

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Cert. Granted – Forfeiture in Drug Conspiracy Cases

Maslenjak v. United States, No. 16-309 (Cert. Granted Jan. 13, 2017).

QUESTION PRESENTED: Whether a naturalized American citizen can be stripped of her citizenship in a criminal proceeding; specifically, 18 U.S.C. § 1425, based on an immaterial false statement?

The Sixth Circuit answered this question affirmatively below, which is in direct conflict with precedents from the First, Fourth, Seventh, and Ninth Circuits.

II. Cert. Granted – Indigent Access to Expert Witnesses

McWilliams v. Dunn, No. 16-5294 (Cert. Granted Jan. 13, 2017).

QUESTION PRESENTED: Whether, when the Supreme Court held in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that an indigent defendant is entitled to meaningful expert assistance for the “evaluated, preparation and presentation of the defense” it clearly established that the expert should be independent of the prosecution?

The majority of Circuits, including the Third Circuit in *Szuchon v. Lehman*, 273 F.3d 299 (3d Cir. 2001), hold that *Ake* requires appointment of an independent expert.

III. Cert. Granted – Ineffective Assistance of Counsel Resulting in Structural Error

Weaver v. Massachusetts, No. 16-240 (Cert. Granted Jan. 13, 2017).

QUESTION PRESENTED: Whether a defendant asserting ineffective assistance of counsel that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel’s ineffectiveness?

The Third Circuit currently holds that prejudice may not be presumed when a structural error claim is raised as part of a claim of ineffective assistance of counsel. *Palmer v. Hendricks*, 592 F.3d 386 (3d Cir. 2010).

IV. Cert. Granted – Ineffective Assistance of Appellate Counsel

Davila v. Davis, No. 16-6219 (Cert. Granted Jan. 13, 2017).

QUESTION PRESENTED: Whether the rule that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel also applies to procedurally defaulted, but substantial ineffective assistance of appellate counsel claims?

It does not appear that the Third Circuit has ruled on this question. The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have answered this question in the negative, while the Ninth Circuit has answered it in the affirmative.

THIRD CIRCUIT

I. Sentencing / Due Process / Consideration of Arrest Record

United States v. Mateo-Medina, --- F.3d ---, 2017 U.S. App. LEXIS 342 (3d Cir. Jan. 9, 2017).

The district court cannot consider a defendant's bare record of arrests not leading to convictions in fashioning an appropriate sentence. *See United States v. Berry*, 553 F.3d 273 (3d Cir. 2009). Such information does not satisfy the reliability requirements of the Due Process Clause. This is true even under the plain error standard of review. Here, the district court committed reversible error by not only considering Mr. Mateo-Medina's bare record of arrests, but also by misstating his record.

In repeating its holding from *Berry*, the Court explained why bare arrest records are patently unreliable: a variety of socioeconomic factors, such as the neighborhood in which one resides and the race of the defendant, often implicitly affects who gets stopped and arrested, particularly for drug crimes.

II. Grand Jury Investigation / Jurisdiction Post-Indictment / Crime-Fraud Exception

In re Grand Jury Matter #3, --- F.3d ---, 2017 U.S. App. LEXIS 1498 (3d Cir. Jan. 27, 2017).

The Court of Appeals may continue to exercise jurisdiction over an appeal of an evidentiary ruling in a grand jury proceeding even after the grand jury has returned both an indictment and a superseding indictment, so long as the grand jury investigation continues.

On the substantive question, the crime-fraud exception to the attorney work product rule does not strip an attorney's work product of confidentiality based on evidence suggesting that the client had merely thought about using the work product to facilitate a fraud. Rather, an actual act to further a fraud is required in order for attorney work product to lose protection under the crime-fraud exception.

III. U.S.S.G. § 2K2.1(a)(4)(A) / “Crime of Violence” / PA Burglary

United States v. Steiner, --- F.3d ---, 2017 U.S. App. LEXIS 1823 (3d Cir. Feb. 1, 2017).

On remand from the Supreme Court with directions to address the appropriateness of Mr. Steiner’s sentence, the Third Circuit left intact its earlier opinion affirming his conviction. *See United States v. Steiner*, 815 F.3d 128 (3d Cir. 2016). However, the Court held that in light of the Supreme Court’s intervening decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), Steiner’s Pennsylvania burglary conviction could not serve as a predicate “crime of violence” to enhance his base offense level under U.S.S.G. § 2K2.1(a)(4)(A). The Court remanded for an expedited sentencing and ordered Mr. Steiner’s release on supervision, since he has already served more prison time than what his correctly calculated guideline range would recommend.

First, the Court held that the Pennsylvania burglary statute is indivisible and therefore the categorical approach, rather than the modified categorical approach, must be used. The statute prohibits unlawful entry into “a building or occupied structure, or separately secured portion thereof, with the intent to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.” “Occupied structure” is defined as “[a]ny structure, vehicle, or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.” After surveying state law on this issue, the Court determined that the different types of structures that can be the locus of a burglary conviction are alternative means of committing the core burglary element, rather than alternative elements, rendering the statute indivisible.

Second, the Court held that the Pennsylvania burglary statute is broader than a generic “burglary of a dwelling,” which is the definition of a crime of violence under the guidelines. *See* U.S.S.G. § 4B1.2(a). Importantly, for purposes of applying this decision to the Armed Career Criminal Act, the Court opined in a footnote that the Pennsylvania burglary statute is also broader than “generic burglary,” which the Supreme Court in the *Taylor* case defined as entry of a building or structure with intent to commit a crime. Therefore, Pennsylvania burglary is categorically NOT a conviction for a crime of violence.