

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Cert. Granted – Refusal to Submit to a Chemical Test to Determine Alcohol Use

Birchfield v. North Dakota, No. 14-1468; *Beylund v. Levi*, No. 14-15-7; *Bernard v. Minnesota*, No. 14-1470 (Cert. Granted and Consolidated December 11, 2015).

ISSUE: Whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood?

II. Cert. Granted – Uncounseled Prior Predicate Convictions in an Assault Case

United States v. Bryant, No. 15-420 (Cert. Granted Dec. 14, 2015).

ISSUE: Whether reliance on valid uncounseled tribal court misdemeanor convictions in order to prove 18 U.S.C. § 117(a)'s predicate-offense element violates the Constitution?

THIRD CIRCUIT

I. Confrontation Clause / 50-Victim Enhancement / Right of Allocution

United States v. Moreno, --- F.3d ---, 2016 U.S. App. LEXIS 31 (Jan. 5, 2016).

- (1) Moreno's Sixth Amendment Confrontation Clause rights were violated when a cooperating witness read statements from a non-testifying U.S. Secret Service Agent's investigative reports into the record at trial. However, the error was harmless because the memoranda at issue played a small role in the government's case and the evidence against Moreno was strong.
- (2) The district court did not clearly err when it applied the four-level enhancement for 50 or more victims under U.S.S.G. § 2B1.1(b)(2)(B). The record reflected that Moreno was responsible for over 110 fraudulent property appraisals that home buyers paid for, and there was also a financial impact on buyers who were induced by the fraudulent appraisals to buy properties for prices above their market values.

(over)

- (3) Moreno's right of allocution was violated when the prosecutor engaged in a vigorous and lengthy cross-examination about the scope of the conspiracy immediately after he was done speaking to the Court. Although unpreserved, this allocution error was plain because cross-examination during allocution clearly circumvents all of Rule 32's policy goals for allocution as stated in *United States v. Ward*, 732 F.3d 175 (3d Cir. 2013). The effect on Moreno's substantial rights was both presumed and actually demonstrated in this case because the prosecutor relied heavily on Moreno's admissions in his sentencing argument and the district court relied on the statements in fashioning the ultimate sentence. Finally, a violation of a defendant's allocution right affects the fairness, integrity, and/or public reputation of judicial proceedings.

The Third Circuit took care to note that even if the error had not been plain, the Court would have exercised its supervisory authority to prohibit the practice of cross-examination during allocution.