

GUIDELINES AND CRIMINAL LAW UPDATE

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Part I

GUIDELINES UPDATE



INTERMISSION



Part II

CRIMINAL UPDATE

SENTENCING ISSUES

U.S. v. Young, 872 F.3d 742

Tier Classification in Failure to Register Cases

Mr. Young failed to register as a sex offender. At sentencing, he objected to his tier classification under U.S.S.G. § 2A3.5, arguing the Mississippi statute was too broad to fall under the definitions in 34 U.S.C. § 20911(4) as a Tier III offender.

At sentencing, prosecutors argued a “circumstance specific approach,” looking at the facts of the underlying conviction, should be used. Young argued that a categorical approach should apply.

U.S. v. Young, 872 F.3d 742

A “categorical approach” limits a court’s review to only the *elements* of the offense of conviction. The facts of the case are not to be considered.

Examples: Statutes - ACCA, “aggravated felony” in illegal entry. Guidelines – career offender, firearms, illegal entry.

When a statute is divisible, meaning it sets forth alternative elements, a “modified categorical approach” is used. Ex. – a burglary statute involving entry into a home or vehicle.

U.S. v. Young, 872 F.3d 742

When a “modified categorical” approach is used, the court can look at a limited number of documents to determine which statute led to a defendant’s conviction. These documents include statutory definitions, charging documents, written plea agreements, transcripts of a plea colloquy, and specific factual findings by a court to which the defendant assents.

U.S. v. Young, 872 F.3d 742

The Fifth Circuit holds that the “categorical approach” applies in comparing prior convictions to determine tier levels, except when it comes to the special circumstance of the age of a victim.

Even so, the Court found that the Mississippi statute is comparable with the federal statute and affirms the conviction. Young had argued to the contrary since the state statute could be violated in ways beyond those listed federally (lustful touching of a shoulder or ear). The Court determined there was no “realistic probability” his examples would be prosecuted.

ERRONEOUS GUIDELINES CALCULATIONS AND SENTENCING

U.S. v. Perlaza-Ortiz, 869 F.3d 375

District Court – “I also want to be very clear in this case that this sentence, if there is any some – for whatever reason, any miscalculation or inappropriate determination of the Guideline range, based on the 3553(a) factors, this would definitely still be the appropriate sentence with the 3553(a) factors taken as a whole.”

U.S. v. Perlaza-Ortiz, 869 F.3d 375

The genesis of that quote:

“Applying the sentencing guidelines is daily becoming more complex, in part because of defense counsels’ accelerating creativity in challenging guidelines calculations. To avoid the costs and administrative burdens of resentencing, we have repeatedly urged courts in appropriate cases to explain that they would have imposed the same sentence regardless of possible mistakes in guidelines calculations.” U.S. v. Shepherd, 848 F. 3d 425.

U.S. v. Perlaza-Ortiz, 869 F.3d 375

“It is not enough for the district court to say the same sentence would have been imposed but for the error. Instead, the government must show that the [sentence] the district court imposed was not influenced in any way by the erroneous Guideline calculation.” U.S. v. Hernandez, 831 F.3d 284 (5th Cir. 2016)

Perlaza was sentenced prior to the decision in Mathis v. U.S., 136 S.Ct. 2243, which gave guidance regarding the divisibility of statutes.

U.S. v. Perlaza-Ortiz, 869 F.3d 375

Mathis affected the methodology of the modified categorical approach, contrary to prior precedent in the Fifth Circuit.

Perlaza had a “crime of violence” enhancement leading to a 16-level increase; Perlaza argued that an 8-level increase was appropriate. The difference reduced his Guidelines range from 41-51 months to 18-24. The district court imposed a 41 month sentence. Applying Mathis to the prior conviction, the Fifth Circuit determined that the lower range applied and remanded for resentencing, holding that the harmless error doctrine did not apply.

U.S. v. Hott, 866 F.3d 618

Hott was convicted of being a felon in possession. His base offense level under § 2K2.1 was increased because of a prior conviction in Texas for poss. w/intent to distribute. However, the Fifth Circuit subsequently held that Texas statute did not qualify as a controlled substance offense under the Guidelines. *U.S. v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). The prosecution conceded this error on appeal.

Hott's Guidelines range was 135-168. He received 120 months. If correctly calculated, his range would have been 108-135. Like Perlaza in the last slide, did the Fifth Circuit hold that since an incorrect range was calculated and used, the harmless error doctrine did not apply and remand the case?

U.S. v. Hott, 866 F.3d 618

Nooooo.

Hott would have to show “a reasonable probability that, but for the error, the outcome of the proceeding would be different.” At sentencing, the district court found “after considering all the facts and circumstances” that “the offense conduct as well as the relevant conduct...coupled with the defendant’s prior criminal history, justify this particular sentence.”

U.S. v. Hott, 866 F.3d 618

In Hott's case, the Fifth Circuit held that "our review of the record shows that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range."

Plus, in the written statement of reasons, the court stated that "even if the guideline calculations are not correct, this is the sentence the court would otherwise impose under 18 U.S.C. § 3553."

U.S. v. Hott, 866 F.3d 618

How do we reconcile the *Hott* decision with the language from *Perlaza*, where the Fifth Circuit stated that the prosecution “must show that the sentence the district court imposed was not influenced in any way by the erroneous Guideline calculation”?

The *Hott* court stated “the offense conduct as well as the relevant conduct...coupled with the defendant’s prior criminal history, *justify this particular sentence.*” However, *Hott*’s range was 135-168 and he received 120, which was the stat. max.

U.S. v. Hott, 866 F.3d 618

The district court had no way to know that the Fifth Circuit would subsequently determine that the Texas statute would no longer be considered a “controlled substance offense,” substantially reducing Hott’s Guidelines range.

It would seemingly be impossible for the prosecution to “show that the sentence the district court imposed was not influenced in any way by the erroneous Guideline calculation.”

U.S. v. Hott, 866 F.3d 618

Do not be surprised to hear judges adding the phrase “justify this particular sentence” on the record, and adding the phrase “even if the guideline calculations are not correct, this is the sentence the court would otherwise impose under 18 U.S.C. § 3553” to the written statement of reasons.

Reconciling the two cases is difficult, but where did the discrepancy come from?

U.S. v. Hott, 866 F.3d 618

In Hott, the Fifth Circuit used a “plain error” standard, stating that Hott “did not object to the application of § 2K2.1” before the district court.

How could he have known that the court would overturn years of precedent, addressing whether an prior offense is a “controlled substance offense” under the Guidelines, months after sentencing?

Further, it is more accurate to say that Hott was objecting to the definition of a “controlled substance offense.” Regardless, the court deemed the standard on appeal to be plain error.

U.S. v. Hott, 866 F.3d 618

“Plain error” requires showing clear and obvious error, affecting substantial rights. These substantial rights are affected when there is a reasonable probability that, but for the error, the outcome would have been different. If shown, the court has the discretion to correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The court stated that Hott “fails to show a reasonable probability of a different outcome and does not satisfy plain error review.”

U.S. v. Hott, 866 F.3d 618

By contrast, the *Perlaza* court, applying the subsequently decided *Mathis* decision, stated that a *de novo* review was appropriate when determining whether a prior conviction qualified as a “crime of violence” under the Guidelines.

The irony is that that case cited for the proposition that a *de novo* review was appropriate was.....*U.S. v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). The very same case used by the *Hott* court in determining that the Texas poss. w/intent statute was not a “controlled substance offense.” However, the *Hott* court used a different standard of review in order to deny relief.

U.S. v. Hott, 866 F.3d 618

So, what case did the *Hott* court use to determine that the standard of review would be that of plain error?

U.S. v. Shepherd, 848 F. 3d 425.

U.S. v. Perlaza-Ortiz, 869 F.3d 375

The genesis of that quote:

“Applying the sentencing guidelines is daily becoming more complex, in part because of defense counsels’ accelerating creativity in challenging guidelines calculations. To avoid the costs and administrative burdens of resentencing, we have repeatedly urged courts in appropriate cases to explain that they would have imposed the same sentence regardless of possible mistakes in guidelines calculations.” U.S. v. Shepherd, 848 F. 3d 425.

U.S. v. Hott, 866 F.3d 618

In *Shepherd*, the defendant failed to object under § 2K2.1 regarding whether a Texas aggravated assault statute would constitute a “crime of violence.”

HOWEVER, a line of 5th Circuit cases already established that particular Texas Agg. Assault statute was a crime of violence. Nothing changed thereafter. So, even if *Shepherd* had objected, the sentence would still have been deemed correct. Thus, plain error was deemed the standard on appeal. This is not true of *Perlaza* or *Hott*, where definitions changed.

U.S. v. Hott, 866 F.3d 618

5th Circuit precedent in effect the day Hott was sentenced clearly indicated the statute at issue was a “controlled substance offense.” Thereafter, *Tanksley* was decided and abrogated those cases.

However, in *Hott*, the Fifth Circuit applied a plain error review as if *Tanksley* had not overruled prior cases indicating that the Texas poss. w/intent statute was a “controlled substance offense.”

Hott filed a Petition for Certiorari and was denied.

U.S. v. Reyes-Ochoa, 861 F.3d 582

5th Circuit applies *Mathis* to a Virginia burglary statute, finds it indivisible, and applies a categorical approach. Reyes did not object at sentencing and the court uses a plain error standard on appeal.

However, the court grants relief, noting that the error reduced the Guidelines range from 41-51 months down to 15-21. The court refers to the 20 month disparity from the upper end of his Guidelines range to the bottom of the one initially used to be “substantial disparity” and remands for resentencing.

U.S. v. Reyes-Ochoa, 861 F.3d 582

Dissent – “I see no miscarriage of justice in the defendant’s having to live with the consequences of the sentence he originally received, which was right when it was pronounced.”

Same judge who said - “To avoid the costs and administrative burdens of resentencing, we have repeatedly urged courts in appropriate cases to explain that they would have imposed the same sentence regardless of possible mistakes in guidelines calculations.”

U.S. v. Rico-Meja, 859 F. 3d 318

Illegal re-entry with 16-level increase for “terroristic threatening” as a “crime of violence.” District court calculated Guidelines range of 41-51 months. The “terroristic threatening” statute did not involve the “use, attempted use, or threatened use of physical force” as an element.

The district court had stated the sentence would “be the same sentence I would pronounce even if would have sustained the defendant’s objection to the Guideline enhancement.” 5th Circuit - “As the district court’s characterization of Rico-Meja’s prior offense is a question of law, we review it *de novo*.”

U.S. v. Rico-Meja, 859 F. 3d 318

Where a district court does not consider the correct guidelines range, a determination of harmlessness requires the *proponent of the sentence* to “convincingly demonstrate both (1) that the district court would have imposed the same sentence had it not made the error and (2) that it would have done so for the same reasons it gave at the prior sentencing.

“This court has noted that such a showing involves a heavy burden, requiring the proponent to point to evidence in the record that will convince [the appellate court] that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error.”

U.S. v. Rico-Meja, 859 F. 3d 318

There was no explicit or particularized statement from the district court showing it calculated or considered the correct Guidelines range, so a harmless error analysis must take place in the *Ibarra-Luno* scenario. (Last slide.)

The prosecution could only point to the district court stating it had “considered everything else about this case.” Mr. Rico received the low-end of the Guidelines and the Fifth Circuit noted that the district court did not calculate a Guidelines range absent the 16-level enhancement. So, the prosecution could not show that the erroneous Guideline calculation did not affect the sentence.

Rico-Mejia, June 1, 2017.

“Crime of violence” definition. Objection made. *De novo* review. Remanded.

Reyes-Ochoa, June 30, 2017.

“Crime of violence” definition. No objection. Plain error standard. Remanded.

Hott, August 7, 2017.

“Controlled substance offense” definition. No objection. Plain error standard. Affirmed.

Perlaza-Ortiz, August 23, 2017.

“Crime of violence” definition. No objection. *De novo* review. Remanded.

What Now?

How do you handle a situation when a judge tells you the same sentence would be imposed even if the Guidelines are not calculated correctly?

In *Gall v. U.S.*, 552 U.S. 38, 49-50 (2007), the S.Ct. stated as follows:

“As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. See 551 U.S., at 347-348. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however.”

What Now?

“If [the judge] decides that an outside-Guidelines sentence is warranted, he must consider the *extent of the deviation* and ensure that the justification is sufficiently compelling *to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.* After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.”

MISTRIAL

U.S. v. Bennett, 2017 WL 4583744

An RN was helping an MD suffering from dementia, and began writing herself prescriptions for controlled medications using his DEA number and a signature stamp.

The Dept. of Human Services was investigating. At trial, the prosecutor elicited the following testimony from a DHS worker: “We went by there to try to interview the Bennetts in their home, and Mr. Bennett was actually the one who said, ‘We have nothing to say,’ and slammed the door in our face. He informed us that he did have an attorney, and so we respected his right to counsel.”

U.S. v. Bennett, 2017 WL 4583744

In addition to the “he slammed the door in our face” evidence, the prosecutor also had a bankruptcy trustee testify that “Ms. Bennett showed up and said that she wanted to have her attorney present.”

The defense moved for a mistrial, arguing that prosecutors wanted to make it appear the defendant was “hiding behind her Constitutional rights to evade the truth.”

U.S. v. Bennett, 2017 WL 4583744

The first comment (“we have nothing to say”) was made by Mr. Bennett. The Fifth Circuit noted that “Fifth and Sixth Amendment rights, like Fourth Amendment rights, are personal in nature and cannot be asserted vicariously.” Further, the district court promptly and unequivocally instructed the jury to disregard both comments. Motion for mistrial denied.

U.S. v. Bennett, 2017 WL 4583744

Bennett also argued that the prosecutor constructively amended the Indictment by changing from the conjunctive (“and”) in the Indictment, to disjunctive (“or”) in jury instructions.

“Distributing and dispensing controlled substances” to “distributing or dispensing...” The jury picked up on this and sent out a note.

The Fifth Circuit, effectively slamming the door on this argument, said “it is well-established in this Circuit that a disjunctive statute may be plead conjunctively and proved disjunctively.”



U.S. v. Oti, 872 F.3d 678

Dr. Okechuku operated a pain management clinic in Dallas. The clinic was cash-only, and did not accept insurance, Medicare, or Medicaid, nor did it take appointments. Each morning when the clinic opened there would be 30-40 patients waiting to enter. It made \$5,000 to \$11,000 per day.

Patients were recruited from homeless shelters, driven to the clinic, and given an examination (lasting app. 4 minutes). Once a prescription was obtained, it would be filled, then the patients received \$50 for their services.

U.S. v. Oti, 872 F.3d 678

With so much cash at the clinic, Dr. Okechuku put in bars on windows and doors, hired armed security guards, and installed security cameras.

When the “pill mill” was busted, Dr. Okechuku was charged with conspiracy to distribute controlled substances and possessing and brandishing a firearm in furtherance of a drug-trafficking crime. He was convicted and sentenced to 300 months.

U.S. v. Oti, 872 F.3d 678

Section 924(c) requires the prosecution to show that the defendant used or carried a firearm during and in relation to a crime of violence or drug trafficking crime. The jury in this case found that Dr. Okechuku “brandished” a firearm (7 yrs. consecutive).

Okechuku argued there was insufficient evidence to support “in relation to” drug trafficking, since the fact that the guards were armed was happenstance. The Fifth Circuit responded that all inferences are resolved in favor of the jury verdict.

U.S. v. Oti, 872 F.3d 678

The district court allowed an ATF agent to testify as an expert. Dr. Okechuku argued the court erred, under Rule 704, by allowing him to testify as to a legal conclusion. Asked if he had an opinion as to whether the security guards were using, carrying, and *brandishing* a firearm in furtherance of drug trafficking activity, the agent responded “Absolutely.”

Brandish – “wave or flourish as a threat or in anger or excitement.” There was no evidence that the security guards ever took a gun out of a holster.

What is brandishing?



U.S. v. Oti, 872 F.3d 678

We have especially urged the government to use caution when case agents also function as experts **because the expert label “confers upon [the agent] the aura of special reliability and trustworthiness surrounding expert testimony.”** **An expert witness is permitted to give his opinion on an “ultimate issue” of fact, assuming he is qualified to do so.** However, an expert witness is not permitted to offer conclusions of law. **Fed. R. Evid. 704.**

“An expert may never render conclusions of law.” **This rule and the other Federal Rules of Evidence “afford ample assurances against the admission of opinions which would merely tell the jury what result to reach.”**

U.S. v. Oti, 872 F.3d 678

The Fifth Circuit found this to be “forbidden territory” and its admission constituted error. They stated that the prosecution “must resist the temptation to test the boundaries” with inadmissible legal conclusions.

But, the error was deemed harmless (7 years?) since there were other witnesses who stated that the guards “visibly wore their firearms every day at the clinic” and were “there to quell any disturbances with their firearms.”

ROLE OF APPELLATE REVIEW

U.S. v. Zamora-Salazar, 860 F.3d 826

To uphold a conviction, there is no requirement that the evidence exclude every possible “hypothesis of innocence.” A jury is free to choose among reasonable constructions of the evidence.

The reviewing court only ascertains whether the jury made a “rational decision,” not “whether the jury correctly determined guilt or innocence. Credibility choices that support the jury’s verdict must be accepted and it is not within the court’s province on appeal to reweigh the evidence.

AGGREGATE SENTENCES

Dean v. United States, 581 U.S. ____

Dean and his brother committed two robberies of drug dealers. During each robbery, Dean's brother threatened and assaulted the victim with a gun, while Dean searched for valuables. Dean was convicted of robbery counts, and two counts of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c).

§ 924(c) says that any sentence mandated (here, 5-year and 25-year terms) must run consecutively to "any other term of imprisonment imposed on the person," including any sentence for the predicate crime.

Dean v. United States, 581 U.S. ____

At sentencing, Dean urged the district court to consider his lengthy mandatory minimum sentences when calculating the sentences for his other counts and to impose concurrent one-day sentences for those counts. The judge said he would have agreed to Dean's request but understood §924(c) to preclude a sentence of 30 years plus one day. On appeal, Dean argued that the district court had erred in concluding that it could not vary from the Guidelines range based on the mandatory minimum sentences he would receive under §924(c).

The Eighth Circuit ruled that Dean's argument was foreclosed by Circuit precedent and that his sentence was otherwise substantively reasonable.

Dean v. United States, 581 U.S. ____

The U.S. Supreme Court held, unanimously, that § 924(c) does not prevent a sentencing court from considering a mandatory minimum imposed under that provision when calculating an appropriate sentence for the predicate offense.

The factors under 18 U.S.C. § 3553(a) are used to set both the length of separate prison terms, §3582(a), and an aggregate prison term comprising separate sentences for multiple counts of conviction, §3584(b). As a general matter, these sentencing provisions permit a court imposing a sentence on one count of conviction to consider sentences imposed on other counts.

VENUE

U.S. v. Kiekow, 872 F.3d 236

Kiekow lived in a trailer in Picayune. He was accused of receiving large shipments of cocaine and marijuana from cartels in Mexico. The shipments would travel from Houston, Texas to New York, Tennessee, Illinois, Georgia, Oklahoma, and Mississippi. Kiekow and others would wrap the drugs, spray them with Lysol, then tape the packages.

The case was tried in the Eastern District of Texas, though Houston is not in that district. On appeal, Kiekow argued that without proof that he committed some part of the offense in the E.D. Texas, venue was not proper.

U.S. v. Kiekow, 872 F.3d 236

“A defendant’s right to be tried in the district in which the crime [allegedly] took place finds its roots in both the Constitution and federal statutory law.” It must be proven by preponderance of the evidence.

18 U.S.C. § 3237(a) provides that “any offense against the U.S. begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.” Because travel through the E.D. of Texas was essential in order to get to Picayune, venue was proper.

OPENING THE DOOR

U.S. v. Kiekow, 872 F.3d 236

A co-defendant obtained a pre-trial ruling suppressing evidence obtained at his residence through an alert by a drug-sniffing dog. The court found the search *unduly prejudicial*. However, at trial the co-defendant's attorney questioned two law enforcement agents about whether dogs were utilized during searches at the scene of an unrelated vehicle stop. The court determined that opened the door to rebuttal evidence.

“A defendant cannot complain on appeal he was prejudiced by evidence relating to a subject which he opened up at trial. These questions opened the door to questions concerning drug-sniffing dogs.”

REBUTTAL WITNESSES

U.S. v. Dailey, 868 F.3d 322

Prosecutors filed its notice of intent to call an expert witness, being a RN, in a Medicare fraud case. Right before trial, they supplemented the notice to add additional information expected from the RN.

Dailey objected and filed a motion to continue the trial. The court granted a one-week continuance to allow him to locate, confer with, hire, review thousands of documents, and prepare a rebuttal witness to testify. Dailey was not able to find a rebuttal expert in time.

U.S. v. Dailey, 868 F.3d 322

On appeal, the Fifth Circuit noted that if a defendant needs additional time to call a rebuttal witness, he must show:

1. he exercised due diligence to obtain the attendance of the witness;
2. the witness will tender substantially favorable evidence;
3. the witness is available and willing to testify;
4. denial of the continuance would materially prejudice the defendant.

Collective Knowledge Doctrine

U.S. v. Zuniga, 860 F.3d 276

Reasonable suspicion to stop a vehicle, or probable cause to conduct a search, may arise through the collective knowledge of the officers involved in the operation.

Under the collective knowledge doctrine, an officer initiating the stop or conducting the search need not have personal knowledge of the evidence that gave rise to the reasonable suspicion or probable cause, so long as he is acting at the request of those who have the necessary information.

SPECIAL CONDITIONS OF SUPERVISED RELEASE

U.S. v. Ramos-Gonzales, 857 F.3d 727

Ms. Ramos has a prior conviction for possessing 44 pounds of marijuana, but all evidence suggested that she had not used drugs in over 25 years. Probation recommended “drug surveillance” (urine, breath, saliva testing) as a special condition of supervision. Current charge – transporting an alien.

Conditions “may not impose a greater deprivation of liberty than reasonably necessary for the purposes set forth in 3553(a).” Accordingly, there was no criminal conduct to detect or deter, and the condition was removed.

THANK YOU FOR ATTENDING

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