

# RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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## SUPREME COURT

### I. Re-argument / Armed Career Criminal Act / Residual Clause / Void for Vagueness

*Johnson v. United States*, No. 13-7120 (Order Entered Jan. 9, 2015).

The Supreme Court previously granted *cert.* in this case to resolve the question of whether possession of a short-barreled shotgun is a “violent felony” under the Armed Career Criminal Act (“ACCA”).

The Court has now ordered supplemental briefing and re-argument on the issue of whether, as a constitutional matter, the ACCA’s residual clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”) is void for vagueness. This argument is currently foreclosed in the Third Circuit by *United States v. Gibbs*, 656 F.3d 180 (3d Cir. 2011), but in light of the Supreme Court’s decision to take up the issue, counsel should preserve it in every ACCA residual clause case and may want to consider postponing sentencings involving the issue until June, when *Johnson* is expected to be decided.

### II. 18 U.S.C. § 2113(e) / Bank Robbery / Forced Accompaniment

*Whitfield v. United States*, No. 13-9026, 135 S. Ct. 785 (2015).

A bank robber forces a person to accompany him, for purposes of the ten-year mandatory minimum penalty in 18 U.S.C. § 2113(e), when he forces that person to go somewhere with him, even if the movement occurs within a single building or over a short distance.

## THIRD CIRCUIT

### I. Appellate Jurisdiction / Collateral Orders / Double Jeopardy / Constructive Amendment

*United States v. Wright*, --- F.3d ---, 2015 WL 106198 (3d Cir. Jan. 8, 2015).

The Court dismissed the defendants’ interlocutory appeal in this case for lack of jurisdiction, finding that the district court’s order denying their double jeopardy and constructive amendment claims was neither a collateral order subject to immediate review nor a final order pursuant to 28 U.S.C. § 1291. A collateral order is not final in the traditional sense, but conclusively resolves an important issue separate from the merits, and is effectively unreviewable on appeal. Collateral order appeals are permitted only in exceptional

circumstances, including when double jeopardy may be at issue. The Court adopted a test used by most of the 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?

The Court previously vacated the fraud convictions of Wright, Chawla, and Teitelman under *Skilling v. United States*, 561 U.S. 358 (2010). 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, and to bar certain government arguments that they believed would constructively amend the indictment. The defendants conceded, however, that the government was not prevented from presenting other evidence of criminal intent on the remaining counts, and that even if they prevailed in precluding the specified evidence, no count of the indictment would be dismissed. Thus, the Court concluded, it lacked jurisdiction.

The Court held that the constructive amendment aspect of the motion was not appealable either, because constructive amendment, if it occurs, may be addressed on appeal after trial. Finally, the Court refused to grant mandamus relief, because it identified no irreparable harm.

## **II. Securities & Wire Fraud / Extraterritorial Application / Brady & Jencks / Evidentiary Issues / Loss Amount**

*United States v. Georgiou*, --- F.3d ---, 2015 WL 241438 (3d Cir. Jan. 20, 2015).

- The securities fraud statute, 15 U.S.C. §§ 78j(b) and 78ff, criminalizes deceptive conduct in two contexts: (1) transactions involving purchases or sales of securities listed on an American stock exchange; and (2) transactions involving purchases or sales of any other security in the United States. Under prong two, irrevocable liability establishes the location of a securities transaction. Relevant factors demonstrating irrevocable liability include the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money.

There was sufficient evidence to convict Georgiou under prong two's domestic transaction theory of liability. The evidence showed at least one of the fraudulent transactions in each target stock was bought and sold through U.S.-based market makers, and there were specific instances where target stocks were bought or sold at Georgiou's direction from entities within the United States. The district court's jury instructions were proper, because the court was not required to preclude the jury from considering foreign activity in assessing guilt.

- Unlike securities fraud, wire fraud applies extraterritorially. The wire fraud's jurisdictional requirement is that a communication be transmitted through interstate or foreign commerce for the purpose of executing a scheme to defraud. The evidence was sufficient to convict Georgiou of wire fraud because he regularly used e-mail to direct a cooperating witness and he wired money from a Canadian bank to an undercover FBI agent's account in Pennsylvania.

- Georgiou failed to raise a credible claim under *Brady v. Maryland*, 373 U.S. 83 (1963) or the Jencks Act based on alleged suppression of evidence regarding the cooperating witness's mental health issues, drug use, and statements to the SEC. Some of the evidence was equally accessible to the defense through due diligence. Other evidence was cumulative of other disclosures made in discovery. There was also contested evidence that was neither favorable nor material. Likewise, Georgiou failed to identify any specific statements that were withheld under the Jencks Act.
- An SEC employee's testimony making comparisons of stock quantities and prices did not require scientific, technical, or specialized knowledge. It was therefore proper lay testimony under Federal Rule of Evidence 701.
- The district court did not abuse its discretion when it prohibited Georgiou from introducing extrinsic evidence and limited the cross-examination of the cooperating witness regarding his alleged post-cooperation fraud, under Federal Rules of Evidence 608(b) and 403.
- District courts are not required to consider the impact of market forces when making a loss calculation in securities fraud cases under U.S.S.G. § 2B1.1(b)(1)(M).
- The district court properly assessed a six-level upward adjustment for 250 or more victims under U.S.S.G. § 2B1.1(b)(2)(C). The jury found that Georgiou participated in a "pump and dump" scheme, and the SEC witness identified 1,918 investor accounts that purchased the stock during the scheme, all of them losing over \$1,000.
- Georgiou waived his right to object to the district court's forfeiture order.