THIRD CIRCUIT & SUPREME COURT CRIMINAL CASE LAW DIGESTS

COMPILATION

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2017 SUPREME COURT CASES

FEBRUARY

Buck v. Davis, 137 S. Ct. 759
In a capital case, the defense called a psychologist to testify Buck posed no violent future risk. The expert's report also stated that Buck was statistically more likely to act violently because he is black. The report read, in relevant part: "Race. Black: Increased probability." Buck was sentenced to death. The Texas Attorney General confessed error in five substantially similar cases, which were remanded for resentencing. On Buck's first review, he did not raise an ineffective assistance of counsel claim and was thus barred in future claims. Defendant's habeas claim under § 2254 was held to be procedurally defaulted under *Coleman v. Thompson*, 501 U.S. 722. *Martinez v. Ryan*, 566 U.S. 1 and *Trevino v. Thaler*, 569 U.S. 413 changed this analysis, and so Buck attempted to reopen his § 2254 under Rule 60(b)(6). District court denied relief, and Fifth Circuit denied COA. The Supreme Court held that the Fifth Circuit exceeded the limited scope of the COA analysis by deciding the case on its merits and relying primarily on lack of extraordinary circumstance. The COA analysis has two steps: (1) an initial determination whether a claim is reasonably debatable, and, (2) if so, an appeal proceeds in the normal course. The district court erred in rejecting the *Strickland* analysis, and its denial of Rule 60(b)(6) was an abuse of discretion. The extraordinary circumstance was proven by the clear steps the State took to deal with the psychologist's testimony in similar cases.

MARCH

Moore v. Texas, 137 S. Ct. 1039
State courts do not have free rein to enforce the Constitution's bar on executing intellectually disabled inmates: they cannot disregard the standards in the most recent medical guide on intellectual disabilities. Texas erred in: (1) not considering the standard error of measurement so that an IQ of 74 really ranged from 69 to 79, which would require the court to consider other evidence of intellectual disability; (2) not considering current clinical standards when evaluating how well Moore could handle the demands of everyday life; the court should have focused on deficits, not strengths; (3) using "evidentiary factors" developed in case law that reflect inaccurate stereotypes by laypersons that had no basis in medicine or law. Roberts, Alito, and Thomas, in dissent, would have let the decision stand based on the IQ score but agreed on the other points and found the majority did not give enough guidance.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855
When a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the "no-impeachment rule" give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Racial bias in jury deliberations threatens not only the proceeding in which it occurs but also the administration of justice more broadly. Racial bias is more difficult to screen out. Nonetheless, defendants who allege a juror was racially biased must meet a high bar: statements exhibiting overt racial

bias "must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." Alito, Roberts, and Thomas, in dissent, believe the no impeachment rule should hold to encourage jurors to be open, protect jurors from harassment, and keep verdicts final.

Beckles v. United States, 137 S. Ct. 886
The Federal Sentencing Guidelines, including Section 4B1.2(a)'s residual clause, are categorically not subject to vagueness challenges under the due process clause. The advisory guidelines merely guide, and do not constrain, discretion within a statutory range so they don't "implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." The due process clause remains applicable to sentencing procedures so there is still some constitutional review. Kennedy, concurring, kept the door ajar for possible challenges to "a sentence, or a pattern of sentencing," that is "so arbitrary that it implicates constitutional concerns." Ginsburg limited her concurrence: there was no as-applied vagueness concern here because guidelines commentary specifically declared possession of a sawed-off shotgun a crime of violence. Sotomayor faulted the majority's decision for its overreach and explained that the guidelines operate like statutes that fix sentences, underscoring the disagreement on the court as to the nature of the "advisory" guidelines.

Rippo v. Baker, 137 S. Ct. 905 (per curiam)
The standard for recusal is whether the risk of bias is too high to be constitutionally tolerated.

Manuel v. City of Joliet, 137 S. Ct. 911
The Fourth Amendment (and not the due process clause) governs unlawful pretrial detention claims even after legal process begins; everything else is remanded. Taking the complaint as true: an officer pulled Manuel from a car, beat him, called him racial slurs, and then arrested him for drugs even though a field test on the pills Manuel was carrying came back negative. An evidence technician at the police station conducted another test on the pills that also came back negative, but that the technician falsely stated that the test was positive. Another officer then swore out a complaint against Manuel; based on all these false statements, a county judge ordered Manuel to be detained. Manuel was not released until seven weeks later, after a state police lab reported that the pills contained no controlled substances. For "unknown reasons," the state prosecutor waited a month to move for dismissal. Manuel sued Joliet alleging two Fourth Amendment violations: false arrest and prolonged unlawful post-arrest detention. The opinion deals with the threshold inquiry and does not decide damages or filing deadlines.

APRIL

Dean v. United States, 137 S. Ct. 1170
District courts have the authority to vary from the Guidelines range based on the mandatory minimum consecutive sentences a defendant receives under 18 U.S.C. § 924(c). As a general matter, numerous statutory sentencing provisions, including 18 U.S.C. §§ 3553(a), 3582(a), and 3584, permit courts imposing a sentence on one count of conviction to consider sentences imposed on other counts. Further, nothing in § 924(c) restricts the authority conferred on sentencing courts under these other statutory sentencing provisions. Section 924(c) requires only that any mandatory minimum under § 924(c) be imposed "in addition to" the sentence for the predicate offense and run consecutively to that sentence. Nothing

in those requirements prevents a sentencing court from considering a mandatory minimum under § 924(c) when calculating the appropriate sentence for the predicate offense.

Manrique v. United States, 137 S.Ct. 1266
A defendant who wishes to appeal an order imposing restitution in a deferred restitution case must file a notice of appeal from that order. Petitioner's single notice of appeal, filed after sentence was imposed, but before restitution was ordered and an amended judgment was entered, did not invoke appellate review of the deferred restitution amount.

NOVEMBER

Kernan v. Cuero, 138 S. Ct. 4
Cuero pleaded guilty to charges that would have led to a sentence of approximately 14 years. Before he was sentenced, prosecutors sought to amend the criminal complaint against him to account for two other felony convictions which qualified as a second "strike" under California's "three strikes" law. The trial court granted the prosecutors' request and permitted Cuero to withdraw his guilty plea. Cuero then pleaded guilty to a new deal for 25 years. The Ninth Circuit reversed, reasoning Cuero had a due process right to have his first plea agreement enforced, and it ordered the federal district court to require the state to resentence him with his original plea deal. The Supreme Court reversed, reasoning even if the state's efforts to amend the complaint violated the Constitution, there are no Supreme Court cases that "clearly establish" Cuero's right to have the first plea deal enforced as a remedy for that violation.

2017 THIRD CIRCUIT CASES

JANUARY

United States v. Mateo-Medina, 845 F.3d 546. It is plain error for a sentencing court to consider a bare arrest record as part of the § 3553(a) review. The sentencing court in this case erroneously factored into its analysis defendant's past arrests that did not lead to convictions.

Coleman v. Superintendent Green SCI, 845 F.3d 73. The "fundamental miscarriage of justice" exception to the one-year statute of limitation under AEDPA requires a claim of actual innocence.

Gardner v. Warden Lewisburg, USP, 845 F.3d 99. A petition under § 2255 is the correct way to seek relief of a sentencing error based on *Alleyne v. United States*, 133 S. Ct. 2151. Section 2255 provides an "adequate and effective means to adjudicate" this issue. Petitioner did not need to file under 28 U.S.C. § 2241, the general habeas statute, which is to be used in exceptional cases when § 2255 would not provide an effective way to address an error.

In re Grand Jury Matter #3, 847 F.3d 157
(1) An appeal of an evidentiary ruling in a grand jury proceeding is not moot after an indictment is returned, if the grand jury is continuing its investigation. If the grand jury proceedings have not concluded, then there is a live controversy and the Third Circuit has jurisdiction. (2) The crime-fraud exception to the attorney-client privilege and attorney work-product protection requires evidence of communication in furtherance of the fraud. The Appellant's act of forwarding an email from his attorney to an accountant, which set forth steps he needed to take to protect himself including amending records, was not sufficient to trigger the exception. There was no evidence appellant ever took any steps to change the records; the lawyer told the accountant not to make any changes and to hold off until further instructed; and the lawyer sent no further instructions to the accountant.

FEBRUARY

United States v. Brown, 849 F.3d 87
A court's decision, without objection, to empanel dual juries is subject to plain error under 52(b). Lack of objection is not grounds for waiver; waiver requires that the defendant was "actually aware of his due process and jury rights and that he himself- not just his counsel- knowingly sanction a procedure that arguably impinged on those rights." The Court extended the analysis under Rule 14, governing prejudicial joinder, to dual juries and held that a defendant must show "clear and substantial prejudice resulting in a manifestly unfair trial." While the Court did not encourage the practice of dual juries, it will not serve to overturn a conviction without obvious error.

United States v. Steiner, 847 F.3d 103
Felon-in-possession of a firearm case. Police received a tip that the defendant owned a shotgun and during a subsequent search found various ammunition. At trial, the government introduced a prior, irrelevant, arrest warrant claiming it as "background" under 404(b). Since the arrest warrant was not the reason police were led to defendant, contrary to what police claimed, it was error to admit the warrant. Ultimately, the error was deemed harmless.
Case was GVRed (grant petition, vacate, remand) from the Supreme Court after *Mathis v. United States*, 136 U.S. 2243 (2016) (explaining modified categorical

approach is to be used when analyzing divisible statutes and the categorical approach is to be used when analyzing non-divisible statutes). Here, the Court determined Pennsylvania's burglary law was not divisible: it intended to expand the common-law definition and provided different *means* to accomplish the main burglary *element*. Under the categorical approach, the Pennsylvania statute was not a predicate "crime of violence." The case was remanded for expedited resentencing.

United State v. Jackson, 849 F.3d 540
Conspiracy to possess with intent to distribute cocaine. Jackson appealed denial of his motion to suppress evidence derived from intercepted cellphone calls. Specifically, he argued that two federal orders authorizing the wiretaps of cellphones under Title III should have been suppressed because the orders were based on illegal state wiretaps. He contended the state wiretaps were illegal because the state court lacked authority to authorize wiretaps over cellphones outside of Pennsylvania. The Third Circuit adopted the "listening post" theory under Title III: "either the interception of or the communications themselves must have been within the judge's territorial jurisdiction." Both Title III, and the Pennsylvania wiretap statute modeled after Title III, hold an interception is lawful if made in Pennsylvania; the phones and calls themselves can be outside the jurisdiction. Because here the interceptions were made at a listening post in Pennsylvania, the Third Circuit upheld the district court's denial of the defendant's suppression motion. The Third Circuit rejected other challenges under a plain error analysis: (1) The case agent's lay testimony opining about the meaning of a clear conversation had been erroneously admitted under Rule 701. The agent exceeded the scope of 701, by implying some information was known to him which made him better suited to interpret the words used than a jury. The error was not plain or obvious and the defendant did not prove prejudice because Jackson's co-defendants provided much of the same information. The Third Circuit rejected that the evidence of two co-conspirators' guilty pleas was introduced as substantive evidence of Jackson's guilt: rather, they were introduced to establish the witnesses' credibility and firsthand knowledge of the crime and to refute Jackson's selective prosecution claim. Finally, while mention of a witness's invocation of the Fifth Amendment in front of the jury was inopportune, it occurred in response to the district court's question about the applicable hearsay exception and so the error did not rise to reversible plain error.

United States v. Douglas, 849 F.3d 40
Appeal from sentence for drug conspiracy, challenging application of U.S.S.G. § 3B1.3 (position of trust) and U.S.S.G. § 3C.1.1 (obstruction of justice). Defendant worked as an airline mechanic with an Airport Operation Authority ("AOA") badge which afforded him unfettered access to the airport, which he used to help smuggle cocaine. The Court upheld the abuse of trust enhancement, particularly due to the "critical importance" of airport security and that Douglas's expansive access indicates he was entrusted with significant discretion to perform his duties. The Court overturned the obstruction enhancement because the government failed to prove Douglas willfully failed to appear when he missed the first day of trial for medical reasons.
** Rehearing en Banc Granted, Opinion Vacated, case reargued on October 18, 2017

MARCH

Johnson v. Lamas, 850 F.3d 119
The Third Circuit ruled that a Sixth Amendment Confrontation Clause violation was harmless. The first jury to hear the case found Johnson's co-defendant guilty of third-degree murder and conspiracy and hung on those counts for Johnson. At Johnson's re-trial, the government called his co-defendant, who had since made a statement implicating Johnson and had his 25-50-year sentence vacated, as a witness. The co-defendant refused to testify so the government introduced his statement. However, analyzing the decision under AEDPA as opposed to de novo, the Third Circuit concluded it was not unreasonable for the state court to rule that the error was harmless because two other witnesses (although drug addicts at the time and strenuously impeached) corroborated each other to identify Johnson as the shooter. The Third Circuit also rejected Johnson's argument, finding no legal support that the prosecutor violated due process by insisting that the co-defendant to take the stand even though the prosecutor knew he would refuse to testify.

Chavez-Alvarez v. A.G., 850 F.3d 583
The Third Circuit reversed the BIA's removal of a lawful permanent resident, finding his military conviction for sodomy was not a crime involving moral turpitude. The BIA had reasoned that the application of a sentencing enhancement in his case was the "functional equivalent" of a conviction for the enhanced offense of forcible sodomy. Applying the categorical approach, the Third Circuit ruled that sodomy did not require proof of force and, given *Lawrence v. Texas*, was not a crime involving moral turpitude. The President's delegated authority to define (and enhance) punishments does not function to define the crime itself.

United States v. Repak, 852 F.3d 230
In a 68-page opinion, the Third Circuit affirmed a public official's conviction for Hobbs Act extortion and federal program bribery. Repak, the longtime head of the Johnstown Redevelopment Authority (JRA), was convicted of getting contractors who did business with the JRA to replace the roof on his home and excavate land for his son's gym. The opinion:
(1) affirmed admission of other-bad-acts evidence (additional bribes) under 404(b). The district court failed to conduct the required detailed analysis but the Third Circuit conducted its own analysis. The evidence was relevant to show that Defendant knew that the items he received were not unilateral token gifts but were given in order to influence his official acts as JRA's executive director. The timing and similarity of actors evinced a course of conduct which showed intent. The limiting instruction, as well as the fact that the evidence consisted of uncharged conduct not a conviction, tempered the prejudicial impact of the proffered evidence.
(2) affirmed admission of evidence that Repak had an affair with his assistant over a Rule 403 objection: the evidence showed Repak's motive for soliciting certain gifts, and assisted the jury in assessing the assistant's credibility.
(3) rejected a sufficiency challenge, finding unpersuasive Repak's argument that his conduct did not involve "official acts," as defined in *McDonnell v. United States*, 136 S. Ct. 2355 (2016)
(4) rejected plain-error challenges to the extortion and bribery jury instructions
(5) rejected Repak's argument that the indictment was constructively amended
(6) denied Repak's claim of prosecutorial misconduct in summation although the

government's reference to Repak's affair was "inappropriate, irrelevant to any issue at trial, and unnecessarily prejudicial."

United States v. Apple Macpro Computer, 851 F.3d 238 - John Doe, a defendant charged with accessing child pornography, was held in civil contempt for refusing to comply with an order to decrypt his digital devices that the government seized. The Third Circuit affirmed the order. First, under a plain error standard of review, it found that the magistrate court had jurisdiction under the All Writs Act to order decryption: it issued a search warrant under Fed. R. Crim. P. 41 and the decryption order was a necessary and appropriate means of effectuating that warrant. A grand jury subpoena is not the only means at the government's disposal. Furthermore, the order did not violate his Fifth Amendment privilege against self-incrimination because any testimonial aspect of the production was a "foregone conclusion": the government had custody of the evidence, and had provided evidence that the encrypted files existed and Doe could access them.

MAY

Bey v. Superintendent Greene, 856 F.3d 230
During trial, Petitioner's attorney failed to object to a flawed jury instruction that incorrectly stated the law and was also confusing. During the appeal, appellate counsel failed to raise ineffective assistance of trial counsel as grounds for relief. The appellate attorney was ineffective under *Strickland*. Therefore, Petitioner showed the cause and prejudice necessary to overcome any procedural default that would bar having his claim reviewed on the merits. The Third Circuit held that the flawed jury instruction deprived him of due process and granted habeas relief.

Fahie v. Virgin Islands, 858 F.3d 162
(1) The Third Circuit retains certiorari jurisdiction over any cases commenced in the Virgin Island Superior Court on or before December 28, 2012. Pursuant to 48 U.S.C. § 1613, the circuit court does not have certiorari jurisdiction over cases commenced after that date.
(2) Appellant also challenged the inclusion of an aiding and abetting jury instruction even though the theory was not formally presented to the jury. The Third Circuit found the instruction appropriate because even though the prosecution did not specifically use the phrase aiding and abetting as part of its case, it was included in the Information and the government requested the jury instruction, putting the defense on notice about the theory. Appellant argued that he could not be guilty of aiding and abetting because his co-defendant pleaded guilty to being an accessory, and therefore there was no one for appellant to aid and abet. The circuit rejected that argument because it would function to completely restrict the government in future prosecutions by a prior plea agreement. Moreover, judicial estoppel did not prevent the theory: a plea as an accessory for one defendant and prosecution of the other for aiding and abetting were not so inconsistent as to amount to a misrepresentation or fraud on the court.

JUNE

Lambert v. Warden, 861 F.3d 459
At trial, Lambert's co-defendant introduced a psychiatric expert in support of his defense that he lacked the requisite intent. A portion of Lambert's statements that incriminated Lambert was excluded, but the expert's testimony was not otherwise limited, and the jury was not instructed that the statements

could not be used against Lambert. In closing, the prosecutor argued that the co-defendant's out-of-court statements helped prove Lambert's guilt. The Third Circuit held that the co-defendant's statements to the psychiatrist were testimonial because the statements were made for the primary purpose of substituting for Lambert's in-court testimony. The Circuit also held (1) reasonable jurists could find that the prosecutor's closing arguments relied on the truth of the co-defendant's statement to a psychiatric expert to draw conclusions about Lambert's intent in his co-defendant's plan; (2) Lambert raised a substantial claim that trial counsel was ineffective for failing to request a limiting instruction, and (3) post-conviction counsel's failure to raise the ineffectiveness claim excuses Lambert's procedural default. The Court thus vacated the District Court's denial of relief and remanded with instructions to conduct an evidentiary hearing to consider the ineffective assistance of trial counsel.

United States v. Johnson, 801 F.3d 474 The Third Circuit rejected two jurisdictional challenges to a revocation proceeding in one district where the defendant's concurrent term of supervised release was revoked in another district. Johnson was convicted of two separate offenses, one in the Middle District of Florida, the other in the District of the Virgin Islands. In each case, he was sentenced to prison and to a three-year term of supervised release. Upon release, he settled in Florida and was actively supervised by the Florida Probation Office. With the exception of one status phone call, he had no contact with the Virgin Islands Probation Office. He committed a new offense in Florida and the Middle District revoked his supervised release. Subsequently, the Virgin Islands Probation Office moved to revoke Johnson's supervised release in that District, and Johnson challenged the District's jurisdiction. The Third Circuit rejected his challenge, joining the Second and Fifth Circuits in finding that concurrent terms of supervised release do not merge: the term of supervised release in the Virgin Islands was not constructively discharged by revocation in Florida and Florida would not have jurisdiction to discharge the Virgin Islands supervised release absent formal transfer of supervision under 18 U.S.C. § 3605. The Third Circuit also found that the inaction of the Probation Office in the Virgin Islands in supervising Johnson in Florida did not cut short the District Court's jurisdiction over revocation of supervised release.

United States v. Chaka Fattah, Jr., 858 F.3d 801- An FBI agent's leaks to the press regarding the execution of sealed search warrants did not violate the defendant's Fifth or Sixth Amendment rights.

Fattah claimed the pretrial publicity about the search warrants caused his employer to terminate his employment, depriving him of income necessary to afford counsel of his choice and thereby violating his Sixth Amendment right to counsel. The Court found that applying such a far-reaching theory of causation would stretch the outer limits of the Sixth Amendment to breaking because: (1) the government lacked any desire or purpose to deliberately interfere with counsel, (2) any alleged loss of income would have been an unintended and incidental consequence of the agent's actions, and (3) there was no close nexus between the employer and the agent's actions with regard to the termination. However, even if the Court were to accept Fattah's theory, it would decline to remand for an evidentiary hearing because Fattah's claim to unrealized income was contradicted

by his own undisputed statements and actions.
The agent's conduct also was not outrageous government conduct violating Fattah's right to due process under the Fifth Amendment. Relief was once granted on this ground, in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), but the Third Circuit has repeatedly distinguished and questioned that case since. The Court rejected the argument in the instant case, stating that "[t]he remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police," if such a violation occurred.

Vickers v. Superintendent Graterford SCI, 858 F.3d 841 - Grant of habeas reversed. Counsel was deficient in failing to apprise the defendant of all aspects of his right to a jury trial and in failing to secure an on-the-record waiver, but this was not structural error triggering a presumption of prejudice and Vickers did not establish prejudice. In light of *Lafler v. Cooper*, 566 U.S. 156 (2012) (addressing prejudice in ineffective assistance of counsel claims alleging a defect in the process leading to a judicial proceeding), the Third Circuit modified its test for determining prejudice from *United States v. Lilly*, 536 F.3d 190 (3d Cir. 2008). *Lilly* determined prejudice by a showing of a reasonable probability that "in the absence of counsel's advice, another fact finder (i.e., a jury) would have been reasonably likely to come to a different outcome." *Lafler* demands a process-based analysis. The inquiry is whether there is a reasonable probability that but for his counsel's failure to ensure a proper waiver of his Sixth Amendment right to be tried before a jury, a defendant would have exercised that right. Applying the revised test, Vickers had not met his burden.

JULY

United States v. Wrensford, 866 F.3d 76. A defendant was arrested for Fourth Amendment purposes (a de facto arrest) when he was forcibly removed from the place where he was stopped, brought to a police station, and placed in a cell without probable cause and without being read his Miranda rights. Further, the identification that stemmed from that arrest was tainted. The case was remanded for the district court to determine (1) whether a Fourth Amendment exception would have nonetheless protected the identification and (2) whether a new trial was warranted or if admission of the information during trial was harmless beyond a reasonable doubt. The district court did not abuse its discretion in denying motions for mistrial based on non-unanimous jury verdicts. The following weighed in favor of affirming the conviction: counsel did not object to further polling of a dissenting juror, the interest in obtaining at least a partial verdict in a case involving multiple defendants and multiple counts, the Court's supplemental jury instruction, and the lack of evidence that a juror's will had been overborne during re-deliberation. The district court properly refused to give a voluntary manslaughter jury instruction because the evidence in the case did not indicate that the crime resulted from a sudden quarrel or in the heat of passion.

United States v. Azcona-Polanco, 865 F.3d 148 - Non-citizens who have been convicted of a deportable offense are presumptively exempt from discretionary supervised release. Deportation is essentially automatic, so imposing supervised release mainly serves to enhance any subsequent punishment for illegal reentry. When judges impose supervised release on defendants

who will be deported, despite the presumption against it, they must acknowledge the presumption and state their reasons for nevertheless imposing it. Here, the Court held that this failure to acknowledge and explain was not plain error given the defendant's prior criminal history including a prior illegal re-entry.

United States v. Stimler, 864 F.3d 253
The Third Circuit affirmed the convictions of Orthodox Jewish rabbis who were convicted of conspiracy to commit kidnapping for their roles in a scheme "to assist Orthodox Jewish women to obtain divorces from recalcitrant husbands."
The Stored Communications Act (SCA) does not violate the Fourth Amendment. The SCA permits the government to access historic cell site location information (CSLI) by court order, not warrant, if the government shows "reasonable grounds" to believe the records are" relevant and material to an ongoing criminal investigation." Reasonable grounds is a lesser burden than probable cause. CSLI does not implicate an individual's reasonable expectation of privacy. *In Re Application* (3d Cir. 2010), and the Supreme Court decisions in *Riley* (contents of cell phone) and *Jones* (GPS technology) did not overturn *In Re Application.* However, the Court also rejected the government's contention that CSLI was voluntarily given over to third parties. Judge Restrepo opined that a warrant was necessary for CSLI, but would affirm under the good-faith exception.

The government did not violate the Religious Freedom Restoration Act ("RFRA") in prosecuting defendants. If a defendant makes out a prima facie case that (1) they possess a sincerely held religious belief, and (2) the government's conduct substantially burdened that belief, the government must then show the prosecution is the least restrictive way of supporting a compelling interest. The defendants failed to show that their actions overrode the government's interest in preventing kidnapping and torture.
The Court affirmed rulings barring evidence: Explanation of Jewish marital law/religious motivation cannot negate the intent to commit a crime; the motive to perform a mitzvah could be the reward for a kidnapping. Evidence that Jewish men who signed a Jewish marital contract impliedly consented to being kidnapped and tortured at the behest of rabbis was properly barred. Such consent must be specific. Certain co-conspirator statements were not testimonial, not subject to the Confrontation Clause, and admissible under Fed. R. Evid. 801. A response to a challenge to the rabbi's authority by one of their victims, was not made to help a criminal prosecution, but instead to assert the authority of the defendants to act as they did. The Court also dismissed challenges to the sufficiency of the evidence and the alleged outrageousness of the FBI conduct.

United States v. Jackson, 862 F.3d 365
The government appealed from the criminal sentences imposed on a husband (probation) and wife (2 years) for abusing their foster children on a military base. They were acquitted of federal assault charges but convicted of various New Jersey laws against child abuse for which there were no precise federal counterparts. Thus, the state law offenses had to be "assimilated" into federal law pursuant to the Assimilative Crimes Act and U.S.S.G. § 2X5.1. The panel (2-1) reversed the district court's conclusion that the federal sentencing guideline for assault was not "sufficiently analogous" to the elements of child abuse in

order to use the child abuse guideline to calculate the guideline range: the elements need not match perfectly. The district court also erred in (1) refusing to make sentencing-related findings of fact beyond those found by the jury and (2) "focusing on state sentencing principles to the exclusion of basic federal sentencing principles." Judge McKee dissented, mainly to disagree with the majority on the analogous-guideline point.

Finally, Judge Cowen's opinion concluded that the sentences were substantively unreasonable. In a footnote, Judge Fuentes "would vacate" on procedural error "without reaching" substantive unreasonableness. Judge McKee also refrained from reaching substantive unreasonableness.

AUGUST

Haskell v. Superintendent, Greene SCI, 886 F.3d 139 - Habeas granted. Haskell challenged his conviction as tainted by perjured testimony in violation of his Fourteenth Amendment right to due process. The Third Circuit held that, when the State has knowingly presented or failed to correct perjured testimony, a defendant need not show "actual prejudice" to prevail. In other words, the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993), does not apply under these circumstances. A petitioner carries his burden when he has shown a reasonable likelihood the false testimony could have affected the judgment of the jury. Haskell made the reasonable likelihood showing and relief was granted.

United States v. Ferriero, 866 F.3d 107 The Third Circuit upheld Travel Act and RICO Act violations where the record showed that Ferriero, as the Bergen County (NJ) Democratic leader, arranged to receive a percentage of fees paid to a vendor that he recommended to local offices during the course of his official duties. The Court held that there is no requirement to prove an agreement to "undermine the integrity of a public action" when the RICO charges stem from the current version of New Jersey's bribery statute. Furthermore, a sufficient nexus to support the RICO charges does not require that Ferriero carried out the bribery scheme in an official capacity. It was enough that Ferriero's position enabled or facilitated the racketeering. The Court also found that a communication can be fraudulent and violate federal wire fraud law when it contains half-truths and omits critical information. Finally, it found that the New Jersey bribery statute is neither overbroad nor unduly vague, and the Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2015), did not impact the present conviction because that case dealt with "officials acts" and not "public issues." The statute is sufficiently clear to give party chairs a reasonable opportunity to understand they cannot take payments from vendors in exchange for urging party members to buy the vendors' products.

United States v. Chapman, 866 F.3d 129 The Third Circuit held that mailing a letter containing any threat to injure the recipient or another person in violation of 18 U.S.C. § 876(c) qualifies as a crime of violence for the purposes of the career offender enhancement (U.S.S.G. § 4B1.1). In arriving at this conclusion, the Third Circuit extended the analysis of *United States v. Castleman*, 134 S. Ct. 1405 (2014), to find that physical force, as set forth in U.S.S.G. § 4B1.2(a)(1), involves the intentional employment of something capable of causing physical pain or injury to another person, regardless of whether the defendant

struck the victim's body. The Circuits are now split 5-3 on *Castleman*'s reach, with the Third Circuit in the majority.

Next, because Section 876(c) is a divisible statute, containing alternative versions of the crime, the Court applied the modified categorical approach. Based on Chapman's indictment, the Court focused on the second of the two versions of the crime, which has two elements: (1) "the defendant knowingly mailed a threatening communication" and (2) "the communication contained a threat to injure the person of the addressee or another." The Court noted that the "threat to injure" element closely tracks the language in the force clause of the Sentencing Guidelines. The Court rejected the argument that a threat to injure does not necessarily require the threat to use violent physical force. The Court relied on *Castleman* and also concluded that, beyond "the slightest offensive touching" which does not qualify as "physical force," there is no minimum quantum of force necessary to satisfy *Johnson*'s definition of physical force.

In a footnote, the Court explained that Chapman's other conviction for mailing a threat to take the life of, kidnap, or inflict bodily harm on the president under 18 U.S.C. § 871(a) is governed by the same analysis and summarily upheld the district court's holding that it constituted a crime of violence.

United States v. Gjeli, 867 F.3d 418

(1) The district court did not violate defendants' Sixth Amendment *Apprendi* rights by applying the four-level enhancement for the use of a dangerous weapon (an axe) under U.S.S.G. § 2E2.1(b)(1)(B), because the enhancement did not increase the statutory maximum penalty to which they were exposed. The axe was used in an incident that also involved a firearm, which the defendants were acquitted of possessing in furtherance of a crime of violence, 18 U.S.C. § 924(c). However, since use of the axe was never charged in any count of the indictment, the application of the enhancement did not rest on acquitted conduct. Even if it did, the Sixth Amendment does not prohibit the district court from relying on conduct underlying an acquitted charge to assess sentencing enhancements so long as the conduct was proven by a preponderance of the evidence. (Several Supreme Court Justices have disagreed that such a proposition holds in all cases.) Here, the testimony of the victim, corroborated by another witness, was enough to establish the use of the axe by a preponderance of the evidence.

(2) The district court did not violate Rule 32(i)(3)(B) by failing to address a defendant's RICO grouping argument, because the court properly concluded that his objection would not have affected the sentencing. Nor did the district court err in excluding contested Groups altogether, because the guidelines would not have changed: even without the contested groups, both defendants would have been subject to the maximum five-level increase to the base offense.

(3) Remand was necessary under Rule 36 to correct the district court's clerical error of forgetting to include the final forfeiture order in the judgment. More importantly, however, the Court remanded based on *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which held that under the drug forfeiture statute, co-defendants cannot be held jointly and severally liable for property that a co-conspirator derived from the crime but that the defendant himself did not acquire. The Court found that *Honeycutt* also applies to the substantially similar

statutes located at 18 U.S.C. §§ 1963 and 981(a)(1)(C). Thus, forfeiture is limited, including under the principal civil forfeiture statute, to property each defendant himself actually acquired as the result of the crime, just like in drug cases. Remand was necessary for the district court to reconsider its forfeiture rulings.

United States v. Martin, 867 F.3d 428
Martin signed a plea agreement indicating his drug guideline range was 70-87 months and that the appropriate sentence was 87 months. When the PSR came back indicating he was a career offender, the district court adopted the career offender designation, but applied the parties' agreed-upon Guidelines range and sentenced Martin to the top of that range – 87 months. Martin later moved to reduce his sentence pursuant to Amendment 782, which lowered most drug guideline ranges by two levels. In affirming the denial of Martin's sentence reduction motion, the Third Circuit held that a reduction was not consistent with applicable policy statements because of Martin's career offender status. Therefore, the career offender range was the appropriate range to consider, and because that particular range was not lowered by any amendment to the Guidelines, Martin was not eligible for a sentencing reduction under 18 U.S.C. § 3582(c)(2).

United States v. Washington, 869 F.3d 193
The record was sufficiently developed to resolve Washington's ineffective assistance of counsel claim on direct appeal because the issue was litigated and decided in a post-trial, presentencing hearing. Although trial counsel's alleged alcohol use is relevant to both the performance and prejudice prongs of an ineffective assistance claim, it does not require a departure from the familiar *Strickland* standard. With respect to trial counsel's opening the door to Washington's prior drug conviction through cross-examination of the case agent, the Court struggled to find a strategic basis for counsel's acts but found that Washington failed to establish prejudice because the evidence was overwhelming.

Washington's argument that application of the mandatory minimum penalty for nonexistent drugs violated his due process rights falls under the often-invoked but rarely successful "outrageous government conduct" doctrine. The Eleventh Circuit has adopted a somewhat relaxed standard for sentencing manipulation that requires a lesser showing than a typical outrageous government conduct claim. Here, the Court left open whether such a standard applies in the Third Circuit, instead holding that on the facts of Washington's case, he failed to show that excising the mandatory minimum was appropriate. The Court recognized that the drug-quantity component of the mandatory minimum sentence has no real-world foundation because the drug quantity was fictitiously created by the government in its sting operation. However, other Courts of Appeals have found that using 5 or 10 kilograms as the quantity stated in the sting does not amount to sentencing manipulation, and it is allegedly a conservative number based upon drug weights found in typical Philadelphia stash houses. Washington failed to introduce any evidence that the 5 kilograms charged in the indictment and the 10 kilograms stated to the defendants were chosen to inflate his sentence. The Court did take care to express its misgivings about these types of reverse stash house stings and to leave open the possibility that a due process claim would be successful under a more egregious set of facts.

A substantive claim of selective prosecution

or selective enforcement generally requires a defendant to meet a two-part test by providing "clear evidence" of discriminatory effect and discriminatory intent/purpose. This generally requires evidence that similarly situated individuals of a different race or classification were not prosecuted, arrested, or otherwise investigated. Because criminal defendants do not often have access to the statistical or other information necessary to make out the claim, a defendant can file a motion for discovery on an anticipated selective prosecution claim. The *Armstrong/Bass* test dictates that a defendant is entitled to discovery on such a claim if he can come forth with "some evidence" that similarly situated individuals of a different race were not prosecuted or arrested. This showing must be credible and cannot be satisfied with nationwide statistics. Because the "special solicitude" behind prosecutorial discretion is what drives the *Armstrong/Bass* test, the Third Circuit joined the Seventh Circuit in holding that there is a distinction between selective prosecution claims and selective enforcement claims. *Armstrong/Bass* applies to selective prosecution claims. However, when claims of selective law enforcement are raised, or there are mixed claims that involve prosecutors acting in investigative or other capacities (where they would not ordinarily be entitled to immunity), the district court exercises broader discretion to permit a claim's development by conducting a limited pretrial inquiry on a proffer that shows "some evidence" of discriminatory effect. The proffer must include reliable statistical evidence, or its equivalent, and may be based in part on patterns of prosecutorial decisions even if the underlying challenge is solely to law enforcement decisions. A defendant is not initially required to provide "some evidence" of discriminatory intent, or show that similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement. The proffer must be strong enough to support a reasonable inference of discriminatory intent and non-enforcement. Once this standard has been met, the district court can conduct a limited inquiry by: hearing testimony of case agents or supervisors; making an in camera analysis of policy statements, manuals, or other agency documents; and disclosing such materials to defendant as it deems appropriate. Courts are not bound by the decisions of other district judges to grant or deny discovery, even within the same district, but it is a factor that can be considered. The Third Circuit also approved a "measured approach" to the taking of discovery, where additional discovery can be granted based on what an initial disclosure reveals. If the information obtained crosses the Armstrong/Bass threshold, discovery can be extended to the prosecutor's office.

On this newly set forth standard, remand was appropriate for the district court to consider Washington's discovery motion. It did not matter that he initiated the conversation with the informant, because it remains plausible that the government would not have pursued the investigation had the "robbery crew" been white. And, although Washington received a redacted portion of the ATF manual on the eve of trial, it is for the district court to determine in the first instance whether that was all he would have been entitled to in the initial limited discovery production. If the court grants additional discovery and a successful selective enforcement claim is borne out, the proper remedy would be to strike the indictment in whole or in part. Washington would not be barred from raising such a claim for failing to file his motion to dismiss

pre-trial under Rule 12(b), because the reason he did not file the motion was the district court's denial of his initial discovery motion to support his claim.

Judge McKee concurred in part and dissented in part. He would hold that applying the mandatory minimum penalty in stash house reverse sting operations, where there are no actual drugs, is not appropriate.

United States v. Penn, 870 F.3d 164
The district court did not abuse its discretion under Federal Rule of Criminal Procedure 24(c)(1) when it excused an African-American juror from service because of a scheduled surgery, college classes, and basketball practice. Rule 24(c) does not require the district court to make explicit findings and the district court adequately articulated its reasons on the record. Additionally, impossibility is not required to meet Rule 24(c)'s "unable to perform" or "disqualified" definitions. Disqualification of jurors is committed to the sound discretion of the district court, whose reasoning was adequate here.

SEPTEMBER

United States v. Poulson, 871 F.3d 261
Poulson pled guilty to mail fraud for creating a Ponzi scheme that defrauded multiple homeowners and investors. He challenged a sentence enhancement for causing victims substantial financial hardship, U.S.S.G. § 2B1.1, which was enacted in 2015. As a matter of first impression, the Third Circuit ruled that district courts have "considerable" discretion in determining what constitutes "substantial financial hardship": they can look at the factual record to make inferences about the extent of a victim's loss and there are no specific loss amounts or formulas for determining if a loss warrants application of the enhancement. Here, district court did not plainly err in determining "substantial financial hardship" was loss of: (1) over $60,000 in retirement savings and interest; (2) $16,000 that sabotaged victim's plan to use her investment to purchase a home for her and her elderly sister; (3) $9,500 in investment account, which impacted their savings and altered retirement plans; (4) $13,000 in retirement account and $3,120 in interest, which was approximately 25% of his total retirement savings, upon which wife was completely reliant; and (5) $42,250 in investment fund, forcing him to work additional side jobs. However, the district court erred in imposing a five-year occupational restriction, when three years was the maximum term for supervised release.

Wilkerson v. Superintendent of Fayette SCI, 871 F.3d 221 - Convictions for attempted murder and aggravated assault of a single victim did not violate the Double Jeopardy Clause. Although assault can be a lesser included offense of attempted murder, the Third Circuit found that a reasonable jury could determine that Petitioner committed two separate criminal acts when he first beat the victim with the gun (aggravated assault) and then shot him (attempted murder). An *Apprendi* challenge to the sentencing enhancement for causing serious bodily injury that was based on a judge's factual finding not submitted to the jury was denied. Although the state conceded error, the claim was time barred by ADEPA's one-year statute of limitations.

In re: Thomas F. Hoffner, 870 F.3d 301
Leave granted to file a second or successive (SOS) habeas petition under 28 U.S.C. § 2244 challenging a 2002 career offender sentence. A claim under *Johnson v. United*

States, 135 S. Ct. 2551 was a "qualifying new rule" and thus petitioner made a *prima facie* showing that he met the pre-filing requirements to raise an SOS petition. Without getting to the merits of the motion, the Third Circuit found that *Beckles v. United States*, 137 S. Ct. 886, was not determinative because petitioner was sentenced pre-*Booker* under a mandatory guideline regime. The Third Circuit instructed that SOS motions should be considered "permissively and flexibly."

United States v. Hodge, 870 F.3d 184
(1) Convictions for using a firearm during a crime-of-violence, 18 U.S.C. § 924 (c) and Virgin Island law 14 V.I.C. 2253(a) did not violate the Double Jeopardy Clause, nor were the separate convictions multiplicitous, because each statute contained an element not required by the other statute.
(2) Double Jeopardy Clause did not bar two convictions under 924(c) stemming from a single use of a firearm: the two convictions were lawful because each was based on a separate predicate offenses, robbery and attempted murder.
(3) Multiple convictions under 14 V.I.C. 2253 were multiplicitous and unlawful because they were all based on crimes committed with the same firearm in one continuous offense.
(4) No violation of the Sixth Amendment right to counsel after the trial court denied the request to substitute counsel following a colloquy with defense counsel. Defense counsel assured the court there were no conflicts of interest, breakdown in communication, or problems with continued representation. Although the court only spoke with counsel, defendant was present and so was the proposed new counsel.
(5) The trial court's refusal to dismiss three potential jurors, who knew victims or were otherwise biased, was not an abuse of discretion, because those jurors were not ultimately empaneled, but dismissed through peremptory challenges.

Satterfield v. D.A., 872 F.3d 152
The holding in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), allows petitioners to overcome ADEPA's one-year statute of limitations based on a credible showing of innocence. The Third Circuit noted that if Petitioner could make a showing of actual innocence then the *McQuiggin* decision was "almost certainly an exceptional circumstance" that may allow relief under Federal Rule of Civil Procedure 60(b)(6). The Third Circuit remanded for the district court to decide the case in the first instance, instructing the lower court to consider equitable circumstances.

NOVEMBER

United States v. Ley, 876 F.3d 103
When assigning points for prior sentences to calculate criminal history score, prior sentences "always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest." U.S.S.G. § 4A1.2(a)(2). A traffic stop, followed by the issuance of a summons, does *not* constitute an intervening arrest in the context of the criminal history calculation.

United States v. Ferguson, 876 F.3d 512
The district court did not commit plain error when it mentioned Ferguson's bare arrest record at sentencing, distinguishing *Mateo-Medina*, 845 F.3d 546 (3d Cir. 2017) and *Berry*, 553 F.3d 273 (3d Cir. 2009). While the record need not be explicit to show the court improperly relied on a bare arrest record, neither is the mere mention of an arrest record, no matter how insignificant, sufficient to withstand plain error review.

This is a question that "cannot be divorced from the facts and circumstances of each sentencing hearing."

DECEMBER

United States v. Graves, 877 F.3d 494
The Court affirmed Graves's 100-month sentence for a single count of unlawful firearm possession. In doing so, the Circuit held that the defendant's prior North Carolina robbery convictions qualified as "crimes of violence" under U.S.S.G. § 4B1.2(a)(2) (listing robbery as an enumerated offense), because they were no broader than generic robbery, as defined by an overwhelming majority of states, but not the Model Penal Code ("MPC").

In North Carolina, robbery can be committed by using or threatening de minimis force -- for example, by merely swiping a person's hand away from her belonging. Presumably, then, this offense would not qualify as a crime of violence under the career offender guideline's force clause, U.S.S.G. § 4B1.2(a)(1), because it does not require violent force capable of causing physical pain or injury to another. *United States v. Chapman*, 866 F.3d 129, 132 (3d Cir. 2017). Despite the minimal force required, the Court held that Graves's prior offenses were still crimes of violence because North Carolina robbery is no broader than the generic version set forth in U.S.S.G. § 4B1.2(a)(2).

Though the Court has, in the past, described the MPC as the "ideal starting point" for the analysis, *see United States v. Marrero*, 677 F.3d 155, 165 (3d Cir. 2014), the Court determined the MPC did not control the generic definition inquiry here. Under the MPC, robbery requires inflicting or threatening to inflict serious bodily injury, a degree of force unquestionably greater than North Carolina's robbery definition. Instead, the Court adopted the broader definition embraced by 37 other states, which do not condition robbery on the use of violent force. The Court deemed state legislation to be the "most important factor" cases like this, where the MPC has only been embraced by a small minority of states. State statutes may not always be the dispositive factor, such as where the states are closely divided or legislative history indicates that Congress or the Sentencing Commission favored a particular generic definition.