

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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Christofer Bates, EDPA

THIRD CIRCUIT

I. Immigration / PA Misdemeanor Obstruction / Crime of Moral Turpitude

Ildefonso-Candelario v. Att’y Gen. of the United States of America, 866 F.3d 102 (3d Cir. 2017).

The Pennsylvania statute for misdemeanor “obstructing the administration of law or other governmental function,” 18 Pa. Cons. Stat. § 5101, criminalizes both non-fraudulent as well as fraudulent conduct, such as obstruction through physical interference or obstacle. Therefore, the statute is categorically NOT a crime of moral turpitude under 8 U.S.C. § 1182(a)(2)(A)(i)(I), and *Ildefonso-Candelario* is not statutorily excluded from seeking a cancellation of removal under *id.* § 1229b(b)(1)(C).

II. Sentencing Guidelines / Career Offender / Mailing Threats / Crime of Violence

United States v. Chapman, 866 F.3d 129 (3d Cir. 2017).

The use of physical force as set forth in the career offender guideline, U.S.S.G. § 4B1.2(a)(1), involves the intentional employment of something capable of causing physical pain or injury to another person, regardless of whether the defendant struck the victim’s body. This holding extends the analysis from *United States v. Castleman*, 134 S. Ct. 1405 (2014), which dealt with misdemeanor crimes of domestic violence, to felony crimes of violence. As things now stand, the Circuits have split 5-3 on whether *Castleman* reaches as far as this, with the Third Circuit in the majority.

18 U.S.C. § 876(c) is a divisible statute defining two separate crimes: the knowing mailing of a communication containing a threat to kidnap any person, and the knowing mailing of any communication containing a threat to injure the person of the addressee or another. Therefore, the Court must apply the modified categorical approach when determining whether the defendant’s § 876(c) conviction is a career offender predicate. *Chapman*’s indictment charged him with mailing a communication threatening to injure two individuals.

Mailing a letter threatening to injure someone under § 876(c) closely tracks the career offender guideline’s requirement of “threatened use of physical force against the person of another,” and so the Court joined the Fourth, Fifth, Eighth, and Ninth Circuits in holding it qualifies as a crime of violence under U.S.S.G. § 4B1.2(a)(1). In a footnote, the Court explained that *Chapman*’s other conviction for mailing a threat to take the life of, kidnap, or inflict bodily harm on the president under 18 U.S.C. § 871(a) is governed by the same analysis and summarily upheld the district court’s holding that it constituted a crime of violence.

III. Sufficiency / Overbreadth / RICO / Wire Fraud / Travel Act / NJ Bribery

United States v. Ferriero, 866 F.3d 107 (3d Cir. 2017).

The Travel Act prohibits using interstate travel, mail, or facilities with intent to carry out any unlawful activity or with intent to distribute the proceeds of any unlawful activity, 18 U.S.C. §§ 1952(a)(3) and (a)(1). Likewise, RICO proscribes participating in the conduct of an interstate enterprise's affairs through a pattern of racketeering activity, 18 U.S.C. § 1962(c). Both the unlawful activity described in the Travel Act and the racketeering activity described in the RICO statute are defined to include bribery under state laws.

There was sufficient evidence to support Ferriero's convictions for violating the Travel Act and RICO in connection with his alleged bribery under New Jersey state law, N.J. Stat. Ann. § 2C:27-2, which prohibits a person from directly or indirectly offering, conferring or agreeing to confer upon another, or soliciting, accepting, or agreeing to accept any benefit as consideration for a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election. The record demonstrated that Ferriero, as the Bergen County Democratic leader, agreed to accept payments from John Carrino as consideration for a particular recommendation to Democrats holding office in Bergen County on the public issue of whether their towns should contract with Carrino's company, which provided emergency notification services to local governments. The current New Jersey bribery statute contains no additional requirement that the defendant's conduct include an agreement to undermine the integrity of the public action.

There was also sufficient evidence to prove the RICO count's "nexus" requirement was fulfilled. The government must prove a sufficiently close relationship between the defendant, his involvement in the enterprise's affairs, and the pattern of racketeering. This includes the nexus between the defendant and the conduct of the enterprise's affairs and between those affairs and the predicate racketeering activity. Here, the enterprise was the Bergen County Democratic Organization, and the affairs were any matters constituting party business. It was rational for jurors to find that when Ferriero made recommendations of vendors to local party members holding public office, it was party business by virtue of the influence he had over their re-elections and careers. Ferriero need not have carried out the bribery scheme "in an official capacity." The nexus requirement can be proven when a defendant's position enabled or facilitated the racketeering.

The evidence was sufficient to sustain Ferriero's wire fraud conviction in connection with an email sent from Carrino to Cliffside Park CFO Frank Berardo in which Carrino intentionally failed to disclose Ferriero's financial interest (a commission) in the contract between Carrino's company and the Borough of Cliffside Park. Cases which require that the defendant have a fiduciary duty to disclose usually involve contexts where no representation was made and the defendant merely stood silent. Here, Carrino did effectively make a representation by virtue of an attachment to the email, and there was sufficient evidence for a rational juror to find that the representation, in context, was materially false and fraudulent. The record demonstrated the Cliffside Park officials were concerned with who was involved with Carrino's company and who stood to benefit from the contract. Although Carrino was truthful when he said he was the only

owner, a rational juror could have found that his failure to disclose Ferriero's entitlement to 25 percent of the company's profits constituted a fraudulent omission.

New Jersey's bribery statute is not unconstitutionally vague. By proscribing acceptance of "any benefit as consideration for a decision, opinions, recommendation, vote or exercise of discretion," the statute clarifies that the benefit must be given in exchange for one of these things "in favor of a particular outcome." And, "[t]he definition 'any benefit not authorized by law' narrows the statute further." The statute is sufficiently clear to give party chairs a reasonable opportunity to understand they cannot take payments from vendors in exchange for urging party members to buy the vendors' products. Nor is the statute overbroad; indeed, there are no applications (much less a substantial number) that are unconstitutional. The laws do not punish legitimate First Amendment activity but "corrupt agreements" which do not enjoy First Amendment protection.

Finally, the Court rejected Ferriero's argument that *McDonnell v. United States* requires relief. In that case, SCOTUS construed the *federal* bribery statute, which proscribes benefits in return for an "official act." SCOTUS held in *McDonnell* that the statute's definition of "official act" does not include setting up meetings and events, and that the jury must be instructed accordingly. But Ferriero's case involves the very different New Jersey statute, which is much more narrowly drafted. Finally, unlike *McDonnell*, this case does not involve a federally drafted statute that constrains state officials, so it does not raise the same federalism concerns.

IV. Sentencing / Acquitted Conduct / Grouping / Forfeiture

United States v. Gjeli, --- F.3d ---, 2017 U.S. App. LEXIS 14894 (3d Cir. Aug. 11, 2017).

The district court did not violate defendants' Sixth Amendment *Apprendi* rights by applying the four-level enhancement for the use of a dangerous weapon (an axe) under U.S.S.G. § 2E2.1(b)(1)(B), because the enhancement did not increase the statutory maximum penalty to which they were exposed. The use of the axe was in connection with an incident that allegedly also involved a firearm, which the defendants were acquitted of possessing in furtherance of a crime of violence, 18 U.S.C. § 924(c). However, since the use of the axe was never charged in any count of the indictment, the application of the enhancement did not rest on acquitted conduct. Even if it did, the Sixth Amendment does not prohibit the district court from relying on conduct underlying an acquitted charge to assess sentencing enhancements so long as the conduct was proven by a preponderance of the evidence. (Several Supreme Court Justices have disagreed that such a proposition holds in all cases.) Here, the testimony of the victim, which was corroborated by another witness, was enough to establish the use of the axe by a preponderance of the evidence.

The district court did not violate Rule 32(i)(3)(B) by failing to address a defendant's RICO grouping argument, because the court properly concluded that his objection would not have affected the sentencing. Nor did the district court err in excluding contested Groups altogether, because even without the contested groups, both defendants would have been subject to a five-level increase to the base offense level based on the remaining Groups, and the Guideline ranges would not have changed.

Remand was necessary under Rule 36 to correct the district court's clerical error of forgetting to include the final forfeiture order in the judgment. More importantly, however, the Court held that *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which held that under the drug forfeiture statute, co-defendants cannot be held jointly and severally liable for property that a co-conspirator derived from the crime but that the defendant himself did not acquire, also applies to the substantially similar statutes located at 18 U.S.C. §§ 1963 and 981(a)(1)(C). Thus, forfeiture is limited, including under the principal civil forfeiture statute, to property each defendant himself actually acquired as the result of the crime, just like in drug cases. Remand was necessary for the district court to reconsider its forfeiture rulings.

V. Sentencing Reductions / Career Offender / Agreed Upon Sentence

United States v. Martin, --- F.3d ---, 2017 U.S. App. LEXIS 15206 (3d Cir. Aug. 15, 2017).

Martin signed a plea agreement indicating his drug guideline range was 70-87 months and that the appropriate sentence was 87 months. When the PSR came back indicating he was a career offender, the district court stated at sentencing that Martin was in fact a career offender but that the Court was accepting the parties' agreed-upon below guidelines sentence. Martin then moved to reduce his sentence pursuant to Amendment 782's lowering of all drug guideline ranges by two levels.

Although Martin's sentence was based on a drug guideline range that was later reduced, a reduction in his sentence was not consistent with applicable policy statements because of his career offender status, *see* U.S.S.G. §§ 1B1.10(a)(2)(B) and 1B1.10 cmt. n. 1(A). Amendment 759 clarified that the applicable guideline range must be calculated before any departures or variances. Therefore, the career offender range was the appropriate range to consider, and because that particular range was not lowered by any amendment to the Guidelines, Martin was not eligible for a sentencing reduction under 18 U.S.C. § 3582(c)(2).

VI. Habeas Corpus / Savings Clause / Actual Innocence

Bruce v. Warden, Lewisburg USP, --- F.3d ---, 2017 U.S. App. LEXIS 15945 (3d Cir. Aug. 22, 2017).

The "savings clause" embodied at 28 U.S.C. § 2255(e) allows a petitioner to seek a writ of habeas corpus under *id.* § 2241 where § 2255's motion remedy is inadequate or ineffective to test the legality of his detention. Third Circuit precedent permits entertainment of a § 2241 petition where the prisoner asserts a claim of actual innocence on the theory that he is being detained for conduct that has been rendered non-criminal by an intervening Supreme Court decision and Third Circuit precedent construing that SCOTUS decision that applies retroactively to cases on collateral review. Second, the prisoner must be otherwise barred from challenging the legality of his detention under § 2255.

Those requirements were met in this case. Petitioner was convicted of murdering another person with intent to prevent a communication by any person to a federal law enforcement

officer relating to the possible commission of a federal offense, in violation of 18 U.S.C. § 1512(a)(1)(C). Fifteen years after Bruce's conviction, the Supreme Court decided *Fowler v. United States*, 563 U.S. 668 (2011), which held that a conviction cannot be sustained when the defendant killed the victim with the intent to prevent communication with law enforcement generally where but there is no evidence he had *federal* officers in mind at the time of the offense. *Fowler* announced a substantive rule of law that is retroactive to cases on collateral review. Therefore, the district court properly exercised jurisdiction over Bruce's § 2241 petition. Actual innocence claims are governed by a "relaxed" gateway standard, which requires the petitioner to "demonstrate that, in light of all the evidence, it is more likely that not that no reasonable juror would have convicted him." An intervening change in the law that renders the petitioner's conduct non-criminal can be sufficient, but on review the district court can consider evidence that was arguably illegally admitted as well as evidence tenably claimed to have been wrongly excluded or to have become available only after trial. On the facts presented here, Bruce failed to make the showing required.

VII. Cross-Appeal / Timeliness / Jury Instructions / Due Process / Ineffective Assistance

Mathias v. Superintendent, Frackville SCI, --- F.3d ---, 2017 U.S. App. LEXIS 16394 (3d Cir. Aug. 28, 2017).

This was a Commonwealth appeal from a district court grant of habeas relief; after our office was appointed, we filed a cross-appeal. Mr. Mathias is serving a life sentence for first-degree murder; the Commonwealth's theory at trial was that his co-defendant fired the fatal shots, but that he was liable as the accomplice.

Federal Rule of Appellate Procedure 4(a)(3), which governs the time for filing cross-appeals, is not jurisdictional, and thus failure to comply with the rule can be excused by the reviewing court. Waiver of Rule 4(a)(3) is appropriate when "in the interest of justice." Relevant factors for the Court to consider are (1) whether any party will be adversely and unfairly affected if the cross-appeal is not allowed (prejudice); (2) whether the issues substantially overlap such that severance may be inefficient or create an absurd result (merits); (3) whether good reason exists for the delay in filing (willfulness); and (4) whether there are extenuating circumstances present in the case that otherwise warrant relief (extraordinary circumstance). Mathias' claims would likely be barred by the successive habeas petition bar, were substantially related to the claims already before the court, would not prejudice the government in opposing the claims, and newly-appointed counsel raised the claims promptly after entering her appearance. A waiver of Rule 4(a)(3) was appropriate.

The Court next held that a certificate of appealability (COA) is necessary for a petitioner taking a cross-appeal. This requires the petitioner to show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and, where the claim was denied on procedural grounds, that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Mathias failed to make that showing because the claims he tried to raise on cross-appeal were plainly waived by his failure to properly raise them in his initial § 2254 petition itself.

The district court misapplied plenary review rather than AEDPA deference to Mathias' ineffective assistance and due process claims. Pennsylvania's three-part test for ineffective assistance of counsel is not contrary to the federal standard set forth under *Strickland*.

Mathias' substantive claims related to faulty jury instructions the trial court provided regarding first degree murder. The trial court at times correctly stated that to find Mathias guilty as an accomplice, he had to share the specific intent to kill with the principal, and at other times incorrectly instructed the jury that it could convict based solely on the specific intent of the principal. Mathias failed to show that the PA Superior Court unreasonably applied the prejudice prong of *Strickland*, because an intervening Supreme Court decision on inconsistent jury instructions rendered his claim less than "clearly established" under federal law. Mathias' due process claim failed for the same reasons. In any event, any error would have been harmless because the trial court's other conspiracy instructions made clear to the jury that it had to find the co-conspirators shared the specific intent to kill in order to convict.

VIII. Stash House Reverse Sting / Ineffective Assistance / Sentencing Manipulation-Due Process / Selective Law Enforcement

United States v. Washington, --- F.3d ---, 2017 U.S. App. LEXIS 16395 (3d Cir. Aug. 28, 2017).

The record was sufficiently developed to resolve Washington's ineffective assistance of counsel claim on direct appeal because the issue was litigated and decided in a post-trial, pre-sentencing hearing. Although trial counsel's alleged alcohol use is relevant to both the performance and prejudice prongs of an ineffective assistance claim, it does not require a departure from the familiar *Strickland* standard. With respect to trial counsel's opening the door to Washington's prior drug conviction through cross-examination of the case agent, the Court struggled to find a strategic basis for counsel's opening the door but found that Washington failed to meet the prejudice prong of the *Strickland* analysis because the evidence was overwhelming.

Washington's argument that application of the mandatory minimum penalty for non-existent drugs violated his due process rights falls under the often-invoked but rarely successful "outrageous government conduct" doctrine. The Eleventh Circuit has adopted a somewhat relaxed standard for sentencing manipulation that requires a lesser showing than a typical outrageous government conduct claim. In this appeal, the Court left open whether such a standard applies in the Third Circuit, instead holding that on the facts of Washington's case, he failed to show that excising the mandatory minimum was appropriate. The Court recognized that the drug-quantity component of the mandatory minimum sentence has no real-world foundation because the drug quantity was fictitiously created by the government in its sting operation. However, other Courts of Appeals have found that using 5 or 10 kilograms as the quantity stated in the sting does not amount to sentencing manipulation, and it is allegedly a conservative number based upon drug weights found in typical Philadelphia stash houses. Washington failed to introduce any evidence that the 5 kilograms charged in the indictment and the 10 kilograms stated to the defendants were chosen to inflate his sentence. The Court did take care to express its misgivings about these types of reverse stash house stings and to leave open the possibility that a due process claim would be successful under a more egregious set of facts.

A substantive claim of selective prosecution or selective enforcement generally requires a defendant to meet a two-part test by providing “clear evidence” of discriminatory effect and discriminatory intent/purpose. This generally requires evidence that similarly-situated individuals of a different race or classification were not prosecuted, arrested, or otherwise investigated. Because criminal defendants do not often have access to the statistical or other information necessary to make out the claim, a defendant can file a motion for discovery on an anticipated selective prosecution claim. The *Armstrong/Bass* test dictates that a defendant is entitled to discovery on such a claim if he can come forth with “some evidence” that similarly-situated individuals of a different race were not prosecuted or arrested. This showing must be credible and cannot be satisfied with nationwide statistics.

Because the “special solicitude” behind prosecutorial discretion is what drives the *Armstrong/Bass* test, the Third Circuit joined the Seventh Circuit in holding that there is a distinction between selective prosecution claims and selective enforcement claims. *Armstrong/Bass* applies to selective prosecution claims. However, when claims of selective law enforcement are raised, or there are mixed claims that involve prosecutors acting in investigative or other capacities (where they would not ordinarily be entitled to immunity), the district court exercises broader discretion to permit a claim’s development by conducting a limited pretrial inquiry on a proffer that shows “some evidence” of discriminatory effect. The proffer must include reliable statistical evidence, or its equivalent, and may be based in part on patterns of prosecutorial decisions even if the underlying challenge is solely to law enforcement decisions. A defendant is not initially required to provide “some evidence” of discriminatory intent, or show that similarly situated persons of a different race or equal protection classification were not arrested or investigated by law enforcement. The proffer must be strong enough to support a reasonable inference of discriminatory intent and non-enforcement.

Once this standard has been met, the district court can conduct a limited inquiry by hearing testimony of case agents or supervisors, making *in camera* analysis of policy statements, manuals, or other agency documents, and disclosing such materials to defendant as it deems appropriate. Courts are not bound by the decisions of other district judges to grant or deny discovery, even within the same district, but it is a factor that can be considered. The Third Circuit also approved a “measured approach” to the taking of discovery, where additional discovery can be granted based on what an initial disclosures reveal. If the information obtained crosses the *Armstrong/Bass* threshold, discovery can be extended to the prosecutor’s office.

On this newly set forth standard, remand was appropriate for the district court to consider Washington’s discovery motion. It did not matter that he initiated the conversation with the informant, because it remains plausible that the government would not have pursued the investigation had the “robbery crew” been white. And, although Washington received a redacted portion of the ATF manual on the eve of trial, it is for the district court to determine in the first instance whether that was all he would have been entitled to in the initial limited discovery production. If the court grants additional discovery and a successful selective enforcement claim is borne out, the proper remedy would be to strike the indictment in whole or in part. Washington would not be barred from raising such a claim for failing to file his motion to

dismiss pre-trial under Rule 12(b), because the reason he did not file the motion was the district court's denial of his initial discovery motion to support his claim.

Judge McKee concurred in part and dissented in part. He would hold that applying the mandatory minimum penalty in stash house reverse sting operations, where there are no actual drugs, is not appropriate.

IX. Removal of Juror / Rule 24(c)(1) / Due Process / Equal Protection

United States v. Penn, --- F.3d ---, 2017 U.S. App. LEXIS 16617 (3d Cir. Aug. 30, 2017).

The district court did not abuse its discretion under Federal Rule of Criminal Procedure 24(c)(1) when it excused an African-American juror from service because of a scheduled surgery, college classes, and basketball practice. Rule 24(c) does not require the district court to make explicit findings and the district court adequately articulated its reasons on the record. Second, Rule 24(c) does not require impossibility to serve to meet the "unable to perform" or "disqualified" definitions set forth in the rule. Disqualification of jurors is committed to the sound discretion of the district court, whose reasoning was adequate here.

The defendant also raised Constitutional claims with respect to the juror's removal, but they were all rooted in the Rule 24(c) argument and thus could have been deemed waived. On the Equal Protection argument, the *Batson* decision does not confer upon a defendant a right to *maintain* the racial composition of the jury as it was selected.

X. Immigration / Crime of Violence / Residual Clause / Vagueness

Peguero-Mateo v. Att'y Gen. of the United States, --- F.3d ---, 2017 U.S. App. LEXIS 17190 (3d Cir. Sept. 6, 2017).

The Supreme Court will now hear re-argument in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015) in its October 2017 term. In light of this delay, this case reaffirms the Third Circuit's prior holding from *Baptiste v. Att'y Gen. of the United States*, 841 F.3d 601, 621 (3d Cir. 2016), that 18 U.S.C. § 16(b)'s definition of a crime of violence is unconstitutionally vague. It also confirms that the vagueness doctrine applies in removal proceedings as well as criminal cases.

XI. Double Jeopardy / Right to Counsel / Strikes for Cause / Premeditation

United States v. Hodge, --- F.3d ---, 2017 U.S. App. LEXIS 17274 (3d Cir. Sept. 6, 2017).

Hodge's convictions for violating 18 U.S.C. § 924(c) and 14 V.I.C. § 2253(a) (the Virgin Islands crime-of-violence firearm offense) did not violate double jeopardy. Although the Virgin Islands and the federal government are the same sovereign for purposes of the double jeopardy analysis, each statute requires proof of an element the other does not. Section 924(c) requires that the firearm be a real one, and the Virgin Islands' statute requires that the firearm be unauthorized.

Crimes occurring as part of the same underlying occurrence may constitute separate predicate offenses (and thus support multiple § 924(c) convictions) if they were properly charged as separate crimes. Therefore, Hodge's two § 924(c) convictions arising out of his robbery and attempted murder of the same victim did not violate his double jeopardy rights.

The permissible unit of prosecution for a 14 V.I.C. § 2253(a) prosecution is each instance of possessing, bearing, transporting, or carrying of a firearm, regardless of how many predicate crimes of violence are committed. Section 2253(a) would still be applicable for firearm possession even in the absence of a crime of violence, which renders the analysis different than a § 924(c) conviction. The crime of violence portion of § 2253(a) merely functions as a sentencing enhancement to the defendant's already-unlawful firearm possession. Thus, Hodge's multiple counts of conviction for violating the statute where he possessed only one gun during one occurrence was multiplicitous. Only one conviction could stand. Likewise, 14 V.I. § 104 prohibits multiple punishments for the same act. This statute provides even greater protections than the double jeopardy clause and further supports vacating two of the three convictions under this statute.

Section 2253(a)'s mandate of a consecutive sentence to the predicate felony does not conflict with § 104 given the V.I. Legislature's clear intent to punish both separately.

Section 104 requires that a concurrent sentence be imposed for related convictions and that executions of punishment for all but one convictions arising from the same criminal act be stayed. However, there was no basis for doing so here because the counts challenged by Hodge corresponded to multiple convictions arising from separate acts against separate victims. Even counts 9 and 10, which involved the same victim, did not implicate § 104 because the assault and robbery against this victim were distinct acts where Hodge discharged his gun multiple times, with a break in sequence.

The district court did not violate Hodge's Sixth Amendment rights by denying his request for substitute counsel moments before his trial began. Eve-of-trial requests for a new lawyer necessitate a two-part procedure: first, the court must determine whether the reasons for the request constitute good cause, sufficient to justify a continuance of trial; and if not, the defendant must decide, as informed by a searching inquiry on the part of the court, whether to continue with existing counsel or proceed pro se. Examples of "good cause" are a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict with the attorney. Here, the district court did not conduct a direct colloquy, but this failure was not an abuse of discretion. The defense attorney was questioned and confirmed there were no conflicts and that the two were still communicating, and Hodge was present and did not request to be heard. Although questioning the attorney whom the defendant wants to fire risks overlooking some latent, legitimate reason for substitute counsel, failure to conduct a one-on-one colloquy with the defendant as to whether there is good cause is not in and of itself reversible error.

Hodge's claims that three jurors should have been stricken for cause failed, because he was able to exercise his peremptory strikes on those potential jurors. There was no claim that the jury actually empaneled was biased.

Hodge did not demonstrate plain error in the district court's admission of testimony from an off-duty police officer (and witness to the crime) as to his unemployment. This testimony increased the probative value of the officer-witness's correct identification of Hodge and the basis of her knowledge of his identity. The prosecutor's repetition of this testimony in closing was also permissible.

The evidence was sufficient to show Hodge's premeditation as it pertained to the attempted murder and corresponding firearms charges. The premeditation was circumstantially proven by Hodge's preparation and use of a firearm.

With respect to the jury instructions, the district court defined attempted murder to the jury and was not required to repeat the definition every single time attempted murder was mentioned as an element of a crime. It was not plain error for the district court to define premeditation yet fail to define deliberate or willful, as it is difficult to imagine how a crime could be premeditated yet not be deliberate and willful. In the absence of any evidence regarding provocation or "sudden passion," the jury had a sufficient basis to evaluate the elements of attempted murder.

XII. Second Successive Habeas Petition / Career Offender / Mandatory Guidelines / Johnson Claims

In re: Thomas F. Hoffner, Jr., --- F.3d ---, 17284 (3d Cir. Sept. 7, 2017).

Hoffner made a prima facie showing under 28 U.S.C. § 2255(h) of the pre-filing requirements for a second or successive habeas petition where he is alleging there is a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. He will be permitted to file a second petition challenging the career offender guideline's residual clause as void for vagueness in a pre-*Booker* mandatory guidelines case (such claims fail in advisory guidelines cases under the Supreme Court's recent *Beckles* decision).