Alert
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Notice of Appeal
A Quarterly Review of Third Circuit Opinions for White-Collar Criminal Lawyers

COZEN O'CONNOR

Precedential Opinions of Note

Third Circuit Affirms Constitutionality of New Jersey's Non-Monetary Bail Reform

Holland v. Rosen (July 9, 2018), No. 17-3104

http://www2.ca3.uscourts.gov/opinarch/173104p.pdf

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

Background

Petitioner sued to enjoin the State of New Jersey from determining a defendant's entitlement to pre-trial release through a risk-based system (in place of the old system of monetary bail). Petitioner, who was placed on house arrest while awaiting trial on aggravated assault charges, argued that he had a constitutional right to post monetary bail to secure his pretrial release.

Holding

The United States Constitution does not provide a right to deposit money or obtain a corporate surety bond as an alternative to non-monetary conditions of pretrial release.

Key Quote

"[E]ven if the Eighth Amendment [to the Constitution] provides a 'right to bail,' we do not construe its original meaning to include a right to make a cash deposit or to obtain a corporate surety bond to secure pretrial release." (Slip. op. at 27.)

Court Clarifies Scope of Fees That Relators May Recover in False Claims Act Cases

United States ex. rel. Palmer v. C&D Technologies Inc. (July 17, 2018), No. 17-2350

http://www2.ca3.uscourts.gov/opinarch/172350p.pdf

Unanimous decision: Greenberg (writing), Jordan, and Krause

Background

Following settlement in a False Claims Act action, the parties were unable to agree on the attorneys' fees that the Relator should recover. Specifically, the Relator argued that he was entitled to reimbursement for legal fees incurred in litigating the petition for fees itself.

Holding

The False Claims Act allows successful relators to recover reasonable fees/costs associated with litigating their entitlement to those fees in contested proceedings (referred to as "fees on fees").

Key Quote

On remand, "[t]he District Court should proceed in two steps: (1) as with all fee petitions, it must first determine whether the fees on fees are reasonable; and (2) once the reasonability analysis is complete, the Court must consider the success of the original fee petition and determine whether the fees on fees should be reduced based on the results obtained." (Slip. op. at 27.)

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Related Practice Areas

- White Collar Defense & Investigations

Third Circuit Uses Lenient Approach to Determine the 'Rodriguez Moment' of a Traffic Stop

United States v. Green (July 25, 2018), No. 17-1576

http://www2.ca3.uscourts.gov/opinarch/171576p.pdf

Unanimous decision: Fisher (writing), Greenaway, Jr., and Nygaard

Background

Defendant challenged the constitutionality of a search in which police discovered approximately twenty pounds of heroin in his trunk.

Holding

After initially stopping Defendant, the police officer unreasonably extended the traffic stop by returning to his patrol car and calling his colleague to discuss his suspicion that Defendant was trafficking drugs (as opposed to speeding). Courts have expressed great difficulty in applying *Rodriguez v. United States* (U.S. 2015), which held that a traffic stop is unreasonably extended when an officer, without reasonable suspicion, investigates other crimes during that stop. The Third Circuit adopted a cautious approach to determining this "*Rodriguez* moment," erring on the side of Defendant.

Key Quote

"In light of the uncertainty in applying *Rodriguez* to the present facts, we believe that the prudent course is to err on the side of caution and proceed on the assumption — not conclusion — that the '*Rodriguez* moment' occurred immediately after Volk's initial conversation with Green." (Slip. op. at 17.)

Court Holds That 'New Evidence' Includes Any Evidence Not Presented at Trial

Reeves v. Fayette SCI (July 23, 2018), No. 17-1043

http://www2.ca3.uscourts.gov/opinarch/171043pa.pdf

Decisions: Schwartz (writing), Cowen, and McKee (concurring)

Background

Defendant, convicted of murder and related charges, sought *habeas corpus* relief from his conviction based on actual innocence. Defendant argued that the Court should excuse his petition's untimeliness based on the actual innocence exception to procedural default recognized in *Schlup v. Delo* (U.S. 1995).

Holding

Evidence of actual innocence that an ineffective counsel failed to present at trial is new evidence for purposes of appeal, despite the fact that this evidence was available to the defense at the time of trial.

Key Quote

"The limited approach we adopt to evaluate new evidence to support an actual innocence gateway claim, where that claim is made in pursuit of an underlying claim of ineffective assistance of counsel: (1) ensures that reliable, compelling evidence of innocence will not be rejected on the basis that it should have been discovered or presented by counsel when the very constitutional violation asserted is that counsel failed to take appropriate actions with respect to that specific evidence; and (2) is consistent with the Supreme Court's command that a petitioner will pass through the actual innocence gateway only in rare and extraordinary cases." (Slip. op. at 19-20.)

Withdrawal of Consent Requires More Than Expression of Unhappiness with Search

United States v. Williams (August 1, 2018), No. 16-3547

http://www2.ca3.uscourts.gov/opinarch/163547p.pdf

Decisions: Roth (writing and concurring), Hardiman (concurring), and Fisher (concurring)

Background

Following his guilty plea to a drug offense, Defendant appealed the District Court's denial of his suppression motion. The District Court had denied Defendant's suppression motion because it found that Defendant voluntarily consented to the search of his car — where officers found the contraband – and did not unequivocally withdraw this consent during the search. After the search of his car, Defendant complained that he had been standing "out [there] for half an hour" after he told the officer "you searched my car three times [and] y'all got me on the side of this road in the middle of the winter holding me up and I got to go."

Holding

Defendant, who complained about the length of the search, failed to establish that he had withdrawn his initial consent to search his car.

Key Quote

"Although defendants need not use a special set of words to withdraw consent, they must do more than express unhappiness about the search to which they consented." (Slip. op. at 13.)

Third Circuit Upholds FINRA's Arbitration Clause

Reading Health System v. Bear Stearns & Co. (August 7, 2018), No. 16-4234

http://www2.ca3.uscourts.gov/opinarch/164234p.pdf

Unanimous decision: Roth (writing), Pappert, and Schwartz

Background

Reading Health System executed a series of contracts with Bear Stearns (now J.P. Morgan Securities) that included a forum selection clause requiring all disputes arising out of these contracts to be litigated in the Southern District of New York. This forum selection clause contradicted the Financial Industry Regulatory Authority's (FINRA) Rule 12200, which requires all FINRA members—including J.P. Morgan—to submit to arbitration at the customer's request.

Holding

J.P. Morgan's forum selection clause does not negate J.P. Morgan's obligation, as a member of FINRA, to arbitrate customer claims.

Key Quote

"[W]e are reluctant to find an implied waiver here. Reading's right to arbitrate is not contractual in nature, but rather arises out of a binding, regulatory rule that has been adopted by FINRA and approved by the SEC. By condoning an implicit waiver of Reading's regulatory right to arbitrate, we would erode investors' ability to use an efficient and cost-effective means of resolving allegations of misconduct in the brokerage industry and thus undermine FINRA's ability to regulate, oversee, and remedy any such misconduct." (Slip. op. at 34.)

McDonnell Necessitates Revised Jury Instructions in Fattah Case

United States v. Fattah, Nicholas, Brand, Vederman (August 9, 2018), Nos. 16-4397, 16-4410, 16-4411, 16-4427, 17-1346

http://www2.ca3.uscourts.gov/opinarch/164397p.pdf

Unanimous decision: Smith (writing), Greenaway, Jr., and Krause

Background

Following his June 2016 conviction for political corruption, bribery, and related charges, former Congressman Fattah appealed his conviction. He argued on appeal that the District Court's jury instructions were flawed in light of *McDonnell v. United States* (U.S. 2016), which held that an "official act" from a politician must include more than setting up a meeting, calling another public official, or hosting an event. Following a post-verdict motion by Fattah, the District Court acquitted Fattah of bank fraud, making false statements to financial institutions, and falsifying records.

Holding

The District Court failed to properly instruct the jury on what constitutes an "official act" for purposes of the bribery statute. Although the Third Circuit remanded four bribery related charges for retrial, the Court affirmed all other convictions and restored guilty verdicts on two bank-fraud related charges.

Key Quote

"In this case, as in *McDonnell*, the jury instructions were erroneous. We conclude that the first category of the charged acts—setting up a meeting between Vederman and the U.S. Trade Representative—is not unlawful, and that the second category—attempting to secure Vederman an ambassadorship—requires reconsideration by a properly instructed jury. The third charged act—hiring Vederman's girlfriend—is clearly an official act. But because we cannot isolate the jury's consideration of the hiring from the first two categories of charged acts, we must reverse and remand the judgment of the District Court." (Slip. op. at 65.)

Court Affirms Philadelphia Traffic Court Judges' Perjury Convictions

United States v. Hird, et al. (August 21, 2018), Nos. 14-4754, et al.

http://www2.ca3.uscourts.gov/opinarch/144754p.pdf

Unanimous decision: Nygaard (writing), Greenaway, Jr., and Fisher

Background

Three Philadelphia Traffic Court judges were acquitted of mail and wire fraud charges stemming from allegations that they had fixed traffic tickets. They were convicted of perjury, however, for denying the allegations under oath. The defendants argued on appeal that the perjury convictions were inconsistent with the jury's acquittals.

Holding

There was sufficient evidence at trial to support the judges' perjury convictions based on their denials that they had given special consideration, even though they were acquitted of fraud charges based on that conduct.

Key Quote

"[A] jury's determination that [defendant's] ticket-fixing conduct did not constitute wire fraud, mail fraud, and conspiracy does not preclude its determination that he lied about this conduct before the Grand Jury." (Slip. op. at 43.)

Third Circuit Upholds Suppression of Gun Found After Needless Questions Extended Stop

United States v. Clark (August 30, 2018), No. 17-2739

http://www2.ca3.uscourts.gov/opinarch/172739p.pdf

Unanimous decision: Ambro (writing), Jordan, and Vanaskie

Background

Defendant was a passenger in a car that police stopped for traffic violations. After confirming the driver's authority to operate the vehicle, officers questioned Defendant and asked the driver additional questions about his criminal history and his relationship with Defendant. After asking additional questions, officers searched Defendant and discovered an illegal handgun.

Holding

The officers' questions concerning the driver's criminal history and relationship with Defendant were not related to the driver's authority to operate the vehicle. In the absence of any information that cast doubt on the driver's legal ability to drive, these additional questions were unconnected to the public safety mission of the traffic stop. Consequently, this questioning impermissibly extended the traffic stop in violation of the Fourth Amendment. The later-discovered evidence of Defendant's gun must be suppressed.

Key Quote

"Simply stated, we hold that, after [one officer's] computerized check confirmed [the driver's] authority to drive the vehicle and without any other indicia he lacked that authority, the traffic stop was effectively completed. To then turn to the passenger—Clark—for questioning that sought suspicion for criminal activity went beyond 'ordinary inquiries incident to [the traffic] stop.'" (Slip. op. at 13 (quotation omitted) (third alteration in original).)

Court Addresses Public Disclosure Bar to Qui Tam Actions

United States ex rel. Silver v. Omnicare, Inc., et al. (September 4, 2018), No. 16-4418

http://www2.ca3.uscourts.gov/opinarch/164418p.pdf

Unanimous decision: Chagares (writing), Vanaskie, and Fuentes

Background

A *qui tam* relator alleged that PharMerica, a pharmacy that serves nursing homes, illegally provided discounts to nursing homes in exchange for securing their lucrative Medicare Part D and Medicaid business. Relator based his claims on publicly available documents that he read in light of his non-public knowledge about the rates PharMerica was charging.

Holdings

Mere reliance on publicly available information is not enough to run afoul of the False Claims Act's public disclosure bar if the public information is insufficient, on its own, to support an allegation of fraud. Rather, where the allegation depends upon non-public information, read in conjunction with publically available information, the fraud has not been publicly disclosed. District Courts also have an obligation to independently determine whether public documents disclose the alleged fraud, even if the relator concedes that he or she relied on such documents to discover it.

Key Quote

"[W]e clarify now that the FCA's public disclosure bar is not triggered when a relator relies upon non-public information to make sense of publicly available information, where the public information – standing alone – could not have reasonably or plausibly supported an inference that the fraud was in fact occurring." (Slip. op. at 21.)

Confrontation Clause Violated by Use of Stonewalling Witness's Prior Statement

Preston v. Superintendent Graterford SCI, et al. (September 5, 2018), No. 16-3095

http://www2.ca3.uscourts.gov/opinarch/163095p.pdf

Unanimous decision: Rendell (writing), Greenaway, Jr., and Fuentes

Background

Defendant challenged his state murder conviction, based on the use of his brother's prior statements at Defendant's trial. Defendant's brother was called as a witness at Defendant's trial but refused to meaningfully answer questions. Consequently, the trial court admitted prior statements that Defendant's brother had made. Trial counsel did not raise a Confrontation Clause objection, and Defendant's post-conviction counsel did not raise trial counsel's ineffectiveness in post-conviction proceedings.

Holding

Defendant's post-conviction counsel was ineffective for failing to raise his trial counsel's ineffective assistance. Moreover, Defendant's Confrontation Clause rights were violated by the admission of the witness's prior statements when the witness (Defendant's brother) refused to meaningfully participate in cross-examination, and trial counsel was ineffective for failing to raise the issue. However, trial counsel's failure did not affect the outcome of the trial and was therefore harmless, so Defendant's conviction stands.

Key Quote

"We . . . conclude that the use of a witness's prior statement against a criminal defendant violates the defendant's Confrontation Clause rights when the witness refuses to answer any substantive questions on cross-examination." (Slip. op. at 27-28.)

Habeas Relief Granted for Double Ineffective Assistance of Counsel

Workman v. Superintendent Albion SCI, et al. (September 11, 2018), No. 16-1969

http://www2.ca3.uscourts.gov/opinarch/161969p.pdf

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

Background

A jury convicted Defendant of first-degree murder. His trial counsel did not call any witnesses to establish his theory of the case, which was directly contradicted by the Government's expert testimony. In post-conviction proceedings, counsel did not argue that trial counsel had been ineffective. Defendant raised both lawyers' ineffectiveness on federal *habeas*.

Holding

The petition for a writ of *habeas corpus* is granted. A defendant is not barred from raising a new claim that trial counsel was ineffective **if** he can show that 1) post-conviction counsel's performance was deficient, and 2) the ineffective assistance of trial counsel claim is "substantial." Defendant need not demonstrate that this claim would ultimately be successful. Here, the Court held that Defendant had made a sufficient showing and concluded that Defendant's trial counsel was constitutionally ineffective.

Key Quote

"[W]hen a petitioner shows that post-conviction relief counsel's performance was unreasonably deficient, the requirement that the deficient performance result in prejudice may be satisfied with a

substantial claim of ineffective assistance of trial counsel that would otherwise have been deemed defaulted." (Slip. op. at 18 (internal quotation omitted).)

Act in Furtherance of Conspiracy Need Not Be Reasonably Foreseeable to Create Venue

United States v. Renteria (September 11, 2018), No. 17-2079

http://www2.ca3.uscourts.gov/opinarch/172079p.pdf

Unanimous decision: Fuentes (writing), Greenaway, Jr., and Rendell

Background

Defendant became involved in a pre-existing drug distribution conspiracy when he met a co-conspirator to supply drugs and accept payment in California. He accepted payment for a shipment of methamphetamine that had been sent to the co-conspirator in Philadelphia before Defendant became aware of or joined the conspiracy. Defendant stood trial and was convicted of conspiracy to distribute controlled substances in the Eastern District of Pennsylvania. He appealed his conviction on the grounds that venue should be limited to districts where it was reasonably foreseeable to him that conduct would take place in furtherance of the conspiracy.

Holding

Venue is proper in any district in which a co-conspirator commits an act in furtherance of the conspiracy, regardless whether it was reasonably foreseeable to the defendant.

Key Quote

"Just as we conclude that the Constitution and [18 U.S.C.] § 3237(a) do not explicitly provide for a reasonable foreseeability requirement, we also choose not to imply one." (Slip. op. at 9-10.)

Law Enforcement Not Liable for Search of Penn State Employee's Emails

Walker v. Coffey (September 20, 2018), No. 17-2172

http://www2.ca3.uscourts.gov/opinarch/172172p.pdf

Unanimous decision: Roth (writing), Jordan, and Stearns (District Judge sitting by designation)

Background

Defendants were two law enforcement agents investigating Walker for computer crimes. They sought Walker's emails from her employer, Pennsylvania State University (Penn State), which requested a formal subpoena. Defendants issued a partially blank subpoena, but Penn State nonetheless produced Walker's work emails. After the charges were dropped, Walker sued Defendants for violating her Fourth Amendment rights by searching her emails without a warrant.

Holding

Because Walker's emails were subject to Penn State's common authority over the workplace, Penn State's consent to the search of Walker's work emails was valid and did not infringe her clearly established Fourth Amendment rights.

Key Quote

"There is no dispute that the emails in question were sent or received via Walker's work email address, as part of an email system controlled and operated by Penn State. Thus, for purposes of the Fourth Amendment, the emails were subject to the common authority of Walker's employer." (Slip. op. at 19.)

ISIS-Supporter's Documents Remain Sealed Due to National Security

United States v. Thomas (September 21, 2018), No. 17-2644

http://www2.ca3.uscourts.gov/opinarch/172644p.pdf

Unanimous decision: Greenaway, Jr. (writing), Restrepo, and Bibas

Background

After Defendant pled guilty to charges that she "knowingly attempted to provide material support and resources . . . to a designated foreign terrorist organization," a third party sought to unseal documents docketed in Defendant's case.

Holding

Interests of national security and safety can overcome the First Amendment's right of access to plea documents. The District Court properly denied the motion to unseal Defendant's "Plea Document" on these grounds, but the District Court should re-examine a specific grand jury exhibit to determine whether portions of that document can be redacted and released.

Key Quote

"[W]hile a presumptive right of access under the First Amendment attaches to plea hearings and documents related to plea hearings, the District Court properly concluded that the compelling government interests of national security and safety would be substantially impaired by permitting full access to the plea document here." (Slip. op. at 3.)

Statutory Maximum Bars Reduction in Guidelines

United States v. Rivera-Cruz (September 24, 2018), No. 17-3448

http://www2.ca3.uscourts.gov/opinarch/173448p.pdf

Unanimous decision: Hardiman (writing), Krause, and Bibas

Background

At sentencing, Defendant's entire Sentencing Guidelines range exceeded the statutory maximum sentence for his crimes. The District Court, however, granted a downward departure from that statutory maximum sentence based on Defendant's cooperation with prosecutors. The U.S. Sentencing Commission later reduced the Guidelines offense level for Defendant's offense, and Defendant sought a sentencing reduction under 18 U.S.C. § 3582(c)(2).

Holding

Defendant is ineligible for a reduced sentence. Revised Guidelines may only be used to reduce sentences that were "based on" the Guidelines range. The Third Circuit held that a sentence is not "based on" the Guidelines range when the entire Guidelines range exceeded the statutory maximum, even where the sentencing judge granted a downward departure to impose a sentence below that maximum level.

Key Quote

"Like a range that falls entirely **below** a statutory minimum, a range (such as [Defendant's]) that falls entirely **above** a statutory maximum will typically 'drop[] out of the case.' And once out of the case, it cannot form the basis of the sentence." (Slip. op. at 7 (quotation omitted) (second alteration in original).)

Court Affirms Dismissal of Civil RICO Claim For Lack of a 'Domestic Injury'

Humphrey v. GlaxoSmithKline PLC (September 26, 2018), No. 17-3285

http://www2.ca3.uscourts.gov/opinarch/173285p.pdf

Unanimous decision: McKee (writing), Shwartz, and Nygaard

Background

Plaintiffs provided foreign anti-bribery compliance consulting services to businesses in China, including Defendants. As a result of their investigative work on behalf of Defendants, Plaintiffs were arrested and imprisoned. Plaintiffs sued Defendants under the Racketeer Influenced and Corrupt Organizations Act (RICO) for their loss of goodwill and prospective American customers.

Holding

The Court affirmed the dismissal of Plaintiffs' RICO claims because Plaintiffs did not plead sufficient facts to establish domestic injuries. The Court announced a non-exhaustive list of factors to determine whether a party suffers domestically as a result of foreign racketeering activity. Here, Plaintiffs did not allege domestic injuries because their entire business was located and conducted abroad, provided services abroad pursuant to agreements under foreign law, and was harmed by Defendants' conduct overseas.

Key Quote

"Whether an alleged injury to an intangible interest was suffered domestically . . . requir[es] consideration of multiple factors. These include . . . where the injury itself arose; the location of the plaintiff's residence or principal place of business; where any alleged services were provided; where the plaintiff received or expected to receive the benefits associated with providing such services; where any relevant business agreements were entered into and the laws binding such agreements; and the location of the activities giving rise to the underlying dispute." (Slip. op. at 20-21.)

Court Clarifies Standard to Seek New Trial for Juror Misconduct

United States v. Noel (September 26, 2018), No. 14-2042

http://www2.ca3.uscourts.gov/opinarch/142042p.pdf

Unanimous decision: Krause (writing), Roth, and Fisher

Background

Defendant requested a new trial based on newly discovered evidence of juror misconduct. Specifically, evidence showed that the juror, who testified during *voir dire* that he worked for the U.S. Marshals Service and did not know Defendant or his case, had been transporting prisoners on a day that Defendant was in court. Defendant argued that the juror may have transported him, which would have contradicted the juror's testimony.

Holding

The Court affirmed the denial of Defendant's motion without a hearing because Defendant's evidence: (1) could have been discovered by reasonably diligent counsel, and (2) did not show specific, non-speculative impropriety. Once counsel knows of information that is reasonably possible to prove material to the defense, she must inquire further. Furthermore, while evidence of misconduct need not be incontrovertible, there must be substantial and specific proof of impropriety to merit a hearing.

Key Quote

"[W]e hold that to satisfy the diligence standard, counsel must conduct further inquiry once the circumstances alert her to the existence of additional information that has a reasonable possibility of proving material to the defense." (Slip. op. at 24.)

Non-Precedential Opinions of Note

United States v. Gatson (August 9, 2018), No. 16-3135

http://www2.ca3.uscourts.gov/opinarch/163135np.pdf

The Third Circuit ruled that Defendant had no Fourth Amendment standing to challenge the collection of cell-site records for a phone that Defendant failed to affirmatively claim as his own. Specifically, the Court stated that the Government's attribution of the phone to Defendant was insufficient to establish that Defendant had an "expectation of privacy" in the phone because Defendant must demonstrate this expectation of privacy. (Slip. op. at 3.)

United States v. Hartline, Bekkedam (August 14, 2018), Nos. 16-4217, 17-1289

http://www2.ca3.uscourts.gov/opinarch/164217np.pdf

The Court upheld Defendants' convictions for committing fraud on the Troubled Asset Relief Program (TARP), making false statements, and conspiracy. Evidence that Defendants were aware that loans to their financial institution "could not be properly characterized as capital," but that they falsely told regulators that the institution satisfied capital requirements, was "sufficient to prove that the defendants made the underlying false representations with the specific intent" to defraud the program. (Slip. op. at 6.)

United States v. Pagan (August 27, 2018), No. 17-3064

http://www2.ca3.uscourts.gov/opinarch/173064np.pdf

Defendant cooperated against Appellant in the Appellant's prosecution and subsequently pled guilty. Appellant then made a third-party Motion to Unseal in Defendant's case. Appellant's Motion sought sealed documents for use in his request to revisit his sentence, which was denied while Appellant's Motion was pending. Because Appellant was only seeking the sealed documents as support for his since-denied request, the District Court dismissed the Motion as moot. The Third Circuit held that the Motion was not moot because the Appellant, as a member of the public, had a "right of access to judicial documents" unrelated to his interest in using them in litigation. (Slip. op. at 4.)

United States v. Advantage Medical Transport, Inc., et al. (September 12, 2018), No. 17-3132

http://www2.ca3.uscourts.gov/opinarch/173132np.pdf

The Third Circuit upheld Defendants' convictions for making false statements in a health care matter, concluding that ambulance logs that had been altered to hide the fact that patients were ambulatory were "material" false statements to Medicare. Despite the fact that the alterations did not actually impact Defendants' entitlement to reimbursement, they were material because they were "of the type that would naturally tend to influence Medicare's decisionmaking authority." (Slip. op. at 7.)