

## Notice of Appeal

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

### Precedential Opinions of Note

#### False Claims Act's First-to-File Bar Permits Amended Complaint Adding New Relator

*In re Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)* (September 1, 2020), No. 18-2472

<http://www2.ca3.uscourts.gov/opinarch/182472p.pdf>

Unanimous decision: Bibas (writing), Jordan, and Nygaard

#### Background

Three individuals formed a partnership. That partnership served as the relator in a *qui tam* suit alleging that pharmaceutical companies submitted false claims for healthcare reimbursement. After the relationship among the individual partners soured, a new partnership was formed, and the individuals forming the new partnership filed an amended complaint using the same name as the relator. The district court dismissed the suit and concluded that, under applicable Delaware partnership law, the partnerships were distinct legal entities, and the new partnership's presence in the suit violated the first-to-file bar under the False Claims Act.

#### Holding

The Third Circuit vacated the dismissal of the *qui tam* suit and remanded the case. First, it held that the first-to-file bar is not jurisdictional, siding with a number of other circuit courts; it reasoned that, unless Congress has clearly stated a rule is jurisdictional, it will not be treated so. Second, the Court held that the False Claims Act, while barring intervention or the filing by non-parties of their own related suits based on the same facts, does not bar the addition of a party to an existing suit by, in this case, amending the complaint.

#### Key Quote

"The False Claims Act's first-to-file bar stops new relators from intervening in other parties' suits or bringing their own separate suits based on the same facts. Yet it does not bar parties from amending a complaint to add, remove, or swap relators." (Slip. op. at 18)

#### Court Affirms Conviction for Immigration Fraud and Perjury

*United States v. Jabateh* (September 8, 2020), No. 18-1981

<http://www2.ca3.uscourts.gov/opinarch/181981p.pdf>

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

#### Background

Defendant, a former commander during the Liberian civil war, sought asylum and permanent residency in the United States under false pretenses — specifically, that he did not engage in genocidal acts. A jury convicted the Defendant of immigration fraud and perjury based on his oral misrepresentations during an immigration application interview.



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## Holding

The Third Circuit affirmed the Defendant's convictions. The Court held that the applicable statute, which prohibits certain uses of false statements in connection with immigration applications, only criminalizes the use of false statements in written documents, not false *oral* statements. However, under the plain-error standard of review, the Court determined such a reading of the statute was not clear at the time of the Defendant's trial and throughout his appeal. Thus, the trial error could not rise to the level of plain error.

## Key Quote

"At bottom, Jabateh's challenge presents a new issue of interpretation, where only a close interpretative inquiry reveals the best reading of [18 U.S.C.] § 1546(a). That, under controlling decisions of Federal Rule [of Criminal Procedure] 52(b), is not a clear, plain error." (Slip. op. at 30-31.)

## Malicious Prosecution Claim Requires Resolution of Case Suggesting Innocence

*Ra-King Allen v. New Jersey State Police* (September 9, 2020), No. 19-3138

<http://www2.ca3.uscourts.gov/opinarch/193138p.pdf>

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

## Background

Police found heroin in the trunk of Plaintiff's car after a traffic stop. Plaintiff pled guilty to distributing narcotics. The Supreme Court of New Jersey reversed and vacated Plaintiff's conviction on the drug charge because the search did not fall into an exception to the Fourth Amendment's general prohibition on warrantless searches. The State of New Jersey moved to dismiss the indictment, which the trial court granted. Plaintiff subsequently alleged malicious prosecution in a civil rights lawsuit pursuant to 42 U.S.C. § 1983. The district court granted summary judgment on the claim, in part, because the Plaintiff's prosecution did not conclude in his favor.

## Holding

The Court affirmed the district court's grant of summary judgment. The Court determined that, to meet the requisite element of a malicious prosecution claim, final disposition of the underlying criminal action must have concluded in a manner suggesting the Plaintiff's innocence. Under a fact-driven analysis, the Court held the suppression of otherwise reliable evidence, on purely technical grounds, which then led to the abandonment of the prosecution, did not meet the requisite standard.

## Key Quote

"Neither the trial court nor the Supreme Court cast any doubt at any point on the reliability of the heroin discovered during the search or its relevance to the charges for which Allen was convicted; the issue was solely whether the search itself was constitutionally permitted. The evidence was thus ultimately suppressed for reasons 'having no or little relation to the evidence's trustworthiness,' and Allen has not shown otherwise." (Slip. op. at 9-10) (internal citations omitted.)

## Court Upholds Limitation on Public Access to Jury Selection During Trial

*United States v. Williams* (September 10, 2020), No. 17-2111

<http://www2.ca3.uscourts.gov/opinarch/172111p.pdf>

Majority decision: Fisher (writing) and Roth

Dissent: Restrepo

## Background

At trial, the district court, *sua sponte*, limited public access during *voir dire*, and specifically permitted only prospective jurors, court personnel, the Defendants, and trial counsel and staff in the courtroom, absent express authorization by the court. No defendant objected at trial to this partial closure of the trial proceedings.

## Holding

The Court affirmed the district court's order limiting the public's access to the jury-selection process. The Court held that such a limitation was structural error, but the limitation did not constitute plain error. After noting that no party or member of the public objected to the partial closure, the Court reasoned the costs of closing part of the trial were mitigated by countervailing forces, which included the public's access to all other phases of trial, the fact that the transcripts of *voir dire* were later made available, and that the costs of a second trial would be excessive.

## Key Quote

"Further, a transcript of the proceedings was produced and later disclosed. And as our Court has said, '[i]t is access to the content of the proceeding — whether in person, or via some form of documentation — that matters.'" (Slip. op. at 28) (internal citations omitted.)

## Dissent

Judge Restrepo dissented on the issue of the public's access to the entire trial because the Defendant's constitutional right to a public trial is fundamental "to protecting [the] right to a jury free of prejudice and ensuring public confidence in the administration of justice." (Judge Restrepo dissent at 5-6.) According to Judge Restrepo, "the specific structural error at issue here fits the special category of errors that must be corrected even without a particularized showing of prejudice." (*Id.* at 7.)

## Third Circuit Finds Plain Error in Factual Mistake at Sentencing

*United States v. Brito* (September 21, 2020), No. 19-3239

<http://www2.ca3.uscourts.gov/opinarch/193239p.pdf>

Unanimous decision: Bibas (writing), McKee, and Fuentes

## Background

Following two terms of incarceration for drug offenses and two removals from the United States, Defendant returned again to the United States illegally. The Defendant pled guilty to illegal reentry. At sentencing, he requested leniency and a sentence below the Sentencing Guidelines range, on the basis that he had not committed any crimes since the birth of his children. The district court refused the variance. At sentencing, the district court also misstated Defendant's criminal history, but defense counsel did not object.

## Holding

The Court vacated and remanded for resentencing. Applying the plain-error standard to the circumstances of the case, the Court held that the failure to state the Defendant's criminal history correctly, including the number of his deportations, undermined his case for leniency. This, in turn, undermined the integrity of the judicial proceedings.

## Key Quote

"A sentence should not rest on factual errors that skew the amount of punishment needed. But that is what happened here. Brito advanced a compelling claim for leniency. Yet the District Court's factual error undermined his argument. That struck at the integrity of his sentence. We will thus vacate and remand for resentencing." (Slip. op. at 11.)

## Sentencing Adjustment for Abuse of a Position of Trust was Plain Error

*United States v. Capps* (October 8, 2020), No. 19-3033

<http://www2.ca3.uscourts.gov/opinarch/193033p.pdf>

Unanimous decision: Jordan (writing), Matey, and Roth

## Background

Defendant pled guilty to conspiracy to commit mail fraud, money laundering, and tax evasion. He had previously worked for The Vanguard Group, and siphoned dormant account funds to co-conspirators, who then kicked some of the proceeds back to the Defendant. At sentencing, the Defendant did not object to the presentence report, and the district court adopted the Guidelines range calculated in the report. Defendant appealed and argued that the district court erred in applying the abuse of a position of trust adjustment.

## Holding

The Third Circuit vacated and remanded for resentencing. The Court emphasized that when a defendant has shown the district court mistakenly applied an incorrect, higher Guidelines range, such error is presumed to be prejudicial and undermines the integrity of the judicial process. The Court then held that the district court plainly erred when applying the abuse of a position of trust adjustment because the applicable Guidelines commentary states the adjustment applies to a money laundering offense only if the abuse concerns the laundering itself. According to the Court, on the record, the abuse of trust stemmed from the mail fraud conduct, which gave rise to the laundering, and the adjustment should not have been applied to the laundering offense.

## Key Quote

“In other words, the abuse of a position of trust has to be manifested in how the money is laundered, not in how the money was gained. According to Capps, the District Court plainly erred because, in applying the adjustment, it relied on his position at Vanguard and his conduct related to the conspiracy to commit mail fraud, not on any position he had or anything he did in laundering the stolen funds. We agree.” (Slip. op. at 7.)

## No Finding of Exceptional or Extraordinary Circumstances Needed Before Granting Early Termination of Supervised Release

*United States v. Melvin* (October 16, 2020), No. 20-1158

<http://www2.ca3.uscourts.gov/opinarch/201158p.pdf>

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

## Background

After pleading guilty and serving a sentence for firearms offenses, the Defendant began a term of supervised release. The Defendant moved for early termination of his supervised release pursuant to 18 U.S.C. § 3583(e). The district court denied the motion, and the Defendant appealed.

## Holding

The Third Circuit reversed and found an abuse of discretion in requiring the Defendant to show that changed or extraordinary circumstances warranted relief. The Court clarified the standard of review applied to a motion for early termination of supervised release does not require a showing of exceptional or extraordinary, or new or unforeseen, circumstances before justifying release.

## Key Quote

“We therefore hold that a district court need not find that an exceptional, extraordinary, new, or unforeseen circumstance warrants early termination of a term of supervised release before granting a motion under 18 U.S.C. § 3583(e)(1). ... [E]xtraordinary circumstances may be sufficient to justify early termination of a term of supervised release, but they are not necessary for such termination.” (Slip. op. at 6-7.)

## **En Banc Court Favors Plain Language of Sentencing Guidelines Over Guidelines Commentary**

*United States v. Nasir* (December 1, 2020), No. 18-2888

<http://www2.ca3.uscourts.gov/opinarch/182888p.pdf>

Majority decision: Jordan (writing), McKee, Ambro, Greenaway, Jr., Krause, Restrepo, Matey, Scirica, Rendell

Concurrence: Matey (writing)

Partial concurrence: Bibas (writing)

Partial concurrence/dissent: Porter (writing), Smith, Chagares, Hardiman, Shwartz, Bibas, and Phipps

### **Background**

A jury convicted Defendant of two drug offenses and a firearms offense. The district court denied his motion to suppress evidence obtained from searches of his storage unit, home, and vehicles, and the court also denied post-trial motions. At sentencing, the district court applied a career-offender enhancement.

### **Holding**

The Court affirmed the convictions on the drug counts; reversed on the firearms count; and reversed the application of the sentencing enhancement. As to the felon-in-possession charge, the Court held that, even under the deferential plain-error standard, the Sixth Amendment required a jury to find the requisite *mens rea* element. As to the career offender enhancement, the Third Circuit held the plain language of the Sentencing Guidelines does not contemplate inchoate drug offenses, and, while the district court had relied on the Guidelines commentary to include an “attempt” crime as a qualifying conviction, the commentary should not have been given such deference.

### **Key Quotes**

“That brings us to the difficult and dividing issue in this case, one that has elicited a variety of responses from other courts of appeals dealing with the aftermath of *Rehaif* [*v. United States*, 139 S. Ct. 2191 (2019)]. The assertion that Nasir knew he was a felon is founded entirely on information that his jury never saw or heard, so the question is whether an appellate court on plain-error review is restricted to the trial record or is instead free to consider evidence that was not presented to the jury. We conclude that, even on plain-error review, basic constitutional principles require us to consider only what the government offered in evidence at the trial, not evidence it now wishes it had offered.” (Slip. op. at 30-31.)

“On that basis, along with the plain text of the guidelines, another of our sister courts of appeals has rejected the notion that commentary to 4B1.2(b) can expand the guidelines’ scope. ... We too agree that separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves. ... [S]itting en banc, we overrule [*United States v. Hightower*, [25 F.3d 182 (3d Cir. 1994)], and accordingly, will vacate Nasir’s sentence and remand for resentencing without his being classified as a career offender.” (Slip. op. at 26) (internal citations omitted).)

### **Concurrence**

Judge Matey concurred that the Court’s discretion afforded under the plain-error doctrine does not “allow for a result contrary to the original understanding of the Sixth Amendment.” (Judge Matey concurrence at 2.)

### **Partial concurrence**

Judge Bibas concurred in part, stating “[i]f the Sentencing Commission’s commentary sweeps more broadly than the plain language of the guideline it interprets, we must not reflexively defer.” (Judge Bibas concurrence at 1.)

### **Partial dissent**

Judge Porter dissented and determined that the court’s ability to review forfeited errors is

constrained more so than the majority believes, and would have held that the plain-error standard did not limit the record of review to that at trial.

## Fingerprint Evidence Alone Cannot Support Conviction

*United States v. Travillion* (December 15, 2020), No. 18-1282

<http://www2.ca3.uscourts.gov/opinarch/181282p.pdf>

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

### Background

A state jury convicted Petitioner of robbery. The state appellate courts denied Petitioner's contention of insufficient evidence, and the Petitioner sought habeas relief in federal district court. The district court dismissed the petition for writ of habeas corpus.

### Holding

The Court remanded with instructions to grant the petition and issue the writ. The Court held that a rational trier of fact could not have found the elements of the crime beyond a reasonable doubt. The Court held that fingerprint evidence alone could not establish Petitioner's guilt.

### Key Quote

"So essentially the only evidence linking Travillion to the crime was the fingerprint evidence on the Manila folder and paper, plus the fact that Travillion's characteristics were, at best, close enough to the witness' description of the robber not to *exclude* him. That is not enough to reasonably conclude that the *Jackson* [*v. Virginia*, 443 U.S. 307 (1979)] test was satisfied here." (Slip. op. at 13.)

## Non-Precedential Opinions of Note

### *United States v. Sears* (November 24, 2020), No. 20-1016

<http://www2.ca3.uscourts.gov/opinarch/201016np.pdf>

The Court rejected the Government's appeal of the district court's suppression of seized evidence. The Court held that the police lacked reasonable suspicion to stop the Defendant because the "officers had reliably observed little more than [Defendant] walking away from them in a high-crime area at night, which does not rise to the level of reasonable suspicion." (Slip op. at 7.)

### *United States v. Gilmore* (December 4, 2020), No. 20-1234

<http://www2.ca3.uscourts.gov/opinarch/201234np.pdf>

The Court affirmed a jury's convictions on federal tax and financial crimes. The Court held that the Defendants' expert could not opine on the lack of willfulness due to a hoarding disorder that hampered Defendant's judgment because "evidence of a lack of volitional control does not constitute a 'legally acceptable theory of a lack of mens rea,' as 'any showing of purposeful activity, regardless of its psychological origins,' will generally satisfy mens rea." (Slip. op. at 5.) The Court also affirmed the jury instructions surrounding willfulness and emphasized that willfulness does not require knowledge of a defendant's criminal conduct for purposes of charging tax crimes.

### *Ajjahnon v. St. Joseph's University Medical Center* (December 28, 2020), No. 20-2386

<http://www2.ca3.uscourts.gov/opinarch/202386nppan.pdf>

The Third Circuit affirmed the dismissal of a pro se relator's action filed pursuant to the False Claims Act because a pro se litigant may not pursue a qui tam action on behalf of the Government.

***United States v. Brooks (December 29, 2020), No. 19-3562***

<http://www2.ca3.uscourts.gov/opinarch/193562np.pdf>

The Third Circuit rejected the Defendant's contention that the allegedly unlawful appointment of the Acting Attorney General for the United States (Matthew Whitaker) rendered invalid her criminal prosecution by a local U.S. Attorney's office.

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