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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If you would like to discuss a legal issue in your case, please contact Dustin at:

Dustin C. Talbot
Office of the Federal Public Defender
Middle and Western Districts of Louisiana
Dustin_Talbot@fd.org
337-262-6336

SEARCH AND SEIZURE:

A police officer's reasonable mistake of law does not violate the Fourth Amendment

Heien v. North Carolina, SCOTUS, December 15, 2014

- A police officer stopped Heien's car because it had a brake light that did not work. During the stop, Heien consented to a search of the car, which yielded cocaine .
- The police officer's belief that a car must have two working brake lights was mistaken. In North Carolina, only a single working brake light is required. This means that Heien's vehicle was stopped despite the dact that Heien had, in fact, not committing any traffic violation.
- The Court held that a reasonable mistake of law by a police officer creates reasonable suspicion to justify a *Terry* stop of a vehicle. The Court reasoned that the North Carolina brake light law could reasonably be read to require two working brake lights, which makes this police officer's mistake of law reasonable under the Fourth Amendment.
- The officer's mistake of law must be objectively reasonable, and not based on a particular officer's "subjective understanding" or on a "sloppy study of the laws he is duty-bound to enforce."
- Justice Kagan cautions overzealous officers: Only a "genuinely ambiguous" statute should support a "reasonable" mistake about its meaning, one that would present judicial officers with "interpretive work" that is "really difficult" or "very hard."
- PRACTICE TIP: A police officer's mistake of law must be reasonable! An officer cannot feign an unreasonable mistake of law to justify a bad stop.

Historical cell site date is not subject to a reasonable expectation of privacy, and therefore, is not subject to suppression if the United States violates the Stored Communications Act, 18 U.S.C. § 2703(d).

United States v. Guerrero, Docket 13-50379, September 11, 2014

- There appears to be a CIRCUIT SPLIT on this issue. PRESERVE FOR CERT.

TRIAL & EVIDENCE ISSUES:

Testimony about juror statements during deliberations not admissible to show dishonesty during voir dire

Warger v. Shauers, SCOTUS, December 9, 2014

- Federal Rule of Evidence 606(b) generally prohibits the testimony of jurors about statements made during deliberations when the testimony is offered in "an inquiry into the validity of a verdict or indictment."
- The Court held that Rule 606(b) precludes a party seeking a new trial from using a juror's affidavit about statements made by another juror during deliberations to show that the second juror gave dishonest answers during voir dire.

A jailhouse confession is not "testimonial" under *Crawford v. Washington* and therefore testimony by a jailhouse snitch regarding a confession by a co-conspirator does not violate *Bruton*

United States v. Vasquez, Docket 12-41194, September 3, 2014

- *Bruton v. United States*, 391 U.S. 123 (1968) established that when a co-defendant's confession implicates a criminal defendant, and the co-defendant does not testify at trial, the admission of the confession violates the criminal defendant's rights under the 6th Amendment Confrontation Clause.
- In this case, a jailhouse snitch testified that the co-defendant confessed to the crime and implicated the defendant. The co-defendant did not testify and thus was not subject to cross examination about the confession.
- The court held that *Bruton* applies only to statements by co-defendants that are testimonial under *Crawford v. Washington*. Statements from one prisoner to another are "clearly nontestimonial" for purposes of crawford. A jailhouse confession was therefore admissible even if the co-defendant did not testify.

In order to support stacked 924(c) convictions, the jury must be instructed and must find that the defendant possessed a separate, second firearm

United States v. Campbell, 13-11038, December 30, 2014

- It was unclear from the evidence at trial or the jury verdict form whether the jury's finding was that the defendant possessed a single firearm in connection with two drug trafficking offenses or possessed a second, distinct firearm in connection with the second drug trafficking offense.
- In this case, the defendant did not object to the jury instructions or the jury verdict form, neither of which required the jury to make a finding of a separate, second firearm.
- Because the defendant did not object, the Court affirmed the conviction and the mandatory 30-year sentence.
- PRACTICE TIP: Make sure that the jury instructions and jury verdict form require the jury to make a specific finding regarding the second firearm.

The interim rule implementing SORNA issued by the Attorney General on February 28, 2007 was a "valid promulgation" and therefore required pe-enactment sex offenders to register under SORNA

United States v. Torres, Docket 09-50204, September 8, 2014

- Sex offenders who were convicted prior to the passage of the SORNA are not required by SORNA to register and update their registrations unless and until the Attorney General so specifies in a "valid rule."
- In this case, the court held that the interim rule issued by the Attorney General on February 28, 2007 was a "valid promulgation" and therefore triggered the requirements for registration by pre-act sex offenders starting on that date.
- There is a CIRCUIT SPLIT on whether the February 28, 2007 rule was valid. PRESERVE FOR CERT.

Defendant was guilty of attempt to persuade a minor to engage in prohibited sexual contact even when the defendant refused to make any travel arrangements and broke off contact with the minor

United States v. Howard, Docket 13-40767, September 10, 2014

- Defendant, a bed-ridden man in California, sought out, over the internet, a person who would arrange for him to have sex with a 15-year old girl for $5,000. An undercover officer from Texas contacted the defendant posing as a mother of a 14-year old and an 11-year old daughters. The defendant told the officer that he wanted to have sex with her daughters, wanted her to put the daughters on birth control, and wanted her to perform oral sex on the daughters to prepare them for the sexual encounter. He also sent a photo of his penis with instructions to show it to the daughters. However, once the officer pushed the defendant to make travel plans to come meet the daughters, the defendant said no and broke off contact with the officer. The defendant was then arrested at his home and convicted after a bench trial.
- The question in this case was whether the above actions crossed the line from "preparation" to "attempt," that is, did the above actions prove that he took a "substantial step" toward commission of the offense of attempting to persuade a minor to engage in prohibited sexual contact.
- The Court affirmed the guilty verdict, but only because of the deferential standard of review to the findings of the district court. The Court stated that if it were the trier of fact, it might have reached a different result. The Court also cautioned that these facts should be the "outer bounds of a case" that could constitute an attempt to persuade a minor to engage in prohibited sexual contact.

The "voluntary disclosure" rule does not apply to an alien attempting to exit the United States

United States v. Rojas, Docket 13-50926, October 30, 2014

- The defendant, an illegal alien who had previously been deported, was found on board a bus that was attempting to exit the United States at a border crossing.
- The "voluntary disclosure" rule states that an alien "who voluntarily approaches an INS station when entering the United States cannot be said to have been found or discovered in the United States."
- The Court declined to extend the "voluntary disclosure" rule to a defendant who was attempting to exit the United States.

Theft of government funds violations can be aggregated to reach felony amounts but still charged separately

United States v. Lagrone, 13-10049, December 11, 2014

- Lagrone stole $880 in stamps from two post offices for a total of $1,760. Lagrone was charged with two counts of felony theft.
- 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, even if each individual theft alone would not reach the felony amount.

A statute of limitations defense must be made at or prior to trial

United States v. Lewis, 14-10119, December 22, 2014

- The defendant did not raise his challenge to the statute of limitations until his post-conviction motion for judgment of acquittal.
- The court held that a statute of limitations defense is waived if it is not raised "at trial."

SENTENCING: NON-GUIDELINE ISSUES:

Under *Alleyne*, to trigger a mandatory minimum in a drug conspiracy case, the government must not only show that the conspiracy as a whole involved a certain drug quantity, it must also prove beyond a reasonable doubt the drug quantity attributable to the particular defendant

United States v. Randall, Docket 12-31193, October 29, 2014

- Randall pled guilty to conspiracy to PWID cocaine and the factual basis stated that the overall scope of the conspiracy involved 5 KG or more of cocaine, but that only 148.8 grams of cocaine and 35.2 grams of cocaine base were attributable to him. At the plea, Randall was advised that he faced a mandatory minimum sentence of 10 years.
- On plain error review, the Court held that Randall was only subject to a mandatory minimum sentence of 5 years because the government did not prove beyond a reasonable doubt, and the defendant did not admit, as required by *Alleyne*, that the quantity attributable to the defendant met the threshold for the 10 year mandatory minimum.
- PRACTICE TIP: If your client pleads guilty to a drug conspiracy count, it is the drug quantity that he admits were attributable to him that controls the mandatory minimum sentence, not the drug quantity attributable to the entire conspiracy (that likely affects relevant conduct).
- PRACTICE TIP: If your client goes to trial in a drug conspiracy case, the jury must make a specific finding as to the quantity of drugs attributable to your client, and that finding controls the mandatory minimum sentence.

Alleyne does not apply to judicial fact-finding that makes a defendant ineligible for the safety valve

United States v. King, Docket 14-10146, December4, 2014

- The defendant appeared to be safety valve eligible at the plea stage, but the PSR indicated that a gun was found at the defendant's home near drugs and paraphernalia.
- Over the defendant's objection, the court found that the gun made the defendant ineligible for the safety valve.
- The court held that *Alleyne*, which requires any fact that increases a defendants mandatory minimum sentence be submitted to the jury or admitted by the defendant, does not apply to the safety valve because the safety valve does not increase a mandatory minimum, it removes it.

The original purchase price of a mortgage is irrelevant when calculating the restitution owed to the purchaser of the mortgage on the secondary market

United States v. Beacham, Docket 12-10883, December12, 2014

- When calculating the amount of restitution owed to a victim who purchased a fraudulently procured mortgage loan on the secondary market, the court should determine what the victim paid for the mortgage less any proceeds obtained through foreclosure.

SENTENCING: GUIDELINE ISSUES:

The ransom enhancement under U.S.S.G. § 2A4.1(b)(1) applies anytime a defendant demands money from a third party for a release of a victim, regardless of whether that money is already owed to the defendant

United States v. Fernandez, Docket 13-41033, October 20, 2014

ENHANCEMENTS UNDER U.S.S.G. § 2L1.2:

Under U.S.S.G. §2L1.2, cmt. n. 7, the district court can depart upward based upon the fact that a defendant was previously charged with a serious offense, but pled guilty to a lesser offense

United States v. Fuentes, Docket 13-20654, January 2, 2014

- Defendant had several prior convictions for public lewdness and indecent exposure, but in those cases he was originally charged with the more serious offense of indecency with a child.
- The district court departed upward, pursuant to U.S.S.G. §2L1.2, cmt. n. 7, on the bases that but for the defendant's favorable plea bargaining those cases, he would have faced the 16-level enhancement on his base offense level for a previous crime of violence.
- The court held that the departure was reasonable because the court did not rely on "bare arrest records," but rather the investigation of the probation officer that was not contradicted by the defendant.
- PRACTICE TIP: If the PSR indicates that the court should upwardly depart because your client received a favorable plea in the past, but actually committed a worse offense, it is your burden to put on evidence at sentencing disputing the evidence that your client committed that worse offense.

Possession with intent to deliver a controlled substance under Texas law qualifies as a drug trafficking offense and an aggravated felony to trigger the 16-level enhancement under U.S.S.G. § 2L1.2

United States v. Teran-Salas, Docket 13-40884, September 15, 2014

Sexual battery under Louisiana R.S. § 14.43.1 qualifies as a "crime of violence" to trigger the 16-level enhancement under U.S.S.G. § 2L1.2

United States v. Vigil, Docket 13-40576, December 16, 2014

Theft without effective consent under Texas law qualifies as an aggravated felony to trigger the 8-level enhancement under U.S.S.G. § 2L1.2

United States v. Rodriguez-Salazar, Docket 13-40939, September 30, 2014

SUPERVISED RELEASE VIOLATIONS:

The court subtracts the imposed imprisonment term from the original supervised release term to determine the amount of additional supervised release that can be imposed

United States v. Oswalt, Docket 13-10984, November 7, 2014

- The defendant was sentenced to three concurrent terms of 36 months of supervised release. Upon revocation of that supervised release, the district court sentenced the defendant to three *consecutive* terms of 6 months imprisonment, for a total of 18 months imprisonment, plus 24 months additional supervised release.
- 18 U.S.C. § 3583(h) requires the court to subtract the term of imprisonment from the original supervised release term.
- Because the defendant was serving three concurrent 36 months terms of supervised release, each 6 month term of imprisonment was subtracted from each 36 month term which allowed the court to impose additional supervised release for up to 30 months (36 - 6 = 30). The imposed additional supervised release of 24 months was, therefore, properly within the statute.