THIRD CIRCUIT & SUPREME COURT CRIMINAL CASE LAW DIGESTS

COMPILATION

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JANUARY

Dist. of Columbia v. Wesby, 138 S.Ct. 577
Police officers had probable cause to arrest several partygoers for unlawful entry in a vacant home. The partygoers claimed they were invited to the house. The officers could infer, given "the whole picture," that the partygoers knew the party was unauthorized. These circumstances included: the condition of the house and the conduct of the partygoers (most homeowners do not live in near-barren houses, or invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy). Taking all of the facts into account, an officer could conclude "that there was a substantial chance of criminal activity." In addition, even absent probable cause, the officers were entitled to qualified immunity because the plaintiffs could not clearly establish that the officers knew they lacked probable cause to arrest the partygoers.

Tharpe v. Sellers, 138 S.Ct. 545
In a per curiam opinion, the Supreme Court vacated and remanded a death penalty sentence with a "remarkable" affidavit of a juror who used racial slurs to refer to black people, and "wondered if black people even have souls." The state court's conclusion – that the juror's "vote to impose the death penalty was not based on Tharpe's race" – is normally binding on federal courts in the absence of clear and convincing evidence to the contrary. However, on the unusual facts of this case, the court of appeals should not have rested its review of Tharpe's application for a certificate of appealability on the grounds that it was indisputable among reasonable jurists this juror's service on the jury did not prejudice Tharpe. Rather the Court found that the record supported a finding that reasonable jurists could disagree on whether the state's determination was wrong.

FEBRUARY

Class v. United States, 138 S.Ct. 798
A guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal.

MARCH

Marinello v. United States, 138 S.Ct. 1101
The Internal Revenue Code includes an Omnibus Clause, 26 U.S.C. §7212(a), which allows for prosecution of individuals who, by corruption or use of force, attempt to "obstruct or impede the due administration" of the tax code. The Supreme Court clarified that prosecution under this clause requires a showing that the defendant's conduct was connected to an actual administrative proceeding such as an active investigation or audit; it does not apply to routine procedures like tax collection, processing tax returns or issuing tax refunds.

Ayestas v. Davis, 138 S.Ct. 1080
Petitioner, convicted of capital murder and sentenced to death, challenged the denial of funding under 18 U.S.C. §3599(f) to pay for investigative services during his habeas petition. To receive funding, applicants must show: (1) they do not have the resources to obtain their own lawyer, investigator, or expert, and (2) the services are "reasonably necessary for the representation" of the petitioner in seeking collateral relief. To

qualify as "reasonably necessary" the service need not be essential but something that a reasonable attorney would consider "sufficiently important." The Fifth Circuit erred in applying a test based on "substantial need," which is a heavier burden than was intended by the statute. While recognizing that courts have broad discretion in awarding funding under §3599, the Supreme Court noted that in cases where funding has a "credible chance of enabling" the petitioner to overcome a procedural obstacle it may be erroneous for the court to deny funding. Moreover, while the court may consider the likelihood that the requested service will help the petitioner win relief, the petitioner should not be required to prove that he will win relief. Instead the "reasonably necessary" standard looks to the "likely utility" of the requested service.

APRIL

Wilson v. Sellers, 138 S. Ct. 1188
Petitioner was convicted of murder and sentenced to death. He alleged ineffective assistance of counsel in a state habeas petition. His petition was denied and the Georgia Supreme Court affirmed without any explanatory opinion. A federal district court denied a federal habeas petition advancing the same argument, deferring to the state habeas court's decision. On appeal, the Eleventh Circuit considered the proper method for determining the state court's reasoning where no explanatory opinion had been issued. It held that the district court should have asked what arguments could have supported the Georgia Supreme Court's refusal to grant permission to appeal, and then proceeded to identify a number of bases that it reasonably believed could have supported the decision. The Supreme Court reversed, holding that: (1) the federal court should "look through" the unexplained decision to the last related state-court decision that provides a relevant rationale, and presume that the unexplained decision adopted the same reasoning, and (2) the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision (for instance, a showing that lower court's decision was unreasonable, or that alternative reasons for affirmance are clear from the record).

Sessions v. Dimaya, 138 S.Ct. 1204
For the same reasons announced in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the Supreme Court invalidated the residual clause, defining crime of violence, in §16(b) of the Immigration and Nationality Act (INA), finding it void-for-vagueness.

MAY

Dahda v. United States, 138 S. Ct. 1491
The federal wiretap statute generally requires that either the location where the tapped telephone is located or where the Government's "listening post" is located, or both of those locations, must be found within the authorizing judge's "territorial jurisdiction." Evidence may be suppressed if the wiretap order is "insufficient on its face" – *i.e.*, fails to include information specifically required by the wiretap statute. The Court found that the wiretap authorization here was sufficient on its face, but included excess information authorizing interceptions to take place even if the suspect telephones were transported outside the territorial jurisdiction of the court. The Court deemed this sentence surplus, unconnected with any other relevant part of the orders, and the orders would have properly authorized wiretaps within the authorizing court's territorial jurisdiction if

the sentence had been removed. Accordingly, it upheld admission of the wiretap evidence.

McCoy v. Louisiana, 138 S. Ct. 1500
Petitioner was charged with murder and pled not guilty. Nonetheless, during the trial's guilt phase, and over petitioner's repeated objections, the trial court permitted his counsel to concede that petitioner had committed the murders, with the hope of arguing that specific intent was not present. The jury found him guilty of all three first-degree murder counts and returned three death verdicts. The Louisiana Supreme Court affirmed, rejecting petitioner's claim of a Sixth Amendment violation. The Supreme Court reversed, holding that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the best chance to avoid the death penalty.

Byrd v. United States, 138 S. Ct. 1518
As a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.

United States v. Sanchez-Gomez, 138 S. Ct. 1532
Action by four pretrial detainees, challenging constitutionality of policy of District Court for the Southern District of California of using full restraints during pretrial proceedings, was mooted once the individual claims had dissipated by guilty pleas or dismissal of charges. Detainees could not recast their petitions as petitions for supervisory mandamus since the cases did not involve any formal mechanism for aggregating claims, and the mere presence of allegations that might, if resolved in the four detainees' favor, benefit other similarly situated individuals was also not sufficient to aggregate.

Collins v. Virginia, 138 S.Ct. 1663
Partially enclosed top portion of driveway of home, in which defendant's motorcycle was parked, was "curtilage," for purposes of Fourth Amendment analysis of police officer's warrantless search of motorcycle; driveway ran alongside front lawn and up a few yards past front perimeter of house, top portion of driveway sitting behind front perimeter of house was enclosed on two sides by a brick wall about the height of a car and was enclosed on third side by the house, side door provided direct access between this partially enclosed section of driveway and house, and a visitor endeavoring to reach front door of house would walk partway up driveway but would turn off before entering enclosure and instead would proceed up a set of steps leading to front porch. The automobile exception to the Fourth Amendment's search warrant requirement does not give an officer the right to enter a home or its curtilage to access a vehicle without a warrant, and expanding the scope of the automobile exception, to allow such warrantless access, would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and untether the automobile exception from the justifications underlying it.

Lagos v. United States, 138 S. Ct. 1684
Under the Mandatory Victims Restitution Act of 1996, defendants convicted of specified crimes are required to "reimburse the victim for lost income and necessary child care, transportation, and other expenses *incurred during participation in the investigation or prosecution* of the offense or attendance at proceedings related

to the offense." The Court unanimously concluded that "investigation" and "proceedings" in the statute apply only to government investigations and criminal proceedings. It did not cover costs of private investigation into defendant's wire fraud that victim chose on its own to conduct before government investigation, although victim shared with the government the information that its private investigation uncovered.

JUNE

Hughes v. United States, 138 S. Ct. 1765
A sentence arising out of a negotiated "C-plea" agreement is generally eligible for a sentence reduction where there is a later, retroactive amendment to the relevant Sentencing Guidelines Range. Under § 3582(c)(2), relief is available if the defendant "has been sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered by the Sentencing Commission." Significantly, the Court notes that "in the typical sentencing case there will be no question that the defendant's Guidelines range was the basis for his sentence." This is because, despite *Booker*, the Guidelines are "the starting point for every sentencing calculation in the federal system[,]" and while narrow exceptions exist, this is the general rule. *See Koons* (next case). The Court recognized no distinction where a sentence is imposed pursuant to a C plea agreement because the bargain is contingent on the district court, who is required to consider the guidelines, accepting the agreement and its stipulated sentence. In rebutting the government's argument that this holding deprives them of the benefit of their bargain with respect to C plea agreements, the Court states that relief is still discretionary, "for the statute permits but does not require the court to reduce a sentence."

Koons v. United States, 138 S. Ct. 1783
Petitioners' sentences were not "based on" the Guidelines range, but rather based on their mandatory minimums and substantial assistance to the government. For a sentence to be "based on" a lowered Guidelines range, the range must have at least played "a relevant part [in] the framework the [sentencing] judge used" in imposing the sentence. The Court acknowledged that in most instances sentencing is based on the Guidelines range, but some instances call explicitly for the ranges to be tossed aside. In response to the government's argument that all sentences are based on the Guidelines because they serve as the starting point for all judges, the Court highlighted the difference between focusing on role played by the Guidelines in the initial calculation and the sentence ultimately imposed. In this instance, the sentence eventually imposed was based wholly on the mandatory minimum and substantial assistance departure, not on the advisory range.

Rosales-Mireles v. United States, 138 S. Ct. 1897
Under Federal Rule of Criminal Procedure 52(b), a court of appeals may consider errors that are plain and affect substantial rights, even though they are raised for the first time on appeal. Rosales-Mireles pled guilty to illegal reentry. The presentence report mistakenly counted a state conviction of misdemeanor assault twice, rendering the criminal history a category VI instead of V (a range of 77-96 months instead of 70-87). Petitioner was sentenced to 78 months of imprisonment, and the issue of miscalculation was not raised until appeal. The Fifth Circuit held that the sentencing miscalculation met the first three, but not the

fourth prong of plain error analysis in *United States v. Olano*, 507 U.S. 725 (1993). The error: (1) was not intentionally relinquished or abandoned, (2) was plain, and (3) affected the defendant's substantive rights, but the petitioner failed to establish that the error would seriously affect the fairness or integrity of judicial proceedings because it did not "shock the conscience of the common man." The Supreme Court disagreed and reversed. To a prisoner, the prospect of additional "time behind bars is not some theoretical or mathematical concept . . . The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error." While other errors may require a more substantial expenditure of resources to correct, such as where a retrial is necessary, a brief resentencing imposes a minimal burden. Additionally, institutions such as the Sentencing Commission and Federal Bureau of Prisons rely on data developed during sentencing proceedings. Finally, the Court highlighted that a substantive reasonableness determination is an entirely separate inquiry from whether an error warrants correction under plain-error review. Regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of proceedings.

Chavez-Meza v. United States, 138 S. Ct. 1959
Chavez-Meza pled guilty to possessing methamphetamine with the intent to distribute and faced a Guidelines range of 135 to 168 months. He was sentenced to a prison term of 135 months, the bottom of the Guidelines range. After, the Sentencing Commission amended the Guidelines, which led to petitioner's Guidelines range being lowered to 108 to 135 months. Petitioner sought a proportional sentence modification of 108 months, at the bottom of the new range. The judge imposed a modified sentence of 114 months on an AO-247 form order which certified that the judge had "considered" petitioner's motion and taken into account the § 3553(a) factors. Petitioner appealed, claiming that the judge did not provide an adequate explanation for rejecting his 108-month request. The Court held that "the judge's explanation, minimal as it was, fell within the scope of the lawful professional judgment that the law confers upon the sentencing judge." In *Rita v. United States*, 551 U.S. 338 (2007), the Court held that where a matter is conceptually simple and the record makes clear that the sentencing judge considered the evidence and arguments, the law does not require the judge to write more extensively. But even in those instances where the explanation is lacking or unsatisfactory, a court of appeals may request a more detailed explanation if necessary. In this instance, the petitioner took issue mainly with the lack of explanation for the sentence modification. The Court instructed that "a sentence modification is 'not a plenary resentencing proceeding,'" and that courts should look to the record as a whole, and, in particular, what the judge said at the initial sentencing.

Currier v. Virginia, 138 S. Ct. 2144 (2018)
Currier was indicted by a single grand jury and charged with burglary, grand larceny, and possession of a firearm as a convicted felon. Before trial, the defense and prosecution agreed to sever the firearm charge from the grand larceny and burglary charges. The case proceeded to trial on the

burglary and grand larceny charges, and a jury acquitted Currier of both charges. When the Commonwealth of Virginia sought to try Currier on the remaining charge of felon in possession of a firearm, he objected that collateral estoppel (issue preclusion) protections embodied in the Double Jeopardy Clause precluded his retrial. Notwithstanding his objections, Currier was tried, convicted, and sentenced. The Supreme Court upheld the conviction, holding that because Currier consented to a severance of the multiple charges against him, his second trial and resulting conviction, following an acquittal at his first trial, did not violate the double jeopardy clause.

The Court applied the precedent in *Jeffers v. United States*, 432 U.S. 137 (1977), which held that if a single trial on multiple charges would be sufficient to avoid a double jeopardy violation, there could not be a violation where the defendant seeks two separate trials and persuades the trial court to grant the request. The Court stated that if consent could nullify a double jeopardy complaint in a situation involving a second trial for a greater offense, it could certainly overcome a double jeopardy complaint like Currier's. Finally, the Court concluded that civil issue preclusion principles could not be applied to criminal law through the double jeopardy clause to stop parties from retrying any issue or bringing in evidence regarding a previously tried issue.

Carpenter v. United States, 138 S. Ct. 2206
The Government used cell site location information (CSLI) - transactional records including the date and time of calls, and the approximate location where calls began and ended based on their connections to cell towers – to charge and convict Carpenter on four counts of armed robbery. The Government obtained this information without a warrant, pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d). The Supreme Court agreed with Carpenter that the warrantless search and seizure of the CSLI violated his rights under the Fourth Amendment, finding that expectations of privacy in the age of digital data do not fit neatly into existing precedents, but tracking a person's movements and location through extensive cell-site records is far more intrusive than the precedents might have anticipated. The Court declined to extend the "third-party doctrine"—a doctrine where information disclosed to a third party carries no reasonable expectation of privacy—to cell-site location information, which implicates even greater privacy concerns than GPS tracking does. Accordingly, the Court held that the Government will generally need a warrant to access CSLI.

DECEMBER

United States v. Stitt, 139 S.Ct. 399
Burglary of a structure or vehicle that has been altered or is regularly used to sleep-in overnight, such as a tent or trailer, falls within the scope of generic burglary and therefore qualifies as an enumerated offense under the ACCA.

2018 THIRD CIRCUIT CASES

JANUARY

United States v. Wilson, 880 F.3d 80
Joining several other circuits, the Third Circuit found that unarmed bank robbery by intimidation, in violation of 18 U.S.C. § 2113(a), is categorically a "crime of violence" under the elements clause of U.S.S.G. §4B1.2 (career offender). Intimidation is a threat of physical force and/or bodily harm. The Court rejected the defendant's argument that because intimidation is judged by an objective standard - whether the ordinary bank teller infers a threat of harm - it permits conviction for negligent or reckless behavior. Section 2113(a) has a general intent requirement, requiring the government to prove knowing conduct.

FEBRUARY

United States v. Werdene, 883 F.3d 204
A defendant's right against unreasonable search and seizure was violated when, under a pre-12/1/2016 version of Fed. R. Crim. Pro. 41(b), a magistrate approved a warrant authorizing search and seizure of data from computers located outside of the magistrate's district. The Third Circuit nevertheless held that the evidence should be admitted because the FBI agents who procured the warrant acted in good faith. It rejected the defendant's argument that the good faith exception cannot apply to warrants that are *void ab initio*, as not having the force of law, because the deterrence effect of the exclusionary rule is not advanced by a blanket rule excluding such warrants form the good faith exception.

United States v. Metro, 882 F.3d 431
The Third Circuit vacated the sentence in an insider trading case due to insufficient factual findings attributing others' insider-trading gains to the defendant. Metro used his position at a law firm to give inside information to his close friend Tamayo. Tamayo then called his personal stockbroker Eydelman and passed along Metro's information. Eydelman subsequently made trades for Tamayo, as well as for himself, friends, family members, and other clients. In all, Metro's tips led to illicit gains of over $5.6 million. While Metro personally gained $168,000, the district court found him responsible for $5.6 million.

In insider trading cases, the offense level is enhanced by a defendant's gain and the gains realized by other individuals whom a defendant "acted in concert with" or "provided inside information" to. U.S.S.G. § 2B1.4, cmt. background. Although Metro pled guilty to "conspiring with 'Tamayo, Eydelman, and others' to violate the securities laws," his plea established he learned about Eydelman only after the insider trading activity ended. "When the scope of a defendant's involvement in a conspiracy is contested, a district court cannot rely solely on a defendant's guilty plea to the conspiracy charge, without additional fact-finding, to support attributing co-conspirators' gains to a defendant." "Before attributing gains to a defendant under § 2B1.4's gain analysis, a sentencing court should first identify the scope of conduct for which the defendant can fairly be held accountable for sentencing purposes under § 1B1.3." The Third Circuit rejected the government's position that *United States v. Kluger*, 722 F.3d 549 (3d Cir. 2013) essentially imposed strict liability on tippers.

MARCH

United States v. Van Huynh, 884 F.3d 160
Defendant pled guilty to conspiracy to commit bank and wire fraud after making more than $815,553 worth of fraudulent luxury watch purchases. The Court upheld two sentencing enhancements: (1) a four-level enhancement for being an organizer or leader under §3B1.1 because the defendant recruited other participants, arranged for fake identities and credit cards, decided which stores to target, coordinated travel, and generally made the important decisions and controlled the overall process; and (2) a two-level enhancement under §2B1.1(b)(10)(A), for relocating a scheme to evade law enforcement, because the West Coast conspirators generally targeted stores on the East coast, stores were generally targeted only once, and, when local law enforcement became suspicious, the conspirators never returned to those states. Finally, the Court found the government did not breach the plea agreement by answering the sentencing court's questions about applying §2B1.1(b)(10)(A). The government did not have an affirmative obligation under the agreement to oppose this enhancement, reserved the right to provide information to the court regarding defendant's conduct and sentencing issues, and stated on the record it did not want to undermine the agreement, and was not taking a position on the matter. Moreover, the government's responses to the court actually supported defendant's position that the enhancement should not apply.

United States v. Douglas, 885 F.3d 145
Defendant challenged the drug amount used to calculate his sentencing range. The Court found the government met its burden in establishing the drug amount based on testimony from co-conspirator establishing both the weight of drugs and number of times defendant smuggled drugs through the airport, as well as flight records, telephone records, and bank statements. However, the Court rejected the application of the obstruction of justice enhancement, §3C1.1, where the defendant explained his failure to appear for the first day of trial due to a medical emergency. He provided medical documentation verifying he went to the emergency room, via ambulance, due to chest pains and testing showed a possible heart blockage. The Court did notcredit the government's suggestions that the defendant may have been "faking" the illness, and expressed confusion over why the District Court did not accept the medical excuse in light of the documentation. In a separate opinion, the circuit court also rejected application of the enhancement for abuse of position of trust. Thus the case was remanded for resentencing.

United States v. Douglas, 885 F.3d 124
Following a rehearing *en banc*, the Third Circuit "refined" the two part test for determining if an individual holds a position of trust under §3B1.1. Courts must ask whether a defendant had the authority to "make decisions substantially free from supervision based on: (1) a fiduciary or fiduciary-like relationship or (2) an authoritative status that would lead his actions or judgment to be presumptively accepted." The context of the crime does not matter in determining if the individual occupied a position of trust. Only if the individual was in a position of trust should courts look at the second part of the test – whether the position significantly facilitated the crime. Applying the refined test, the Third Circuit found that an airplane mechanic did not hold a position of trust because the position did not entail decision making authority that could be exercised

free of supervision. The defendant's security clearance and access to certain locations, alone, did not elevate the position to one of trust or supervision. Although his airport access helped him commit the offense, the ability to be somewhere does not automatically equate with professional and managerial discretion.

Bennett v. Graterford, 886 F.3d 268
Under Pennsylvania law, a conviction for first-degree murder requires a specific intent to kill. Petitioner, who remained in a getaway car throughout a botched armed robbery, was convicted of first-degree murder under a theory of accomplice liability. Confusing jury instructions likely led the jury to believe that Petitioner could be found guilty based solely on the principal's intent to kill. However, state law prohibited an accomplice from being convicted of first-degree murder without a finding of specific intent to kill on the accomplice's part. Doing so alleviated the prosecution of establishing the *mens rea* element of the offense, which violated Petitioner's due process protections. The error was not harmless. The Court granted a conditional writ of habeas corpus, with instructions to remand to the state for further proceedings.

APRIL

United States v. Grant, 887 F.3d 131
At age 16, defendant was convicted of RICO violations, drug trafficking, and firearm possession offenses. He was sentenced to life in prison without parole. At a 2012 resentencing under *Miller v. Alabama*, 567 U.S. 460 (2012), he was resentenced to 65 years without parole, meaning the earliest he could be released would be at 72 years old. The Third Circuit held that the Eighth Amendment prohibits a term-of-year sentence that would last the entire duration of a juvenile offender's life expectancy. It remanded for the sentencing court to conduct an individualized hearing on the defendant's life expectancy.
*Opinion Vacated, Rehearing en Banc granted.

United States v. James, 888 F.3d 42
Legislative immunity granted to Virgin Island legislators under 48 U.S.C. §1572(d) does not apply when the charged offense conduct is not legislative in nature.

MAY

United States v. Kalb, 891 F.3d 455
18 U.S.C. § 3731 provides 30 days to file an interlocutory appeal, but a timely filed motion for reconsideration will stop the clock. Here, the District Court granted suppression and the government filed for reconsideration well after the 30-day period. The District reviewed and denied the government's motion for reconsideration on the merits. The Third Circuit affirmed, ruling that the 30-day time period was jurisdictional, and the government's untimely filing stripped the circuit court of jurisdiction to review the suppression ruling.

*United States v. Shaw***,** 891 F.3d 441
Defendant, a corrections officer, was convicted of deprivation of civil rights through aggravated sexual abuse (18 U.S.C. § 242) and obstruction of justice (§1512(b)(3)) in connection with the rape of a female inmate. The Third Circuit rejected each of the defendant's trial challenges. First, defendant challenged the jury instruction on the deprivation count, arguing that the court's instructions misled the jury into believing that non-consent or coerced consent was equivalent to the use of force required to support aggravated sexual abuse.

The Third Circuit agreed that the "disparities" instructions made the base and aggravated offenses indistinguishable, and confused the issues of non-consent, coerced consent, and use of force. However, other parts of the instructions clarified the issue and the instructions in their totality sufficiently distinguished between the lesser and the aggravated offense. Therefore the error did not require overturning the verdict. Second, the Court concluded that the victim's testimony that she was in therapy following the assault was harmless given the overwhelming evidence that included DNA, cell door records, and surveillance videos. Moreover, the testimony was not emphasized by the prosecution. Third, the Court found that the district court did not abuse its discretion by allowing a technician to present lay opinion testimony under F.R.E. 701(c) regarding the jail's incarceration camera clocks. The witness's testimony was based on basic subtraction and not expert scientific or technical methods. Finally, the Court concluded that presumptive prejudice from the length of a trial delay cannot alone carry a Sixth Amendment speedy trial claim without regard to the reason for the delay, the defendant's assertion of his speedy trial right, and any actual prejudice suffered by the defendant.

United States v. Foster, 891 F.3d 93
Totality of the circumstances supported reasonable suspicion for stop - police radio call describing an armed black suspect, the setup of police perimeter, defendant entering the perimeter within six minutes of the call, police observing defendant walking into a residential area in which pedestrians are rare and the officer believing defendant was not from that area, defendant being the only individual that entered the perimeter matching the suspect description among other factors – overcame any vague or imprecise description of the suspect. The Court particularly focused on the geographic and temporal proximity to the offense and the lack of anyone else matching the description of the suspect.

Testimony of barbershop employees regarding their observations of suspicious behavior of two black males in vehicle on day before defendants were arrested in or near the same shopping center parking lot, including that the men were repeatedly looking around the strip of stores, made it probable that defendants each possessed a gun on day of their arrests, and thus the testimony was relevant to government's theory that defendants were casing businesses and so had motive to possess firearms, as required to admit the testimony at defendants' trial for being felons in possession of firearms; the suspicious behavior prompted the employees to photograph the car and its license plate and to contact police, who discovered that car had been stolen, a trooper later observed same car in same parking lot with two black male occupants who appeared to be feverishly looking about the shopping center, and officers then found one defendant outside the car with a gun on his person.

JUNE

United States v. Ramos, 892 F.3d 599
On the government's appeal, the Third Circuit found that second-degree aggravated assault with a deadly weapon, 18 Pa. CS § 2702(a)(4), has as an element "the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Pennsylvania's aggravated assault statute is divisible because it sets forth two alternate degrees of

the offense and, within those degrees, the subsections "criminalize different conduct and set[ ] forth different (albeit overlapping) elements." Thus, because the statute is divisible, the Court was able to consult a limited set of extra-statutory materials to establish Ramos's offense of conviction with certainty: second-degree aggravated assault with a deadly weapon. The minimum conduct sufficient to sustain that conviction was attempting to cause another person to experience substantial pain with a device capable of causing serious bodily injury. The Court concluded, "as a practical and legal matter," an offender can "only do so by attempting to use physical force against another person." (citing *United States v. Chapman*, 866 F.3d 129, 133 (3d Cir. 2017)). The Third Circuit reversed the district court's finding that Ramos was not a career offender, and remanded for resentencing.

United States v. Welshans, 892 F.3d 566 Welshans challenged his conviction and sentence for distribution and possession of child pornography. The Third Circuit rejected Welshans's argument that the prosecution violated his due process right to a fair trial by informing the jury that the files on his computer included deeply abhorrent videos and images of bestiality, bondage, and violent sexual assault of very young children. While the government is free to prove its case as it sees fit, its evidence remains subject to 403 limitations. The Court agreed that the prosecutor's misconduct was plain, but did not rise to the level of a constitutional violation. While the misconduct was pervasive, and any limiting instructions did not address the prejudicial descriptions, the misconduct did not so infect the trial with unfairness because it did not impact the jury's credibility determination. The only contested issue in the case was whether Welshans knew there was child pornography on his computers, and his denial was overwhelmed by the evidence: 10,000 images and hundreds of videos on his computer with no explanation how they got there, as well as his conduct trying to get rid of those files while the police were en route.

The Court did, however, agree that the obstruction enhancement was erroneously imposed. Application Note 4(d) to U.S.S.G. § 3C1.1 provides that not all acts of destroying or concealing evidence are obstruction, for example: "if such conduct occurred contemporaneously with arrest . . . it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation . . . ." Here, Welshans received a call from his aunt that police were on their way to his house and, in a panic, he began moving files on his computer into the recycling bin. Once law enforcement found the laptop, they removed its battery. The files were easily restored, and none were lost. The panel ruled that "material hindrance" requires an actual, negative effect, rejecting the government's overly broad interpretation that anything that takes some "extra time" and might emerge as a trial issue is a material hindrance. (Also, the government only challenged this prong at oral argument, so the Court deemed it waived). Because the enhancement was applied in error, remand was necessary even though the district court had imposed a downward variance, because the Court could not "be sure" that the erroneous calculation did not affect the sentence imposed. Judge Fuentes dissented on the sentencing reversal, finding that contemporaneous should be more strictly defined as conduct occurring "just prior to arrest," and conduct that occurred 40 minutes before agents arrived

was not "just prior."

JULY

United States v. Green, 897 F.3d 173
Officer twice pulled over Defendant's vehicle. First time, Defendant was pulled over and cautioned for having tinted windows. Defendant consented to search of vehicle: no contraband found but officer detected the odor of marijuana in the trunk. Defendant passed officer the next day. Officer admitted he wanted to pull Defendant over because he recognized the vehicle but also determined he was speeding by "pacing" him – calculating car speed based on the distance between the two cars. During the stop, the officer acknowledged recognizing Defendant, they briefly spoke, the officer called for backup and a K-9 unit, and also made a two minute phone call to get information about another traffic stop that he believed was connected to Defendant. After several minutes before backup arrived: the officer issued a warning to Defendant, then told him he was free to go, but asked if he could search the car. Defendant said no, and the officer told him to wait in the car. 15 minutes later the K-9 unit arrived and alerted to drugs. A search pursuant to a warrant revealed 1,000 bricks of heroin. The Third Circuit affirmed the District Court's denial of suppression: (1) The stop was reasonable because it was a valid traffic stop: the "pacing" method was OK. (2) The stop was not too long. In reviewing the officer's actions from the initial moment of contact, the Court found: no single step in the stop took particularly long – officer quickly called for backup and K-9 unit, his phone call with colleague only lasted two minutes, and he issued a warning even before backup arrived. (3) There was also sufficient reasonable suspicion of criminal activity to justify extending the stop: Defendant's misleading statements, previous smell of marijuana, and criminal history.

Abul-Salaam v. Sect'y of Pa. DOC, 895 F.3d 254
Ineffective assistance of counsel in penalty phase of capital case that prejudiced Defendant where trial counsel failed to fully investigate and develop mitigating evidence: childhood abuse, school records, juvenile records, and mental health condition. Attorney's actions could not be justified as strategic decisions.

Reeves v. Fayette SCI, 897 F.3d 154
As a matter of first impression, when a state prisoner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the actual innocence miscarriage of justice gateway to excusing procedural default of a state prisoner's federal habeas claim.

AUGUST

United States v. Clark, 902 F.3d 404
The Third Circuit affirmed the District Court's suppression of a gun because the traffic stop was impermissibly extended in violation of *Rodriguez v. United States*, 135 S. Ct. 1609 (2015). The police pulled a minivan over for several traffic violations, including driving without headlights at night. The minivan belonged to the driver's mother, who was not present. The driver showed a license and proof of insurance, but could not find the registration. He explained it was his mother's car and offered to call her to ask where the registration was located. The officer ran a computer check which (1) confirmed the driver's license was

valid and that the minivan was registered to a woman at the same address listed on the driver's license, and (2) revealed the driver had a criminal record for drug offenses but no outstanding warrants. After running the check, the officer returned and asked the driver about his criminal record, earlier whereabouts, and address, and then asked the driver about the passenger (Defendant), including questions about how long the driver had known him and how they had come to travel together. The officer then similarly questioned the passenger and then returned to the driver to confront him about purported inconsistencies. The officer claimed he smelled marijuana from the passenger's side and asked passenger to get out of the minivan to allow him to search it. The passenger complied and told the officers that he had a gun in his waistband. Passenger was charged with unlawful gun possession and the driver was given motor vehicle summonses and then permitted to leave.

The District Court found the officer's criminal history questions to the driver were not necessary to complete the mission of addressing the traffic violations that justified the stop. The computerized record check already had revealed to the officer the answers to the questions about the driver's criminal history. Thus, these questions unreasonably prolonged the stop. The Third Circuit agreed.

Mitchell v. Dallas SCI, 902 F.3d 156
Three defendants had been convicted of various offenses arising from a robbery and murder. The Court upheld the denial of habeas relief to Mitchell, finding a jailhouse informant's testimony about a third defendant's statements that implicated Mitchell did not violate the Confrontation Clause because the statements were nontestimonial. *See Crawford v. Washington*, 541 U.S. 36 (2004). Mitchell's co-defendant Eley had prevailed on the same claim in 2013. In *Eley v. Ericson*, 712 F.3d 837 (3d Cir. 2013), the Third Court concluded that the admission of that same statement violated Eley's confrontation rights under *Bruton v. United States*, 391 U.S. 123 (1968) (barring admission at a joint trial of one defendant's out-of-court statement inculpating both himself and another defendant). Although *Crawford* had been decided years before *Eley*, neither party argued nor did the Court address the impact of *Crawford.* In the instant case, the respondent had "squarely [ ] raised" *Crawford*.

United States v. Hird, 901 F.3d 196
Defendants were convicted of a scheme to fix tickets in the Philadelphia Traffic Court. The Third Circuit affirmed the convictions and reversed one sentence.

(1) The indictment sufficiently alleged mail and wire fraud where a governmental entity's lawful entitlement to collect fines and costs for traffic violations qualifies as "property" within the meaning of 18 U.S.C. §§ 1341, 1343.
(2) Defendants' statement to the grand jury were sufficient evidence to support perjury convictions, 18 U.S.C. § 1623, despite the defendants' claims that the examiners asked vague questions or their answers were truthful. The Court reaffirmed that "precise questioning is imperative as a predicate for the offense of perjury," but review for sufficiency "is focused on glaring instances of vagueness or double-speak by the examiner" that "would mislead or confuse a witness into making a

response that later becomes the basis of a perjury conviction."

(3) The Court vacated and remanded one sentence: making false statements to the FBI did not contain all of the elements of obstruction of justice and so it was error to use the obstruction guideline, U.S.S.G. § 2J1.2.

United States v. Mayo, 901 F.3d 218
The Third Circuit vacated the District Court's denial of a motion to correct sentence because first-degree aggravated assault in violation of Pa. Stat. Ann. § 2702(a)(1) is not a "violent felony" under the Armed Career Criminal Act (carrying a 15-year minimum sentence). After *Johnson v. United States*, 135 S. Ct. 2551 (2015), ACCA's residual clause is void and so a predicate violent felony must have as an element the use or threat of "physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). Authoritative Pennsylvania precedent showed the offense does not necessarily involve the use or threat of physical force because a conviction may be obtained by proving culpable acts of omission such as failing to provide a child with food or medical care.

SEPTEMBER

United States v. Rivera-Cruz, 904 F.3d 324
The Third Circuit affirmed denial of Defendant's motion for sentence reduction based on Amendment 782: Defendant was not eligible for a reduction because his original sentence was based on a statutory requirement not a guideline range. Defendant's original guideline range was 324 to 405 months but it was capped at a 240-month statutory maximum. Under U.S.S.G. § 5K1.1, the District Court departed to 215 months. Amendment 782 did not reduce the range his sentence was based on: moving from an offense level 36 to 34, the new guideline range of 262 to 327 remained capped at 240 months.

Preston v. Graterford SCI, 902 F.3d 365
Denial of state petitioner's habeas motion affirmed. Confrontation Clause violated where witness's prior statements used against the defendant but the witness refused to answer any questions on cross-examination. Petitioner overcomes procedural default under *Martinez* because the PCRA counsel failed to raise this Confrontation claim as ineffective assistance of counsel on collateral review. However, although trial counsel was deficient under *Strickland*, the deficiency was not prejudicial where the testimony was not that damaging nor would the jury have found differently had it been excluded.

United States v. Renteria, 903 F.3d 326
Defendant, a resident of California, objected to venue in the Eastern District of Pennsylvania for his participation in a conspiracy that shipped drugs to Pennsylvania. The Third Circuit, contributing to a circuit split, rejected the challenge: in a drug conspiracy case, the government need not prove venue in the prosecuting district was reasonably foreseeable to a defendant that acted in furtherance of the conspiracy.

United States v. Noel, 905 F.3d 258
(1) Trial court's limitations on cross-examination of the specific details of codefendants' sentencing exposure was not a violation of the Confrontation Clause: general cross-examination on sentencing reductions and the benefits of cooperation

enough to show bias/motive and further cross-examination would not likely have altered the jury's impression of the witnesses' credibility. (2) New trial based on new evidence of jury misconduct (that a juror who disclosed decades long career as corrections officer/U.S. Marshal in that courthouse and so it was highly probable he had contact with defendant or his codefendants) was properly denied: evidence was not newly discovered, rather defendant was on notice that he should ask for additional information. Moreover, any impropriety was purely speculative.

United States v. Gonzalez, 905 F.3d 165 Defendants were convicted of conspiracy to commit and interstate stalking and cyberstalking resulting in death. The Third Circuit held:

(1) The evidence was sufficient to show conspiracy despite no evidence of an agreement to stalk or kill: the government called 65 witnesses and introduced 760 exhibits showing defendants' three-year campaign of "harassment, intimidation, and surveillance" of the victim through email, YouTube, online postings, and regular mail to spread false accusations that the victim sexually abused her children.
(2) The jury was not required to unanimously find which specific acts the defendants committed that violated the charging statute, rather it needed to unanimously agree that each element of the offense was proved.
(3) The District Court did not plainly err in permitting the jury to find "resulting in death" either on a direct theory of liability, if they believed the death was a reasonably foreseeable and "natural consequence" of their conduct, or on a theory of co-conspirator liability. There need not be an agreement to cause the victim's death.
(4) Defendants' defamatory speech, used to harass and intimidate the victim, with no legitimate purpose, was not protected by the First Amendment.
(5) No error in admitting evidence of earlier restraining order: it was "highly relevant" to show defendants' motive and a jury instruction tempered any prejudice.
(6) Tapes from victim's therapy sessions discussing the impact of defendants' actions were hearsay admissible under Federal Rule of Evidence 803(4). The rule applies to statements made to mental health professionals, as well as medical physicians. The statements did not violate the Confrontation Clause because they were not made with the intention of being used in a future prosecution.
(7) Victim's emails to third parties properly admitted under F.R.E. 803(3) because they showed the victim's state of mind and emotional condition as a result of defendants' actions.
(8) Prosecution's question to FBI case agent- "has anything happened that has shaken your belief in your actions? – was not vouching. Defense counsel had opened the door on cross examination by asking if the agent had any doubts the defendants' involvement. The District Court also gave a limiting instruction that the jury alone could assess the evidence.
(9) District court did not abuse its discretion in precluding evidence of polygraph results when the decision was based on

scientific consensus questioning the reliability of the test.

(10) District Court did not err in ruling the Government would be allowed to present rebuttal evidence to any character evidence introduced by one of the defendants.

(11) No Fifth or Sixth Amendment violation where jury did not make factual findings on issues that affected the advisory guideline range. *Apprendi* requires jury decision when an issue raises a statutory maximum.

(12) District Court correctly applied the official victim enhancement under U.S.S.G. § 3A1.2(c)(1): it was reasonably foreseeable that a shooting in a courthouse created a risk of harm to law enforcement officers.

(13) A life sentence for one of the defendants did not violate the Eight Amendment: life was within the statutory limit and therefore not cruel or unusual.

OCTOBER

United States v. Holena, 906 F.3d 288

The Third Circuit vacated a total ban on computer and internet use as a special condition of supervision for a defendant who had been convicted of using the internet to entice a child to have sex. After a second violation for logging into Facebook and lying about it, the District Court amended the special conditions to forbid possessing or using any computers, electronic communications devices, or electronic storage devices. The Third Circuit agreed that the ban on computers:

(1) was contradictory (due process requires fair warning/understandable conditions);

(2) more restrictive "than is reasonably necessary" to deter crime, protect the public, and rehabilitate the defendant. Courts consider: (a) the restriction's length, (b) its scope, (c) "the defendant's underlying conduct," and (d) the proportion of the supervised-release restriction to the total restriction period (including prison). Lifetime duration was presumptively excessive. The scope of the computer and internet bans was too broad (included using a computer to make a resume or a cellphone to call a friend for a ride) and not justified by the record. On remand, the District Court should consider filtering/monitoring software and offer some categories of websites or a guiding principle on what is permissible or not, i.e., shopping, searching for jobs, news, maps but not chat rooms or any site where the defendant could interact with a child.

(3) violated the First Amendment because it was not tailored. Under *Packingham v. North Carolina*, 137 S. Ct. 1730, 1738 (2017), blanket internet restrictions will rarely be tailored enough to pass constitutional muster because their "wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child."

United States v. Abdullah, 905 F.3d 739

New Jersey third-degree aggravated assault with a deadly weapon, N.J.S.A. § 2C:12-1(b)(2), is categorically a crime of violence

under U.S.S.G. §4B1.1. The Aggravated assault statute is facially divisible: it proscribes three alternative degrees of conduct, each with different maximum sentences. The third-degree offenses are further divisible: the statute uses disjunctive language to establish alternative elements. The minimum conduct under (b)(2) is "conduct attempting to cause any impairment of physical condition with an instrument or substance that, as fashioned, would lead the victim reasonably to believe it was capable of producing serious bodily injury," and thus inherently involves proof of an element of physical force.

United States v. De Castro, 905 F.3d 676
A police officer's request for a defendant to remove his hands from his pockets was not a Fourth Amendment "seizure." There was no exercise of physical force or show of authority: one officer was present during the encounter. He made a "sole, polite, and conversational request" of the defendant; did not draw a weapon or threaten the defendant; and did not communicate that the defendant was not free to leave. The defendant voluntarily removed his hands from his pockets revealing a weapon.

United States v. Schonewolf, 905 F.3d 683
The Third Circuit affirmed an above-Guidelines sentence for a VOSR finding it was not improperly based on rehabilitation, despite the District Court's explicit reference to the defendant's drug addiction problems. *Tapia v. United States*, 564 U.S. 319 (2011) (prohibiting courts from imposing or lengthening a prison term to promote an offender's rehabilitation) applied to revocation sentencing as well. Following *Tapia*, rehabilitation may weigh into selecting a prison sentence, but may not be the primary or dominant consideration. Here, despite references to the defendant's drug problems, the District Court's sentence was not specifically tailored to any particular rehabilitation program nor made longer to achieve certain treatment goals in custody.

NOVEMBER

Reese v. Philadelphia FDC, 904 F.3d 244
A federal detainee can only be released under the Bail Reform Act; he may not seek release pending trial through a §2241 motion.

United States v. McClure-Potts, 908 F.3d 30
The Third Circuit affirmed denial of a reduction under §2L1.1(b)(1) for harboring an illegal alien for purposes other than "for profit": the defendant received food stamps and medical benefits on alien's behalf and he performed house and schoolwork for her. The District Court correctly included in the loss calculation the value of food stamps and other benefits that defendant received on behalf of the alien.

Workman v. Albion SCI, 908 F.3d 896
(1) Ineffective assistance of counsel during the state post-conviction process will excuse procedural default.
(2) Trial counsel's performance was deficient: he did not make an opening argument, call any witnesses, present any evidence, and rested after the court denied his motion for a judgment of acquittal. He presented no case.

United States v. Hester, 910 F.3d 78
(1) The Third Circuit affirmed denial of suppression. Law enforcement made a show of authority at which no reasonable person would have felt free to leave by driving a marked police vehicle up alongside the driver's side of the suspect

car, and parking an unmarked vehicle behind the car, with officers then positioning themselves around the car by all possible exits. The passenger-appellant submitted to the show of authority by remaining in the vehicle while officers questioned the driver and his subsequent, short-lived attempt to flee did not negate the earlier submission. However, police had reasonable suspicion to initiate the stop because the vehicle was idling illegally near a crosswalk, in a high-crime area, just outside a store well known for drug activity.

(2) The Third Circuit vacated the sentence, finding the District Court incorrectly applied a four-point enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for using a weapon in connection with another felony. The government failed to prove by a preponderance that the defendant engaged in evidence tampering: the weapon was recovered, not destroyed. The defendant did not use the weapon to further any evidence tampering, he neither brandished nor otherwise used it, but merely possessed it.

United States v. Baroni, 909 F.3d 550

The Third Circuit affirmed wire fraud convictions:

(1) The defendants deprived the Port Authority of "money" or "tangible property" within the meaning of 18 U.S.C. §1343: they fraudulently redirected public employee labor from proper Port Authority business to work on the lane closure. Baroni also accepted compensation for time he spent conspiring to defraud the Port Authority instead of working on legitimate business.

(2) Sufficient evidence that Port Authority had a "property interest" in the bridge's operations where the lanes and toll booths were revenue generating assets.

(3) Actions were fraudulent as Baroni did not have unilateral authority to change traffic patterns: Baroni had invented the traffic study as a cover story to justify the switch; the Executive Director then ordered him to reopen the shuttered lanes; Baroni lacked the authority to override the Executive Director's mandate; and he was unable to convince the Chairman to re-close the lanes.

(4) Convictions valid under *Skilling v. United States*, 561 U.S. 358 (2010) because convictions were for money and property fraud under § 1343, not honest services fraud under § 1346.

(5) No federalism concerns: the Port Authority is an interstate agency that was created by Congressional consent, and receives substantial federal funding. The federal government has a legitimate interest in ensuring the agency's financial and operational integrity.

(6) Conviction under 18 U.S.C. § 666, theft or bribery concerning programs receiving federal funds, was valid. Political motivations do not negate intentional conduct, Congress intended the statute to be expansive and allow prosecution for misapplication of federal funds. The government's theory and evidence that defendants fraudulently or intentionally misapplied the labor of Port Authority employees was sufficient to affirm conviction, and the value of compensation and professional services exceeded $5,000.

(7) Vacated convictions for civil rights violations of Fort Lee residents: neither the Supreme Court nor Third Circuit has clearly recognized a constitutional right to interstate travel.

DECEMBER

United States v. Bey, 911 F.3d 139
The Court reversed the denial of a motion to suppress, finding that while officers initially had reasonable suspicion to stop the defendant, the government did not satisfy its burden to justify his continued detention in light of the obvious, pronounced differences in skin tone, facial hair, height and weight between the description of the suspect and the defendant.

United States v. McCants, 911 F.3d 127
The Court affirmed suppression and sentence.

(1) In rejecting a challenge to a stop and frisk, the Third Circuit found an anonymous 911 tip "provided sufficient indicia of reliability for reasonable suspicion of ongoing criminal activity" based on the use of the 911 system, the eyewitness account, and the fact that the informant could be held responsible if her account was fabricated. The 911 tipster had reported a specific location at which a man with braids and a red hat was "beating up his girlfriend." The tipster stated "I think he has a gun." The police quickly responded to that exact location and saw a man with braids and a red hat walking down the street with a woman who showed no signs of injury. Police searched the man, found a handgun, arrested him, and recovered heroin, and charged him with illegally possessing guns and drugs. In affirming the District Court, the Third Circuit agreed it was permissible to defer to the officers' reasonable inferences regarding the defendant's demeanor.

(2) Upholding a career offender enhancement based on prior New Jersey robbery convictions, the Third Circuit ruled that N.J.S.A. § 2C:15-1 is "divisible" (setting forth alternative elements rather than means) and that the defendant was convicted of robbery under subsection (a)(2) for "threaten[ing] another with or purposely put[ting] him in fear of immediate bodily injury" in the course of committing a theft. The Court found (a)(2) was categorically a "crime of violence" under both the elements and enumerated clauses of U.S.S.G. § 4B1.2(a).