

## Notice of Appeal

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

### Precedential Opinions of Note

#### Evidence from Outside Limitations Period Permissible to Prove Ongoing Scheme to Defraud

*United States v. James* (April 3, 2020), No. 19-1250  
<http://www2.ca3.uscourts.gov/opinarch/191250ppan.pdf>  
Unanimous decision: Shwartz (writing), Smith, and McKee

#### Background

Defendant, a former senator in the U.S. Virgin Islands Legislature, was convicted of wire fraud and embezzlement. Defendant's convictions arose from his misuse of Legislature funds designated for senators' official use for personal expenses. At trial, the Government introduced evidence of Defendant's fake invoices from both before and within the five-year statute of limitations period for wire fraud. Defendant appealed, arguing, among other things, that the evidence from before the limitations period was inadmissible.

#### Holding

The Court affirmed Defendant's convictions and upheld the use of the pre-limitations evidence. It reasoned that an essential element of wire fraud is proof of a scheme to defraud, and that evidence from before the five-year limitations period can be relevant to show the existence of an ongoing scheme.

#### Key Quote

"The fact that James's scheme began before October 2010 does not make evidence about his scheme from that period inadmissible, as it is relevant to prove an element of a non-time-barred crime: the existence of a scheme to defraud." (Slip. op. at 8.)

#### Court Upholds Conviction for Witness-Tampering Murder

*United States v. Tyler* (April 14, 2020), Nos. 17-2613, 18-1319  
<http://www2.ca3.uscourts.gov/opinarch/172613p.pdf>  
Majority decision: Shwartz (writing) and Scirica  
Concurrence/Dissent: Rendell

#### Background

A jury convicted Defendant of witness tampering by intimidation and murder. In particular, it found Defendant guilty of witness-tampering offenses requiring an intent to prevent communication with a federal law enforcement officer. Defendant had participated in the killing of an informant the day she was set to testify as a witness in the trial of Defendant's brother. The district court vacated the convictions for insufficient evidence, holding that the evidence at trial showed only that the victim was killed to prevent her from testifying but did not show an intent to prevent her from communicating with law enforcement.



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## Holding

The Third Circuit reversed and reinstated Defendant's convictions. It held that a rational jury could have concluded Defendant had the necessary intent to prevent future law enforcement communications because the victim was known to be an ongoing informant. It also held that the Government only needed to show a "reasonable likelihood" that one of the victim's communications would have been to a *federal* law enforcement officer.

## Key Quote

"Because ... there was sufficient evidence upon which a rational juror could conclude that (a) [Defendant] acted with intent to prevent [victim] from communicating with law enforcement, and (b) there was a 'reasonable likelihood' that she would have communicated with a qualifying law enforcement officer had she not been murdered, we will reverse. ..." (Slip. op. at 4.)

## Concurrence/Dissent

Judge Rendell concurred as to the "reasonable likelihood" standard, but dissented on the issue of Defendant's intent because she concluded that there was "no evidence from which a jury could infer that he was motivated in any way by a desire to prevent Doreen Proctor's future communication with law enforcement." (J. Rendell dissent at 3.)

## Third Circuit Denies Prosecutors' Invocation of Absolute Immunity from Civil Rights Suit

*Fogle v. Sokol* (April 20, 2020), No. 19-1066

<http://www2.ca3.uscourts.gov/opinarch/191066p.pdf>

Unanimous decision: Matey (writing), Krause, and Quiñones Alejandro, District Judge

## Background

Plaintiff was wrongfully imprisoned for a high-profile rape and murder he did not commit. DNA evidence eventually exonerated him, leading to his release. Plaintiff thereafter sued the District Attorney and Assistant District Attorney, respectively, involved in his prosecution, for violation of his civil rights under 42 U.S.C. § 1983. Plaintiff alleged that the Defendants knowingly coached witnesses to fabricate statements implicating Plaintiff during the course of their investigation, including through the use of suggestive hypnosis. Defendants sought to dismiss based on absolute immunity as prosecutors, which the district court denied.

## Holding

The Court affirmed the lower court's denial of absolute immunity. It reaffirmed that absolute immunity from Section 1983 suits applies only to prosecutors' conduct in the course of their traditional function as advocates in the judicial system, and does not reach investigative acts. It emphasized that courts must undertake a careful, fact-intensive analysis in weighing immunity claims, and found that the facts as alleged in Plaintiff's complaint described investigative acts that were not immune from Section 1983 liability.

## Key Quote

"[T]he immunity from civil liability enjoyed by prosecutors hinges on the sanctity of our judicial process, not 'any special esteem.' And so only truly prosecutorial functions, not investigative conduct, justify complete protection from suit. [Plaintiff's] complaint alleges acts by [Defendants] that, taken as true, fall outside the narrow doctrine of absolute immunity and survive a motion to dismiss." (Slip. op. at 4 (internal citation omitted).)

## Third Circuit Sets Limits for Admissibility of 'Overview' Testimony

*United States v. Lacerda, Manzoni, & Resnick* (May 5, 2020), Nos. 15-2812, 15-4023, 16-2220

<http://www2.ca3.uscourts.gov/opinarch/152812p.pdf>

Unanimous decision: Porter (writing), McKee, and Roth

## Background

Defendants operated a long-running scheme to defraud timeshare owners through a service that falsely purported to get owners out from under their timeshare debts. A jury convicted each of them of multiple counts of wire and mail fraud. The lead FBI investigator testified at trial, providing a lengthy overview of his investigation. Defendants challenged both their convictions and sentences on appeal, arguing among other things that the FBI agent's overview testimony was improperly admitted.

## Holding

The Court affirmed the convictions and sentences of all Defendants. It held for the first time that overview testimony is admissible so long as it relates to the description of an investigation with which the witness is personally familiar. It found the FBI agent's testimony to be proper in this case because he only testified as to the investigative steps he took as the lead agent, described evidence he had personally reviewed, and related what he observed.

## Key Quote

"We join our sister circuits and now hold that overview testimony that opines on ultimate issues of guilt, makes assertions of fact outside of the officer's personal knowledge, or delves into aspects of the investigation in which he did not participate is inadmissible. But an officer who is familiar with an investigation or was personally involved may tell the story of that investigation—how the investigation began, who was involved, and what techniques were used. In addition, with proper foundation, he may offer lay opinion testimony and testify about matters within his personal knowledge." (Slip. op. at 9-10.)

## Unanimous Supreme Court Overturns 'Bridgegate' Convictions

*Kelly v. United States* (May 7, 2020), No. 18-1059

[https://www.supremecourt.gov/opinions/19pdf/18-1059\\_e2p3.pdf](https://www.supremecourt.gov/opinions/19pdf/18-1059_e2p3.pdf)

Unanimous decision: Kagan (writing)

## Background

A jury convicted Defendants of federal-program and wire fraud based on their involvement in New Jersey's "Bridgegate" scandal. Defendants arranged for a sham traffic study to shut down the town of Fort Lee's access lanes to the George Washington Bridge, knowing it would result in massive traffic jams, as an act of political retaliation against Fort Lee's mayor. In *United States v. Baroni* (3d Cir. 2018), the Third Circuit affirmed the convictions, holding that the wages and labor of the employees used to implement the study was "property" within the scope of both fraud statutes.

## Holding

The Supreme Court overturned the convictions. It acknowledged that the employees' time and labor were property interests, but held that they did not satisfy the property element of the fraud statutes because they were not the object of the fraud. Rather, they were merely incidental costs of the Defendants' exercise of regulatory power. The Supreme Court's decision is discussed further [here](#).

## Key Quote

"But that property must play more than some bit part in a scheme: It must be an 'object of the fraud.' Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." (Slip. op. at 10 (internal citations omitted).)

## Unlawfully Obtained Evidence Admissible Based on Inevitable Discovery Rule

*United States v. Bradley* (May 15, 2020), No. 19-2003

<http://www2.ca3.uscourts.gov/opinarch/192003p.pdf>

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

## Background

A state trooper stopped Defendant for speeding. During the stop, the trooper learned Defendant was driving with a suspended license. Defendant ultimately confessed to having cocaine in the trunk of his car before he was given *Miranda* warnings. The district court suppressed his pre-*Miranda* confession and also suppressed the cocaine as the fruit of Defendant's unlawfully-obtained statement. The Government appealed, only challenging the suppression of the cocaine.

## Holding

The Third Circuit reversed the suppression of the evidence. It held that law enforcement would have inevitably discovered the cocaine legally, even if Defendant had remained silent, because the trooper testified that he would have impounded the car on account of Defendant's suspended license. It reasoned that the state troopers would have searched the trunk during a routine inventory search when the car was impounded. Consequently, the evidence of the drugs should not have been suppressed even though they were discovered as a result of unlawfully-obtained statements.

## Key Quote

"Given Trooper Johnson's testimony concerning police procedure and the course he would have taken once Bradley's ineligibility to drive had been revealed, and given that the cocaine was inside a backpack that was in plain view when the trunk of the rental car was opened, it seems probable that the police would have discovered the cocaine in an inventory search." (Slip. op. at 14.)

## Prosecutors Not Responsible for Other Government Agencies' Misconduct

*United States v. Reyes-Romero* (May 19, 2020), No. 19-1923

<http://www2.ca3.uscourts.gov/opinarch/191923p.pdf>

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

## Background

Defendant was deported after immigration proceedings that were rife with error. He returned to the U.S. and was prosecuted for unlawful re-entry. During the prosecution, Defendant collaterally attacked his initial removal order. After lengthy litigation, the district court granted Defendant's motion to dismiss and collateral attack. The district judge made many findings about the Government's conduct, including that DHS agents lied to the court and the prosecution was brought in bad faith. Defendant then sought attorney fees and costs under the Hyde Amendment, which the court granted. The Government appealed.

## Holding

The Third Circuit reversed, finding that Defendant had not reached the high bar for showing that the "position of the United States" in the prosecution was vexatious, frivolous, or in bad faith. In particular, it held that the district court was wrong to include DHS's conduct in "the position of the United States" for its Hyde Amendment analysis. Rather, the Hyde Amendment is directed only at prosecutors' conduct in the course of a prosecution.

## Key Quote

"For these reasons, we reaffirm the principles set out in [*United States v.*] *Manzo* [(3d Cir. 2013)] and hold that the 'position of the United States' for purposes of the Hyde Amendment refers only to the position taken by the department and officers charged with administering the prosecution. ..." (Slip. op. at 31-32.)

## Defense Counsel May Stipulate to Jurisdictional Elements Without Client's Consent

*United States v. Wilson, United States v. Moore* (May 22, 2020), Nos. 18-1079, 18-1097  
<http://www2.ca3.uscourts.gov/opinarch/181079p.pdf>  
Unanimous decision: Bibas (writing), Hardiman, and Greenaway, Jr.

### Background

A jury convicted Defendants of multiple offenses stemming from two bank robberies. Defendants' lawyers stipulated at trial that the banks were federally insured, a necessary element to establish federal criminal jurisdiction. Defendants challenged their convictions and sentences on appeal, arguing, among other things, that they did not consent to the stipulations and were therefore deprived of their Sixth Amendment right to counsel.

### Holding

The Court affirmed Defendants' convictions and sentences. It held for the first time that a jurisdictional stipulation is not a fundamental decision that requires a defendant's consent. Consequently, a lawyer's failure to consult with the defendant about jurisdictional stipulations, or even insistence on doing so over the defendant's objection, is not a structural error that automatically violates the defendant's Sixth Amendment rights.

### Key Quote

"We hold that a defendant need not consent to a jurisdictional stipulation. Even if a lawyer stipulates to a crime's jurisdictional element without getting his client's consent or over his client's objection, that stipulation does not per se violate a criminal defendant's Sixth Amendment right to counsel." (Slip. op. at 5.)

## Court Adopts 'Broader' Approach to Enhancements for Prior Child Pornography Convictions

*United States v. Portanova* (May 27, 2020), No. 19-1381  
<http://www2.ca3.uscourts.gov/opinarch/191381p.pdf>  
Unanimous decision: Fuentes (writing), Shwartz, and Scirca

### Background

Defendant pled guilty to receiving child pornography. The district court sentenced him to an enhanced mandatory minimum fifteen-year term of imprisonment because of a prior Pennsylvania conviction for possessing child pornography. Defendant challenged his sentence on appeal, arguing that, under the usual categorical approach, his state offense should not trigger the sentencing enhancement because it includes a broader range of conduct than the federal definition of child pornography.

### Holding

The Court affirmed Defendant's sentence. It held that courts should use a "looser" version of the categorical approach because the sentencing enhancement applies to prior state convictions "relating to" the possession of child pornography. This "relating to" language requires a broader approach and encompasses state offenses with elements that do not exactly match their federal counterparts.

### Key Quote

"Because we conclude that Portanova's prior conviction is among those 'relating to ... the ... possession ... of child pornography,' ... he is subject to the fifteen-year mandatory minimum sentence imposed by the District Court under [18 U.S.C.] § 2252(b)(1), and we will affirm." (Slip. op. at 26 (first three alterations in original).)

## Reasonable Suspicion is Sufficient to Extend Traffic Stop to Unrelated Investigation

*United States v. Garner, United States v. Fruit* (May 29, 2020), Nos. 19-1038, 19-1326  
<http://www2.ca3.uscourts.gov/opinarch/191038p.pdf>  
Unanimous decision: Hardiman (writing), Porter, and Phipps

### Background

A state trooper stopped Defendants for speeding in a rental car. After asking typical questions related to the traffic stop, the trooper asked each Defendant a number of unrelated questions, including their employment and criminal history. The trooper eventually asked to search the car and, when Defendants declined to give him permission, he called for a K-9 unit to do a drug sniff, which led to his discovery of cocaine and heroin in the car. The trooper called for the K-9 unit 56 minutes into the stop. Defendants unsuccessfully sought to suppress the drug evidence, arguing that the trooper had unreasonably extended the stop in violation of their Fourth Amendment rights.

### Holding

The Court upheld the denial of Defendants' suppression motion. It reaffirmed that officers may extend a traffic stop for an unrelated investigation so long as the investigation is supported by reasonable suspicion of criminal activity. Here, the Court found the trooper had reasonable suspicion because the rental agreement had expired, the car was missing typical rental bar code stickers, Defendants were driving in a known drug trafficking corridor, and there were air fresheners on every air vent in the car.

### Key Quote

"We hold Trooper Ramirez had reasonable suspicion to extend the stop based on information he obtained during the first few minutes of the traffic stop and before he engaged in any unrelated investigation. So no unlawful extension of the traffic stop ever occurred." (Slip. op. at 12.)

## Third Circuit Affirms Imposition of Federal Death Penalty For First Time in Nearly a Century

*United States v. Savage* (August 11, 2020), Nos. 14-9003  
<http://www2.ca3.uscourts.gov/opinarch/149003p.pdf>  
Unanimous decision: Smith (writing), Jordan, and Fuentes

### Background

Defendant led a violent drug-trafficking ring in North Philadelphia. Through the use of so-called "enforcers," Defendant directed the intimidation and execution of rivals and government cooperators; he also masterminded the killing of a key witness in his murder case and the firebombing of the home of another cooperating witness, which led to the death of six of the witness's family members. Defendant appealed after the jury returned a guilty verdict on all capital counts, including murder/violence in aid of racketeering pursuant to 18 U.S.C. § 1959 ("VICAR"), and a sentence of death.

### Holding

The Court affirmed Defendant's conviction and death sentence. First, the trial court had instructed the jury that, if Defendant was found with intent to kill one victim, that intent could be transferred to the five other victims slain during the arson to meet the intent requirement of the VICAR murder charges. The Court followed the majority view holding that the doctrine of transferred intent encompasses circumstances where the intended victim and unintended others are killed. Second, the Court also upheld the district court's admission of the firebombing victims' autopsy photographs proffered during the penalty phase. The government offered the photos to show the arson murders were "especially heinous, cruel, or depraved," an aggravating factor under the federal death penalty statute that requires a showing of torture. The Court determined the images

were highly relevant to the mutilation of the victims.

## Key Quotes

“Numerous state and federal cases, decided both before and after VICAR’s 1984 enactment, reveal that the principle of transferred intent is not limited to scenarios in which the intended victim survives and there is only one unintended victim. While we concede that the examples we have considered do not constitute an exhaustive study, they are more than sufficient to allow us to conclude — with confidence — that if there is any error in the District Court’s transferred intent instruction, such error is neither ‘clear’ nor obvious. The District Court’s transferred intent instruction was not plainly erroneous.” (Slip op. at 116.) “Savage’s quasi-Rule 403 challenge fails as well. The autopsy photographs may be horrific, but they have considerable probative value, and the District Court took adequate steps to ameliorate any risk of unfair prejudice.” (Slip op. at 172.)

## District Courts Must Articulate Rule 403 Reasoning on the Record

*United States v. Heinrich* (August 18, 2020), No. 19-3035

<http://www2.ca3.uscourts.gov/opinarch/193035p.pdf>

Unanimous decision: Smith (writing), Chagares, and Porter

## Background

Defendant pleaded guilty to the production of child pornography. Prior to the guilty plea, the district judge’s law clerk held a telephonic status conference informing the attorneys the court would grant the Government’s motion to exclude testimony from Defendant’s proffered expert on criminal intent. The law clerk cited Federal Rules of Evidence 403 and 704(b) as the bases for this decision and stated that a written decision would issue. The district judge was absent from the conference, the call was not recorded, and no opinion or order ever issued.

## Holding

The Court vacated the judgment and remanded for further proceedings. It refrained from conducting its own Rule 403 balancing, or holding that the district court impliedly conducted the requisite 403 balancing, due to the absence of any record regarding the discussion of Rule 403.

## Key Quote

“In this case, the District Judge’s law clerk conducted a one-hour-and-fifteen-minute unrecorded and untranscribed telephone conference where he advised counsel that the Judge intended to exclude the proposed expert report under Rules 403 and 704(b). The law clerk also stated that an ‘opinion to support this ruling’ would be forthcoming. ... Since this conference call did not involve the District Judge, and because no formal ruling, order, or opinion was ever docketed, we are left in the unenviable position — indeed, impossible position — of attempting to review an adjunct presented non-ruling that caused the Defendant to plead guilty rather than proceed to trial.” (Slip op. at 9 (alterations added).)

## Former District Attorney is Shielded by Qualified Immunity, Not Absolute Immunity

*Weimer v. County of Fayette* (August 25, 2020), No. 19-1823

<http://www2.ca3.uscourts.gov/opinarch/191823p.pdf>

Unanimous decision: Fisher (writing), Hardiman, and Rendell

## Background

After wrongfully spending over a decade in prison for murder, Defendant’s convictions were vacated and all charges lodged against her dismissed. This precipitated her lawsuit under 42 U.S.C. § 1983, alleging that the former District Attorney of Fayette County, among others, violated her constitutional rights when continuing to direct police investigative efforts despite evidence that had surfaced undermining the Plaintiff’s role in the murder. The district court determined the role of



the District Attorney in the initial investigation of the murder was sufficiently pled, and she was not entitled to absolute immunity for her investigative conduct. The district court also refused to extend qualified immunity to the former District Attorney.

## Holding

The Court affirmed that absolute immunity did not apply to the pre-charge investigative conduct. However, the district attorney was entitled to qualified immunity with respect to the failure to intervene and malicious prosecution claims. The Court reasoned that, at the time of the investigation into the murder, there was no clearly established law that informed the prosecutor of her duty to intervene to prevent an unconstitutional police investigation. Additionally, the Court also determined no widely recognized law undermined the reliability of bite-mark evidence so a reasonable person in the prosecutor's shoes would have known of the unlawfulness of her direction.

## Key Quote

"It is well established in our Circuit that both police and corrections officers must 'take reasonable steps to protect a victim from another officer's use of excessive force.' But we have not extended this duty to prosecutors who fail to intervene to prevent police from conducting unconstitutional investigations. Accordingly, we cannot say that 'any reasonable [prosecutor]' investigating Haith's murder would have understood that she was violating Weimer's constitutional rights in failing to intervene to prevent improper investigatory conduct by police. Put differently, the facts here are simply too dissimilar from those in the excessive force cases for us to hold that those cases would have put Vernon on notice that her actions were unlawful." (Slip op. at 25 (internal citations omitted).)

## Non-Precedential Opinions of Note

### ***United States v. Reh fuss* (April 22, 2020), No. 19-2166**

<http://www2.ca3.uscourts.gov/opinarch/192166np.pdf>

The Court upheld the district court's application of a vulnerable victim enhancement for sentencing a health care fraud that involved targeting low-income seniors to scare them into getting unnecessary genetic tests. Because Defendant had *conceded* the issue, the Court held that the seniors were vulnerable victims, even though only Medicare suffered financial harm.

### ***United States v. Vetri* (April 23, 2020), No. 18-2372**

<http://www2.ca3.uscourts.gov/opinarch/182372np.pdf>

Officers seized Defendant's cell phone while executing a search warrant. The supporting affidavit described electronic equipment "such as" a number of examples, but did not specifically mention cell phones. The Court found that the warrant authorized the search and seizure of the cell phone because it was included within "electronic equipment," even though it was not expressly listed in the affidavit.

### ***United States v. Conner* (April 29, 2020), No. 19-2267**

<http://www2.ca3.uscourts.gov/opinarch/192267np.pdf>

The Court rejected Defendant's argument to reduce the loss amount attributed to his fraud at sentencing because he was not entitled to credit for payments he made to the victim *after* the fraud was detected.



### ***United States v. Cunningham (April 29, 2020), No. 19-2438***

<http://www2.ca3.uscourts.gov/opinarch/192438np.pdf>

The Third Circuit affirmed the modification of Defendant's conditions of supervised release to impose sex-offense counseling, even though Defendant's offense of conviction was not a sex offense. It held the modified conditions were reasonably related to the sentencing factors in 18 U.S.C. § 3553(a) and the goals of supervised release because Defendant had a prior sex-offense conviction and a psychologist recommended the new conditions.

### ***United States v. Byrd (May 8, 2020), No. 19-2986***

<http://www2.ca3.uscourts.gov/opinarch/192986np.pdf>

Defendant pled guilty to drug offenses arising from a traffic stop in which he was driving a rented car that did not have his name on the rental agreement. The district court initially denied Defendant's motion to suppress applying then-current precedent to conclude he had no reasonable expectation of privacy, which the Third Circuit affirmed. The Supreme Court reversed and remanded for a determination of whether probable cause justified law enforcement's search of the car. After an additional hearing, the district court concluded probable cause did exist and again denied the suppression motion, which the Third Circuit again affirmed.

### ***United States v. Jackson (May 13, 2020), No. 19-1579***

<http://www2.ca3.uscourts.gov/opinarch/191579np.pdf>

The Court vacated Defendant's sentence and remanded for resentencing, holding that the sentencing court's mere statement that it had "considered" the sentencing factors in 18 U.S.C. § 3553(a) was insufficient.

### ***United States v. Fattah (May 14, 2020), No. 19-2739***

<http://www2.ca3.uscourts.gov/opinarch/192739np.pdf>

Defendant was convicted of multiple counts relating to fraud, bribery, and corruption. In his first appeal, *United States v. Fattah* (3d Cir. 2018), the Third Circuit vacated certain convictions and remanded for retrial with proper jury instructions. The Government forewent retrial, proceeded to sentencing on the remaining counts, and the district judge re-imposed the same sentence. The Third Circuit affirmed, holding that the district court gave a reasoned basis for its sentence and was not obligated to explain why it did not reduce Defendant's sentence proportionately to the reduction in his Sentencing Guidelines range.

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