory factors in § 3553(a).
- In this case, there was insufficient evidence of a reasonable relationship between the condition and the statutory factors – there was no evidence that sexually stimulating materials fueled the defendant's past crimes.
- PRACTICE TIP: Make sure any special conditions of supervised release are reasonable related to the § 3553(a) factors, and that relationship is explained on the record by the judge.