Defense Opportunities from the Victory Newsletter

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"Federal Criminal Defense Victory Newsletter - A Weekly Summary of Newly Filed, Defense-Favorable, Published Federal Decisions"

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This handout discusses seven "defense opportunities" reflected in recent editions of the Victory Newsletter. The seven opportunities are:

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I. Second Amendment Challenges to Federal Gun Offenses

A. "Gun possession by indicted person" offense held unconstitutional

1. By published opinion filed September 19, 2022, a district court judge in Texas dismissed an indictment charging violation of 18 U.S.C. § 922(n), "possession of a firearm by a person under indictment." The judge found that section 922(n) violated the second amendment right to bear arms. *U.S. v. Jose Gomez Quiroz*, 2022 WL 4352482, No. 22-CR-104, W.D. Texas, Pecos Div., Counts, J., Sept. 19, 2022.

2. DC held that the offense of "gun possession by an indicted person" did not pass muster under the second amendment standard announced by the Supreme Court in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (U.S. 2022). Specifically, DC found that prosecutors did not meet their burden of showing that firearm prohibitions of this nature were in effect in 1791, the year the second amendment came into effect.

3. The court also dismissed a charge of making "materially false statements to a firearms dealer," in violation of 18 U.S.C. § 922(a)(6). At issue was the gun purchaser's false assertion that he was not under indictment. Given that the "possession while under indictment" offense was unconstitutional, D's false statement regarding his status as an indicted person was "immaterial," and thus did not support conviction under § 922(a)(6).

B. “Possessing firearm with an obliterated serial number” offense held unconstitutional

1. By published opinion filed October 12, 2022, a district court judge in West Virginia dismissed a count charging violation of 18 U.S.C. § 922(k), “possession of a firearm with an obliterated serial number.” The judge found that section 922(k) violated the second amendment right to bear arms. *U.S. v. Randy Price*, 2022 WL 6968457, No. 22-CR-97, S.D. West Virginia, Charleston Div., Goodwin, J., Oct. 12, 2022

2. As in the preceding case, the judge held that the “possession of a firearm with an obliterated serial number” offense did not pass muster under the second amendment standard announced by the Supreme Court in *New York State Rifle & Pistol Ass’n v. Bruen*, 142 S.Ct. 2111 (U.S. 2022); specifically, DC found that prosecutors did not meet their burden of showing that a firearm prohibition of this nature was consistent with the Nation’s historical tradition of firearm regulation as understood in 1791.

C. Other statutes that might be susceptible to challenge under the new S.Ct. standard

1. Section 922(o) of title 18 makes it a crime for law-abiding persons to possess machine guns. At the founding, was there a type of firearm deemed so dangerous that possession was prohibited to law-abiding citizens? Was a citizen at the time of the founding prohibited from owning a canon?

2. Section 922(g)(1) of title 18 prohibits firearm possession by convicted felons. Is 922(g)(1) constitutional as applied to persons who were convicted of non-violent white-collar offenses? How was this issue treated when the second amendment came into effect in 1791?

3. Section 922(g)(9) of title 18 prohibits firearm possession by persons convicted of “misdemeanor crime[s] of domestic violence.” How was this issue treated in 1791?

D. Treatises

1. Firearms Law Deskbook, 2021-22 ed., by Stephen P. Halbrook, published by Clark Boardman Callaghan (available on Westlaw)

2. Firearms Law and the Second Amendment: Regulation, Rights, and Policy, 3d ed., by Johnson, Mocsary, Wallace, Kilmer, and Kopel, published by Aspen Publishing

3. The Second Amendment: Gun Rights and Regulation, by Blocher, Miller and Charles, to be published by West in 2023

II. Relief from Prosecutorial Misconduct in Closing Argument

A. New trial ordered – even where the issue wasn't preserved by defense counsel

1. In *U.S. v. Edward Canty, III*, 37 F.4th 775, 786-89 (1st Cir. 2022), CA1 ordered a new trial where the AUSA advanced three improper jury arguments, each without objection by defense counsel: **(a)** AUSA argued that defendants were greedy New Yorkers who came to Maine to "make easy money" off the backs of Mainers struggling with addiction (impermissible call to act as conscience of the community), *Id*. at 786; **(b)** AUSA stated that several government witnesses were customers of the defendants, that these customer/witnesses had gone to jail, and that it was now defendants' "turn" to go to jail; (guilt by association, guilt not based on the evidence), *Id*. at 787; **(c)** AUSA argued that "we" spent three years "carefully" talking to the witnesses, "showed compassion" to them, and "made sure that there was corroborative evidence for their stories" (impermissible vouching), *Id*. at 788.

2. In *U.S. v. Devonte Jemell Starks*, 34 F.4th 1142, 1159, 1173-74 (10th Cir. 2022), CA10 ordered a new trial where, without objection by defense counsel (and in combination with a preserved evidentiary error): **(a)** AUSA asserted that once all the evidence was in, defendant's "right to be presumed innocent" no longer existed (incorrect, presumption continues during jury deliberations), *Id*. at 1159; and **(b)** AUSA argued that government witness was bound by her plea agreement to tell the truth, and "she told you the absolute truth" (vouching), *Id*. at 1173.

3. In *U.S. v. Alfred Velazquez*, 1 F.4th 1132 (9th Cir. 2021), CA9 granted a new trial where, over D objection, government presented a closing argument that minimized their burden of proof. Specifically, AUSA compared the "proof beyond a reasonable doubt" standard to the confidence one needs to "have a meal" without worrying about the possibility of getting sick, or "travelling to court" without worrying about the possibility that one will end up in an accident, *Id*. at 1134. CA9 found that "the comparison to reflexive, quotidian decisions like … 'having a meal,' and 'traveling to court' … seriously distorts the [beyond a reasonable doubt] standard." *Id*. at 1138.

B. Treatises

1. Prosecutorial Misconduct, 2d ed., by Bennett L. Gershman, Oct. 2021 update, published by Clark Boardman (available on Westlaw), Ch. 11, "Summation Misconduct"

2. Prosecutorial Misconduct: Law, Procedure, Forms, 4th ed., by Joseph F. Lawless, published by Michie

III. Preventing prosecutors from getting a "second bite" at the sentencing apple

A. Case law

1. In *U.S. v. Jose Espinoza-Roque*, 26 F.4th 32, 39 (1st. Cir. 2022), evidence submitted by the government was insufficient to support the "unlawful drug user" enhancement; CA1 remanded with instructions to re-sentence without the enhancement: "no party – including the government – is entitled to an unlimited number of opportunities to seek the sentence it desires."

2. Where government failed to present evidence sufficient to support a guideline enhancement for "substantial expenditure of funds to respond to offense," CA6 precluded government, on remand, from presenting additional evidence to meet its burden of proof. *U.S. v. Michael Lee Bourquin*, 966 F.3d 428, 435 (6th Cir. 2020) ("the government failed to meet its burden of sufficiently showing that there was a substantial expenditure of funds to respond to [D's] offense, despite the notice that [D] contested the § 2A6.1(b)(4) enhancement and despite two opportunities to argue the issue. We see no persuasive reason why fairness would require that the government be afforded another opportunity to prove that a substantial expenditure of funds occurred in response to [D's] offense.").

3. Where D objected to PSR drug quantity recommendation, and AUSA failed to meet burden of proving a quantity higher than that admitted by the defense, CA7 bars government, on remand, from introducing new evidence in support of its burden of proof. *U.S. v. Edward Gibbs*, 26 F.4th 760, 767 (7th Cir. 2022) ("When the government fails to meet its burden to support uncharged drug quantities, the government is not permitted on remand to try again and submit new evidence in a belated effort to carry its burden. The government is entitled to only one chance to present this evidence.").

4. In *U.S. v. Kelvin Velez-Vargas*, 32 F.4th 12 (1st Cir. 2022), CA1 precluded government, on remand, from getting a second chance to prove the existence of a prior conviction supporting the "crime of violence" enhancement at U.S.S.G. § 2K2.1:

a. record reflected that all of D's prior convictions were noted in the PSR, and that government relied on only one of those convictions in arguing for the "crime of violence" enhancement; CA1 held that the cited conviction did not meet the "crime of violence" definition.

b. government argued, in the court of appeals, that there was another conviction, cited in the PSR, which met the "crime of violence" definition; although the

government had not initially cited this conviction in support of the enhancement, they asked for an opportunity to cite it on remand.

c. CA1 barred the government from getting a second bite at the apple on remand. *Id*. at 14 ("the case law does not readily welcome the government's belated attempts to identify new qualifying predicates to sustain a sentencing enhancement.").

B. Treatises

1. Federal Sentencing Law and Practice, West Publishing, Jan. 2022 update (available on Westlaw), § 6A1.3, Author's Comment 8 at note 169: "When a judgment is vacated because the appellate court finds that there was not sufficient evidence to support the quantity of drugs on which the sentence was based, the government is not normally permitted to provide additional evidence at the resentencing."

IV. Using downward variances to overcome the "trial penalty"

1. In *U.S. v. Reginald Abraham*, 498 F.Supp.3d 175 (D. Mass. 2020) (Young, J.), DC granted a downward variance to account for the "trial penalty," to-wit, the fact that a similarly situated D who pled guilty would have received a 3-point reduction for "acceptance of responsibility," and would therefore have faced a lower guideline range.

2. The judge explained that, in practice, U.S.S.G. § 3E1.1 "effectively acts as a 'trial penalty.' This Court has long noted that those who exercise their constitutional right to a trial before a jury of their peers suffer a more severe penalty than those who cop a plea, ostensibly because we wish to provide leniency to those others who 'accept responsibility,' but really because they have inconvenienced the government by forcing it to undergo the expense and uncertainty of a trial." *Id*. at 184, cites omitted.

3. The judge went on to note that had D pled guilty, "his guideline range would have been 210-262 months – surely a hefty sentencing range 'sufficient, but not greater than necessary' to accomplish the goals of federal sentencing. Solely because he went to trial, however – a jury trial guaranteed by Article III of the United States Constitution – the recommended sentencing range is 292-365 months. This simply cannot be. These strikingly disparate sentencing ranges (which do not even come close to overlapping) simply do not square with the statutory mandate – 'sufficient but not greater than necessary' … - where the Commission counsels that the huge bulk of similarly situated defendants ought be sentenced within the lower range." *Id*. at 185, emphasis removed.

V. Defense wins under *Brady* and *Giglio*

A. Case law

1. CA9 affirms district court order, issued during jury trial, dismissing all charges with prejudice as a sanction for government's late disclosure of *Brady* materials. *U.S. v. Cliven D. Bundy*, 968 F.3d 1019, 1030-1044 (9th Cir. 2020).

2. District court grants motion for new trial due to prosecutor's failure to disclose *Brady-Giglio* evidence that could have been used during cross-examination of government informant. *U.S. v. Maurice Duncan Burks*, 542 F.Supp.3d 737 (M.D. Tenn. 2021) (Crenshaw, J.).

3. As a sanction for *Brady-Giglio* violations that came to light during trial, district court: **(a)** bars testimony by a government witness; **(b)** orders government to pay $4,844 to the Federal Public Defender's Office for time spent investigating and litigating the *Brady-Giglio* issue; and **(c)** orders government to pay $216 to the Clerk of Court to compensate for time the jurors "sat idle, waiting for the Court to investigate and resolve this matter." *U.S. v. James Dean Cloud*, 2022 WL 801290, No. 19-CR-2032, E.D. Washington, Mendoza, J., Mar. 9, 2022. Op. at *6, note 6.

4. District court holds that *Brady* applies in the suppression context. *U.S. v. Larry White*, 489 F.Supp.3d 274, 279-81 (S.D.N.Y. 2020) (Rakoff, S.J.) (collecting cases, noting split). DC granted D suppression motion, finding that certain electronic seizures were conducted in violation of the fourth amendment. Then, finding that DC had authority to act under *Brady,* the judge ordered the AUSA to notify defense counsel of any evidence that may constitute "fruits" of the illegal seizure. By so ruling, DC enabled defense counsel to move for the suppression of additional evidence that might be tainted under the "fruit of the poisonous tree" doctrine.

5. Several courts have recognized that the *Brad*y "materiality" standard applied in the district court is more "defense-favorable" than the *Brady* materiality standard applied in the court of appeals. *U.S. v. Cliven D. Bundy*, 968 F.3d 1019, 1033 (9th Cir. 2020) (collecting cases). See also *U.S. v. Jim Baugh*, 2022 WL 952265, Op. *3-4, No. 20-CR-10263, D. Mass., Saris, J., Mar. 30, 2022 (collecting cases).

B. Treatises

1. Prosecutorial Misconduct, 2d ed., by Gershman, Oct. 2021 update, published by Clark Boardman (available on Westlaw). *See* Ch. 5, "Nondisclosure of Evidence"

2. Federal Procedure, by LaFave and Israel, *et al.*, West Publishing, Nov. 2021 update (available on Westlaw) § 24.3(b), "Due process duty to disclose evidence favorable to the accused," text at notes 66, 67, and 112 (discussing split of authority on whether *Brady* applies in the suppression context)

VI. Insufficient evidence in "child sex offense" prosecutions

A. District of Columbia Circuit rejects *Dost* "lascivious exhibition" definition, finds evidence insufficient to prove violation of 18 U.S.C. § 2251(a), "producing videos reflecting sexual exploitation of a minor"

1. Noting a circuit split, the District of Columbia Circuit rejects use of the *Dost* "lascivious exhibition" definition, holds evidence insufficient to support convictions for sexual exploitation of minor. *U.S. v. Charles Hillie*, 39 F.4th 674, 690-92 (DC Cir. 2022).

2. Record reflected that a Peeping Tom set up a camera to capture videos of minor girls undressing in their bathroom and bedroom. DC Cir. holds that: **(a)** the "lascivious exhibition" definition requires proof of "overt sexual activity" by the minors; **(b)** in this case, the minor girls were not doing anything overtly sexual; and **(c)** the evidence was therefore insufficient to support the conviction. *Id*. at 690-92.

B. CA5 finds evidence insufficient to support conviction for "distributing a depiction of a minor engaged in sexually explicit conduct," in violation of 18 U.S.C. § 1466A(a)(1)

1. The defendant in *U.S. v. Arthur* operated a web site featuring stories about children engaged in sexual conduct, often violent. The stories were accompanied by drawings that depicted children in sexual situations, often violent. D was convicted of multiple counts of "distributing depictions of minors engaged in sexually explicit conduct," in violation of 18 U.S.C. § 1466A(a)(1).

2. On appeal, CA5 held that the evidence was insufficient to support one of the convictions. *U.S. v. Thomas Alan Arthur*, 2022 WL 6901179, No. 21-50607, CA5, Oct. 12, 2022: "the charged image in Count 1 is a simple black and white pencil or charcoal drawing with minimal detail depicting an adolescent girl alone, reclining and apparently masturbating. Importantly, unlike the children depicted in the images [charged in other counts], there is no indication that the subject of the image in Count 1 is being forced to perform a sexual act. The drawing is simple and utterly lacking in violent depictions. Our independent constitutional review of the image charged in Count 1 leads us to the conclusion that it is not obscene under [the first amendment standard announced by the Supreme Court in] *Miller*. We therefore reverse [D's] conviction on Count 1." Op. at *6.

VII. Constitutional challenges under the commerce clause

A. Challenge to constitutionality of statute criminalizing sexual misconduct abroad

1. CA6 has held that 18 U.S.C. § 2423(c), the statute criminalizing "illicit sexual conduct in a foreign country," does not represent a lawful exercise of congressional power under the foreign commerce clause, and cannot be upheld on that basis. *U.S. v. Micky Rife*, 33 F.4th 838, 842-45 (6th Cir. 2022).

2. The *Rife* panel went on to find that they were obligated, under *ipse dixit* from a one-hundred-year-old S.Ct. decision, to uphold § 2423(c) on an alternative ground – that it was constitutional under the "necessary and proper" clause, because it implemented a congressionally ratified treaty (regarding the sexual abuse of children). *Id.* at 845-48.

3. Notwithstanding their decision to uphold the statute, CA6 identified an argument for why 18 U.S.C. § 2423(c) is *not* a proper exercise of congressional authority under the necessary and proper clause. The argument was presented to the Supreme Court, and left open by the Supreme Court, in *Bond v. U.S.,* 572 U.S. 844, 854-55 (2014).

4. As explained by the CA6 majority, the question left open in *Bond* is "whether the President and two-thirds of the Senate, by the sole fact of their consent to a treaty, can empower Congress to enact legislation that it otherwise could not enact by the exercise of its enumerated powers in Article I. The implications of that question are seismic … [because] the Necessary and Proper Clause would become a portal, through which Congress would leave behind its limited powers and exercise, at last, an unlimited one. For example, a treaty addressing climate change – or an international convention for the prevention of infectious diseases – might empower Congress to regulate virtually any conduct it chose. Congress would be one treaty away from acquiring a general police power." *U.S. v. Rife, supra,* 33 F.4th at 846 (cites and internal quotes omitted).

B. Challenges to the *Scarborough* interstate commerce standard

1. In *Scarborough v. U.S.*, 431 U.S. 563, 575 (1977), the Supreme Court adopted a "minimal nexus" standard in prosecutions under the then-existing felon-in-possession statute: "we see no indication that Congress intended to require any more than the minimal nexus that the firearm have been, at some time, in interstate commerce."

2. Since 1995, the year that the Supreme Court decided *U.S. v. Lopez,* 514 U.S. 549 (1995), defense counsel have argued – without success – that the *Scarborough* "minimal nexus" standard has been superseded by the *Lopez* "substantial effects" standard.

3. Noting the tension between *Scarborough* and *Lopez*, a district court judge in the Middle District of Florida has identified several arguments which might be advanced by defense counsel in seeking a more defense-favorable "interstate commerce" standard in prosecutions under the felon-in-possession statute at 18 U.S.C. § 922(g)(1). *U.S. v. Samuel Storey,* 571 F.Supp.3d 1296 (M.D. Florida, 2021) (Mizelle, J.). The arguments identified by Judge Mizelle could well be applied to other criminal statutes that contain an "interstate commerce" element.

4. Defense counsel might consider arguing, at the close of the government's case-in-chief, that the felon-in-possession statute at 18 U.S.C. § 922(g)(1) is unconstitutional *as applied* to that particular defendant, because: **(a)** there was no evidence that defendant possessed his firearm outside the state where the charges were filed, and **(b)** section 922(g)(1) cannot be constitutionally applied to purely intra-state conduct.

5. Alternatively, defense counsel might consider raising the issue in a post-trial motion for judgment of acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. Specifically, counsel might argue that: **(a)** the interstate commerce element of 922(g)(1) must be construed in light of controlling Supreme Court precedent; **(b)** the standard from *Lopez*, and its progeny, now controls when determining the government's burden of proof on the 922(g)(1) "interstate commerce" element; **(c)** under *Lopez* and its progeny, the government has the burden of proving that defendant's possession of the firearm had (an effect/a substantial effect) on interstate commerce; and **(d)** the government didn't meet that burden of proof, because they didn't show: **(i)** that the gun was used to commit an interstate crime, or **(ii)** that D carried the gun across state lines, or **(iii)** that D's gun had a value that affected an interstate market for used firearms. The benefit of raising your claim post-trial, under Rule 29(c), is that it will no longer be possible for the prosecutor to secure permission from the district court to re-open their case-in-chief, so as to put in the "interstate commerce" evidence that is identified in your motion, and that they failed to produce at trial.

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