

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Capital Cases / Eighth Amendment / Victim Impact Testimony

Bosse v. Oklahoma, No. 15-9173, 2016 U.S. LEXIS 6030 (U.S. Oct. 11, 2016).

This per curiam opinion reaffirms after *Booth v. Maryland*, 482 U.S. 496 (1987) and *Payne v. Tennessee*, 501 U.S. 808 (1991), that in capital cases, the Eighth Amendment prohibits victim impact testimony that includes characterizations and opinions from the victim's family members about the crime, the defendant, and the appropriate sentence. The Eighth Amendment allows the victim's family to testify only about the victim's qualities and the effect of her murder on the family.

II. Double Jeopardy / Inconsistent Verdicts

Bravo-Fernandez v. United States, No. 15-537, 2016 U.S. LEXIS 7269 (U.S. Nov. 29, 2016).

The issue-preclusion component of the Double Jeopardy Clause announced in *Ashe v. Swenson*, 397 U.S. 436 (1970) does not bar the government from retrying defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later overturned for legal error unrelated to the inconsistency. Re-trial is barred on the counts of acquittal, but the government may retry the defendants on the counts the jury convicted on where the inconsistent verdicts leave it unclear what the jury necessarily decided.

III. Cert. Granted – Considering Consecutive Mandatory Sentence in Fashioning Appropriate Sentence on Non-Mandatory Charges

Dean v. United States, No. 15-9260 (Cert. Granted Oct. 28, 2016).

QUESTION PRESENTED: Whether *Pepper v. United States*, 562 U.S. 476 (2011) overruled *United States v. Hatcher*, 501 F.3d 931 (8th Cir. 2007), and related opinions from the Eighth Circuit to the extent those opinions limit the district court's discretion to consider the mandatory consecutive sentence under 18 U.S.C. § 924(c) when determining the appropriate sentence for the felony serving as the basis for the Section 924(c) conviction?

NOTE: There is no precedential Third Circuit decision on this question.

IV. Cert. Granted – Sexual Abuse of a Minor as an Aggravated Felony under the INA

Esquivel-Quintana v. Lynch, No. 16-54 (Cert. Granted Oct. 28, 2016).

QUESTION PRESENTED: Whether a conviction under one of the seven state statutes criminalizing consensual sexual intercourse between a 21-year-old and someone almost 18 constitutes the “aggravated felony” of “sexual abuse of a minor” under 8 U.S.C. § 1101(a)(43)(A) of the Immigration and Nationality Act – and therefore constitutes grounds for mandatory removal?

NOTE: The Third Circuit currently answers “Yes” to this question and holds that such a conviction is an aggravated felony.

THIRD CIRCUIT

I. INA / Aggravated Felony / Pennsylvania PWID / Modified Categorical Approach / Counterfeit Drugs

Singh v. Att’y Gen., --- F.3d ---, 2016 U.S. App. LEXIS 18155 (3d Cir. Oct. 6, 2016).

This appeal from a Board of Immigration Appeals decision reaffirms that Pennsylvania’s Possession with Intent to Deliver statute, 35 P.S. § 780-113(a)(30) is divisible with respect to both the conduct (manufacturing, delivering, etc.) and the controlled substance to which it applies. Therefore, when determining whether a conviction for Section 780-113(a)(30) is an aggravated felony (or whether it serves as a predicate conviction for various federal sentencing enhancements), the modified categorical approach must be applied.

Importantly, Pennsylvania law defines controlled substances as including counterfeit substances, while federal law does not. Employing the modified categorical approach and looking to the appropriate Shepard documents, Singh’s negotiated plea agreement and colloquy stated that his offense involved “PA counterfeit substance – Non Fed.” The substance was not specified in any of the Shepard documents. Since the documents indicated that the substance involved was banned by Pennsylvania law but not federal, Singh’s conviction did not match the elements of the generic federal drug trafficking crime and was not an aggravated felony.

II. Bankruptcy Fraud / Loss Amount / Creditors Paid in Full

United States v. Free, --- F.3d ---, 2016 U.S. App. LEXIS 18165 (3d Cir. Oct. 6, 2016).

The appropriate way to calculate the loss amount under U.S.S.G. § 2B1.1 in a bankruptcy fraud case where all creditors have been paid in full is for the district court to determine whether the defendant intended to cause a loss to his creditors or what he sought to gain from committing the crime. Any loss amount triggering enhancements under the guidelines must reflect a loss amount the bankruptcy creditors actually incurred or which the defendant intended to be incurred. The district court cannot inflate the loss amount based on a theory of abstract harm to the judiciary.

Free paid all his creditors in full but made the choice to file for bankruptcy, concealing assets and lying to the Bankruptcy Court along the way. His repeated lying to the Bankruptcy Court, disrespect for the judicial system, and the value of the assets he concealed from the Court were considerations that could be applied to justify an upward departure or variance, but were not properly considered in the loss amount analysis absent a finding that Free intended to cause pecuniary harm to his creditors.

The Court also summarily affirmed Free's convictions against sufficiency of the evidence challenges, as the evidence of his falsehoods to the Bankruptcy Court was undisputed and overwhelming. The fact that the creditors were paid in full was not a defense to the crimes.

III. Sufficiency / Wiretap Evidence / Rule 403 / Rule 404(b) / Mistrial Claims

United States v. Bailey, --- F.3d ---, 2016 U.S. App. LEXIS 18666 (3d Cir. Oct. 18, 2016).

- (1) The evidence was sufficient to prove all 4 defendants were members of a violent heroin trafficking conspiracy, as opposed to mere buyers, because of the large scale transactions and accumulation of deals suggesting more trust and organization amongst them, the regular delivery of drugs on credit, and the fact that three of the defendants sometimes served as lookouts for the organization.
- (2) The evidence was sufficient to prove all 4 defendants guilty of possessing, using or carrying firearms in furtherance of a drug trafficking conspiracy. The government established that each defendant either committed the substantive offense or met the *Pinkerton* standard for co-conspirator liability. All 4 defendants were aware of numerous drug-related shootings done by the organization, saw firearms in trap houses, and knew the organization used armed enforcers.
- (3) The district court properly denied the defendants' motion to suppress evidence obtained as a result of Title III wiretaps. The government established the necessity of the wiretaps by laying out in a detailed affidavit how traditional investigative techniques, such as controlled drug purchases through confidential informants, listening to prison calls by incarcerated organization members, and physical surveillance were insufficient to reveal the full scope of the conspiracy.
- (4) The district court committed Rule 403 error when it allowed the government to introduce a video to prove a murder of a rival drug dealer by the brother of the head of the organization. Although the non-video evidence offered about the murder was admissible, the surveillance video was brutal and highly disturbing, and was not necessary to establish the government's stated purpose in seeking its admission. The district court also failed to conduct the requisite Rule 403 balancing. However, the error was harmless because the evidence was overwhelming. The Court also rejected a parallel Rule 404(b) argument, because that rule only applies to prior bad acts by the defendant, not by third parties.
- (5) The Court rejected other Rule 403 and Rule 404(b) challenges, as well as the district court's decision to deny defendants' requests for a mistrial based on inflammatory statements made by witnesses at trial. These statements were relatively isolated, and did not outweigh the abundance of evidence pointing to the defendants' guilt.

IV. Interstate Threats / Insufficient Jury Instruction / Harmless Error

United States v. Elonis, --- F.3d ---, 2016 U.S. App. LEXIS 19453 (Oct. 28, 2016).

This case was on remand from the Supreme Court, which held that the district court's failure to instruct the jury on the subjective requirement of the interstate threats statute, 18 U.S.C. § 875(c), improperly allowed the jury to convict on mere negligence. The Third Circuit explained that Section 875(c) contains both a subjective and an objective component. A defendant is guilty if: (1) he transmits a communication for the purpose of issuing a threat or with knowledge that the recipient will view it as a threat, and (2) the jury determines that the communication is objectively threatening. Nevertheless, the Court determined that the district court's error in instructing the jury was harmless. There was overwhelming evidence in the trial record demonstrating beyond a reasonable doubt that Elonis knew the threatening nature of his communications, and therefore he would have been convicted absent the error.

NOTE: The Third Circuit followed the Supreme Court's lead and left open the issue of whether a finding of recklessness would be sufficient to satisfy the *mens rea* requirement of Section 875(c).

V. Grand Jury / Work Product Privilege / Interlocutory Appeals / Jurisdiction

In re Grand Jury Matter #3, --- F.3d ---, 2016 U.S. App. LEXIS 19454 (Oct. 28, 2016).

The Court lacked jurisdiction to hear an appeal from a district court's order to disclose a particular e-mail under the crime-fraud exception against claims that it was privileged. The finality and contempt rules require that a challenger must refuse disclosure and be held in contempt, and then appeal the contempt order instead of filing an interlocutory appeal from the disclosure order. The Pearlman doctrine – which allows an interlocutory appeal from a disclosure order aimed at disinterested third parties, did not apply because the grand jury had already returned an indictment. For these same reasons, the collateral order doctrine was also inapplicable.

VI. Immigration & Nationality Act / Crime of Violence / Void for Vagueness

Baptiste v. Att'y Gen., --- F.3d ---, 2016 U.S. App. LEXIS 20140 (3d Cir. Nov. 8, 2016).

The definition of a “crime of violence” located at 18 U.S.C. § 16(b) is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). Consequently, Baptiste was not convicted of an aggravated felony under the immigration statute and was not removable from the United States on that basis. He was, however, removable because he had been convicted of two or more crimes of moral turpitude.

Section 16(b)'s definition of a “crime of violence” is “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” This

unconstitutionally vague definition is worded *identically* to the language contained in 18 U.S.C. § 924(c)'s "residual clause," which is one part of that statute's definition of a crime of violence.

NOTE: The constitutionality of Section 16(b)'s definition of a crime of violence is currently before the Supreme Court on a *writ of certiorari*, and the constitutionality of Section 924(c)'s residual clause is currently on appeal before the Third Circuit.

VII. ACCA / Pennsylvania PWID / Divisibility / Modified Categorical Approach

United States v. Henderson, --- F.3d ---, 2016 U.S. App. LEXIS 20139 (3d Cir. Nov. 8, 2016).

35 Pa. Stat. Ann. § 780-113(f)(1) disjunctively incorporates all of the controlled substances on Pennsylvania's Schedule I or II as the substances for which a defendant can be sentenced to a maximum penalty of 15 years for possession with intent to deliver. This case holds that Section 780-113(f)(1) is divisible, and therefore the sentencing court can employ the modified categorical approach and look to the appropriate *Shepard* documents to determine the type of substance the defendant was convicted of possessing. Since Henderson's substance of conviction was heroin, he was properly deemed an armed career criminal subject to a 15 year mandatory minimum for his federal conviction for being a felon in possession of a firearm.

Mathis v. United States, 136 S. Ct. 2243 (2016) outlined three methods for determining whether a statute lists multiple elements disjunctively (divisible) or whether it enumerates various factual means of committing a single element (indivisible). This is critical because the modified categorical approach can only be used when the statute is divisible. These three methods are looking to state court precedent, looking to the language of the state statute itself, and third, if state law is not clear, taking a "peek" at the record of conviction itself. Here, a Superior Court decision pertaining to a similar section, Section 780-113(a)(30), stated that the type of drug is an element of the offense. Second, the language of the statute itself provides a list of specific statutory alternatives by cross-referencing Schedule I or Schedule II controlled substances. Finally, a peek at the record of permissible judicial documents indicated that the substance at issue was heroin.