RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Generic Federal Definition of Statutory Rape

Esquivel-Quintana v. Sessions, No. 16-54, 2017 U.S. LEXIS 3551, (May 30, 2017).

In the context of statutory rape offenses that criminalize sexual intercourse based solely on the ages of the participants, the generic federal definition of "sexual abuse of a minor" requires the age of the victim to be less than 16. Therefore, a state statute criminalizing consensual sexual intercourse between a 21 year-old and a 17 year-old does not qualify as sexual abuse of a minor under the Immigration and Nationality Act and is not an aggravated felony.

II. Forfeiture in Drug Cases with Co-Conspirators

Honeycutt v. United States, No. 16-142, 2017 U.S. LEXIS 3556 (June 5, 2017).

Under the statute governing forfeiture in drug cases, 21 U.S.C. § 853, a defendant may not be held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire.

NOTE: This case overturns previous Third Circuit precedent from *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999).

III. Citizenship / Gender / Equal Protection

Sessions v. Morales-Santana, No. 15-1911, 2017 U.S. 3724 (June 12, 107).

The different treatment of unwed fathers and mothers for purposes of derivative citizenship violates the constitutional guarantee of equal protection. Under the main rule, an unwed U.S. citizen father may transmit citizenship to his child if he had been present in the U.S. for five years before the child's birth. (The rule was previously ten years.) This rule applies also to married couples. Congress made an exception for unwed U.S. citizen mothers, who may transmit citizenship if she has lived in the U.S. for just one year pre-birth. The Court left it to Congress to select, going forward, a physical-presence requirement (ten years, one year, or some other period) uniformly applicable to all children born abroad with one U. S.-citizen and one alien parent, wed or unwed. In the interim, the Government must ensure that the laws in question are administered in a manner free from gender-based discrimination. This means that until Congress changes the law, the current five-year rule for unwed fathers applies, rather than the one-year rule for unwed mothers.

NOTE: Language from this case leaves open an argument that for purposes of criminal prosecution under 18 U.S.C. §§ 1325 and 1326, a client born out of wedlock to a U.S. citizen father would only have to prove one year of physical presence to make out a derivative citizenship defense.

IV. Capital Cases / Independent Expert Advice / Mental Health Issue

McWilliams v. Dunn, No. 16-3294, 2017 U.S. Dist. LEXIS 3876 (Jun. 19, 2017).

A capital defendant has a clearly established Due Process right to independent expert advice to evaluate, prepare, and present his defense when a mental health issue is "seriously in question." Although the Court did not hold that a capital defendant has a right to the appointment of his or her own independent expert, the majority noted that appointment of a defendant's own expert is often the most practical way to respect the Due Process right.

V. First Amendment / Ban on Social Media for Sex Offenders

Packingham v. North Carolina, No. 15-1194, 2017 U.S. LEXIS 3871 (Jun. 19, 2017).

This case strikes down, on First Amendment grounds, a state statute criminalizing all social media access for registered sex offenders. The Court assumed the statute was content neutral and applied intermediate scrutiny, which requires that the statute be "narrowly tailored to serve a significant governmental interest." There is a broad governmental interest in protecting the internet from criminal activity in general and protecting minors on the internet in particular. However, the statute at issue in this case was not narrowly tailored at all. By criminalizing all social media access for sex offenders, the statute barred them from forums that for many are the principal sources of current events, employment ads, speaking and listening in the modern public square, and otherwise exploring human thoughts and knowledge, and thus prevents the user from engaging in the legitimate exercise of his First Amendment rights. The state was unable to show that the statute was necessary to serve the purpose of keeping convicted sex offenders away from minors.

VI. Brady Claims / Materiality

Turner v. United States, Nos. 15-1503, 15-1504, 2017 U.S. LEXIS 4041 (Jun. 22, 2017).

In this case, the government conceded that it violated *Brady v. Maryland* by suppressing both exculpatory and impeaching information that could have affected a 30-year-old murder trial involving seven petitioners, who were convicted of a group attack on a woman in an alley that led to her death. In a fact-intensive analysis, the Court held that the suppressed materials were not "material" even though they included evidence that there may have been an alternative perpetrator. Given all the evidence the jury heard, there was not a reasonable probability that the evidence of the alternative perpetrator would have yielded a different outcome.

With respect to the suppressed impeachment evidence, it was largely cumulative of other impeachment evidence that was disclosed at trial. The Court stressed that impeachment evidence

is not always immaterial with respect to a witness simply because they have been impeached with other evidence. However, on this record, and considering these particular witnesses, the cumulative effect of the suppressed evidence was insufficient to make out the materiality prong of a *Brady* claim.

VII. Right to Public Trial / Structural Error / Ineffective Assistance of Counsel

Weaver v. Massachusetts, No. 16-240, 2017 U.S. LEXIS 4043 (Jun. 22, 2017).

Defense counsel's failure to object to the courtroom being closed to the public (because potential jurors occupied all the seats) did not amount to ineffective assistance of counsel. Although a violation of the right to a public trial is a structural error, in some cases unlawful closure might take place and yet the trial can still be fundamentally fair from the defendant's standpoint. In the case of an unpreserved claim of a violation of the public trial right, raised in the context of an ineffective assistance of counsel claim, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or to show the particular public-trial violation was so serious as to render his or her trial fundamentally unfair. Weaver failed to make that showing in this case, where the courtroom was only closed during voir dire and none of the potential harms flowing from a courtroom closure were shown.

This opinion distinguishes three types of structural errors: (1) those in which the right is not designed to protect against erroneous conviction but protect some other interest (right to conduct own defense); (2) those in which the effects are too hard to measure (right to counsel of choice); and (3) those in which the error always results in fundamental unfairness (denial of an attorney, failure to give reasonable doubt instruction). This case does NOT undermine any of the Court's earlier precedents holding that structural errors require reversal because they cause fundamental unfairness, either to the defendant or by undermining the systemic requirements of a fair and open judicial process.

VIII. Prejudice / Ineffective Assistance of Counsel / Guilty Plea

Lee v. United States, No. 16-327, 2017 U.S. LEXIS 4045 (Jun. 23, 2017).

Lee raised a successful ineffective assistance of counsel claim where his trial counsel erroneously assured him that he would not be deported if he pled guilty to possessing ecstasy with the intent to distribute when, in reality, the conviction subjected him to mandatory deportation.

When determining the prejudice prong of the ineffective assistance claim, the test is whether, but for counsel's deficient advice, the defendant would have gone to trial. The test is NOT whether the outcome of the proceedings would have been different. The defendant need not necessarily show that he or she would have been better off going to trial. The likelihood of securing an acquittal might be relevant where the defendant's decision about going to trial hinged upon his or her prospects of success. However, in this case the error was one that affected Lee's understanding of the consequences of pleading guilty. Lee adequately demonstrated a reasonable probability that, having lived in the United States most of his life, he

would have taken his chances at trial in an attempt to secure an acquittal so he could remain in the United States.

IX. Ineffective Assistance in State Post-Conviction Claims / Procedural Default

Davila v. Davis, No. 16-6219, 2017 U.S. LEXIS 4060 (Jun. 26, 2017).

Ineffective assistance of counsel in state post-conviction proceedings does not qualify as cause to excuse the procedural default of ineffective assistance of appellate counsel claims.

X. Plain Error / Erroneous Application of Pre-Fair Sentencing Act Mandatory

Hicks v. United States, No. 16-7806, 2017 U.S. LEXIS 4265 (Jun. 26, 2017).

Hicks was wrongly sentenced after the Fair Sentencing Act's passage to a 20-year mandatory minimum sentence under the pre-FSA mandatory minimum. Although Hicks failed to raise this issue initially, this case vacated the judgment and remanded the case to the Fifth Circuit for further proceedings. Hicks has met the first two prongs of plain error review (error, that is plain) and leaves it to the Fifth Circuit to decide whether the error affected Hicks's substantial rights and whether it implicated the fairness, integrity, or public reputation of judicial proceedings (the third and fourth prongs).

XI. Cert. Granted – Warrantless Seizure and Search of Historical Cell-Phone Records

Carpenter v. United States, No. 16-402 (Cert. Granted June 5, 2017).

ISSUE: Whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of a cell-phone user over the course of 127 days is permitted by the Fourth Amendment?

NOTE: Current Third Circuit precedent recognizes that cell phone users *may* retain a reasonable expectation of privacy in their historical cell site location information, but leaves it to the Magistrate Judge's discretion in each case to determine whether a warrant based upon probable cause should be required for the government to seize and search such information. *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't*, 620 F.3d 304 (3d Cir. 2010).

XII. Cert. Granted – Residual Clause of Obstructing IRS Laws

Marinello v. United States, No. 16-1144 (Cert. Granted Jun. 27, 2017).

ISSUE: Whether the residual clause of 26 U.S.C. § 7212(a), which makes it criminal to "in any other way" corruptly endeavor to obstruct or impede the due administration of the Internal Revenue laws, requires proof that there was a pending IRS action or proceeding, such as an investigation or audit, of which the defendant was aware when he engaged in the purportedly obstructive conduct?

THIRD CIRCUIT

I. Appellate Jurisdiction / Sentencing Reduction

United States v. Rodriguez, 855 F.3d 526 (3d Cir. 2017).

28 U.S.C. 1291 provides the Court of Appeals with jurisdiction to consider the substantive reasonableness of a denial of a sentencing reduction under 18 U.S.C. § 3582(c)(2). Just like a sentencing judgment, a district court's ruling on a Section 3582 motion is a "final decision" of the district court because it closes the criminal case once again. Moreover, 18 U.S.C. § 3742(a) does not limit the Court of Appeals' Section 1291 jurisdiction. Section 3742(a)(1) allows for review for reasonableness because an unreasonable sentence is imposed in violation of the law under 18 U.S.C. § 3721(a)(1).

The district court did not impose an unreasonable sentence by denying Rodriguez a sentencing reduction. Looking to the 18 U.S.C. § 3553(a) factors, the threat to public safety, and Rodriguez's post-sentencing conduct, *see* U.S.S.G. § 1B1.10, cmt. n. 1(B)(ii-iii), it was well within the district court's discretion to determine that the public safety risk outweighed Rodriguez's good conduct in the prison, given the seriousness of the string of violent armed robberies he committed soon after his release from prison on drug and firearm offenses.

II. Ineffective Assistance of Counsel / Eyewitness Identification Instruction

Bey v. Superintendent, Greene SCT, --- F.3d ---, 2017 U.S. App. LEXIS 4874 (3d Cir. Mar. 20, 2017).

Trial counsel was ineffective for failing to object to a faulty eyewitness identification instruction. The instruction was supposed to inform jurors that they *need not* accept eyewitness identification with caution, but the trial court mistakenly instructed the jurors that they *may not* accept the identification with caution. This was tantamount to telling the jury they were required to accept the eyewitness's identification testimony, which deprived Bey of his due process right to have every element of the crime (including his identity) established by the prosecution beyond a reasonable doubt. Given that the witness's identification was the cornerstone of the Commonwealth's case, and the fact that Bey's first trial resulted in a hung jury, Bey established the requisite prejudice to prove ineffective assistance of counsel.

Although the issue was procedurally defaulted, the default was excused under *Martinez v. Ryan*, 566 U.S. 1 (2012), because post-conviction counsel's failure to raise the issue constituted ineffective assistance of counsel in its own right and Bey's underlying claim was indeed a substantial one.

III. Jurisdiction / Aiding and Abetting / Jury Instructions

Fahie v. People of the Virgin Islands, --- F.3d ---, 2017 U.S. App. LEXIS 9018 (3d Cir. May 24, 2017).

Because 48 U.S.C. § 1613 eliminated the Third Circuit's certiorari jurisdiction over all cases commenced in the Superior Court of the Virgin Islands after December 28, 2012, the court had jurisdiction over this case, which was commenced in the Superior Court in 2011.

The trial court properly gave an aiding and abetting instruction in this case, because the government presented the theory through its amended charging instrument and its arguments to the jury suggesting that two shooters killed the victim, even though government counsel did not use the phrase "aiding and abetting." The fact that Fahie's co-defendant pled guilty to being an accessory after the fact did not judicially estop the government from proceeding against Fahie as an aider and abetter.

Finally, because the propriety of the trial court's anti-crime scene investigation jury instruction was fundamentally a matter of Virgin Islands law, the court determined that it improvidently granted certiorari on that question.

IV. Rehearing En Banc Granted – Abuse of Position of Trust

United States v. Douglas, --- F.3d ---, 2017 U.S. App. LEXIS 9779 (3d Cir. Jun. 2, 2017).

In *United States v. Douglas*, 849 F.3d 40 (3d Cir. 2017), the panel held that the district court properly applied the two-level enhancement for abuse of a position of trust under U.S.S.G. § 3B1.3. The panel reasoned that Douglas, who had a special badge enabling him to pass TSA airport checkpoints without having his luggage checked, abused his special security clearance to commit a "difficult to detect" crime when he engaged in a large scale cocaine trafficking conspiracy, despite the fact that he never held any supervisory position in his job. The Court reversed the district court's decision to impose an obstruction of justice enhancement.

This Order grants rehearing en banc on the question of whether application of the abuse of trust enhancement was proper.

V. Grand Jury Leak / Right to Counsel / Due Process / Sufficiency of Indictment / Constructive Amendment / Joinder / Particularity of Search Warrants

United States v. Fattah, Jr., --- F.3d ---, 2017 U.S. App. LEXIS 9781 (3d Cir. Jun. 2, 2017).

An FBI agent admitted at trial that over the course of several months, he disclosed confidential information contained in sealed search warrants to a reporter in exchange for information pertinent to his investigation. This led to reporters being present during the execution of a search warrant at Fattah's home, which occurred two years before he was indicted. After first declining to enforce a waiver against Fattah for failing to re-raise the issue at trial after first raising it in pre-trial motions, the Court went on to deny his claim that the agent's

conduct violated Fattah's Sixth Amendment right to counsel of his choice and also declined to remand for an evidentiary hearing. Fattah alleged that the bad publicity caused him to lose his job and thus rendered him financially unable to retain a private attorney of his choosing. However, the record showed that he was already planning on leaving his job to open his own competing business, and Fattah failed to provide any evidence of which contracts he expected his new business to be awarded. Additionally, a search warrant was executed on Fattah's office, which showed that his employer learned of the investigation independently of any media reports. Finally, rather than showing that the government's misconduct directly interfered with his employer's unconditional payment of legal expenses, Fattah's claim rested on a speculative loss of general, fungible income.

The agent's leaks to the media were unquestionably improper and may warrant independent investigation, but they failed to rise to the level of a due process violation under the "outrageous government conduct" doctrine, where relief is typically only granted in rare cases of excessive government over-involvement in the crime. Here, Fattah's theory was that outrageous conduct occurred through the alleged Sixth Amendment violation, improper disclosure of Fattah as a grand jury target under Federal Rule of Criminal Procedure 6(e), the FBI agent committing obstruction of justice, a violation of FBI policy, and improper disclosure of confidential information in Fattah's tax returns. The Court held above that no Sixth Amendment violation occurred; also, Fattah failed to make a preliminary showing of a Rule 6(e) violation, and even if he did, he failed to demonstrate prejudice sufficient to warrant dismissal, intent to obstruct justice was not proven, a violation of internal agency policies standing alone does not amount to a due process violation, and the proper remedy for improper disclosure of confidential financial information would be prosecution of the agent, not dismissal of the indictment.

The Court also rejected Fattah's challenges to various counts of the indictment and held they properly charged federal offenses. The various fraud counts, rather than alleging mere breaches of contract, properly alleged Fattah's fraudulent intent and that Fattah made false representations to banks in order to obtain loans. The theft from a federally funded program charge alleged that the Philadelphia School District received sufficient federal funding to bring Fattah's conduct within the ambit of the statute. Various other challenges to the sufficiency of the indictment were also rejected.

The government did not constructively amend the indictment by introducing evidence of factual allegations not included in the indictment, by introducing irrelevant, prejudicial and inflammatory evidence or by introducing evidence of uncharged crimes. The factual allegations at best constituted a variance, rather than a constructive amendment, and Fattah failed to prove prejudice because any false statements made on loan applications would have been known to him as the author, thus negating any surprise at trial. Likewise, any challenge to prejudicial or irrelevant evidence should have been challenged through motions *in limine*. In any event, the purportedly prejudicial information provided evidence of Fattah's motive, opportunity, intent, and knowledge regarding the charged crimes. Finally, evidence of other crimes does not constructively amend the indictment so long as the jury is properly charged, as they were here.

The indictment properly joined three categories of offenses charging bank fraud, tax fraud, and fraud on the Philadelphia School district under Federal Rule of Criminal Procedure

8(a). The counts were of a similar character, they were interrelated parts of a common scheme or plan, and the Third Circuit does not have a *per se* prohibition on joining tax and non-tax related charges. Finally, Fattah failed to prove prejudice from the joinder. He did not advance any arguments as to how the joinder impacted the fairness of the trial or how the jury might have been unable to compartmentalize the evidence.

The search warrant in this case met the particularity requirement even though it authorized the seizure of business records spanning time periods not covered by the indictment. The complex nature of the scheme in this case, which spanned years, allowed for the search for and seizure of such records under *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982).

VI. Ineffective Assistance of Counsel / Right to Jury Trial / Prejudice Inquiry

Vickers v. Superintendent, Graterford SCI, --- F.3d ---, 2017 U.S. App. LEXIS 10003 (3d Cir. Jun. 6, 2017).

Trial counsel was ineffective in this case. Even though he discussed with Vickers his general right to a jury trial, he failed to secure an on-the-record waiver and did not apprise Vickers of all aspects of his jury trial right before proceeding with a bench trial. The Court left open whether a total failure to inform a defendant of his right to jury trial could give rise to a structural error. However, where the defendant has, like Vickers, been apprised of his general jury trial right, counsel's failure to inform him of certain aspects of that right does not constitute structural error and prejudice cannot be presumed under the *Strickland* test.

Given the Supreme Court's intervening decision in *Lafler v. Cooper*, 566 U.S. 156 (2012), the Court revised the prejudice test previously set forth in *United States v. Lilly*, 536 190 (3d Cir. 2008). The appropriate inquiry is whether the petitioner has established a reasonable probability that but for his counsel's failure to ensure a proper waiver of his Sixth Amendment right to be tried before a jury, he would have exercised that right. Vickers failed to meet that burden. The record showed that counsel explained to Vickers that his best bet was to try to seek acquittal of his most serious charge, aggravated assault, based on a narrow legal issue a judge would be more likely to understand than a jury, and Vickers' testimony that he repeatedly requested a jury trial was deemed incredible by the PCRA Court.

VII. Ineffective Assistance of Counsel / Confrontation Clause

Lambert v. Warden, Greene SCI, --- F.3d ---, 2017 U.S. App. LEXIS 11493 (3d Cir. Jun. 28, 2017).

Lambert was charged as a co-conspirator and accomplice to Aquil Tillman's acts of murder, aggravated assault, and burglary and the two men were tried jointly. Tillman made statements to a testifying expert that implicated Lambert in his criminal plan. The trial court required defense counsel to redact statements from the testimony that would be facially incriminating to Lambert, since Tillman did not testify at trial and would not be subject to cross-examination. However, the expert testified to portions of Tillman's statement that may have become facially incriminating to Lambert in the context of the entire joint trial. Therefore, the

Court remanded for an evidentiary hearing to determine whether the Commonwealth used Tillman's testimonial statements for their hearsay purpose and, if so, whether trial counsel was ineffective for failing to request a curative limiting instruction.

In so holding, the Court determined that Tillman's statements to the expert were testimonial despite the fact that they were not necessarily made with the intent to accuse Lambert. In the context of the joint trial, Lambert was only required to show that Tillman's statements to the expert were made with the primary purpose of substituting for his in-court testimony about the crime. And, even though the expert was using Tillman's statements to testify about his capacity to form the requisite *mens rea* for the charged crimes, reasonable jurists could have found on the record that the prosecutor's closing argument relied on the truth of Tillman's statements to establish Lambert's advance knowledge and intent to aid in Tillman's criminal plan. Therefore, a limiting instruction was necessary.

VIII. Supervised Release Revocation / Jurisdiction

United States v. Johnson, --- F.3d ---, 2017 U.S. App. LEXIS 11684 (3d Cir. Jun. 30, 2017).

Johnson served an aggregate prison term for federal convictions arising out of the Middle District of Florida and the District of the Virgin Islands, and thereafter began concurrent terms of supervised release. He transferred supervision of his Virgin Islands supervision to the Middle District of Florida, but did not request a transfer of jurisdiction under 18 U.S.C. § 3605. He subsequently pled guilty to a third federal case in the Middle District of Florida, which was a direct violation of his two supervised release terms. The Middle District revoked Johnson's term of supervised release and sentenced him to time served. The Virgin Islands Probation Office later learned of the new conviction and took steps to revoke Johnson's other term of supervised release. He challenged that revocation on jurisdictional grounds, arguing that the two terms merged and that the Middle District of Florida's revocation eliminated the Virgin Islands term of supervised release.

The Third Circuit held that the Virgin Islands term of supervised release was not constructively discharged by the Middle District of Florida's separate judgment of revocation. 18 U.S.C. § 3624(e) specifically acknowledges that a term of supervised release is to be concurrent to other federal or state probationary or parole periods, including other terms of federal supervised release.

Furthermore, § 3624(e) does not condition jurisdiction to revoke a term of supervised release on actual supervision by a particular Probation Office. Therefore, even if the Virgin Islands Probation Office failed to fulfill its statutory responsibility to supervise Johnson, it would not deprive the district court of supervision to revoke the term of supervised release. Even if the Virgin Islands had attempted to engage in a semiformal "courtesy supervision" arrangement with the Middle District of Florida, the Middle District would still have been the Probation Office actually supervising Johnson.

The Court also rejected Johnson's Due Process challenge to his revocation proceeding on the basis that the Virgin Islands District Court improperly relied on two documents provided by

the Middle District of Florida Probation Office pertaining to his release date from prison. Even if the minimal Due Process protections afforded in revocation hearings were not satisfied, there was no demonstrable prejudice, as the start date of Johnson's supervised release term was not seriously in dispute.