RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Chemical Weapons Convention Implementation Act / Breadth of Statute

Bond v. United States, 134 S. Ct. 2077 (2014).

Section 229 of the Chemical Weapons Convention Implementation Act of 1998, which criminalizes the possession or use of "chemical weapons," does not reach Bond's conviction for simple assault, arising from her efforts to poison her husband's mistress by spreading chemicals on her doorknob (and other areas), causing only a minor burn that was easily treated by rinsing with water. **Good language about reading statutes narrowly to avoid federal intrusion on traditionally state crimes.**

II. Straw Purchases of Firearms / Materially False Statements

Abramski v. United States, 134 S. Ct. 2259 (2014).

Abramski bought a gun for his uncle from a licensed gun dealer. Both men were legally eligible to receive and possess firearms. Abramski marked on the federal firearms form that he was the "actual transferee/buyer" of the gun. The Supreme Court held that this was a misrepresentation "material to the lawfulness of the sale." The misrepresentation was therefore punishable under 18 U.S.C. § 922(a)(6) "whether or not the true buyer could have purchased the gun without the straw."

The Court also upheld Abramski's conviction under 18 U.S.C. § 924(a)(1)(A), which prohibits "knowingly mak[ing] any false statement . . . with respect to the information required by this chapter to be kept in the records" of a federally licensed firearms dealer. The statute and the Attorney General's regulations clearly require all federally licensed firearms dealers to retain all "Forms 4473" obtained in the course of selling or disposing of a firearm.

III. Bank Fraud - 18 U.S.C. § 1344(2) / Intent to Defraud Bank

Loughrin v. United States, 134 S. Ct. 2384 (2014).

In a prosecution brought under 18 U.S.C. § 1344(2), which makes a knowing scheme to obtain property owned by, or in the custody of, a bank "by means of false or fraudulent pretenses, representations, or promises," the government does not need to prove – as it must under § 1344(1) – that the defendant intended to defraud a bank. **Instead, the government must simply prove that the false statement will naturally reach the bank (or the custodian of the bank's**

property). **This overrules current Third Circuit law** (*United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002)).

IV. Cert. Granted - Threats to Another Person / Subjective Intent to Threaten

Elonis v. United States, No. 13-983 (Cert. Granted June 16, 2014).

ISSUE: Whether a conviction for threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten or whether it is sufficient to show that a "reasonable person" would regard the statement as threatening; and if the latter, whether the statute is constitutional.

NOTE: This is a Third Circuit case, which adopted the reasonable-person standard.

V. Cert. Granted - Bank Robbery / Forced Accompaniment / *De Minimis* Movement of the Victim

Whitfield v. United States, No. 13-9026 (Cert. Granted June 23, 2014).

ISSUE: Whether 18 U.S.C. § 2113(e), which provides a minimum sentence of ten years in prison and a maximum sentence of life imprisonment for a bank robber who forces another person "to accompany him" during the robbery or while in flight, requires proof of more than a *de minimis* movement of the victim.

NOTE: The Third Circuit has not ruled on this under § 2113(e), but has essentially rejected a *de minimis* exception under USSG 2B3.1(b)(4)(A) (*US v. Reynos*, 680 F.3d 283 (3d Cir. 2012)).

VI. Cert. Granted - Deportability for Drug Paraphernalia Convictions

Mellouli v. Holder, No. 13-1034 (Cert. Granted June 30, 2014).

ISSUE: To trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i), must the government prove the connection between a drug paraphernalia conviction and a substance listed in section 802 of the Controlled Substances Act?

NOTE: The Third Circuit currently requires a relationship between the paraphernalia conviction and the section 802 substance (*Rojas v. Att'y General*, 728 F.3d 203 (3d Cir. 2013) (*en banc*).

THIRD CIRCUIT

I. Fourth Amendment / Searches / Use of a Mobile Tracking Software Tool

United States v. Stanley, 753 F.3d 114 (3d Cir. 2014).

The officer in this case used a "moocher hunter," which is a mobile tracking software tool, to determine the whereabouts of the defendant's computer. Stanley was exploiting his neighbor's unsecure wireless internet connection to access child pornography. The Third Circuit held the officer's use of the "moocher hunter" was not a search within the meaning of the Fourth Amendment. Since the defendant was essentially reaching a "virtual arm" across the street to exploit the neighbor's internet connection, he did not confine his activities to the privacy of his own home and any subjective expectation of privacy he may have had is not one society is prepared to recognize as reasonable (as mooching is likely illegal). By contrast, grow-house operators seek to confine their operations to within the home, which explains why the use of a thermal imager is a search (*Kyllo*).

NOTE: The Court also rejected the district court's finding that the defendant had no legitimate expectation of privacy because he voluntarily disclosed his signal to third parties, a rationale the Court feared "might open a veritable Pandora's Box of Internet-related privacy concerns."

II. U.S.S.G. § 2J1.2(b)(2) / Substantial Interference with Administration of Justice / Destruction of Hard Drive

United States v. Waterman, --- F.3d --- , 2014 WL 2724131 (3d Cir. June 17, 2014).

The district court did not clearly err when it applied the three-level sentencing enhancement at U.S.S.G. § 2J1.2(b)(2) for substantial interference with the administration of justice. A preponderance of the evidence showed that Waterman, a police officer who self-reported to his supervisor downloading approximately twenty videos of child pornography to his home computer, destroyed a hard drive in his patrol car with a screwdriver the day after he was interviewed by the FBI.

NOTE: The Third Circuit stated the language of the enhancement, which requires that the "offense resulted in substantial interference with the administration of justice," imposes a causation requirement. The timing of the offense in relation to the events which give rise to an assertion of substantial interference is a relevant factor for the sentencing court to consider when determining whether the offense *caused* substantial interference.

III. *Alleyne v. United States* / Retroactivity on Collateral Review

United States v. Reyes, --- F.3d --- , 2014 WL 2747216 (3d Cir. June 18, 2014).

The Supreme Court's decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), which held, under the Sixth Amendment, that "any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime" which must be found beyond a reasonable doubt, does not apply retroactively to cases on collateral review. Although *Alleyne* did announce a new rule of law, it is a procedural rule rather than a substantive one. To apply retroactively on collateral review it must be a "watershed rule of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding." *Alleyne* did not announce a watershed rule; rather, it provides only "a limited modification to the Sixth Amendment rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)."

IV. 28 U.S.C. § 2255 / Ineffective Assistance / Failure to Cross Examine on Prior Inconsistent Statements / Failure to Allege Two Charged Conspiracies Violated Double Jeopardy

United States v. Travillion, --- F.3d --- , 2014 WL 3029837 (3d Cir. July 7, 2014).

(1) Trial counsel was not ineffective for failing to impeach Travillion's drug supplier with inconsistent testimony he gave at a near-in-time, factually similar trial. Although courts have found trial attorneys ineffective for failing to cross-examine a witness with a prior inconsistent statement, in this case there was no prejudice. Defense counsel vigorously cross-examined and attacked the supplier's credibility in closing and the evidence against Travillion was overwhelming.

(2) Trial counsel was not ineffective for failing to argue a double jeopardy bar to two separately-charged conspiracy counts. Two different conspiracies existed under the totality of the circumstances. Although the conspiracies overlapped in place, time, and some personnel, their knowledge of, and objectives for the selling of crack and cocaine were not common enough to create one single conspiracy.

V. Supervised Release Revocation / Mandatory Revocation / 18 U.S.C. § 3553(a) factors

United States v. Thornhill, --- F.3d --- , 2014 WL 3056536 (3d Cir. July 8, 2014).

(1) As a matter of first impression, the district court must consider the statutory sentencing factors set forth at 18 U.S.C. § 3553(a) when it sentences a defendant pursuant to the mandatory supervised release revocation provision, 18 U.S.C. § 3583(g).

(2) The district court's order revoking Thornhill's supervised release under the mandatory revocation provision, and imposing three consecutive one-year sentences, was not procedurally unreasonable. The district court's words adequately conveyed that it considered the 3553(a) factors, and a lengthy term of imprisonment was warranted because the district court's

leniency in previous revocation proceedings had not deterred Thornhill from continuing to engage in criminal conduct.

VI. *Sell* Hearings / Competency / Governmental Interests / Sentencing

United States v. Cruz, --- F.3d --- , 2014 WL 3360689 (3d Cir. July 10, 2014).

(1) As a matter of first impression, the government can have a sufficiently important interest in forcibly medicating a defendant in order to render him fit to proceed to sentencing under *United States v. Sell*, 539 U.S. 166 (2003). Under the facts of Cruz's case, his offenses were serious enough to justify the government's interest in proceeding to sentencing.

(2) The district court did not commit clear error when it determined the government's interest in proceeding to sentencing was not undermined by the likelihood that Cruz would be civilly committed in the future.

VII. Procedural Objections at Sentencing / Preservation for Appeal

United States v. Flores-Mejia, --- F.3d --- , 2014 WL 3450938 (3d Cir. July 16, 2014) (en banc).

(1) The Court, overruling *United States v. Sevilla*, 541 F.3d 226 (3d Cir. 2008), created a new rule: when a party wishes to take an appeal based on a procedural error at sentencing, such as the district court's failure to meaningfully consider that party's arguments or to explain some aspect of the sentence imposed, the party must make an objection to the alleged procedural error after the sentence is imposed to avoid plain error standard of review on appeal.

NOTE: If counsel chooses to object to the procedural error earlier in the proceeding, for example, right after the district court denies a substantive request, the objection need not be repeated after the sentence is imposed.

(2) Because defendants sentenced before the issuance of *Flores-Mejia* were not put on notice they must make a procedural objection after the sentence is imposed, the Court declined to apply this new rule retroactively and reviewed the case for an abuse of discretion. The Court found an abuse of discretion here and remanded for re-sentencing, because the district court, by saying "Okay. Thanks. Anything else?", failed to show it meaningfully considered Flores-Mejia's argument for a downward variance to account for his attempted cooperation.

VIII. Carjacking / Abduction Enhancement / Loss Amount

United States v. Smith, --- F.3d --- , 2014 WL 3582897 (3d Cir. July 22, 2014).

(1) The district court did not commit a procedural error when it applied the abduction enhancement set forth at U.S.S.G. § 2B3.1(b)(4)(A). Looking to the three-prong test established in *United States v. Reynos*, 680 F.3d 283 (3d Cir. 2012): (1) Smith's act of pointing a gun at the victim and ordering her to drive to the bank was a sufficient use of force; (2) Smith forced the

victim to accompany him to a different location instead of her intended destination (her home); and (3) Smith forced the victim to drive to the bank to facilitate his threatened revenge for the foreclosure of his home. The fact that the victim disobeyed some of his commands did not preclude application of the enhancement because a victim's "boldness" has no bearing on the defendant's criminal culpability.

(2) The district court did not commit a procedural error in applying the one-point enhancement set forth at U.S.S.G. § 2B3.1(b)(7)(B) for property taken, lost, or destroyed. A robber "takes" property for purposes of this enhancement when he exercises dominion and control over the item, even if he only does so temporarily. Smith's exercise of control over the victim's vehicle while *en route* to the bank was sufficient to warrant application of the enhancement.

IX. Rule 404(b) / Rule of Exclusion / Rule 609 / Statements Against Penal Interest

United States v. Caldwell, --- F.3d --- , 2014 WL 3674684 (3d Cir. July 24, 2014).

(1) The district court committed reversible error when it allowed the government, under Rule 404(b), to admit evidence of Caldwell's two prior gun possession convictions in his felon-in-possession trial. The government's proffered purpose for the evidence, knowledge, was not proper under the facts of the case. Knowledge was not an issue at trial because the government proceeded on a theory of *actual possession*, not constructive possession, and Caldwell's defense was that someone else possessed the gun. The government also failed to adequately articulate the non-propensity chain of inferences it hoped the jury would make from the introduction of Caldwell's prior convictions.

Finally, the Third Circuit held that the district court failed to meaningfully address whether the probative value of Caldwell's prior convictions was outweighed by the danger of unfair prejudice under Rule 403. The district court's reasoning must be apparent from the record. It is not enough for the district court to cite the text of the rule and make a ruling. Here, the probative value of the prior convictions was diminished because Caldwell did not dispute knowledge, and the prejudicial effect was heightened because it came in the form of prior convictions that were essentially for the same charges as the current crime.

NOTE: **The Third Circuit clarified that Rule 404(b) is a rule of *exclusion*, not a rule of inclusion.** Any prior case law characterizing the rule as one of inclusion was merely referring to the fact that the list of enumerated purposes within Rule 404(b) is not exhaustive.

(2) The district court also erred when it allowed the government to impeach Caldwell with evidence of his prior gun possession convictions under Rule 609(a)(1)(B). Although this was a "he said, she said" case and Caldwell's credibility was important, his testimony was also fundamentally important to his defense. Additionally, the prior convictions for gun possession did not by their nature involve dishonest acts and were not especially probative of Caldwell's credibility. Finally, the government failed to show how the probative value of Caldwell's prior convictions was not diminished by the passage of six and-a-half years.

(3) A juvenile who was with Caldwell on the night of his arrest told a defense investigator he was the one who actually possessed the gun. The district court properly excluded this evidence under the hearsay exception for "statements against penal interest" embodied at Rule 804(b)(3). This out-of-court statement was not supported by corroborating circumstances that clearly indicated its trustworthiness. The juvenile viewed Caldwell as an older brother and had a motive to lie, the statement was made to a defense investigator four months after the crime, and the juvenile was not under oath, had not been read *Miranda* warnings, and was not represented by counsel. The juvenile also changed his story multiple times, recanting before Caldwell's second trial.

X. Rule 33 / Newly Discovered Evidence / U.S.S.G. § 2D1.1(b)(1) / U.S.S.G. § 3C1.1

United States v. Napolitan, --- F.3d --- (3d Cir. Aug. 6, 2014) (not yet available on Westlaw).

(1) The district court properly denied Napolitan's motion for a new trial on the basis of newly discovered evidence under Federal Rule of Criminal Procedure 33. His claim was grounded on an allegation that his girlfriend and a law enforcement officer testified falsely (or inconsistently) at trial on an issue key to his defense theory. The Third Circuit held that their testimony was not inconsistent/false. More importantly, however, Napolitan failed to allege facts which showed his due diligence, which is one of five requirements of a newly-discovered evidence claim. Here, Napolitan could have explored these issues at trial by cross-examining the witnesses regarding his defense theory, yet he failed to do so.

(2) The two-point enhancement at U.S.S.G. § 2D1.1(b)(1) applies whenever a defendant convicted of a drug trafficking offense possesses a firearm unless it is "clearly improbable" the weapon was connected to the drug offense. "Clear improbability" is determined under the so-called *Drozdowski* factors: (1) the type of gun involved (e.g., handgun versus hunting rifle); (2) whether the gun was loaded; (3) whether it was stored near drugs or paraphernalia; and (4) whether the gun was accessible. **The Circuit announced a new burden-of-production shifting scheme. The government must first make a *prima facie* showing of possession (temporal and spatial relation between gun/drug activity/defendant); then the defendant must demonstrate clear improbability.** The ultimate burden of applying the enhancement always remains with the government.

Here, the district court applied the wrong standard when it asked whether the types of guns Napolitan possessed were "certainly" the type used by drug dealers, which is too high a bar. The Circuit remanded for a new analysis under the burden-shifting scheme and the *Drozdowski* factors.

(3) A district court cannot refuse to apply the obstruction-of-justice enhancement at U.S.S.G. § 3C1.1 for a defendant's allegedly perjured testimony based solely on a policy concern that the enhancement deters defendants from exercising their fundamental right to testify at trial. **Although the opinion is unclear on this point, this holding applies only in calculating the**

guidelines range at step two. Under *Kimbrough*, courts remain free to vary from the resulting range based on a policy disagreement with the guidelines.

Furthermore, when *denying* a perjury-based enhancement under § 3C1.1, a district court must make an explicit factual finding that the defendant *did not* give false testimony concerning a material matter with the willful intent to mislead the jury (it has long been the law that an explicit finding of perjury is required before *applying* an enhancement). **You should protect the record on this point if you successfully beat back a perjury-based enhancement.**