

THIRD CIRCUIT & SUPREME COURT CRIMINAL CASE LAW DIGESTS

COMPILATION

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JANUARY

Whitfield v. United States, 135 S. Ct. 785
Whitfield, fleeing a botched bank robbery, entered a 79-year-old victim's home and guided the terrified victim from a hallway to a room only a few feet away, where she suffered a fatal heart attack. He was convicted, among other things, of violating 18 U.S.C. § 2113(e), which establishes enhanced penalties, 10 years minimum to life maximum, for anyone who "forces any person to accompany him without consent of such person" in the course of committing or fleeing a bank robbery. The Court rejected the defendant's argument that the harsh penalties militate in favor of interpreting the term *accompanying* to require "movement over a *substantial distance*." It held that a bank robber forces someone to *accompany* him when he "forces that person to go somewhere with him, even if the movement occurs entirely within a single building or over a short distance."

Christeson v. Roper, 135 S. Ct. 891
The Supreme Court reversed the lower court's holding denying an indigent death row inmate's motion to substitute counsel under 18 U.S.C. § 3599(e). *See Martel v. Clair*, 132 S. Ct. 1276, 1281 (2012) (§3599 entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings). The court appointed attorneys missed the deadline for filing the habeas petition. The defendant's best strategy then was to argue for equitable tolling based on his attorneys' omission. The attorneys would have a significant conflict of interest because it would require them to acknowledge their

error. According to the Court, a death row inmate's counsel should be substituted when it is "in the interest of justice." A court of appeals should consider the following factors in reviewing a district court's denial of a death row inmate's motion to substitute counsel: the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client. The Court admonished the lower courts for failing to recognize that the attorneys' obvious and significant conflict of interest warranted a substitution of counsel under § 3599(e).

Jennings v. Stephens, 135 S. Ct. 793
Petitioner had applied for habeas relief on his capital murder sentence and prevailed based on two of three claims of ineffective assistance of counsel. The State appealed and petitioner again raised all three theories to defend the writ. The Supreme Court ruled that to defend a decree in a habeas matter, a petitioner does not have to file a cross-appeal or obtain a certificate of appealability in order to defend the judgment granting him relief on alternative grounds. The Court noted that petitioner's reliance on alternative grounds did not grant him more rights or diminish the State's rights under the original judgment.

FEBRUARY

Yates v. United States, 135 S. Ct. 1074
"Tangible object" for the purposes of the Sarbanes-Oxley Act, 18 U.S.C. §1519, refers to an object used to record or preserve

information, not fish. Defendant ordered his crew to throw undersized fish back into the sea during a government wildlife investigation. The Defendant was charged and convicted under the document shredding provision of the Sarbanes-Oxley Act. A person violates that provision if her or she “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object,” with the intent to impede or obstruct an investigation. The 11th Circuit affirmed the conviction. In a 4-1-4 decision, the Court reversed and remanded it to the Circuit. The plurality noted that although dictionary definitions bear consideration in determining the statutory meaning, the Court must also look at the specific context in which the language is used and the statute as a whole. The concurrence focused on narrower grounds, arguing that the Court needed only apply traditional rules of statutory construction: applying the canons *nosctitur a sociis* and *ejusdem generis* to the list of nouns on the statute makes it clear that tangible object refers to things similar to records or documents. The dissent argued that the meaning of “tangible object” was broad but unambiguous. As such, the ordinary meaning—any object capable of being touched—should apply.

MARCH

Woods v. Donald, 135 S.Ct. 1372

Defense counsel, in a state court trial, was not per se ineffective for briefly leaving the courtroom during testimony concerning other defendants. Following a brief recess, petitioner’s attorney did not return on time. The trial court resumed since the attorney had not previously objected to the admission of evidence that was not related to his client. When the attorney returned, the court explained they had only addressed the

evidence he had not objected to and the attorney stated “I had no dog in the race and no interest in that.” Although *United States v. Cronin*, 466 U.S. 648 (1984) guarantees a criminal defendant the right to counsel at all critical stages of his trial, that right has not been extended to testimony about a co-defendant’s actions. Therefore, Petitioner was not eligible for habeas relief.

Grady v. North Carolina, 135 S.Ct. 1368

Requiring recidivist sex offenders to wear tracking devices for purposes of satellite-based monitoring is a Fourth Amendment search. However, the Supreme Court did not reach the issue of constitutionality, remanding the matter for determination if the search was reasonable.

APRIL

Rodriguez v. United States, 135 S.Ct. 1609

Petitioner was stopped for a routine traffic violation. After the detaining officer checked the driver’s licenses of everyone in the vehicle and issued the petitioner a warning for the traffic offense, the officer asked the petitioner for permission to walk his K-9 dog around the vehicle. Petitioner refused and the officer called for backup. The officer detained petitioner for an additional seven to eight minutes until a second officer arrived. The first officer then retrieved his dog from his vehicle and the dog alerted to the presence of drugs in the vehicle and a search of the vehicle revealed methamphetamine. Petitioner moved to suppress the drugs. The District Court denied suppression, ruling that the seven to eight minute delay was an acceptable *de minimis* intrusion on petitioner’s liberty. The Eighth Circuit affirmed. The Supreme Court reversed, holding that, absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the

Constitution's protection against unreasonable seizures. Authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed. Anything that officers do to prolong the traffic stop after those tasks are completed must be supported by reasonable suspicion or they violate the Fourth Amendment. Remanded to the Eighth Circuit to consider whether the detention for the dog sniff was independently supported by reasonable suspicion.

MAY

Henderson v. United States, 135 S.Ct. 1780 - Henderson was arrested for felony distribution of marijuana, and was required to turn over any firearms he owned as a condition of his bail. He ultimately pleaded guilty, and was thus prohibited from possessing any firearms pursuant to 18 U.S.C. § 922(g). Henderson requested that his firearms be transferred to a friend, the FBI refused to do it, and he filed a motion in the district court. The district court held that granting his request would give him constructive possession of the firearms in violation of § 922(g), and the Eleventh Circuit affirmed. The Supreme Court held that a court-ordered transfer of a felon's lawfully owned firearms to a third party does not violate § 922(g), so long as the court is satisfied that the recipient will not give the felon control over the firearms. One way to ensure this result is if the guns are turned over to a firearms dealer independent of the felon's control, for subsequent sale. However, the Court also recognized that a transfer to a person who expects to maintain custody of the guns is permissible, given that the court is satisfied the felon will have no influence over the firearms.

JUNE

Elonis v. United States, 135 S.Ct. 2001 Defendant Elonis posted self-styled rap lyrics on Facebook which contained graphically violent language and imagery about his wife, co-workers, a kindergarten class, and state and federal law enforcement. Despite Elonis' disclaimers that the lyrics were "fictitious" and that he was merely exercising his First Amendment rights, many people who saw the posts viewed them as threatening. Defendant was charged with five counts of violating 18 U.S.C. § 875(c), which makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." Elonis requested the jury be instructed the government had to prove he intended to communicate a "true threat." However, the district court instructed that defendant could be found guilty if a reasonable person would foresee that his statements would be interpreted as a threat. Elonis was convicted on four of the five counts and the Third Circuit affirmed. The Supreme Court held that the jury instruction requiring only negligence in communicating a threat was not sufficient to support a conviction under § 875(c). The statute required a showing that defendant intended to issue threats, or knew that his communications would be viewed as threats. The Court declined to address whether a mental state of recklessness would also suffice.

McFadden v. United States, 135 S.Ct. 2298 - The defendant was convicted of distribution and conspiracy to distribute bath salts, under the Controlled Substances Analogue Enforcement Act. The Supreme Court vacated the conviction because the jury instructions had not required the government to prove sufficient knowledge

under the Analogue Act. The knowledge requirement is met for a controlled substance if the defendant knew the substance was listed on the schedule of controlled substances (some white powder), or if the defendant knew the drug's identity (heroin) even if he did not know its legal status as an analogue. The Analogue Act defines an analogue with three criteria: a substance with chemical structure substantially similar to a controlled substance, which has a substantially similar effect, and which is represented or intended to have that effect on a person. 21 U.S.C. §813. A defendant must know he is dealing with a controlled substance. A defendant can know he is dealing a controlled substance or knew the specific analogue he was dealing with met the three criteria for an analogue, even if he did not know its legal status as an analogue. That the defendant intended the substance for human consumption is not enough proof. Vacated and remanded to see if error was harmless.

Davis, Acting Warden v. Ayala, 135 S.Ct. 2187 - The Supreme Court held that any federal constitutional error that may have occurred by excluding a capital murder defendant's attorney from part of the *Batson* hearing was harmless. Defendant Ayala objected to seven of the prosecution's peremptory challenges as being impermissibly race-based under *Batson v. Kentucky*, 476 U.S. 79 (1986). Out of the presence of the defense, the judge concluded that the prosecution had valid, race-neutral reasons for the strikes. Ayala was convicted of murder and sentenced to death. The California Supreme Court concluded it was an error as a matter of state law to exclude Ayala from the hearings but harmless. The District Court held that even if the proceedings violated federal law, the state court's harmless finding cannot be

overturned because it was not contrary to or unreasonable under 28 U.S.C. § 2254. The Ninth Circuit granted Ayala habeas relief, holding that the *ex parte* proceedings violated the defendant's federal constitutional rights, and that the error was not harmless. The Supreme Court reversed the Ninth Circuit.

Johnson v. United States, 135 S.Ct. 2551

The question was whether possession of a short-barreled shotgun was a "violent felony" for an ACCA enhancement under § 924(e)(1). The courts below found it was a violent felony under the residual clause, in that it "involve[d] conduct that presents a serious potential risk of physical injury to another." 924(e)(2)(B). The Supreme Court ruled the residual clause, which ties risk assessment to the judicially imagined "ordinary case," not real world facts or statutory elements, was unconstitutionally vague. There is no viable principled and objective standard. The existence of some obviously risky crime does not establish the residual clause's constitutionality; it is by definition vague in all its applications. *James* and *Sykes* are overruled. The remainder of the definition of violent felony and the enumerated offense portion remains intact.

Ohio v. Clark, 135 S.Ct. 2173

The introduction at trial of statements a three-year-old boy made to his teachers identifying his mother's boyfriend as the source of his injuries did not violate the Confrontation Clause, when the child did not testify at trial, even though (1) under Ohio law, children under age ten are considered too young to be able to give testimony in court, and (2) Ohio law requires teachers to report evidence of child abuse to law enforcement authorities. Justice Alito ruled that the statements were not

made with the primary purpose of creating evidence for prosecution. The primary purpose was to assist in an ongoing emergency: whether it would be safe to release the boy to his guardian. Though statements given to people other than the police “are much less likely” to be the kind of statements that would be barred under the Confrontation Clause, the Court left open the possibility that some statements to individuals who are not law enforcement officers could raise confrontation concerns. Scalia and Ginsburg accused Alito of trying to undermine *Crawford* and the Court’s sturdy enforcement of the Confrontation Clause. Thomas disagreed with the scope of Alito’s opinion.

Brumfield v. Cain, 135 S.Ct. 2269

The defendant was convicted of murdering an off-duty police officer and sentenced to death. He sought a hearing under *Atkins v. Virginia* to establish he was intellectually disabled, and thus could not be executed. The Supreme Court held that the state trial court’s decision that Brumfield did not present sufficient evidence of mental impairment was an unreasonable determination of the facts, under 28 U.S.C. § 2254(d)(2), and did not address whether refusal to grant expert funding reflected an “unreasonable application of ... clearly established Federal law,” under § 2254(d)(1). The state court determined that Brumfield’s IQ score was not low enough to prove that he had sub-average intelligence and he did not show that his adaptive skills were impaired. The Supreme Court ruled that an IQ test has a margin of error that, if applied to the score in this case, would place Brumfield in the category of sub-average intelligence; therefore, the state court could not definitively preclude the possibility that Brumfield satisfied this criterion, and to hold otherwise was unreasonable.

Additionally, the factual record presented to the state court provided sufficient evidence to question Brumfield’s adaptive skills. Because Brumfield only needed to raise reasonable doubt regarding his intellectual capacity to get an evidentiary hearing, the state court’s decision that Brumfield did not meet that low threshold was unreasonable. Thomas wrote an emotionally charged dissent, which other dissenters called “inspiring” but did not regard some parts as “essential to the legal analysis in this case.”

OCTOBER

Maryland v. Kulbicki, 136 S.Ct. 2

The Supreme Court summarily reversed the Court of Appeals of Maryland for misapplying the *Strickland* standard for ineffective-assistance-of-counsel claims with regard to Comparative Bullet Lead Analysis (CBLA). The Maryland Court had failed to apply the “rule of contemporary assessment of counsel’s conduct,” how ballistic evidence was viewed at the time of the original trial. Instead, it required defense attorneys to predict the demise of CBLA. Counsel is not required to look for a needle in a haystack that might not exist, “poking methodological holes in a then-uncontroversial mode of ballistics analysis.”

DECEMBER

White v. Wheeler, 136 S.Ct. 456

The Supreme Court reasserted that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas relief is only available to a state petitioner if: (1) the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” and (2) the state court’s

ruling “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” It reminded reviewing federal courts that such deference is owed to the state court decision even in a case where a death sentence has been imposed. Here, the state court excused a prospective juror for cause in a capital case on grounds of substantial impairment of ability to impose the death penalty where court found juror was not absolutely certain he could realistically consider the death penalty. This was sufficient, under clearly established federal law, to dismiss the juror. Although the federal judges reviewing the case may have reached a different conclusion if they were presiding over *voir dire*, simple disagreement cannot overcome the two layers of deference owed by a federal habeas court to a state court decision. Accordingly, the Court reversed the decision by the Court of Appeals and remanded for further proceedings.

2015 THIRD CIRCUIT CASES

JANUARY

United States v. Davenport, 775 F.3d 605
The Government and the Defendant entered into a plea agreement that made recommendations about the Guidelines and stipulated to certain conduct, including the amount of drugs involved in the offense. Reference to a possession of a firearm was removed. Over Defendant’s objections, Probation recommended the firearm possession in connection with drug trafficking enhancement pursuant to U.S.S.G. § 2D1.1(b)(1). At the court’s request, the government provided DEA testimony to support the enhancement. The sentencing court ultimately applied the

enhancement, but varied downward on other grounds. In a §2255 motion, Davenport argued his counsel was ineffective for not arguing the government breached the plea agreement by giving proof of the enhancement. The Third Circuit found no breach of the plea agreement and therefore no ineffective assistance of counsel because (1) the government only addressed the enhancement upon instruction from the sentencing court, and in response to defendant’s argument that there was insufficient evidence to connect the gun to the drug offense; and (2) in the plea agreement, the government reserved the right to provide the court with all relevant information in its possession.

United States v. Wright, 776 F.3d 134

At trial, the jury convicted on some counts and acquitted on others. On appeal, the convictions for honest services fraud were vacated and remanded based on *Skilling v. U.S.* and the other convictions were vacated and remanded for potential prejudicial spillover. On remand for retrial, the defendants sought to limit the scope of the retrial to prevent relitigation of issues they viewed as necessarily decided in their favor when the jury acquitted them on several counts (double jeopardy/collateral estoppel), and to bar certain government arguments that they believed would constructively amend the indictment (grand jury clause violation). The district court denied the motion, and the defendants took an interlocutory appeal. The Third Circuit dismissed the appeal for lack of jurisdiction, finding that the district court’s order was neither a collateral order subject to immediate review nor a final order pursuant to 28 U.S.C. § 1291.

Interlocutory review in a criminal matter is rare, but there is a small class of collaterally

appealable orders that can be raised if the claim would be effectively unreviewable after trial. The Third Circuit adopted a test used by most other circuits to determine whether double jeopardy is sufficiently implicated to permit collateral order review: would the claim, if successful, require dismissal of – at a minimum – an entire count? As for constructive amendment, the Third Circuit explained there was no grand jury violation here. *See Midland Asphalt Co. v. United States*, 489 U.S. 794 (1989) (technical or procedural violation “so fundamental that it causes the grand jury to no longer to be a grand jury, or the indictment no longer to be an indictment”). Defendants can raise constructive amendment on direct appeal.

United States v. Georgiou, 777 F.3d 125

Defendant was convicted of conspiracy, securities fraud, and wire fraud for his participation in planned manipulation of the markets of four publicly traded stocks, resulting in more than \$55 million in actual losses. The District Court sentenced him to 300 months imprisonment, \$55 million in restitution and \$26 million in forfeiture. On appeal, the Third Circuit rejected all of Georgiou’s challenges to his conviction and sentence.

First, Georgiou argued that his securities fraud convictions were improperly based on the extraterritorial application of U.S. law. Under *Morrison v. National Australia Bank Ltd.*, Section 10(b) of the Securities Act and Section 10(b)-5 of the regulations implementing the Act, apply to actors who employ manipulative or deceptive devices in two contexts: (1) transactions involving the purchase or sale of a security listed on an American stock exchange, and (2) transactions involving the purchase or sale of any other security in the United States.

561 U.S. 247, 273 (2010). The court held that the purchase and sale of securities issued by U.S. companies through U.S. market makers, acting as intermediates for foreign entities, constitute “domestic transactions” under *Morrison’s* second prong. A transaction is domestic based on where the purchase and sale occurs, not its origination. A transaction is domestic where: (1) the parties incur irrevocable liability to carry out the transaction within the United States, or (2) when title is passed in the United States. Here, the court found irrevocable liability because “at least one of the target stocks was bought and sold through U.S.-based market makers and because some of the target stocks were purchased from entities located in the United States. Unlike securities fraud, wire fraud applies extraterritorially to communications transmitted through interstate or foreign commerce for the purpose of executing a scheme to defraud.

Second, the Third Circuit affirmed the District Court’s denial of a motion for a new trial based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963) and the Jencks Act: that the government suppressed evidence regarding the cooperating witness’ mental health issues, drug use, and statements to the SEC. The Third Circuit held that (1) impeachment evidence is not suppressed where the material was “accessible” to the defendant through other channels; (2) the failure to disclose evidence of a witness’s mental health history and treatment was not material because there was no evidence it affected the reliability of his testimony, or that it was likely to alter the verdict; (3) the failure to produce certain documents did not constitute a *Brady* violation because the documents sought were not material in light of the voluminous record produced at discovery. Georgiou also

failed to identify any statements that were withheld in violation of the Jencks Act.

Third, Georgiou argued that the District Court erred on evidentiary and sentencing issues. Concerning the evidentiary issues, the Third Circuit found that the District Court did not abuse its discretion, finding: (1) testimony by a lay witness, in his capacity as an SEC employee, comparing stock quantities and prices did not violate FRE 701 because it did not require scientific, technical, or specialized knowledge; (2) certain charts were properly admitted because under FRE 1006 a chart can be used to prove the contents of a voluminous writing; (3) testimonial and extrinsic evidence of a witness's post-cooperation fraudulent activities were not improperly excluded based on FRE 608(b) because such evidence was already on the record; (4) denial of Defendant's motion to unseal was proper where it was filed after a notice of appeal was filed with the appellate court.

With respect to sentencing, a district court is not required to consider market forces in its loss calculation. This requirement only applies in civil securities fraud cases. The court refused to extend it to the criminal domain, as other circuits have done. A six-level upward adjustment for 250 or more victims under U.S.S.G. § 2B1.1(b)(2)(C) was not clearly erroneous where an SEC witness identified \$1,918 investor accounts which each lost over \$1,000.

FEBRUARY

United States v. Wright, 777 F.3d 635
Wright appealed the District Court's denial of his motion to suppress evidence gathered from his home when the warrant used did not contain an attached affidavit with the list

of items to be seized. The government's warrant application referred to an attached affidavit for the portion identifying the items to be seized. However, at the time of execution the agent did not notice that the attachment had been removed, and thus, the approved list was not present during the search. The Third Circuit affirmed, holding that although the evidence was seized in violation of the Fourth Amendment, the exclusionary rule did not require suppression because the agents conducted the search in accordance with the warrant, the government gained nothing it would otherwise not have obtained, and it was unclear how Defendant was harmed by his inability to check the list of items the government intended to seize at the time of the raid on his apartment.

Dennis v. Sec'y, Pa. Dep't of Corr., 777 F.3d 642 - Vacating grant of habeas relief because the state court did not unreasonably apply federal law in rejecting *Brady* claims. In 1991, the defendant was convicted of murder and sentenced to death. The conviction and sentence were affirmed over various appeals and in post-conviction relief proceedings. Defendant then filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, which the District Court granted holding that the Pennsylvania Supreme Court unreasonably applied *Brady v. Maryland* and its progeny in rejecting Defendant's claims that the prosecution had withheld three pieces of exculpatory and material information. The Third Circuit vacated the District's order finding no unreasonable application of precedent: 1) *Brady* did not apply to inadmissible evidence, 2) no *Brady* violation with respect to a receipt because it was publicly available with reasonable diligence and thus was not "withheld," 3) undisclosed police report was not material because it would not have

changed the result. Case remanded for decision on remaining claims.

*** REHEARING ON BANC WAS GRANTED AND THE OPINION WAS VACATED. EN BANC ORAL ARGUMENT TOOK PLACE ON OCTOBER 14, 2015. OPINION PENDING.**

MARCH

Wilson v. Sec’y Pa. Dep’t of Corr., 782 F.3d 110 - Petitioner had received a writ of habeas corpus vacating his murder conviction and giving the state 180 days to retry him. Nearly five and half years later the court sought to retry him for murder. Wilson filed a motion to enforce the writ because the 180 days to retry him had passed. He also filed for civil relief under Federal Rule of Civil Procedure 60(b)(6). In support of the Rule 60(b) motion, he argued extraordinary circumstances including the prosecution’s delay, deterioration of his mental condition, and recently discovered *Brady* violations. The state disputed the merits and argued these issues had to be exhausted in state court. The District Court denied the motions after four hearings. The District Court noted that the issues raised by Petitioner were unrelated to the reasons the writ was initially issued and so they first had to be addressed by a state court.

MAY

United States v. Merlino, 785 F.3d 79 Merlino’s three year supervised release term began on September 7, 2011. On June 18, 2014, he was observed associating with several felons, in violation of his supervision conditions. On August 26, Probation issued a revocation petition to the District Court. On September 2, the District Court ordered

the issuance of a summons, which was served electronically on counsel. Due to scheduling conflicts with Merlino’s attorney, the summons was not issued until September 16, ten days after Merlino’s term of supervised release terminated. The clerk testified that without the scheduling conflict, the summons would have been issued on September 2 or 3. The District Court equitably tolled the statutory deadline and sentenced Merlino to four months’ imprisonment. The government argued the September 2 order to issue a summons served as notice to Merlino. The Circuit Court held that 18 U.S.C. § 3583(i) is a jurisdictional statute not subject to equitable tolling. The September 2 order to issue a summons did not qualify as an actual summons, requiring the defendant to appear at a certain place and time. Counsel’s notice of the order and the District Court’s intention to issue the summons did not satisfy the statutory requirement that “a warrant or summons” be issued prior to termination of supervised release. Only issuance of an actual warrant or summons satisfies the statutory requirement.

In re In the Matter of Grand Jury Empaneled on May 9, 2014, 786 F.3d 255

John Doe, acting as the custodian of records for ABC Entity, a professional corporation, refused to comply with a grand jury subpoena to produce documents. The grand jury proceedings were against a clinical blood laboratory, “OTE”, which bribed physicians to use their services. Doe’s refusal was based on his Fifth Amendment privilege against self-incrimination and an argument that the subpoena was overly broad. Rejecting the overly broad argument and highlighting that the Supreme Court has ruled that corporations may not claim a Fifth Amendment privilege, the District Court found the corporation in contempt and

entered a \$2,000 sanction per day, which was stayed pending appeal. The contempt order was vacated by the Circuit on a potential procedural defect. During this time, Doe fired all employees save himself and began using independent contractors. The Government filed a new subpoena, requesting the same documents listed in the original. Again Doe refused to comply with the order. Again the corporation was found in contempt and the sanction was again put on hold pending appeal. On appeal, Doe argued that as the only employee of the corporation any documents he produced could be seen by the jury as production of incriminating files, which would violate the Fifth Amendment. The Circuit followed the collective entity doctrine previously adopted by the Supreme Court, which prevents a corporation, regardless of its size, from claiming a Fifth Amendment privilege. As for the overly broad argument, the Circuit emphasized that a grand jury's power must be broad and the law presumes that the grand jury's actions are within the scope of its authority.

United States v. Kolodesh, 787 F.3d 224
Kolodesh was convicted of conspiracy to defraud a health care program, healthcare fraud, mail fraud, and money laundering. On appeal, Kolodesh alleged prosecutorial misconduct, evidentiary issues, errors in responding to a request from the jury, and in sentencing. The prosecutorial misconduct was based on the use of an alleged inaccurate transcript of wiretapped conversations and testimony concerning Russian stereotypes. Regarding transcripts, the Court found Kolodesh invited error by stipulating to their truth and accuracy. Regarding stereotype testimony, the Court found that the government did not elicit any statements about stereotypes and did not rely on stereotypes in opening or closing

statements.

The evidentiary issues included exclusion of exculpatory medical evidence, admission of uncharged wrongful acts, denial to rebut such evidence, and admission of conversations concerning overseas accounts. The Court found it was error to exclude as hearsay testimony from Kolodesh's wife that he did not go to work because of illness, but the error was harmless because he made calls and had meetings while at home. It was not error to permit testimony of uncharged acts of fraud carried out by Kolodesh's employees: the evidence could establish Kolodesh's knowledge of fraudulent activity (he claimed he was unaware), and was not to show he was a defrauder. Moreover, Kolodesh was allowed to call witnesses in rebuttal, with the same limitation as on the government that testimony was limited to conduct up until 2001 to prevent a mini-trial about fraud at a different facility. The Court also found the bank account testimony admissible as circumstantial evidence of his knowledge of fraudulent conduct and that its probative value substantially outweighed its prejudicial effect.

Next, there was no abuse of discretion in instructing the jury to continue deliberating (relying on its recollection) as it waited for transcripts it requested. After discussions with the lawyers, the judge told the jury it had two options: audio recordings or redacted transcripts, and the jury could continue deliberating. The jury returned a verdict two hours later, before the transcripts were complete.

Finally, Kolodesh challenged sentencing enhancements and the reasonableness of his sentence. The government established a loss amount of \$16.2 million by two

coconspirators who were intimately involved in the scheme and had direct knowledge of the level of fraud. There was no clear error on the organizer enhancement as it was in line with the jury's verdict. The obstruction of justice enhancement was proper where Kolodesh met with a witness and discussed the witness's upcoming testimony. His sentence term and restitution were not unreasonable. The BOP could care for his medical needs and the large restitution order would make the government whole.

JUNE

In Re: Commonwealth's Motion, 790 F.3d 457 - Pennsylvania attempted to bar attorneys from the Capital Habeas Unit of the Federal Community Defender Organization for the Eastern District of Pennsylvania (FCDO) from representing clients in state Post-Conviction Review Act (PCRA) cases. The FCDO is a non-profit organization representing indigent defendants in federal court. The FCDO receives federal grants, administered by the Administrative Office of the United States Courts (AO). These funds are to be used only for representing federal clients. In the seven cases leading to this consolidated case, the FCDO representing clients in state court without an authorization order from the federal court. These seven cases were removed to federal court, three in the Eastern District and four in the Middle District of Pennsylvania. The Eastern District found jurisdiction and granted the FCDO's motion to dismiss, while the Middle District denied jurisdiction and remanded the cases to state court. The Third Circuit looked at both the jurisdictional question and the motion to dismiss.

First, the Circuit found that the FCDO

qualified for removal under the federal officer removal statute. The Court held that the FCDO was "acting under" the AO during the conduct being challenged by Pennsylvania. This determination was based on the nature of the relationship between the FCDO and the AO. The FCDO provides a service that the federal government would otherwise provide, and therefore assists the AO in carrying out its duties. Further, the court found the FCDO had three colorable defenses: (1) FCDO claims it did not misuse federal funds, (2) disqualification by the state was preempted by federal law, and (3) the state lacks a cause of action to enforce the terms of the grant. Based on these reasons, the Court found that removal was proper.

As for the merits of the motion to dismiss, the Court found the disqualification proceedings to be preempted, regardless of whether grant funds had been misused. The sole power to regulate or enforce the rules of the grant lies with the AO, and therefore, the state has no authority to challenge the FCDO's use of funds.

JULY

United States v. Lowe, 791 F.3d 424 The Third Circuit reversed the District Court's denial of suppression. Three marked police cars responded to a vague anonymous tip about a "black male wearing a gray hoodie with a gun." When four uniformed officers approached the defendant and told him to put his hands in the air, no gun was visible. Although he did not react immediately to orders to put his hands in the air, he "froze," made no attempt to run, and was in custody within one to two minutes. He moved to suppress the weapon based on lack of reasonable suspicion to conduct a *Terry* stop. The Third Circuit took a close

look at what constitutes the moment of seizure in a *Terry* stop asking whether the suspect/defendant had submitted to a “show of authority.” There is a “show of authority” if an officer’s words or actions would make a reasonable person believe he is not free to leave a scene. The Third Circuit ruled that the officer’s approach of the defendant was a show of authority and no reasonable person would have felt free to leave. When a suspect freezes, shows no aggression, and does not leave the scene, he or she has submitted to authority, and a seizure has occurred within the meaning of the Fourth Amendment. Finally, having ruled that Lowe was seized at the time he was approached by the officers, prior to discovery of the weapon, the Court held there was no reasonable suspicion for the *Terry* stop, and the weapon was suppressed.

United States v. Edwards, 792 F.3d 355
After being *Mirandized*, appellant invoked his right to remain silent. Over the defense’s objection, the government repeatedly referenced his post-arrest silence as proof of guilt, including during closing arguments, inviting the jury to draw inferences from his silence. The government acknowledged it violated the constitutional rule of *Doyle v. Ohio*, 426 U.S. 610 (1976), but claimed it was harmless. The Third Circuit found the government’s actions violated the Fifth Amendment and the *Doyle* error was not harmless. The short jury instruction provided by the trial court was ineffective, contradicted prior instructions, and was not timely enough to cure the error.

Norris v. Brooks, 794 F.3d 401
The holding in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) does not permit a habeas petitioner to obtain relief under Fed. R. Civ. P. Rule 60(b)(6). *Martinez* stands only for the proposition that sometimes an attorney

error in initial-review collateral proceeding may establish a cause for default of a claim of ineffective assistance of counsel. It is a “narrow exception.” The alleged error in *Norris* occurred during a collateral appeal and therefore was outside the exception created in *Martinez*. Therefore the Petitioner could not seek relief under Rule 60(b)(6).

United States v. Small, 793 F.3d 350
Small was convicted of a federal offense while completing a state sentence. To avoid the federal detainer and being remanded to federal custody, he secured forged court documents stating that his federal sentence had been vacated. He was released at the end of his state sentence. Small was charged with several additional crimes in connection with these actions including mail fraud, forging a seal of a federal agency, and escape. He argued he could not be convicted of escape because he was never in federal custody within the meaning of 18 U.S.C. §751. The Third Circuit joined other circuits in ruling that “custody” does not require a showing a physical restraint or confinement. Small was in custody by virtue of the judgment of conviction that was issued by a federal court.

United States v. Chabot, 793 F.3d 338
Foreign bank account records maintained in accordance with C.F.R. §1010.420 fall within the records exception to Fifth Amendment privilege. In reaching this conclusion, the Third Circuit found that all three prongs of the test in *Grosso v. United States*, 390 U.S. 62 (1968) were met: (1) the records in question serve a legitimate noncriminal purpose in connection with tax collection and intelligence activities, and thus primarily serve a regulatory purpose; (2) account holders would normally keep such records; and (3) the documents have a

“public aspect.” The Third Circuit noted several times that participation in foreign banking is voluntary.

United States v. Fountain, 792 F.3d 310
The Third Circuit clarified that a conviction under the Hobbs Act for extortion under color of official right requires only that: (1) the payor made a payment to the public official based on the reasonable belief that the official would perform official acts in exchange for the payment and (2) the defendant was aware the payment was based on that belief. Inducement is not an element of under color of official right.

The Third Circuit affirmed various sentencing enhancements. The sophisticated means enhancement under §2B1.1 was proper where Fountain created a scheme that relied on sophisticated knowledge of IRS practices, manipulated hundreds of people, abused one appellant’s position within the IRS, and involved recruiters, electronic filing, and use of wireless networks to route funds into different bank accounts. Use of a minor enhancement under §3B1.4 was proper where Fountain had her daughter collect payments. The Third Circuit rejected the argument that the crime was “complete” by the time payment was collected since the false returns had already been filed.

United States v. Centeno, 793 F.3d 378
(1) There was sufficient cumulative (though no direct) evidence to affirm convictions for aiding and abetting in an assault. Specifically, there was enough evidence to infer that the defendants’ presence during the assault was intimidating to the victim and encouraging to the assailants. Moreover the behavior post-assault, fleeing the scene with the other men involved in the attack, suggested approval of the offense and a consciousness of guilt. (2) There

was sufficient evidence to affirm conviction for assault by striking and robbery: the defendant was identified by two witnesses and the description of the getaway car was consistent with the vehicle discovered by law enforcement. (3) The Government’s statement to the jury that it could convict the defendant of aiding and abetting based solely on his role as the getaway driver constituted a constructive amendment of the indictment because it permitted the jury to convict him of aiding and abetting based on facts that supported a conviction for accessory after the fact. (4) Conviction of assault by striking violated the Double Jeopardy Clause because it was a lesser included offense of assault resulting in serious bodily injury.

AUGUST

United States v. Fazio, 795 F.3d 421
Defendant, an Italian citizen and lawful permanent resident in the United States, moved to collaterally attack his plea agreement on the basis of ineffective assistance of counsel because his counsel failed to properly warn him of the immigration consequences of his plea, as required by *Padilla v. Kentucky*, 559 U.S. 356 (2010). Specifically, Fazio alleged that plea counsel advised him only that he would face a possibility of deportation, when in fact his plea would result in almost certain deportation. The Third Circuit found that Fazio’s plea agreement was entered into knowingly and voluntarily because Fazio was competent to plead guilty and pleaded knowing that deportation was a possible consequence of his plea. While the Court agreed that plea counsel did err under *Padilla* in failing to inform Fazio that the plea made him subject to automatic deportation, not simply the possibility of deportation, the Court declined to decide

whether this error constituted ineffective assistance because it found that the district court's in-depth plea colloquy and the language of the plea agreement itself remedied any error. Fazio was entitled to be advised that conviction for drug distribution made him subject to automatic deportation. Both the language of the plea agreement and the district court questions during the plea colloquy made clear that Fazio was willing to plead guilty even if that plea led to automatic deportation. Accordingly, the Third Circuit affirmed the enforcement of Fazio's collateral attack waiver.

United States v. Bui, 795 F.3d 363
Defendant claimed counsel provided ineffective assistance by incorrectly advising him (1) about the availability and applicability of the safety valve sentencing provision and (2) by failing to advise him about available defenses to the charges: debatable evidence whether the property where defendant sold drugs was a school or in a school zone. On appeal of the denial of his habeas corpus petition, the Third Circuit noted that an erroneous sentencing prediction by counsel is not ineffective assistance of counsel if an adequate plea hearing is conducted. Here, the attorney's erroneous advice constituted ineffective assistance because it was based on a lack of familiarity with longstanding precedent that the safety valve provision did not apply to defendant's offense of conviction (drug distribution in a school zone). Furthermore, the plea colloquy did not remedy the error but, instead, served to reinforce the incorrect advice. The defendant established prejudice resulting from the ineffective assistance because he had no incentive to plead guilty if he were unable to benefit from the safety valve reduction. Accordingly, the Third Circuit granted the defendant's habeas petition and remanded for further

proceedings.

SEPTEMBER

United States v. Tolliver, 800 F.3d 138
The District Court granted habeas relief (on an ineffective assistance of counsel claim for failure to investigate) without holding an evidentiary hearing. The government appealed. 28 U.S.C. § 2255(b) requires an evidentiary hearing unless "the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief." Granting or denying a motion without holding an evidentiary hearing is an abuse of discretion if there exists a dispute of material fact. Here, petitioner's submission raised disputes of material fact and therefore, the District Court abused its discretion. Vacated and remanded with instructions to the District Court to hold an evidentiary hearing.

United States v. Ross, 801 F.3d 374
Ross was convicted of nine counts of various drug trafficking and firearms offenses. For Count 8, possession of a machinegun, 18 U.S.C. § 922(o), the judge failed to instruct the jury that the government was required to prove beyond a reasonable doubt that Ross had specific knowledge of the firearm's characteristics that made it a machinegun as defined by the statute, 26 U.S.C. § 5845(b). The judge imposed concurrent 10 year terms of imprisonment on counts 1, 2, 3, 4, 5, 8, and 10, followed by a consecutive 30 year term of imprisonment on count 7. (Ten years on Count 5 and 30 years consecutive on Count 7 were mandatory). The judge also imposed an \$800 special assessment - \$100 for each count. Ross' convictions were affirmed on appeal.

Ross pursued a § 2255 motion, which the

District Court denied. The Third Circuit issued a certificate of appealability on whether (1) trial and appellate counsel rendered ineffective assistance by failing to argue that the government introduced insufficient evidence to convict for possession of a machinegun and (2) the jury instructions required the jury to find as an essential element that Ross knew of the characteristics of the firearm that brought it within the statutory definition of “machinegun.” The government argued that even if defendant could meet the *Strickland v. Washington* standard, he was not entitled to relief because he was not claiming the right to be released from custody, as required by § 2255. Defendant claimed that the \$100 special assessment and the collateral consequences associated with the § 922(o) conviction each constitute “custody” within the meaning of § 2255. The Court agreed with the government. The \$100 assessment does not constitute the kind of severe restriction on defendant’s liberty and therefore cannot satisfy the “in custody” requirement of § 2255. Nor could defendant point to any collateral consequence not already existing due to his prior convictions or the other convictions in this case. Consequently, his conviction on count 8 did not render him in custody and so his claim was not cognizable under § 2255. The Third Circuit vacated the District Court’s order denying relief and directed that the § 2255 motion be dismissed.

United States v. Lewis, 802 F.3d 449 (*en banc*) - Defendant was convicted of using or carrying a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(a)(i), which carries a 5-year mandatory minimum sentence. He was sentenced for brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(a)(ii), which carries a 7-

year mandatory minimum. Defendant timely objected and appealed. The Third Circuit affirmed the sentence. The Supreme Court granted defendant’s petition for a writ of certiorari, and remanded for further consideration in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). The government continued to oppose the *Alleyne* argument on the ground that the error was harmless. A divided panel of the Third Circuit agreed, finding that had the jury been instructed on the brandishing element, it would have found that element beyond a reasonable doubt. On reconsideration *en banc*, a plurality of the Court deemed the error a sentencing error, rather than a trial error, and concluded the error contributed to the sentence imposed, as defendant received the mandatory 7-year sentence. In a concurring opinion, four judges (Smith, McKee, Ambro, and Jordan) agreed resentencing was required but said they would hold the error was structural and therefore reversible if properly preserved. In a dissenting opinion, two judges (Fisher and Hardiman) agreed with the plurality that the error was not structural and would find it harmless. Sentence vacated and case remanded for resentencing.

United States v. Nagle, 803 F.3d 167
As a matter of first impression, the Third Circuit held that defendant, a shareholder and corporate executive, could not challenge the search and seizure at the corporate offices because he did not have a reasonable expectation of privacy in his employees’ offices, employees’ computers, or the electronic files located on the company’s network servers. A shareholder or company executive may only challenge the search if he shows some personal connection to the places searched and material seized and protected those places or materials from outside intrusion. Status as a shareholder or

executive is not enough. Nagle failed to show such a personal connection (that he used the employees' offices or computers or that he ever accessed other employees' emails or files on the network server) and thus had no reasonable expectation of privacy in those items and no basis to move for suppression.

As for loss analysis, the defendants challenged the District Court's determination that they were responsible for the face value of the DBE contracts received without any credit for actual work performed on the contracts. (The scheme here was to obtain subcontracts set aside for disadvantaged business enterprises (DBE)). The Third Circuit agreed with the defendants that the loss amount was the face value of the DBE contracts minus the fair market value of the services they provided under those contracts. Such an offset would be due regardless of whether it applied U.S.S.G. §2B1.1 Application Note 3(A) (standard loss definition) or Note 3(F)(ii) (special application note for loss in "government benefit" cases). The sentences were vacated and remanded for a new loss calculation applying the appropriate credit for the fair market value of the services rendered under the contracts.

Washington v. Secretary, 801 F.3d 160
The case involved a robbery of a dollar store during which two store employees were shot and killed. At trial, codefendant Taylor testified and identified Washington as the driver. The state introduced a statement by another codefendant, Waddy, who was also on trial, which redacted Washington's name and replaced it with generic terms such as "the driver." Washington was convicted and his conviction was affirmed on direct appeal and in state post-conviction proceedings. He pursued federal habeas relief on the *Bruton*

issue. The District Court granted relief on the *Bruton* claim because "(A) the Pennsylvania Superior Court unreasonably applied clearly established federal law when it concluded that the trial court had properly admitted into evidence redacted nontestifying coconspirator testimony and (B) that error substantially and injuriously affected Washington's case." The Third Circuit affirmed. The state petitioned for certiorari, and the Supreme Court granted the petition, vacated the Court's judgment, and remanded the case for further consideration in light of *White v. Woodall*, 134 S. Ct. 1697 (2014) (holding that a state court decision merely declining to "extend" a SCOTUS precedent cannot be an unreasonable application of clearly established federal law under AEDPA).

On remand, the District Court again granted habeas relief, ruling that the state court unreasonably applied federal law as established by relevant Supreme Court precedent, including *Bruton v. United States*, 391 U.S. 123 (1968), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998). The Third Circuit again affirmed, ruling: "[t]aken together, the current state of the law is that there is a Confrontation Clause violation when a nontestifying codefendant's confession is introduced that names another codefendant, [] or that refers directly to the existence of the codefendant in a manner that is directly accusatory[.]" Here, the insufficiently redacted statement was admitted in violation of this precedent. Because this conclusion rests on well-established federal law, the District Court's *Bruton* analysis did not constitute error under *White*. Finally, the Third Circuit agreed that the violation had a "substantial and injurious effect or influencing in determining the jury's verdict." The Commonwealth has filed a

petition for certiorari.

United States v. Schneider, 801 F.3d 186
Defendant began providing financial and housing assistance to a 12-year old Russian ballet dancer. The dancer moved into the defendant's Moscow apartment and the defendant sexually abused the dancer. When the dancer was 15, he and the defendant travelled to Philadelphia, where the dancer lived at defendant's parents' home and attended a summer ballet program. They travelled back to Moscow where the abuse resumed, and then moved to Massachusetts, where the dancer attended school and danced professionally. In 2008, the dancer filed a civil suit alleging sexual abuse. In 2010, a grand jury returned an indictment charging defendant with (1) traveling in foreign commerce for the purpose of engaging in illicit sexual conduct with a minor, 18 U.S.C. § 2423(b) (2000), and (2) transporting an individual in foreign commerce with the intent that such individual engage in illegal sexual activity, 18 U.S.C. § 2421 (2000). The charges related to the travel from Philadelphia to Moscow in 2001. The jury returned guilty verdicts on both counts. The judge granted the defendant's motion for acquittal on the transport count based on the "innocent round trip" exception to § 2421, as enunciated in *Mortensen v. United States*, 322 U.S. 369 (1944).

Defendant challenged the trial court's refusal to apply the "innocent round trip" exception to his travel charge under § 2423(b). The Third Circuit did not comment on the District Court's acquittal on the transport charge. The Third Circuit ruled that the "innocent round trip" exception did not apply to a charge of travel under § 2423(b). The defendants in *Mortensen* operated a brothel in Nebraska and travelled

to Utah for a vacation, bringing two prostitutes with them. No illegal sexual conduct occurred during the vacation and the women resumed working as prostitutes upon their return to Nebraska. The Supreme Court concluded the trip at issue was a "complete break or interlude" in the illicit sexual activity; there was no illegal purpose to the trip and it did not violate § 2421. Illicit sexual conduct need not be the most important reason for transporting the victim when multiple purposes are present. In this case, the trip to Philadelphia was a "critical component" of the defendant's scheme to sexually abuse the victim; it was not a "complete break or interlude" in the scheme. The Third Circuit explained: "because the trip was part of [defendant's] calculated plan to manipulate and abuse the victim, the *Mortensen* exception is inapplicable."

The Third Circuit also rejected defendant's other challenges. There was no statute of limitations violations (for 2001 conduct charged in 2010) where 18 U.S.C. § 3283 extends the statute of limitations for child sexual abuse offenses. The District Court did not err in (1) refusing to admit evidence regarding the defendant's inability to seek proper medical treatment for a non-life threatening condition during his pre-trial incarceration, and (2) admitting excerpts from a film defendant had shown to the dancer, depicting a relationship between a young dancer and an older patron. The Court also concluded that defendant had not met his burden to prove newly discovered evidence regarding the victim's deposition testimony from the civil suit required a new trial. The Court also upheld the sentencing court's application of the cross reference under U.S.S.G. §§ 2A3.2(c)(1) and 2A3.1, related to child sexual abuse offenses.

OCTOBER

United States v. Foy, 803 F.3d 128

Foy was charged in the EDPa with threatening a federal official and revocation of probation. The EDPa ordered a competency evaluation pursuant to 18 U.S.C. 4241(d). The criminal case was dismissed and probation was terminated. The warden at the Missouri Federal Medical Center certified Foy's dangerousness and a Missouri district court ordered Foy committed under section 4246(d). Foy filed motions in the EDPa under 28 U.S.C. §§ 2241, 2255, and Fed.R.Civ.P. 60(d)(3). The EDPa denied the motions. The Third Circuit vacated, finding that the EDPa lacked jurisdiction because Foy's commitment was currently pursuant to a Missouri order. Discharge was not appropriate under 18 U.S.C. § 4247(h). Fed.R.Civ.P. 60(b)'s savings clause did not give EDPa jurisdiction to rule on Missouri's commitment order. There is no 2255 if there is no sentence. 2241 must be filed in the District of confinement. The case was remanded for consideration of transfer to Missouri, or dismissal for lack of jurisdiction. Judge Krause would remand with directions to transfer "in the interests of justice" under 28 U.S.C. § 1631.

DECEMBER

United States v. Doe, ___ F.3d ___, 2015 WL 8287858 - This case concerns an appeal from the denial of a 28 U.S.C. §2255 motion filed in 2012 and a request to reopen a separate § 2255 motion filed in 2008. Petitioner was sentenced in federal court in 2003, under the then mandatory Sentencing Guidelines, as a career offender. The procedural and legal history of the case are especially complex, and the case presents a

number of procedural and jurisdictional questions, including disputes over statute of limitations, retroactivity, collateral review, and mootness. In sum, the Third Circuit made the following findings and remanded Doe's case for further proceedings in the district court:

- Although Doe completed his prison term, his case is not moot because, if he wins, the District Court will shorten his term of supervised release.
- The Third Circuit has jurisdiction to issue a certificate of appealability (COA) even though it is questionable whether Doe made the substantial showing of the denial of a constitutional right because the case on which his claim is premised, *Begay v. United States*, 553 U.S. 137 (2008), was not explicitly a constitutional decision; cognizability is not always a jurisdictional limit.
- The Court assumes without deciding that Doe's 2012 § 2255 motion is not a second or successive motion.
- The Court remands for the District Court to consider whether Doe is entitled to reinstate his 2008 motion under Federal Rule of Civil Procedure 60.
- Doe has not procedurally defaulted his claim.
- *Begay* applies retroactively.
- Claims of *Begay* error are cognizable on collateral review where they are not procedurally defaulted and the § 2255 movant was sentenced under the mandatory Guidelines.
- Even if Doe is unsuccessful in reinstating his 2008 motion, he may

be able to pursue relief under 28
U.S.C. § 2241.