RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Double Jeopardy / Separate Sovereigns / Puerto Rico

Puerto Rico v. Sanchez Valle, No. 15-108, 136 S. Ct. 1863 (2016).

The "separate sovereigns" exception to double jeopardy does not permit the Commonwealth of Puerto Rico to prosecute and convict a person for an offense for which he was convicted in the United States District Court. Because the prosecutorial authority of Puerto Rico historically derives from the United States (through Congress), it is not a "separate sovereign" for purposes of the exception to double jeopardy. Therefore, the petitioners in this case, who were convicted of firearms offenses in federal court, may not be prosecuted by Puerto Rico under the laws of the Commonwealth for those same offenses.

NOTE: Justice Ginsburg, joined by Justice Thomas, wrote a concurring opinion which urges defense practitioners to challenge the "separate sovereigns" exception to double jeopardy when the separate sovereign is a state or Indian tribe. According to Justice Ginsburg, the doctrine fails to serve the purpose of double jeopardy and is "an affront to human dignity." The argument may be strongest in a case where the defendant is acquitted in state court, and then prosecuted in federal court.

II. Uncounseled Tribal Court Convictions / Domestic Assault by a Habitual Offender

United States v. Bryant, No. 15-420, 2016 U.S. LEXIS 3775 (U.S. June 13, 2016).

Uncounseled tribal court convictions that occurred in proceedings that complied with the Indian Civil Rights Act and were valid when entered may be used as predicate convictions in a prosecution for "domestic assault in Indian Country by a habitual offender," in violation of 18 U.S.C. § 117(a).

Since tribes are separate sovereigns, there is no Sixth Amendment right to counsel in tribal courts. Through the Indian Civil Rights Act, Congress accorded procedural protections similar to those contained in the Bill of Rights, but the tribe must only provide a defendant with counsel if the tribal court imposes a sentence in excess of one year. Since Bryant received less than one year in his previous cases, the convictions were valid when entered and counted for purposes of the domestic assault habitual offender statute. Finally, since the Indian Civil Rights Act sufficiently ensures the reliability of tribal court convictions, the use of these uncounseled convictions in a federal prosecution does not violate the defendant's Due Process rights.

III. Fourth Amendment / Illegal Stop / Discovery of Valid Arrest Warrant / Attenuation

Utah v. Streiff, No. 14-1373, 2016 U.S. LEXIS 3926 (U.S. June 20, 2016).

In this case, a police officer unlawfully stopped and detained Streiff and learned during the detention that he had a valid warrant out for his arrest for a traffic violation. The officer arrested him pursuant to the warrant and conducted a search incident to arrest, finding methamphetamine and paraphernalia. The Supreme Court held that under the three "attenuation" factors announced in *Brown v. Illinois*, 422 U.S. 590 (1975): (1) the temporal proximity between the unconstitutional conduct and the discovery of evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the official misconduct, the evidence was admissible in Streiff's criminal prosecution.

Even though the temporal proximity factor favored suppression, both of the other *Brown* factors weighed in favor of admissibility. The discovery of a valid arrest warrant gave rise to a legal duty for the officer to arrest Streiff, and sufficiently broke the causal chain. The officer should have attempted to engage Streiff in a consensual encounter as he was leaving a suspected drug house instead of initiating a *Terry* stop. However, the officer was merely negligent in incorrectly assuming he had a basis to stop Streiff. There was no evidence of systemic or recurrent misconduct necessitating invocation of the exclusionary rule to promote deterrence.

IV. Hobbs Act Robbery / Drug Dealer / Commerce Clause

Taylor v. United States, No. 14-6166, 2016 U.S. LEXIS 3928 (U.S. June 20, 2016).

To obtain a conviction under the Hobbs Act for robbery or attempted robbery of a drug dealer, the government is not required to prove that the drugs the defendant stole or attempted to steal either traveled or were destined for transport across state lines. It is sufficient for the government to prove the defendant knowingly stole or attempted to steal drugs or drug proceeds, because, as a matter of law, the market for illegal drugs is commerce over which the federal government has jurisdiction.

The evidence on the interstate commerce element was sufficient in this case because the government introduced evidence that Taylor's gang intentionally targeted drug dealers to obtain drugs and drug proceeds, and both robberies were committed with intent to obtain those illegal drugs and drug proceeds.

V. ACCA / Categorical Approach / Alternative Means to Satisfy Elements

Mathis v. United States, No. 15-6092, 2016 U.S. LEXIS 4060 (U.S. June 23, 2016).

This case reaffirms the Court's emphasis on the categorical approach to determining whether a conviction qualifies as an Armed Career Criminal Act ("ACCA") predicate. When a statute defines only one crime, with one set of elements, but lists alternative means by which a defendant can satisfy those elements, and those means are broader than the generic form of a qualifying offense, the sentencing court cannot look to the *Shepard* documents to explore the

means by which the defendant was convicted of committing the crime to determine whether it qualifies as an ACCA predicate.

Specifically, in this case, Iowa's burglary statute is broader than a generic burglary offense because "structures" and "vehicles" were alternative means of fulfilling a single element. Therefore, it did not matter that the defendant's prior offense conduct involved burglarizing a structure, because the sentencing court never should have looked past the elements of the offense; in other words, the sentencing court improperly resorted to the modified categorical approach.

NOTE: The Court prohibited the sentencing court from looking at state record documents outside of a proper modified categorical approach where "authoritative sources of state law" make it "clear" that each of the alternative terms listed in the relevant statute set forth alternative means and not elements. Examples of authoritative sources of state law would be a state Supreme Court decision holding that the jury need not agree on the means of commission, and, in some cases the statute itself may provide the answer either by assigning different punishments tied to alternative means (thus making them elements under *Apprendi*) or by itself identifying which facts must be charged or are merely means of committing the offense.

Where state law is not clear, the sentencing judge may "peek" at the record of prior conviction itself to see if the charging document, plea colloquy, plea agreement, or jury instruction reveal that the term is an element or means. If this "sneak peek" does not make the answer plain, the defendant must prevail due to lack of clarity. Keep in mind that this "pre-" modified categorical approach "sneak peek" may be used if and only if state law is not clear.

VI. Warrantless Breath Tests and Blood Tests / Fourth Amendment / DUI

Birchfield v. North Dakota, No. 14-1468, 2016 U.S. LEXIS 4058 (U.S. June 23, 2016).

The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but it does NOT permit warrantless blood tests. Breath tests are not very intrusive or embarrassing, but blood tests require piercing the skin and extracting part of the defendant's body. It also gives law enforcement a sample from which they can extract more than just blood alcohol content, which could cause anxiety for the testee. The Court acknowledged the government's interest in preserving highway safety, and so it determined that the states have an interest in incentivizing cooperation with law enforcement by criminalizing refusal to submit to breath tests. However, because blood tests are more intrusive, the result must be different. A defendant's refusal to submit to a warrantless blood draw cannot be justified as a search incident to arrest or as based on implied consent. This produced three different results for the different defendants in these consolidated cases:

(1) Birchfield –refused the blood draw, was threatened with an unlawful search and therefore his conviction for refusing that search was unlawful.

(2) Bernard – was criminally prosecuted for refusing a breath test, which was permissible because he had no right to refuse.

(3) Beylund – submitted to a blood draw after being told that state law required him to submit. The Court remanded to the North Dakota Supreme Court to reconsider its conclusion that Beylund's consent was voluntary in light of the inaccuracy of the officer's advisory.

VII. Misdemeanor Crime of Domestic Violence / Physical Force / Recklessness

Voisine v. United States, No. 14-10154, 2016 U.S. LEXIS 4061 (U.S. June 27, 2016).

For purposes of determining whether a prior conviction qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) (prohibiting firearm possession by such convicts), the phrase "use . . . of physical force" in § 921(a)(33)(A) includes acts of force undertaken recklessly, "i.e., with conscious disregard of a substantial risk of harm."

NOTE: The Court pointed out in a footnote that its interpretation of "use of force" in this context "does not resolve" whether reckless behavior is encompassed by 18 U.S.C. § 16, and that courts of appeals have usually read that term in § 16 to reach only violent force, i.e., intentional force. The Court's more expansive reading of § 921(a)(33)(A) does not foreclose the possibility that § 16 excludes reckless conduct in light of the two statutes' different contexts and purposes, so any Court of Appeals decision excluding reckless conduct from § 16's reach remains intact, for now.

In the Third Circuit, a conviction for mere recklessness cannot constitute a crime of violence. *United States v. Marrero*, 743 F.3d 389, 395 (3d Cir. 2014) (quoting *United States v. Lee*, 612 F.3d 170, 196 (3d Cir. 2010)) (construing U.S.S.G. § 4B1.2's residual clause, *compare Aguilar v. Att'y Gen. of the United States*, 663 F.3d 692 (3d Cir. 2011) (construing § 16)).

VIII. Honest Services Fraud / Hobbs Act Extortion / Official Act

McDonnell v. United States, No. 15-474, 2016 U.S. LEXIS 4062 (June 27, 2016).

An "official act" under the federal bribery statute is a decision or action on a question, matter, cause, suit, proceeding, or controversy. That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision to take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or organizing an event – without more – does not fit the definition of an official act.

The jury instructions against McDonnell were erroneous because they failed to adequately explain to the jury how to identify the pertinent question, matter, cause, suit, proceeding or controversy. The instructions were over inclusive and left open the possibility that the jury thought a typical meeting, call, or event itself qualified as the pertinent question, matter, cause, suit, proceeding or controversy. Second, the instructions failed to inform the jury that the question, matter, cause, suit, proceeding or controversy must be more specific than and focused

than a broad policy objective. Third, the instructions did not inform the jury that to convict McDonnell, it had to find that he made a decision or took an action – or agreed to do so – on the identified "question, matter, cause, suit, proceeding or controversy" as properly defined.

Finally, the Court rejected McDonnell's claim that the honest services statute and the Hobbs Act are unconstitutionally vague, and left it to the Fourth Circuit on remand to determine whether there was sufficient evidence that he committed an "official act" or agreed to do so.

IX. Cert. Granted – *Johnson*'s Application to Guidelines, Retroactivity, and Sawed-Off Shotguns

Beckles v. United States, No. 15-8544 (Cert. Granted June 27, 2016).

Questions presented:

(1) Whether Johnson's constitutional holding (that the Armed Career Criminal Act's residual clause is unconstitutionally vague) applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review?

(2) Whether *Johnson* applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in U.S.S.G. § 4B1.2(a)(2)?

(3) Whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in the commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after *Johnson*?

THIRD CIRCUIT

I. Sentence Reductions / Career Offender / Ex Post Facto

United States v. Thompson, Nos. 15-3086 & 15-3107, 2016 U.S. App. LEXIS 10275 (3d Cir. June 7, 2016).

Two defendants convicted of drug offenses, one whom received a departure from his career offender range to the top of his drug guideline range, and another whom received a variance from the career offender range to the middle of his drug guideline range pursuant to a Rule 11(c)(1)(B) plea, were not eligible for sentencing reductions based on Amendment 782 to the Guidelines, which lowered by two levels the base offense levels for drug offenses under U.S.S.G. § 2D1.1.

To receive a reduction under 18 U.S.C. § 3582(c)(2), the defendant (1) must have been sentenced based on a range that has been subsequently lowered by the Sentencing Commission, and (2) the reduction must be consistent with applicable policy statements issued by the Commission. In 2011, after the defendants were convicted and sentenced, the Commission promulgated Amendment 759, which stated that a sentencing reduction is unwarranted unless an amendment to the Guidelines has the effect of lowering a defendant's applicable guideline range.

U.S.S.G. § 1B1.10(a)(2)(B). The application notes state that the applicable guideline range is defined as the range that corresponds to the offense level and criminal history category determined before any departures or variances are decided. *Id.* cmt. n.1(A).

Therefore, even though the appellants sentences were "based on" the drug guideline ranges, which were subsequently lowered by the Commission, sentence reductions were not consistent with the Commission's policy statement regarding the "applicable guideline range," which defines that term as the range before any variances or departures are granted. Amendment 759 does not violate the Ex Post Facto clause, U.S. Const. Art. I, § 9, cl.3, because it does not lengthen the period of time the appellants will spend incarcerated; rather, it denies them the benefit of a discretionary reduction of that period of time. This holding is in line with the Ninth, Seventh, and Eleventh Circuits.

II. Conspiracy to Rob Stash House / Entrapment / Outrageous Prosecution

United States v. Dennis, --- F.3d ---, 2016 U.S. App. LEXIS 11572 (3d Cir. June 24, 2016).

This case involved a reverse sting operation by which an ATF informant recruited Dennis to help him rob a fake drug "stash house," resulting in Dennis being charged with conspiracy to rob a narcotics stash house, conspiracy to possess narcotics with intent to distribute, and carrying a firearm in furtherance of these crimes. The Court held that the district court should have given the jury an entrapment instruction on the robbery and gun possession charges, but that the court properly declined to instruct the jury on entrapment as it pertained to the drug charges.

To receive an entrapment instruction, the defendant bears the burden of production on the two elements of the defense: (1) government inducement to commit the crime, and (2) his lack of predisposition to commit the crime. Dennis met the inducement prong by showing the government's conduct amounted to more than "mere solicitation" or "opening an opportunity" to commit the crime. The ATF's informant played a central role in soliciting Dennis's participation in the scheme. Dennis had no knowledge of any of the crimes ATF was investigating and was only targeted after the informant produced his name in response to the ATF's general inquiry into people involved in robberies. The informant had a personal relationship with Dennis and appealed to his sympathies by using his sick mother (who Dennis had met several times) as a reason to commit the robbery. The informant set up the first meeting with the ATF agent, drove Dennis to the meeting, and asked that Dennis play the role of a seasoned robber. The government also pitched a significant $1.5 to $2 million payoff.

Dennis produced sufficient evidence on his lack of predisposition to commit the robbery and gun possession crimes. He did not have robbery or violent crimes in his history, there was partially corroborated testimony about him turning away three prior opportunities to commit bank robberies with the informant, he disavowed violence on the stand, testified that he had not owned a gun in several years, and presented expert testimony on his vulnerability due to his low IQ. Dennis did not meet his burden of production on lack of predisposition with respect to the drug charges, however, given his prior convictions for possession and distribution of narcotics. The fact that the drug crimes were intertwined with the robbery and gun charges was not sufficient to warrant the instruction on the drug charges.

On these facts, the district court properly declined to dismiss the indictment as an outrageous prosecution in violation of due process. These facts did not warrant a finding that the government created the crime for the sole purpose of obtaining a conviction, and the government's conduct did not amount to shocking, outrageous, or clearly intolerable conduct such that it offended due process.

III. Habeas / Statement Against Interest

Staruh v. Superintendent, Cambridge Springs SCI, --- F.3d ---, 2016 U.S. App. LEXIS 12037 (3d Cir. June 30, 2016).

This case denied habeas relief to a petitioner convicted of homicide who sought to have her conviction overturned because the state courts refused to allow admission of her mother's "confession" to committing the crime to a defense investigator on the eve of her trial, after previously denying responsibility for two and-a-half years. The Third Circuit distinguished this case from *Chambers v. Mississippi*, 410 U.S. 284 (1973) and held that Staruh's due process right to present a defense was not violated by the excluded confession.

Staruh did not meet Pennsylvania's declaration against interest exception to the hearsay rule, PA. R. EVID. 804(b)(3), because coming from a relative, the statement lacked the necessary assurances of trustworthiness. For these same reasons, the rule announced in *Chambers* did not require admission of the statement. In that case, the confessing third party gave a sworn statement that was turned over to the police and, while he repudiated the statement, he was available for cross-examination at trial, and three other witnesses provided corroborating testimony. In contrast, the mother's statements were not offered immediately after trial under circumstances that could have exposed her to criminal prosecution, she was not subject to cross examination, and there were no corroborating statements from other witnesses. The mother was attempting to "have her cake and eat it too."