

## Notice of Appeal Spring 2019

### Precedential Opinions of Note

#### District Court Lacked Authority to Dismiss Indictment After Two Mistrials

***United States v. Wright* (January 17, 2019), No. 17-1972**

<http://www2.ca3.uscourts.gov/opinarch/171972p.pdf>

Majority decision: Shwartz (writing) and McKee

Dissent: Nygaard

#### Background

Defendant was twice tried before a jury for being a felon in possession of a firearm. Both trials ended in mistrials because neither jury could reach a verdict. The district court relied on its inherent authority to dismiss the indictment and bar a third retrial.

#### Holding

The Third Circuit reversed. A district court may only exercise its inherent authority to dismiss an indictment to address prosecutorial misconduct that prejudices the defendant. The district court's dismissal was improper in this case because there was no misconduct by the government.

#### Key Quote

"[A] court may dismiss an indictment based upon its inherent authority only if the Government engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice." (Slip. op. at 13.)

#### Dissent

Judge Nygaard dissented, writing that the district court did "possess the inherent power to dismiss an indictment after serial hung juries," and that it did not abuse its discretion after doing so here. (Judge Nygaard dissent at 1.)

#### Judge Should Have Postponed Sentencing for Defendant

***United States v. Chapman* (February 7, 2019), No. 17-1656**

<http://www2.ca3.uscourts.gov/opinarch/171656p.pdf>

Unanimous decision: Restrepo (writing), McKee, and Vanaskie

#### Background

Defendant pled guilty to conspiracy to possess cocaine with the intent to distribute. Defendant's counsel failed to inform his client about the ultimate date of sentencing. Defendant requested a continuance so that his family could be present and submit letters of support to the judge. The district court denied the request and proceeded with sentencing.

#### Holding

The Court vacated Defendant's sentence and remanded to a different district court judge for resentencing. The district court abused its discretion by refusing to postpone the sentencing because, by doing so, it prevented Defendant from offering letters of support from his family.



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#### Related Practice Areas

- White Collar Defense & Investigations

## Key Quote

“Regardless of whether the letters would have in fact brought about a lesser sentence, the law — as well as a sense of basic fairness — dictates that [Defendant] not be prevented from presenting mitigating information because of his own counsel’s oversight and the Court’s congested docket.” (Slip. op. at 14.)

## Third Circuit Confirms that Defendants Cannot Conspire with Government Informants

***United States v. Garner* (February 8, 2019), No. 17-1181**

<http://www2.ca3.uscourts.gov/opinarch/171181p.pdf>

Unanimous decision: Ambro (writing), Shwartz, and Fuentes

## Background

Defendant plotted to rob a bank with two men, one of whom was an FBI informant. A jury convicted him of conspiracy to commit armed bank robbery, attempted bank robbery, and possession of a firearm in furtherance of a crime of violence. Defendant challenged the sufficiency of the evidence on appeal.

## Holding

The Court affirmed all of Defendant’s convictions. In particular, the Court expressly stated that an agreement between Defendant and the informant would have been insufficient to support a conspiracy, but that Defendant’s agreement with the other conspirator was enough to affirm his conviction on that count.

## Key Quote

“Indeed, merely conspiring with Saber, a government informant, would not make [Defendant] criminally liable. This is the rule in other Circuits, and we adopt it as well.” (Slip. op. at 5 (citations omitted).)

## Time as a Fugitive Tolls a Defendant’s Period of Supervised Release

***United States v. Island* (February 26, 2019), No. 17-3826**

<http://www2.ca3.uscourts.gov/opinarch/173826p.pdf>

Majority decision: Scirica (writing) and Ambro

Dissent: Rendell

## Background

In June 2013, Defendant began a three-year term of supervised release. In September 2015, the district court issued a warrant because Defendant stopped reporting to probation and his probation officer could not locate him. Defendant shot a police officer in June 2016 and was arrested. The probation officer filed a violation petition based on this conduct days **after** Defendant’s three-year term of supervised release expired. The district court ultimately revoked Defendant’s release and imposed prison time based solely on the June 2016 violation.

## Holding

The Court affirmed. It held that Defendant’s term of supervised release had not expired because Defendant’s time as a fugitive did not count toward his period of supervision. Consequently, Defendant remained under the district court’s supervision at the time the probation office filed its violation petition in June 2016.

## Key Quote

“Because the fugitive tolling doctrine helps realize the design and purpose of supervised release,

we join the majority of circuits to have considered the question and recognize a supervised release term tolls while a defendant is of fugitive status. A defendant cannot count toward his sentence time spent out of the court's supervision as a consequence of his own doing." (Slip. op. at 9.)

## Dissent

Judge Rendell dissented, writing that the Majority was wrong to apply "tolling for fugitives from supervised release" because the relevant statutory text did not authorize it, and thus "the District Court was without the power to extend the term of [Defendant's] supervised release based upon tolling." (Judge Rendell dissent at 1.)

## Court Clarifies Acceptable Delays for Mental Health Evaluation Under Speedy Trial Act

***United States v. Williams* (March 5, 2019), No. 17-3422**

<http://www2.ca3.uscourts.gov/opinarch/173422p.pdf>

Unanimous decision: Restrepo (writing), Chagares, and Hardiman

## Background

An indictment charged Defendant with several firearms offenses. The district court ordered that Defendant undergo a psychological exam to determine his competency to stand trial. Forty-seven days elapsed before Defendant, who was in custody, was transported to another facility for this exam. Defendant ultimately moved to dismiss the indictment for violation of his rights under the Speedy Trial Act, 18 U.S.C. § 3161, *et seq.* The district court denied the motion.

## Holding

The Court reversed and remanded with instructions to dismiss the indictment. While delays relating to mental competency proceedings are generally excludable, the Act sets a 10-day upper limit on delays related to "transportation" for mental health examinations. Consequently, only 10 days were excludable from Defendant's wait to be transported for his exam. The total remaining non-excludable time exceeded the limit in the Act and required dismissal of the indictment.

## Key Quote

"[W]e hold that periods of unreasonable delay of more than ten days in the transport of a defendant to the site of a psychological examination conducted in the course of a proceeding to determine a defendant's mental competency are non-excludable for purposes of computing the time within which the Government must commence a trial of a defendant under the Speedy Trial Act." (Slip. op. at 10.)

## District Courts Must Explain Reasons to Use 'Ends of Justice' to Pause Speedy Trial Clock

***United States v. Reese* (March 5, 2019), No. 17-2484**

<http://www2.ca3.uscourts.gov/opinarch/172484p.pdf>

Unanimous decision: Ambro (writing), Chagares, and Greenaway, Jr.

Concurrence: Ambro and Greenaway, Jr.

## Background

A jury convicted Defendant of multiple counts of wire fraud and identity theft. Defendant's trial date was postponed several times. At one point, the district court continued the trial by citing only its own schedule without providing other reasons. Defendant's counsel did not object and mentioned that he would not have been available for the original date anyway. Just before trial, Defendant made a motion to dismiss the indictment under the Speedy Trial Act, which the court denied.

## Holding

The Court reversed, vacated Defendant's conviction, and remanded for dismissal of the indictment. For a district court to rely on the "ends of justice" to exclude a delay for Speedy Trial purposes, it must either: (1) invoke the exclusion by name or reference to the Act, or (2) provide an adequate factual basis for the exclusion on the record. The district court did neither at the time of the continuance, thus, the resulting delay was not excludable. Because the total non-excludable time exceeded the Act's limit, the indictment must be dismissed.

## Key Quote

"When a district court enters a continuance order without either stating the factual basis for excluding time under the Act or using language that invokes it (the latter of which allows a later factual explanation), the delay caused by the continuance is not excluded and the district court cannot exclude the time in hindsight." (Slip. op. at 13.)

## Concurrence

Judges Ambro and Greenaway Jr. wrote separately, concluding that waiver would not "preclude [Defendant's] challenge in this appeal" if that issue had been raised. (Slip. op. at 15.)

## Wife Who Participated in Medicare Fraud Liable for False Claims by Husband's Company

***United States ex rel. Doe v. Heart Solution, PC* (March 14, 2019), No. 17-2019**

<http://www2.ca3.uscourts.gov/opinarch/172019p.pdf>

Unanimous decision: Roth (writing), Jordan, and Stearns (D. Mass., sitting by designation)

## Background

A civil complaint under the False Claims Act (FCA) asserted Medicare fraud by Defendants Nita Patel, her husband Kirtish Patel, and two companies solely owned by Mrs. and Mr. Patel, respectively. In a separate case, both Patels pled guilty to criminal fraud charges relating to this same alleged conduct. The district court granted summary judgment against all Defendants as to all charges, holding that the Patels' convictions collaterally estopped the Defendants from contesting liability in the civil case. Only Mrs. Patel and her company appealed.

## Holding

The Court affirmed in part and reversed in part. Among a number of holdings, it held Mrs. Patel liable under the FCA for false claims made by her husband's company, even though she did not own it, because ownership is not an element of an FCA claim. The Court, however, reversed summary judgment against Heart Solution, Mrs. Patel's company, because the Patels' guilty pleas did not estop the company.

## Key Quotes

"We conclude that individual employees with no ownership interest in a company can be liable under Sections 3729(a)(1)(A) and 3729 (a)(1)(B) of the FCA." (Slip. op. at 10.)

"Heart Solution cannot be estopped based on Ms. Patel's criminal conviction and plea colloquy . . . [because] Heart Solution did not have any opportunity, much less a 'full and fair opportunity,' to litigate **any** issue involved in this appeal." (Slip. op. at 16.)

## Non-Precedential Opinions of Note

***United States v. Roebuck* (January 23, 2019), No. 17-2718**

<http://www2.ca3.uscourts.gov/opinarch/172718np.pdf>

The district court revoked Defendant's supervised release and imposed a new five-year term of

supervised release that it erroneously believed was mandatory. The court mistakenly relied on mandatory language in the original statute of conviction that, in fact, only applied to the initial sentence. The Third Circuit vacated the sentence as plain error because “neither the [U.S. Sentencing] Guidelines nor [18 U.S.C.] § 3583(h) require” district courts to impose it. (Slip. op. at 10.)

***United States v. Schlosser* (January 30, 2019), No. 17-2872**

<http://www2.ca3.uscourts.gov/opinarch/172872np.pdf>

The Third Circuit upheld Defendant’s tax evasion convictions but vacated Defendant’s conviction for impeding the administration of tax law under 26 U.S.C. § 7212(a). *Marinello v. United States* (U.S. 2018), which was decided after Defendant’s conviction, required the jury to find additional elements for the latter offense. Specifically, juries must now find interference with “a particular administrative proceeding” that was either “pending” or “reasonably foreseeable.” (Slip. op. at 3.)

***United States v. Handy* (March 25, 2019), No. 17-3842**

<https://www2.ca3.uscourts.gov/opinarch/173842np.pdf>

The Third Circuit held that the sentencing judge committed plain error by applying an obstruction-of-justice enhancement “based on the offenses charged in the indictment, not on any conduct obstructing the investigation of those offenses.” (Slip. op. at 5.)

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