SEVENTH CIRCUIT UPDATE

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ATTEMPTED AGGRAVATED IDENTITY THEFT NOT A CRIME

- ***United States v. Muresanu,* No. 18-3690**.
- Muresanu was charged with attempted aggravated identity theft, but there is no such federal crime
- the statutory definition of aggravated identity theft does not cover attempts
- The district court deleted the attempt language from the jury instructions and instructed the jury on the elements of the completed crime. The modified instruction conformed to the statutory offense but varied from the charges in the indictment. The jury found Muresanu guilty on all counts.
- The Court of Appeals reversed and remanded, holding that the modification of the jury instructions led the jury to convict Muresanu of crimes not charged by the grand jury, violating his Fifth Amendment right to be tried only on charges brought by indictment. That category of error is per se reversible.

EXPERT TESTIMONY ON AGE OF CHILDREN NOT REQUIRED

- ***United States v. Dewitt,* No. 19-1295.**

- Dewitt was found guilty by a jury of child pornography offenses.

- Dewitt argued the government's evidence was insufficient because the jury heard no expert testimony (from a medical doctor, for example) about the age of girls depicted in images sent from his cellphone.

- The Court of Appeals held that, while some cases may present close calls that benefit from expert evidence, this one did not. The jury heard and saw more than enough to make a reliable finding that Dewitt possessed, produced, and distributed images of children. The Court affirmed.

CHILD MUST ENGAGE IN SEXUALLY EXPLICIT CONDUCT FOR 2251(A) CONVICTION

- ***United States v. Howard,* No. 19-1005.**

- Howard was charged with seven crimes relating to possession, receipt, distribution, and production of child pornography.

- The videos involved in the production counts do not depict a child engaged in sexually explicit conduct; they show Howard masturbating next to a fully clothed and sleeping child.

- The Court of Appeals held that the videos are not child pornography. The government's theory was that Howard violated the statute by "using" the clothed and sleeping child as an object of sexual interest to produce a visual depiction of himself engaged in solo sexually explicit conduct. However, the Court held that government's interpretation of § 2251(a) "stretches the statute beyond the natural reading of its terms considered in context" and vacated the two production convictions.

CONTACT WITH PARENT ENOUGH FOR 2422(B) CONVICTION

- ***United States v. Hosler,* No. 19-2863.**

- Hosler was convicted after a bench trial of using a facility or means of interstate commerce to attempt to persuade, induce, entice, or coerce a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b).

- The charge stemmed from Hosler's communications over a period of several weeks with an undercover police detective posing as a mother offering her 12-year-old daughter for sex in exchange for money.

- On appeal, Hosler argued that his conduct did not meet the requirements of the statute because he did not attempt to transform or overcome the supposed minor's will.

- The Court of Appeals disagreed, finding "It is sufficient for conviction if the defendant makes a "direct attempt to use the parent as an intermediary to convey the defendant's message to the child."

OPEN QUESTION WHETHER ILLINOIS RESIDENTIAL BURGLARY IS A VIOLENT FELONY

- ***United States v. Glispie,* No. 19-1224.**
- Glispie pled guilty to being a felon in possession of a firearm but reserved the right to challenge his designation as an armed career criminal based on his prior convictions for residential burglary under Illinois law.
- Glispie argued residential burglary in Illinois covers a broader swath of conduct than generic burglary for purposes of the ACCA and cannot be used as a predicate offense.
- If the limited-authority doctrine applies to residential burglary, then a conviction for Illinois residential burglary is broader than generic burglary and cannot qualify as an aggravated felony for purposes of the ACCA.
- The Court respectfully sought the assistance of the Supreme Court of Illinois by certifying this controlling question of law. **This issue is still pending so objections should be made.**

AGG. CRIMINAL SEXUAL ABUSE NOT CRIME OF VIOLENCE

- ***United States v. Williams,* No. 18-3318.**
- Williams was convicted after a jury trial of Hobbs Act robbery.
- The Court of Appeals found his prior Illinois conviction for aggravated criminal sexual abuse was not a crime of violence for career offender guideline purposes
- However, the district court's sentence was not plain error because the judge specifically found she would impose the same sentence regardless of his career offender status.
- *But see,* ***United States v. Vesey,* No. 19-3068,** holding the Illinois aggravated criminal sexual abuse statute is divisible and some parts are crimes of violence.

GUIDELINES REQUIRE CATEGORICAL APPROACH, BUT . . .

- ***United States v. Carter,* No. 18-3713.**

- Carter appealed, arguing that the district court erred in classifying two of his prior convictions as crimes of violence.

- The Court of Appeals affirmed because Carter had at least two prior felony convictions that qualify as crimes of violence under the categorical approach required under the Guidelines.

- The Court also reminded the district courts that the classification of prior convictions under the Sentencing Guidelines can produce abstract disputes that bear little connection to the purposes of sentencing. As the Sentencing Commission itself has recognized since the Sentencing Guidelines were first adopted, district judges may and should use their sound discretion to sentence under 18 U.S.C. § 3553(a) on the basis of reliable information about the defendant's criminal history even where strict categorical classification of a prior conviction might produce a different guideline sentencing range.

PRIOR POSSESSION OF FIREARM AND RULE 404(B)

- ***United States v. Washington,* No. 19-1331.**

- Washington was charged with unlawfully possessing a firearm as a felon after police officers saw him toss a gun into a residential yard.

- Before trial the government moved to admit a video posted on YouTube about three months before the arrest depicting Washington holding what prosecutors argued was the same gun. Over Washington's objection, the district judge permitted the admission of still photos from the video but not the video itself. The jury found Washington guilty.

- Washington appealed and challenged the admission of this evidence. The Court of Appeals affirmed, holding that evidence of recent past possession of the same gun is admissible for a non-propensity purpose—namely, to show the defendant's ownership and control of the charged firearm.

- However, the court noted past possession of a different gun would raise Rule 404(b) concerns.

REHAIF ISSUES – GUILTY PLEA (FELON IN POSSESSION)

- ***United States v. Williams,* No. 19-1358.**

- Williams had pled guilty to possessing a firearm after a felony conviction when the Supreme Court issued *Rehaif v. United States* and his plea reflected the law as it was in this Circuit before that decision.

- On appeal, Williams sought to withdraw his plea on plain error review but argued the Court should adopt a new standard called "the supervening-decision doctrine" under which the government would bear the burden of proving that an error did not affect the defendant's rights.

- The Court of Appeals rejected this argument and concluded that the defendant bears the burden of showing that his erroneous understanding of the elements of § 922(g) affected his substantial rights - his decision to plead guilty - before he may prevail. Williams failed to carry that burden, and the Court affirmed.

REHAIF ISSUES – JURY TRIAL (FELON IN POSSESSION)

- ***United States v. Maez*, et. al, Nos. 19-1287, 19-1768, & 19-2049.**
- The defendants in these cases were found guilty of violating 18 U.S.C. § 922(g) at jury trial.
- They asserted *Rehaif* errors including a missing element in their indictments and jury instructions and a denied motion for a judgment of acquittal.
- Applying plain-error review, the Court of Appeals concluded the asserted errors do not require reversing any of the convictions.

REHAIF – DOMESTIC VIOLENCE MISDEMEANANT

- ***United States v. Triggs*, No. 19-1704.**

- Triggs was indicted for unlawfully possessing a firearm in violation of 18 U.S.C. § 922(g)(9), which prohibits firearm possession by persons convicted of a misdemeanor crime of domestic violence.

- Soon after he filed his notice of appeal, the Supreme Court issued its decision in *Rehaif*. Triggs raised a *Rehaif* claim on appeal, seeking to withdraw his plea.

- The Court of Appeals reversed and remanded, holding the error is plain and prejudicial because Triggs could plausibly argue he did not know he belonged to the relevant category of persons disqualified from firearm possession - more specifically, that he did not know his ten-year-old conviction was a "misdemeanor crime of domestic violence" as that phrase is defined for purposes of § 922(g)(9).

REHAIF – UNLAWFUL USER OF CONTROLLED SUBSTANCE

- ***United States v. Cook,* No. 18-1343.**

- A jury convicted Blair Cook of being an unlawful user of a controlled substance (marijuana) in possession of a firearm and ammunition. See 18 U.S.C. §§ 922(g)(3).

- The Court of Appeals rejected Cook's vagueness and Second Amendment challenges to section 922(g)(3) along with his objection to the jury instruction on who constitutes an unlawful user of a controlled substance.

- However, the Court reversed and remanded for a new trial in light of the Supreme Court's decision in *Rehaif*.

FIRST STEP ACT – FAILURE TO APPLY AT SENTENCING PLAIN ERROR

- ***United States v. Godinez,*** **No. 19-1215.**
- Godinez pled guilty to conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846.
- The government filed an information under 21 U.S.C. § 851, advising the district court that Godinez had a prior Ohio conviction for possession of cocaine.
- On appeal, Godinez argued that the First Step Act of 2018, enacted after the signing of his plea agreement but before his sentencing, rendered invalid both the information and the increased penalties it carried.
- The Court of Appeals agreed and held that, by failing to recognize the changes implemented by the First Step Act, the district court premised its sentencing calculations on a mandatory minimum that was twice what it should have been. This oversight constituted plain error and required that Godinez be resentenced.

FIRST STEP ACT – INTERACTION WITH FAIR SENTENCING ACT

- ***United States v. Shaw*, et al., Nos. 19-2067, 19-2069, 19-2078, 19-2117.**

- The Court of Appeals held that in order to determine whether a defendant is eligible for a reduced sentence under the First Step Act, a court needs to look only at a defendant's statute of conviction, not to the quantities of crack involved in the offense.

- More specifically, if a defendant was convicted of a crack-cocaine offense that was later modified by the Fair Sentencing Act, he or she is eligible to have a court consider whether to reduce the previously imposed term of imprisonment.

FIRST STEP ACT – INTERACTION WITH SENTENCING REFORM ACT

- ***United States v. Sutton,* No. 19-2009.**

- Over a decade ago, the district court sentenced Sutton to his then statutory minimum 15 years' imprisonment for distributing crack and carrying a firearm during a drug-trafficking crime.

- Under the First Step Act, a defendant sentenced for a covered offense (which includes Sutton's crack cocaine charge) may move for the district court to impose a reduced sentence. Sutton submitted his motion seeking relief and the district court denied it.

- The Court of Appeals asked the parties to brief how the First Step Act interacts with the Sentencing Reform Act, which generally prohibits a court from modifying a sentence.

- The Court of Appeals held that the First Step Act is its own procedural vehicle and the only limits on the district court's authority under the First Step Act come from the interpretation of the First Step Act itself.

FIRST STEP ACT – VIOLATION OF SUPERVISED RELEASE

- ***United States v. Corner,* No. 19-3517.**

- Corner violated the conditions of his supervised release, and he was sentenced to 18 months' imprisonment followed by 42 months' supervised release.

- He moved for a reduced sentence under section 404 of the First Step Act. The district court did not assess Corner's eligibility for relief under the Act, explaining that it would not lower his sentence regardless of his eligibility because he had violated the terms of his release.

- Corner appealed and argued it was procedural error to deny relief without first determining with the Act applied to his sentence and what the new statutory penalties would be. The Court of Appeals agreed with Corner and reversed.

FIRST STEP ACT – COVERED AND NON-COVERED OFFENSES

- ***United States v. Hudson,* et al., Nos. 19-2075, 19-2476, & 19-2708.**

- The First Step Act allows district courts to reduce the sentences of criminal defendants who have been convicted of a "covered offense." A "covered offense" is a federal crime (committed before August 3, 2010) for which the statutory penalties were modified by the Fair Sentencing Act of 2010.

- The Appellants in these appeals argued the district court erred in denying their First Step motions.

- The Court of Appeals reversed and remanded holding if a defendant's aggregate sentence includes both covered and non-covered offenses, the district court can reduce the sentence for the non-covered offenses.

FIRST STEP ACT – DOES NOT APPLY TO CASES PENDING ON APPEAL

- ***United States v. Sparkman,* No. 17-3318.** Sparkman's case was on appeal after a resentencing hearing. During the pendency of the appeal, the First Step Act was enacted. The Court of Appeals reaffirmed its holding in *Pierson* that the First Step Act does not apply to cases pending on appeal when it was enacted.

- ***But see United States v. Bethany,* No. 19-1754 and *United States v. Uriarte,* No. 19-2092.**

- The First Step Act applies when a defendant's case is remanded for resentencing (or resentencing ordered after successful 2255) and the First Step Act was passed while the defendant was on appeal or 2255 was pending.

FOURTH AMENDMENT - SHOTSPOTTER

- ***United States v. Rickmon,* No. 19-2054.**

- Police departments use a surveillance network of GPS-enabled acoustic sensors called ShotSpotter to identify gunfire, quickly triangulate its location, and then direct officers to it.

- As a matter of first impression, the Court of Appeals considered in this case whether law enforcement may constitutionally stop a vehicle because, among other articulable facts, it was emerging from the source of a ShotSpotter alert.

- The district court held that the totality of the circumstances provided the officer responding to the scene with reasonable suspicion of criminal activity to justify the stop. The Court of Appeals affirmed.

FOURTH AMENDMENT – SCOPE OF APPELLATE REVIEW OF RECORD

- ***United States v. Howell,* No. 18-3157.**

- After ruling out an initial suspect of a warehouse break in, the initial suspected pointed at Howell as a possible suspect. Howell was crossing the street and walking toward the police. When an officer approached to ask what was going on, Howell did not answer, looked panicked, and put his hands in his pockets. The officer reacted by patting down Howell and found a gun in his jacket. A federal gun charge followed, and Howell moved to suppress the gun as the fruit of an unconstitutional stop-and-frisk.

- The Court of Appeals reversed the denial of his suppression motion. The Court held that the proper scope of review was to limit itself to the pretrial record rather than looking at the arresting officer's trial testimony as well. The reason for this was because that was the only source of facts the district court considered in denying Howell's motion.

FOURTH AMENDMENT – AIR FRESHENER ON REVIEW MIRROR

- ***United States v. Jackson & Freeman,*** **Nos. 19-2928 & 19-3153.**

- A police officer pulled over Jackson and his passenger Freeman for violating a provision of the Chicago municipal code prohibiting any object obstructing the driver's clear view through the windshield - in this case an air freshener.

- Jackson and Freeman moved to suppress the evidence for lack of probable cause to conduct the traffic stop based on their argument that the officer erroneously believed that there could not be anything hanging from the rearview mirror, regardless of whether it obstructed the driver's view. The district court denied the motion.

- The Court of Appeals affirmed, finding that all that is required for a traffic stop is reasonable suspicion and because the officer had an articulable and objective basis for suspecting that the air freshener obstructed Jackson's clear view in violation of the city municipal code, the stop was lawful.

STATEMENTS TO PRETRIAL SERVICES

- ***United States v. Chaparro*, No. 18-2513.**

- A jury found Chaparro guilty on three felony charges for viewing and transporting child pornography. The charges arose from three crimes separated by significant gaps in time: viewing child pornography on a hard drive in July 2013, transmitting child pornography files over the Internet in August 2014, and viewing child pornography on a smartphone in November 2014.

- In his pretrial interview, Chaparro said he lived at the scene of the crimes on all of the relevant dates. The district court admitted this statement as proof that he was at the residence and responsible for the offenses.

- The Court of Appeals held that the admission of Chaparro's pretrial services statement was an error. When Congress created Pretrial Services, it made pretrial services information "confidential" and specifically prohibited its admission "on the issue of guilt in a criminal judicial proceeding." 18 U.S.C. § 3153(c)(1) & (3).

PRIOR DRUG CONVICTIONS

- In ***Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019),** an immigration case, the Seventh Circuit determined that a 2016 violation of 720 ILCS 570/402(c) does not qualify as a controlled substance offense because it is overbroad (it includes salvia) and indivisible.

- Section 402(c) is the catch-all, any controlled substance part of the drug possession statute.

- In sum – the Illinois catch-all subsection of the drug statutes is susceptible to challenges, because it is indivisible and (depending on the year) may be overbroad.

PRIOR DRUG CONVICTIONS

- ***United States v. De La Torre,* et al., Nos. 18-2009, 18-2218, 18-2286, 18-3303, & 19-1299.**

- The Court of Appeals' reversed two defendants' guilty pleas based on predicate drug offenses used to increase their sentences under 21 U.S.C. § 851.

- One of those defendants, Chapman, had prior convictions for possession of controlled substances under 720 ILCS 570/402(c) (1993). The Court of Appeals held that Illinois statute was broader than the federal definition of felony drug offense because it covers propylhexedrine and the federal statute does not and the statute was not divisible.

- The Court made the same decision about defendant Rush who had a prior conviction under Indiana Code § 35-48-4-2 (2000) for possession of methamphetamine. The Indiana statute criminalizes a wider range of methamphetamine isomers than the federal statute which specifically limits to "the optical isomer."

PRIOR DRUG CONVICTIONS

- ***United States v. Garcia & Pineda-Hernandez,* Nos. 18-1890 & 18-2261.**

- Garcia and Pineda-Hernandez were two defendants charged in a large drug distribution conspiracy. Garcia pled guilty and Pineda-Hernandez was convicted after a jury trial. Garcia argued that the district court improperly enhanced his sentence by using a prior Indiana drug conviction.

- The Court of Appeals agreed holding that because Indiana includes a wider class of drugs under its statutes than the federal government does, and the Indiana statute is not divisible, it does not qualify as a felony drug offense under 21 U.S.C. § 841(b)(1).

PRIOR DRUG CONVICTIONS

- ***United States v. Ruth,* No. 20-1034.**

- This appeal involved a question about whether the Illinois drug statute sweeps more broadly than its federal counterpart because the former includes a particular isomer of a substance that the latter does not.

- Ruth pled guilty to federal gun and drug charges and received an enhanced sentence due to his prior Illinois conviction for possession with intent to deliver cocaine.

- The Illinois statute defines cocaine to include its positional isomers, whereas the federal definition covers only cocaine's optical and geometric isomers. Ruth argued the district court erred in sentencing him because, using the categorical approach, the overbreadth of the Illinois statute disqualifies his prior conviction as a predicate felony drug offense.

- The Court of Appeals agreed and vacated Ruth's sentence and remanded for resentencing.

PRIOR SEX CONVICTIONS

- ***United States v. Kaufmann,* No. 18-2742.**

- For certain federal crimes involving sexual exploitation of minors, a federal statute - 18 U.S.C. § 2252(b) - increases the mandatory minimum sentence when the defendant has a prior conviction "under the laws of any State relating to," among other things, "possession … of child pornography."

- Kaufmann pled guilty to two federal crimes involving sexual exploitation of a minor. The district court imposed an enhanced mandatory minimum sentence under § 2252(b) because Kaufmann has prior convictions for possession of child pornography under an Indiana statute.

- Kaufmann challenged his sentence, arguing that his prior state convictions do not support a § 2252(b) enhancement because the Indiana statute of his convictions criminalized conduct broader than the federal version of possession of child pornography. The Court of Appeals affirmed, holding a § 2252(b) enhancement does not require the state statute of conviction to be the same as or narrower than the analogous federal law. Rather, the words "relating to" in § 2252(b) expand the range of enhancement-triggering convictions.

RELEVANT CONDUCT – PROOF OF "ICE" METH PURITY

- ***United States v. Carnell,* No. 19-2207.**
- Carnell pled guilty to a conspiracy to distribute a mixture containing methamphetamine.
- The sentencing guidelines distinguish between mixtures involving methamphetamine and methamphetamine that is at least 80% pure. The latter the Guidelines refer to as "ice," and that definition carries with it sentences that are substantially higher than those for non-ice methamphetamine.
- Carnell argued on appeal that the government failed to meet its burden of proving that the substance in which he dealt was ice methamphetamine, and therefore he should have been sentenced as though he was involved in a conspiracy to distribute methamphetamine that is less than 80% pure.
- The Court of Appeals agreed, holding the government bears the burden of proving the methamphetamine involved in the case is at least 80% pure and "circumstantial evidence by users, dealers and law enforcement that a drug appears to be ice based on look, smell, effect, nomenclature or the like will not suffice to meet the government's burden, by a preponderance of the evidence, that a drug is at least 80% pure methamphetamine."

CATEGORICAL APPROACH AND SENTENCING FINDINGS

- ***United States v. Gardner,* No. 18-1731.**

- Gardner was arrested after firing a gun at two vehicles thought to be driven by rival gang members. He pled guilty to possessing a firearm as a felon. The district judge imposed an above-Guidelines sentence based in part on Gardner's use of violence in a prior burglary.

- On appeal Gardner argued procedural error, asserting the categorical approach applies when a judge exercises *Booker* discretion to impose an above-Guidelines sentence based on a defendant's aggravating conduct in a prior crime.

- The Court of Appeals disagreed, holding the sentencing judge may consider aggravating circumstances in a defendant's criminal record without the constraints imposed by the categorical approach that usually applies to statutory sentencing enhancements and the determination of offense-level increases and criminal-history points under the Sentencing Guidelines.

DENIAL OF PSR TO DEFENDANT

- ***United States v. Melvin,* No. 19-1409.**
- Melvin wanted to obtain a copy of his presentence investigation report before his sentencing hearing but the district court ordered the probation office not to give a copy to Melvin, who was instead allowed only to review the report with his attorney. At his sentencing hearing, Melvin asked for his own copy of the report, but the district court refused his request.
- Melvin appealed, arguing that the district court violated 18 U.S.C. § 3552(d) and Federal Rule of Criminal Procedure 32(e)(2) by denying him a copy of his presentence investigation report.
- The Court of Appeals held that the district court did not violate § 3552(d), but did violate Rule 32(e)(2), which means what it says: defendants should be given their presentence investigation report. Melvin did not receive his report, so this was error. However, the Court concluded the error was harmless in Melvin's case.

SUPERVISED RELEASE CONDITIONS - WAIVER

- **Failure to object to conditions of supervised release will be considered a waiver of the right raise challenges to those conditions on appeal in most cases.**

- ***United States v. Collins,* No. 18-3011.**

- ***United States v. Anderson & Roach,* Nos. 18-1870 & 18-3096**.

- ***United States v. Groce,* No. 19-1170.**

- A defendant who receives an opportunity to object to a proposed condition of supervised release at sentencing but fails to do so waives his objection for appellate purposes.

- ***But see United States v. Manyfield,* No. 19-2096** (reversal where the defendant did not have notice of the conditions of supervised release and no opportunity to object)**.**

SUPERVISED RELEASE REVOCATION – BENEFIT UNDER 3582

- ***United States v. Durham,* No. 18-3283.**
- Durham received a 35-year sentence for a federal drug offense that was later reduced to 20 years due to subsequent amendments to the Sentencing Guidelines.
- On supervised release, however, Durham violated the terms of his supervised release, including by committing a domestic battery. The district court sentenced him to 30 months' imprisonment for these violations - about twice the high end of the guidelines advisory range.
- Durham argued the sentence was the product of the district court effectively penalizing him for benefiting from the amendments to the guidelines that reduced his original sentence. The Court of Appeals affirmed, noting that the district court's reliance on § 7B1.4, Application Note 4 was likely in error but had no effect on the sentence.

QUESTIONS?

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