

Notice of Appeal

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

Precedential Opinions of Note

Court Holds 2009 Amendments to 31 U.S.C. § 3729(a)(1)(B) Apply Retroactively

United States ex rel. International Brotherhood of Electrical Workers Local Union No. 98 v. The Fairfield Company (July 13, 2021), No. 20-1922
<http://www2.ca3.uscourts.gov/opinarch/201922p.pdf>
Unanimous decision: Smith (writing), McKee, and Ambro

Background

A construction contractor agreed to improve a railroad track — a project partially funded by the federal government. The contractor misclassified its laborers, although its federal contract required accurate classification under a federal wage law. IBEW Local 98, as Relator, sued under the False Claims Act. It alleged the contractor falsely certified payrolls and submitted those payrolls to the government, in exchange for funding.

Holding

The Court upheld judgment against the contractor. As a matter of first impression, the Court determined that the amended liability standard under § 3729(a)(1)(B) — of “knowingly ... caus[ing] ... a false record or statement material to a false or fraudulent claim” — applied retroactively to the Union’s case. The Court then determined the contractor’s falsely certified payrolls were material to the Government’s payments because the Government anticipated accurate classification and payrolls as conditions of payment.

Key Quote

“Congress’s 2009 amendments to 31 U.S.C. § 3729(a)(1)(B) apply retroactively to cases pending on or after June 7, 2008, no matter when the underlying conduct occurred.” (Slip Op. at 69.)

Sixth Amendment Right to Counsel of Choice Warrants Habeas Relief in Capital Case

Randolph v. Secretary Pennsylvania Department of Corrections (July 20, 2021), No. 20-9003
<http://www2.ca3.uscourts.gov/opinarch/209003p.pdf>
Unanimous decision: Restrepo (writing), Chagares, and Krause

Background

The week before his state-capital trial opened, Defendant hired an attorney to replace his court-appointed one. Three times the trial court denied the new attorney’s requests for modest adjournments. In his final request, counsel had sought a continuance of three hours, to attend a prior engagement. When counsel failed to appear for jury selection, the trial court rejected counsel’s entry of appearance. Thereafter, Defendant proceeded to trial with his court-appointed attorney, and a jury convicted Defendant of first-degree murder. The trial court imposed a death sentence.



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Holding

The Court affirmed the district court's grant of the writ of *habeas corpus*. It reasoned the Pennsylvania Supreme Court's subsequent affirmance of the trial court's rulings applied federal law erroneously. Specifically, the trial court violated Defendant's Sixth Amendment right to counsel of his choice.

Key Quote

"Here, however, the state trial court's ruling prevented Stretton from picking Randolph's jury, a critical stage of the criminal proceeding, and the court was unwilling to be even minimally accommodating to Stretton's reasonable request for a minor delay." (Slip Op. at 22.)

Court Holds Commentary to Sentencing Guidelines Enhancement is Entitled to a Rebuttable Presumption of Deference

United States v. Perez (July 22, 2021), No. 19-1469

<http://www2.ca3.uscourts.gov/opinarch/191469p.pdf>

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

Concurrence: Bibas

Background

Defendant pleaded guilty to federal drug and firearms offenses. At sentencing, the district court applied an enhancement related to the possession of guns in the commission of a felony offense — U.S.S.G. § 2K2.1(b)(6)(B) — based on the Sentencing Commission's Commentary to the enhancement. The enhancement dramatically increased the Sentencing Guidelines range.

Holding

The Court vacated the judgment and sentence. It first held the Sentencing Commission's interpretation of the Guideline enhancement deserved deference because the Guideline itself was ambiguous and the agency's interpretation was reasonable. However, the Commentary created a rebuttable presumption of proof, which, under the circumstances, permitted the Defendant to disprove the application of the enhancement. Because the district court failed to provide Defendant that opportunity, the Court remanded for further proceedings.

Key Quote

"While the Commentary to the Guidelines, on which the District Court relied, deserves deference, we are persuaded that the Court misapplied it in this instance. We believe the Commentary creates a rebuttable presumption, rather than a bright-line rule, that the enhancement should apply when a defendant possesses guns and drugs together." (Slip. Op. at 3.)

Concurrence

Judge Bibas concurred in the judgment, but he disagreed that the Guidelines Commentary at issue warranted deference. Judge Bibas also disagreed with the majority's creation of the rebuttable presumption. (Judge Bibas concurrence at 1-2.)

En Banc Court Holds Sentencing-Package Doctrine Does Not Apply to Vacated Sentences

United States v. Grant (August 16, 2021), No. 16-3820

<http://www2.ca3.uscourts.gov/opinarch/163820pen.pdf>

Majority decision: Smith (writing), Chagares, Jordon, Hardiman, Krause, Bibas, Porter

Concurrence: Hardiman (writing), Jordan, Bibas, Porter

Partial concurrence: Greenaway (writing), Restrepo, Krause (in part)

Partial concurrence/dissent: Ambro (writing), McKee, Restrepo (in part)

Background

A federal jury convicted Defendant of a homicide committed when Defendant was a juvenile. The district court imposed a mandatory sentence of life imprisonment without parole. After re-sentencing under the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), the district court imposed a discretionary term of incarceration that Defendant argued constituted *de facto* life imprisonment.

Holding

The Court affirmed the re-sentencing on the homicide-related counts. First, the Court held the *Miller* Court's prohibition against a sentence of mandatory life-without-parole did not extend to discretionary sentences. Second, the Court rejected Defendant's challenge under the Court's sentencing-package doctrine—a doctrine that requires a trial court reconsider a defendant's sentence *de novo* after *vacatur* of the defendant's conviction. The Court declined to extend the doctrine to Defendant's case, where only his sentence had been vacated.

Key Quote

"The doctrine has been applied in our precedential opinions only to vacated convictions — not vacated sentences. But Grant's convictions have never been disturbed. While one of our sister circuits has applied the judge-made doctrine to a vacated sentence, *see United States v. Catrell*, 774 F.3d 666, 670 (10th Cir. 2014), our precedent does not extend that far." (Slip Op. 23-24.)

Concurrence

Judge Hardiman concurred that the Supreme Court's decision in *Miller* relied on a nebulous test underlying the Supreme Court's Eighth Amendment jurisprudence — "the evolving standards of decency" standard. According to Judge Hardiman, the Supreme Court's jurisprudence has displaced the actual text of the Eighth Amendment. (Hardiman concurrence at 1.)

Partial concurrence

Judge Greenaway concurred in part. While he concurred with the judgment on the homicide-related counts, he determined, under *Miller*, that the proper question is whether a Defendant is corrigible, and, if so, whether a juvenile homicide offender has a meaningful opportunity for release.

Partial concurrence/dissent

Judge Ambro advocated for an extension of the sentencing-package doctrine to vacated sentences.

Defendant's Statements Were Admissible after Limited Invocation of Right to Counsel During Custodial Interrogation

United States v. Rought (August 24, 2021), No. 20-2667

<https://www2.ca3.uscourts.gov/opinarch/202667p.pdf>

Majority decision: Chagares (writing), Porter

Dissent: Roth

Background

A jury convicted Defendant of drug offenses. During a custodial interrogation, Defendant invoked his right to counsel when asked about the death of a friend from the underlying drug crime. The officers continued to ask Defendant questions about other topics. After this inquiry into other subjects, Defendant volunteered information about the death of his friend. The district court denied his motion to suppress the resulting statements.

Holding

The Court affirmed the denial of Defendant's suppression motion. In doing so, the Court held that, once a defendant makes a limited invocation of his right to counsel, custodial interrogation on that

topic must cease. But, if the defendant initiates communication again about that topic — without prompting — authorities may engage in conversation about that subject, and the subsequent statements will be admissible at trial.

Key Quote

“After a limited invocation, interrogation can continue on topics not covered by the invocation. If the suspect, without prompting from law enforcement, then voluntarily reinitiates discussion of a covered topic and waives her previously invoked rights, it ‘is quite consistent with the Fifth Amendment’ for the suspect’s statements about a covered topic to be admissible at trial.” (Slip Op. at 3) (internal citations omitted).

Dissent

Judge Roth dissented, remarking “The Majority has created the perfect playing field for a gotcha game. ... The interrogators not only can continue questioning him about other topics, but they also can try to induce him to talk about the very topic that he has said he does not want to discuss.” (Roth dissent at 1.)

Court Clarifies Proper Standard for Evidentiary Hearing on 28 U.S.C. § 2255 Motion

United States v. Arrington (September 9, 2021), No. 19-2973
<http://www2.ca3.uscourts.gov/opinarch/192973p.pdf>
Unanimous decision: Ambro (writing), Bibas, and Jordan

Background

Defendant moved to vacate his convictions under 28 U.S.C. § 2255, claiming his trial counsel was ineffective for waiving his right to testify without his consent. The district court denied the motion. Defendant appealed, contending his entitlement to, at least, a hearing before denial.

Holding

The Court agreed that the district court relied, in part, on an incorrect standard in denying the motion without a hearing. The Court clarified the proper standard to obtain a hearing on a § 2255 motion: the district court must conduct a hearing unless the motion, and the record, clearly show the prisoner’s claim is meritless. Under this proper standard, the Court determined that Defendant’s case did not warrant a hearing because his proposed testimony did not sufficiently undermine the outcome of his trial.

Key Quote

“[I]f a claim, when taken as true and evaluated in light of the existing record, states a colorable claim for relief under *Strickland* [*v. Washington*, 446 U.S. 668 (1984)], then further factual development in the form of a hearing is required.’ ... This is a ‘reasonably low threshold for *habeas* petitioners to meet.’” (Slip Op. at 7) (internal citations omitted).

Court Held District Court Lacked Authority to Impose SORNA Registration Requirements

United States v. Icker (September 14, 2021), No. 20-2632
<http://www2.ca3.uscourts.gov/opinarch/202632p.pdf>
Unanimous decision: Greenaway (writing), Hardiman, and Bibas

Background

Defendant, a police officer, used his authority to force oral sex on women. Defendant pleaded guilty to charges that do not constitute sex offenses for purposes of the Sex Offender Registration and Notification Act (SORNA). Nonetheless, the district court required Defendant to comply with

SORNA's registration requirements, as a special condition of his supervised release.

Holding

The Court vacated the Defendant's judgment of conviction and sentence. It held that a district court cannot discretionarily order registration under SORNA to a defendant not convicted of a sex offense. Further, the Court determined that Defendant had no notice of any potential SORNA registration — his plea agreement and colloquy were silent on the matter — so Defendant did not waive his right to appeal the SORNA-related condition.

Key Quote

"[B]ecause the record shows he was not given notice of any potential SORNA registration requirements, we will not enforce his appellate waiver as he did not enter into it knowingly and voluntarily. Reaching the merits of Icker's claims, we hold that the District Court plainly erred by mandating that Icker comply with SORNA requirements." (Slip Op. at 3.)

Panel Will Reconsider Its Ruling in Fraud Case Involving Charter School Operator

United States v. Shulick (September 16, 2021), No. 18-3305

<http://www2.ca3.uscourts.gov/opinarch/183305po.pdf>

Decision: Fisher

Background

The owner of a for-profit education company diverted public funding, earmarked for educational purposes, for his own use and for the benefit of co-conspirator, Chaka Fattah, Jr. A jury convicted Defendant of embezzlement under 18 U.S.C. § 666, among other related charges.

Order

In a short Order, the Court granted a petition for panel rehearing, but denied the petition for rehearing *en banc*. The panel will issue an amended opinion and judgment. The amended decision is forthcoming.

Petition

In his petition, Defendant argued the panel incorrectly exercised plain error review on his instructional claim. The trial judge had informed the jury that Defendant could be convicted under § 666, even if the school benefitted from the misuse of funds. But, according to Defendant, the Supreme Court's decision in *Kelly v. United States* invalidated this particular jury standard. Thus, the panel's application of plain error review enabled it to skirt a discussion on the merits of the instructional challenge.

A discussion of the initial panel decision can be found [here](#).

A discussion of the Supreme Court decision can be found [here](#).

Non-Precedential Opinions of Note

United States v. Dunham (July 20, 2021), No. 20-2686

<http://www2.ca3.uscourts.gov/opinarch/202686np.pdf>

The Court affirmed Defendant's fraud-related convictions because he failed to prove the Government exploited a potential conflict of interest involving Defendant's former attorney.

United States v. Brown (August 3, 2021), No. 21-1754

<http://www2.ca3.uscourts.gov/opinarch/211754np.pdf>

The Court affirmed a denial of Defendant's motion for compassionate release, but, in doing so, rejected the Government's argument that an appellate waiver barred Defendant's appeal. The Court held that when Defendant had pleaded guilty, the First Step Act of 2018, permitting a defendant to move for compassionate release on his own, did not exist. Thus, Defendant could not have knowingly waived a right that did not exist when he entered his plea.

United States v. Smith (September 10, 2021), No. 19-2063

<http://www2.ca3.uscourts.gov/opinarch/192063np.pdf>

The Court affirmed the application of the use-of-sophisticated-means sentencing enhancement — pursuant to U.S.S.G. § 2B1.1(b)(10)(C) — in a scheme involving the sale of counterfeit tickets to entertainment and sporting events. However, the Court vacated the judgment of conviction and sentence because the district court failed to adequately explain its application of a two-point role enhancement, under U.S.S.G. § 3B1.1(c), for Defendant's alleged leadership in the scheme.
