THIRD CIRCUIT & SUPREME COURT CRIMINAL CASE LAW DIGESTS

COMPILATION

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2019 SUPREME COURT CASES

JANUARY

Shoop v. Hill, 139 S.Ct. 504
A unanimous court reversed the Sixth Circuit's grant of habeas relief for relying on *Moore v. Texas I*, 137 S.Ct. 1039 (2017), to vacate a state court decision that was issued years before *Moore* had been decided. The case was remanded for the District Court to evaluate the claim regarding intellectual disability based solely on Supreme Court holdings that were clearly established at the relevant time.

Stokeling v. United States, 139 S.Ct. 544
The Armed Career Criminal Act's elements clause encompasses a robbery offense that, like Florida's law, requires the criminal to overcome the victim's resistance, even if the force used is "minimal." Thomas' majority opinion is based largely on his evaluation of the common law's definition of force sufficient to distinguish robbery from simple theft, but also comports with *Johnson v. United States* (2010), which decided that mere physical contact was insufficient to meet the "physical force" requirement of the ACCA. A four-person dissent concluded that Congress did not expressly or necessarily adopt a common-law "minimal force" definition of robbery.

FEBRUARY

Madison v. Alabama, 139 S.Ct. 718
While a mental disorder that leaves a prisoner without any memory of committing his crime does not necessarily preclude execution, *Panetti v. Quarterman*, 551 U.S. 930 (2017), dementia may preclude execution if there is an "[in]comprehension of why a defendant has been singled out" to die. The Supreme Court vacated and remanded where it was unsure whether the state court relied on an incorrect view of the law, i.e., that only delusions, and not dementia, could preclude execution.

Garza v. Idaho, 139 S.Ct. 738
A defendant's attorney rendered deficient performance by not filing notice of appeal in light of defendant's clear requests. The Court held that the presumption of prejudice under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), applies regardless of whether the defendant has signed an appeal waiver.

Timbs v. Indiana, 139 S.Ct. 682
The Eighth Amendment's excessive fines clause is an incorporated protection applicable to the states under the 14th Amendment's due process clause. Here, Timbs pleaded guilty to drug charges and was sentenced to home detention and probation. The government also brought a civil *in rem* action to seize a $42,000 SUV (bought with proceeds of Timbs's father's life insurance policy) on the theory that Timbs had used it to transport drugs. The maximum fine on the drug conviction was $10,000.

Moore v. Texas II, 139 S.Ct. 666
A per curiam opinion, issued without argument, reversed Texas Court of Criminal Appeals' redetermination that Moore did not have an intellectual disability and was thus eligible for the death penalty because it failed to apply *Moore v. Texas I*, 137 S.Ct. 1039 (2017).

MARCH

Nielson v. Preap, 139 S.Ct. 954
A noncitizen does not become exempt from mandatory detention without release on bond or parole under 8 U.S.C. § 1226(c) through the failure of the Secretary of

Homeland Security to take him into immigration custody immediately upon his release from criminal custody.

MAY

Nieves v. Bartlett, 139 S. Ct. 1715
The court held that, as a general rule, the existence of probable cause defeats a First Amendment retaliatory arrest claim. However, the court concluded that when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals would not have been arrested absent the First Amendment protected speech, the no-probable-cause requirement does not apply. The court also stated that because this is an objective inquiry, the statements and motivations of the arresting officer are irrelevant at this stage. If the plaintiff can make this showing, then the plaintiff's claim proceeds as if there had been probable clause in the first place. NOTE: Justice Sotomayor dissented, Justice Thomas concurred in part, and Justices Gorsuch and Ginsburg concurred in part and dissented in part.

JUNE

United States v. Davis, 139 S. Ct. 2319
The Court held that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague because it provides no reliable way to determine which offenses qualify as crimes of violence. The Court reasoned that the statute's residual clause is incompatible with Congress's intended results and does not provide defendants fair warning about the statute's mandatory penalties. The Court also stated that the term offense carried the same generic meaning throughout the statute, and § 924(c)(3)(B) carried the same categorical-approach command as § 16(b). Furthermore, the Court noted that ambiguities about a criminal statute should be resolved in the defendant's favor, and the power of punishment is vested in the legislative not in the judicial branch.

Rehaif v. United States, 139 S. Ct. 2191
The Court held that the word knowingly under 18 U.S.C. § 924(a)(2) applies to the defendant's conduct and status. Therefore, for prosecutions under § 922(g) and § 924(a)(2), the Government must prove both that a defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. The Court reasoned that certain individuals may possess a gun innocently. Therefore, it is the defendant's status, not the defendant's conduct, which makes the difference. Adding a scienter requirement to the defendant's status will help to distinguish between innocent and wrongful conduct. The Court does not believe it will be burdensome for the government to prove the defendant's knowledge of his status, but did not address what proofs would establish it.

United States v. Haymond, 139 S. Ct. 2369
The plurality opinion determined that application of 18 U.S.C. § 3583(k)'s mandatory minimum (for certain violations of supervised release for sex offenders) violates a defendant's right to trial by jury under the Fifth and Sixth Amendments. A mandatory minimum sentence that results from additional judicial factual findings by a preponderance of the evidence is unconstitutional: any finding of fact that alters a defendant's legally prescribed punishment must be made by a jury and a judge must find those facts beyond a reasonable doubt. The plurality also acknowledged that a defendant's final sentence includes any supervised release sentence he may receive. Consequently, supervised release violations subject to § 3583(k) can expose a defendant to an additional mandatory minimum prison term beyond that authorized by the jury's

verdict. The plurality did not address the constitutionality of § 3583(k)'s maximum sentence.

Quarles v. United States, 139 S. Ct. 1872
The Court held that for purposes of 18 U.S.C. § 924(e), remaining-in burglary occurs when the defendant has the intent to commit a crime at the time of remaining, which is at any time during which the defendant unlawfully remains in the building or structure. The Court reasoned that to define remaining-in burglary narrowly would frustrate the goals of the Armed Career Criminal Act and would be incompatible with Congress's reasons for including burglary as a § 924(e) predicate offense.

Gamble v. United States, 139 S. Ct. 1960
The Court refused to overrule its interpretation of the Fifth Amendment's Double Jeopardy Clause. The Court upheld previous precedent stating that under the dual-sovereignty doctrine, a State may prosecute a defendant under state law even if the Federal Government prosecuted the defendant for the same conduct under federal statute. The Court distinguished "same offense" from "same conduct or actions" explaining that an offense is defined by law and each law is defined by a sovereign. Therefore, where there are two different sovereigns, there are two different laws resulting in two different offenses.

Flowers v. Mississippi, 139 S. Ct. 2228
The Court reinforced and enforced *Batson v. Kentucky*. In doing so, the Court clarified that after *Batson*, a district court judge may still consider a prosecutor's history of discriminatory peremptory strikes from past trials in the jurisdiction. Disparate questioning or investigation may only constitute a *Batson* violation when it is accompanied by other evidence of discriminatory intent. The Court found the following facts significant when deciding that the State had committed a *Batson* violation: at the defendant's six trials combined, the State used its peremptory challenges to strike 41 out of 42 black prospective jurors it could have struck, the State engaged in dramatically disparate questioning of black and white prospective jurors, and the State struck at least one prospective juror who was similarly situated to other white prospective jurors whom the State did not strike.

Mont v. United States, 139 S. Ct. 1826
The Court held that pretrial detention lasting longer than thirty days qualifies as "imprisonment in connection with a conviction" under 18 U.S.C. § 3624(e) when that detention is credited as time served for a new offense. Therefore, a convicted criminal's period of supervised release is tolled during his pretrial detention for a new criminal offense. However, when the defendant's pretrial detention is not credited as time served for a new criminal offense, the charges against the defendant are dismissed, or the defendant is acquitted, the defendant's pretrial detention does not toll the period of supervised release.

Mitchell v. Wisconsin, 139 S. Ct. 2525
The plurality concluded that the exigent-circumstances exception to the Fourth Amendment almost always permits a warrantless blood test of an unconscious driver who cannot be administered a breath test. The plurality reasoned that when a driver is unconscious, the driver will likely be taken to a hospital and his blood may be drawn for diagnostic purposes regardless of the need for BAC information. The plurality also noted that prompt testing is required because alcohol dissipates from the bloodstream very quickly and BAC tests are crucial for highway safety. However, the plurality did not rule out the possibility that, in an unusual case, a warrantless blood

test of an unconscious driver can violate the Fourth Amendment.

2019 THIRD CIRCUIT CASES

JANUARY

United States v. Fattah, 914 F.3d 112

U.S. Congressman Chaka Fattah, Sr. received a substantial illicit loan for his mayoral campaign, and used his political influence and personal connections to engage friends, employees, and others in schemes to preserve his political status by hiding the source of the illicit loan and its repayment. Fattah and four of his associates were charged in a 29-count indictment with, inter alia, misusing federal grant money and federal appropriations, siphoning money from nonprofit organizations to pay campaign debts, and misappropriating campaign funds to pay personal obligations. In a 165-page opinion, the Court vacated five counts of conviction for bribery and honest-services fraud, reversed the judgements of acquittal on two counts, and otherwise affirmed, including many evidentiary rulings.

(1) Based on two notes from the jurors, the District Court questioned five jurors extemporaneously but made sure the jurors did not reveal the substance of the deliberations. The Third Circuit affirmed dismissal of a juror for misconduct under Fed.R.Crim.P. 23(b) ("for good cause"), concluding the District Court did not abuse its discretion in finding the juror violated his oath by not deliberating in good faith because he was intent on hanging the jury no matter the law or evidence.

(2) The jury instructions for bribery and honest services fraud were incomplete and erroneous under *McDonnell v. United States*, 136 S.Ct. 2355 (2016). *McDonnell* requires the government to prove an accused has performed an "official act. The inquiry is two steps: (1)(A) the government must identify a question, matter, cause, suit, proceeding or controversy, which is 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; (1)(B) the government must establish whether the qualifying matter may at any time be pending or may by law be brought before a public official, a procedure that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete; and (2) the government must prove that the public official made a decision or took an action on the identified question, matter, cause, suit, proceeding or controversy. The three acts at issue here were setting up a meeting between an associate and a U.S. Trade Representative (not unlawful), attempting to secure an associate an ambassadorship (requires consideration by an appropriately instructed jury, and hiring this associate's girlfriend (clearly an official act) in return for a thing of value.

(3) evidence was sufficient to support conviction, after remand, for conspiracy to commit honest services fraud;

(4) evidence was sufficient to show an agreement existed and that defendants engaged in a RICO conspiracy;

(5) there was not a variance between the indictment and evidence, and the evidence was sufficient for conspiracy to commit wire fraud; and

(6) decision to quash subpoena for witness's mental health records did not violate due process, and the District Court did not abuse its discretion in limiting reference to a witness's bipolar disorder and medications, where there was no limitations on questioning related to memory, competence, or truthfulness.

On the government's appeal, judgments of acquittal were reversed. The evidence was sufficient to convict defendants of bank fraud, 18 U.S.C. § 1344, and making false statements to a financial institution, 18 U.S.C. § 1014, because the Credit Union Mortgage Association (CUMA) is a "mortgage lending business" as defined in 18 U.S.C. § 27.

United States v. Wright, 913 F.3d 364
In this government appeal, the Third Circuit reversed the District Court's dismissal of the indictment with prejudice after two trials and two hung juries. The lead opinion (Judge Schwartz) held that the district court lacked inherent authority to dismiss the indictment absent misconduct or "any prejudice beyond the general anxiety and inconvenience of facing a retrial." The exercise of inherent authority: (1) "must be a reasonable response to the problems and needs confronting the court's fair administration of justice," and (2) "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz v. Bouldin*, 136 S.Ct. 1885, 1892 (2016). Neither requirement was met here. A more narrow concurrence with the judgment by Judge McKee held that the current state of the law does not support dismissal of the indictment in the absence of prosecutorial misconduct, bad faith, or more than two unsuccessful trials. Judge Nygaard would have affirmed dismissal.

United States v. Goldstein, 914 F.3d 200
Section 2703(c) of the Stored Communication Act (SCA) provides that the government may use either a warrant or a court order to obtain cell phone records, including cell site location information (CSLI). A court order requires less than probable cause: the court must find that there are "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Supreme Court held that the Fourth Amendment required the government to use a search warrant to obtain long-term CSLI from a wireless carrier, and therefore that the Section 2703(d) process was invalid. In *Goldstein*, the Third Circuit held that the good-faith exception to the exclusionary rule applied to historical CSLI obtained pursuant to a court order under the SCA: "[B]ecause the government relied on a properly-obtained valid judicial order, a then-valid statute, and then-binding appellate authority, it had an objectively reasonable, good faith belief that its conduct was legal."

FEBRUARY

United States v. Daniels, 915 F.3d 148
The Third Circuit affirmed a 15-year mandatory minimum sentence under ACCA, 18 U.S.C. § 924(e)(2)(A)(ii), based on the defendant's three Pennsylvania convictions for possession with intent to distribute a controlled substance, 35 Pa. Stat. Ann § 780-113(a)(30). Subsection (a)(30) prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." The Pennsylvania and federal definitions of delivery are nearly identical and both Pennsylvania and federal law include provisions for attempt and accomplice liability. *United States v. Glass*, 904 F.3d 319 (3d Cir. 2018) (citing 21 U.S.C. § 802(8) and 21 U.S.C. § 846)).

Although the definition of "serious drug offense" in ACCA does not include attempts, as does the definition of "violent felony" in (e)(2)(B), the ACCA's use of the term "involving" sufficiently expands the

meaning of a serious drug offense beyond the simple offenses of manufacturing, distributing, and possessing a controlled substance to include attempt. The Court left open whether mere offers to sell sweep more broadly than the federal counterpart.

The Court also found that Pennsylvania and federal law similarly criminalize conduct under an attempt and accomplice framework. Pennsylvania's and the federal approaches to attempt liability for drug offenses "are essentially identical." Both follow the Model Penal Code's requirements of intent and a substantial step. Likewise, Pennsylvania and federal law base their respective approaches to accomplice liability on the Model Penal Code: all three define an accomplice as a person who had the specific intent to facilitate a crime and acted to facilitate it. The Court rejected that Pennsylvania courts would hold a defendant liable under subsection (a)(30) for offers to sell, mere preparation, or a buyer's solicitation.

United States v. Chapman, 915 F.3d 139
The Third Circuit vacated a criminal sentence because the District Court had failed to postpone sentencing. Chapman's lawyer did not notify Chapman of the sentencing hearing, and so, on, the day of sentencing, Chapman asked the District Court to give him at least a week to collect letters from his family. Chapman was a career offender with a guideline range of 188 to 235 months. As part of the plea, the government would recommend a sentence of 188 months, and Chapman could seek a variance no lower than 144 months. The District Court sentenced him to 192 months. The Third Circuit found that Chapman's request for a continuance sufficiently preserved the issue for appeal and reviewed the District Court's denial for abuse of discretion/harmless error. The Third Circuit found that the failure to postpone and give Chapman time to collect family letters to mitigate his sentence contravened the principles underlying the right to allocution, codified in Fed. R. Crim. P. 32(i)(4)(A) and also "improperly compromised the appearance of fairness." The Third Circuit took the rare step of ordering resentencing by a different judge.

United States v. Garner, 915 F.3d 167
A panel of the Third Circuit found sufficient evidence to sustain Garner's convictions for conspiracy to commit armed bank robbery, attempted bank robbery, and possession of a firearm in furtherance of a crime of violence. Garner had planned to rob a bank, but the person he asked to help him was an FBI informant who immediately reached out to the FBI with Garner's offer. Garner was arrested while the robbery was still being planned. Most of the short opinion reiterated settled law and analysis: (1) sufficiency of the evidence is reviewed in the light most favorable to the government; (2) the informant's surveillance of a bank and three men's detailed discussion to plan to rob it after that were sufficient to establish conspiracy even if the final details still had to be set; and (3) a defendant may commit an attempt even where he stops short of "the last act necessary" for the actual commission of the crime. The Court joined other Circuits (citing the Seventh and Tenth) and held that a defendant cannot be criminally liable for conspiring with a government informant.

United States v. Island, 916 F.3d 249
A supervised release term tolls while a defendant deliberately absconds from the court's supervision, in this case between the issuance of a first warrant for violating supervised release and the defendant's apprehension due to his fugitive status. The panel discussed that the fugitive tolling doctrine helps realize the design and purpose of supervised release. The

rehabilitative goals of supervised release are served only when defendants abide by the terms of their supervision—not simply by the passage of time during the release term. Also, the doctrine avoids rewarding fugitive defendants for misconduct.

Piasecki v. Bucks County Ct., 917 F.3d 161
The requirements that come with registration under Pennsylvania's Sex Offender Registration and Notification Act satisfy the habeas "custody" requirement, under 28 U.S.C.A. § 2254(a). SORNA restricts registrants' "physical liberty" in various ways, including banning computer internet access and requiring them to appear frequently in person at a state police barracks. Past cases have found custody to include parole restrictions, own-recognizance release pending appeal, and community service obligations. In a lengthy footnote, the Court observed that the condition banning computer internet access is common, "[y]et it is not at all clear that the judges imposing such sweeping and unconditional bans appreciate the impact they would have if literally interpreted and enforced," barring things like using an ATM, having a smartphone, navigating by GPS, or simply driving a late-model car."

MARCH

United States v. Williams, 917 F.3d 195
The Third Circuit reversed on Speedy Trial Act grounds and directed the district court to dismiss with prejudice. The court joined three circuits in splitting with the Second Circuit and holding that "periods of unreasonable delay of more than ten days in the transport of a defendant to the site of a psychological examination conducted in the course of a proceeding to determine a defendant's mental competency are non-excludable" for Speedy Trial Act purposes. At issue were 47 days of transport between when the district court ordered the defendant to be evaluated at FMC Butner and when he arrived. Ten of those days were excludable but the other 39 were presumptively unreasonable, many of which were because the Marshals failed to retrieve the defendant until 28 days after the court's order, a delay attributable to the government.

United States v. Reese, 917 F.3d 177
The Third Circuit dismissed on speedy trial grounds but left open the possibility of a retrial. With less than three weeks left on the defendant's Speedy Trial Act clock, the district court continued the trial sua sponte for another two-and-a half months. The opinion also has a two-judge authored concurrence that criticized five other circuits' rulings that defendants can waive Speedy Trial Act claims by failing to seek dismissal on that basis in district court. Waiver was not an issue here because the government had not raised it its brief or in oral argument.

United States v. Ayala, 917 F.3d 752
The Third Circuit affirmed the conviction for Hobbs Act robbery and conspiracy, 924(c), and Virgin Islands (V.I.) robbery, and 11-year sentence of a defendant who played a supporting role (securing plane tickets, hotel rooms, and a rental car for the robbers, sitting in the getaway car, and paying the robbers afterward). She argued her participation was the product of duress because she feared for her life and that of her incarcerated brother at the hands of two violent men who told her to do it.

The court rejected the challenges that (1) District of V.I. courts lack jurisdiction to hear federal criminal cases and (2) D.V.I. judges lack authority to serve after their 10-year terms have expired. The Court also found that convictions for both Hobbs Act robbery and V.I. first-degree robbery did not violate Double Jeopardy because each

requires proof the other does not: Hobbs Act (interstate commerce) and V.I. robbery (display or threat to use a dangerous weapon). The Court also upheld shackling during sentencing.

Finally, the Court rejected the defendant's challenge to the court's limitation on her ability to cross-examine the government's witnesses about reputations for violence, given that such questioning went to the heart of her affirmative defense of duress — that she had an objectively reasonable fear that these men would hurt her. The trial court gave little explanation other than citing Rule 403, and did not put any balancing on the record, which troubled the Court. The Court found the limitation on reputation evidence was slight and the defense had elicited significant evidence that the actual robbers were afraid of the violent men as well.

APRIL

United States v. Rowe, 919 F.3d 752
For purposes of proving the drug quantities that trigger mandatory minimum sentences under 21 U.S.C. § 841(b), the government cannot aggregate separate drug distributions or possessions with intent to distribute, even when the indictment charges distribution or PWID over a period of time. For distribution under the statute, each unlawful transfer is a distinct offense. This case involved the 10-year mandatory minimum penalty for heroin distribution under § 841(b)(1)(A). The evidence was insufficient because the government failed to prove a single instance of distribution over 1,000 grams of heroin. A series of transactions adding up to 1,000 grams was not sufficient.

While PWID, is a continuing offense, there still must be a single possession of the threshold amount at one point in time. Possession of a controlled substance begins when a defendant has the power and intention to exercise dominion and control over the entire quantity at issue, and ends when his possession is interrupted by a complete dispossession or by a reduction less than the threshold quantity. Stated another way, one instance of PWID ends if the quantity possessed dips below 1,000 grams and another begins once the amount is replenished above that amount. The evidence in this case was insufficient to prove that Rowe ever possessed more than 1,000 grams of heroin at one time. Rowe's case was remanded for resentencing on the lower, 100 gram drug quantity for which the jury also returned a guilty verdict.

This case does not change the fact that drug quantities are aggregated for purposes of calculating the guideline range.

United States v. Greenspan, 923 F.3d 138 -
Greenspan was convicted of accepting kickbacks, using interstate facilities with the intent to commit commercial bribery, honest services fraud, and conspiracy for engaging in a scheme to refer over 100,000 blood tests to a laboratory in exchange for more than $200,000 in cash, gifts, and other benefits. Greenspan raised four challenges on appeal, all of which were rejected.

1. Advice of counsel: Although the district court committed several errors with regard to the advice of counsel good faith defense, the errors were harmless. The district court's jury instructions were erroneous on the burden of proof but not prejudicial. A hearsay ruling was error but harmless: the district court should not have excluded Greenspan's testimony about what exactly his lawyer told him - offered to explain why Greenspan believed his actions were lawful. A ruling on scope was also error but harmless: the district court should not have limited Greenspan's testimony to 5 out of 8

agreements his practice reached with the laboratory. The evidence could have supported a jury finding that the advice of counsel defense applied to the three excluded agreements, which was an issue for the jury to resolve. Greenspan was still able to present significant evidence on his defense, the prosecution did not challenge the attorney's involvement in all of the agreements between the medical practice and the laboratory, and the evidence taken as a whole was overwhelming in proving corruption.

NOTE: The Court suggested district courts should model their advice of counsel instructions from 1 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal, Instruction* 8-4, at 8- 19 (2017) and Seventh Circuit Pattern Criminal Jury Instructions §6.12 (2012).

2. Medical necessity testimony: The district court did not err in excluding testimony on the medical necessity of the blood tests because the evidence was only marginally relevant to Greenspan's intent. The issue was why he referred them to that particular laboratory, not the purpose for which they were ordered. The evidence carried a grave risk of confusing or misleading the jury, because it would have been calculated to ask the jury to acquit because Greenspan was doing good deeds and deserved a break. Any such error was harmless because the evidence was overwhelming and both parties agreed in closing that the necessity of the tests was not at issue.

3. Constructive amendment: The Court declined to address whether the government constructively amended counts three and four of the indictment in its closing argument for adding "consulting fees" in addition to "receiving office Christmas parties" as charged kickbacks. On plain error review, any alleged amendment failed prong four, as it did not affect the trial's fairness, integrity, or reputation. The charged and uncharged crimes were closely linked and evidence of guilt on the closely linked crime was overwhelming and essentially uncontroverted: the consulting fees and Christmas parties came from the laboratory through the same person, were both kickbacks in the same bribery scheme, and were discussed in the same voicemail. The evidence was strong, the scheme "stood or fell together," and despite notice of the allegations, Greenspan never produced any plausible explanation for the repeated payments.

4. Allocution at sentencing: Finally, the Court declined to reverse Greenspan's sentence for an allocution error. Denial of the right to allocution does not require per se reversal. Under the fourth prong of plain error analysis, the integrity and fairness of the proceedings is not implicated where the decision of the defendant not to allocate or defense counsel's failure to object to the denial were part of the defense strategy. Here, Greenspan apologized to the Court in writing and sent sentencing videos in which he expressed remorse (all without admitting guilt), yet his counsel twice declined the Court's invitation to allocute on his behalf because he intended to appeal. Reversing the sentencing based on this allocution error, would work an injustice.

United States v. McCants, 920 F.3d 169, *cert. granted and judgment vacated on unrelated grounds*, *McCants v. United States*, 2019 WL 5150464 (Oct. 15, 2019) –

In *McCants*, the Third Circuit considered whether: (1) a 911 caller's anonymous tip that a man who possibly had a gun was beating up his girlfriend justified stop and frisk of defendant, and (2) defendant's prior New Jersey convictions for second-degree

robbery were for crimes of violence under career offender Sentencing Guideline.

Regarding the anonymous tip, the Court held that the 911 call bore sufficient indicia of reliability and provided officers with reasonable suspicion that justified a *Terry* stop of the defendant. Although the arresting officers had no face-to-face interaction with the 911 caller and the putative victim showed no signs of injury, the caller used the 911 system to report an eyewitness account of ongoing domestic violence and provided a detailed description of the suspect's location, clothing, and hair, which were confirmed by the officers within minutes of the call. Furthermore, the caller could be held responsible if her allegations turned out to be fabricated. Accordingly, the Court upheld the stop.

On the crime of violence issue, the Court ruled that New Jersey's second-degree robbery statute was divisible, setting out alternative elements for sustaining a conviction rather than the means of committing the offense. As such, the sentencing court was permitted, under the modified categorical approach, to look beyond the elements of the statute to the *Shepard* documents to determine if the relevant subsection required violent force. Looking to those documents, the Court agreed that the district court properly concluded that McCant's plead guilty to subsection (a)(2), which is categorically a crime of violence, not (a)(3), which is not.

NOTE: The Supreme Court recently vacated *McCants* on grounds entirely unrelated to its divisibility holding. While not binding on district courts, the Government continues to cite *McCants* as persuasive authority on the crime of violence issue.

MAY

United States v. Trant, 924 F.3d 83
In considering whether to grant a motion to reopen a trial (here the government moved to reopen its case in chief to admit a stipulation), district courts must consider (1) the timing of the moving party's request to reopen (whether the opposing party will have a reasonable opportunity to rebut the new evidence presented); (2) the effect of granting the motion (whether this will cause substantial disruption to the proceedings or result in the new evidence taking on distorted importance); (3) the reasonableness of the moving party's explanation for failing to introduce the desired evidence before resting; and (4) whether the new evidence is admissible and has probative value. The court also clarified that district courts should not be extremely reluctant to grant a motion to reopen trial as is the case in suppression-hearing cases. Furthermore, the court defined prejudice as when a party experiences an unfair or unreasonable impairment of his defense.

The district court also did not abuse its discretion when it did not permit the defendant to cross examine a witness on conduct that had no probative value as to the witness's truthfulness or untruthfulness.

United States v. Bailey-Snyder, 923 F.3d 289 - The court held that an inmate's placement in administrative segregation while he is under investigation for a new crime does not trigger his right to a speedy trial under the Sixth Amendment or the Speedy Trial Act. The court declined to extend the constitutional right of a speedy trial to the period before arrest. The court reasoned that the Bureau of Prison does not operate in a prosecutorial fashion and therefore administrative segregation does not constitute an arrest or public accusation for purposes of the Sixth Amendment's

right to a speedy trial. The court also reasoned that administrative segregation does not constitute arrest for purposes of § 3161(b). Furthermore, the court addressed the issue of vouching. The court held that a commonsense conclusion was not improper vouching even without explicit evidence in the record to support it.

United States v. Baker, 928 F.3d 291
The defendant, a police officer who was found guilty of stealing or embezzling public funds, appealed the district court's refusal to instruct the jury on the defense of entrapment, to define theft as permanently as opposed to temporarily deprive, and to exclude evidence of the defendant's wife cancer-related medical expenses. The court held that the defendant was not entitled to the defense of entrapment because the defendant took government funds because of his own decision making not because the government induced him to do so. The court also rejected the defendant's argument that intent to permanently deprive is needed to prove theft. The court held that for theft purposes, an intent to temporarily deprive is enough because the intent to permanently deprive is neither an element of theft nor a defense. Lastly, the court held that the district court did not abuse its discretion in not admitting the evidence of the defendant's wife cancer-related medical bills. The court reasoned that because the defendant's wife was a cancer survivor, the probative value of the medical bills was substantially outweighed by the danger that the testimony might mislead the jury due to sympathy for the defendant's wife.

JUNE

United States v. James, 928 F.3d 247
The court held that legal innocence alone can support withdrawal of a guilty plea. But the defendant must present a credible claim of legal innocence supported by facts in the record. Bare assertions of legal innocence are not enough. In determining whether a defendant has a fair and just reason for requesting a withdrawal, a district court must consider (1) whether the defendant asserts his innocence; (2) the strength of the defendant's reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal. If the defendant wants to withdraw his guilty plea because of ineffective assistance of counsel, the defendant must prove that (1) his attorney's advice was under all the circumstances unreasonable under prevailing professional norms; and (2) that he suffered sufficient prejudice from his counsel's ineffective assistance.

Beers v. AG United States, 927 F.3d 150
The court held that, to be successful, a challenger to 18 U.S.C. § 922(g)(4) must distinguish his circumstances from the circumstances of those who had been adjudicated as mentally ill or committed to a mental institution. The burden then shifts to the government to demonstrate that the regulation satisfies heightened scrutiny. The court overruled *United States v. Burton* in so far as it allowed a challenger to § 922(g)(4) to distinguish himself from the historically barred class of mentally ill individuals by demonstrating passage of time or evidence of rehabilitation. The court reasoned that there is no historical support for restoration of Second Amendment rights due to rehabilitation. The court also noted that courts are ill-equipped to determine whether individuals who were previously deemed as mentally ill should have their Second Amendment rights restored.

United States v. Greene, 927 F.3d 723
Appellant and his girlfriend were pulled over during a traffic stop, during which appellant was arrested for marijuana possession. During booking he asked if his

girlfriend was in trouble, to which the arresting officer replied she possibly faced charges for automobile and drug violations. Appellant blurted out he would "take the hit," but later moved to suppress those statements because he has not been Mirandized. The inculpatory statement was properly admitted. The officer's statements were not part of an interrogation, but a response to Appellant's question. He was not coerced into a confession.

Second, officer properly seized a bag of marijuana under the "plain-feel doctrine," as his extensive experience in drug investigations allowed him to identify the bag while it was in the suspect's pocket, during a lawful pat-down.

United States v. A.M., 927 F.3d 718
1. Enhancement under §2B1.1(b)(11)(A)(i) for use of use of "device-making equipment" is appropriate in aggravated identity theft cases.
2. The court cannot grant a downward departure below a mandatory minimum without a motion from the government.

JULY

United States v. Soriano Nunez, 928 F.3d 240 – Defendant, who was granted pre-trial release pursuant to the Bail Reform Act but then taken into custody pursuant to an Immigration and Customs Enforcement (ICE) detainer, moved to dismiss the indictment, which charged her with passport fraud, making a false representation of United States citizenship, using a false social security number, and producing a state driver's license not issued for her use, or for her release from detention. The district court denied the motion and defendant appealed.

The Third Circuit did not reach the motion to dismiss the indictment because it was not a final judgment over which the Court had jurisdiction. As to the bail order, the Court agreed with the district court that defendant's release on bail under the Bail Reform Act in her criminal case did not mandate her release from her detention by Immigration and Customs Enforcement (ICE), pursuant to the Immigration and Nationality Act (INA), pending removal proceedings. The Bail Reform Act explicitly applied only to federal criminal proceedings, not state or immigration proceedings, there was no textual conflict between the Bail Reform Act and the INA, as these statutes served different purposes, detention for removal purposes did not infringe on an Article III court's role in criminal proceedings, and criminal and removal processes could proceed simultaneously.

United States v. Payano, 930 F.3d 186
If the district court applies an incorrect statutory maximum at sentencing, it is not itself sufficient to show a reasonable probability of a different outcome absent the error, like it is when an incorrect guideline range is applied. Without the presumption, the defendant must show actual prejudice to satisfy the third prong of plain error review. Payano showed actual prejudice, because the record showed the government repeatedly mischaracterized his prior conviction as both drug trafficking and an aggravated felony and asked for an upward variance, which the district court granted. It was unclear whether the district court conflated Payano's drug trafficking conduct in the prior and instant conviction with a mistaken belief that his prior conviction had been for drug trafficking. Remand was appropriate to protect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Blunt, 930 F.3d 119
The district court erred when it denied the husband and wife defendants' separate motions to sever their trials under Federal Rule of Criminal Procedure 14 where the wife was claiming her husband was threatening and engaging in violence against her. As to the husband, it tended to elicit an unfairly prejudicial emotional response from jurors, and the wife's testimony supported the government's theory that it was the husband's voice on recorded calls with government entities. As to the wife, she should not have been forced to choose between testifying in her own defense and exercising her right to assert spousal privilege.

AUGUST

United States v. Damon, 933 F.3d 269
Appellant appealed the denial of his motion to terminate supervision. The District Court denied the motion finding it barred by the appellate waiver in the plea agreement, which prohibited appeals of within guideline sentences. Supervised release is part of a "sentence" and within the scope of a waiver.

In re Matthews, 934 F.3d 296
In considering an application to file a second or successive motion to vacate a sentence, a court of appeals does not look at the merits of the challenge but only looks to see if the petitioner has satisfied the pre-filing requirements set forth in § 2255, which the circuit acknowledges is a "light burden." Moreover, Petitioners filed a timely motion following the decision in *United States v. Davis*, 139 S. Ct. 2319. Therefore, the circuit court ruled it would be improper to consider the government's argument that Petitioner's claim was futile.

United States v. Porter, 933 F.3d 226
Defendant could not appeal the denial of a motion to suppress after entering an unconditional guilty plea. A challenge can only survive an unconditional guilty plea if it impacts the constitutional validity of the conviction via guilty plea. Here, the unconditional plea of guilty was a confession of guilt that formed the basis for the conviction. A Fourth Amendment claim does not compromise the validity of the conviction. Comments by the judge at sentencing that defendant had a right to appeal certain issues did not open the door to an appeal because they were made after sentencing and not during the plea colloquy. In the plea colloquy, defendant was advised on the constitutional rights he was waiving by pleading guilty.

Cordaro v. United States, 933 F.3d 232
District court properly asserted jurisdiction over petition under 28 U.S.C. §2241: defendant claimed actual innocence and was barred from seeking relief under §2255 because an intervening statutory interpretation does not permit a successive petition. Claim of innocence based on a change in statutory interpretation required petitioner to show it was more likely than not that no reasonable jury properly instructed under the new interpretation would have convicted him. The circuit court affirmed the denial of the petition because defendant's actions were still "official acts" under *McDonnell v. United States*, 136 S.Ct. 2355 (2016). First, a reasonable jury, properly instructed with the new definition of "official acts" could consider defendant's agreeing to help contractors keep public contracts a public act involving a "matter" before a "public official." Second, defendant received considerable sums of money in exchange for his influence over the contracts. Discovery of "new impeachment" evidence against certain witnesses would not likely have affected a properly instructed jury.

SEPTEMBER

Howell v. Superintendent Rockview SCI, 939 F.3d 260 - The court held that the district court properly denied the defendant's habeas petition alleging a Sixth Amendment violation. The court concluded that any under-representation in the defendant's jury pool was not caused by a systematically discriminatory process. To establish a fair-cross section violation, the defendant must prove that (1) an allegedly excluded group is distinctive in the community; (2) the group's representation in jury-selection panels is not fair and reasonable for the community's population; and (3) the group is under-represented due to its systematic exclusion from the jury-selection process. Proof of discriminatory intent is no longer needed. Otherwise, a district court would be imposing greater restrictions on a defendant than those required by the Supreme Court, which is not allowed.

United States v. Aviles, 938 F.3d 503 The court affirmed the district court's denial of a *Franks* hearing because the defendant did not make a substantial showing that the alleged omissions or misstatements would have been material to the magistrate judge's probable cause determination. Because the defendant failed to meet his burden to support a *Franks* hearing, he could not show that his motion to suppress should have been granted. The court also held that the First Step Act does not apply to the defendant who was sentenced before the First Step Act was enacted but whose case was still on direct appeal. The court reasoned that Congress's use of the word "imposed" excludes cases in which a district court has entered a sentencing order from the First Step Act's amendments. The court also found that the defendant's convictions under N.J. Stat. Ann § 2C:35-4 and Md. Code Ann., Crim. Law § 5-602 do not qualify as felony drug offenses. Therefore, the district court erred in sentencing the defendant to life in prison under 21 U.S.C. § 841 (b)(1)(A).

Velazquez v. Superintendent Fayette SCI, 937 F.3d 151 - The court held that it can exercise habeas jurisdiction where a petitioner merely asserts that the district court entered the wrong guilty plea. The court reviewed the defendant's guilty but mentally ill (GBMI) claim de novo. And found the defendant's counsel was ineffective for failing to object to a defective plea procedure. This was prejudicial even if the appropriate plea would not have resulted in a reduced sentence. To establish ineffective assistance of counsel resulting in a deprivation of process, a defendant need only demonstrate that but for counsel's ineffective assistance, the defendant would have chosen to exercise the right or take advantage of the opportunity of which he was deprived. Here, there was a reasonable probability that, but for counsel's failure to object, the defendant would have taken advantage of the process afforded by a GBMI guilty plea.

OCTOBER

United States v. Henley, 941 F.3d 646 Although parolees have a diminished expectation of privacy, neither a Pennsylvania statute nor any condition of Henley's parole authorized a warrantless search of his home without suspicion. Therefore, the warrantless search at issue required that his parole officer have reasonable suspicion. Parole officers are like any other law enforcement agent in that they can draw on their own experience and specialized training to make deductions from the cumulative information they possess that may elude an untrained person. Reasonable suspicion existed in this case. Henley had begun associating with

former and current parolees suspected of dealing drugs and had violated the conditions of his parole. His parole officer also observed that his door had been kicked in, smelled an odor of marijuana, and had received tips that he was selling marijuana. Finally, Henley's income was out of proportion to his lawful employment. All of these factors in the totality supported reasonable suspicion for a warrantless parole search.

NOVEMBER

United States v. Sepling, 944 F.3d 138
Sentencing counsel was ineffective because he did not undertake a reasonable inquiry into a controlled substance (methylone) not specified in the Guidelines. Had defendant's counsel investigated the controlled substance, he would have been able to challenge the 500:1 methylone to marijuana ratio set forth by the government in the equivalency table, which resulted in a calculation of 5,000 kilograms of marijuana and a BOL of 34. It was counsel's responsibility to ensure that the presentencing report's calculations were correct and that the district court had the information needed to conduct a fair sentencing hearing. Defendant's counsel did not know anything about the controlled substance at issue and did not take reasonable diligence to investigate the substance. Instead, the defendant's counsel relied on the government's characterization of the controlled substance.

United States v. Gray, 942 F.3d 627
The court held that the district court properly imposed three two-level enhancements under U.S.S.G. § 2K2.1(b)(4), § 3C1.2, and § 3C1.1. Regarding the enhancement for possession of a stolen firearm, the court found sufficient the introduction of a reliable NCIC report that established the stolen status of the firearm at the time the defendant possessed it, even if the firearm was no longer considered stolen at the time of trial. The court also found that throwing a loaded firearm in a residential neighborhood near where a police officer and at least one civilian was present created a substantial risk of serious bodily injury while fleeing. The defendant also qualified for the perjury enhancement because the elements of falsity and materiality were implicit in the jury's guilty verdict for possession of a firearm, and the record supported a finding that the defendant willfully provided false testimony.

DECEMBER

United States v. Mitchell, 944 F.3d 116
The court held that when determining a sentence, a district court can mention but not rely on a defendant's record of prior arrests that did not lead to a conviction. Here, the defendant had some criminal convictions but the court overemphasized the dismissed charges in declaring "[t]his is as long and serious of [a] criminal record as I've seen in twelve and a half years on the bench." Under the Due Process Clause, a defendant cannot be deprived of liberty because of mere speculation.

United States v. Ludwikowski, 944 F.3d 123 - Because the defendant was not in custody, the court held that no *Miranda* warnings were needed. To determine whether a defendant was in custody, a district court must analyze whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave, and whether the relevant environment presents the same inherently coercive pressures as those at issue in *Miranda.* Here, the defendant was not physically restrained, and the door was not locked. The defendant came to the station voluntarily, was released and left in

his own car after the interview, and had his phone at all times. Furthermore, the court noted that the Constitution does not protect a defendant from the pressure of concealing his wrongful acts during interrogation. The court also found that the defendant's statements were voluntary and free of coercion because the defendant is a mature, educated, and sophisticated business owner who was in sound mental and physical health at the time of questioning. The court also found that the admission of expert testimony at the defendant's trial did not constitute plain error.