

THIRD CIRCUIT & SUPREME COURT CRIMINAL CASE LAW DIGESTS

COMPILATION

January 1, 2016 through December 31, 2016

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2016 SUPREME COURT CASES

JANUARY

Hurst v. Florida, 136 S. Ct. 616

Florida's capital sentencing scheme violates the Sixth Amendment, in light of *Ring v. Arizona*, 536 U.S. 584 (2002), because it authorizes a judge – not the jury – to make the critical findings necessary to impose the death penalty. The Court expressly overruled prior precedent as “irreconcilable with *Apprendi*,” which had held that the Sixth Amendment does not require that the jury make the specific findings authorizing the imposition of the sentence of death.

Kansas v. Carr, 136 S.Ct. 633

The Court held: (1) the Eighth Amendment does not require judges to instruct juries that mitigating circumstances need not be proved beyond a reasonable doubt; and (2) the Constitution does not require the severance of the defendants' joint sentencing proceedings, even where the testimony of one brother implicated the other as the corrupting older brother, and cross-examination of a sister by one brother revealed an equivocal confession.

Musacchio v. U.S., 136 S. Ct. 709

This is a case about the failure of the parties to pay attention. The government failed to object to a jury instruction that erroneously added an element that it had to prove. Musacchio failed to raise a statute-of-limitations defense until appeal and, on appeal, wanted his sufficiency-of-evidence challenge decided under the erroneous instruction, which held the government to an additional element of proof. The government won on both points. First, sufficiency is assessed against the elements of the charged crime, not the erroneous instruction with an

extra element. Second, a statute-of-limitations defense can never be plain error (and thus never raised for the first time on appeal) because when the defendant does not press the defense, the government has no burden of proving that it filed a timely indictment.

Montgomery v. La., 136 S. Ct. 718

The holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), finding that mandatory lifetime incarceration without possibility of parole for juveniles convicted of homicide violated the Eighth Amendment's ban on cruel and unusual punishment, is a substantive rule that must be applied retroactively.

MARCH

Lockhart v. U. S., 136 S. Ct. 958

In child pornography cases, a ten-year mandatory minimum is triggered under 18 U.S.C. § 2252(b)(2) when there is a prior state conviction “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” The question in this case was whether the qualifying phrase “involving a minor or ward” applies to all of the listed items or only the offense immediately preceding it. Applying the “rule of last antecedent,” the Supreme Court held that “involving a minor or ward” only modified “abusive sexual conduct” and not the other listed items. Therefore, although Petitioner's conviction for sexual abuse involved an adult victim, it still triggered the mandatory minimum sentence.

Weary v. Cain, 136 S. Ct. 1002

Petitioner's conviction for murder was overturned due to the prosecution's failure

to disclose material evidence, in violation of his due process rights. The case against Petitioner had been entirely circumstantial, with no physical evidence. The key witness changed his story throughout the investigation and the trial. The government withheld information that went directly to the witnesses' credibility, including reports that the witness had a personal vendetta against Petitioner. The government also failed to turn over evidence that another witness was hopeful he would receive some relief from his existing sentence, in consideration for his testimony. Finally, the government did not disclose medical information about another individual allegedly involved in the murder, which would cast doubt on the key witness's account of the events. The Supreme Court noted that the new evidence should be viewed cumulatively, not as isolated pieces of information. As a whole, the new evidence sufficiently undermined confidence in the verdict.

Luis v. United States, 136 S. Ct. 1083

A defendant in a criminal case may use untainted funds to pay for an attorney of her choice. The government's pretrial request to freeze her assets, including legitimate funds, in a manner which prevented her from paying for legal defense, violated the Sixth Amendment.

APRIL

Welch v. United States, 136 S. Ct. 1257

The Supreme Court held the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), to be a substantive change in the law and therefore retroactive to cases involving the Armed Career Criminal Act ("ACCA"). *Johnson* ruled the residual clause of the ACCA void for vagueness. This ruling altered "the range of conduct or the class of

person that the [ACCA] punishes." Before *Johnson*, ACCA applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions qualified as a violent felony only under the residual clause, and exposed the offender to a mandatory minimum 15-year sentence. After *Johnson*, the same offender faces a maximum of 10 years under the ACCA.

Molina-Martinez v. U.S., 136 S. Ct. 1338

The Supreme Court held that in light of the centrality of the Guidelines range in the sentencing process, when a defendant is sentenced under an incorrect range, "the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error," even where, as in this case, the sentence imposed was within the correct range. The Court rejected the Fifth Circuit's ruling that the district court incorrectly calculated the Guidelines range, but imposed a sentence within the correct range, the defendant, on appeal, "must identify 'additional evidence' to show that use of the incorrect Guidelines range did in fact affect his sentence."

MAY

Ocasio v. U.S., 136 S. Ct. 1423

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). The Supreme Court has previously held that a public official violates that statute when he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992). A jury found Ocasio, a former Baltimore Police officer, guilty of four offenses relating to his involvement in a wide-

ranging kickback scheme involving the Majestic Repair Shop and Baltimore Police officers, who referred accident victims to Majestic for body work, in exchange for kickbacks of \$150–\$300 per vehicle. Ocasio was convicted on three substantive counts plus a conspiracy to commit Hobbs Act extortion. The Supreme Court rejected that his conspiracy conviction was flawed even though the owners of the repair shop, not public officials, could not commit the underlying substantive offense as principals. They "shared a common purpose" of having petitioner and other police officers commit every element of the substantive extortion offense. The majority held that the person extorting can conspire with the persons extorted to violate the Hobbs Act, with proof that the owner of the property agreed to give it over under color of official right.

Foster v. Chatman, 136 S. Ct. 1737

Foster was sentenced to death in Georgia. *Batson v. Kentucky*, 476 U.S. 79 (1986) was decided months before his trial and the prosecution had provided roughly a dozen "race-neutral" reasons for striking the four black jurors. In habeas proceedings, the defendant obtained the prosecution's previously withheld notes from jury selection. The previously-withheld notes reflect that the prosecution made a concerted effort to keep black prospective jurors off of the jury (1) highlighting the jurors, circling the word BLACK next to the "Race" question, identifying these jurors as "B#1," "B#2," and "B#3"; and ranking them if it had to come down to picking one. The Supreme Court held that (1) the case raised a federal question even though it was unable to ascertain if Georgia's unelaborated judgment might possibly have rested on an independent state ground; and (2) the Georgia decision that Foster failed to show

purposeful discrimination was clearly erroneous.

Betterman v. Montana, 136 S. Ct. 1609

Betterman missed a court date on a domestic assault charge. He turned himself in and was sentenced to 5 years imprisonment on that charge. He was also charged with bail jumping, to which he pleaded guilty, but was not sentenced for over 14 months. In the interim, he was kept at a local jail so he was denied early release and programs offered only in prison. He made repeated requests to be sentenced, which the trial judge refused to do. When eventually sentenced on the bail jumping charge, he received an additional 7 year sentence. The Supreme Court rejected the Sixth Amendment speedy trial claim: "[B]etween conviction and sentencing, the Constitution's presumption-of-innocence-protective speedy trial right is not engaged." The Court left open the possibility that a defendant who suffers inordinate delay "may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." However, no due process claim was raised here so the majority expressed no opinion but wrote in a footnote that relevant considerations for such a claim "may include the length of and reasons for the delay, the defendant's diligence in requesting expeditious sentencing, and prejudice." The majority also "reserve[d] the question [of] whether the Speedy Trial Clause applies to bifurcated proceedings in which, at the sentencing stage, facts that could increase the prescribed sentencing range are determined" as well as the question of "whether the right reattaches upon renewed prosecution following a defendant's successful appeal, when he again enjoys the presumption of innocence."

Torres v. Lynch, 136 S. Ct. 1619

The question was whether attempted third-degree arson in NY is an aggravated felony that makes the petitioner ineligible for cancellation of removal. The majority held that a state offense counts as a §1101(a)(43) “aggravated felony” when it has every element of a listed federal crime except one requiring a connection to interstate or foreign commerce; state crimes do not require a jurisdictional hook.

Lynch v. Arizona, 136 S. Ct. 1818

When the state has put a capital defendant’s future dangerousness at issue and acknowledged that the only possible sentence besides death is life imprisonment without parole, the defendant has a right to inform the jury of that fact, and the Arizona Supreme Court erred in holding to the contrary.

Kernan v. Hinojosa, 136 S. Ct. 1603

Because the Supreme Court of California’s summary denial of Antonio Hinojosa’s petition for federal habeas relief was on the merits, the Ninth Circuit should have reviewed Hinojosa’s ex post facto claim through deferential, rather than de novo, review, as mandated by AEDPA.

JUNE

Puerto Rico v. Sanchez-Valle, 136 S. Ct. 1863

– The Commonwealth of Puerto Rico indicted Defendants for illegally selling firearms in violation of Puerto Rican law. While those charges were pending, the defendants were also indicted by a federal grand jury for violations of analogous federal gun trafficking statutes. Both defendants pleaded guilty to the federal charges and moved to dismiss the pending Commonwealth charges on double jeopardy grounds. The Puerto Rican courts dismissed

the charges, finding that Puerto Rico’s gun sale prosecutions violated double jeopardy. The Government appealed. The Supreme Court concluded that the Commonwealth’s prosecution violated the double jeopardy clause. The Court’s analysis turned on the fact that the prosecutorial powers of the two jurisdictions, rather than having independent origins, derived from the same “ultimate source,” the U.S. Congress. Because Congress conferred on Puerto Rico the power to create its Constitution, which in turn conferred the authority to bring criminal charges in the Commonwealth, this made Congress the original source of power for Puerto Rico’s prosecutors. Therefore, because the original source of power for both Puerto Rico’s prosecutors and the Federal Government’s prosecutors derived from the same ultimate source, Puerto Rico and the United States are not separate sovereigns for double jeopardy purposes and cannot bring separate prosecutions.

United States v. Bryant, 136 S. Ct. 1954

Title 18, Section 117(a) makes it a federal crime for any person to commit a domestic assault within Indian country after having sustained at least two prior convictions for domestic violence in federal and state court, as well as in Indian tribal court proceedings. The defendant, who had multiple prior tribal court convictions for domestic assault, challenged his conviction under § 117(a), arguing that using uncounseled tribal court convictions to convict him of a federal felony offense violated his Sixth Amendment right to counsel. But, as the Supreme Court noted, the Indian Civil Rights Act (ICRA) provides that, in tribal court, a sentence of imprisonment of up to one year may be imposed without according indigent defendants the right to appointed counsel. The defendant’s qualifying prior convictions, which all resulted in sentences

of less than one year, complied with ICRA and were valid when entered. The defendant's current sentence under § 117(a) punishes his most recent act of domestic violence, not his prior crimes prosecuted in tribal court. He was denied right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was adjudicated guilty of a felony offense carrying greater than one year in prison. Therefore, the Court held that use of those tribal court convictions as predicate offenses in a § 117(a) prosecution did not violate the Sixth Amendment.

Utah v. Strieff, 136 S. Ct. 2056

Applying the attenuation doctrine from *Brown v. Illinois*, 422 U.S. 590 (1975), the Supreme Court found that a police officer's discovery of a valid, pre-existing arrest warrant attenuated the connection between the officer's unlawful investigatory stop and the drug-related evidence seized from the defendant during a subsequent search incident to arrest. Operating on an anonymous tip about drug activity at a local residence, a narcotics detective observed numerous people coming and going from the house. The detective stopped Strieff after observing him leaving the house and asked Strieff what he was doing at the house. The detective also asked to see Strieff's identification. Upon relaying Strieff's identification information to a police dispatcher, the detective learned that Strieff had an outstanding arrest warrant. The detective arrested Strieff, searched him, and found drugs and drug paraphernalia. Strieff attempted to suppress the evidence, arguing it was derived from an unlawful investigatory stop. The Supreme Court found that, although the illegal stop was close in time to Strieff's arrest, the unlawfulness of the stop was attenuated by a valid, outstanding arrest warrant that

predated the detective's investigation and was unconnected to the stop. According to the Court, "[t]he discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling [the detective] to arrest Strieff." Furthermore, the detective's decision to initiate the stop was unlawful because he lacked a sufficient basis for the stop, but that the detective's misconduct was neither purposeful, nor flagrant. Accordingly, the Court concluded that the evidence should not have been suppressed.

Taylor v. United States, 136 S. Ct. 2074

The Supreme Court granted certiorari to resolve a circuit conflict regarding what the Government must prove to satisfy the Hobbs Act commerce element when a defendant commits a robbery that targets a rival drug dealer's drugs or drug proceeds. The Court resolved the split by concluding that a Hobbs Act robbery prosecution satisfies the Act's commerce element if the Government shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds, even where the defendant's conduct, in and of itself, neither directly affected, nor threatened commerce. All that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect on commerce. Thus, according to the Court, "[a]s long as Congress may regulate the purely intrastate possession and sale of illegal drugs, Congress may criminalize the theft or attempted theft of those same drugs." Here, the Government met its burden by introducing evidence that the defendant's gang intentionally targeted drug dealers to obtain illegal drugs and drug proceeds. Such proof, the Court found, was sufficient to meet the commerce element of the Hobbs Act.

Birchfield v. North Dakota, 136 S. Ct.

2160 The Supreme Court granted certiorari to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test (either breathalyzer or blood test) measuring the alcohol in their bloodstream. The Court concluded that police do not need a warrant before they administer a breathalyzer test to motorists arrested for drunk driving under the search-incident-to-arrest exception to the Fourth Amendment, but that they do need a warrant before taking a blood test because blood draws are significantly more intrusive than breath tests.

Mathis v. U. S., 136 S. Ct. 2243

In order to determine whether a prior offense is a qualifying prior for purposes of applying the Armed Career Criminal Act (“ACCA”), courts compare the elements of the prior offense with the elements of the “generic” version of the listed offense to see if those elements are the same as, or narrower than, those of the generic offense. In *Mathis*, the Supreme Court considered whether the ACCA makes an exception to that rule when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one or more of its elements. It declined to find such an exception. *Mathis* involved an Iowa burglary statute which was broader than generic burglary of a dwelling because it punished unlawful entry into any building, structure, *or land, water, or air vehicle*. As the Court pointed out, the listed locations were not alternative elements, but rather alternative means of satisfying a single locational element. These alternative factual scenarios remain off-limits to judges imposing ACCA enhancements. The sentencing court may only ask whether the elements of state crime and generic offense match. It may not decide

which of the alternative means was at issue in the prosecution.

McDonnell v. U. S., 136 S. Ct. 2355

Former Virginia governor Robert McDonnell and his wife were convicted of honest services fraud and Hobbs Act extortion charges related to their acceptance of \$175,000 in loans, gifts, and other benefits from the owner of Virginia business Star Scientific in exchange for McDonnell’s assistance in helping Star Scientific secure scientific research studies at publicly funded universities in Virginia. The “official acts” relied on by the government to prove the fraud were arranging meetings, hosting events, and contacting other government officials on behalf of Star Scientific. The Supreme Court granted certiorari to clarify the meaning of “official act” and held that an “official act” requires that a public official make a decision or take action (or agree to do so) on a question or matter pending before the public official. The question or matter must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is pending or may by law be brought before the public official. Setting up a meeting, talking to another official, or organizing an event does not, without more, constitute an “official act” under the honest services fraud statute.

Voisine v. United States, 136 S. Ct. 2272

Under 18 U.S.C. § 922(g)(9), any person convicted of a misdemeanor crime of domestic violence is prohibited from possessing a gun or ammunition with a connection to interstate commerce. A crime of domestic violence is defined as a misdemeanor committed by a person with a

specified domestic relationship with the victim that “has, as an element, the use or attempted use of physical force.” 18 U.S.C. § 921(a)(33)(A). The Supreme Court previously held that the knowing and intentional application of force satisfied the definition of crime of domestic violence under § 921(a)(33)(A), but expressly left open the question of whether a reckless assault also qualified as a “use” of force so that a misdemeanor conviction for such conduct would trigger § 922(g)(9)’s firearms ban. Here, the Supreme Court resolved that question affirmatively, holding that “use” of physical force in § 921(a)(33)(A) encompasses acts of force undertaken recklessly, *i.e.*, with conscious disregard of a substantial risk of harm. This, according to the Court, included misdemeanor assault statutes covering reckless conduct.

Williams v. Pa., 136 S. Ct. 1899

Under the Due Process Clause, there is an impermissible risk of actual bias when a judge who, as a district attorney, gave approval to seek the death penalty against an inmate, failed to recuse himself and participated in the judicial decision to reinstate the inmate’s death sentence after inmate was granted post-conviction relief.

NOVEMBER

Bravo-Fernandez v. U. S., 137 S. Ct. 352

Issue preclusion under the Double Jeopardy Clause does not bar retrial when the jury returned irreconcilably inconsistent verdicts of conviction and acquittal, but the convictions were later vacated for a legal error not connected to the inconsistent verdicts. Petitioners were convicted of bribery in violation of 18 U.S.C. § 666, but were acquitted of conspiring to violate §666 and traveling in interstate commerce in furtherance of the §666 violation. The

convictions were later overturned on appeal due to jury instruction error. Specifically, the appellate court determined that the jury had not received proper instructions on what constituted criminal conduct under the statute. Petitioners argued on remand that they could not be retried on the count that they were convicted on because the acquittals on the other counts showed the jury believed they were not guilty. The Supreme Court found that the inconsistent verdicts made it impossible to determine the reasons for the jury’s decisions or what it would have done without the instructional error, thus issue preclusion did not apply and the defendants could be retried. Moreover, the verdict had not been vacated due to insufficient evidence, which would have precluded retrial, nor had the trial error explained or reconciled the inconsistent verdicts. The acquittals remained in place, and those issues could not be retried.

DECEMBER

Salman v. U.S., 137 S.Ct. 420

Is evidence of a close family relationship sufficient to sustain a conviction for insider trading, or must there be evidence that the individuals knew there would be financial gain through the exchange of information? The Court unanimously affirmed the appellate court’s judgment and held that a close family relationship was sufficient evidence to sustain a conviction for insider trading. A person commits insider trading when they know that the person who made the tip stands to benefit from disclosing insider information. A personal benefit may be inferred where there is a personal relationship involved, such as one between a family member or friend, because of the likelihood that the person being tipped will return the favor.

Shaw v. U.S., 137 S.Ct. 462

To convict a defendant of defrauding a financial institution under the Bank Fraud Act of 1984, the government does not need to prove that the target of the deception was a bank. The Court unanimously held that the statute at issue (18 U.S.C. §1344(1), which makes it a crime to "knowingly execut[e] a scheme . . . to defraud a financial institution.") deals specifically with property rights, and a bank has property rights in a bank account because the bank has the right to use the funds as a source of funds for loans that earn the bank interest. Therefore, any scheme that involves defrauding the funds from a bank account necessarily involves defrauding a bank. Although the statute requires that the government show there was a scheme to defraud, it does not require the government to show that the bank actually sustained a financial loss or that the intent of the scheme was to cause the bank to sustain a financial loss. Similarly, the defendant cannot argue that he didn't have actual knowledge that the bank would be harmed.

2016 THIRD CIRCUIT CASES

JANUARY

U.S. v. Moreno, 809 F.3d 766

Applying plain-error review, the Third Circuit vacated a sentence because the defendant's right of allocution was violated when the court permitted the prosecutor to vigorously cross-examine the defendant during his allocution. The Court found (1) the error was plain even though "no previous cases have explicitly proscribed cross-examination during allocution," because cross-examination was clearly contrary to the purpose of allocution; (2) even if the error were not plain, the court would still exercise its supervisory power to hold that defendants may not be cross-examined during allocution; and (3) although allocution error is presumed prejudicial on plain-error review, here there was evidence of actual prejudice. The conviction was affirmed: although it violated the Confrontation Clause for a witness-cooperator to read into the record portions of a memo written by a federal agent about his proffer sessions, the error was harmless. A sentencing enhancement for more than 50 victims under U.S.S.G. § 2B1.1(b)(2)(B) was also affirmed.

MARCH

United States v. Steiner, 815 F.3d 128

Initially, the Third Circuit agreed with the Appellant that introduction of evidence regarding an arrest warrant on an unrelated matter was erroneous because it was not proper "background" evidence under Federal Rule of Evidence 404(b), as the arrest warrant was not connected to the federal charges and not necessary to the government's case. The appellate court blamed the government for the trial court's

erroneous admission of the evidence, but found ultimately harmless error. Secondly, Appellant argued that the single indictment charging him with possession of firearm and multiple types of ammunition was duplicitous. More specifically he argued that the different types of ammunition should have been charged separately and the jury should have been required to unanimously find which types of ammunition he possessed. The Third Circuit held simultaneous possession of different firearms and types of ammunition are not separate offenses. Thus the indictment was not duplicitous and no curative instruction was necessary.

*vacated and remanded (137 S. Ct. 494)

APRIL

Dellavecchia v. Secretary, PA Dept. of Corrections, 819 F.3d 682

Finding a police officer did not deliberately elicit statements from the defendant immediately after his bedside arraignment at a hospital, the Third Circuit held there was no Sixth Amendment right to counsel violation. The officer simply listened to the defendant's "spontaneous and unsolicited statement[.]" Moreover, the purpose of the hospital visit was not to question the defendant, but to assist in the bedside arraignment. Though *Miranda* warnings were not provided, the court found that the officer's warning to the defendant that anything he said could be used against him further supported the conclusion that he did not elicit any statements. The Third Circuit further held that even if the lower court erred by not excluding the defendant's statement, the overwhelming evidence of guilt rendered the error harmless.

United States v. Lopez, 818 F.3d 125

The Third Circuit ruled the government's impeachment of the defendant with his post-

Miranda silence met all four prongs of the plain error test. The defendant did not assert he had been framed until trial. Cross-examining the defendant, the government repeatedly asked the defendant whether he told anyone the police framed him prior to trial, inviting the jury to infer that the assertion was a fabrication. The government argued this in its summation too. This strategy violated *Doyle v. Ohio*, 426 U.S. 610 (1976), and was an error that was clear or obvious, thereby satisfying the first two prongs of the plain error test. It also met the third prong. It affected the defendant's substantial rights, meaning that there was a reasonable probability that it affected the outcome of the case, which "depended entirely" on the defendant's credibility. Finally, the court found the government's conduct so blatant, that the *Doyle* violation impeded the "fairness, integrity, and reputation of judicial proceedings."

MAY

U.S. v. Vasquez-Algarin, 821 F.3d 467

Officers entering a dwelling to arrest someone must at least have probable cause to believe the person is there. Law enforcement officers need both an arrest warrant and a search warrant to apprehend a suspect at what they know to be a third party's home. If the suspect resides at the address in question, however, officers need only an arrest warrant and a "reason to believe" that the individual is present at the time of their entry. The court joined four other circuits in interpreting reasonable belief as at least functionally equal to probable cause. The seized evidence was suppressed because the good-faith exception to the exclusionary rule was inapplicable.

U.S. v. Nerius, 824 F.3d 29

Nerius was sentenced to a bottom-of-the-

range 37 months as a career offender following conviction for impeding correctional employees and damaging property within prison. On *Johnson* remand, Nerius was resentenced to 36 months, the top of the non-career offender range. The new sentence did not trigger a presumption of judicial vindictiveness nor violate due process under *North Carolina v. Pearce*, 395 U.S. 711 (1969), because the *Pearce* presumption does not apply when the new sentence is less than that originally imposed. The Court found the fact that the two sentences fell in different -in this case opposite- relative positions within the original and revised Guideline ranges to be irrelevant. Absent the presumption, an appellant must demonstrate "proof of actual vindictiveness" to support a claim of judicial vindictiveness. Nerius did not raise a claim of actual vindictiveness.

U.S. v. Kelly, 650 Fed.Appx. 136

In an unusual dissent from denial of rehearing in a non-precedential opinion, four judges questioned whether jury instructions in a drug-conspiracy case unjustly expose mere purchasers to criminal liability as conspirators. Judge McKee explained that the Court's "current approach to informing jurors how to distinguish between a purchaser from a drug conspiracy and a member of that conspiracy is so meaningless that it presents the illusion of an objective standard while furnishing no guidance to jurors who must make this crucial distinction . . . Although some of our factors may be relevant to this inquiry, the irrelevant factors I discuss below create the very real danger of placing a thumb on the conspiratorial side of the scale and thereby tipping the balance in favor of a conviction for conspiracy when only a buyer-seller relationship has been established."

JUNE

United States v. Thompson, 825 F.3d 198

United States Sentencing Guidelines' Amendment 759, which amended the Application Notes to U.S.S.G. §1B1.10 to make clear that a defendant's "applicable guideline range" is to be determined *before* any departures or variances, is not an *ex post facto law* and, therefore, does not apply retroactively.

United States v. Dennis, 826 F.3d 683

District Court erred in failing to give entrapment instruction where defendant established inducement and raised reasonable doubt as to his predisposition to commit the charged Hobbs Act robbery and firearms offenses. On the inducement prong, the defendant, who was the target of reverse sting operation by the ATF, had no known connections to the crimes the ATF was investigating at the time and was only targeted after the Confidential Informant (CI) was asked to identify people he knew who were involved in robberies. Moreover, the CI's personal relationship with the defendant allowed the CI to appeal to the defendant's sympathies based on the story of the CI's sick mother whom the defendant knew. Finally, the CI continued to play an active role in the scheme, shepherding the defendant through the process. As for lack of predisposition, the Court found that the defendant presented enough evidence to create reasonable doubt on predisposition. It further found that the district court erred by impermissibly weighing the competing evidence regarding predisposition and by improperly drawing inferences against the defendant on the robbery and firearms charges. Thus, the Court reversed the defendant's conviction and sentence on the Hobbs Act robbery and firearms counts and remanded for a new trial.

JULY

U. S. v. Napolitan, 830 F.3d 161

The Third Circuit held that a defendant cannot collaterally challenge a state court sentence as part of a federal sentencing challenge unless (1) he is raising a *Gideon* violation or (2) the applicable federal statute or sentencing guideline directly permits the collateral attack. In reaching this decision the appellate court looked at the precedent established in *Custis v. United States*, 511 U.S. 485 (1994), where the Supreme Court held that a defendant cannot collaterally attack a state conviction through an appeal of a federal sentence. The circuit court explained that it was illogical to allow a collateral attack on a state sentence via an appeal of a federal sentence, when similar collateral attacks on state convictions are prohibited. Additionally, the Third Circuit noted that all other circuit courts addressing this issue have reached the same conclusion, barring collateral attacks of a prior state sentence in a federal sentencing appeal. Finally, the appellate court reasoned that there were other ways for the appellant to challenge the state sentence including filing a habeas petition.

U. S. v. Calabretta, 831 F.3d 128

First, the Third Circuit held that the residual clause in §4B1.2 was unconstitutionally vague for the same reasons the Supreme Court invalidated ACCA's. In this case, eluding would only qualify as a crime of violence under the residual clause, a fact the government conceded. Therefore, eluding in the second degree was not a crime of violence under the guidelines. Appellant's career offender status and past record were a major factor in his initial sentence. Not only did the career offender status greatly increase his sentencing range, it also made him ineligible for a sentence reduction

following the amendment to the guideline drug tables. Therefore, despite a large variance in the initial sentence, it was plain error that affected his substantial rights.

United States v. Menendez, 831 F.3d 155

First, conduct alleged against Senator Menendez was not protected by the Speech and Debate Clause. The privilege only protects individuals from indictment for legislative activities. The conduct alleged against Senator Menendez was not “manifestly legislative nor clearly non-legislative” but rather “ambiguously legislative.” This requires courts to make an extremely fact specific inquiry by looking at the content, purpose and motive of the conduct. For purposes of reviewing a motion to dismiss the Indictment, the Third Circuit accepted as true the factual allegations in the Indictment. Under this standard, the appellate court found sufficient evidence that the Senator’s acts were not legislative in nature, but were made on behalf of a particular party, and thus not privileged. Second, denial of motion to change venue can only be challenged through a request for a petition of a writ of mandamus, not as a direct appeal. Senator waived the issue by not addressing it in his opening brief. Third, the Ethics Act does not violate separation of powers among the branches of government.

Doe v. Hesketh, 828 F.3d 159

A victim of child pornography is not collaterally estopped from seeking civil damages under 18 U.S.C. § 2255, simply because a defendant has already paid criminal restitution

AUGUST

United States v. Rengifo, 832 F.3d 220

The Third Circuit addressed the issue of whether “term of imprisonment” is

synonymous with “sentence of imprisonment” for purpose of applying the career offender Guidelines. Defendant argued that his 1999 conviction did not count as a prior felony conviction under §4A1.2(e) because it was not a “sentence of imprisonment exceeding one year and one month.” Section 4A1.2(k) instructs that in parole revocations, the original “term of imprisonment” should be added to any “term of imprisonment” imposed upon revocation. Defendant argued that the original term of imprisonment was only 71 days, which, when added to the 294 imposed upon the subsequent revocations, did not add up to a sentence exceeding one year and one month. The government argued that the original sentence was the maximum imposed, *i.e.*, one year, which would result in a term of longer than one year and one month. The Court looked to the language of Application Note 11 to §4A1.2(k), which instructs, “[r]ather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence.” The Court considered the Note’s reference to “original term of imprisonment” a “strong indication that ‘sentence of imprisonment’ and ‘term of imprisonment,’ the latter of which is used in §4A1.2(k), are interchangeable.” The Court further noted that the “terms are found in close proximity throughout the career offender guidelines and in notes accompanying the section.” The Court thus concluded that the prior conviction was correctly counted as a qualifying predicate for the career offender guideline.

United States v. Stevenson, 832 F.3d 412

On appeal, defendant argued that the district court should have dismissed the indictment

with prejudice based on the violation of his Speedy Trial rights. He also argued that the indictment failed to allege all elements of fraud in relation to identification documents, and he appealed the District Court's denial of his motions to suppress, the propriety of the district court's conduct at trial, and the reasonableness of his 360-month sentence. The Speedy Trial Act requires that a trial start "within seventy days from the filing date (and making public) of the information or indictment." When a Speedy Trial Act violation is found, the court may dismiss the indictment with or without prejudice, depending on three factors: seriousness of the offense; reason for the delay; and administration of justice. The Court found a Speedy Trial violation, but dismissed the indictment without prejudice. In weighing the relevant factors, it found that the offense was serious, that the delay was largely due to the repeated delays and chaotic nature of the litigation (which it blamed on the 8 defendants, finding that any government contribution was relatively innocent and harmless), and no prejudice to the defendant from the delay. The Court also addressed what it called a "close case" of sufficiency of the indictment on fraud in relation to identification documents. The Court found an implied reference to interstate commerce in the indictment's description of interstate activity. But it found that any failure would have been harmless (and applied harmless error review here, based on Supreme Court guidance in analogous circumstances).

United States v. Miller, 833 F.3d 274

Addressing the definition of "investment advisor" under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-2(a)(11) for the first time, the Court found that the defendant was an investment advisor and that the district court properly applied the investment advisory enhancement under the

Sentencing Guidelines, which adopts the statutory definition of "investment advisor" as "any person who, for compensation, engages in the business of advising others" on investments. The Court rejected the defendant's argument because he admitted to providing personal advice to some investors, which could be considered by the court as relevant conduct. The Court also found he was "'in the business' of providing securities advice because he held himself out as a person who provides investment advice" to investors. The Court concluded his conduct "was exactly the type that is contemplated under the investment adviser enhancement." The Court also found the defendant provided securities advice "for compensation," as required by the Act. Based upon his advice, investors bought his company's promissory notes. Thus, the principal they provided became defendant's compensation when he commingled investors' accounts and used the money for his own purposes. The Court also rejected the defendant's argument that the enhancement was not applicable because he was not registered as an "investment adviser," but as an "investment adviser representative." The Court also found that the government had not breached the plea agreement and that the sentence was substantively reasonable.

SEPTEMBER

U.S. v. Adeolu, 836 F.3d 330

The Third Circuit affirmed application of the vulnerable-victim enhancement in U.S.S.G. § 3A1.1(b)(1) to a tax preparer who had his clients claim false dependents and used the personal information of young children to do so. The Court determined that harm is encompassed within the analysis of the nexus between a victim's vulnerability and the crime's success wherein a court can

assess whether a victim has been “taken advantage of” in a manner that facilitates the defendant's scheme. Actual harm is inconsequential to this analysis. § 3A1.1 is targeted at “defendants [who] know or should know of their victim's particular vulnerability and are therefore more blameworthy for knowingly or even negligently harming them.” “But a defendant is not more or less blameworthy for the purposes of this enhancement based on the amount of harm that a victim experiences. Applying the enhancement in such a manner would create a disparity in the punishments for defendants who are more successful (and cause more harm) and those who are less successful.” Here, the “nexus” between the victims’ vulnerability and the success of the scheme was established because (1) youth gave rise to their vulnerability: children are unable to guard against theft of personal information; and (2) Adeolu knew the ages of the victims were integral to qualifying as dependents on the fraudulent returns.

U.S. v. Fulton, 837 F.3d 281

The trial court committed obvious errors by admitting two police officers’ lay-opinion testimony, but that the errors were harmless in light of other proof of the defendant’s guilt. In order for lay-opinion testimony to be admissible under FRE 701, it must be (among other things) helpful to the jury. The Third Circuit held that one officer’s testimony interpreting phone records was not helpful because it was “dead wrong and even misleading.” Other testimony about whether two people looked alike was not helpful because the officers were not sufficiently familiar with the people they were discussing. The court rejected various other challenges including: plain error review of prosecutorial misconduct during closing arguments regarding GPS tracking

evidence prosecutors are given wide latitude and the error claimed here was simply that the prosecutor inaccurately ascribed precision to certain ambiguous testimony

OCTOBER

United States v. Free, 839 F.3d 308

On appeal, the Third Circuit grappled with the question of how to calculate “loss” under the Sentencing Guidelines when a defendant commits bankruptcy fraud but all of his creditors receive payment in full. Defendant Free filed for bankruptcy even though he had more than sufficient assets to pay his debts. He then hid assets worth hundreds of thousands of dollars from the Bankruptcy Court. Free was convicted of multiple counts of bankruptcy fraud. At sentencing, Free argued that there were no victims and no loss for Guidelines purposes because every creditor received 100 cents on the dollar in the bankruptcy proceedings. The district court calculated the loss, at the Government’s suggestion, based on the value of the assets concealed from the bankruptcy court on the theory that concealment of assets can harm creditors and harms the integrity of the judicial system. The Third Circuit reversed, holding that “loss” under the Guidelines is not broad enough to cover injuries like abstract harm to the judiciary but is, instead, limited to pecuniary harm suffered by or intended to be suffered by the victims of the fraud. Thus, the Government is not entitled to a punitive loss calculation, even in cases involving fraud, absent evidence of actual or intended pecuniary loss. Accordingly, the Third Circuit vacated the district court’s loss calculation and remanded to allow the district court to determine what, if any, loss to creditors Free intended, or the gain he sought by committing the crime.

United States v. Elonis, 841 F.3d 589

Defendant Elonis' case appeared back in the Third Circuit on remand from the U.S. Supreme Court, which held that, as a matter of statutory interpretation, a conviction under 18 U.S.C. § 875(c), transmitting a threat to injure another person in interstate commerce, cannot be based solely on an objective standard (whether a reasonable person would have perceived the words as a true threat). Instead, according to the Supreme Court, there must be a mens rea requirement greater than negligence. While the Supreme Court refused to address whether a mens rea of recklessness would be sufficient, it wrote that the jury should have been instructed that Elonis could be convicted if it found he "transmitted a communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat." On remand, the Third Circuit found that the trial court's instruction containing the objective standard was harmless error because the Government had produced evidence beyond a reasonable doubt that the defendant knew his communications (primarily in the form of song or rap lyrics) would be viewed as a threat and an objective person would view the communications as a threat. For the conviction based on posts discussing his ex-wife, the Third Circuit noted that Elonis continued to make similar postings even after a hearing where his ex-wife described the Facebook posts as threatening. For the convictions based on posts discussing state police, elementary schools, and FBI agents, the Third Circuit reasoned that because Elonis knew that posts containing very similar lyrics discussing his former co-workers had made them feel threatened, that he knew these particular posts would make other people feel threatened as well.

United States v. Bailey, 840 F.3d 99

The Third Circuit affirmed convictions for violent heroin drug trafficking activities. Although the Court found that the district court violated Fed. R. Evid. 403 when it admitted video of a drug-trafficking related murder and assault, the Court held the error harmless given the overwhelming amount of other evidence of guilt. The evidence was sufficient to prove all four defendants were members of a violent heroin trafficking conspiracy, as opposed to mere buyers, because the large scale transactions and accumulation of deals suggested trust and organization, there was regular delivery of drugs on credit, and three of the defendants sometimes served as lookouts for the organization. The evidence was also sufficient to prove all four defendants guilty of possessing, using or carrying firearms in furtherance of a drug trafficking conspiracy. The government established that each defendant either committed the substantive offense or met the *Pinkerton* standard for co-conspirator liability. All four defendants were aware of numerous drug-related shootings done by the organization, saw firearms in trap houses, and knew the organization used armed enforcers. The district court properly denied the defendants' motion to suppress evidence obtained as a result of Title III wiretaps. The government established the necessity of the wiretaps by laying out in a detailed affidavit how traditional investigative techniques, such as controlled drug purchases through confidential informants, listening to prison calls by incarcerated organization members, and physical surveillance were insufficient to reveal the full scope of the conspiracy. The district court committed Rule 403 error when it allowed the government to introduce a video to prove a murder of a rival drug dealer by the brother of the head of the organization. Although the non-video

evidence offered about the murder was admissible, the surveillance video was brutal and highly disturbing, and was not necessary to establish the government's stated purpose in seeking its admission. The district court also failed to conduct the requisite Rule 403 balancing. However, the error was harmless because the evidence was overwhelming. The Court also rejected a parallel Rule 404(b) argument, because that rule only applies to prior bad acts by the defendant, not by third parties. The Court rejected other Rule 403 and Rule 404(b) challenges, as well as the district court's decision to deny defendants' requests for a mistrial based on inflammatory statements made by witnesses at trial. These statements were relatively isolated, and did not outweigh the abundance of evidence pointing to the defendants' guilt.

NOVEMBER

U. S. v. Henderson, 841 F.3d 623

Pennsylvania's Controlled Substance Act is a divisible statute because it addresses different elements of an offense, not different means of committing the same offense. Applying the three tests set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Third Circuit ruled that the statute found under 35 Pa. Stat. Ann. §780-113(f) was divisible because the drug schedules were different elements, not different means. More specifically, under the *Mathis* means/elements tests, the circuit found: (1) State courts had already held that drug type was an element of the offense, not separate means of committing the offense; (2) the drug schedules were not "illustrative examples", but rather the different drug types carried different sentences; (3) a review of the record supported a finding that the different drug schedules were elements of the offense, not separate means of

committing the offense. The Third Circuit further noted that in properly conducting a means versus elements determination, courts may consider a variety of documents including charging instruments, plea forms, sentencing orders and conviction documents; courts are not limited to the conviction documents. Since the statute is divisible, the district court properly applied the modified categorical approach in finding that defendant's priors qualified as serious drug offenses under ACCA.

Baptiste v. A.G., 841 F.3d 601

The Third Circuit joined the Sixth, Seventh, Ninth and Tenth Circuits in holding that the residual clause in 18 U.S.C. § 16(b) is void for vagueness. Specifically, the Court held, "because the two inquiries under the residual clause that the Supreme Court found to be indeterminate [in *Johnson v. United States*, 135 S. Ct. 2251 (2015)] – the ordinary case inquiry and the serious potential risk inquiry – are materially the same as the inquiries under § 16(b), § 16(b) is unconstitutionally vague."

DECEMBER

United States v. Robinson, 844 F.3d 137

The defendant was convicted of Hobbs Act robbery and of brandishing a firearm during a crime of violence (the Hobbs Act robbery). The Circuit held that the categorical approach, which directs a court to look only at the elements of the particular offense of conviction to determine whether it qualifies as a crime of violence, does not apply when an 18 U.S.C. § 924(c) conviction is contemporaneous with the conviction for a crime of violence. It concluded that "when, as here, the two offenses, robbery and brandishing a gun, have been tried together and the jury has reached a guilty verdict on both offenses, the Hobbs Act robbery

qualifies as a crime of violence under the ‘elements clause’ of 18 U.S.C. § 924(c)(3)(A).” The categorical approach does not apply because the record of all necessary facts are before the district court. “The jury’s determination of the facts of the charged offenses unmistakably shed light on whether the predicate offense was committed with ‘the use, attempted use, or threatened use of physical force against the person or property of another.’” Also, the Circuit considered the language of the Hobbs Act robbery statute in conjunction with the brandishing conviction under § 924(c). The Court said that looking at a contemporaneous conviction allows a court to determine the basis for a defendant’s predicate conviction and the defendant suffers no prejudice because the court is not finding any new facts which are not already of record. The Court also affirmed the denial of defendant’s suppression motion, finding the photo array used to identify him was not unduly suggestive, and held that defendant’s right to self-representation was not denied by the district court’s failure to hold a *Farretta* hearing. The Court remanded the case to the district court to determine whether the career offender provision applied.

United States v. Galati, 844 F.3d 152

Defendant was convicted of using interstate commerce facilities in the commission of a murder-for-hire, in violation of 18 U.S.C. § 1958, and discharging a firearm during a crime of violence (the murder-for-hire). Applying the analytical framework announced in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016), the Circuit framed the question as whether a § 1958 violation which results in personal injury and during which a firearm is discharged is a crime of violence. The Court concluded that the “discharge of a firearm, coupled with

resulting personal injury, qualifies as a use of physical force” and that defendant therefore committed a crime of violence as defined in § 924(c)(3)(A).” The Circuit did not address the challenge to the residual clause in § 924(c)(3)(B).