

Appellate Update

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Supreme Court Decisions

Search and Seizure

Cellular Location Records

Carpenter v. United States, 138 S.Ct. 2206 (June 22, 2018)

- Held: Tracking a person's movements and location through extensive cell-site records is a "search" under the Fourth Amendment. The warrantless search and seizure of cell phone location records violates the Fourth Amendment.

Search and Seizure

Automobile Exception

Collins v. Virginia, 138 S. Ct. 1663 (May 29, 2018)

- Held: The Fourth Amendment's automobile exception does not permit a police officer without a warrant to search a vehicle located in a home or its curtilage.

Search and Seizure

Rental Cars

Byrd v. United States, 138 S. Ct. 1518 (May 14, 2018)

- Held: A driver otherwise in lawful possession or control of a rental car maintains a reasonable expectation of privacy, even if he is not an authorized driver on the rental agreement.

Wiretapping Orders

Dabda v. United States, 138 S. Ct. 1491 (May 14, 2018)

- Held: Wiretap orders containing sentence authorizing interception of communications outside the district court's territorial jurisdiction were not “insufficient on their face” within meaning of the wiretap statute's suppression provision.

Double Jeopardy

Currier v. Virginia, 138 S.Ct. 2144 (June 22, 2018)

- Held: A defendant who is indicted on multiple charges and agrees to have the charges tried in separate trials gives up his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal in his first trial.

Sixth Amendment

McCoy v. Louisiana, 138 S. Ct. 1500 (May 14, 2018)

- Held: The Sixth Amendment guarantees a defendant the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.

Mandatory Victims Restitution Act

Lagos v. United States, 138 S. Ct. 1684 (May 29, 2018)

- Held: The Mandatory Victims Restitution Act of 1996, requirement that defendants “reimburse the victim for . . . expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense,” 18 U. S. C. § 3663A(b)(4), applies to only government investigations and criminal proceedings, and does not require reimbursement for private investigations and civil proceedings.

Guidelines Error

Plain Error

Rosales-Mireles v. United States, 138 S. Ct. 1897 (June 18, 2018)

- Held: A sentencing-guideline miscalculation found to be plain error will, in the ordinary case, require the court of appeals to vacate a defendant's sentence as "risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings."

Supreme Court Cert Grants

Burglary under ACCA

- ISSUE PRESENTED: Is burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation categorically “burglary” under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii)?

United States v. Stitt, No. 17-765 (Cert. Granted Apr. 23, 2018); *United States v. Sims*, No. 17-766 (Cert. Granted Apr. 23, 2018)

Violent Felonies under ACCA

- ISSUE PRESENTED: Whether a state robbery offense that includes “as an element” the common law requirement of overcoming “victim resistance” is categorically a “violent felony” under the ACCA, when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

Stokeling v. U.S., No. 17-5554 [Arg: 10.9.2018]

SORNA

- **ISSUE PRESENTED:** Whether the federal Sex Offender Registration and Notification Act's delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.

Gundy v. U.S., No. 17-6086 [Arg: 10.2.2018]

“Separate Sovereigns” Exception to Double Jeopardy

- ISSUE PRESENTED: Whether the Supreme Court should overrule the “separate sovereigns” exception to the double jeopardy clause?

Gamble v. United States, No. 17-646 (Cert. Granted June 28, 2018)

Eighth Amendment / Capital Punishment

- **ISSUE PRESENTED:** Whether a state may execute a prisoner whose competency has been compromised by cognitive dysfunction which leaves him with no memory of his commission of the capital offense or understanding of the circumstances of his scheduled execution.

Madison v. Alabama, No. 17-7505 [Arg: 10.2.2018]

Eighth Amendment / Capital Punishment

- SUMMARY OF ISSUES PRESENTED:

(1) Whether a court evaluating an as-applied challenge to a state's method of execution based on an inmate's medical condition should assume that medical personnel are competent to manage his condition and that procedure will go as intended;

(2) evidentiary requirements for a court at summary judgment stage when comparing two methods of execution;

(3) whether the Eighth Amendment requires an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution.

Bucklew v. Precythe, No. 17-8151 [Arg: 11.6.2018]

Third Circuit Decisions

Categorical Approach

ACCA – PA Aggravated Assault / § 2702(a)(1) (F1)

- Held: A conviction under PA F1 aggravated-assault statute, 18 Pa. Cons. Stat. § 2702(a)(1)—causing serious injury to another with extreme indifference to human life—does not qualify as a violent felony under the ACCA.

United States v. Mayo, 2018 WL 3999884 (3d Cir. Aug. 22, 2018)

Categorical Approach

PA Aggravated Assault / § 2702(a)(4)

- Held: PA F2 aggravated assault with a deadly weapon, in violation of 18 Pa. C.S. § 2702(a)(4), is categorically a crime of violence.
- Relying on *United States v. Castleman*, the Court then found § 2702(a)(4) qualifies as a predicate crime of violence because it “categorically has ‘physical force’ as an element.”

United States v. Ramos, 892 F.3d 599 (3d Cir. 2018)

Categorical Approach

NJ Aggravated Assault with a Deadly Weapon

- Held: New Jersey third degree aggravated assault with a deadly weapon, N.J.S.A. § 2C:12-1(b)(2), is a crime of violence for purposes of the career offender guideline, U.S.S.G. § 4B1.1.

United States v. Abdullah, 2018 WL 4702225(3d Cir. Oct. 2, 2018)

Categorical Approach

ACCA / PA F3 Robbery / Successive § 2255

- Held: PA F3 robbery incorporating “force however slight” does not necessarily require violence in its commission, and is therefore not categorically violent felony under the ACCA.
- Habeas Notes:
 - (1) A petitioner who files a Johnson successor petition needs to show only that he might have been sentenced under the unconstitutional residual clause, not that he actually was.
 - (2) Rule 11(c)(1)(C) guilty plea does not preclude a defendant from collaterally attacking his sentence if his sentence would be unlawful once he proved that ACCA no longer applies to him in light of Johnson.
 - (3) A defendant seeking a sentence correction in a second or successive § 2255 motion based on Johnson, and who has used Johnson to satisfy the gatekeeping requirements of § 2255(h), may rely on post-sentencing cases (i.e., Mathis, Descamps) to support his Johnson claim. Once a Johnson claim satisfies 2255(h), the petitioner is “already through the gate” and “we are no longer concerned with AEDPA retroactivity.”

United States v. Ronald Peppers, 2018 WL 3827213 (3d Cir. 2018)

Categorical Approach

PA Controlled Substance Offense

- Held: Pennsylvania's controlled substances statute prohibiting “manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance” does not sweep more broadly than Sentencing Guidelines' definition of generic “controlled substance offense.”

United States v. Glass, 2018 WL 4443889 (3d Cir. Aug. 22, 2018)

CA / Alleyne / Rosemond

Armed Bank Robbery § 2113(d) / § 924(c) / A&A

- Held: Armed bank robbery, necessarily requires the force element, as required under elements clause of definition of crime of violence for Section 924(c) predicate.
- Held: Error under *Alleyne v. United States*, did not affect defendant's substantial rights on plain error review, with respect to lack of jury finding of brandishing of firearm, due to the uncontroverted evidence on the issue.
- Held: Erroneous aiding and abetting instruction which did not require advanced knowledge that a firearm would be used as required under *Rosemond v. United States*, harmless given overwhelming evidence of foreknowledge of confederates' use of the weapon.

United States v. Dominique Johnson, 2018 WL 3734212 (3d Cir. 2018)

Search and Seizure

Terry Stops

- Held: Trooper who observed defendant within a defined search area, saw defendant very soon after the suspect was reported missing and within two-tenths of a mile of the stolen car, confirmed that no other pedestrian matching the description, generic as it was, had been observed in the search area, and had 14 years of experience patrolling the area and knew that it was rare for individuals to be walking along that stretch of the relatively high-speed road which had no sidewalks had reasonable suspicion for Terry Stop.
- Held: Handcuffing and transport back to the shopping center parking lot was also within the scope of a proper Terry stop, as it was a very short distance between the stop and the parking lot.
- Held: The government's "casing businesses" motive was a proper non-propensity purpose for admitting testimony of barbershop employees of two men in vehicle on the day before defendants were arrested in or near the same shopping center parking lot.
- Held: District court's factual findings, that defendant was involved in conspiracy to rob a store in shopping center on the day he was arrested, were not clearly erroneous and thus supported enhancing defendant's sentence for being a felon in possession of a firearm due to his using a firearm in connection with another felony offense (2K2.1(b)(6)(B)).

United States v. Foster, 891 F.3d 93 (3d Cir. 2018)

Search and Seizure

What is a Seizure

- Held: De Castro was not seized for Fourth Amendment purposes when a police officer, acting alone, exited his police car and asked him to remove his hands from his pockets from a distance of five to ten feet away in a polite, conversational, and non-threatening tone with no weapon drawn.

United States v. De Castro, 2018 WL 4762751 (3d Cir. Oct. 3, 2018)

Search and Seizure

Withdrawal of Consent to Search

- Held: When a suspect consents to a search, he may terminate the search by withdrawing his consent. This is a corollary to the Supreme Court's recognition that the subject of a consensual search determines the scope of that search.
- Withdrawing consent to search requires an act or statement that an objective viewer would understand as an expression of desire to no longer be searched—must do more than express unhappiness about the search.

United States v. Williams, 898 F.3d 323 (3d Cir. Aug. 1, 2018)

Search and Seizure

Extension of Traffic Stop

- Held: Police officer questioning vehicle driver about his criminal history impermissibly extended traffic stop where questions came after officer ran computerized check on vehicle and confirmed driver was authorized to use vehicle, which completed the mission of the stop.

United States v. Clark, 902 F.3d 404 (3d Cir. 2018)

Search and Seizure

Work Email

- Held: University employer had independent authority to consent to a search and to produce employee's work emails.

Walker v. Coffey, 2018 WL 4496344(3d Cir. Sept. 20, 2018)

Sentencing

Agg Felony / False Report in a Commodities Transaction

- Held: As a matter of first impression in the Circuit, Commodities Exchange Act (CEA) provision criminalizing making a false report or statement in connection with a commodities transaction did not require proof of the materiality of the defendant's fraud; the Board of Immigration Appeals erred when it automatically concluded that Section 6b(a)(1)(B) required otherwise and conclude that Wang's conviction constituted a crime of fraud or deceit.

Wang v. Att'y Gen. of the United States, 898 F.3d 341 (3d Cir. 2018)

Sentencing

Obstruction Enhancement

- Held: Welshans acted “contemporaneously with arrest” when he moved files into his laptop’s recycling bin after receiving a call that the police were on their way, and agents arrived soon after with a search warrant. Thus, Section 3C1.1 does not apply.”
- The Government waived its argument of “material hindrance,” but even if the argument had been timely made, there was no material hindrance because the files were easily restored and none were lost.

United States v. Welshans, 892 F.3d 566 (3d Cir. 2018)

Evidence

403 / Child Pornography / Pros Misconduct

- Held: At child pornography trial, probative value of written descriptions of child pornography, which involved bestiality, bondage, and violent sexual assault of very young children, was substantially outweighed by danger of unfair prejudice.
- Held: At closing argument of child pornography trial, prosecutor's references and detailed, graphic descriptions of the child pornography including videos of bestiality, bondage, and violence against young children, were inflammatory, and therefore amounted to prosecutorial misconduct.

United States v. Welshans, 892 F.3d 566 (3d Cir. 2018)

Sentencing

Tapia

- Held: *Tapia* applies to post-revocation prison sentences; and
- The Court adopts a “narrow” standard, requiring that rehabilitation must have been the determining factor in a prison sentence before finding a *Tapia* violation applies; and
- In viewing the record as a whole, the District Court’s decision to impose a prison sentence, and what length of sentence to impose, were made independently of any discussion of Schonewolf’s drug addiction and the potential for sobriety.

United States v. Schonewolf, 2018 WL 4782146 (3d Cir. Oct. 4, 2018)

Sentencing

Conditions of Supervised Release

- Held: Contradictory conditions of supervised release – one which forbade use of computers and the like, one that required approval for internet access, and one that provided for searches of his computers – did not give defendant fair warning of what is impermissible in violation of due process.
- The conditions were not too broad in scope and narrowly tailored to the defendant. On remand the district court must conduct another revocation hearing and make findings to support any restrictions it chooses to impose.

United States v. Holena, 2018 WL 49057486 (3d Cir. Oct. 10, 2018)

Confrontation Clause

Cooperators

- Held: The district court stayed within reasonable bounds when it precluded defense counsel from inquiring about mandatory minimum, statutory maximum, or specific sentences. Counsel was allowed to ask whether the cooperators were facing significant sentences they hoped to reduce, and that the government dropped charges, agreed to their release pending sentencing, and to refrain from bringing additional charges. This was sufficient to expose their potential biases to testify.
- Held: Newly discovered job description and time sheets for juror who worked for U.S. Marshal Service which showed that juror worked on same days that defendant and co-defendants were processed, did not show substantial evidence of specific impropriety to warrant a hearing on a new trial motion, despite the fact that during voir dire juror indicated he did not have involvement in the arrest or know anything about the case.

United States v. Noel, 2018 WL 4608722 (3d Cir. Sept. 26, 2018)

Specific Offenses

Aggravated Sexual Abuse

- Held: Jury instructions, read in their totality, did not improperly convey that jury could convict defendant of deprivation of civil rights through aggravated sexual abuse without finding actual force.

United States v. Shaw, 891 F.3d 441 (3d Cir. 2018)

Specific Offenses

Juror Misconduct / Bribery / Consp. RICO

- Held: Juror's unequivocal statement that he was going to hang the jury, and that it would be "11 to 1 no matter what," provided sufficient basis to find that he had violated his oath as a juror and that there was no reasonable possibility that his intransigence was based on his view of the evidence, warranting his dismissal.
- Held: The district court's instructions on what constitutes an "official" act under the bribery and honest services fraud statutes were incomplete and erroneous under *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which was decided a week after the jury verdict. An official act must be identified through a two-step process. Step 1(A) requires the government to identify a question, matter, cause, suit, proceeding or controversy that, at Step 1(B) is pending or may be brought before a public official. Step 2 requires the government to prove the public official made a decision to take an action on the identified matter, cause, suit, proceeding or controversy. Several bribery convictions were vacated and remanded.
- Held: The evidence was sufficient to prove a RICO conspiracy because it showed beyond a reasonable doubt that the five co-defendants agreed to conceal and repay an illegal loan to the Congressman's Mayoral campaign.

United States v. Fattah, 902 F.3d 197(3d Cir. Aug. 9, 2018)

Specific Offenses

Wire Fraud

- Held: Fines and costs owed to the City and State from traffic tickets constituted a property interest within the meaning of the wire fraud statute, thus the indictment sufficiently alleged a wire fraud charge.
- Held: Evidence was sufficient to sustain convictions for perjury before the grand jury, prosecutor's questions were not impermissibly ambiguous when taken in context. The Court also rejected the defendants' contentions that their answers were actually true.
- Held: District court erred in sentencing defendant found guilty of false statements under the obstruction guideline at U.S.S.G. § 2J1.2, because the false statements charge does not contain all the elements of obstruction.

United States v. Hird, 901 F.3d 196 (3d Cir. 2018)

Specific Offenses

Cyberstalking

- Held: No unanimity jury instruction is required in cyberstalking prosecution under § 2261A(2), mens rea and individual acts alleged in the indictment that satisfied the course of conduct requirement did not themselves constitute distinct elements of the offense.
- Held: § 2261A does not violate the First Amendment, because criminal acts are not protected speech even if speech is the means of their commission; the U.S. Supreme Court has held that speech integral to engaging in criminal conduct is not protected by the First Amendment.
- Held: Victim's statements to her mental health therapist of the toll the stalking and harassment took on her were admissible; statements made to a mental health professional for purposes of diagnosis or treatment qualify under the hearsay exception in Federal Rule of Evidence 803(4).
- Held: Statements were also not testimonial and did not violate Confrontation Clause.

United States v. Gonzalez, 2018 WL 4265966 (3d Cir. Sept. 7, 2018)

Venue

Drug Conspiracy

- Held: Circuit declines to adopt a “reasonable foreseeability” test to determine whether venue is proper.

United States v. Renteria, 903 F.3d 326 (3d Cir. 2018)

Third Circuit En Banc Grants

Categorical Approach

En banc cases pending

United States v. Harris, No. 17-1861

- Issues: Whether PA first- and second-degree robbery; or PA first-degree aggravated assault are violent felonies under ACCA?

United States v. Santiago, No. 16-4194

- Issue: Whether this Court's precedent that a statute must require intentional use of force to qualify as a crime of violence under the Guidelines was overruled by the Supreme Court's decision in *Voisine v. United States*.

Life Sentences of Juveniles

- Panel Opinion in *United States v. Grant*, 887 F.3d 131 (3d Cir. 2018), vacated.
- Opinion held that under Eighth Amendment, non-incorrigible juvenile offender must be afforded opportunity for release at point in his or her life that still affords fulfillment outside prison walls; a de facto life sentence in the federal no-parole system cannot be squared with that requirement.

Rehearing *en banc* February 20, 2019.

Resources

- Federal Defender Third Circuit Blog
 - <http://circuit3.blogspot.com/>
- FCDO Website
 - <http://pae.fd.org/>
- DefenseLink (CJA Newsletter) & Case Summaries
 - <http://pae.fd.org/CJA.html>
- Defender Services / Training Division
 - <http://www.fd.org/>
- Sentencing Law and Policy Blog
 - <http://sentencing.typepad.com/>
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