RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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THIRD CIRCUIT

I. Habeas / Ineffective Assistance of Post-Conviction Counsel / FED. R. CIV. P. 60(b)(6)

Cox v. Horn, --- F.3d ---, 2014 WL 3865836 (3d Cir. Aug. 7, 2014).

The Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which recognized that post-conviction counsel's unreasonable failure to litigate claims alleging ineffective assistance of trial counsel can provide "cause" to excuse a procedural default, can potentially be grounds for relief under Federal Rule of Civil Procedure 60(b)(6) if the motion was filed within a reasonable time of the *Martinez* decision.

More than just the change in the law following *Martinez* is required for Rule 60(b)(6) relief. The petitioner must show "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur."

II. Inside Trading / Misappropriation Theory / Perjury / Sufficiency / Newly Discovered Evidence

United States v. McGee, --- F.3d ---, 2014 WL 3953647 (3d Cir. Aug. 14, 2014).

(1) McGee was convicted of insider trading pursuant to Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78ff, under the "misappropriation theory" of liability set forth at 17 C.F.R. § 240.10b-5 ("SEC Rule 10b-5(b)(2)"). Misappropriation occurs when a person who is an outsider to the corporation "misappropriates confidential information for securities trading purposes, in breach of a duty to disclose owed to the source of the information." Rule 10b5-(b)(2) creates a duty of trust when the insider and outsider "have a history, pattern, or practice of sharing confidences, such that the recipient knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality."

Rule 10b-5(b)(2) is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The rule, which sets forth the misappropriation theory of insider trading liability without a requirement of deception, is a valid exercise of the SEC's rulemaking authority because it is based on a permissible reading of Section 10(b) of the Securities and Exchange Act.

(2) There was sufficient evidence to support McGee's conviction under the misappropriation theory. The evidence showed he and the source of the information had established a pattern of sharing confidences with one another during their ten year mentor-mentee relationship in Alcoholics Anonymous, and through social interactions, within the meaning of Rule 10b-5(b)(2).

(3) Although a perjury conviction under 18 U.S.C. § 1621 cannot be obtained by the uncorroborated testimony of one witness, here McGee's high volume trading in the company's stock after the insider allegedly told him of the impending sale was sufficient corroboration. The testimony was also sufficient to prove the falsity of McGee's testimony (that he had no idea the company was about to be sold) during SEC proceedings.

(4) McGee motion for a new trial under Rule 33 was properly denied because he did not demonstrate diligence in obtaining the "newly discovered" evidence and, in any event, the evidence did not establish he was wrongly convicted, nor did it attack the heart of the insider's testimony against him.

III. Conspiracy to Possess with Intent to Distribute / Lesser Included Jury Instruction / Judicial Factfinding at Sentencing / Confrontation Clause / Right to Present a Defense / Variance from Indictment / *Brady* Violations

United States v. Freeman, --- F.3d ---, 2014 WL 4056553 (3d Cir. Aug. 18, 2014).

(1) 21 U.S.C. § 841(a)(1) (possession with intent to distribute a detectable amount of cocaine), is a lesser included offense of the charged offense in this case, 21 U.S.C. § 841(b)(1)(A)(ii)(II) (possession with intent to distribute more than five kilograms of cocaine). The district court properly instructed the jury on the lesser included offense because there were multiple defendants participating at varying levels in the importation of cocaine, and a jury could have rationally concluded that it could not attribute a specific amount to any particular defendant.

(2) The district court's factfinding regarding the amount of cocaine attributable to each defendant for guidelines purposes did not violate the defendants' Sixth Amendment rights under *Alleyne v. United States*, 133 S. Ct. 2151 (2013) because it did not increase the statutory minimum or maximum penalties.

(3) Remand for resentencing was required for one of the defendants because the district court made only a conclusory response to his objection to the amount of drugs allegedly attributable to him in the Presentence Investigation Report.

(4) The district court did not violate the Sixth Amendment's Confrontation Clause by prohibiting one of the defendant's attorneys from cross-examining a cooperating witness about all the other uncharged individuals he sold drugs for. The district court merely limited that line of cross-examination to specific instances of misconduct the cooperator failed to disclose to the government, pursuant to Federal Rule of Evidence

608(b). These limitations still allowed defense counsel to engage in ample cross-examination, and the right to present a defense was properly preserved.

(5) The government's evidence proved a single, complex drug importation conspiracy rather than multiple separate conspiracies. There was no prejudicial variance from the indictment.

(6) The government did not commit a *Brady* violation because it did not suppress evidence to the defendant's prejudice. Some of the challenged evidence was not even in existence at the time of the trial, and other evidence was in the possession of the defense attorney before trial.

IV. Waiver / Speedy Trial / Right to Impartial Jury / Rule 403 / *Brady* / Safety Valve

United States v. Claxton, --- F.3d ---, 2014 WL 4056561 (3d Cir. Aug. 18, 2014).

(1) The district court granted Claxton's motion for a judgment of acquittal notwithstanding the jury's guilty verdict, but failed to conditionally determine whether his motion for a new trial should be granted if the judgment of acquittal was later vacated or reversed, as required by Federal Rule of Criminal Procedure 29(d). The Third Circuit eventually reversed the district court's judgment of acquittal.

Claxton did not waive his arguments for a new trial by failing to allege the Rule 29(d) error in a cross-appeal, nor by failing to renew his arguments after the initial remand.

(2) Trial delay resulting from co-defendants' numerous pre-trial motions and interlocutory appeals was excludable under the Speedy Trial Act.

(3) Claxton's Sixth Amendment speedy trial claim was properly denied. The ninteen months between the indictment and Claxton's initial apperance and the twenty-two month delay between arraignment and trial were sufficient to trigger analysis of the other three factors announced in *Barker v. Wingo*, 407 U.S. 514 (1972). However, the delay was not caused by a lack of effort on the part of law enforcement and all of the post-appearance delay was attributable to the defendants for filing numerous motions and appeals. Although Claxton continually asserted his right to a speedy trial, the length of delay attributable to the government was not lengthy enough for the Court to presume prejudice. Further, Claxton's pre-trial incarceration in Puerto Rico for 84 days did not establish specific prejudice because there was no evidence of substandard conditions during this time.

(4) Claxton's Sixth Amendment right to an impartial jury was not violated. There was no showing that the impaneled jurors were tainted by the pretrial publicity surrounding Claxton's co-defendants' earlier trial. The district court also properly denied Claxton's motion for a mistrial based on jury tampering. The district court properly conducted a hearing regarding improper communication with the two jurors involved, and

concluded Claxton suffered no prejudice, in part because neither of those two jurors participated in the jury's deliberations. Finally, the district court properly denied Claxton's motion for a new trial based on juror misconduct on the basis that one of the jurors failed to disclose a prior work relationship with a government witness during voir dire. The law does not categorically impute bias to coworkers of key government witnesses, and Claxton did not demonstrate any prejudice.

(5) The district court did not commit error when it allowed the government to introduce photographs and physical evidence of seized drugs. This evidence was highly relevant to establishing the existence of a conspiracy and Claxton's involvement in it. The probative value of the contested evidence substantially outweighed the prejudice to Claxton under Federal Rule of Evidence 403.

(6) Claxton's *Brady* claim failed because the government eventually turned over the contested impeachment material, and the Court allowed additional cross-examination and gave defense counsel as much time as needed to prepare. Claxton provided no evidence to support his claim that the government willfully withheld the contested *Brady* material, and therefore dismissal of the indictment was not an appropriate sanction under *Fahie v. Government of the Virgin Islands*, 419 F.3d 249, 254-55 (3d Cir. 2005).

(7) The district court correctly denied Claxton safety valve relief under U.S.S.G. § 5C1.2 and 18 U.S.C. §§ 3553(f)(1)-(5) because he provided the government with information about completely unrelated crimes. He did not provide all information he had regarding the charged drug conspiracy.

V. Restitution / Bad Faith / Violation of Supervised Release

United States v. Bagdy, --- F.3d ---, 2014 WL 4100586 (3d Cir. Aug. 21, 2014).

The district court erred when it revoked Bagdy's supervised release based on a finding he acted in bad faith by embarking on a lavish spending spree that dissipated the balance of a recently-received inheritance while delaying proceedings intended to modify the district court's restitution order. It was improper to revoke Bagdy's supervised release because his spending spree did not violate any of the conditions, as there was no good faith term in the restitution obligations.

NOTE: The Court suggested district courts might consider adding a term to the conditions of supervised release that would provide for contingencies where a defendant with a restitution obligation comes upon an unforeseen inheritance or windfall.

VI. Fourth Amendment / Probable Cause / Automobile Exception

United States v. Donahue, --- F.3d ---, 2014 WL 4115949 (3d Cir. Aug. 22, 2014).

Law enforcement agents caught Donahue in Las Cruces, New Mexico driving his son's Ford Mustang two weeks after he was ordered to surrender to serve a federal sentence on bank fraud and related charges. The Third Circuit held there was probable cause to believe the Mustang contained evidence showing that Donahue "knowingly" failed to surrender for his sentence in violation of 18 U.S.C. § 3146(a)(2), such as false identification documents, and therefore the warrantless search was proper under the automobile exception to the Fourth Amendment's warrant requirement. Once the automobile exception attached, there were "virtually no temporal, physical, or numerical limitations on the search's scope." This authorized the law enforcement agents to search the contents of the Mustang, including any packages or containers, and law enforcement could repeat the search so long as it remained in continuous custody of the Mustang.

NOTE: The Third Circuit suggested Donahue might not have had standing to object to the search of the Mustang because he was a fugitive, but ultimately declined to rule on the issue because the government failed to raise it in the district court and preserve it for review.

VII. Breach of Plea Agreement / Appellate Waiver

United States v. Erwin, --- F.3d ---, 2014 WL 4194129 (3d Cir. Aug. 26, 2014).

Erwin knowingly and voluntarily entered into a plea agreement in which he agreed not to file an appeal if his sentence fell within or below the guideline range agreed upon by the parties, with the caveat that he could appeal the district court's determination of his criminal history category. He also entered into a cooperation agreement with the government. In exchange for the plea, the government agreed not to bring additional criminal charges against him and to move for a downward departure to account for his substantial assistance. At sentencing, the district court departed five levels downward from the stipulated final offense level. Erwin appealed, arguing the district court should have used the lower statutory maximum penalty as the starting point for the downward departure rather than the agreed upon offense level. The Third Circuit held that Erwin's appeal fit squarely within the scope of the appellate waiver and enforcement did not work a miscarriage of justice.

More importantly, the Court held that Erwin's appeal breached the terms of the plea agreement and the appropriate remedy for his breach is specific performance of the agreement's terms. The Court held the government is excused from its obligation to move for a downward departure. The judgement of sentence was vacated and the case remanded for de novo resentencing. The government was not required to file a cross-appeal in order to seek a de novo resentencing.

VIII. *Terry Stop* / Rule 404(b) / Improper Statements During Summation

United States v. Brown, --- F.3d ---, 2014 WL 4211171 (3d Cir. Aug. 27, 2014).

(1) Four police officers approached Brown to discuss his vehicle being parked too closely to an intersection, displaying badges and identifying themselves as Pittsburgh police. The initial encounter was consensual because the officers did not activate police lights or sirens, brandish weapons, block Brown's path, touch him, or make threats or intimidating movements.

The encounter ripened into a *Terry* stop when a detective grabbed Brown's waistband to prevent him from fleeing. The seizure was supported by a reasonable suspicion, because by that point another detective had observed a firearm under the vehicle's driver's seat, an observation that was made in conjunction with the officers witnessing Brown making furtive movements in a high crime area. The subsequent custodial arrest was supported by probable cause because after the police seized Brown, they asked him if he had a permit to carry the firearm and he admitted he did not.

The officers conducted a valid search incident to arrest when they recovered the gun from the vehicle, because they had probable cause to believe the vehicle contained evidence relevant to the crime of arrest.

(2) The district court erred when it permitted the government to introduce, under Rule 404(b), evidence that Brown previously obtained firearms through a straw purchaser to prove "he did have the knowledge that there was a firearm in his car and that he knows what firearms are."

The Third Circuit held the evidence was not admissible to show Brown knows what firearms are, because he did not claim unfamiliarity with guns at trial. However, since the government prosecuted this case under a constructive possession theory, knowledge of the firearm's existence in the vehicle was a proper non-propensity purpose for the evidence under Rule 404(b). Nevertheless, the government failed to prove the evidence was relevant to show Brown's knowledge, because it failed to explain how a previous *purchase* of firearms tends to prove he knowingly *possessed* the firearm found in his vehicle six years later. Purchases and possession are two distinct acts. The government's proposed chain of inferences was "indubitably forged with an impermissible propensity link" - that since he used a straw purchaser in the past, he must have used a straw purchaser here. Further, the district court's statement that the government could introduce the evidence to show motive or knowledge "and that type of thing along those lines" was insufficient to explain its reasoning.

Introduction of the evidence not harmless merely because it was introduced through a stipulation, especially since there were no government witnesses who could place the gun in Brown's hands and Brown presented his own witness who testified she placed the gun under the seat without his knowledge.

NOTE: A helpful quote for use in response to a government motion to admit other bad acts under Rule 404(b): "The District Court should have asked the Government to answer this question: 'How, exactly, does Brown's admission to ATFE agents that he sold heroin in exchange for firearms in 2005 suggest that he had knowledge of the gun found under the driver's seat of the Impala on the morning of March, 23, 2011?' Put to this task, the Government would have been unable to articulate the requisite chain of inferences without resort to propensity-based links or attempts to build a bridge too far."

(3) The prosecutor's argument in closing that fingerprints could not have been extracted from the firearm inappropriately relied on facts not in evidence because the government did not present any testimony from an expert to explain that the surface of the firearm at issue would not hold fingerprints.

IX. Career Offender / *Descamps* / PA Terroristic Threats

United States v. Brown, --- F.3d --- (3d Cir. Sept. 2, 2014) (not yet on Westlaw).

Pennsylvania terroristic threats (§ 2706) is NEVER a crime of violence under the career offender guideline, U.S.S.G. § 4B1.1. By extension, it should never be a crime of violence under U.S.S.G. § 2L1.2 or 18 U.S.C. § 16, or a violent felony under the Armed Career Criminal Act.

In *Brown*, the court applied *Descamps* to overrule prior precedent (a case called *Mahone*). The court found that terroristic threats is not categorically a crime of violence, because some acts that fall within the statute do not require as an element the use, attempted use or threatened use of force against a person (rather, the force can be against property). The statute is divisible into three subsections, but each subsection is overbroad, as well, in the same way. Under *Descamps*, because none of the subsections is itself divisible, a district court may not resort to the modified categorical approach and investigate further. Thus, despite the fact that terroristic threats "may appear to be a crime of violence to a layperson," it is not, under *Descamps*. Brown's career offender sentence was vacated, and the case remanded for resentencing.

This case contains a good discussion of application of *Descamps*, including a hypothetical using variables in place of elements, which may be useful in illustrating your point in challenging other statutes. The case also effectively overrules *United States v. Blair*, 734 F.3d 218 (3d Cir. 2013), a bad Third Circuit case that came out in the immediate aftermath of *Descamps*.

X. Government Notice of Appeal / Fourth Amendment / Dissipation of Exigency

United States v. Mallory, --- F.3d --- (3d Cir. Sept. 3, 2014) (not yet on Westlaw).

The district court determined that police exceeded their search authority under the exigency exception to the warrant requirement when they continued to search for Mallory's gun, after: (1) they completed their initial sweep, (2) Mallory had been apprehended and handcuffed, and (3) all individuals at the scene were under control outside. The court determined to review the factfinding underlying that decision for clear error, and the question whether the facts established a legal exigency, de novo.

Noting that the government bears a "heavy burden" to establish a "true emergency," the court affirmed the district court's order granting Mallory's Motion to Suppress on the basis that the exigency justifying the initial entry and search had dissipated. Although there was reason to believe a dangerous weapon was nearby, there was no reason to believe anyone could gain access to it. The opinion contains a non-exclusive list of factors to consider to determine whether an exigency has dissipated, including: (1) the time elapsed, (2) the nature of the crime being investigated, (3) when the search occurred compared to the arrest, (4) whether the premises were secured, (5) whether family/associates had been threatening, (6) whether anyone could access the weapon, and (7) the intrusiveness of the search.

The Court also held that the date triggering the government's notice-of-appeal filing deadline is the day the order is entered on the docket.