Dan Siegel's
Federal Criminal Defense
Victory Newsletter
A weekly summary of newly filed,
defense-favorable, published federal decisions
Issue 50 of 2022, Mon., Dec. 12, 2022

DC holds unconstitutional 18 U.S.C. § 922(n), the statute that criminalizes "receipt of firearms by persons under indictment." U.S. v. Stolynn Shane Stambaugh, 2022 WL 16936043, No. 22-CR-218, W.D. Oklahoma, Wyrick, J., Nov. 14, 2022. "A historical analogue to support constitutional applications of § 922(n) might well exist, but the United States hasn't pointed to it. And because it is the United States' burden to demonstrate that laws like § 922(n) are 'part of the historical tradition that delimits the outer bounds of the right to keep and bear arms,' that failure is fatal." Op. at *6.

En banc CA11 adopts defense-favorable construction of First Step Act "safety valve" provision. U.S. v. Julian Garcon, 2022 WL 17479829, No. 19-14650, CA11, Dec. 6, 2022. Interpreting 18 U.S.C. § 3553(f)(1), en banc majority holds that D is ineligible for the "safety valve" only if: (A) he has a total of more than 4 criminal history points; *and* (B) at least one of his prior convictions is for an offense that received at least 3 criminal history points; *and* (C) he has at least one additional prior conviction for a violent offense that received at least 2 criminal history points.

DC grants 2255 relief based on defense counsel ineffectiveness at sentencing; counsel failed to ask that the federal sentence be made concurrent with a state sentence, and DC might have granted the request had it been made. Andre Stockett v. U.S., 2022 WL 17478505, No. 20-CR-02, N.D. Ohio, Western Div., Carr, S.J., Oct. 31, 2022. "I believe the petitioner has established with reasonable probability that I might have run the sentences concurrently. Thus, I find that he has met *Strickland's* prejudice requirement." Op. at *2.

Notwithstanding defendant's use of a partially fictitious return address, DC holds that D has standing to seek suppression of drug package that he posted in the U.S. Mail. U.S. v. Jaavaid McCarley-Connin, 2022 WL 17478495, No. 21-CR-374, N.D. Ohio, Western Div., Carr, S.J., Nov. 1, 2022. "[A]n individual, who sends a package under a fictitious name, has an expectation of privacy in the package's contents that society is willing to recognize." Op. at *4, cites omitted.

DC holds unconstitutional 18 U.S.C. § 922(g)(8), the statute that criminalizes "possession of firearms by persons subject to domestic abuse restraining orders." U.S. v. Litsson Antonio Perez-Gallan, 2022 WL 16858516, 22-CR-427, W.D. Texas, Pecos Div., Counts, J., Nov. 10, 2022. Rationale: (1) under the Supreme Court decision in *Bruen*, prosecutor must show that the firearm restriction at issue is consistent with the Nation's historical tradition of firearm regulation; (2) "until the mid-1970s, government intervention – much less removing an individual's firearms – because of domestic violence practically did not exist." Op. at *5; (3) because "the historical record does not contain evidence sufficient to support the federal government's disarmament of domestic abusers," section 922(g)(8) is unconstitutional. Op. at *12.

CA2 holds that prior New York conviction for "attempted sale of a narcotic drug" cannot be counted as a career offender predicate. U.S. v. Vincent Gibson, 2022 WL 17419595, No. 20-3049, CA2, Dec. 6, 2022. Rationale: (1) New York defined "narcotic drug" to include "naloxegol;" (2) naloxegol has been removed from the federal controlled substance schedule; (3) because the state drug schedule includes naloxegol, but the federal drug schedule doesn't, D's prior conviction does not "categorically" meet the definition of a career offender "controlled substance offense."

CA6 holds that, under the circumstances presented, there was no need to seek court of appeals authorization to file a "second or successive" 2255 motion. In Re: Ronald Jones, 2022 WL 17491932, No. 22-5689, CA6, Dec. 8, 2022. D was convicted of a federal drug offense, and was sentenced as a career offender. After exhausting his direct appeal rights, and after losing a 2255 challenge, D went back to state court and secured an order invalidating one of the prior convictions that was used to support his career offender enhancement. D then filed a second 2255 petition, alleging that in light of the state court order, he no longer met the definition of a "career offender." DC transferred D's petition to the court of appeals, for determination of whether to approve the filing of a "second or successive" petition. CA6 holds that D's second petition did not come within the AEDPA definition of a "second or successive" petition, and that court of appeals approval was therefore unnecessary. "[W]hen the events giving rise to a 2255 claim have not yet occurred at the time of a prisoner's first § 2255 motion, a later motion predicated on those events is not 'second or successive.'" Op. at *1, cites, quotes omitted.

DC suppresses drugs found in D's backpack where: (1) D's conduct, at bus station, did not give police the "reasonable suspicion" necessary to conduct a warrantless stop; and (2) government failed to prove applicability of the "attenuation" exception to the fourth amendment warrant requirement – even though the backpack search occurred after police discovered that D had an open arrest warrant. U.S. v. Keith Cottrell, 2022 WL 13008904, No. 21-CR-20676, E.D. Michigan, Southern Div., Parker, J., Oct. 21, 2022. Rationale: (1) "reasonable suspicion cannot be ascertained from a suspect's ambiguous behavior." Op. at *4, cite omitted; (2) although the existence of an arrest warrant was a factor that supported the government's "attenuation" argument, that factor was outweighed by (a) the short period of time between the unlawful stop and the search of D's bag, and (b) the flagrancy of the fourth amendment violation. Op. at *6-7.

DanSiegel@DanSiegelLaw.com