Dan Siegel's

Federal Criminal Defense

Victory Newsletter

A weekly summary of newly filed,
defense-favorable, published federal decisions
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Where D made two false statements during single FBI interview, government violated "multiplicity" rule by charging two separate "false statement" violations; case remanded with instructions to vacate conviction on count two, re-sentence on count one. U.S. v. Alexander Samuel Smith, 2022 WL 17347783, No. 20-4414, CA4, Dec. 1, 2022.

In granting motions for compassion release, DC gives weight to the fact that Ds – who went to trial – received much more severe sentences than similarly situated co-defendants who entered into plea agreements. U.S. v. Anthony Russo and Paul Moore, 2022 WL 17247005, Nos. 92-CR-351 & 90-CR-1063, E.D.N.Y., Block, S.J., Nov. 28, 2022. Op. at *7, *10.

CA3 holds that the "loss" enhancement at U.S.S.G. § 2B1.1 is limited to "actual" losses, and does not include "intended" losses that are not actually suffered; case remanded with instructions to re-sentence without the loss enhancement. U.S. v. Frederick H. Banks, 2022 WL 17333797, No. 19-3812, CA3, Nov. 30, 2022. Rationale: (1) the text of 2B1.1 provides for enhancements based on the victim's "loss;" (2) the word "loss" unambiguously means "actual loss;" (3) dispite this unambiguous language, the guideline commentary defines "loss" to include both "actual" and "intended" loss; (4) because the commentary "sweeps more broadly than the plain language of the guideline," the commentary is accorded no weight, and guideline text controls. Op. at *6-7.

Where indictment charged five counts of bank fraud, and two of the counts involved conduct occurring more than 10 years prior to filing of the indictment, the applicable 10-year statute of limitations required dismissal of the two counts; "continuing offense" exception to the statute of limitations does not apply to bank fraud. U.S. v. Deborah Lynn Curran, 2022 WL 17369720, No. 22-CR-53, S.D. Iowa, Eastern Div., Locher, J., Dec. 1, 2022.

Magistrate Judge denies government motion, under All Writs Act, for an order granting permission to conduct drone surveillance of suspected drug houses; motion denied without prejudice to government's right to apply for a search warrant under Criminal Rule 41. In the Matter of the Application of the United States of America for an Order Authorizing Small Unmanned Aircraft System Surveillance of Private Property, 2022 WL 16757941, No. 22-MJ-2005, E.D. North Carolina, Western Div., Numbers, J., Magistrate Judge, Oct. 26, 2022.

DC grants compassionate release where: (1) D was convicted of leading a meth conspiracy; (2) D's "mandatory" guideline range, at 1994 sentencing, was life imprisonment; (3) D received a sentence of life imprisonment; (4) under today's "advisory" guideline regime, D's guideline range would remain "life imprisonment;" nonetheless (5) in exercising its authority under the current advisory regime, DC would choose to vary below the "life imprisonment" guideline range. U.S. v. Raul Amezcua, 2022 WL 7693153, No. 93-CR-5046, E.D. Calif., Drozd, J., Oct. 13, 2022. Given evidence of D's rehabilitation, given that D has reached the age of sixty, and given that D has served 34 years of his life sentence, DC imposes sentence of "time served."

CA6 grants 2254 relief, orders new trial for prisoner convicted of murder; D's fifth and sixth amendment rights were violated when, using an exhibit that had been admitted into evidence, jurors conducted an experiment in the jury room. Samuel Fields v. Scott Jordan, Warden, 2022 WL 17348103, No. 17-5065, CA6, Dec. 1, 2022. State argued that the petitioner had not overcome AEDPA deference, because there was no S.Ct. decision that grants relief due to a jury room experiment conducted with an exhibit. CA6 majority disagrees, relying on S.Ct. case law holding that, under the fifth and sixth amendments, "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence." Op. at *3, cite omitted.

CA1 holds that at sentencing for supervised release violation, DC plainly erred when it varied upward based on facts that did not appear in the record; on remand, sentencing for the SR violation must be assigned to a new judge, and decided on the existing record. U.S. v. Angel Ramos-Carreras, 2022 WL 17351616, No. 21-1747, CA1, Dec. 1, 2022. While on supervised release, D was charged, in the local Puerto Rico courts, with "sexual assault in the third degree." After pleading guilty to the local offense, a petition was filed in federal court alleging that, by committing the local offense, D had violated his terms of supervised release. D admits SR violation, P.O. calculates guideline range of four to ten months imprisonment. DC imposes statutory maximum of three years imprisonment, stating that "the attempt was against his own 15-year-old-daughter whom he had registered as his daughter when she was born. He touched and sucked on her left breast and then touched and squeezed her vagina over her clothing." Op. at *1. These facts did not appear in the SR violation petition, and were not supported by any in-court testimony. Applying "plain error" review, CA1 vacates the sentence and remands for resentencing. "The record at the time of sentencing includes no indication that [D] admitted to more than attempted lewd behavior, a category that includes misconduct far less salacious than that described by the extra-record allegations on which the [DC] relied … [r]eciting extraneous non-record avowals without identifying the source or providing notice to [D] that these asserted details would be considered in determining his sentence for the condition at issue was a clear error." Op. at *3.

CA4 holds that DC erred in denying motion to suppress; police didn't have "reasonable suspicion" to extend traffic stop so as to permit drug sniff by police dog; in light of police video, DC fact findings in support of reasonable suspicion were clearly erroneous. U.S. v. Teresa Miller, 2022 WL 17259018, No. 21-4086, CA4, Nov. 29, 2022. District court "clearly erred" in crediting officer's testimony on two factors alleged to support a finding of "reasonable suspicion." First, officer testified that driver was slow to stop her vehicle; panel reviewed the police video and concluded that driver stopped at the first available opportunity, and within a reasonable period of time. Second, officer testified to the driver's "nervousness," including trembling hands and excessive conversation; panel reviewed the police video and concluded that the driver's hands were not shaking, and that her comments were responsive to the officer's questions. While it was true that video showed the driver tapping her fingers on the car door, and that such "fidgeting" may be a sign of nervousness, "tapping one's fingers may just as likely be a sign of annoyance, impatience, or even boredom – any of which may be expected when a person is stopped by a police officer and is awaiting the results of a license check. By itself, tapping one's fingers is a very weak indicator of nervousness." Op. at *8, cite omitted. Finally, "traveling on a known drug corridor is not itself probative of criminal behavior and does not serve to eliminate a substantial portion of innocent travelers." Op. at *9, cite omitted.

DC grants motion to suppress un-Mirandized statement made while in police custody; government failed to prove applicability of the "spontaneous statement followed by clarifying question" exception to the Miranda rule. U.S. v. Charles Powell, 2022 WL 6772323, No. 21-CR-572, E.D.N.Y., Komitee, J., Oct. 11, 2022. When a suspect is in custody, and makes an un-Mirandized but spontaneous statement, police are permitted to ask clarifying questions without first securing a Miranda waiver. Police may not, however, ask questions that seek to expand the scope of the spontaneous statement. In this case, prosecutor alleged that D made a spontaneous statement, that police followed up with reasonable clarifying questions, and that D's subsequent admissions were admissible under the aforementioned Miranda exception. DC held that government failed to meet burden of proving applicability of the exception by a preponderance of the evidence. Rationale: the gov could not establish, "at least not with any precision," what the volunteered statement was, and what the officer asked in response. Op. at *6. Because of this lack of precision, "we cannot say with confidence whether [the officer] was merely seeking clarification or, alternatively, [was] expanding on the scope of what [D] had volunteered." Op. at *6.

DC grants 2254 relief based on D counsel ineffectiveness during plea negotiations; AEDPA deference overcome; release ordered if D not re-tried within 120 days. James Henry Alexander v. Dean Williams, 2022 WL 17367926, No. 21-CV-1353, D. Colorado, Martinez, J., Nov. 17, 2022. D was offered plea agreement with a maximum 16-year sentence. Defense counsel, who was aware of defendant's serious criminal record, told the client that if he didn't accept the plea, and was convicted at trial, and was adjudicated a "habitual criminal," he could receive 32 years in prison. D went to trial, lost, was adjudicated a habitual criminal, and received a mandatory 64 years in prison. DC holds that counsel performed deficiently in miscalculating the applicable "habitual criminal" sentence, and that D was prejudiced by the deficient performance.

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