

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Section 1983 Claims / Qualified Immunity / Fourth Amendment / Exigency

City and Cty. of San Francisco v. Sheehan, --- S. Ct. ---, 2015 U.S. LEXIS 3200 (May 18, 2015).

The plaintiff in this civil rights action was a mentally ill woman living in a group home. The officers shot her multiple times in her room when she threatened them with a knife as they tried to escort her to a psychological emergency room. During the confrontation, the officers entered the room, retreated to the hallway after Sheehan threatened them, and then re-entered and, ultimately shot her.

The Court held that the officers were entitled to qualified immunity because no clearly established Fourth Amendment law forbade the police from re-entering the room to prevent Sheehan from escaping or gathering more weapons without waiting for backup.

II. Court-Ordered Transfer of Firearms / 18 U.S.C. § 922(g)

Henderson v. United States, --- S. Ct. ---, 2015 U.S. LEXIS 3199 (May 18, 2015).

When a district court is satisfied that a felon will not retain control over his guns, the felon-in-possession statute, 18 U.S.C. § 922(g), does not apply, and the court has the equitable power to accommodate the felon's request to transfer the guns to a third party.

The defendant in this case was convicted of a drug distribution offense and surrendered his firearms to the FBI as a condition of his bail. After Henderson was convicted, he asked the FBI to transfer his firearm to a friend, who had agreed to purchase the firearms. The FBI denied the request, stating that transfer of the firearms to a third party would place Henderson in constructive possession of the firearms, in violation of § 922(g). Henderson filed a motion in the district court seeking an order directing the FBI to transfer the firearms to his wife or his friend. Both the district court and the Eleventh Circuit forbade the transfer.

The Court explained that in these situations, the defendant's motion should be denied if the district court believes the felon will later exercise control over the weapons by using them or telling someone else how to do so. The Court suggested that the district court can order the transfer of possession of the firearms to a licensed firearms dealer for sale on the open market, or the court can ask the proposed transferee to promise to keep the guns away from the felon and to acknowledge that allowing him to use them would aid and abet a § 922(g) violation. The district court has the discretion to deny a defendant's motion to transfer possession of his firearms if the proper safeguards or assurances are not met.

III. Immigration / Removability / Controlled Substances / Categorical Approach

Mellouli v. Lynch, --- S. Ct. ---, 2015 U.S. LEXIS 3716 (June 1, 2015).

Mellouli’s Kansas misdemeanor paraphernalia conviction for concealing unidentified orange pills in his sock did not trigger removal under 8 U.S.C. § 1227(a)(2)(B)(i). The Court applied the categorical approach, holding that “to trigger removal under 1227(a)(2)(B)(i), the government must connect an element of the alien’s conviction to a drug ‘defined in [21 U.S.C. § 802].’” That did not happen in Mellouli’s case because it was immaterial under Kansas law whether the substance involved was defined in one of the five federal drug schedules. *See* 21 U.S.C. § 802(6). Nor did the state charge, or seek to prove, that Mellouli possessed a substance on the 802 schedules.

IV. Interstate Threats / Mens Rea / Negligence

Elonis v. United States, --- S. Ct. ---, 2015 U.S. LEXIS 3719 (June 1, 2015).

Negligence is not sufficient to support a conviction for transmission of interstate threats to injure under 18 U.S.C. § 875(c). This means that it is not enough for the jury to find that a reasonable person would view the communication as a threat, contrary to what the district court and Third Circuit held below.

Although the Court stated that § 875(c)’s *mens rea* requirement would be met where the defendant transmits a communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat, the Court declined to address whether a mental state of recklessness would also suffice. The Court also declined to address the First Amendment issues that had been raised by the parties.

NOTE: This case contains excellent language about the strong presumption against strict liability or negligence crimes, and how courts should usually read a *mens rea* requirement into each element that criminalizes otherwise innocent conduct.

V. Cert. Granted – Mandatory Minimum for Aggravated Sexual Abuse

Lockhart v. United States, No. 14-8358 (Cert. Granted May 26, 2015).

18 U.S.C. § 2252(b)(2) requires the district court to impose a prison term of at least ten years on a defendant convicted of possessing child pornography if he “has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.” The question presented in this case is whether § 2252(b)(2)’s mandatory minimum sentence is triggered by a prior conviction under a state law relating to “aggravated sexual abuse” or “sexual abuse,” even though the conviction did not “involve a minor or ward.”

This issue has divided Courts of Appeals, but the Third Circuit has not previously decided the issue.

THIRD CIRCUIT

I. Fifth Amendment / Subpoena Duces Tecum / Collective Entity Doctrine

In re: Grand Jury Empaneled May 9, 2014, --- F.3d ---, 2015 U.S. App. LEXIS 8029 (3d Cir. May 15, 2015).

Under the collective entity doctrine, an individual cannot rely on the Fifth Amendment's privilege against self-incrimination to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally. It makes no difference that, as in this case, the individual serves as the corporation's custodian, sole owner, and only employee. The Third Circuit affirmed the district court's order holding the corporation in contempt for failing to comply with the grand jury subpoena.

The Third Circuit also rejected a Fourth Amendment overbreadth challenge to the subpoena. Despite this Fourth Amendment protection, grand jury investigations paint with a broad brush, and grand juries are presumed to act within the legitimate scope of their authority absent a strong showing to the contrary. Where a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that "there is no reasonable possibility that the category of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation." Here, the district court correctly concluded that arrangements between the corporation and third parties could be disguised as kickbacks, and therefore patient records might reflect that blood samples had been impermissibly ordered or taken.

II. Medicare Fraud / Prosecutorial Misconduct / Evidentiary Issues / Sentencing

United States v. Kolodesh, --- F.3d ---, 2015 U.S. App. LEXIS 8813 (3d Cir. May 28, 2015).

The Third Circuit upheld Kolodesh's conviction and sentence for Medicare fraud against a host of prosecutorial misconduct, evidentiary, and sentencing challenges:

- Prosecutorial Misconduct:
 - The prosecutor did not commit misconduct by introducing and repeatedly referring to a purportedly inaccurately transcribed, irrelevant, and unduly prejudicial portion of a wiretapped conversation between Kolodesh and one of his employees where he used profanity. Kolodesh stipulated to the accuracy of the transcript at trial, and it was clearly relevant to Kolodesh's *mens rea* and the existence of an agreement to defraud Medicare.
 - The prosecutor did not commit misconduct by eliciting testimony about stereotypes of Russians "gaming the system." Most of the statements were offered up by witnesses without prompting by the government, and the statements that were elicited through questioning were relatively innocuous, referring to the company having two teams of nurses, one English and one Russian, to serve the language needs of the patient populations the company served.

- Evidentiary Challenges
 - The district court erred when it excluded certain evidence of Kolodesh's illness, which kept him homebound during the time of some of the fraudulent activity. In particular, his wife's proffered testimony about her personal knowledge of his illness was not hearsay and was admissible. However, the error was harmless because it would not have affected the outcome of the trial.
 - The district court need not have *sua sponte* excluded evidence of uncharged acts of fraud, because it was offered as circumstantial evidence of Kolodesh's knowledge of the charged fraudulent activity, not to impugn his character.
 - Evidence of a secret Swiss bank account was relevant and properly admitted, because it provided circumstantial evidence of knowledge of the charged fraudulent activity.
 - The district court did not abuse its discretion in giving jurors the option of continuing deliberations while waiting for a witness transcript they had requested.

- Sentencing Challenges
 - The district court did not commit procedural error by estimating the loss amount at \$16.2 million based on the extensive trial testimony of co-conspirators recounting their intimate involvement in the management of the company and, together with Kolodesh, their direction of the company's fraudulent activities.
 - The district court did not commit procedural error when it applied a four-level enhancement for Kolodesh's role as an organizer or leader under U.S.S.G. § 3B1.1(a). Kolodesh's arguments on appeal amounted to nothing more than a request that the Third Circuit reweigh the evidence and reassess credibility of government witnesses.
 - The district court did not commit procedural error when it applied a two-level enhancement for obstruction of justice based on testimony that Kolodesh set up a meeting with a government witness and said "don't bury me." The enhancement was proper even though the witness admitted that Kolodesh did not threaten him or ask him to lie or change his testimony.
 - Kolodesh's sentence of 176 months – a downward departure from the guideline range of 188 to 235 months - was substantively reasonable.
 - The district court's restitution order, which was based on the loss amount and required Kolodesh to pay the full amount under the joint and several theory of liability, *see* 18 U.S.C. § 3664(h), was not erroneous.