FEDERAL LAW UPDATE 2018

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SUPREME COURT TERM 2017-2018

- Carpenter v. United States 16-402
- CELL TOWER RECORDS ARE DIFFERENT.
- The warrantless seizure of historic cell phone location records ("tower dump") violates the 4th Amendment.
- Cell-site information used to convict on string of robberies.
- Third-party doctrine holds that a defendant does not have a reasonable expectation of privacy in records shared with a third party (i.e. the phone company).
- However, because of "seismic shifts in digital technology", third-party doctrine does not apply to cell-site data because of greater privacy concerns.

CLASS V. UNITED STATES, 16-424

- Defendant pleaded guilty to possessing a firearm near the U.S. Capital building, sought to challenge constitutionality of statute on appeal.
- Guilty plea does not inherently waive such challenge; a plea agreement waiving challenge would have been enforced, but one was not entered in this case.
- If appellate challenge is specifically waived in plea agreement, court will enforce.
- If appellate challenge is specifically preserved (Rule 11(a)(2)), challenge may be raised.
- If plea agreement is silent regarding appellate challenge, issue not waived if assertion of guilt is consistent with challenging constitutionality of statute as a whole.
- Applies to both direct appeal and collateral 2255 proceedings. Class began as a collateral challenge.

COLLINS V. VIRGINIA, 16-1027

- HOUSE TRUMPS VEHICLE
- Automobile exception to 4th Amendment does not permit police to search a vehicle located in a home or its curtilage without a warrant.
- When in or near a home, the protection of the home trumps the vehicle exception.

BYRD V. UNITED STATES, 16-1371

- DRIVER'S SEAT CONFERS STANDING
- The driver in lawful possession of a rental car may challenge the search of the vehicle, even if he or she is not an authorized driver on the rental agreement, due to reasonable expectation of privacy protected by the 4th Amendment.
- Provided the actual driver has permission of the renter, but even without permission of the rental company, the driver has "dominion and control" over the vehicle and protected by the 4th Amendment.

CURRIER V. VIRGINIA, 16-1348

- BE CAREFUL WHAT YOU WISH FOR
- Defendant agreed to severance of multiple charges related to burglary, larceny, and felon in possession of a firearm. Firearm charge was severed.
- First trial was on burglary and larceny, and Defendant was acquitted. Defendant argued he could not be tried on firearm offense because of collateral estoppel. Jury already acquitted of participation in burglary, so double jeopardy precluded trial on firearm charge. District court denied motion and Currier was convicted of firearms offense in second trial.

CURRIER V. VIRGINIA, 16-1348 CONTINUED

- Court found that consent to severance waived double jeopardy protection against second trial. Consent waived protection from multiple trials and also protection against re-litigation of issue.
- Practice tip – common to move for severance of felon in possession charges because of prejudicial effect on jury upon learning of defendant's prior conviction(s).
- Be careful what you wish for. If odds of acquittal on non-firearm offense are good, severance may be unwise.
- In state court, section 110 may preclude retrial even if double jeopardy does not.

DIMAYA V. SESSIONS, 138 S.Ct. 1204 (2018)

- Residual clause of the Immigration and Nationality Act, 18 U.S.C. 16, is unconstitutionally vague.
- Defines a "Crime of Violence" in language identical to that contained in Armed Career Criminal Act (any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another").
- This language was held unconstitutionally vague in Johnson v. U.S. (2015).
- Recall that nearly identical language in Career Offender provision of the Sentencing Guidelines IS constitutional because the Guidelines, unlike a statute, are not subject to void-for-vagueness challenge.

MCCOY V. LOUISIANA, 138 S.CT. 1500 (2018)

- TRIAL MEANS TRIAL.
- At trial, defense counsel may NOT wholly or partially admit a defendant's guilt to a lesser charge or certain elements of the offense charged without client's authorization.
- McCoy was charged with first degree capital homicide. Counsel thought it was strategically wise to admit to second degree murder on a diminished capacity theory due to strong evidence of homicide and in an effort to avoid death penalty.
- Client maintained complete innocence throughout proceedings and adamantly objected to any admission of guilt.
- Strategic decisions belong to counsel but decision to plead guilty or go to trial belongs to client.

MCCOY V. LOUISIANA, 138 S.CT. 1500 (2018) CONTINUED

- Case was NOT decided as IAC, but rather issue of client autonomy, removing McCoy's burden to show prejudice resulting from counsel's actions.
- Practice tip – Have client sign authorization to concede guilt to a lesser offense or unchallenged count of Indictment. Also wise to have client sign stipulation if one is entered.

THARPE V. SELLERS, 17-6025

- Last term, Supreme Court created exception to "no impeachment" rule. A jury's verdict may be challenged by extrinsic evidence that guilty verdict was based on racial prejudice. Pena-Rodriguez v. Colorado, 137 S.Ct. 855 (2017).
- Tharpe court reversed and remanded on factual grounds, leaving open possibility Pena-Rodriguez will be held to apply retroactively.

D.C. V. WESBY, 138 S.CT. 577 (2018)

- Police raid a raucous party, arresting partygoers.
- Complaint made about noise; Partygoers observed to be using marijuana and alcohol; when questioned, gave vague answers and said "Peaches" has invited them; "Peaches" indicated she did invite partygoers but did not have homeowner's permission; House observed to be dirty and have little furniture.
- Factors taken together created probable cause to arrest.

HUGHES V. UNITED STATES, 138 S.CT. 1765 (2018)

- Parties agreed sentencing guideline were 188-235 months.
- Hughes pleaded guilty to 180 month sentence as a Rule 11(c) plea agreement. Type 11(c) agreement provides joint recommendation for specific sentence. Court accepted plea.
- Guideline was then reduced to 151-188.
- Even though Hughes agreed to 180 month sentence, agreement was based on higher guideline range.
- Hughes determined eligible for sentence reduction pursuant to 18 U.S.C. 3582(c)(2) because sentence of 180 was "based on" Guidelines.

KOONS V. UNITED STATES, 138 S.CT. 1783 (2018)

- Similar facts to Hughes but different result.
- Koons' sentence was determined by mandatory minimum and 5K1.1 downward departure for substantial assistance. Therefore, subsequent amendment to Guidelines lowering range did not warrant 18 U.S.C. 3582(c)(2) relief because sentence was not "based on" the Guidelines.
- All sentences have a guideline range as a starting point, but because of mandatory and 5K1.1, Guidelines did not drive actual sentence imposed.

ROSALES-MIRELES V. UNITED STATES, 138 S.CT. 1897

- Defendant pleaded guilty to illegal reentry.
- Probation officer erroneously counted a prior conviction twice, double counting prior record points. Correct guideline was 70-87 months, but P.O. calculated to be 77-96 months.
- Sentence of 78 months was imposed.
- Supreme Court remanded for re-sentencing even though sentence imposed was within the correct range. The use of the correct Guideline range when imposing sentence is necessary to ensure a resulting sentence is not greater than necessary, and to uphold the fairness, integrity, and public reputation of the judicial system.

LAGOS V. UNITED STATES, 138 S.CT. 1684 (2018)

- Mandatory Victims Restitution Act of 1996 requires a convicted defendant to "reimburse the victim for…expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceeding related to the offense." 18 U.S.C. 3663A(b)(4).
- Statute applies only to governmental investigations and criminal proceedings. It does not extend to private investigations or civil proceedings.

SIGNIFICANT THIRD CIRCUIT DECISIONS

- United States v. Wilson, 2018 U.S. App. LEXIS 1061 (3d Cir. Jan 17, 2018) – Unarmed bank robbery in violation of 18 U.S.C. 2113(a) is categorically a crime of violence of purposes of the Career Offender provisions of the Sentencing Guidelines (4B1.2(a)) because statute requires intimidation, knowing mental state, and implicitly requires threat of force.
- Categorical approach means subjective facts of prior conviction do not matter. Any conviction counts as a predicate offense if there is no way to commit crime without engaging in violence or threat of violence.
- Decision suggests 18 U.S.C. 2113(a) is also a COV for purposes of Armed Career Criminal Act due to similarity of language between statute and Guideline.

UNITED STATES V. RAMOS, 892 F.3D 599 (3D CIR. 2018).

- Aggravated assault with a deadly weapon, 18 Pa.C.S. 2702(a)(4), is categorically a crime of violence for purposes of Armed Career Criminal Act because physical force is an element.
- Likely governs Career Offender as well due to similarity of language.

UNITED STATES V. MAYO, 2018 WL 3999884 (3D CIR. AUG. 22, 2018)

- Pennsylvania first degree aggravated assault statute, 18 Pa.C.S. 2702(a)(1) by causing serious bodily injury to another with extreme indifference to human life, does NOT qualify as a violent felony under the Armed Career Criminal Act.
- Text of statute and cases interpreting it establish that defendant need not engage in affirmative use of physical force against another person, and physical force and bodily injury are not the same.
- Probably also applies to Career Offender guideline.

UNITED STATES V. GLASS, 2018 U.S. APP. LEXIS 23571 (3D CIR. JULY 26, 2018).

- Pennsylvania manufacture, delivery, or possession with intent to deliver statute does not criminalize mere offers to sell. Therefore, it is not broader than the Guidelines definition of controlled substance offense for purposes of the Career Offender enhancement. PWID under PA law therefore is a predicate offense for purposes of Career Offender.

UNITED STATES V. VAN HUYNH, 2018 U.S. APP. LEXIS 5633 (3D CIR. MAR. 6, 2018).

- Plea agreement stipulated to specific Guideline calculation for an Offense Level of 20. Agreement did not address the "relocation of conspiracy" to another jurisdiction enhancement.
- Court inquired to the Government whether "relocation of conspiracy" enhancement applied. Government expressed neutrality on the issue.
- Government was not required to oppose enhancements not in plea agreement, and therefore did not breach the agreement by expression of neutrality.

UNITED STATES V. DOUGLAS, 2018 U.S. APP. LEXIS 6401 (3D CIR. MAR. 15, 2018)

- Defendant was airline mechanic convicted of role in drug smuggling conspiracy.
- Sentencing court applied enhancement for "abuse of position of trust" pursuant to USSG 3B1.3. Enhancement requires 1) defendant held a position of public or private trust; 2) the defendant abused it in a manner that significantly facilitated the commission or concealment of the offense.
- Public or private trust requires that the defendant to have had power to make decisions free from supervision based on a fiduciary-like relationship or authoritative status that would cause the decisions to be presumptively accepted.
- Abuse of trust requires the court to consider several factors: 1) whether the defendant's position allowed for the commission of a difficult-to-detect wrong; 2) the degree of authority which the position vests relative to the object of the wrongdoing; and 3) whether there was reliance on the integrity of the person occupying the position. Status must provide more than some mere assistance.

UNITED STATES V. DOUGLAS, 2018 U.S. APP. LEXIS 6401 (3D CIR. MAR. 15, 2018)

- Douglas did not occupy a position of trust. Although he had access to non-public areas of airport, he was subject to supervision and did not have fiduciary-like relationship.

UNITED STATES V. WILLIAMS, 2018 U.S. APP. LEXIS 21304 (3D CIR. AUG. 1, 2018).

- Just as a defendant may consent to a search, a defendant may also terminate consent to search.
- Withdrawal of consent requires an act or statement that an objective viewer would understand to be an expression of unhappiness about the search.
- Williams' complaint about the length of the search and being on the roadside in winter was not a withdrawal of consent.

UNITED STATES V. WELSHANS, 2018 WL 2976804 (3D CIR. 2018)

- Defendant attempted to delete file of child pornography from his computer because he received a call that police were on their way.
- At trial, the Government refused to stipulate that the files were in fact child pornography and played for the jury two videos depicting horrific sexual abuse of very young children.
- Third Circuit found the evidence to be "immensely prejudicial" and inadmissible, in part due to the defendant's offer to stipulate. However, conviction was upheld as admission was harmless error due to overwhelming evidence of guilt.

UNITED STATES V. WELSHANS, 2018 WL 2976804 (3D CIR. 2018)

- Sentencing court imposed a two level sentencing enhancement for "obstruction of justice" due to defendant's attempt to delete files knowing police were on their way.
- Guidelines do not provide for enhancement if destroying or concealing evidence occurred contemporaneously with arrest and did not hinder prosecution.
- Court found deletion attempt was contemporaneous with arrest and not a hindrance to prosecution; therefore enhancement was in error.

2018 AMENDMENTS TO UNITED STATES SENTENCING GUIDELINES

- November 1 Amendments passed by the United States Sentencing Commission take effect.
- 2017 USSC lacked quorum, so no amendments.
- Official Summary of 2018 Amendments is available:

https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf

TRIBAL CONVICTIONS

- Uncommon to see in eastern states.
- If defendant has a prior conviction from a trial jurisdiction, Criminal History Points are not assigned but sentencing court may consider conviction(s) as a basis for an upward departure.
- The court should consider
  - 1) whether the defendant was represented by counsel;
  - 2) what Due Process protections applied;
  - 3) whether the conduct giving rise to the tribal conviction also resulted in state or federal convictions for which points were applied, and
  - 4) if the offense conduct would otherwise result in application of points.

FENTANYL

- 2D1.1(d)(13) now provides a four (4) level increase in offense level for "knowingly misrepresenting or marketing another substance or mixture as containing fentanyl."
- If drug dealer markets heroin or other controlled substance as containing fentanyl knowing it does not, a 4 level enhancement applies.
- Burden is of course on the Government to prove.

FENTANYL CONTINUED

- Fentanyl is defined as N-Phenyl-N[1-(2-phenylethyl)-4-piperidinyl] propanamide and analogue with "a chemical structure similar to N-Phenyl-N[1-(2-phenylethyl)-4-piperidinyl] propanamide, whether a controlled substance or not.
- 1 gram of fentanyl converts to 2.5 kilograms of marijuana
- 1 gram of fentanyl analogue converts to 10 kilograms of marijuana

per 2D1.1 Drug Conversion Table.

Why penalize analogue 4x more than fentanyl itself? To be consistent with 21 U.S.C. 841(b)(1)(A)(vi), which provides 10 year mandatory minimum for 100 grams of analogue or 400 grams of fentanyl mixture.

MARIHUANA CONVERSION NO LONGER APPLIES

- When defendant is culpable for more than one controlled substance, 2D1.1 previously required conversion of all drugs to marijuana based on "Drug Conversion Table." Although this was the practice for decades, it caused confusion among defendants and often resulted in sentencing based on a drug defendants were not actually culpable for possessing.
- "Drug Conversion Table" is now "Drug Equivalency Table." Drugs are now converted into "Converted Drug Weight" rather than marijuana.

2L1.2 UNLAWFUL ENTRY TO UNITED STATES

- Guideline is driven primarily by defendant's prior record.
- 2018 Amendments clarified that the time of the criminal conduct controls application of enhancements, not the date of conviction.

3E1.1 ACCEPTANCE OF RESPONSIBILITY

- Defendants get two or three level reduction for Acceptance of Responsibility. AOR typically means a timely guilty plea. Common for a defendant to plead guilty but contest some aspects of relevant conduct.
- 3E1.1 has been clarified. False or frivolous denial of relevant conduct is not consistent with AOR but an unsuccessful challenge to relevant conduct alone does not make the challenge false or frivolous.

5C1.1 NEW STATEMENT OF POLICY

- 2018 Application Note to 5C1.1:
- "nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment."
- This new application note is consistent with the statutory language in 28 U.S.C. § 994(j) regarding the "general appropriateness of imposing a sentence other than imprisonment" for "a first offender who has not been convicted of a crime of violence or an otherwise serious offense."

5C1.1 NEW STATEMENT OF POLICY

- If client is:
  - First time offender – no prior convictions or other comparable judicial dispositions of any kind.
  - Crime of conviction is non-violent – did not use violence or credible threat of violence or possess a firearm or other dangerous weapon i.e. many financial or drug offenses; and
  - Guideline range falls in Zone A or B;
  - Court should consider a sentence other than imprisonment.

  Zone B tops out at 8-14 months for 'true' first time offender, but this Application Note gives defense counsel plausible argument for probation, community corrections or home confinement.

2018-2019 US SUPREME COURT TERM

- Cases where cert has been granted but case not yet decided.
- If client's pending case may be affected, consider continuing case until SCOTUS decides relevant issue.

- Gamble v. United States, 17-646 – Separate sovereigns doctrine under review.
  - Current law – Does not violate Double Jeopardy for a defendant to be prosecuted for the same offense by state and federal government under separate sovereigns exception.
  - Question presented – whether separate sovereigns should be overturned.
  - Gamble was prosecuted by Federal Government and state of Alabama for gun possession arising from same traffic stop.
  - Supreme Court may rule without deciding question because federal felon in possession statute contains interstate commerce element which state law does not, changing double jeopardy analysis because crimes are not for the same conduct.

TIMBS V. INDIANA, 17-1091

- Whether the 8th Amendment's prohibition on excessive fines is incorporated to the states.
  - Recall incorporation doctrine – not all of Bill of Rights applies to states i.e. right to indictment by grand jury does not apply to states.
  - SCOTUS has found most, but not all, of Bill of Rights to apply to states by way of 14th Amendment Due Process Clause.
  - 8th Amendment provides "Excessive bail shall not be required, no excessive fines imposed…"
  - To date, excessive fines prohibition has not been applied to states.

GRUNDY V. UNITED STATES, 17-6086

- Whether federal sex offender registration is constitutional under the non-delegation doctrine because Congress delegated authority to Attorney General to regulate.
- Congress may empower administrative agencies to enforce law and promulgate regulations to carry out laws, but may not wholly delegate its legislative authority.
- Question is whether Congress delegated too much authority to Attorney General to implement registration system.
- Clients subject to registration obligation who are charged with failing to register may need to consider continuance.

STOKELING V. UNITED STATES, 17-5554

- Does state robbery offense that includes "overcoming victim resistance" count as a "violent felony" predicate offense for purposes of the Armed Career Criminal Act?
- ACCA provides for 15 year mandatory minimum for felon in possession defendants with 3 or more prior "violent felony", "serious drug offense" or burglary convictions.
- Question presented is whether slight force robbery counts.
- Interpretation of ACCA is often applied to Career Offender guideline as well, so watch out for clients who are Career Offenders due to slight force robbery priors.

UNITED STATES V. STITT, 17-765

- Another ACCA case.
- Does burglary of a non-permanent dwelling or mobile structure that is adapted for overnight accommodation qualify as "burglary" for purposes of the Armed Career Criminal Act?
- ACCA defines burglary to involve "building or structure"
- Many state burglary statutes include vehicles, making convictions ineligible to be ACCA predicate offense. See Mathis v. US, 579 U.S. ___.
- Does a mobile home count as a "building or structure?"

GARZA V. IDAHO, 17-1020

- Garza entered a plea agreement containing an appeal waiver provision. Garza instructed counsel to appeal nevertheless.
- Counsel did not file an appeal.
- Question is whether "presumption of prejudice" standard applies as it would without an appeal waiver or whether the defendant is required to show the invalidity of the appeal waiver.

FLOWERS V. MISSISSIPPI, 17-9572

- Quadruple murder case.
- Tried 6 times, reversed 5 times, primarily on Batson grounds.
- In 6th trial, prosecutor used preemptory strikes on five African-American prospective jurors.
- Flowers was convicted and again sentenced to death.
- MS Supreme Court upheld over Batson challenge. SCOTUS will decide.