Alert

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Notice of Appeal

A quarterly newsletter reviewing Third Circuit opinions impacting white collar criminal lawyers

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Related Practice Areas

- White Collar Defense & Investigations

Precedential Opinions of Note

Court Remands Habeas Petition for Evidentiary Hearing on Potential Constitutional Violations

Simon v. Virgin Islands (July 9, 2019), No. 18-2755
http://www2.ca3.uscourts.gov/opinarch/182755p.pdf
Unanimous decision: Rendell (writing), Smith, and Jordan

Background

A jury convicted Defendant of burglary, robbery, and felony-murder. The Government's key witness at trial was a co-conspirator, who had previously been convicted for his role in the murder, and who testified that he had no agreement with the Government to reduce his conviction. After testifying at Defendant's trial, the Government sought to vacate and reduce the co-conspirator's conviction. Later, Defendant's trial counsel acknowledged in another proceeding that, at the time he represented Defendant, he also represented a third potential participant in the murder. Defendant eventually filed a petition for *habeas corpus*, asserting, among other things, that (a) the Government had failed to disclose its agreement with the co-conspirator, and (b) his trial counsel was ineffective for a conflict of interest. The lower courts denied the petition without an evidentiary hearing.

Holding

Defendant raised a *prima facie* case of constitutional violations, entitling him to an evidentiary hearing. First, Defendant showed that the co-conspirator could plausibly have made an agreement with the Government for his testimony, which might violate the Government's disclosure obligations under *Brady v. Maryland* (U.S. 1963). Second, Defendant showed his trial counsel's representation of the third potential participant could plausibly be an actual conflict of interest that would make him ineffective. Consequently, it was an abuse of discretion to resolve the petition on those points without an evidentiary hearing.

Key Quote

"Our conclusion does not predetermine the merits of [Defendant's] *Brady* claim. Rather, we conclude that the development of a factual record is necessary to determine whether the Government violated its obligation to disclose its prior promises to or agreements with a witness." (Slip. op. at 17.)

Court Concludes Sentencing-Range Error Is Not Per Se Prejudicial

United States v. Payano (July 10, 2019), No. 18-1153
http://www2.ca3.uscourts.gov/opinarch/181153p.pdf
Unanimous decision: Krause (writing), Jordan, and Roth

Background

Defendant, who had been deported after a drug possession, pled guilty to illegally reentering the

country. At sentencing, the Government erroneously maintained (and the district court adopted) that Defendant had pleaded guilty to aggravated reentry, which carried a statutory maximum sentence ten years greater than the maximum for "ordinary" illegal reentry. The Government's mistake was based on its incorrect belief that Defendant was originally deported for drug **trafficking**, rather than drug possession. The district court imposed an above-the-Guidelines-range sentence of four years' imprisonment.

Holding

The Third Circuit remanded for resentencing, holding that the district court's mistake about the statutory maximum sentence was plain error. It rejected Defendant's argument, however, that the statutory maximum error was *per se* prejudicial, noting that generally the statutory maximum has little impact on the actual sentence imposed. Instead, the Court found that the error was prejudicial **in this case** in light of the Government's erroneous arguments.

Key Quote

"In sum, unlike an erroneous Guidelines range, an erroneous statutory range is not 'itself ... sufficient to show a reasonable probability of a different outcome absent the error.'" (Slip. op. at 15 (quotation omitted).)

Third Circuit Reverses Lower Court that 'Unduly Narrow[ed]' Camden Excessive Force Suit

Forrest v. Parry (July 10, 2019), No. 16-4351
http://www2.ca3.uscourts.gov/opinarch/164351p.pdf
Unanimous decision: Greenaway, Jr. (writing), Bibas, and Fuentes

Background

Camden police officers falsely arrested Plaintiff; they beat him and subjected him to baseless prosecution. He sued the officers and the City of Camden, asserting deprivations of his civil rights under 42 U.S.C. § 1983. He presented extensive evidence of Camden's failure to train and supervise its police department, as well as the Internal Affairs Unit's failure to supervise and discipline police misconduct. On summary judgment, the district court unilaterally divided Plaintiff's suit into separate theories of liability. It only permitted one theory to go forward — the failure to supervise through Internal Affairs — and granted summary judgment against more general theories that the City failed to supervise or train its officers.

Holding

The Court reversed the district court's decision. It held that dividing the case into distinct theories led the district court inappropriately divide the evidence and fail to consider that the same evidence could support multiple theories. This mistake at the summary judgment phase led the district court to make further errors in excluding evidence and instructing the jury.

Key Quote

"The District Court's framing of the case was unduly narrow and incorrect. [Plaintiff's] sole surviving claim was not that Internal Affairs failed to supervise, but, more broadly, that Camden failed to investigate and discipline its officers, and that failure amounted to deliberate indifference to the right of those to whom those officers would come into contact." (Slip. op. at 38.)

McDonnell Decision Not a Ground to Challenge Official's Bribery Conviction

Cordaro v. United States (August 5, 2019), No. 16-4351
http://www2.ca3.uscourts.gov/opinarch/181022p.pdf
Unanimous decision: Chagares (writing), Ambro, and Greenaway, Jr.

Background

A jury convicted Defendant, a former Lackawanna County Commissioner, of bribery and related charges. Defendant took payments from government contractors in exchange for preserving their existing contracts with the County and securing new ones. After his conviction, the Supreme Court decided *McDonnell v. United States* (U.S. 2016), which narrowed the definition of "official acts" for purposes of the general, public official bribery statute, 18 U.S.C. § 201. Defendant challenged his conviction in a petition for *habeas corpus*, arguing that the conduct for which he was convicted was no longer criminal after *McDonnell*.

Holding

The Third Circuit affirmed Defendant's convictions. Defendant failed to show that, even if the jury had been instructed consistent with *McDonnell*, no reasonable juror would have convicted him. Indeed, the evidence demonstrated that Defendant had taken official acts within *McDonnell*'s definition in exchange for bribes.

Key Quote

"Taking this evidence together, would some reasonable juror conclude that [Defendant] committed official acts as defined by *McDonnell*? The answer is yes. And [Defendant] must show that it is **more likely than not** that **no** reasonable juror would reach that conclusion. He fails to do so and thus fails to prove his actual innocence." (Slip. op. at 20 (emphasis in original).)

Court Holds Appellate Waiver Covers Early Termination of Supervised Release

United States v. Damon (August 6, 2019), No. 18-2444
http://www2.ca3.uscourts.gov/opinarch/182444p.pdf
Unanimous decision: Matey (writing), Jordan, and Bibas

Background

Defendant pled guilty to drug offenses. Defendant waived his right to appeal or challenge his sentence as a part of his plea agreement. The district court's sentence included a five-year term of supervised release. After serving his prison sentence and part of his supervised release, Defendant moved for early termination of his supervised release under 18 U.S.C. § 3583(e)(1). The district court denied the motion, holding that it was barred by Defendant's appellate waiver.

Holding

The Third Circuit affirmed. It held that supervised release is a part of a defendant's sentence, and that motions for early termination constitute a challenge to the sentence prohibited by the terms of Defendant's plea agreement.

Key Quote

"Because [Defendant's] plea agreement precludes challenges to his sentence, and because any shortening of his supervision would amount to a change in his sentence, we will affirm the decision of the District Court." (Slip. op. at 3.)

Divided Panel Holds State Court Settlement Does Not Bar False Claims Act Suit

United States ex rel. Charte v. American Tutor, Inc. (August 12, 2019), No. 18-1979
http://www2.ca3.uscourts.gov/opinarch/181979p.pdf
Majority decision: Fuentes (writing) and Ambro
Dissent: Hardiman

Background

Relator, Jean Charte, was terminated by her former employer, American Tutor, after accusing it of fraudulent billing practices. American Tutor sued Charte in New Jersey state court over the accusations. While that suit was pending, Charte brought a False Claims Act (FCA) suit against

American Tutor in federal court. That case remained under seal while the Government investigated. Charte and American Tutor then settled the state court action while the FCA suit remained under seal. Eventually, the Government declined to intervene in the FCA suit, and it was eventually unsealed. Charte then began to litigate the *qui tam* case without the Government's assistance. The district court granted summary judgment in American Tutor's favor, holding that Charte was precluded by the state-court settlement.

Holding

The Third Circuit reversed. It held that baring the FCA suit would be fundamentally unfair. The Court agreed that the FCA and state-court suits arose from the same factual transaction, which would ordinarily trigger New Jersey's preclusion doctrine. It reasoned, however, that preclusion would be unfair because Charte was legally prohibited from alerting American Tutor to the under-seal FCA suit during settlement negotiations. Moreover, the United States is the real party-in-interest to the FCA action, not Charte.

Key Quote

"Here, the factual-nexus requirement of the entire controversy doctrine is satisfied; the state court action and the *qui tam* action both relate to American Tutor's allegedly fraudulent billing practices. Nonetheless, considering the totality of the circumstances, we hold that the entire controversy doctrine does not apply to the instant *qui tam* claims." (Slip. op. at 13-14.)

Dissent

Judge Hardiman dissented, writing that fairness is "a two-way street" and that, by settling, American Tutor was "entitled to repose in this lawsuit." (Judge Hardiman dissent at 1.)

En Banc Court Joins Sister Circuits In Interpretation of Immigration Statutes

Bastardo-Vale v. Attorney General of the United States (August 12, 2019), No. 17-2017
http://www2.ca3.uscourts.gov/opinarch/172017p.pdf
Majority decision: Shwartz (writing), Smith, Chagares, Jordan, Hardiman, Greenaway, Jr., Krause, Restrepo, Bibas, Porter, and Matey
Dissents: McKee (writing) and Ambro; Ambro (writing) and McKee

Background

Defendant, a foreign citizen on a nonimmigrant visa, pled no contest to second-degree unlawful imprisonment, which under Delaware law is not an aggravated felony. He was then subject to removal proceedings. Defendant sought asylum and withholding of removal. The Board of Immigration Appeals (BIA) concluded Defendant was ineligible for either asylum or withholding of removal because he had committed a "particularly serious crime." In so deciding, the BIA ignored the Third Circuit's controlling decision in *Alaka v. Attorney Genera*l (3d Cir. 2006), which held that only aggravated felonies were "particularly serious crimes" for purposes of the withholding of removal statute. Defendant appealed, and the Third Circuit sat *en banc* to reconsider whether *Alaka* was properly decided.

Holding

The Court overruled *Alaka*, concluding that "particularly serious crimes" included, but were not limited to, aggravated felonies under both the asylum and withholding of removal statutes. It thereby joined other circuits that have considered the question. The BIA is entitled to designate additional, non-aggravated crimes, as "particularly serious," either though administrative rulemaking or case-by-case adjudication.

Key Quote

"The phrase 'particularly serious crime' means the same thing in both [the asylum and withholding of removal] statutes, and the language of those statues shows that aggravated felonies are a subset of particularly serious crimes." (Slip. op. at 3.)

Dissent

Judge McKee, joined by Judge Ambro, dissented, writing that, in the asylum statute, Congress had "expressly limit[ed]" the BIA to only designating non-aggravated crimes as "particularly serious" by administrative rulemaking. (Judge McKee dissent at 2.) Consequently, the BIA could not determine in removal proceedings that an individual's non-aggravated conviction was particularly serious.

Dissent

Judge Ambro, joined by Judge McKee, also dissented, writing that *Alaka* "got this right" and that only aggravated felonies were "particularly serious" for purposes of the withholding of removal statute. (Judge Ambro dissent at 2.)

Court Vacates Conviction for Failure to Follow Procedure for 'Guilty But Mentally Ill' Plea

Velazquez v. Superintendent Fayette SCI (September 3, 2019), No. 17-3176
http://www2.ca3.uscourts.gov/opinarch/173176p.pdf
Unanimous decision: Greenaway, Jr. (writing), Smith, and Chagares

Background

Defendant, who had a history of mental illness, was convicted of multiple charges. Defendant pled guilty but mentally ill (GBMI), a Pennsylvania plea under which a defendant can receive mental health treatment during his sentence. In order to accept a GBMI plea, a judge must first determine the defendant was mentally ill at the time of the offense after an evidentiary hearing. In this case, the judge never held a further GBMI hearing and recorded the plea as simply a "guilty plea." Defendant's counsel did not object to any aspect of the court's handling of the plea. Defendant eventually petitioned for a writ of *habeas corpus* in federal court, which the district court denied.

Holding

The Third Circuit reversed, granting the petition and vacating Defendant's conviction. It first held that federal *habeas* jurisdiction was proper because Defendant's claim, properly construed, challenged the validity of his guilty plea. The Court proceeded to find that Defendant's counsel was constitutionally ineffective for failing to object to the deficient GBMI procedure. Defendant did not need to prove the GBMI plea would have resulted in a better sentence, only that he would have taken advantage of the GBMI process.

Key Quote

"[P]etitioners alleging ineffective assistance of counsel resulting in a deprivation of process need not show that the decision to undergo the process would have resulted in a more favorable outcome. Instead, they need only demonstrate a reasonable probability that, but for counsel's error(s), they would have made the decision — that is, chosen to exercise the right or take advantage of the opportunity of which they were deprived." (Slip. op. at 25.)

Third Circuit Halts Pipeline Project; Natural Gas Company May Not Condemn State Property

In re: PennEast Pipeline Company, LLC (September 10, 2019), Nos. 19-1191 – 19-1192
http://www2.ca3.uscourts.gov/opinarch/191191p.pdf
Unanimous decision: Jordan (writing), Bibas, and Nygaard

Background

Plaintiff, a private gas company, sued New Jersey in federal court to condemn various properties owned by the state along the route of a proposed natural gas pipeline. The Natural Gas Act (NGA) delegates the federal government's eminent domain power to private companies, including Plaintiff, for this purpose. New Jersey moved to dismiss on the grounds that the suit was barred by its

Eleventh Amendment sovereign immunity. The district court denied the motion, holding that the NGA's delegation to Plaintiff included the federal government's power to sue states in federal court without their consent.

Holding

The Third Circuit reversed, dismissing the condemnation claims against New Jersey. It held that the federal government's power to condemn land is distinct from its exception from state sovereign immunity, and that the NGA only delegated eminent domain power to private companies. Consequently, private companies cannot sue to condemn state land without the state's consent. The Court cast serious doubt on whether the federal government can delegate its Eleventh Amendment exception, but it declined to resolve that question.

Key Quote

"In the absence of any indication in the text of the statute that Congress intended to delegate the federal government's exemption from state sovereign immunity to private gas companies, we will not assume or infer such an intent. ... Accordingly, we hold that the NGA does not constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity." (Slip. op. at 33.)

SEC Injunctions Not Bound by Five-Year Limitations Period Because They Are Not Penalties

> *Securities and Exchange Commission v. Gentile* (September 26, 2019), No. 18-1242
> http://www2.ca3.uscourts.gov/opinarch/181242p.pdf
> Unanimous decision: Hardiman (writing), Krause, and Greenberg

Background

Defendant, a broker-dealer, was involved in two pump-and-dump schemes from 2007 to 2008. Eight years after the last scheme, the SEC brought a civil enforcement action against him seeking injunctions against future violations of securities law and prohibiting his participation in the penny stock industry. Defendant moved to dismiss the action, arguing that the injunctions were barred by the five-year statute of limitations for actions "for the enforcement of any civil fine, penalty, or forfeiture." 28 U.S.C. § 2462. The district court granted the motion and dismissed the action.

Holding

The Court reversed the dismissal. It held that properly issued SEC injunctions are not "penalties" subject to the five-year statute of limitations, reasoning that injunctions are equitable remedies to prevent future harm, not punishments for past wrongdoing. The Court observed that SEC injunctions can be improper when they are solely punitive and lack a preventative purpose. But it noted that its inherent equitable discretion — not the statute of limitations — was the proper basis on which to deny requests for such injunctions.

Key Quote

"We therefore hold SEC injunctions that are properly issued and valid in scope are not penalties and thus are not governed by [28 U.S.C.] § 2462. If an injunction cannot be supported by a meaningful showing of actual risk of harm, it must be denied as a matter of equitable discretion—not held time barred by § 2462." (Slip. op. at 23.)

Non-Precedential Opinions of Note

United States v. Yusuf (July 15, 2019), No. 18-2487

http://www2.ca3.uscourts.gov/opinarch/182487np.pdf

The district court sentenced Defendant for two crimes; the court stated that it imposed a reduced

sentence on the conspiracy conviction, in part, because of the mandatory minimum sentence it was required to impose for Defendant's aggravated identity theft conviction. The Third Circuit vacated the sentence because the identity theft statute "prohibited courts from engaging in this kind of discounting." (Slip. op. at 7.)

Ezeobi v. Warden Fairton FCI (July 22, 2019), No. 17-2103

http://www2.ca3.uscourts.gov/opinarch/172103np.pdf

Defendant was convicted in the United Kingdom. While serving his sentence there, he was indicted in the United States. Although he would have qualified for early release in the U.K., he served an additional seven months of his U.K. sentence due to the pending U.S. indictment. Later convicted in the U.S., the district court sentenced Defendant, assuming he would get time-served credit for those seven months. The Bureau of Prisons then denied that credit. The Third Circuit affirmed the denial, but suggested that a petition under 28 U.S.C. § 2255 would be the appropriate vehicle to seek reconsideration of his sentence before the original district judge.

United States v. Oyerinde (August 19, 2019), No. 19-1359

http://www2.ca3.uscourts.gov/opinarch/191359np.pdf

Defendant unsuccessfully sought early termination of his supervised release, which was imposed as a part of his sentence after he pled guilty. His guilty plea included a broad appellate waiver. The Third Circuit enforced the appellate waiver to dismiss the appeal, citing *United States v. Damon* (3d. Cir. 2019).

United States v. Jones (August 20, 2019), No. 17-2663

http://www2.ca3.uscourts.gov/opinarch/172663np.pdf

Defendant was convicted of two robberies of the same bank. A witness to the second robbery identified Defendant as the robber. She did so, however, only after a co-worker received a letter from police announcing that he had been arrested as a suspect in the first robbery, which prompted the witness to Google his mug shot. Defendant moved to suppress the identification. The district court denied the motion, holding that the police letter was not a state-arranged identification procedure. Although it found the case "troubling," the Third Circuit affirmed. It declined to "draw a firm line," deciding only that the letter in this case was too attenuated to be a state-arranged identification procedure. (Slip. op. at 12.)

United States v. Neff (September 6, 2019), Nos. 18-2282, 18-2539

http://www2.ca3.uscourts.gov/opinarch/182282np.pdf

A jury convicted Defendants of racketeering, mail and wire fraud, and money laundering arising out of a payday loan operation that charged illegally high interest rates. According to the indictment, the operation attempted to avoid state unlawful debt laws by falsely presenting the lending companies as owned by Indian tribes in order to benefit from tribal immunity. The fraud charges arose from Defendants' responses to a class-action lawsuit in which they tried to appear judgment-proof.

In a decision resolving a host of appellate claims, the Third Circuit held that racketeering did not require a *mens rea* for willfulness when the predicate crime is collecting an unlawful debt. It also held that the class-action plaintiffs' unvested causes of action were "property" subject to the mail and wire fraud statutes. And it determined that tribal immunity did not prevent criminal racketeering liability for collecting unlawful debts, even if it would prevent a civil suit for violating the state laws

that made the interest rates illegal.

United States v. Walker (September 6, 2019), No. 15-4062

http://www2.ca3.uscourts.gov/opinarch/154062po.pdf

In June, the Third Circuit applied the good-faith exception to permit admission of cell phone location data that was obtained without a warrant prior to the U.S. Supreme Court's decision in *Carpenter v. United States* (2018).

The panel granted Defendant's petition for rehearing and vacated its June opinion, in order to allow the parties to address the impact of the U.S. Supreme Court's recent decision in *United States v. Davis* (2019) on the case.

United States v. Savino (September 24, 2019), No. 18-2223

http://www2.ca3.uscourts.gov/opinarch/182223np.pdf

Defendant, a physician, appealed his convictions under the Anti-Kickback and Travel Acts, which arose from bribes he received from a blood-testing lab. Defendant permitted an employee of the lab to operate a blood-drawing station in the back of his Staten Island practice in exchange for monthly cash payments. The Third Circuit affirmed that there was sufficient evidence these payments amounted to bribes for purposes of the Anti-Kickback Act. And it held that New Jersey's physician bribery law was a predicate offense for the Travel Act — although Defendant was located out of state, the bribe payments originated from the New Jersey lab.

United States v. Joseph (September 26, 2019), No. 18-2673

http://www2.ca3.uscourts.gov/opinarch/182673np.pdf

Defendant's challenge to the length of his prison sentence was moot, because he had already served the entirety of his prison time and did not demonstrate any "collateral consequences" from the claimed sentencing errors that would make the district court "likely" to reduce its supervised release sentence. (Slip. op. at 2-3.) The Third Circuit suggested that Defendant could instead seek modification of his supervised release under 18 U.S.C. §3583(e)(1).

United States v. Woodley (September 26, 2019), No. 16-4119

http://www2.ca3.uscourts.gov/opinarch/164119np.pdf

Defendant sought to suppress the results of the search of a rental car. Defendant was not listed on the rental agreement, gave a false name to the officer, the rental had expired, and an agent of the rental company consented to the search. While acknowledging the "general rule" from *Byrd v. United States* (U.S. 2018) — that an unlisted renter still has a reasonable expectation of privacy in a rental car — the Third Circuit upheld the search on based solely on the agent's consent.