Criminal Law Appellate Update

Review of the Supreme Court's October 2017 Term and Significant Eleventh Circuit Decisions

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Fifth Amendment—Double Jeopardy

***Currier v. Virginia*, 138 S. Ct. 2144 (2018).**

- Double Jeopardy Clause does not bar severance and successive prosecution of transactionally related offenses where offenses could have been tried together and defendant agreed to severance

***Gamble v. United States*, --- S. Ct. ---, 2018 WL 3148287 (U.S. June 28, 2018).**

- Supreme Court granted cert. to decide next term whether to overrule dual-sovereignty doctrine, which allows state and federal prosecutions for same conduct because Court has held violations of laws of separate sovereigns are not the same offense under the Double Jeopardy Clause
- S.D. Ala. § 922(g) case; state conviction was under Ala. Code § 13A-11-72 (certain persons prohibited to possess a firearm)

Fourth Amendment—Cell Phones & Electronic Privacy

***Carpenter v. United States*, 138 S. Ct. 2206 (2018).**

You do not, by carrying a cell phone in your pocket, voluntarily create and convey a running log of your whereabouts to anyone who cares to look.

- Government's acquisition of cell-site location information for 127-day period from defendant's mobile provider was a search under the Fourth Amendment, requiring a warrant based on probable cause
- Third-party doctrine's limitation on reasonable expectation of privacy doesn't extend to such "pervasive tracking"

Fourth Amendment—Cell Phones & Electronic Privacy (Cont'd)

Forensic searches of electronic devices *at the border* do not require a warrant or probable cause, *United States v. Vergara*, 884 F.3d 1309 (11th Cir. 2018). Come to think of it, they don't even require reasonable suspicion, *United States v. Touset*, 890 F.3d 1227 (11th Cir. 2018).

Elsewhere, though, a greater expectation of privacy is reasonable: An officer's warrantless seizure of iPhone from traffic accident bystander who took photos and video of traffic accident scene violated Fourth Amendment and was not justified to prevent destruction of evidence. *Crocker v. Beatty*, 886 F.3d 1132 (11th Cir. 2018) (also finding no qualified immunity).

Fourth Amendment—Cell Phones & Electronic Privacy (Cont'd)

***Dahda v. United States*, 138 S. Ct. 1491 (2018).**

A wiretap order authorizing interception outside the issuing judge's district is not *facially* insufficient under the wiretap statute, 18 U.S.C. § 2518

- Under § 2518(10)(a)(ii), facial insufficiency would require suppression of all intercepts under order, even within district
- The test of facial insufficiency is whether the wiretap order "lacks information that the wiretap statute requires it to include"; rejected 10th Circuit's test that focused on "core concerns" embodied in wiretap statute

Fourth Amendment—Automobile Searches

Reasonable expectation of privacy by unauthorized driver

- A driver in lawful possession and control of a rental car has a reasonable expectation of privacy in the car even if the rental agreement does not list him or her as an authorized driver, *Byrd v. United States*, 138 S. Ct. 1518 (2018).

Automobile exception doesn't override other limitations

- The automobile exception to the warrant requirement does not allow an officer to enter a home or its curtilage without a warrant in order to search a vehicle located there, *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

Fourth Amendment—Residences and Other Buildings

- Officers' actions outside residence manifested intent to secure residence and detain occupants, exceeding permissible scope of warrantless "knock and talk," but didn't require suppression, *United States v. Maxi*, 886 F.3d 1318 (11th Cir. 2018).
- Simultaneous entry of residence and outbuilding to execute arrest warrant was justified by reasonable belief that defendant could be in either building, *United States v. Williams*, 871 F.3d 1197 (11th Cir. 2017).
- Houseguest lacked reasonable expectation of privacy in house he used for commercial purpose of trafficking marijuana, though he had slept and socialized there, *Campbell v. United States*, 891 F.3d 940 (11th Cir. 2018).

Fourth Amendment—Scope of Consent

***United States v. Plasencia*, 886 F.3d 1336 (11th Cir. 2018).**

- Boat operator gave written consent to "complete" search of boat
- Park ranger powered up boat's GPS device and seized it; later analysis of device revealed details of past movements and linked boat to smuggling migrants
- Consent's scope is what an officer "could reasonably interpret the consent to encompass"
- Powering up, seizing, and searching GPS device did not exceed the scope of consent

Sixth Amendment and Related Matters—Confrontation Clause

***United States v. Osmakac*, 868 F.3d 937 (11th Cir. 2017).**

- Government notified defense of intent to present evidence obtained through surveillance under Foreign Intelligence Surveillance Act ("FISA") warrant
- Defendant moved for production of undisclosed classified material to determine whether surveillance was lawful
- District court reviewed material *in camera* and denied motion
- Held: District court did not abuse its discretion, and nondisclosure did not violate Confrontation Clause
- "The ability to cross-examine witnesses does not include the power to require the pretrial disclosure of all information that might be potentially useful in contradicting unfavorable testimony."

Sixth Amendment and Related Matters—Speedy Trial

- Sixth Amendment right to speedy trial requires government only to make a "diligent, good-faith effort" to find a missing defendant and bring him or her to trial. The defendant must also demonstrate actual prejudice that impaired his ability to prepare a complete defense, *United States v. Machado*, 886 F.3d 1070 (11th Cir. 2018).
- After defendant's conviction was reversed on appeal for Speedy Trial Act violation, district court on remand did not err in dismissing without prejudice and allowing reindictment that resulted in longer sentence after retrial, *United States v. Mathurin*, 868 F.3d 921 (11th Cir. 2017).

Sixth Amendment and Related Matters—Right to Counsel

- Denying a testifying defendant the opportunity to discuss testimony during overnight recess might violate Sixth Amendment right to counsel, but defendant could not show actual deprivation of right where court imposed limitation in response to counsel's request to speak with defendant "about matters other than his testimony," *United States v. Nelson,* 884 F.3d 1103 (11th Cir. 2018)
- Denial of defendant's motion for continuance to review video evidence first disclosed on eve of trial was not reversible violation of Sixth Amendment right to counsel, because video was not exculpatory and defendant couldn't show prejudice, *United States v. Jeri*, 869 F.3d 1247 (11th Cir. 2017)

Sixth Amendment and Related Matters—Right to Present Complete Defense

***United States v. Mitrovic*, 890 F.3d 1217 (11th Cir. 2018).**

- The right to present a complete defense does not guarantee the right to present hearsay statements of unavailable "recalcitrant" witnesses that were inadmissible under Federal Rules of Evidence
- Traditional hearsay rules did not deprive defendant of constitutional right to present a complete defense

Sixth Amendment and Related Matters—Right to Impartial Jury

***Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017).**

- 42 U.S.C. § 1983 action against police officers for actions in response to altercation between two gay men, formerly partners
- "[T]he sexual orientation of [plaintiff] and his witnesses would be central facts at trial and were 'inextricably bound up' with the issues to be resolved at trial."
- Trial court's refusal of plaintiff's requested voir dire question about anti-gay bias violated Sixth Amendment right to trial by impartial jury and was not harmless

Substantive Issues: Knowledge

- *United States v. Louis*, 861 F.3d 1330 (11th Cir. 2017)
  - To sustain a conviction for possession of a controlled substance with intent to distribute, the government must prove that the defendant knowingly possessed a controlled substance. Thus, the government must prove beyond a reasonable doubt that the defendant knew that the boxes placed in his car contained a controlled substance, as opposed to merely knowing the box contained some contraband.

Substantive Issues: Knowledge

- *United States v. Carroll*, 886 F.3d 1347 (11th Cir. 2018)
  - To sustain a conviction for distributing child pornography, the government must provide some proof that the defendant consciously shared files, either by authorizing their distribution or knowingly making them available to others
  - The Ares program, by default, saved downloaded files to a shared folder that other Ares users could access
  - Potentially a different outcome under other programs where, for example, the program:
    - prompts the user during installation to choose whether he wants to share downloaded files
    - Requires the user to authorize file sharing for each peer who requests it
    - Requires a user to acknowledge a licensing agreement that explains the peer-to-peer process

Sessions v. Dimaya—Another Void Residual Clause

***Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).**

- 18 U.S.C. § 16—statutory definition of "crime of violence" incorporated into Immigration and Nationality Act's definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43)
- Subsection (b) of § 16 encompasses "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"
- Court held § 16(b) void for vagueness based on same holding, in *Johnson v. United States*, 135 S. Ct. 2551 (2015), regarding similar provision of Armed Career Criminal Act ("ACCA")

Sessions v. Dimaya—Another Void Residual Clause (Cont'd)

- ACCA residual clause *(Johnson)*: felony that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*"
- § 16(b) *(Dimaya):* felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"
- 18 U.S.C. § 924(c)(3)(B): felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"

Sessions v. Dimaya—Another Void Residual Clause (Cont'd)

So is the § 924(c) residual clause going to be next?

Maybe … and maybe not

***United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016).**

- "We do not agree that the categorical approach applies . . . [w]hen the predicate offense . . . and the § 924(c) offense are contemporaneous and tried to the same jury, [so that] the record of all necessary facts are before the district court."

Sessions v. Dimaya—Another Void Residual Clause (Cont'd)

The 11th Circuit has taken note of *Robinson*

***United States v. St. Hubert*, 883 F.3d 1319, 1335–36 (11th Cir. 2018) (in dicta)**:

"The Third Circuit has aptly explained why a [non-]categorical approach is more appropriate in § 924(c) firearm cases, where the federal district court evaluates a contemporaneous federal crime charged in the same indictment and has an already developed factual record as to both offenses."

Sessions v. Dimaya—Another Void Residual Clause (Cont'd)

So has the Solicitor General

Supp. Br. of United States at 1, 3, *United States v. Jenkins*, No. 17-97, 2018 WL 1891590 (U.S. Apr. 19, 2018):

"Section 924(c)(3)(B) may be amenable to a narrowing construction under the canon of constitutional avoidance," to allow "[a] non-categorical approach . . . ."

Sessions v. Dimaya—Another Void Residual Clause (Cont'd)

Pro-prosecution aspects of a non-categorical approach:

- Would save the residual clause from invalidation and avoid a constitutional ruling and a flood of post-conviction challenges to *COV-based* § 924(c) convictions
- Would prevent defendants whose associated offense actually was violent from arguing it isn't a COV because it *can* be committed nonviolently
- Could allow expansion of 924(c) to new COVs never considered before, where specific facts satisfy the definition

Sessions v. Dimaya—Another Void Residual Clause (Cont'd)

***Possible* pro-defense aspect of a non-categorical approach**

Would the COV finding be a jury question? If so …

- Opens up rich vein of potential defense theories
- Could make § 924(c) trials a much more tenable option—particularly valuable, given mandatory minimums
- Could make federal prosecutors more reluctant to bring some § 924(c) charges, given aversion to bringing borderline cases

The Armed Career Criminal Act- Serious Drug Offenses

- To qualify as separate ACCA predicates, prior convictions must have arisen from "separate and distinct" criminal episodes and be for crimes that are "temporally distinct"
- *United States v. Longoria*, 874 F.3d 1278 (11th Cir. 2017)
  - "a drug conspiracy and a substantive drug offense occurring within its span may have been committed on occasions 'different from one another,'" and, thus, may qualify as separate predicates
  - Mr. Longoria's prior indictment charged him with conspiracy to possess with intent to distribute a controlled substance from December 2007 through December 2008, and two substantive distribution counts for incidents on November 24, 2008 and December 3, 2008

Violent Felonies and Crimes of Violence

- ACCA- Violent Felony- 18 U.S.C. § 924(e)(2)(B)
  - Has as an element the use, attempted use, or threatened use of physical force against the person of another (elements/force clause)
  - Or is burglary, arson, or extortion, or involves the use of explosives (enumerated clause)
- Guidelines: Crime of Violence- U.S.S.G. § 4B1.2(a)
  - Has as an element the use, attempted use, or threatened use of physical force against the person of another
  - Or is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or involves the use or unlawful possession of a firearm or explosives (enumerated clause)
- Force in these clauses is force capable of causing pain or injury. *Curtis Johnson v. United States*, 559 U.S. 133 (2010)

Violent Felonies and Crimes of Violence

- *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (*en banc*)
  - The *en banc* Eleventh Circuit, in a 6-5 decision, held that a Florida conviction for felony battery qualifies as a crime of violence under U.S.S.G. § 2L1.2
  - A person commits felony battery if he: (1) actually and intentionally touches or strikes another person against the will of the other, and (2) causes great bodily harm, permanent disability, or permanent disfigurement
  - The Court held that intentional force—even of the touching variety—that in fact causes great bodily harm, permanent disability, or permanent disfigurement, necessarily constitutes force that is capable of causing pain or injury

Violent Felonies and Crimes of Violence: Indirect Force

- *United States v. Deshazior*, 882 F.3d 1352 (11th Cir. 2018)
  - The Eleventh Circuit held that a Florida conviction for sexual battery with a deadly weapon qualifies as a violent felony under the elements clause
  - Deshazior argued that this conviction was not a violent felony because it did not require the direct use of physical force. It could be accomplished by poison or sloshing bleach in a person's face.
  - The Court rejected this argument, holding that Florida statute required force capable of causing pain or injury to another person, and it did not matter whether the use of force was direct or indirect

Violent Felonies and Crimes of Violence: Robbery

- *In re Welch*, 884 F.3d 1319 (11th Cir. 2018)
  - An Alabama robbery conviction qualifies as a violent felony under the elements clause because it requires force with intent to overcome physical resistance
- In *Welch*, the Court relied on its prior decisions concluding that a Florida robbery conviction qualifies as a violent felony, because the Florida and Alabama statutes employ a similar force requirement
- The Supreme Court has granted *cert.* to address whether Florida robbery qualifies as a violent felony. *Stokeling v. United States*, 138 S. Ct. 1438 (2018).
  - Currently set for oral argument on October 9, 2018

Violent Felonies and Crimes of Violence: Alabama Statutes

- First-Degree Assault- Ala. Code § 13A-6-20
  - Alabama's first degree assault statute is divisible.
  - Assault "with intent to cause serious injury by means of a deadly weapon or a dangerous instrument" qualifies as a violent felony under the elements clause. *In re Welch*, 884 F.3d 1319 (11th Cir. 2018)
- First-Degree Sexual Abuse- Ala. Code §13A-6-66
  - Alabama's sexual abuse statute is divisible—(1) sexual abuse by forcible compulsion and (2) sexual abuse of a person incapable of consent.
  - Sexual abuse by forcible compulsion does not qualify as a violent felony because state decisions had "watered down" the element of forcible compulsion to the point that it did not necessarily include as an element the use, threatened use, or attempted use of physical force

Violent Felonies and Crimes of Violence: Additional Florida and Georgia Statutes

- *United States v. Dixon*, 874 F.3d 678 (11th Cir. 2017)
  - Florida conviction for domestic battery by strangulation qualifies as a crime of violence under the elements clause
- *United States v. Morales-Alonso*, 878 F.3d 1311 (11th Cir. 2018)
  - Georgia conviction for aggravated assault qualifies as a crime of violence under the enumerated clause un U.S.S.G. § 2L1.2
- *United States v. Joyner*, 882 F.3d 1369 (11th Cir. 2018)
  - Florida conviction for strong arm robbery categorically qualifies as a violent felony under the elements clause

Mandatory Victims Restitution Act

- The MVRA requires that defendants convicted of certain offenses repay the victim for expenses incurred "during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. § 3663A
- *Lagos v. United States*, 138 S. Ct. 1684 (2018)
  - The Supreme Court clarified that "investigation" and "proceedings" includes only government investigations and criminal proceedings, not any private investigations or civil or bankruptcy proceedings

Appellate Concerns: Plain Error and the Sentencing Guidelines

- Plain error standard: (1) an error, (2) that is plain, and (3) that is prejudicial, in that it is not harmless. Once that standard is met, an appellate court should exercise its discretion to correct the error if the error "seriously affects the fairness, integrity or public reputation of the judicial proceedings."
- In *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the Supreme Court held that an error in Guideline calculations that is plain ordinarily is not harmless.
- In *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), the Supreme Court further explained that, where a defendant has established plain error in his Guidelines calculations, the risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity or public reputation of judicial proceedings.

Appellate Issues: Guilty Pleas

- *Class v. United States*, 138 S. Ct. 798 (2018)
  - A guilty plea does not, by itself, bar a defendant from challenging the constitutionality of the statute of conviction on appeal
  - What about appeal waivers?
    - The plea in this case included, in relevant part, express waivers of: (1) defenses based on the statute of limitations, (2) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range; and (3) most collateral attacks on the conviction. Additionally, the agreement expressly enumerated certain categories of claims Class could raise on appeal.
    - The Court determined that this did not expressly waive the right to raise a constitutional claim on appeal

Collateral Challenges

- *Burgess v. United States*, 874 F.3d 1292 (11th Cir. 2017)
  - Where the government waived any procedural bar to a 28 U.S.C. 2255 claim, the district court erred by *sua sponte* invoking the plea agreements collateral-attack waiver to bar a claim
- *Beeman v. United States*, 871 F.3d 1215 (11th Cir. 2017)
  - In order to succeed on a collateral attach based on *Johnson v. United States*, a movant bears the burden of establishing that the sentencing court relied solely on the residual clause in classifying his prior conviction as a “violent felony”

Any questions?