

## Notice of Appeal

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

### Precedential Opinions of Note

#### Court Rejects Assertion of Unconstitutional Trial Delay

*United States v. Chu* (March 18, 2024), No. 23-1375  
<https://www2.ca3.uscourts.gov/opinarch/231375p.pdf>  
Unanimous decision: Chung (writing), Krause, Porter

#### Background

A jury convicted Defendant of health care fraud offenses after a series of delays in her trial date, due to the COVID-19 pandemic and a Superseding Indictment that was filed 11 weeks before trial. During these delays, Defendant unsuccessfully moved to dismiss her indictment on the grounds that she was denied her right to a speedy trial under the Speedy Trial Act and the Sixth Amendment.

#### Holding

The Court affirmed. The Court held that, in part, Defendant's claims of emotional distress insufficiently demonstrated that she had suffered prejudice from the trial delays. Nor did Defendant demonstrate that the Government's purpose in filing the Superseding Indictment was to abuse the grand-jury process and delay trial.

#### Key Quote

"[T]he District Court asked the government to explain the basis of the Superseding Indictment and carefully reviewed the proposed substantive changes, which included an increase in the total amount of false claims submitted and new counts in connection with new claims of fraud and receipt of healthcare kickbacks. We agree with the District Court's conclusion that such changes were consistent with a good faith investigation and that Chu failed to show that the government's 'sole or dominant purpose' was to impermissibly delay her trial." (Slip Op. at 9.)

#### *En Banc* Court Sets New Appellate Review Standard in Shareholder Derivative Actions

*In re: Cognizant Technology Solutions Corporation Derivative Litigation* (May 3, 2024), No. 22-3027  
<https://www2.ca3.uscourts.gov/opinarch/223027p.pdf>  
Unanimous decision: Fuentes (writing), Chagares, Jordan, Hardiman, Krause, Restrepo, Bibas, Porter, Matey, Phipps, Freeman, Montgomery-Reeves, Chung

#### Background

Cognizant employees in India bribed government officials in violation of the Foreign Corrupt Practices Act. After incurring significant investigative costs and an SEC levy to the tune of \$25 million, disgruntled shareholders filed suit alleging, among other claims, breach of fiduciary duty. Prior to filing suit, Plaintiffs failed to make a pre-suit demand. The District Court dismissed the complaint because Plaintiffs had failed to adequately plead why making such a demand would have



Stephen A. Miller

**Co-Chair, White Collar Defense & Investigations**

samiller@cozen.com  
Phone: (215) 665-4736  
Fax: (215) 665-2013



Andrew D. Linz

**Associate**

alinz@cozen.com  
Phone: (215) 665-4638  
Fax: (215) 665-2013



Catherine Yun

**Associate**

cyun@cozen.com  
Phone: (215) 864-8021  
Fax: (215) 665-2013

#### Related Practice Areas

- White Collar Defense & Investigations

been futile, as required by Federal Rule of Civil Procedure 23.1. The Court reviewed the case *en banc* to decide which standard of appellate review should apply after a district court dismisses a shareholder derivative action for the failure to plead demand futility.

## Holding

For the first time, the Court determined that *de novo* review is the appropriate appellate review standard, not the abuse-of-discretion standard it once employed. Under this standard of review, the Court affirmed the District Court's dismissal. The Court held that the Plaintiffs failed to demonstrate that a pre-suit demand would have been useless: they failed to show that the directors of the company faced substantial likelihood of liability on the derivative claims.

## Key Quote

"We agree with that approach, and we see no sound reason to apply a different standard of review to shareholder derivative actions than we would to any other type of case. So we now hold that a district court's decision to dismiss a derivative action for failure to plead demand futility is to be reviewed *de novo*." (Slip Op. at 6-7.)

## Court Vacates Sentence for Failure to Adequately Consider Mitigating Evidence

*United States v. Cora-Alicea* (May 6, 2024), No. 23-1927  
<https://www2.ca3.uscourts.gov/opinarch/231927p.pdf>  
Unanimous decision: Restrepo (writing), Matey, McKee

## Background

Defendant pleaded guilty to drug-related offenses for bagging drugs in a drug-trafficking operation. At sentencing, the district judge reduced Defendant's Sentencing Guidelines range based on his minor role in the operation and acceptance of responsibility. Defendant had argued for a mitigation-based variance based on his depression, cognitive deficits, job prospectives, and traumatic childhood, but the District Court refused to consider these mitigation factors in imposing his sentence.

## Holding

The Court vacated for resentencing. While the District Court had issued a small variance, it had done so based on Defendant's prior lack of criminal history. But the District Court had ignored Defendant's other mitigating factors under 18 U.S.C. 3553(a). The District Court explained that the mitigating evidence was already considered in the downward adjustments under the Guidelines calculation — an error that required reversal.

## Key Quote

"Things went awry in this case during step three. As described above, Mr. Cora-Alicea sought a variance to a below-Guidelines range sentence of time served. But the District Court erroneously concluded that all but one of his grounds for a variance (the unavailability of the two-level reduction for having zero criminal history points) had already been accounted for by the downward adjustments for safety valve eligibility, minor role, and acceptance of responsibility applied in step one's Guidelines calculation. This is incorrect as a matter of law." (Slip Op. at 9.)

## Court Rejects Double Jeopardy Challenge After Mistrial

*United States v. Islam* (May 16, 2024), No. 23-2306  
<https://www2.ca3.uscourts.gov/opinarch/232306p.pdf>  
Unanimous decision: Scirica (writing), Chagares, Porter

## Background

Defendant was charged in a multi-count racketeering conspiracy. His trial involved two distinct

phases before the same jury. Over the first five weeks of the trial, the District Court needed to replace multiple jurors for a variety of reasons, eventually using all of the available alternate jurors. Ultimately, the trial court dismissed one of the 12 remaining jurors after they contracted COVID. Defendant declined to consent to proceed with only 11 jurors pursuant to Federal Rule of Criminal Procedure 23(b)(2), and the District Court found “manifest necessity” to declare a mistrial. Defendant then unsuccessfully sought dismissal of the indictment on double-jeopardy grounds.

## Holding

The Third Circuit affirmed the District Court’s refusal to dismiss the indictment. It concluded that the trial court had carefully considered the circumstances that had resulted in the juror dismissals, and had exhausted the reasonable options at its disposal to avoid a mistrial. Under such circumstances, the Court found no error in the finding that a mistrial was manifestly necessary.

## Key Quote

“In this case, we hold the District Court considered and exhausted all reasonably available alternatives such that its decision to declare a mistrial was manifestly necessary. It therefore did not abuse its discretion when it discharged the jury.” (Slip Op. at 14.)

## Third Circuit Applies Guidelines Commentary to Find Fake Gun a ‘Dangerous Weapon’

*United States v. Chandler* (June 11, 2024), No. 22-1786

<https://www2.ca3.uscourts.gov/opinarch/221786p.pdf>

Majority opinion: Jordan (writing), Krause

Dissent: Bibas

## Background

Defendant pleaded guilty to armed robbery and kidnapping charges after he robbed U.S. Postal employees using a replica firearm. At sentencing, the District Court applied the U.S. Sentencing Guidelines enhancement for using a “dangerous weapon.” Defendant challenged his sentence on appeal, arguing among other things that the trial court erred in applying the enhancement because the replica was not a real handgun and, consequently, not a dangerous weapon.

## Holding

A divided panel of the Court affirmed Defendant’s sentence. The Court applied the framework articulated in *Kisor v. Wilkie* (U.S. 2019), and *United States v. Nasir* (3d Cir. 2021). The majority concluded that the term “dangerous weapon,” as used in the Guideline, was ambiguous, and that the Guideline commentary interpreting that term was a reasonable reading entitled to deference. The commentary included items that “closely resemble” or “create the impression” of a dangerous weapon; the majority applied this definition to hold that trial court did not err in applying the dangerous weapon enhancement to Defendant’s replica firearm.

## Key Quote:

“Criminal defendants have long been on notice that using an imitation of a dangerous weapon to achieve criminal ends is the equivalent in the eyes of the law of using the real thing. The fear instilled in victims is just as real and there remains a real risk of violence.” (Slip Op. at 32.)

## Dissent

Judge Bibas dissented, arguing that the term “dangerous weapon” is unambiguously limited only to real weapons that are actually capable of inflicting harm, and suggesting that the majority opinion “water[s] down the ordinary meaning of ‘dangerous weapon’ by including non-weapons that only seem dangerous.” (Dissent at 1.)

## Third Circuit Holds District Courts Can Remove Unlawful Conditions of

## Supervised Release

*United States v. D'Ambrosio* (June 26, 2024), Nos. 23-1310 & 23-1319

<https://www2.ca3.uscourts.gov/opinarch/231310p.pdf>

Unanimous decision: Restrepo (writing), Chagares, Freeman

## Background

A jury convicted Defendants of charges related to their participation in a sex-trafficking ring. During sentencing, the District Court and parties discussed the possibility that Defendants would be required to register as sex offenders as a condition of supervised release. The District Court declined to resolve whether Defendants' convictions qualified as sex offenses requiring registration; it instead deferred that determination to United States Probation. The Probation Department ultimately required Defendants to register.

The Third Circuit thereafter held in *United States v. Icker* (3d Cir. 2021) that courts must make the determination of whether a conviction constitutes a sex offense as a matter of law. Defendants then challenged their registry conditions in a motion pursuant to 18 U.S.C. § 3583(e)(2). The District Court denied the motion, although it acknowledged that the conditions were unlawful after *Icker*, as they had been imposed after a determination made by Probation rather than the court. Nevertheless, the District Court concluded that it lacked the authority to hear a legal challenge to a condition of supervised release in a § 3583(e)(2) motion.

## Holding

The Court reversed and remanded. It concluded that the District Court had erred, per *Icker*, when it deferred the sex-offense determination to Probation. And it held that District Courts may modify an unlawful supervised release condition in a § 3583(e)(2) motion, so long as the defendant timely raises and exhausts his legal challenges to that condition. It noted, however, that a defendant cannot use such a motion to create a new avenue of review over legal issues that could and should have been raised in earlier proceedings.

## Key Quote

“Assuming a person properly exhausts all challenges to the legality of a condition of supervised release, we hold that a district court may consider legality as grounds for modification in a § 3583(e)(2) motion.” (Slip Op. at 13.)

## Non-Precedential Opinions of Note

### *United States v. Pritchett* (May 13, 2024), No. 23-2005

<https://www2.ca3.uscourts.gov/opinarch/232005np.pdf>

Police officers searched Defendant after he initially fled their pursuit. During the search, they recovered a firearm, cash, and drugs, and Defendant was charged with related offenses. The District Court suppressed all evidence stemming from the search, holding that Defendant's particular movements were not sufficiently furtive. And his flight — refusing to stop walking and entry into a townhouse — were not sufficiently suspicious to support a *Terry* stop. The Court of Appeals affirmed.

### *United States v. Henon* (May 29, 2024), No. 23-1463

<https://www2.ca3.uscourts.gov/opinarch/231463np.pdf>

A jury convicted Defendant, a former Philadelphia City Council member, of charges relating to political corruption, bribery, and honest-services fraud. The Court held that it was not clearly erroneous for the District Court to permit proof of an implicit *quid pro quo* agreement and affirmed the convictions.

## ***United States v. Rowland* (July 1, 2024), No. 23-1821**

<https://www2.ca3.uscourts.gov/opinarch/231821np.pdf>

The Court reversed a denial of a *pro se* Defendant's Federal Rule of Criminal Procedure 41(g) motion to return his personal jewelry seized during a narcotics-trafficking investigation. The Court held the District Court erred in denying Defendant's motion because it was prematurely lodged after his conviction and sentence, but pending his direct appeal and potential collateral proceedings. The Government had conceded that the jewelry was neither contraband nor subject to forfeiture. And the Court held that district courts maintain jurisdiction to consider Rule 41(g) motions regardless of whether a criminal prosecution is pending or perfected.

---