SEVENTH CIRCUIT UPDATE

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PRETRIAL ISSUES

Right to Counsel
Pretrial Detention & Release
CARES Act
Guilty Pleas

APPOINTMENT OF MULTIPLE ATTORNEYS

***United States v. Campos-Rivera,* No. 19-3214.**

- Campos-Rivera was represented by an assistant federal public defender and then a CJA panel attorney
- Campos-Rivera then filed a half-dozen *pro se* motions raising issues that his new attorney declined to pursue. The district judge told him that he could not proceed *pro se* and through counsel.
- Campos-Rivera asked the judge to dismiss his attorney and appoint a third. The judge declined to do so, explaining that a disagreement about motion strategy did not justify the appointment of yet another attorney. Campos-Rivera elected to proceed *pro se.*

The Court of Appeals affirmed finding that a disagreement between attorney and client over pretrial motions is not grounds for the appointment of a new attorney.

PRETRIAL DETENTION & RELEASE

***United States v. Wilks,* No. 21-2559.**

- Wilks appealed from an order revoking his pretrial release based on his violation of his release conditions.
- Revocation of pretrial release is governed by 18 U.S.C. § 3148.
- The Court of Appeals held that the district court did not follow the statutory framework in making the revocation decision and reversed and remanded for further proceedings.
- The Court held that the district court failed to address why detention was necessary, which is required by the statute.

This case may also be helpful _____.

ATTORNEY CONFLICT

***United States v. Bell*, No. 20-2679.**

- Bell refused legal representation and represented himself. However, on the eve of trial, Bell retained a recent law school graduate to represent him.
- This attorney was newly admitted to the Illinois Bar, had never tried a case, and had met Bell in jail only a few days before trial. In addition, the attorney had previously met with one of Bell's co-defendants at the behest of the co-defendant's attorney.
- The district court advised Bell against retaining the attorney and appointed conflict counsel to advise him but Bell insisted.

On appeal, Bell argued the district court erred by allowing him to proceed with the attorney because he had an attorney client relationship with his co-defendant. The Court of Appeals affirmed, holding there was no actual or potential conflict of interest.

CARES ACT

***United States v. Coffin,* No. 20-2385.**

- Coffin pled guilty to two counts of being a felon in possession of a firearm in March of 2020.
- Shortly after, Congress enacted the CARES Act in response to the COVID-19 pandemic. The CARES Act created an exception to the rule that a defendant must be present for plea and sentencing hearings.
- Coffin appealed arguing presence at these hearings was non-waivable under the Seventh Circuit's precedent and contesting the district court's CARES Act findings.

The Court of Appeals affirmed, holding that the CARES Act created an exception to the non-waivable presence rule and that Coffin waived any challenge to the district court's findings by indicated he had no objections at the hearing.

CARES ACT

***United States v. Howell,* No. 20-3086.**

- Howell appealed from his resentencing on a firearm conviction and claimed he did not properly consent to appearing by video teleconference for his resentencing under the CARES Act.
- The Court of Appeals held that, "[w]hile the record is not as clear as we would ordinarily expect, it shows sufficiently:
  - (a) that the defendant was informed his consent was required;
  - (b) that the defendant conferred with his counsel on the topic; and
  - (c) that the judge, lawyers, and defendant all proceeded with a clear understanding that the defendant had consented to the use of a video teleconference."

CARES ACT

***United States v. Davis,* No. 21-1854.**

- Davis raised a challenge to the district court's use of videoconferencing for his change of plea and sentencing hearings.
- However, Davis entered into a plea agreement containing a waiver of his appellate rights.
- The Court of Appeals dismissed the appeal holding an alleged error in application of the CARES Act is subject to this waiver just like any other claim of error

GUILTY PLEAS

***United States v. Adam Sprenger,* No. 19-2779.**

- Sprenger pled guilty to one count of production of child pornography and one count of possession of child pornography pursuant to a plea agreement. The production count was invalidated by *United States v. Howard,* 968 F.3d 717 (7th Cir. 2020).
- The government agreed the production count should be vacated.
- The primary issue on appeal was whether Sprenger would be allowed to withdraw his entire guilty plea and invalidate the entire agreement on the ground that the legal theory upon which his production conviction rests is invalid.
- The Court of Appeals held he was not, finding the plea agreement still provided an adequate factual basis for the possession conviction, which supported that Sprenger's plea to the possession offense remained knowing and voluntary notwithstanding the invalidity of the production conviction.

TRIAL ISSUES

Admission of Evidence
Defenses
Experts
Cross-Examination
Jury Issues

BATTERED SPOUSE DEFENSE

***United States v. Dingwall,* No. 20-1394.**

- Dingwall was charged with three counts of robbery and three counts of brandishing a firearm during a crime of violence.
- She admitted she committed the robberies but claimed she committed them under duress, in fear of brutal violence at the hands of her abusive boyfriend.
- Dingwall filed a motion in limine seeking a ruling on evidence to support her duress defense, including expert evidence on battering and its effects. The district court denied Dingwall's motion.
- The Court of Appeals reversed and remanded, holding that although Dingwall "faces challenges in demonstrating both imminence and no reasonable alternatives," those questions are for the jury to decide.
- The Court joined the Ninth, District of Columbia, and Sixth Circuits in concluding that immediate physical presence of the threat is not always essential to a duress defense and that expert evidence of battering and its effects may be permitted to support a duress defense because it may inform the jury how an objectively reasonable person under the defendant's circumstances might behave.

LACK OF DNA ON GUN CROSS-EXAMINATION

***United States v. Parker,* No. 20-1231.**

- Parker was convicted after a jury trial of being a felon in possession of a firearm.
- He appealed, arguing that the district court violated his Sixth Amendment rights under the Confrontation Clause when it prohibited him from cross-examining the government witnesses about the lack of DNA evidence tying him to the firearm.
- The Court of Appeals affirmed, holding even if it assumed that Parker properly preserved the argument, and even if it were to determine that the district court erred by disallowing the proposed cross examination, any error would have been harmless.

EVIDENTIARY RULINGS ON THE RECORD

***United States v. Julius,* No. 20-2451.**

- A jury found that Julius set fire to the building where his ex-girlfriend was living after she spurned his attempts to rekindle their relationship.
- On appeal, Julius argued that the district court erred in allowing lay witnesses to offer expert testimony about the process of extracting data from his cellphone and in cutting off his cross-examination of one of those witnesses.
- The Court of Appeals affirmed, holding that Julius could not meet the plain error standard of review and any error was harmless.

However, the Court noted the record was difficult to review because the district court had ruled off the record. The Court reminded district courts to make evidentiary rulings on the record as the duty to comply with § 753(b) (the Court Reporter's Act) lies with the court and not the parties.

BUYER-SELLER INSTRUCTION

***United States v. Vizcarra-Millan*, et al., Nos. 19-3476, 19-3481, 19-3484, 20-1113, & 20-1266.** Grundy and a network of drug suppliers, couriers, distributors, and dealers trafficked hundreds of pounds of methamphetamine in Indianapolis. Grundy and over two dozen co-conspirators were indicted. After a three-week trial, Grundy and four other defendants were convicted of all the charges against them. In these consolidated appeals, the five trial defendants and one defendant who pled guilty challenge their convictions. There were no sentencing issues. Grundy argued that the district court violated his Sixth Amendment right to counsel by improperly obstructing him from representing himself. Vizcarra-Millan argued that the district court should have disqualified his chosen counsel due to a conflict of interest. Atwater, Beasley, and Moseby challenged the denials of their untimely motions to suppress evidence. Atwater, Beasley, and Neville contended that the evidence was insufficient to support some of their convictions. The Court of Appeals affirmed on all issues with the exception of the sufficiency of evidence issue raised by Beasley as to two of his convictions. Specifically, the Court reversed his conviction on the conspiracy conviction because the evidence only established Beasley had a buyer-seller relationship with his supplier and reversed his possession conviction because the government failed to prove constructive possession.

USE OF BOLSTERING TESTIMONY

***United States v. Hidalgo-Sanchez & Gomez*, Nos. 21-2673 & 21-1158.**

- Hidalgo-Sanchez and Gomez were indicted for their roles in a drug distribution conspiracy operating in Milwaukee, Wisconsin. Each was convicted by a jury and appealed.
- Gomez challenged the government's use of bolstering testimony.
- The Court found that the government's use of bolstering testimony constituted error, but the plain error standard was not met.
- The Court concluded with a warning, "In closing, we want to be very clear: the use of bolstering testimony of the nature used in this case is impermissible and it has the potential to damage our criminal courts whenever it is used. The responsibility for avoiding this falls squarely on the government. At the very least, the government should ensure that its training materials reflect the seriousness of avoiding this type of conduct. It must also do whatever else is necessary to ensure this does not happen again. Finally, we impart upon the defense bar the importance of objecting immediately to the use of this type of testimony. . . . As all criminal law attorneys are surely aware, plain error review is, by design, a much harder path to reversal than review for harmless error."

FOURTH AMENDMENT ISSUES

GOVERNMENT AGENTS

***United States v. Shelton,* No. 19-3388.**

- Shelton was convicted of conspiracy to commit wire fraud and conspiracy to commit honest services fraud related to her actions as an employee of the Calumet Township Trustee's Office.
- Shelton learned during her trial that an FBI Agent had directed another employee to conduct warrantless searches of her office. She moved for a mistrial, asserting violations of the Fourth Amendment as well as *Brady* and *Giglio* arguments. The district court denied the motions.
- The Court of Appeals found the district court erred when it concluded that Shelton lacked any reasonable expectation of privacy in her office and desk against the intrusions of a co-worker who was working as an agent of the government.
- The Court then considered whether the remaining evidence against Shelton was enough to sustain her conviction and concluded it was not. It vacated her conviction.

BUT SEE . . . GOVERNMENT AGENTS

***United States v. Bebris,* No. 20-3291.**

- Bebris sent child pornography over Facebook Messenger. Bebris's conduct was discovered and reported by Facebook, which uses PhotoDNA to compare images on Facebook's system with a database of known child pornography.
- Bebris argued before the district court that the evidence against him should be suppressed, specifically contending that Facebook took on the role of a government agent by monitoring its platform for child pornography and reporting that content.
- On appeal, Bebris made this argument but primarily contended that he was deprived of the opportunity to prove that Facebook acted as a government agent because the district court denied his Federal Rule of Criminal Procedure 17(a) subpoena seeking pre-trial testimony from a Facebook employee with knowledge of Facebook's use of PhotoDNA.
- The Court of Appeals affirmed holding, the district court properly exercised its discretion in quashing that subpoena, as it sought cumulative testimony to material already in the record.

PROLONGING TRAFFIC STOPS

***United States v. Gholston,* No. 20-2168.**

- Officer Cowick pulled over Gholston for turning without signaling. Because Cowick suspected that Gholston was a drug dealer, he called for a trained dog to perform a drug sniff at the scene. As Cowick was finishing the routine procedures required for a minor traffic violation, the dog arrived and alerted officers to the presence of methamphetamine.
- Gholston filed a motion to suppress arguing Cowick unreasonably delayed the stop in order to allow the "K9" officer to arrive and perform an inspection. The district court denied the motion.
- The Court of Appeals found that the district court committed no reversible error in finding that Cowick did not unlawfully prolong the stop and thus did not violate Gholston's Fourth Amendment rights.

WARRANTLESS USE OF POLE CAMERAS

***United States v. Tuggle,* No. 20-2352.**

- Tuggle's case presented an issue of first impression for the Seventh Circuit: whether the warrantless use of pole cameras to observe a home on either a short- or long-term basis amounts to a "search" under the Fourth Amendment.
- Most federal courts of appeals that have weighed in on the issue have concluded that pole camera surveillance does not constitute a Fourth Amendment search.
- The Seventh Circuit held that the extensive pole camera surveillance in this case did not constitute a search under the current understanding of the Fourth Amendment. The government's use of a technology in public use, while occupying a place it was lawfully entitled to be, to observe plainly visible happenings, did not run afoul of the Fourth Amendment.

PROBATIONERS AND PAROLEES

***United States v. McGill,* No. 19-2636.**

- During a visit to McGill's home, his probation officer seized a cell phone without warrant to do so. Law enforcement later discovered thousands of images of child pornography
- The Court of Appeals held the seizure of the phone fell within two exceptions to the warrant requirement - the plain view doctrine and reasonable suspicion that he was in violation of his conditions of supervised release.

***United States v. Wood,* No. 20-2974.**

- Wood was arrested for violating his parole. During the arrest, parole agents found methamphetamine hidden underneath the back cover of his cellphone. An investigator later extracted the data from his cellphone, revealing child pornography.
- Wood moved to suppress the data asking the Court to apply *Riley v. California* to parolees.
- The Court of Appeals disagreed and affirmed the denial of Wood's motion to suppress. The Court held that Wood's diminished expectation of privacy and the state's strong governmental interests required a finding that the search of Wood's cell phone was reasonable.

PROBATIONERS & PAROLEES – STALKING HORSE

***United States v. Price*, No. 20-3191.**

- Price was convicted by a jury of unlawfully possessing firearms and ammunition as a felon.
- On appeal, he challenged the district court's denial of his motion to suppress evidence located during warrantless searches, arguing that federal law enforcement used parole officers as a "stalking horse" to circumvent the Fourth Amendment's protections.
- The Court of Appeals affirmed, finding that, as a parolee, Price had reduced privacy expectations and his parole agreement included a provision that allowed probation officers to conduct a search based on "reasonable cause."
- Because probation officers reasonably believed he purchased ammunition and a magazine and went to a shooting range, there was reasonable cause to arrest and search him.
- The Court also held that the Supreme Court's subsequent decisions in *Knights* and *Samson* have eroded the rational from *Griffin* which first promulgated the concept of a "stalking horse." The court held that when the government relies on the totality-of-the-circumstances analysis as articulated in *Knights* and *Samson* to justify a parole search under the Fourth Amendment, the stalking horse theory has no application.

EN BANC DECISION – PROLONGED TRAFFIC STOP

***United States v. Cole*, No. 20-2105 (en banc).**

- Cole was pulled over while traveling on an Illinois interstate with an Arizona driver's license and a California registration.
- During the detention that followed, the trooper questioned Cole about his license, registration, and travel plans. Cole's answers led the trooper to suspect that Cole was trafficking drugs.
- To investigate his suspicions, the trooper called for a K-9 unit to meet him and Cole at a nearby gas station. The dog alerted, and officers found large quantities of methamphetamine and heroin in Cole's car.
- A divided panel of the Seventh Circuit reversed on the basis that the trooper's initial roadside questioning unreasonably prolonged the traffic stop.
- The Court of Appeals heard the case *en banc* and held that travel-plan questions ordinarily fall within the mission of a traffic stop but must be reasonable under the circumstances. The Court held the questions were reasonable in this case given Cole's answers.

BORDER SEARCH

***United States v. Skaggs*, No. 20-1229.**

- Skaggs was charged with twelve counts related to his production and possession of child pornography, based on evidence found in several thumb drives seized from him pursuant to a warrantless border search at Minneapolis-St. Paul International Airport.
- Skaggs filed a motion to suppress the evidence, which the district court denied.
- The Court of Appeals affirmed. First, the Court held that "[n]o court has ever required more than reasonable suspicion for a border search. Because reasonable suspicion existed here, the district court correctly denied Skaggs's motion to suppress, given the good faith exception."

PEN REGISTERS

***United States v. Soybel,* No. 19-1936.**

- Soybel perpetrated a series of cyberattacks on his former employer. To confirm the source, the government sought and received a court order under the Pen Register Act, 18 U.S.C. §§ 3121 et seq., authorizing the installation of pen registers and "trap and trace" devices to monitor internet traffic.
- Among the data collected, the pen registers recorded the IP addresses of the websites visited by internet users within Soybel's apartment. The IP pen registers were instrumental in confirming that Soybel unlawfully accessed his employer's system.
- This appeal presented a constitutional issue of first impression in this circuit: whether the use of a pen register to identify IP addresses visited by a criminal suspect is a Fourth Amendment "search" that requires a warrant.
- The Court of Appeals held that it is not a search because IP pen registers are analogous in all material respects to the telephone pen registers that the Supreme Court upheld against a Fourth Amendment challenge in *Smith v. Maryland,* 442 U.S. 735 (1979).

NO REASONABLE SUSPICION – A WIN!

***United States v. Segoviano,* No. 20-2930.**

- Segoviano was charged in a two-count indictment with possession with intent to distribute a controlled substance and possession of a firearm in furtherance of a drug trafficking crime.
- Segoviano filed a motion to suppress the evidence uncovered during a search of his apartment and statements made by him to them during his detention. The district court determined that no evidentiary hearing was necessary and denied the motion.
- The Court of Appeals reversed and remanded holding the pre-arrest detention was constitutionally problematic. The facts relied upon by the district court were insufficient as a matter of law to constitute reasonable suspicion that Segoviano was harboring a fugitive.
- Therefore, under well-established Fourth Amendment jurisprudence, it was not enough for Segoviano to merely be present in a building in which the agents believed that the fugitive could be located; the mere propinquity to where the fugitive might be located was insufficient to provide reasonable suspicion to detain Segoviano, whose only connection to the facts known to the agents was his residence in the building

MULTIPLE PAT-DOWNS

United States v. Smith, No. 21-1266.

- Chicago police found a loaded handgun in Smith's underwear after a series of pat-downs during a traffic stop.
- The district court concluded that the officer had reasonable suspicion to conduct each pat-down because of Smith's unusual body language throughout the stop: repeatedly leaning his pelvis against a car, waddling as if he had something between his legs, and appearing unusually nervous.
- The Court of Appeals affirmed, holding the second and third pat-downs were reasonable after observing Smith's behavior that seemed to indicate something was in his pants. The Court cautioned that "multiple pat-downs during a traffic stop are not the norm and reasonable suspicion must support each pat-down as the stop unfolds."

CRIMES OF VIOLENCE ISSUES

924(c)
Hobbs Act Robbery
ACCA
Crime of Violence Predicates

HOBBS ACT ROBBERY

***United States v. McHaney,* No. 20-1690.**

- McHaney argued that Hobbs Act robbery is not a crime of violence as defined under 18 U.S.C. § 924(c).
- The Court of Appeals affirmed citing its "growing, unequivocal precedent to the contrary" that Hobbs Act robbery meets the definition of a crime of violence under 18 U.S.C. § 924(c) and thus is a qualifying predicate crime under the statute.

ACCA

***United States v. Love,* Nos. 20-2131 & 20-2297.**

- Love pled guilty to multiple drug counts and a felon-in-possession count.
- The government argued he had three prior offenses to trigger the Armed Career Criminal Act: a 1994 Illinois armed robbery; a 2009 federal distribution of crack cocaine; and a 2015 Indiana Class D battery resulting in bodily injury.
- Two were at issue – the Illinois armed robbery and the Indiana battery.
- Love claimed he received a "restoration of rights" letter without an express reference to guns after he was released on the 1994 Illinois armed robbery conviction. _____ (*see also United States v. Stevenson, No. 20-2261.)*
- He argued his 2015 Indiana Class D battery-resulting-in-bodily-injury conviction was not a crime of violence under the ACCA.
- The Court of Appeals held both convictions qualified as predicates.

ACCA

***United States v. Robinson,* No. 21-1622.**

- Robinson pled guilty to one count of being a felon in possession of a firearm. The district court sentenced Robinson as an Armed Career Criminal to the 180-month statutory minimum.
- Robinson argued on appeal that after *Borden v. United States*, 141 S. Ct. 1817 (2021) he no longer qualifies for the armed-career-criminal mandatory minimum.
- The Court of Appeals affirmed, holding that Robinson's 1992 aggravated-discharge conviction was a predicate under the Act's elements clause. _____

CRIMES OF VIOLENCE – GUIDELINES CASES

***United States v. Cunningham,* No. 20-3203.**

- Cunningham appealed his sentence for unlawful possession of ammunition under 18 U.S.C. § 922(g)(1) and contended that the court erred in determining that one of his two convictions for aggravated battery under Illinois law, 720 ILCS 5/12-4 (2010), was a "crime of violence."
- Cunningham argued that the court should have relied on unspecified information from the Illinois Department of Corrections to find that he was convicted under a subsection of the statute that does not categorically define a crime of violence.
- The Court of Appeals affirmed holding that the court-certified record of conviction—which was consistent with criminal records from two separate police departments—shows that Cunningham was convicted under 720 ILCS 5/12-4(a), which, he conceded, is a crime of violence.

CRIMES OF VIOLENCE – GUIDELINES CASES

***United States v. Thomas,* Nos. 21-1239 & 21-1240.**

- Thomas pled guilty to distributing methamphetamine while on supervised release, appealed the district court's determination that he was a career offender.
- He argued his prior conviction under Wisconsin's child abuse statute is not a crime of violence under the career offender guideline because the statute prohibits intentionally causing bodily harm but does not separately include the use of physical force as an element.
- The Seventh Circuit affirmed based on controlling precedent that a crime including the element of intentionally causing bodily harm is a crime of violence.
- _____interest in cert petition

SENTENCING ISSUES

Procedural Errors
Sentencing Guidelines
Restitution

ACQUITTED OR UNCHARGED CONDUCT

***United States v. Rollerson,* No. 20-2258.**

- A jury convicted Rollerson on drug and firearm charges but acquitted him on other drug charges. He argued the district court erred by increasing his Sentencing Guideline range based on drug activity for which he was either acquitted or never charged.
- The Court affirmed Rollerson's sentence because the conduct at issue was supported by sufficiently reliable information and was relevant to his convictions.
- Although the record on the controlled buys was sparse, but in the absence of contradictory evidence, a police officer's affidavit attesting that the buys actually occurred provided the "modicum of reliability" that is needed to find by a preponderance of the evidence that Rollerson committed those additional crimes.

***United States v. McClinton,* No. 20-2860.**

- the jury found McClinton guilty of robbing the CVS in violation of 18 U.S.C. § 1951(a); and brandishing a firearm during the CVS robbery in violation of 18 U.S.C. § 924(c)(1)(A)(ii).
- The jury found him not guilty of the indicted crimes of robbery of the accomplice, in violation of 18 U.S.C. § 1951(a), and causing death while using a firearm during and in relation to the robbery of the accomplice, in violation of 18 U.S.C. § 924(j)(1).
- At sentencing, the district court concluded, using a preponderance of the evidence standard, that McClinton was responsible for the accomplice's murder. The district court judge therefore enhanced McClinton's offense level from 23 to 43
- The Court of Appeals held that the argument regarding use of acquitted conduct at sentencing is currently foreclosed by circuit and Supreme Court precedent but it was not frivolous to raise it to preserve it for Supreme Court review.

CALCULATION OF DRUG AMOUNTS

***United States v. Gibbs,* No. 20-3304.**

- Gibbs participated in a conspiracy to obtain and distribute methamphetamine.
- Gibbs argued on appeal that the district court erred in relying on the PSR to determine the amount of methamphetamine he should be held accountable for where the PSR did not support the calculation of the drug amounts.
- The Court of Appeals held that without substantiation for its statements regarding the amount of drugs, the government failed to meet its burden to prove the uncharged conduct by a preponderance of the evidence.
- Because the PSR charged Gibbs with an unsupported drug quantity, Gibbs's denial of the amount was enough to shift the burden of proof back to the prosecution.

CLOUD COMPUTING AND DISTRIBUTION OF CP

***United States v. Hyatt,* No. 21-1212.**

- Hyatt was charged with three child-pornography offenses: transportation, receipt, and possession. He pled guilty to the receipt offense.
- On appeal, he argued the district court plainly erred when it applied a two-level enhancement under § 2G2.2(b)(3)(F) for distribution of child pornography based solely on the fact that he uploaded images to a folder in his Dropbox account yet took no steps to allow any other person to obtain access to that folder.
- The Court of Appeals agreed this was error and remanded the case for resentencing.
- The Court further noted that no circuit has accepted the government's position that a two level enhancement under § 2G2.2(b)(3)(F) for distribution of child pornography applies based solely on the upload of files to cloud-based storage.

APPEAL PROOFING

***United States v. Asbury,* No. 21-1385.**

- Asbury was charged and convicted of distribution of methamphetamine
- On appeal, Asbury argued the district court erred in calculating his relevant conduct and failed to make any findings regarding the information contained in the PSR regarding drug amounts. The government conceded the error.
- At sentencing, the district court made several conclusory statements that it would impose the same sentence regardless of any potential guideline error.
- The Court of Appeals reversed and remanded for resentencing holding, "a conclusory comment tossed in for good measure is not enough to make a guidelines error harmless." Finding the district court had made no specific findings, reversal was necessary.

RULE 51(A) V. RULE 51(B)

***United States v. Wood,* No. 20-1454.**

- Wood stole money from homeowners in foreclosure by promising to provide financial services which he did not render.
- He argued the district court relied on facts of an unrelated case when sentencing him. He had not lodged an objection at sentencing.
- The Court of Appeals discussed the differences between errors that fall within Rule 51(a) and those that fall within Rule 51(b).
  - In cases where the grounds for appeal exist "prior to and separate from" the district court's ultimate ruling, Rule 51(b) applies (requiring an objection to avoid plain error review) _____.
  - However, in cases where the grounds for appeal exist only because of part of the district court's ultimate ruling in the case, such as statements made *sua sponte* by the court, Rule 51(a) applies (not requiring an "exception" to the court's ruling).
  - This ruling reconciles the Court's prior case law.

ROLE OF VICTIMS AT SENTENCING

***United States v. Issa*, No. 20-2949.**

- Issa embezzled tens of millions of dollars, pled guilty, and was sentenced to a below Guidelines 200 months in prison.
- He argued the district court violated his due process rights by erroneously admitting and relying statements from the victims to justify the sentence and allowing the victims' lawyer to act as a *de facto* prosecutor.
- The Court of Appeals affirmed holding that although the CVRA does not allow victims to formally intervene, it does allow the victims an opportunity to be heard, which is what occurred in this case.

RESTITUTION

***United States v. Morrow*, No. 20-2259.**

- Morrow and several codefendants participated in four robberies.
- Following his arrest, law enforcement was able to recover the electronics from the fourth robbery but not the other three.
- On appeal, Morrow argued because the government had the electronics from the fourth robbery in its possession at the time of sentencing, the district court erred in ordering monetary restitution for those stolen goods.
- The Court of Appeals affirmed Morrow's convictions and sentence of imprisonment but remanded for correction of the restitution order.
- The Court agreed that because the government had possession of the property stolen in the fourth robbery, the court erred in ordering restitution for that property.

RESTITUTION

***United States v. Robl,* No. 20-1790.**

- Robl pled guilty to one count of wire fraud for falsely holding himself out as a licensed and insured asbestos abatement contractor as part of a larger scheme to defraud customers.
- Robl appealed the restitution order arguing the district court lacked jurisdiction to enter the order and argued the district court denied him the right to be present under Rule 43.
- The Court of Appeals affirmed and held the district court had jurisdiction to enter the restitution order and that it committed no error in the course of adjudicating the amount of restitution.

***United States v. Wyatt,* No. 20-2382.**

- Wyatt pled guilty to one count of inter- state sex trafficking and was sentenced to ten years' imprisonment.
- the district court entered an order requiring Wyatt to pay restitution to three victims of his trafficking.
- He appealed the restitution order, arguing that the district court improperly delayed the restitution determination, did not rely on a statutorily required "complete accounting" of the victims' losses (and otherwise erred by relying on improper evidence and, as a result, ordered too much restitution), deprived him of counsel during the restitution process, and improperly ordered restitution outside of his presence.
- The Court of Appeals affirmed.

POST CONVICTION ISSUES

Compassionate Release
First Step Act
Supervised Release

COMPASSIONATE RELEASE

***United States v. Ugbah,* No. 20-3073.**

- Ugbah moved for compassionate release under 18 U.S.C. § 3582(c)(1) arguing his medical conditions exposed him to extra risk from COVID-19.
- The district court denied the motion without making findings regarding whether he had shown an "extraordinary and compelling" reason for release.
- The Court of Appeals affirmed holding because Ugbah could not establish extraordinary and compelling reasons, it was unnecessary for the district court to consider the § 3553(a) factors. The Court concluded, "One good reason for denying a motion such as Ugbah's is enough, more would be otiose. The district judge supplied at least one good reason and no bad ones."

***United States v. Barbee,* No. 21-1356.**

- Barbee appealed the denial of his motion for compassionate release.
- The Court of Appeals affirmed finding that, although the district court's ruling on the issue was "terse," remand was not necessary because reconsideration would not produce a decision in Barbee's favor.

***United States v. Rucker,* No. 21-2001.**

- Rucker appealed the denial of his motion for compassionate release based on his heightened risk of COVID-19.
- The district court concluded Rucker had not shown that his medical circumstances were extraordinary and compelling, and the sentencing factors of 18 U.S.C. § 3553(a) weighed against early release.
- The Court of Appeals affirmed and held the district court did not abuse its discretion in applying the factors under § 3553(a).
- The Court noted the district court's assessment of Rucker's COVID-19 risk was "cursory" but found any error was harmless based on the facts of the case.

COMPASSIONATE RELEASE

***United States v. Broadfield*, No. 20-2906.** Broadfield moved for compassionate release arguing his medical conditions exposed him to extra risk from COVID-19 and that the district court erroneously relied on the fact he had been convicted of a weapons offense when he had not been. The Court of Appeals affirmed finding that, although the district court made a mistake, and error was harmless because Broadfield had not shown extraordinary and compelling reasons for his release.

***United States v. Kurzynowski*, No. 20-3491.** Kurzynowski pled guilty to distributing child pornography. In 2015, the district court sentenced Kurzynowski to 96- months in prison. Kurzynowski moved for compassionate release pursuant to § 603 of the First Step Act of 2018, 18 U.S.C. § 3582(c)(1)(A)(i). The district court denied the motion. Kurzynowski appealed, arguing the district court improperly thought the Sentencing Commission's criteria in U.S.S.G. § 1B1.13 constrained its discretion. The Court of Appeals affirmed for two reasons. First, the district court properly exercised its discretion in denying Kurzynowski's motion. Second, under *United States v. Broadfield*, 5 F.4th 801 (7th Cir. 2021), the fact that Kurzynowski is vaccinated precludes a finding that the COVID-19 pandemic presents extraordinary and compelling reasons for his release.

COMPASSIONATE RELEASE

***United States v. Manning*, No. 20-3416.** Manning, a federal inmate who is represented by counsel recruited for him by the district court, appeals the denial of his request for compassionate release. The government argued that the district court impermissibly appointed and compensated Manning's lawyer. The court did so pursuant to the Southern District of Illinois's Administrative Order 265, which appoints the Federal Public Defender's Office and Criminal Justice Act panel attorneys to represent indigent prisoners in non-frivolous compassionate release cases. The government contended that Order 265 and the appointment and compensation of counsel in this case defy our precedent that there is no right to counsel in a sentence-modification proceeding. The Court of Appeals declined to decide this issue because it was not properly raised in the appeal.

FIRST STEP ACT

***United States v. Fowowe,* No. 20-3197.**

- Fowowe filed a motion for a reduced prison sentence under § 404(b) of the First Step Act which the district court denied.
- On appeal, Fowowe argued the district court's evaluation of his request was deficient because the court failed to apply a Seventh Circuit decision that post-dated his initial sentencing by more than eleven years - *United States v. Ruth,* 966 F.3d 642 (7th Cir. 2020).
- The Court of Appeals considered whether § 404(b) authorizes or requires a district court to apply a judicial decision issued after the defendant was initially sentenced.
- It held that § 404(b) authorizes but does not require district courts to apply an intervening judicial decision in evaluating First Step Act motions. Given this, it concluded the district court did not abuse its discretion in declining to recalculate Fowowe's sentencing range.

FIRST STEP ACT

***United States v. Thacker,* No. 20-2943.**

- Thacker is serving a 33-year federal sentence for a series of armed robberies he committed in 2002. The sentence included "stacked" § 924(c) counts.
- Thacker sought to reduce his sentence based on the amendment Congress enacted in the First Step Act of 2018 to limit the circumstances in which multiple sentences for violations of § 924(c) can be stacked.
- The district court denied Thacker's motion, concluding in part that the discretion in § 3582(c)(1)(A) to reduce a sentence upon finding "extraordinary and compelling reasons" does not include the authority to reduce § 924(c) sentences lawfully imposed before the effective date of the First Step Act.
- The Court of Appeals affirmed, holding that given Congress's express decision to make the First Step Act's change to § 924(c) apply only prospectively, the amendment, whether considered alone or in connection with other facts and circumstances, cannot constitute an "extraordinary and compelling" reason to authorize a sentencing reduction.

TERMS OF SUPERVISED RELEASE

***United States v. Teague & Whipple,* Nos. 20-3132 & 20-3316.**

- Both defendants in this consolidated appeal received a term of supervised release that was mandatory under their statute of conviction. *See, e.g.*, 21 U.S.C. § 841(b)(1)(C).
- The Court of Appeals considered whether a term of supervised release that is mandatory for initial sentencing remains a mandatory part of any new sentence after revocation.
- The Court of Appeals held that it is not and revocation proceedings operate under different rules and the initially mandatory term of supervised release is not mandatory upon revocation.

POSITIVE UA — GRADE C OR GRADE B?

***United States v. Patlan,* No. 21-1500.**

- Patlan appealed from his sentence after his revocation of supervised release.
- He argued the district court erred in failing to recognize its discretion to treat a failed drug screening as a Grade C violation rather than a Grade B violation.
- The Court of Appeals affirmed, finding that Patlan repeatedly admitted possessing controlled substances (the Grade B violation) and the district court was therefore not required to exercise discretion at all.
- The Court affirmed the holding from *United States v. Trotter,* 270 F.3d 1150 (7th Cir. 2001) that after a defendant's failed drug test, the inference of possession is permissible but not required, depending on the circumstances.

QUESTIONS?

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