

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Ineffective Assistance of Counsel for Eliciting Racially-Based Future Dangerousness Testimony

Buck v. Davis, 15-8049, 2017 U.S. LEXIS 1429 (U.S. Feb. 22, 2017).

This case relies on the *Martinez* and *Trevino* decisions to excuse the procedural default of an ineffective assistance of trial counsel claim and grants relief under Federal Rule of Civil Procedure 60(b). The Court found that trial counsel was ineffective for eliciting expert testimony at sentencing that the petitioner's race made him more likely to commit future crimes of violence. Such race-based future dangerousness evidence is patently unconstitutional, and no competent defense attorney would introduce such evidence.

II. Cert. Granted – Effect of Guilty Plea on Constitutional Challenge to Statute of Conviction

Class v. United States, No. 16-424 (Cert. Granted Jan. 13, 2017).

QUESTION PRESENTED: Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction?

In this case, the defendant raised Second Amendment and Due Process challenges to his prosecution for carrying a firearm on the grounds of the U.S. Capitol Building. He pled guilty, admitting his factual guilt without an explicit appellate waiver. When he re-raised his constitutional claims on appeal, the D.C. Circuit held that his guilty plea waived all claims of error on appeal, including constitutional ones.

The Circuits are currently split as follows: the D.C., First, and Tenth Circuits all hold that a guilty plea waives constitutional challenges to the statute of conviction. The Third, Fifth, Sixth, Ninth, and Eleventh Circuits hold that a guilty plea does not inherently waive constitutional challenges. Finally, the Fourth, Seventh, and Eighth Circuits allow facial, but not as-applied constitutional challenges to a conviction after a guilty plea.

THIRD CIRCUIT

I. Two-Jury Procedure in Joint Trial / Preserving Sentencing Objections

United States v. Brown, --- F.3d ---, 2017 U.S. App. LEXIS 3124 (3d Cir. Feb. 22, 2017).

Brown was charged with participating in a cocaine trafficking conspiracy. He was tried along with another co-defendant who was connected to the conspiracy, but had no connection to him personally. The remainder of the co-conspirators pled guilty. The trial court made the decision to empanel separate juries for Brown and his co-defendant who went to trial. Brown argued on appeal that the dual jury procedure violated his Fifth Amendment Due Process rights and his Sixth Amendment right to a trial before an impartial jury.

The Court began by holding that Brown's constitutional challenges were not waived merely because his defense counsel agreed to the dual jury procedure. There was no record made that Brown knew the rights he was waiving and the consequences of waiving those rights. The court reserved for 2255 proceedings the issue of whether defense counsel was ineffective for agreeing to the dual jury procedure.

Substantively, Federal Rule of Criminal Procedure 14 gives the district courts great latitude in crafting procedures for joint trials. The dual jury procedure used in this case was within the trial court's discretion. Further, Brown was unable to point to any prejudicial evidentiary spillover from his co-defendant sufficient to establish a plain error.

The Court also rejected Brown's invitation to revisit its earlier *en banc* decision in *United States v. Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014), which requires a defendant to raise procedural objections after the district court pronounces its sentence in order to preserve the error and avoid plain error review.

II. Drug Weight / Abuse of Trust / Obstruction of Justice / Sentencing Disparity

United States v. Douglas, --- F.3d ---, 2017 U.S. App. LEXIS 3125 (3d Cir. Feb. 22, 2017).

Douglas, who had a special badge enabling him to pass TSA checkpoints without having his luggage checked, was involved in a large scale cocaine trafficking conspiracy. The evidence supported the district court's factual finding that the government proved Douglas responsible for more than 450 grams of cocaine by a preponderance of the evidence. A co-defendant testified that Douglas smuggled 10 or 13 kilograms through the San Francisco International Airport 40 to 50 times. This was corroborated by flight records, telephone toll records, and bank deposits.

The district court properly applied the two-level enhancement for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. Given the "paramount importance of airport security," the discretion that a person has when given security access at an airport is similar to the way prison workers are treated under the guidelines. And given the importance of airport security to the nation's national security, government authorities who grant access to secured areas in the airport expect those with access to act with integrity. Therefore, an airport employee granted a security

clearance is reasonably viewed as a person who occupies a position of public trust that can be breached by using his position to further a crime. The enhancement was proper here even though there was no evidence that Douglas held any supervisory position, because given his security clearance, Douglas's freedom permitted him to commit a "difficult-to-detect" crime.

The district court erred when it imposed an obstruction of justice enhancement based on Douglas's failure to appear for court on one day of trial. There was no evidence in the record to suggest Douglas's failure to appear was willful. To the contrary, there were medical records demonstrating that he had been in the emergency room in the early morning hours, along with a doctor's note excusing him from court that day. Thus, the case was remanded for resentencing.

III. "Listening Post" Theory for Wiretaps / Evidentiary Issues

United States v. Jackson, --- F.3d ---, 2017 U.S. App. LEXIS 3367 (3d Cir. Feb. 24, 2017).

In this case, the Third Circuit adopted the "listening post" theory that under Title III either the interception of or the communications themselves must have been within the issuing judge's territorial jurisdiction. This meant that the wiretaps intercepting Mr. Jackson's out-of-state phone calls were lawful, because the intercepting law enforcement officers were located inside Pennsylvania. The Pennsylvania wiretap statute, which is generally modeled after Title III, includes an express provision adopting the listening post theory. Therefore, the evidence from the state wiretaps upon which the later federal wiretap orders were partially premised was lawfully obtained, and the district court properly denied Mr. Jackson's motion to suppress evidence from the federal wiretaps.

The district court erred in allowing the agent to testify as a lay witness about his understanding of the meaning of clear conversations made during the intercepted calls. In some parts, the agent inferred the knowledge for his testimony on other evidence, rather than on his direct knowledge of the events at issue. The error in admitting this testimony, however, was not plain. Furthermore, there was minimal prejudice because Jackson's co-defendants testified to the same basic interpretations of the calls, and the jury was able to independently review them to reach its own conclusions.

The district court did not err when it permitted the government to elicit testimony about the cooperating co-defendants' guilty pleas. Such evidence was not admitted as substantive evidence of Jackson's guilt; rather, it was relevant to the cooperators' credibility, whether the government was selectively prosecuting Jackson, and whether the co-conspirators had firsthand knowledge of the crime for which Jackson was on trial.

There was no plain error established by the prosecutor's inopportune mention of a co-conspirator's invocation of his Fifth Amendment right in response to a question from the district court about the applicability of a particular hearsay exception. Finally, there was valid claim of cumulative trial error.

IV. Ineffective Assistance of Counsel for Failing to Seek Judge's Recusal

McKernan v. Superintendent, Smithfield SCI, --- F.3d ---, 2017 U.S. App. LEXIS 3593 (3d Cir. Feb. 28, 2017).

This case holds that the constitutional right to an impartial trial extends to a bench trial, and cannot be waived by a defendant. Defense counsel in this case rendered ineffective assistance when he not only failed to move for a recusal of the trial judge in McKernan's bench trial for homicide, but also talked McKernan out of pursuing the issue.

The trial judge called the homicide victim's family into her robing room after reading a website they had created about her, which painted her as a lenient judge who was incapable of rendering harsh decisions to defendants. She also referred to the district attorney as the family's attorney, when in fact the prosecutor represented the Commonwealth of Pennsylvania. And finally, the judge reassured the family that she was not a judge incapable of issuing harsh results. These facts played directly into McKernan's trial theory --- that he was guilty of a lesser degree of homicide. Any competent attorney would have moved to recuse the judge (who was deciding the issue of innocence or guilt in the bench trial) as a result of this bias. Not only that, but defense counsel took things a step further by talking McKernan out of pursuing a recusal motion. The prejudice prong of the ineffective assistance claim was met here because the trial judge's sensitivity to criticism for being too lenient made it far less likely that she would accept McKernan's defense that he was guilty of a lesser degree of homicide.