RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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Christofer Bates, EDPA

THIRD CIRCUIT

I. Fifth Amendment / Self-Incrimination / Required Records Exception

United States v. Chabot, --- F.3d ---, 2015 U.S. App. LEXIS 12367, (3d Cir. July 17, 2015).

The foreign bank records that 31 C.F.R. § 1010.420 requires foreign bank account holders to keep fall within the required records exception to the Fifth Amendment's privilege not to incriminate oneself. The required records exception applies when three prongs are met: (1) the reporting or recordkeeping scheme must have an essentially regulatory purpose; (2) a person must customarily keep the records the scheme requires him to keep; and (3) the records must have "public aspects." *See Grosso v. United States*, 390 U.S. 62, 67-68 (1968).

On the first prong, the regulation at issue has an essentially regulatory purpose even though it is administered by the Financial Crimes Enforcement Network, because monitoring and enforcing compliance with currency and tax laws is an equally important objective of the regulation as ferreting out crime. Second, the Court easily concluded that the required records: account holder names and addresses, account types, account numbers, and balance information, are records that are "customarily kept" by bank account holders. Finally, foreign bank records acquire public aspects through the processes by which the government circulates the data from these records to several government agencies, which in turn use the information for a number of important noncriminal purposes, such as implementing economic, monetary, and regulatory public policies.

II. Ineffective Assistance of Counsel / Evidentiary Hearing

United States v. Tolliver, --- F.3d ---, 2015 U.S. App. LEXIS 15451, (3d Cir. Sept. 1, 2015).

The district court abused its discretion when it granted Tolliver's 28 U.S.C. § 2255 motion based on her counsel's failure to conduct an adequate pre-trial investigation without first holding an evidentiary hearing, because material facts were in dispute about her claim. The Court remanded for the district court to hold an evidentiary hearing to resolve these factual disputes, consistent with 28 U.S.C. § 2255(b).

III. AEDPA / Career Offender / Mandatory Guidelines / Cognizable Claim

United States v. Doe, --- F.3d ---, 2015 U.S. App. LEXIS 15578, (3d Cir. Sept. 2, 2015).

A claim that the district court erred in sentencing the defendant as a career offender is cognizable on collateral review under 28 U.S.C. § 2255, at least when the defendant was sentenced under the mandatory Sentencing Guidelines in place before *Booker*.

This holding is narrow. It does not decide whether challenges to the advisory Guidelines, procedural Guidelines errors, provisions other than career-offender designation, defaulted claims, or Guidelines errors that do not cause prejudice can give rise to relief on collateral review. The Court remanded to the district court so a host of procedural *habeas corpus* issues implicated by the Anti-terrorism and Effective Death Penalty Act ("AEDPA") could be resolved in the first instance.

IV. Search Warrant / Email Communications / Speech and Debate Clause / Attorney Work Product and Attorney-Client Privilege / Collateral Order Doctrine / *Perlman* Doctrine / Return of Property Under Rule 41(g)

In re Fattah, --- F.3d ---, 2015 U.S. App. LEXIS 15579, (3d Cir. Sept. 2, 2015).

This case involved a Congressman's interlocutory appeal of the district court's denial of his challenge to an unexecuted search warrant for his private email account on Speech and Debate Clause and attorney-client privilege/work product grounds. The Court held:

(1) Because an unexecuted search warrant is not completely separate from the merits and is reviewable on appeal, the collateral order doctrine did not provide a basis for appellate jurisdiction.
(2) Under the Perlman doctrine, a discovery order aimed at a third party may be immediately appealed on the theory that the third party will not risk contempt by refusing to comply. The Perlman doctrine is meant to protect privilege holders from the disclosure of privileged materials by a disinterested third-party. Even though the search warrant was served on a third party, Google, the Congressman failed to cite an applicable privilege to support his claim. Thus, the Perlman doctrine did not provide jurisdiction for the Court to entertain the Speech and Debate Clause claim.
(3) The Perlman doctrine does apply to the Congressman's attorney-client privilege and work product claims because they are legally cognizable non-disclosure privileges that can be destroyed by a third party, such as Google.
(4) The taint team that was set up to protect the Congressman's emails covered by attorney-client privilege was insufficient because it placed a non-lawyer Department of Justice agent as the first level of review. On remand, the district court was directed to implement whatever filtering procedures are necessary, with an independent Department of Justice *attorney* as the first layer of review.
(5) The Congressman's Rule 41(g) Motion seeking return of his property (the emails) did not provide a basis for appellate review. There was no property to return because the search warrant remained unexecuted.