FEDERAL PUBLIC DEFENDER
SOUTHERN DISTRICT
OF FLORIDA

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DEFENSE NEWSLETTER

Vol. 14, No. 1 Kathleen M. Williams, Federal Public Defender November 2008

SUPREME COURT UPDATE

Recent Grants of Certiorari

Yeager v. United States, No. 08-67 (U.S. Nov. 14, 2008)
Issue: Whether, under the Double Jeopardy Clause, the government may retry defendants acquitted of some charges on factually related counts on which the jury failed to reach a verdict.

Abuelhawa v. United States, 08-192 (U.S. Nov. 14, 2008)
Issue: Whether a person who uses a cell phone to buy drugs solely for personal use (a misdemeanor) can be charged with the separate crime of using a phone to facilitate the sale of drugs (a felony).

Dean v. United States, No. 08-5274 (U.S. Nov. 14, 2008)
Issue: Whether, under 18 U.S.C. § 924(c)(1)(A)(iii), the mere discharge of a firearm during a crime of violence or drug trafficking, even if accidental, is subject to a ten-year sentencing enhancement.

ELEVENTH CIRCUIT CASE SUMMARIES

U.S. v. McNEESE, No. 08-10093 (Nov. 3, 2008)

● **Sentence, Fed. R. Crim. P. 35(b): Government May Limit Sentence Reduction to Sentence Imposed on a Specific Count.** The Court held that the government does have the authority to limit a Rule 35(b) motion for reduction of sentence to one count of an indictment and thereby preclude a district court from resentencing a defendant to a sentence less than that previously imposed on a separate count of the indictment. The defendant was convicted on two counts. On one count, the court imposed a life sentence; on the other count, it imposed a 240-month sentence. After the defendant gave "substantial assistance" to law enforcement, the government moved, under Rule 35(b), to reduce sentence on the count for which a life sentence was imposed, but not on the other, 240-month count. The defendant wanted a sentence below 240 months. The district court imposed a 240-month sentence, noting that it could not resentence below 240 months because the government had not moved for a Rule 35(b) reduction for that count. The

Court rejected McNeese's argument that the sentencing court had authority to sentence below 240 months. The Court noted that the government could control McNeese's sentence under Rule 35(b) and that its failure to seek a sentence reduction could only be challenged if it had "unconstitutional motives" for not doing so – something McNeese did not allege.

U.S. v. STEED, No. 08-10557 (Nov. 10, 2008)

● **Fourth Amendment: Search Valid Where Police Relied in Good Faith on State Statute That Was Not Clearly Unconstitutional. Evidence: No Error Admitting Hearsay Testimony Regarding Police Knowledge of Trends in Drug Trafficking and Testimony Regarding Defendant's Nervousness. Jury Instruction: No Error in Giving Deliberate Ignorance Instruction Where Court Also Gave Actual Knowledge Instruction.** The Court affirmed a marijuana trafficking conviction. The Court rejected the argument that the marijuana seized from the tractor-trailer the defendant was driving should have been suppressed because the Alabama statute pursuant to which the police officer inspected the truck's paperwork and equipment (and ultimately discovered marijuana) was clearly unconstitutional. Without reaching the question whether the Alabama statute was, in fact, unconstitutional, the Court held that it was not "clearly unconstitutional," and the police could therefore in good faith rely on it and conduct the inspection. The Alabama statute permitted police in effect to inspect trucks at any time, at any place, and for any reason. The Court nonetheless concluded that it was not "clearly unconstitutional." The statute gave "notice" that specifically designated officials may inspect vehicles. The scope of the inspection was limited to "commercial motor vehicles." Although the statute in effect allowed inspections at any time, this was reasonable because commercial trucks operate at all hours. Although the state lacked a limitation with respect to place, this too was reasonable because it is easy for trucks to avoid designated checkpoints. Finally, although the statute placed no limitation on the police's discretion to inspect, this presented no concern. The Court rejected the argument that the police officer, testifying as an expert, was permitted to give hearsay testimony about police knowledge of trends in drug trafficking. The Court found no violation of Fed. R. Evid. 703, noting that the testimony was not improperly conveying conversations between the police officer and non-testifying witnesses and co-defendants, but instead properly establishing how his "personal training and experience" formed the basis for his knowledge of drug trafficking, criminal indicators, and the commercial trucking industry. The Court also rejected the argument that the officer violated Rule 704(b) by testifying as to the defendant's state of mind, an issue that should have been left to the trier of fact. The Court found that the officer properly testified about the nervousness of the defendant, but left it to the jury to decide whether this nervousness established a guilty state of mind. The Court rejected a challenge to the "deliberate ignorance"

instruction, finding that any impropriety in giving this instruction was not prejudicial because the judge also gave the jury an "actual knowledge" instruction and there was sufficient evidence to support this instruction, in light of the defendant's nervousness and the suspicious state of his paperwork.

U.S. v. JAMES, No. 08-12067 (Nov. 12, 2008)

● **Retroactive Guidelines Amendment: Defendant Not Eligible for Retroactive Application of Sentencing Guidelines Amendment Where Amendment Had No Lowering Effect on Offense Level.** The Court held that a crack cocaine offender was not eligible for Amendment 706's retroactive sentence reduction because the Amendment did not affect the calculation of James' offense level in a way favorable to him. At his original 1989 sentencing, the base offense level for James' 10-15 kilos of crack cocaine was 36. The Guidelines were later amended to increase the punishment to level 38. As a result, James was not entitled to resentencing under 18 U.S.C. § 3582(c)(2).

U.S. v. JONES, No 08-13298 (Nov. 19, 2008)

● **Retroactive Guidelines Amendment: Defendant Not Eligible for Retroactive Application of Sentencing Guidelines Amendment Where Amendment Had No Effect on Offense Level**. The Court upheld the denial of a § 3582(c)(2) sentence reduction to a crack offender. Jones was originally sentenced in 1994 based on Guideline offense level 38, for a quantity of crack cocaine he admitted was in excess of 12 kilos. The current Guidelines still provide for level 38 for offenders at this quantity of cocaine, even after the recent Guideline amendments. Accordingly, Jones did not qualify as an offender whose Guideline range was lowered, and therefore was not eligible for a sentence reduction under § 3582(c)(2). The Court rejected Jones' reliance on Booker. The Court pointed out that his sentence might be higher today as result of a Booker variance. Further, § 3582(c)(2) allows sentence reduction only when lowered by the Sentencing Commission. Booker was therefore inapplicable.

U.S. v. WILLIAMS, No. 08-12475 (Nov. 26, 2008)

● **Retroactive Guidelines Amendment: Defendant Not Eligible for Retroactive Application of Sentencing Guidelines Amendment Where Amendment Had No Lowering Effect on Sentencing Range Controlled by Mandatory Minimum Even Though Court Departed Below Mandatory Minimum**. The Court reversed the district court's grant of a motion for sentence reduction based on Amendment 706 of the Sentencing Guidelines. Mr. Williams entered a plea of guilty to a crack cocaine distribution offense that carried a mandatory minimum sentence of 120-months' imprisonment. At his initial sentencing, the government filed a motion for a downward departure below the mandatory minimum sentence based on Mr. Williams' substantial assistance to the government. The district court granted the

motion and sentenced Mr. Williams to a 60-month term of imprisonment. When Amendment 706 became retroactive, the district court *sua sponte* granted Mr. Williams a sentence reduction and resentenced him to a 50-month term of imprisonment. On the government's appeal, the Court held that the district court lacked the authority to grant a sentence reduction since Mr. Williams' term of imprisonment was not based on a sentencing range that had been subsequently lowered. Specifically, the sentencing range applicable to Mr. Williams under the amended Sentencing Guidelines continued to be the mandatory minimum sentence of 120 months' imprisonment despite the prior downward departure. The Court rejected the argument that the downward departure constituted a waiver of the mandatory minimum.

Updated Case Citations

Dombrowski v. Mingo, 543 F.3d 1270 (11th Cir. Oct. 3, 2008)

U.S. v. Jackson, 544 F.3d 1176 (11th Cir. Oct. 7, 2008)

U.S. v. Singleton, 545 F.3d 932 (11th Cir. Oct. 23, 2008)

U.S. v. Valladares, 544 F.3d 1257 (11th Cir. Oct. 9, 2008)

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