MEMORANDUM

TO: FPD Staff Attorneys & CJA Panel Attorneys
FR: Neil Jaffee
RE: July-August 2011 Case Summaries

D.C. CIRCUIT

United States v. Ventura, No. 09-3101, 2011 WL 2600680 (D.C. Cir. July 1, 2011). District court did not err in considering as support for upward variance underlying facts of defendant's prior state abduction conviction entered pursuant to nolo plea – which findings of facts were properly accepted from PSR in absence of any objections by defendant, as required by Fed. R. Crim. P. 32(i)(3)(A); while sentencing court may not draw adverse inference from defendant's silence in finding facts relating to circumstances of crime, court may accept facts in PSR where defendant fails to object, obviating need for court to rule on disputed facts without making adverse inference from defendant's failure to dispute facts; court could not consider defendant's nolo plea colloquy for purpose of calculating guidelines range but could consider it in evaluating § 3553(a) factors; court gave adequate reasons for sentence imposed, addressing each § 3553(a) factor and focusing on those factors particularly relevant to defendant's sentencing.

United States v. Saani, No. 09-3138, 2011 WL 2652391 (D.C. Cir. July 8, 2011). Sentencing court did not err in ruling that defendant's offense level should be increased pursuant to U.S.S.G. § 5K2.7 because defendant's criminal conduct significantly disrupted government function; in denying acceptance of responsibility reduction, sentencing court properly considered defendant's failure at plea hearing to admit he had underreported income and his refusal subsequently to cooperate fully with probation, but case remanded for resentencing because record unclear as to whether court improperly considered defendant's silence at sentencing and improperly took into account defendant's refusal to disclose source of certain funds in denying defendant credit for accepting responsibility and in varying upward from guidelines range.

United States v. Delaney, No. 10-3062, 2011 WL 2739839 (D.C. Cir. July 15, 2011). District court did not clearly err in finding that any inconsistencies between police officer's grand jury and suppression hearing testimony that defendant consented to search of his car were not so glaring as to render incredible officer's testimony and apparent violations of MPD protocols as to preservation of crime scene, which were unrelated to defendant's consent to search, did not undermine officer's credibility; remand for resentencing where sentencing record (including sealed sentencing hearing) indicates that district court misunderstood authority to consider under § 3553(a) certain proffered facts relating to defendant's history and characteristics.

United States v. Salahmand, No. 09-3136, 2011 WL 2937102 (D.C. Cir. July 22, 2011). Vulnerable victim adjustment under U.S.S.G. § 3A1.1(b)(1) applies to victims of defendant's relevant conduct, as well as victims of defendant's offense conduct.

United States v. Nwokoro, No. 11-3046, 2011 WL 3332279 (D.C. Cir. Aug. 3, 2011). Remand for district court to consider relevant facts and to prepare findings of facts and statement of reasons for defendant's pretrial detention where court's factual findings and reasoning were insufficient to demonstrate that it considered all information regarding statutory factors and had made reasoned decision that defendant constituted flight risk and that no conditions could reasonably assure he would appear for trial.

United States v. Laureys, No. 10-3047, 2011 WL 3629716 (D.C. Cir. Aug. 19, 2011). Defendant's on-line chat with detective posing as child molester with access to minor girl, in which defendant chatted in explicit terms about sexual conduct with particular nine-year-old girl whom detective said frequented his apartment, was sufficient evidence to prove defendant's intent to persuade minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b), and to travel interstate with intent to engage in sexual conduct with minor, in violation of 18 U.S.C. § 2423(b); defendant did not challenge on appeal district court's instruction that jury could convict under § 2422(b) if government proved defendant knowingly attempted to persuade an adult – rather than a minor directly – to arrange for a minor to engage in sexual activity but any instructional error was invited by defense attorney's acquiescence to proposed instruction and in any event, any error was not "plain" because instruction did not contradict any D.C. Circuit or Supreme Court precedents and every circuit to consider issue has held § 2422(b) can be violated if defendant communicates with adult intermediary rather than with child directly (dissent would find instruction was plain error given unambiguous language of statutory language); although no implication in chat that minor would be present at defendant's initial meeting with undercover detective, evidence was sufficient for jury to infer that defendant's travel to meet detective was to engage ultimately in sexual conduct with minor, in violation of § 2423(b) (dissent would hold such evidence was insufficient to prove requisite intent); remand for hearing as to whether defense counsel was ineffective for failing to call certain defense witnesses; supervised release conditions restricting defendant's contact with minors not plain error.

OTHER COURTS

United States v. Molignaro, No. 10-1320, 2011 WL 2628330 (1st Cir. July 6, 2011). Statutory prohibition against imposing or lengthening sentences of imprisonment to promote rehabilitation extends to resentencing following supervised release revocation.

United States v. Dellosantos, No. 09-2135, 2011 WL 3569334 (1st Cir. Aug. 16, 2011). Prejudicial variance between indictment charging defendants with conspiracy to possess with intent to distribute both cocaine and marijuana and trial evidence tending to show they participated in separate conspiracies to possess with intent to distribute cocaine only; evidence was insufficient to establish single conspiracy and separate conspiracies had materially different goals where evidence suggested defendants were indifferent to marijuana conspiracy's operations and defendants were deprived of adequate notice of charges against them due to variance.

United States v. Lee, No. 10- 493, 2011 WL 3084958 (2d Cir. July 26, 2011). Sentencing court procedurally erred by refusing to grant third-point reduction for acceptance of responsibility based upon government's refusal to file motion for third point because it had been required to prepare for hearing on defendant's PSR objections.

Virgin Island v. John, No. 09-4185, 2011 WL 3559933 (3d Cir. Aug. 15, 2011). Good faith exception to exclusionary rule inapplicable to unconstitutional seizure of evidence pursuant to warrant to search defendant's home for child pornography where warrant affidavit established probable cause to believe only that home contained evidence that defendant had sexually assaulted several children at school where he taught but affidavit failed to allege any evidence that defendant possessed child pornography in his home or reason to believe that person who committed child sexual assault would be likely to possess child pornography.

United States v. Waller, No. 10-1321, 2011 WL 3584335 (3d Cir. Aug. 16, 2011). Jury instruction on intent in prosecution for possession of heroin with intent to deliver, which allowed jury to consider any statements made "or omitted" by defendant, improperly invited jury to infer intent from defendant's post-arrest, post-*Miranda* warnings silence, in violation of his Fifth Amendment due process right.

United States v. Dixon, No. 10-4300, 2011 WL 3449494 (3d Cir. Aug. 9, 2011). Fair Sentencing Act of 2010, which reduced disparity between quantities of crack cocaine and powder cocaine required to trigger mandatory minimum sentences, applied to defendant who committed and was convicted of crack cocaine offense before Act's enactment date but was sentenced after that date.

United States v. Divens, No. 09-4967, 2011 WL 2624434 (4th Cir. July 5, 2011). Government cannot base refusal to move for additional one-level reduction for acceptance of responsibility on defendant's refusal to sign plea agreement that contained appellate waiver.

United States v. Digiovanni, No. 10-4417, 2011 WL 3000496 (4th Cir. July 25, 2011). State trooper unlawfully extended duration of traffic stop without reasonable suspicion to detain defendant where trooper questioned defendant extensively as to whether there were any drugs in vehicle and asked numerous questions concerning defendant's travel history and travel plans and waited approximately 15 minutes before returning defendant's license and rental contract and issuing warning ticket; defendant's consent to search vehicle was involuntary and therefore did not remove taint of illegal seizure arising from trooper's unlawful extension of traffic stop .

United States v. Bonner, No. 10-4768, 2011 WL 3375650 (4th Cir. Aug. 5, 2011). Circumstantial evidence indicating that robbery defendant had worn hat found in garbage can behind scene of robbery was insufficient to support conviction where forensic biologist testified that hat contained DNA of two or more people, no credible physical evidence indicated the defendant was wearing hat on night of robbery, and no eyewitness identified robber in any respect other than that he was African-American.

United States v. Massenburg, No. 10-4209, 2011 WL 3559897 (4th Cir. Aug. 15, 2011). Police lacked reasonable suspicion to frisk defendant where officers were responding to anonymous report of gun shots fired within vicinity of where defendant was stopped, report was only corroborated by defendant's companion immediately before frisk occurred, and defendant's purported nervous behavior consisted only of his refusal to consent to search and his conduct in standing slightly away from companion and looking down as they voluntarily talked with officers; collective-knowledge doctrine does not justify search/seizure based upon information known to member of police team but not communicated to other officers.

United Sates v. Simmons, No. 08-4475, 2011 WL 3607266 (4th Cir. Aug. 17, 2011). Because state failed to prove aggravating factors sufficient to warrant imposition of sentence exceeding 12 months' imprisonment, defendant's prior state conviction for non-aggravated marijuana possession was for offense not "punishable by imprisonment for a term exceeding one year," therefore, did not qualify as predicate drug felony conviction for purposes of enhancement under Controlled Substances Act; hypothetical aggravating factors regarding prior conviction could not be considered in calculating defendant's maximum punishment under Act.

United States v. Hill, No. 10-4320, 2011 WL 3626788 (4th Cir. Aug. 18, 2011). Officer's entry into defendant's home to execute arrest warrant was improper where officers relied solely on unidentified and unresponsive noise coming from within home and information received by police gave them reason to believe that person inside home was not defendant.

United States v. Mudekunye, 646 F.3d 281 (5th Cir. 2011). District court plainly erred in enhancing defendant's sentence for preparation of fraudulent tax returns, for abuse of position of trust or use of special skill, in addition to enhancement for defendant's being in business of preparing or assisting in preparation of tax returns where error resulted in sentence substantially above correct guidelines range and record did not suggest that court would have imposed that sentence if it had correctly calculated guidelines range.

United States v. Johnson, 643 F.3d 545 (7th Cir. 2011). District court procedurally erred in failing to address defendant's argument for application of one-to-one ratio between crack and powder cocaine.

United States v. Renner, No. 10-2112, 2011 WL 3426226 (8th Cir. Aug. 8, 2011). Sentencing court did not procedurally err in considering as mitigation that tax evasion defendant had consulted tax professionals, even if jury rejected defendant's good-faith trial defense.

United States v. Begdasarian, No. 09-50529, 2011 WL 2803583 (9th Cir. July 19, 2011). Defendant's anonymous comments on Internet Message Board using racial slurs and predicting that African-American presidential candidate would be shot was insufficient evidence to sustain conviction for threatening to kill major presidential candidate where comments did not express any subjective intent on part of defendant to take any action.

United States v. Yepez, No. 09-50271, 2011 WL 2988774 (9th Cir. July 25, 2011). In calculating criminal history points for purposes of safety valve eligibility, district court must credit state court orders modifying or terminating state probationary sentences.

United States v. Gonzalez-Melchor, No. 10-50111, 2011 WL 2652463 (9th Cir. July 8, 2011). Appellate waiver negotiated by district court at sentencing in exchange for reduced sentence was invalid and unenforceable.

United States v. Evanston, No. 10-10159, 2011 WL 2619277 (9th Cir. July 5, 2011). After administering unsuccessful *Allen* charge, district court abused discretion in inquiring into reasons for jury's deadlock and then permitting supplemental arguments focused on factual issues dividing jury.