

Dan Siegel's
Federal Criminal Defense
Victory Newsletter

A weekly summary of newly filed,
defense-favorable, published federal decisions
Issue 42 of 2022, Mon., Oct. 17, 2022

Granting D's pre-trial motion to dismiss, DC holds unconstitutional offense of "possessing firearm with an obliterated serial number" at 18 U.S.C. § 922(k). U.S. v. Randy Price, 2022 WL 6968457, No. 22-CR-97, S.D. West Virginia, Charleston Div., Goodwin, J., Oct. 12, 2022. Rationale: under the Supreme Court's new second amendment standard, the burden is on the government to show that a challenged firearm regulation is "consistent with the Nation's historical tradition of firearm regulation" – as that tradition existed in 1791, the year the second amendment came into effect. Because the government failed to meet its burden, the district court concluded that it had "no choice but to find 18 U.S.C. § 922(k) unconstitutional." Op. at *6.

Granting post-conviction relief, DC vacates mandatory life sentence imposed under the § 3559 "three-time loser" law, where D was convicted of armed bank robbery, and his "three-time loser" enhancement was based, in part, on an Arizona conviction for second degree murder. James Wade Arnold v. U.S., 2022 WL 4612493, No. 97-CR-176, D. Arizona, McNamee, S.J., Sept. 30, 2022. Rationale: because Arizona second degree murder includes a mental element of "ordinary" recklessness, it is not categorically a "three-time loser" predicate.

CA5 orders new trial on charge of "causing death in course of a 924(c) violation" where: (1) jury given opportunity to convict based on alternative 924(c) predicates; (2) one of the predicates, RICO conspiracy, wasn't a 924(c) "crime of violence;" and (3) in the absence of a special verdict form, there was no way to tell whether the jury relied on the permissible or impermissible 924(c) predicate. U.S. v. Telly Hankton, *et al.*, 2022 WL 7880976, No. 16-30995, CA5, Oct. 14, 2022.

CA7 remands for reconsideration of motion for sentence reduction under the First Step Act where record does not reflect that DC considered D's arguments regarding post-sentence rehabilitation. U.S. v. Jamell Newbern, 2022 WL 6900928, No. 22-1244, CA7, Oct. 12, 2022.

CA5 holds evidence insufficient to support conviction for "distributing depictions of minors engaged in sexually explicit conduct;" panel also holds that DC erred in precluding testimony by defense expert regarding "literary and artistic value" of the charged stories and images. U.S. v. Thomas Alan Arthur, 2022 WL 6901179, No. 21-50607, CA5, Oct. 12, 2022. D operated web site featuring stories describing children engaged in sexual conduct, often violent. The stories were accompanied by drawings that depicted children in sexual situations, and the drawings often depicted violence. D convicted of multiple counts of "distributing depictions of minors engaged in sexually explicit conduct," in violation of 18 U.S.C. § 1466A(a)(1). CA5 finds that DC erred in precluding testimony by defense expert, but holds that error was harmless. Op. at *6-9. Dissent would find that the error was not harmless. Op. at *9-11. All three judges agreed, however, that the evidence was insufficient to support conviction on Count 1. "[T]he charged image in Count 1 is a simple black and white pencil or charcoal drawing with minimal detail depicting an adolescent girl alone, reclining and apparently masturbating. Importantly, unlike the children depicted in the images [charged in other counts], there is no indication that the subject of the image in Count 1 is being forced to perform a sexual act. The drawing is simple and utterly lacking in violent depictions. Our independent constitutional review of the image charged in Count 1 leads us to the conclusion that it is not obscene under [the standard announced by the Supreme Court in] *Miller*. We therefore reverse [D's] conviction on Count 1." Op. at *6.

CA3 holds that state court violated D's sixth amendment right to a speedy trial, due to fifty-month pre-trial delay; panel reverses DC order denying post-conviction relief, orders D's immediate release from custody. Chal Kennedy, Jr. v. Superintendent Dallas SCI, 2022 WL 6657885, No. 21-1265, CA3, Oct. 11, 2022. Record reflects that: (1) defendant was released on home confinement after ten months of pre-trial detention; (2) this initial ten-month delay was attributable to the defense; and (3) during the forty-month period of pre-trial delay following release on home confinement, D did not file new speedy trial objections, and did not update his old objections. Despite these facts, CA3 orders post-conviction relief, finding that the forty months of post-release pre-trial delay were attributable to the state, and that defendant demonstrated that his trial defenses were prejudiced by the delay.

DanSiegel@DanSiegelLaw.com