SEVENTH CIRCUIT UPDATE

Johanna M. Christiansen
Assistant Federal Public Defender
Central District of Illinois

PRETRIAL ISSUES

Bruen
Guilty Pleas
SORNA

BRUEN AND § 922 OFFENSES

***United States v. Hill*, 2023 U.S. App. LEXIS 8239 (7th Cir. Apr. 6, 2023)(unpub.)**

- In this decision granting an *Anders* brief, the Court considered whether there was a viable argument that **§ 922(g)(1) violates the Second Amendment after *Bruen***.
- Any issue raised in this case would be reviewed under plain error and, because the law is unsettled, any error would not be plain.
- However, the Court noted no appellate court has held that § 922(g)(1) violates the Second Amendment.
- It acknowledged that the **historical evidence is mixed** about whether the Second Amendment's protections apply to felons and noted it has not decided the question.

GUILTY PLEA – CONSPIRACY OR BUYER/SELLER

***United States v. Goliday*, 41 F.4th 778 (7th Cir. 2022).**

- Goliday pled guilty to conspiracy to distribute heroin.
- At the change of plea, Goliday was confused about **how a conspiracy offense differed** from just buying and selling drugs.
- The facts acknowledged during the plea offered no clarity on the point either and the district court did not follow up to resolve the confusion.
- The Court of Appeals reversed and remanded, holding some step should have been taken to ensure not only that Goliday understood the nature of the conspiracy offense, but also that there was a factual basis for the guilty plea.

SORNA – CLASSIFICATION OF PRIOR CONVICTION

***United States v. Thayer,* 40 F.4th 797 (7th Cir. 2022).**

- Thayer pled guilty to fourth-degree criminal sexual conduct under Minnesota law
- When Thayer later moved to Wisconsin he failed to register and was charged with failing to comply with SORNA.
- The district court dismissed the indictment, finding SORNA was categorically misaligned with Thayer's Minnesota statute of conviction.
- The government appealed and presented an issue of first impression - whether the definition of "sex offense" is analyzed under a categorical approach or the circumstance-specific approach.
- The Court of Appeals reversed and remanded, aligning itself with every other circuit to consider the issue and found that the **circumstance-specific approach applies**.

TRIAL ISSUES

Admission of Evidence
Defenses
Experts
Confrontation

DUAL ROLE EXPERT TESTIMONY

***United States v. Jones*, 56 F.4th 455 (7th Cir. 2022).**

- The Court found that the district court's instruction to the jury on a "dual-role" witness improperly endorsed the case agent's testimony.

- The parties asked the court to give the cautionary instruction suggested by the Court in *United States v. Jett*, 908 F.3d 525 (7th Cir. 2018). The district court agreed.

- However, when the district court actually instructed the jury, it stated:

- "[Expert witnesses] *can be tendered as witnesses if their testimony* ***will be helpful to the jury*** *to determine a fact at issue, which we found yesterday with* [*the police captain*], *which I think is the case today with* [*the case agent*] *with respect to code words. We talked about code words*. We've heard again this morning on the amount of data that the agent has considered and his career as well as in this case in particular and the same with [the police captain]. *The testimony* ***will be the product of reliable principles*** *and methods, which is basically their experience in this case, and that they have reliably applied those principles and methods to the facts in this particular case.* ***So we think that this -- the Court thinks that this testimony will be helpful to you."***

- While the error was plain, it did not affect the defendants' substantial rights.

ENTRAPMENT – NOT ENOUGH EVIDENCE

***United States v. Mercado Berrios,* 53 F.4th 1071 (7th Cir. 2022).**

- Mercado used an Internet application to meet "Alexis" who said she was 15.
- The district court did not allow the entrapment instruction. Court of Appeals affirmed.

- Predisposition:
  - Mercado introduced explicit sexual content into the text conversation and repeatedly mentioned sex throughout
  - Mercado first raised topic of physical appearance
  - Mercado asked for photos, send sexual GIFs and emjois

- Not Inducement:
  - Misrepresenting age of "minor" at beginning
  - "Minor" restarting conversation
  - Using internet app made for adults
  - "Minor's" enthusiasm for illicit sex

ENTRAPMENT – ENOUGH EVIDENCE

***United States v. Anderson,* 55 F.4th 545 (7th Cir. 2022).**

- Anderson exchanged hundreds of messages with an FBI agent—who posed first as an 18-year-old woman and then as a 15-year-old girl—and drove to a planned rendezvous at a gas station.
- Anderson appealed and argued he offered sufficient evidence of entrapment to have the jury instructed on that defense.
- In *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014) (en banc), the Court held the defendant must show "some evidence to get instruction.
- Lack of Predisposition
  - No record of sexual misconduct or offenses against children
  - Agent suggested "criminal liaison"
  - Expressed reluctance
- Government Inducement
  - persistent attempts at persuasion

CONFRONTATION

***United States v. Graham*, 47 F.4th 561 (7th Cir. 2022).**

- Graham was charged with conspiracy to commit sex trafficking and six related crimes
- About a year before he was indicted, police were called to a local motel to break up a fight between Graham and his coconspirator Patience Moore. During that encounter, the officers' body cameras captured Moore in an agitated state shouting that Graham was prostituting young women.
- The government played the body-camera recordings at Graham's federal trial during an officer's testimony but did not call Moore to testify.
- Graham's attorney moved for a mistrial, arguing Graham was denied his Sixth Amendment right to confront Moore.
- The Court of Appeals held that there was no Confrontation Clause violation because Moore **uttered her statements spontaneously** as the officers were responding to a fight in progress.

FOURTH AMENDMENT ISSUES

CIGARETTE IS NOT PROBABLE CAUSE

***United States v. Coates,* 2023 U.S. App. LEXIS 6108 (7th Cir. Mar. 15, 2023)(unpub).**

- Coates pled guilty to possessing with intent to distribute 50 grams or more of methamphetamine and challenged the district court's denial of his motion to suppress on appeal.
- The Court of Appeals was persuaded by Coates's argument that the officer's observation of a brown, hand-rolled **cigarette alone was insufficient** to supply probable cause to justify his arrest.
- However, probable cause was provided because of Coates's recent participation in controlled purchases of methamphetamine.

ALTERATION TO WARRANT

***United States v. Taylor*, 63 F.4th 637 (7th Cir. 2023).**

- Taylor challenged the validity of the search warrant after the text of the warrant appeared to have been **altered by police officers to expand its scope**, without any indication that the issuing judge approved the changes.
- The Court of Appeals agreed that the affidavit did not support probable cause to search for evidence of child pornography, but it found that the affidavit did support probable cause to search for evidence of crimes of bestiality.
- The unusual problem in this case was that the crime for which the affidavit established probable cause - bestiality - is not the crime for which the typed text of the warrant authorized a search.
- The Court found that it did not know whether the issuing judge approved law enforcement's handwritten alterations to the warrant and held that an evidentiary hearing was needed.

CURTILAGE

***United States v. Banks*, 60 F.4th 386 (7th Cir. 2023).**

- In April of 2021 a police officer saw a Snapchat post of Banks barbequing on his front porch with a gun sitting on the grill's side shelf.
- Officers knew Banks was a convicted felon but instead of getting a warrant, they went to Banks's home, walked onto his porch, and, after a tussle, arrested him in his family room.
- The Court of Appeals held that the Fourth Amendment did not permit failure to get a warrant, as the Supreme Court has held in no uncertain terms that **a front porch, which is part of a home's curtilage,** receives the same protection as the home itself.
- The Court also held that no exception to the warrant requirement saved the officers' actions here and reversed the district court's denial of Banks's motion to suppress.

ODOR OF MARIJUANA

***United States v. Colbert*, 54 F.4th 521 (7th Cir. 2022).**

- During a traffic stop, a detective and a police officer worked in tandem to search Colbert's vehicle and frisk him, uncovering on his person a brick-shaped package later confirmed to contain a controlled substance. Colbert argued the officers did not have reasonable suspicion to frisk him.
- The Court of Appeals affirmed, holding the officers' detection of an odor of marijuana supported the reasonable suspicion to frisk Colbert because, "Like alcohol, marijuana is an intoxicating substance, and the **odor of marijuana in a vehicle or on a suspect raises concern** for officers that a defendant may act in an unpredictable and dangerous manner."
- The Court added that other factors contributing to reasonable suspicion were Colbert's failure to promptly stop his vehicle, failure to promptly leave his vehicle when asked, nervous behavior such as a rising and falling chest and asking questions, and a bulge in his pants pocket.

CONSENT OF HOUSEMATE

***United States v. Davis*, 44 F.4th 685 (7th Cir. 2022).**

- Police arrested Davis, a convicted felon, on a state warrant for three counts of aggravated battery by discharge of a firearm, just outside of his residence and then entered his house without a warrant.
- The officers recovered a .22 caliber rifle.
- Davis moved to suppress the rifle on the basis that no valid exception to the warrant requirement justified the initial entry and then the later search.
- The district court denied Davis's motion based on the undisputed facts in the record, finding that the sweep and search were justified by three separate exceptions to the warrant requirement: a protective sweep following Davis's arrest, exigent circumstances because a child was in the home at the time of the arrest, and the voluntary consent to search by Davis's housemate.
- The Court of Appeals affirmed based on the **voluntary consent of the housemate.**

CONSENT OF LANDLORD

***United States v. Thomas*, ___ F.4th ___, 2023 U.S. App. LEXIS 9306 (7th Cir. Apr. 19, 2023)**

- Thomas was suspected to be supplying large quantities of illegal drugs in Indiana. Using a fictitious identity, Thomas leased a condominium in Atlanta, Georgia.
- Thomas's landlord told the officers that she had rented the unit to e"Alredius Frieson." With the landlord's consent, officers searched the condo, finding drugs, drug paraphernalia, and six cell phones.
- Thomas moved to suppress the evidence obtained from the search of the condo, contending that his landlord could not consent to a search of the property he had leased.
- The government conceded that the lease gave Thomas a subjective expectation of privacy in the condo but argued that this is not an expectation that society is prepared to accept as reasonable, because Thomas had obtained the lease by deceiving the landlord about his identity, which is a crime in Georgia.
- The Court of Appeals disagreed and held that **deceiving a landlord** to obtain a lease does not alter society's understanding that a **landlord may not consent** to a search on the tenant's behalf.

PRIVACY IN HOTEL HALLWAY

***United States v. Lewis*, 38 F.4th 527 (7th Cir. 2022).**

- Lewis was a distributor in a drug trafficking operation and his cell phone was given to the FBI by an informant. After tracking his cell phone to a hotel, officers eventually saw a woman resembling Lewis's wife enter a room at a hotel, drop off a duffel bag, and drive away in a car registered in Lewis's name.
- After a drug-sniffing dog alerted at the room, officers applied for a search warrant, and the team executed the warrant the same day. Inside the room, officers found Lewis, $2 million in cash, and 19.8 kilograms of cocaine.
- Lewis argued that the dog sniff violated his reasonable expectation of privacy.
- The Court of Appeals affirmed, holding Lewis lacked a **reasonable expectation of privacy** in the **exterior hallway** of his hotel, where the dog sniff occurred.

PRIOR CONVICTION ISSUES

ACCA

ACCA – SEPARATE OCCASIONS

***United States v. Richardson,* 60 F.4th 397 (7th Cir. 2023).**

- Richardson was convicted of being a felon in possession of a firearm and the district court sentenced him as an armed career criminal to the mandatory-minimum 15 years in prison.
- Richardson argued that he should not be classified as an Armed Career Criminal because his prior convictions did not occur on separate occasions.
- The Court of Appeals affirmed the district court's conclusion that each of his prior convictions was committed on a different occasion.
- Purporting to rely on *Wooden v. United States,* the Court agreed with the district court's findings that the three robberies were on separate occasions. The Court noted the record was bare regarding *Shephard* documents but **did not consider the serious Sixth Amendment issues** stemming from the decision making in this case.

ACCA – SERIOUS DRUG OFFENSE

***United States v. Turner*, 47 F.4th 509 (7th Cir. 2022).**

- Turner was sentenced under the ACCA based in part on two prior convictions under a Wisconsin drug trafficking statute.
- He argued that the Wisconsin statute sweeps more broadly than the definition of a "serious drug offense" under the ACCA because the state law makes it a crime to deal in substances that the federal law does not reach.
- The Court of Appeals affirmed, holding that the evidence before the district court shows, however, that the supposed overbreadth concerns only substances that, as a matter of chemistry, **do not exist and cannot possibly exist.**
- The Court held that under the ACCA, a categorical mismatch cannot be based on truly impossible conduct. Wisconsin's drug statute does not expand the scope of conduct actually treated as criminal beyond the definition in the ACCA, despite superficial textual differences.

SENTENCING ISSUES

CRIME OF VIOLENCE - § 924(C)

***United States v. Worthen*, 60 F.4th 1066 (7th Cir. 2023).**

- Worthen was charged with **aiding and abetting Hobbs Act robbery** and discharge of a firearm resulting in death under § 924(j) for his role in the robbery and murder of a gun store owner.
- He argued on appeal that Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A) based on accessory liability.
- The Court of Appeals affirmed, finding an aider and abettor of a Hobbs Act robbery necessarily commits all of the elements of the principal Hobbs Act robbery.
- Therefore, because the principal offense is a crime of violence, aiding and abetting the offense is a crime of violence.
- The Court noted that every other circuit to consider the issue was in agreement.

ACQUITTED CONDUCT

United States v. Robinson, 62 F.4th 318 (7th Cir. 2023).

- Robinson raised a challenge that the Constitution prohibits using acquitted conduct for sentencing purposes.
- The Court of Appeals affirmed, holding that the Supreme Court's decision in ***Watts* controls** and the Court has repeatedly rejected any arguments to overrule it.

United States v. Gan, 54 F.4th 467 (7th Cir. 2022).

- A jury convicted Gan on three counts of money laundering and one count of operating an unlicensed money transmitting business, but acquitted him on one count of participating in a money laundering conspiracy.
- Binding Supreme Court precedent allows consideration of acquitted conduct at sentencing when, as in this case, the judge finds the conduct proved by a preponderance of the evidence.

DOUBLE COUNTING

***United States v. Tinsley*, 62 F.4th 376 (7th Cir. 2023).**

- A jury convicted Tinsley of armed bank robbery, drug possession with intent to distribute, and multiple gun-related crimes.
- The Court rejected Tinsley's double counting argument
- Reaffirmed its hold that **double counting is generally permissible** unless the text of the guidelines expressly prohibit it. In so holding, the Court overruled a portion of *United States v. Bustamonte,* 493 F.3d 879, 889-90 (7th Cir. 2007) that held that double counting is "generally impermissible."
- Now, double counting is "generally permissible" unless the guidelines expressly prohibit it.

METH PURITY

***United States v. Moore*, 52 F.4th 697 (7th Cir. 2022)**

- Moore was convicted of multiple drug offenses.
- At sentencing, the district court found that the 55.6 grams of methamphetamine found in Moore's home were 100% pure.
- Moore appealed, arguing that the chemist's affidavit that he submitted was "**some evidence**" sufficient to call the purity finding into question and that the government failed to support the finding on purity.
- Moore argued that the district court erred by placing a burden on him to perform independent testing and by assuming, without supporting evidence, that the Drug Enforcement Administration's methods for testing purity are reliable and were applied correctly in Moore's case.
- The Court of Appeals agreed with Moore and held that the "some evidence" standard is not a demanding one and, although the chemist's affidavit did not resolve conclusively the accuracy of the DEA test results, it raised a "fair question" about them. The Court reversed and remanded for resentencing.

GUN BUMP

***United States v. Jones*, 56 F.4th 455 (7th Cir. 2022).**

- Jones was involved in a methamphetamine transaction with his uncle, a new drug customer, and the new customer's wife. The wife wore a concealed firearm on her hip during the transaction.
- The district court found that Jones should receive the gun bump based on the wife's possession that was reasonably foreseeable to Jones and/or because his uncle had a reputation for possession of guns.
- The Court of Appeals disagreed on both theories.
- First, the wife's **possession of a firearm was not foreseeable** to Jones who had never met either the customer or his wife, the potential distrust amongst the parties cut both ways, and she possessed the gun during the meeting where neither party possessed drugs.
- Second, the uncle's **possession of firearms at different times** during the conspiracy was not enough to show that he either possessed a firearm during the transaction Jones was involved in or that it was reasonable foreseeable Jones that he might possess a firearm.

STOLEN OR OBLITERATED SERIAL NUMBER

***United States v. Prado*, 41 F.4th 951 (7th Cir. 2022).**

- Prado was charged with unlawful possession of a firearm as a felon.
- During the search of his home, officers recovered nine firearms, including five that were stolen, one with an obliterated serial number, and one with no serial number.
- The Court of Appeals held that § 2K2.1(b)(4) provides for a **two level** increase if any firearm was stolen ***or* a four level** increase if any firearm had an altered or obliterated serial number and that only one enhancement was envisioned.
- Therefore, the district court could not apply both the two level and four level increases.

LARGE CAPACITY MAGAZINE

***United States v. Smith,* 54 F.4th 1000 (7th Cir. 2022).**

- Smith was convicted of several narcotics and firearms offenses.
- On appeal, he argued the district court erred by applying the enhancement for carrying a firearm with a large capacity magazine because the firearm was manufactured to carry such a magazine.
- The Court of Appeals rejected this argument stating that the **manufacturer was not in violation** of the guideline but Smith's decision to carry such a firearm while selling drugs was in violation of the guideline.

ON BEHALF OF CHARITABLE ORGANIZATION

***United States v. Nitzkin,* 37 F.4th 1290 (7th Cir. 2022).**

- Nitzkin was executive director of a charity in Illinois and embezzled money from the charity. He pled guilty to wire fraud and was sentenced to 42 months' imprisonment.
- He argued that, the district court improperly enhanced his sentence under § 2B1.1(b)(9)(A) for "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency." He argued he did not "misrepresent" he was acting in such a manner because he was **a legitimate officer** of a legitimate charity. The commentary allows for the enhancement regardless of whether the defendant was actually associated with the organization.
- The circuits have uniformly accepted the application note as an authoritative construction of § 2B1.1(b)(9)(A).
- The Court reversed and remanded, however, because all of the parties failed to abide by Application Note 8(E)(i) which indicates that if the conduct that forms the basis for an enhancement under subsection (b)(9)(A) also forms the basis for an enhancement under § 3B1.3 (abuse of position of trust), **the abuse of trust enhancement does not apply**.

OBSTRUCTION DURING STATE INVESTIGATION

***United State v. Mikulski,* 35 F.4th 1074 (7th Cir. 2022) .**

- Mikulski was involved in a shootout in a public park. After police questioned him about the incident, he instructed his mother to hide his gun.
- He was charged with and pled guilty to unlawful possession of a firearm.
- He appealed and argued the district court misapplied a sentencing enhancement for obstruction of justice based on his efforts to hide the gun. He argued his conduct obstructed the state investigation, not the federal case.
- The Court of Appeals affirmed, joined every circuit to decide the issue and held the enhancement "applies when the **obstruction of the state investigation is based on the same facts** as the eventual federal conviction, regardless of whether the federal investigation ha[d] commenced."

"CREDIT" FOR TIME SERVED IN STATE CUSTODY

***United States v. Kimble,* 2023 U.S. App. LEXIS 4793 (7th Cir. Feb. 28, 2023) (unpub.)**

- Kimble was charged in state and federal court with being a felon in possession. At sentencing, he asked the district court to give him "credit" for the time he served in state custody prior to his federal indictment.
- The Court of Appeals noted that **the use of the word "credit," is misleading in this situation**.
- The Bureau of Prisons (not the sentencing judge) calculates and awards credit for the time the defendant spent in custody prior to the commencement of the sentence. 18 U.S.C. § 3585(b).
- Instead, it is proper to **request a lower sentence based on time spent in state custody** that will not be calculated as credit by the BOP. The district court has the discretion to account for that time.
- The problem here is that this distinction was not made clear to the judge—either in the sentencing memorandum or at the sentencing hearing.

SAFETY VALVE

***United States v. Pace,* 48 F.4th 741 (7th Cir. 2022).**

- Pace was charged with possession with intent to distribute 50 grams or more of a mixture containing a detectable amount of methamphetamine. He argued he was eligible for relief pursuant to the "safety valve" provision of 18 U.S.C. § 3553(f).
- The district court determined he did not qualify and sentenced him to 60 months. The question hinged on whether Pace could meet the five elements found in § 3553(f), including the conditions of his criminal history.
- Pace argued that a defendant is only disqualified from the application of the safety valve if he fails to satisfy each of § **3553(f)(1)'s subsections (A), (B), and (C).**
- The Court of Appeals affirmed the determination that Pace did not qualify for safety valve but did so with three separate opinions. Judge Ripple wrote the majority opinion and agreed with the government's analysis. Judge Kirsch wrote a concurring opinion largely agreeing with Judge Ripple's opinion. Judge Wood issued a dissenting opinion agreeing with the defendant's interpretation.

REASONABLENESS OF BELOW GUIDELINES SENTENCE

***United States v. Oregon*, 58 F.4th 298 (7th Cir. 2023).**

- Oregon pled guilty to one count of money laundering.
- The district court sentenced him to eighteen months in prison—six months below the range calculated under the Sentencing Guidelines.
- On appeal, Oregon argued his sentence was unreasonable because the district court failed to consider relevant mitigating factors and improperly relied on the need for general deterrence and to avoid sentence disparities.
- The Court of Appeals affirmed, holding "there is a **nearly irrebuttable presumption that a below-range sentence is reasonable**."

§ 3553(A) FACTORS ARE NOT OFFENSE LEVELS

***United States v. Settles,* No. 21-2780.**

- Settles pled guilty to being a felon in possession of a firearm. The district court imposed a sentence of 87 months in prison, which was significantly higher than the guidelines range of 33 to 41 months.

- Settles challenged the procedures the district court used in arriving at that sentence—in particular, the court's attribution of **additional "offense levels" corresponding to the § 3553(a) factors.**
- The Court of Appeals affirmed but held that the district court's method was "more arbitrary than the court may have realized" and did not recommend the approach.
- However, because the district court also explained its sentence with a more traditional application of section 3553(a), any error in methodology was harmless.

POST CONVICTION ISSUES

Appellate Practice
Compassionate Release
First Step Act
Supervised Release

APPEAL WAIVERS

***United States v. Harris*, et al., Nos. 21-1405, 21-1468, & 21-1991.**

- Harris contended that his written judgment contradicts the district judge's oral pronouncement of his sentence.
- The government argued that Harris's appeal should be dismissed because he waived his right to challenge his sentence as part of a plea agreement.
- The Court held that an argument that a written judgment conflicts with a sentencing judge's oral pronouncement is not a challenge to the sentence - rather, it is a request for imposition of the actual sentence the judge intended. Therefore, an appeal waiver will generally not bar this type of claim.

APPELLATE PRACTICE

***United States v. Smartt & Butler,* Nos. 21-1637 & 21-2297 (unpub.)** The Court issued this separate unpublished order to address defense counsel's repeated assertion of arguments that are "waived, inexcusably undeveloped, and frivolous on the merits." The Court reminded defense attorneys that if there are **no nonfrivolous arguments for review on appeal, the attorney must file an *Anders* brief** and move to withdraw from the case. Due to the repeated violations of this particular attorney, the Court found a "pattern of deficient work" and considered sanctions. However, it decided on a warning and reminder to heed his professional obligations.

***United States v. Richardson,* No. 22-1690 (unpub.)** The Court of Appeals issued this order to address defense counsel's "dogged refusal to comply with the rules and orders" of the Court. The Court reviewed defense counsel's representation on his last 10 appeals before the Seventh Circuit and found his performance lacking in that **he routinely ignored court rules, court orders, and filing deadlines**. In light of the continuing violations, the Court sanctioned the attorney $1,000, suspended him from the bar of the Court for one year, banned him from appointment under Criminal Justice Act until he demonstrates ability comply with court orders, and transmitted a copy of the order to the state Supreme Court Disciplinary Commission.

COMPASSIONATE RELEASE

Reaffirmed *Thacker* and *Concepcion* did not change analysis:

- *United States v. Williams,* No. 22-1981
- *United States v. Brock,* No. 22-1148
- *United States v. Peoples,* No. 21-2630

Recognized Sentencing Commission has issued updates:

- ***United States v. Williams,* No. 22-1212.**
- Court indicated it was aware different circuits have taken different approaches and the Sentencing Commission has proposed relevant amendments. However, it described the **potential changes as "at an early stage"** and it would not speculate on the changes.

FIRST STEP ACT – SENTENCING PACKAGE

***United States v. Curtis*, No. 21-2615.**

- Curtis is serving several consecutive sentences for his connection to a drug conspiracy involving crack cocaine. He moved for resentencing under the First Step Act, which permits retroactive sentencing relief for certain drug offenders. The district court found that Curtis was eligible for resentencing on some of his drug offenses and reduced the associated terms of imprisonment.
- But the court refused to consider resentencing with respect to several firearms offenses, because it concluded that those offenses were not covered by the Act, were not grouped with Curtis's eligible drug offenses at the original sentencing hearing, and therefore were not eligible for resentencing.
- Curtis appealed, arguing that the district court's review should encompass a defendant's entire sentencing package, including offenses that are neither covered by the First Step Act nor grouped with covered offenses.
- The Court of Appeals agreed that **the district court does have discretion under the First Step Act to reduce an aggregate sentence**, even if part of that sentence rests on offenses that are neither covered by the Act nor grouped with a covered offense. However, the Court affirmed and found that Curtis's consecutive sentences for the firearms convictions were not part of a package.

RESENTENCING

***United States v. Carnell,* No. 21-2135.**

- In a prior appeal, the Court of Appeals reversed and remanded for resentencing.
- On remand, the district court recalculated both Carnell's offense level and his criminal-history category. It **increased the criminal history category from category III to V** to account for Carnell's convictions on two Illinois offenses while he was on appeal the first time.
- The Court of Appeals affirmed, holding that determining an individualized sentence on remand, **a court "may consider intervening events** that alter the assessment of factors made at the earlier sentencing."

MITIGATION ARGUMENTS AT REVOCATION

***United States v. Yankey*, No. 22-1697.**

- Yankey's supervised release was revoked, and he was sentenced to 24 months in prison followed by 24 more months of supervision.
- Yankey appealed his sentence, arguing that the district court disregarded his mitigation arguments and failed to consider relevant sentencing factors, and that his sentence is substantively unreasonable.
- The Court of Appeals affirmed, holding the district court's questions and comments indicated he considered the mitigation arguments. The Court encouraged district court to ask during revocation hearings **whether it has considered all of the defendant's arguments** in mitigation, as it has encouraged for sentencing hearings.

DON'T FORGET *TAPIA*

***United States v. Shaw*, No. 21-1692.**

- Shaw violated multiple conditions of his supervised release. The district court revoked his supervised release and sentenced him to two years' imprisonment which was a sentence significantly above the range recommended by the guidelines.
- The district court did not mention the factors from § 3583(e) but instead explained that it **was sending Shaw to prison to "help" him** and **give him a chance to access rehabilitative programs.**
- The Court of Appeals reversed and remanded holding "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).
- Courts are precluded from imposing or lengthening a prison term to promote an offender's rehabilitation. *Tapia v. United States*, 564 U.S. 319, 325–26 (2011).

QUESTIONS?

Johanna M. Christiansen, AFPD

(309) 671-7891

johanna_christiansen@fd.org

ilc.fd.org

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