RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Cert. Granted – Whether 18 U.S.C. § 16(b)'s Residual Clause if Void for Vagueness

Lynch v. Dimaya, No. 15-1498 (Cert. Granted Sept. 29, 2016).

ISSUE: Whether the residual clause in 18 U.S.C. § 16(b) is void for vagueness in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015)?

NOTE: Section 16(b)'s residual clause, defining a crime of violence (in part) as "any . . . 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," is identical to the residual clause in 18 U.S.C. § 924(c). So this case should also determine whether § 924(c)'s residual clause is unconstitutionally vague.

The Third Circuit has not weighed in on this issue. The Sixth, Seventh, Ninth, and Tenth Circuits have all decided that § 16(b)'s residual clause is unconstitutionally vague, while the Fifth Circuit has held it is not.

THIRD CIRCUIT

I. Felon-In-Possession / Second Amendment / "As Applied" Challenges

Binderup v. Att'y Gen., --- F.3d ---, 2016 U.S. App. LEXIS 16407 (3d Cir. Sept. 7, 2016) (en banc).

Although the federal felon-in-possession of a firearm statute, 18 U.S.C. § 922(g)(1), is constitutional on its face, the *en banc* Court sustained two as-applied Second Amendment challenges to claimants who were prohibited persons based on non-violent state misdemeanor convictions that were punishable by more than one year in prison. An as-applied Second Amendment challenge requires the Court to evaluate whether the law burdens the challenger's Second Amendment's rights by examining (a) the traditional justifications for prohibiting the challenger's class of persons from possessing a firearm, and (b) the facts presented about the challenger and his background that distinguish his circumstances from those persons in the historically barred class. If the challenger clears these hurdles and proves the law burdens his Second Amendment rights, the Court must then decide at the second step whether the law survives intermediate scrutiny.

The claimants here were convicted of corrupting the morals of a minor (for dating a 17 year-old), and misdemeanor unlicensed gun possession, crimes that are punishable by more than one year in prison, but are not serious enough to justify stripping away a person's Second Amendment rights. Both defendants had gone crime free for substantial amounts of time. The government could not show that the felon-in-possession statute survives intermediate scrutiny as-applied to these challengers, because their isolated, decades-old non-violent misdemeanor convictions do not permit an inference that disarming people like them would promote responsible firearm use.

II. Vulnerable Victim Enhancement / Actual Harm

United States v. Adeolu, --- F.3d ---, 2016 U.S. App. LEXIS 16655 (3d Cir. Sept. 12, 2016).

The vulnerable victim enhancement, U.S.S.G. § 3A1.1(b)(1), does not require a showing of actual harm to the victim; rather, the government must prove a nexus between the victim's vulnerability and the crime's success. Application of the enhancement requires the Court to engage in a three-part test to determine whether (1) the victim was particularly susceptible or vulnerable to the criminal conduct; (2) the defendant knew or should have known of the susceptibility or vulnerability; and (3) the vulnerability or susceptibility facilitated the crime in some manner.

The standard was clearly met in this case where the defendant, a tax preparer, stole children's identifying information to allow clients to falsely claim them as dependents on their tax returns. Children have a particular inability to guard against theft of personal information, and Adeolu should have known of this vulnerability, especially since the children's ages were vital to his clients falsely claiming them as dependents. Finally, the nexus between the vulnerability and the crime's success was proven because Adeolu profited from the sale of his victims' personal information and falsely listed them as dependents because of their youth.

III. Lay Testimony / Expert Testimony / Plain Error

United States v. Fulton, --- F.3d ---, 2016 U.S. App. LEXIS 17050 (3d Cir. Sept. 19, 2016).

Where a witness is not in a better position than the jurors to form an opinion or make an inference, the witness's lay opinion is inadmissible under Rule 701(b). Here, the district court erred when it allowed an agent to testify that investigators eliminated an alternative suspect because he was allegedly on the phone when the bank robbery occurred. This testimony was not only unhelpful to the jury, it was wrong and misleading. The error was not plain, however, because defense counsel was able to elicit on cross examination that the call could have gone to voicemail, and presented its own investigator to testify that the call did in fact go straight to voicemail.

The district court also erred when it allowed government investigators to offer lay opinions that Fulton better matched the appearance of the bank robber on the surveillance tape than the alternative suspect did. Since both Fulton and the alternative suspect were strangers to the investigators before this case began, their opinions were not helpful to the jury. The error

was deemed harmless, however, because the jurors could rely on their independent assessment of whether Fulton looked like the robber on the surveillance tape. Additionally, the defense was able to elicit *proper* lay testimony from two witnesses intimately familiar with Fulton, who testified that he did not look like the robber. Chief Judge McKee concludes this analysis with a warning about the danger of jurors placing special significance on the identification testimony from law enforcement witnesses.

The Court also held that a person who banked at the branch and was familiar with the bank in question was permitted to offer lay opinion testimony about the height of the bank counters. The Court also rejected Fulton's claim that he was deprived of a fair trial based on the government's slight mischaracterization in summation of expert testimony regarding GPS data from a cell phone apparently carried from the bank to a yard behind the house where Fulton and the alternative suspect lived, as well as Fulton's "cumulative error" claim, which was not raised in the district court.

IV. Fourth Amendment / Deadly Force / Reasonableness / Superseding Cause

Johnson v. City of Philadelphia, --- F.3d ---, 2016 U.S. App. LEXIS 17138 (Sept. 20, 2016).

The standard for determining whether deadly force is appropriate under the Fourth Amendment is reasonableness under the totality of the circumstances, and nothing more. Whether the suspect posed significant threat of death or serious physical injury and whether deadly force was necessary to prevent the suspect's escape or serious injury to others are relevant factors, but are not constitutionally required in their own right.

The Court left open two questions: (1) whether official police department policies may be considered among other things when assessing reasonableness; and (2) whether the "totality of the circumstances" inquiry should account for whether the officer's own reckless or deliberate conduct unreasonably created the need to use deadly force.

This constitutional tort case was decided based on proximate causation. Even if the police officer's failure to retreat and attempt to de-escalate his confrontation with a drug-induced psychotic suspect violated the Fourth Amendment, the suspect's violent and illegal act of slamming the officer against multiple cars and trying to reach for his firearm severed any causal connection between the officer's initial actions and his subsequent use of deadly force. The Court was careful to note that the violence of this attack rendered the inquiry straightforward; this case does not "broadly immunize police officers from Fourth Amendment liability whenever a mentally disturbed person threatens an officer's safety."