

Third Circuit criminal-case precedential opinions

March 24, 2018 to March 18, 2019

CA3blog, by Matthew Stiegler

U.S. v. Ayala — criminal — affirmance — Chagares

Yesterday the Third Circuit affirmed the conviction and 11-year sentence of a Virgin Islands woman who played a supporting role in the gunpoint robbery of a St. Thomas jewelry store. Her defense was that her involvement (securing plane tickets, hotel rooms, and a rental car for the robbers, sitting in the getaway car, and paying the robbers afterward) was the product of duress because she feared for her life and that of her brother at the hands of two violent men who told her to do it.

The court rejected a number of interesting challenges, including that D.V.I. courts lack jurisdiction to hear federal criminal cases and that D.V.I. judges lack authority serve after their 10-year terms have expired. The court rejected the defendant's argument that certain evidence was erroneously excluded under Federal Rule of Evidence 403, but it noted that it was troubled that the district court did not give its reasoning on the record. Finally, the court upheld the district court's decision to shackle her during sentencing based on the marshals' view (the basis for which apparently was not discussed and is anything but obvious to this reader) that there was a security concern.

The court's opinion presents the facts of the crime and the trial without comment, but, for me at least, it's hard to read it without wondering whether justice was done here.

Joining Chagares were Hardiman and Restrepo. Arguing counsel were Joseph Diruzzo III of Florida for the defendant and Kim Chisholm for the government.

This entry was posted in Cases on March 7, 2019.

U.S. v. Reese — criminal — reversal — Ambro

"This is one of the rare cases in which the Speedy Trial Act ... requires that we vacate a conviction and remand for dismissal of the indictment," begins today's first opinion. And "rare" is both true and ironic, because today's other opinion, issued by a different panel, does the same thing.

Here, with less than three weeks left on the defendant's Speedy Trial Act clock, the district court continued the trial sua sponte for another two-and-a-half months. The Third Circuit held that dismissal was required but left it to the district court to decide first whether re-prosecution would be allowed.

In a concurrence that, unusually, lists two judges as co-authors, Judges Ambro and Greenaway criticized five other circuits' rulings that defendants can waive Speedy Trial Act claims by failing to seek dismissal on that basis in district court. The concurrence observed that waiver was not an issue here because the government had not raised it in its brief or in oral argument.

Joining Ambro were Chagares and Greenaway. Arguing counsel were Jacob Schuman of the EDPA federal defender for the defendant and Michelle Olshefski of the MDPA U.S. Attorney's office for the government.

U.S. v. Williams — criminal — reversal — Restrepo

The Third Circuit reversed on Speedy Trial Act grounds here, too, but in this case the panel directed the district court to dismiss with prejudice, precluding re-prosecution. The court joined three circuits in splitting with the Second Circuit and holding that "periods of unreasonable delay of more than ten days in the transport of a defendant to the site of a psychological examination conducted in the course of a proceeding to determine a defendant's mental competency are non-excludable" for Speedy Trial Act purposes.

Joining Restrepo were Chagares (who sat on both panels) and Hardiman. Arguing counsel were Omardare Jupiter of the DVI federal defender for the defendant and Everard Potter of the DVI U.S. Attorney's office for the government.

Close Third Circuit followers will note that today's opinions were posted earlier than normal. The Court's consistent practice is to post the day's precedential opinions on its website around 12:35 (with rare late-afternoon postings, too), a couple hours after counsel receive them through ECF, but I stumbled upon today's opinions around 10:30. I assume this earlier posting was a blip rather than a change in procedure, but we'll see.

This entry was posted in [Cases](#) and tagged [Circuit splits](#), [Concurrences and other non-dissenting separate opinions](#), [Reversals](#) on [March 5, 2019](#).

Piasecki v. Bucks County Court — habeas — reversal — McKee

[Disclosure: as explained below, I assisted Peter Goldberger in representing the petitioner-appellant in this appeal.]

For a federal court to consider a habeas petition, the petitioner must be "in custody" at the time the petition is filed. Past cases have found custody to include parole restrictions, own-recognizance release pending appeal, and community service obligations. Today, the Third Circuit held that the requirements that come with registration under Pennsylvania's Sex Offender Registration and Notification Act satisfy the habeas custody requirement because SORNA restricts registrants' physical liberty in various ways, including banning computer internet access and requiring them to appear frequently at a state police barracks, in person. The court distinguished rulings from other Circuits involving other, less-restrictive sex-offender-registry statutes.

In an interesting footnote, the opinion focused more deeply on the condition banning computer internet access and observed that computer and internet bans are common, "Yet it is not at all clear that the judges imposing such sweeping and unconditional bans appreciate the impact they would have if literally interpreted and enforced," barring things like using an ATM, having a smartphone, navigating by GPS, or simply driving a late-model car. It noted with a lengthy stringcite that "many courts have struck down statutes or vacated sentences that impose broad bans on computer and internet usage."

Joining McKee were Ambro and Restrepo. Arguing counsel were [Stephen Harris](#) of the Bucks County district attorney's office for the Commonwealth and

[me](#) for the petitioner — I had the privilege of arguing in place of Mr. Piasecki's counsel, [Peter Goldberger](#), who wrote the briefs, because he was out of state attending to a compelling family matter.

This entry was posted in [Cases](#) and tagged [Habeas corpus opinions](#), [Reversals](#) on [February 27, 2019](#)

US v. Island — criminal — affirmance — Scirica

A divided Third Circuit panel today answered a question that also has divided the circuits, holding that a criminal defendant's term of supervised release is tolled while the defendant is absent from supervision as a fugitive. The majority reasoned that the relevant statutory text was silent on the matter and joined the Second, Fourth, and Ninth Circuits against the First.

Judge Rendell dissented, arguing that the text did answer the question and that the majority's rule will prove burdensome for courts to apply.

Joining Scirica was Ambro, with Rendell dissenting. Arguing counsel were Keith Donoghue of the EDPA federal defenders for the defendant and Bernadette McKeon of the EDPA USAO for the government.

Workman v. Superintendent — habeas corpus — reversal — Fuentes

In an amended opinion, the Third Circuit today held that a habeas petitioner had shown that his trial counsel provided ineffective assistance of counsel by failing to mount a defense and, while that issue was procedurally defaulted, his post-conviction counsel's ineffectiveness excused the default. [As I've disclosed in prior posts about this case, I did some minor consulting for petitioner's counsel.]

In the court's [original opinion](#) (and again in an [amended one](#) that it also later withdrew) the panel had *presumed* prejudice from trial counsel's errors under *US v. Cronin*, but today the court held that the petitioner had *shown* prejudice under *Strickland v. Washington*. I [wrote](#) that the prior amended opinion was "puzzling" and that "something seems not quite right here," and urged readers to stay tuned, so to

day's ruling isn't surprising and strikes me as substantially sounder than the previous ones. So, all's well that ends well.

Joining Fuentes were Ambro and Restrepo. Arguing counsel were Marshall Dayan of the WDPA FD for the petitioner and Catherine Kiefer of the Philly DA's office for the superintendent.

This entry was posted in [Cases](#) and tagged [Habeas corpus opinions](#), [Reversals](#) on [February 12, 2019](#).

US v. Garner—criminal—affirmance—Ambro

Today, the Third Circuit affirmed a defendant's convictions for bank robbery and related crimes, rejecting his challenge to the sufficiency of the evidence. The court joined other circuits in holding that a defendant cannot be criminally liable for conspiring with a government informant.

Joining Ambro were Shwartz and Fuentes. The case was decided without oral argument.

This entry was posted in [Cases](#) on [February 8, 2019](#).

US v. Chapman—criminal—reversal—Restrepo

In a calmly scolding opinion, the Third Circuit today vacated a criminal sentence and remanded for resentencing by a different district judge because the sentencing judge refused to postpone sentencing despite knowing that the defendant's lawyer had failed to notify the man beforehand of his sentencing hearing, which deprived the man of the chance to offer witnesses and letters seeking sentencing leniency.

When an opinion chooses to quote the district judge's "pique" and "irritation," when it says "it is plain the District Court erred" and it "unfairly" deprived the defendant's rights, when it describes a position the sentencing judge rejected as "manifestly reasonable," when it states that "the District Court improperly compromised the appearance of fairness" and describes this "appearance of unfairness" as "especially stark," and when it orders resentencing by a different judge, I'd say the court is sending a stern message.

I'd guess that the court is aware that the district judge in question has been mentioned ([here](#), for example)

as a potential nominee to fill Judge Vanaskie's seat, and also that a 2017 non-precedential CA3 opinion also was critical of a ruling by same district judge. If those guesses are right, today's opinion is all the more remarkable.

Joining Restrepo was McKee; Vanaskie had been the third judge on the panel prior to his retirement. Arguing counsel were Candace Cain of the WDPA defender for the defendant and George Rocktashel of the MDPA AUSAs for the government.

US v. Daniels—criminal—affirmance—Cowen

The Third Circuit today affirmed a defendant's career-offender sentence, holding that *attempted* drug dealing qualifies as a serious drug offense under the ACCA and that "the scope of attempt and accomplice liability under Pennsylvania law is coextensive with the meaning of those terms under federal law."

Joining Cowen were Krause and Fuentes. The case was decided without oral argument.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Reversals](#) on [February 7, 2019](#).

US v. Goldstein — criminal — affirmance — Roth

The Third Circuit held that the government's warrantless use of cell-site location data violated the Fourth Amendment, reversing its prior ruling on that point in this case (captioned *US v. Stimler*, link [here](#)) in light of the Supreme Court's intervening ruling in *Carpenter*. But the court affirmed the conviction again, this time under the good-faith exception.

Roth was joined by Chagares and Restrepo. Arguing counsel were Aidan O'Connor of Pashman Stein for the defendant and Norman Gross and Glenn Moramarco for the government.

This entry was posted in [Cases](#) on [January 22, 2019](#).

US v. Wright — criminal — affirmance — Shwartz

Today, a fractured Third Circuit panel reversed a district court's order dismissing a criminal indictment with prejudice after two trials and two hung juries.

The lead opinion held that the district court lacked inherent authority to dismiss the indictment absent misconduct or “any prejudice beyond the general anxiety and inconvenience of facing a retrial.”

Judge McKee concurred in the judgment and Judge Nygaard dissented. Although both separate opinions refer to Judge Schwartz’s opinion as a majority opinion, at first blush I read Judge McKee’s rationale as narrower than Judge Schwartz’s so it is unclear to me which opinion will be viewed as binding precedent by future panels.

The case originally was decided yesterday without Judge McKee’s opinion.

Arguing counsel were Donovan Cocas of the WDPA US Attorney’s office for the government and Renee Pietropaolo of the WDPA federal defenders for the defendant.

This entry was posted in [Cases](#) and tagged [Civil opinions](#), [Concurrences](#) and other non-dissenting separate opinions, [Dissents](#), [Reversals](#) on January 18, 2019.

US v. Bey — criminal — reversal — McKee

The Third Circuit today vacated a defendant’s criminal conviction, holding that, while the initial stop was lawful, the continuation of the stop after the officers should have realized that he did not meet the physical description violated the Fourth Amendment.

Joining McKee were Vanaskie and Restrepo. Arguing counsel were Brett Sweitzer of the EDPA federal defender for the defendant and Robert Zauzmer of the EDPA US Attorney’s office for the government.

This entry was posted in [Cases](#) and tagged [Reversals](#) on [December 21, 2018](#).

US v. McCants — criminal — affirmance — Hardiman

The Third Circuit today rejected a criminal defendant’s challenge to legality of a search that resulted from an anonymous 911 call, as well as his challenges to his sentencing as a career offender based on

prior NJ convictions for second-degree robbery as crimes of violence.

Joining Hardiman were Krause and Bibas. Arguing counsel were Leticia Olivera of the NJ FPD for the defendant and Richard Ramsay of the NJ USAO for the government.

[post updated to correctly identify arguing counsel for the government.]

This entry was posted in [Cases](#) on [December 18, 2018](#).

US v. Hester — criminal — partial reversal — Restrepo

The Third Circuit affirmed the denial of a motion to suppress evidence seized during a traffic stop, but reversed the application of a sentencing enhancement for evidence tampering.

On the suppression issue, the court held that the traffic stop was a seizure and that the defendant submitted to authority despite his eventual failed attempt to flee, but that the stop was supported by reasonable suspicion.

On the sentencing issue, it held that application of the enhancement was erroneous for two reasons: (1) factually, the defendant’s actions didn’t amount to tampering (“we cannot agree that ex post expressions of regret about not having committed a potentially criminal act amounts to an attempt to commit that same criminal act” is a cool line), and (2) legally, the enhancement didn’t apply because it required possession of a gun “in connection with” another offense and no connection was present here. The court rejected the government’s argument that remand was pointless because the judge had already departed downward due to uncertainty about the enhancement’s application.

Joining Restrepo were Smith and McKee. Arguing counsel were John Romano for the government and Leticia Olivera of the NJ federal defenders for the defendant

US v. Baroni — criminal — partial reversal — Scirica

The introduction admirably summarizes things:

Defendants William E. Baroni, Jr. and Bridget Anne Kelly engaged in a scheme to impose crippling gridlock on the Borough of Fort Lee, New Jersey, after Fort Lee's mayor refused to endorse the 2013 reelection bid of then-Governor Chris Christie. To this end, under the guise of conducting a "traffic study," Baroni and Kelly, among others, conspired to limit Fort Lee motorists' access to the George Washington Bridge—the world's busiest bridge—over four days in early September 2013: the first week of Fort Lee's school year. This scheme caused vehicles to back up into the Borough, creating intense traffic jams. Extensive media coverage ensued, and the scandal became known as "Bridgegate."

In 2015, a grand jury indicted Baroni and Kelly for their role in the scheme. Each Defendant was charged with seven counts: conspiracy to obtain by fraud, knowingly convert, or intentionally misapply property of an organization receiving federal benefits, 18 U.S.C. § 371, and the substantive offense, *id.* § 666(a)(1)(A); conspiracy to commit wire fraud, *id.* § 1349, and two counts of the substantive offense, *id.* § 1343; and conspiracy against civil rights, *id.* § 241, and the substantive offense, *id.* § 242. A jury convicted Defendants on all counts. They appeal only their judgments of conviction.

For reasons that follow, we will affirm Defendants' judgments of convictions on the wire fraud and Section 666 counts but will reverse and vacate their civil rights convictions.

Criminal liability on the civil rights convictions turned on whether their actions were subject to qualified immunity. The court today held that they *were* protected by qualified immunity, even though their actions had been clearly illegal in the Third Circuit for almost three decades, because there was not a robust consensus on the point among the rest of the circuits. It wrote, "The Supreme Court has suggested that a single binding case from the defendant's jurisdiction is insufficient to give notice that certain conduct could lead to criminal punishment. *See Carroll v. Carman*, 135 S. Ct. 348, 350 (2014)." But *Carroll* assumed for the sake of argument that a *single* prior decision *could* constitute clearly established law, and instead held that the case relied on there did not answer the question. So today's holding appears, at least at first blush, to expand significantly the scope of qualified immunity.

Joining Scirica were Ambro and Siler CA6 by designation. Arguing counsel were Michael Levy of Sidley Austin for one defendant, Jacob Roth of Jones Day for the other, and Bruce Keller for the government.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Reversals](#) on [November 27, 2018](#).

~~[Workman v. Superintendent](#)—[habeas corpus reversal](#)—[Fuentes](#)~~

~~Well, something seems not quite right here, but here goes. Back in September, the Court issued a panel opinion, [link here](#), which I summarized as follows:~~

~~The Third Circuit today ruled in favor of a habeas corpus petitioner, holding that his trial counsel was ineffective for failing almost entirely to mount a defense and that post conviction counsel's ineffectiveness excused default of that issue under *Martinez v. Ryan*. Notably, the court held that the petitioner did not need to prove prejudice from his counsel's error because, under *United States v. Cronie*, prejudice was presumed due to counsel's near total failure to contest the prosecution's case.~~

~~[Disclosure: I provided minor consulting assistance to counsel for the petitioner.]~~

~~Joining Fuentes were Ambro and Restrepo. Arguing counsel were Marshall Dayan of the WDPA defender for the petitioner and Catherine Kiefer of the Philadelphia DA's office for the Commonwealth.~~

~~Then last month the panel granted the Commonwealth's petition for panel rehearing, vacated its original opinion, and promised a new one. The Commonwealth's rehearing petition had argued that applying *Cronie* here was error but (remarkably) that the court could more soundly reach the same result by finding that counsel was ineffective under the usual deficient performance and prejudice *Strickland* test.~~

~~But then today, the panel reissued the opinion with, as best I can tell, no substantive changes. The new opinion corrects a few missing line spaces between paragraphs (while leaving a typo in a heading, "Assistance,") but still applies *Cronie*.~~

~~I'm not sure how to interpret this, to be honest, but stay tuned.~~

~~[UPDATE: my original post linked to the old opinion instead of the new one, sorry to add to the confusion.]~~

[UPDATE2: the panel granted rehearing again.]

This entry was posted in [Cases](#) on [November 15, 2018](#).

US v. McClure-Potts — criminal — affirmance — Greenaway

The Third Circuit today affirmed a criminal conviction for Social Security fraud, rejecting the defendant’s arguments that (1) she should have received a Sentencing Guidelines reduction for frauds committed “other than for profit” despite having received government benefits, (2) certain factual findings by the judge at sentencing were clearly erroneous, and (3) the court erred in calculating the loss amount used to set her Guidelines range.

Joining Greenaway were Ambro and Chagares. Arguing counsel were Fritz Ulrich of the MDPA federal defenders for the defendant and Stephen Cerutti of the MDPA US Attorney’s office for the government.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#) on [November 8, 2018](#)

[** *GAP in case coverage* **]

US. v. Rivera-Cruz — criminal — affirmance — Hardiman

The introduction ably explains:

Reynaldo Rivera-Cruz appeals an order of the United States District Court for the Middle District of Pennsylvania denying his motion for a sentence reduction. The relevant statute (18 U.S.C. § 3582(c)(2)) authorizes sentence reductions for defendants initially “sentenced to a term of imprisonment based on” a United States Sentencing Guidelines (USSG) range that was later lowered by the United States Sentencing Commission. In *Koons v. United States*, 138 S. Ct. 1783 (2018), the Supreme Court held that such relief is unavailable to a defendant whose Guidelines range is “scrapped” in favor of a statutory mandatory minimum sentence. *Id.* at 1787–88. We now hold that the same is

true where, as here, a statutory *maximum* displaces the defendant’s Guidelines range.

In *Koons*, a statute set the available sentence completely outside the Guidelines range, by requiring a *minimum* that was *above* the top of the range. Here, the statute also took the available sentence completely out of the Guidelines range, but by setting a *maximum* that was *below* the bottom of the range. The court reasoned that the “distinction is immaterial” here.

Joining Hardiman were Krause and Bibas. The case was decided without oral argument.

This entry was posted on [September 25, 2018](#).

US v. Thomas — criminal — partial affirmance — Greenaway

A media company intervened in a criminal case involving aid to a foreign terrorist group, seeking to unseal records from the case including a guilty-plea document and materials involving surveillance discovery. The district court denied the request on national security grounds. Today, the Third Circuit affirmed as to the plea document, recognizing a presumptive First Amendment right to access but holding that the presumption was overcome here, and remanded for the district court to reconsider redaction of the rest.

Joining Greenaway were Restrepo and Bibas. The case was decided without oral argument.

Reese v. Warden — criminal — Fuentes — affirmance

The Third Circuit today held that a federal prisoner may not challenge his pretrial detention through a habeas petition under 28 USC § 2241. The ruling was a bit unusual in that the court noted that the issue was novel in the circuit, decided it with a signed precedential opinion, and agreed with two sister-circuit cases from the 80’s, one of them per curiam — but it denied the pro se inmate’s request for counsel, summarily affirmed without full briefing, and ruled that no substantial question was presented.

Joining Fuentes were Chagares and Greenaway. The case was decided without argument.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Reversals](#) on [September 21, 2018](#).

US v. Glass — criminal — affirmance — Vanaskie

The Third Circuit this afternoon granted the government's motion to publish an opinion in a case it previously had decided by non-precedential opinion. Such motions seem to rarely be filed *except* by the government in criminal cases, which I see as unfortunate and a disservice to the court.

Anyhow, the case involved a defendant's challenge to being sentenced as a Sentencing Guidelines career offender. The court rejected his argument that Pennsylvania's PWID statute criminalized offenders and thus didn't qualify as predicate controlled substance offenses.

Joining with Vanaskie were Krause and Restrepo. The case was decided without oral argument.

This entry was posted in [Cases](#) on [September 14, 2018](#).

Workman v. Superintendent — habeas corpus — reversal — Fuentes

Update: on October 30 the panel granted the Commonwealth's petition for panel rehearing and vacated the original opinion, with a new opinion and judgment to come.

~~The Third Circuit today ruled in favor of a habeas corpus petitioner, holding that his trial counsel was ineffective for failing almost entirely to mount a defense and that post conviction counsel's ineffectiveness excused default of that issue under *Martinez v. Ryan*. Notably, the court held that the petitioner did not need to prove prejudice from his counsel's error because, under *United States v. Cronie*, prejudice was presumed due to counsel's near total failure to contest the prosecution's case.~~

~~[Disclosure: I provided minor consulting assistance to counsel for the petitioner.]~~

~~Joining Fuentes were Ambro and Restrepo. Arguing counsel were Marshall Dayan of the WDPA defender for the petitioner and Catherine Kiefer of the Philadelphia DA's office for the Commonwealth.~~

US v. Renteria — criminal — affirmance — Fuentes

The Third Circuit today split with the Second Circuit in holding that venue for a conspiracy conviction does not require proof that it was reasonably foreseeable that conduct in furtherance of the conspiracy would occur in the venue district, affirming a defendant's conviction and sentence.

[Disclosure: I assisted counsel for the defendant by being a judge for her oral argument moot.]

Joining Fuentes were Greenaway and Rendell. Arguing counsel were Susan Lin of Kairys Rudovsky for the defendant and Bernadette McKeon of the EDPA U.S. Attorney's office for the government.

This entry was posted in [Cases](#) and tagged [Circuit splits](#), [Criminal opinions](#), [Habeas corpus opinions](#), [Reversals](#) on [September 11, 2018](#).

US v. Gonzalez — criminal — affirmance — Chagares

After a man killed his son's ex-wife, and then himself, in the lobby of a Delaware courthouse, prosecutors charged the son and his sister with stalking resulting in death and related counts. Both were convicted and sentenced to life in prison. (Their mother also was convicted, but she died while the appeal was pending.) They appealed their convictions and sentences on 13 different grounds, but today the Third Circuit affirmed. The opinion observed that the case was complicated and raised numerous issues of first impression, and effusively praised District Judge McHugh's handling of the case.

Joining Chagares were Scirica and Rendell. Arguing counsel were Tieffa Harper of the Delaware federal defender for the son, Jeremy Ibrahim Sr. for the sister, and Jamie McCall for the government.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Prisoner rights opinions](#), [Watch](#) on [September 7, 2018](#).

Preston v. Superintendent Graterford SCI — habeas corpus — affirmance — Rendell

Damien Preston was tried for third-degree murder, convicted, and sentenced to 20 to 40 years in prison. The Third Circuit today held that, at his trial, his constitutional right to confront the witnesses against him was violated when the prosecution introduced a witness's prior statements to help convict Preston and the witness refused to answer any substantive questions on cross-examination. But, because this is a habeas corpus case, he lost anyway for opaque reasons.

Preston's trial lawyer missed the Confrontation Clause issue, a blunder the opinion describes as "clearly substandard." Then his direct appeal lawyer and his post-conviction lawyer did, too. Preston was able to overcome post-conviction counsel's mistake based on *Martinez v. Ryan*. Significantly for habeas nerds, the court held that *Martinez* requires only trial counsel's deficient performance, not prejudice, and that *Martinez*'s substantiality requirement is the same as COA reasonable debatability. And he even proved that his trial counsel's performance was deficient. But Preston lost in the end because the court held that he failed to show a reasonable probability that, but for counsel's error, the outcome would have changed.

So, in the end, important good news for future defendants and habeas petitioners, but bad news for Mr. Preston.

Joining Rendell were Greenaway and Fuentes. Arguing counsel were Tom Gaeta of the EDPA federal defender (and former CA3 staff attorney) for the petitioner and Max Kaufman of the Philadelphia DA's office for the Commonwealth.

This entry was posted on [September 5, 2018](#).

US v. Clark — criminal — affirmance — Ambro

A police officer stopped a vehicle for traffic violations, questioned the driver, questioned the passenger, pat-down searched the passenger, and, 23 minutes after the stop began, discovered a gun and a

marijuana joint on the passenger. Today, the Third Circuit affirmed the suppression of the fruits of the pat-down search, holding that the officer impermissibly extended the traffic stop beyond its mission by questioning the driver about his criminal history and the passenger about other criminal activity after the driver's authority to drive the vehicle had been confirmed.

Joining Ambro were Jordan and Vanaskie. Arguing counsel were AUSA Norman Gross for the government and Lisa Van Hoeck of the federal defender for the defendant.

UPDATE: A second notable Fourth Amendment development today: in the afternoon, the court posted an [order](#) granting panel rehearing in *US v. Goldstein*, and directing the parties to file supplemental briefs addressing cell-site data and the Supreme Court's subsequent ruling in *Carpenter v. United States*. Goldstein's appeal had been decided last year, my post [here](#); he and two co-defendants were convicted for conspiring to kidnap Orthodox Jewish husbands to aid their wives in obtaining divorces.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#) on [August 30, 2018](#).

Mitchell v. Superintendent — habeas — affirmance — Greenberg

Two defendants were jointly tried for murder. One of the defendants, Eley, won habeas relief in the Third Circuit in 2013 on a claim arising from the admission of certain evidence at the trial. Eley's co-defendant Mitchell raised the same legal issue in exactly the same posture, but his case moved more slowly than Eley's, and the district court denied Mitchell relief, based on a Supreme Court case decided years *before* the Third Circuit decided *Eley*.

Today, the Third Circuit affirmed. The court's view appeared to be that, while Eley had gotten a windfall because his panel had missed controlling law fatal to his claim, Eley's win didn't help poor Mitchell. Eley was [freed](#) five years ago, but Mitchell is serving life.

Joining Greenberg were Chagares and Fuentes. The case was decided without oral argument.

This entry was posted in [Cases](#) and tagged [Habeas corpus opinions](#) on [August 23, 2018](#).

US v. Mayo — criminal — reversal — Jordan

The Third Circuit today vacated a criminal defendant's sentence, holding that a conviction under Pennsylvania's aggravated-assault statute, 18 Pa. Cons. Stat. § 2702(a)(1), does not qualify as a violent felony under the residual clause of ACCA, the Armed Career Criminal Act.

Joining Jordan were Chagares and Fuentes. Arguing counsel were Fritz Ulrich of the MDPA defender for the defendant and Carlo Marchioli of the MDPA US Attorney's office for the government.

This entry was posted on [August 22, 2018](#).

US v. Hird — criminal — partial affirmance — Nygaard

In a six-defendant consolidated criminal appeal arising out of the prosecution of Philadelphia traffic-court judges and others for ticket-fixing, the Third Circuit affirmed on almost all grounds, reversing only as to one defendant's sentence with the government's concurrence. It's a heavily fact-intensive opinion, rejecting challenges to the sufficiency of the indictment's fraud allegations and the sufficiency of perjury evidence, among others.

UPDATE: the court issued an amended opinion on January 18, 2019. The link above now goes to the new opinion; the original opinion is [here](#). Unfortunately, the amended opinion did not indicate what changed or even indicate in the caption that this was an amendment.

Joining Nygaard were Greenaway and Fisher. Arguing counsel were [Lisa Mathewson](#), [Peter Goldberger](#), [Michael Engle](#) of Stradley Ronon, and [Mark Cedrone](#) of Cedrone & Mancano for the defendants and Robert Zauzmer for the government.

This entry was posted on [August 21, 2018](#).

US v. Peppers — criminal sentencing / § 2255 — reversal — Jordan

The Third Circuit today vacated a district court's denial of relief in a successor post-conviction challenge to a criminal defendant's sentencing under the residual clause of the Armed Career Criminal Act. The opinion's introduction ably summarizes:

Ronnie Peppers was sentenced in 2003 to fifteen years of imprisonment for being a felon in possession of a firearm. That was the mandatory minimum under the Armed Career Criminal Act ("the ACCA" or "the Act"), and the District Court imposed it because of Peppers's previous convictions. Peppers now challenges that sentence as unconstitutional in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated a clause of the ACCA – the "residual clause" – as unconstitutionally vague. He argued in District Court in a motion under 28 U.S.C. § 2255 that he was impermissibly sentenced under that invalid clause. But that § 2255 motion was not his first, and § 2255 itself, through subsection (h), places limits on any effort to file a second or successive collateral attack on a criminal judgment. The District Court denied Peppers's second § 2255 motion after determining that his prior convictions remained predicate offenses for ACCA purposes because they are covered by portions of the Act that survived *Johnson*. Because we disagree with the District Court's conclusions, we will vacate its decision and remand the case for further proceedings.

Five holdings lead to our remand. First, the jurisdictional gatekeeping inquiry for second or successive § 2255 motions based on *Johnson* requires only that a defendant prove he might have been sentenced under the now-unconstitutional residual clause of the ACCA, not that he was in fact sentenced under that clause. Second, a guilty plea pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) does not preclude a defendant from collaterally attacking his sentence in a § 2255 motion, if his sentence would be unlawful once he proved that the ACCA no longer applies to him in light of *Johnson*. Third, a defendant seeking a sentence correction in a second or successive § 2255 motion based on *Johnson*, and who has used *Johnson* to satisfy the gatekeeping requirements of § 2255(h), may rely on postsentencing cases (*i.e.*, the current state of the

law) to support his *Johnson* claim. Fourth, Peppers's robbery convictions, both under Pennsylvania's robbery statute, are not categorically violent felonies under the ACCA, and, consequently, it was error to treat them as such. Fifth and finally, Peppers failed to meet his burden of proving his *Johnson* claim with respect to his Pennsylvania burglary conviction. We will therefore vacate the District Court's order and remand for an analysis of whether the error that affected Peppers's sentence, i.e., the error of treating the robbery convictions as predicate offenses under the ACCA, was harmless in light of his other prior convictions.

Joining Jordan were Chagares and Fuentes. Arguing counsel were MDPA AFD Fritz Ulrich for the petitioner and MDPA AUSA Carlo Marchioli for the government.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Habeas corpus opinions](#), [Reversals](#) on [August 13, 2018](#).

US v. Fattah — criminal — partial reversal — Smith

[UPDATE: the court issued an amended opinion replacing this one on January 16, 2019, link [here](#).]

In a 142-page opinion, the Third Circuit today affirmed some, vacated some, and reinstated some of the criminal convictions of former Philadelphia Congressman Chaka Fattah Sr. and three co-defendants. The facts and procedural history of the opinion alone spanned over 40 pages, longer than most published opinions.

Joining Smith were Greenaway and Krause. Arguing counsel were Jonathan Ian Kravis for the government, Bruce Merenstein of Schnader for Fattah, and [Ann Flannery](#) of Philadelphia, [Barry Gross](#) of Drinker Biddle, and [Glen Nager](#) of Jones Day for the three co-defendants.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Major cases](#) on [August 9, 2018](#).

US v. Johnson — criminal — affirmance — Fisher

The Third Circuit rejected a series of challenges to a criminal defendant's conviction and sentence arising from a series of bank robberies. Proceeding after a Supreme Court GVR, the court held that the district court's failure to instruct the jury on an element of the crime was *Alleyne* error but that reversal was not warranted under plain error review. The court also held that a prior federal bank-robbery conviction under 18 USC § 2113(d) was a crime of violence under the § 924(c) federal gun-enhancement statute.

Interestingly, the court firmly rejected the government's argument that the defendant forfeited some of his claims by failing to raise them prior to the Supreme Court's remand.

Joining Fisher were Jordan and Scirica. Arguing counsel were [Ron Krauss](#) for the defendant and [Bob Zauzmer](#) for the government.

This entry was posted in [Cases](#) and tagged [Circuit splits](#), [Civil opinions](#), [Criminal opinions](#) on [August 7, 2018](#).

US v. Green — criminal — affirmance — Chagares

By statute, 28 USC § 2255, federal prisoners are allowed to file a petition challenging their conviction within one year of a Supreme Court decision recognizing a retroactively applicable "newly recognized" right. In 2015, the Supreme Court held in *US v. Johnson* that the so-called residual clause of the Armed Career Criminal Act was unconstitutionally vague, and it later held that this rule applied retroactively. The wording of the residual clause of the ACCA statute is similar to the wording of the residual clause of the career-offender provision of the Sentencing Guidelines. So the prisoner in this case filed a petition within a year of *Johnson* asserting that he was erroneously classified under the Guidelines as a career offender.

Splitting with the Seventh Circuit, the Third Circuit today held that the prisoner's claim did not involve a right that was "newly recognized" under § 2255 because the court interpreted a subsequent Supreme Court ruling, *Beckles v. US*, to foreclose application of *Johnson* to Guidelines residual-clause career-offender challenges. The court also distinguished its ruling last year in *In re: Hoffner*. (And, on a typography note, the paragraph formatting in the opinion is inconsistent.)

Joining Chagares were Greenberg and Fuentes. Arguing counsel were Fritz Ulrich for the prisoner and John Pelletieri for the government.

[Disclosure: I've provided some consulting assistance to counsel for the prisoner.]

This entry was posted in [Cases](#) and tagged [Circuit splits](#), [Criminal opinions](#) on [August 6, 2018](#).

US v. Williams — criminal — affirmance — Roth

Things rarely seen: a panel opinion in which all three judges filed separate concurring opinions. It happened today in case where the Third Circuit rejected a defendant's challenges to the denial of his suppression motion based on withdrawal of consent and his classification as a career offender.

Judge Hardiman concurred in part and concurred in the judgment to argue that the modified categorical approach need not be applied in cases involving RICO predicate offenses. Judge Roth concurred ("I agree with the reasoning and the conclusions of the majority opinion, which I in fact wrote") to argue that, while the modified categorical approach may be required in RICO-predicate cases, it shouldn't be. And Judge Fisher concurred, arguing that the defendant validly withdrew consent to the search but that it was supported by probable cause.

Arguing counsel were Kimberly Brunson for the federal defender and Donovan Cocas for the government.

This entry was posted on [August 1, 2018](#).

US v. Green IV — criminal — affirmance — Fisher

The Third Circuit today rejected a criminal defendant's challenge to a vehicle stop. The officer made the stop for speeding after pacing the vehicle from between a mile and two-tenths of a mile away. After the driver refused to consent to a vehicle search, the officer made the driver wait for 15 minutes for a dog to arrive to sniff the vehicle for drugs. The court rejected challenges to both the initial stop and the prolongation.

The court's analysis of reasonable suspicion turns on statements by the driver that it deems fishy but which strike me as quite unremarkable. For example, the opinion thought a key fact was that, when asked by the officer how he was doing, the driver responded, "I can't complain," instead of immediately explaining to the officer that his daughter recently had broken her leg. On the other hand, the opinion's prolongation section is an admirably lucid discussion of an area of the law that is anything but.

Joining Fisher were Greenaway and Nygaard. Arguing counsel were Kimberly Brunson of the WDPA FPD for the defendant and Michael Ivory for the government.

This entry was posted in [Cases](#) and tagged [Civil opinions](#), [Criminal opinions](#) on [July 25, 2018](#).

Reeves v. Coleman — habeas corpus — reversal — Shwartz

[Disclosure: I represented the petitioner-appellant in this appeal, along with my superb pro bono co-counsel [David Fine](#).]

Under habeas corpus law, petitioners who present new evidence of their actual innocence can have federal review of their procedurally barred or untimely constitutional claims if their innocence showing is strong enough. But what evidence qualifies as "new" evidence of innocence? Is innocence evidence "new" any time it was not presented at trial? What if it was available at trial, but counsel failed to discover or present it due to ineffective assistance of counsel?

Today the Third Circuit held that innocence evidence is new if it is the very evidence upon which the petitioner relies to demonstrate his counsel's ineffective assistance, and that Reeves's evidence meets that test, vacating the district court's denial of relief based on the availability of the evidence at trial. The new-evidence standard announced today is more permissive than the various standards most district courts in the circuit have been applying, and today's ruling is helpful for innocent prisoners fighting to get federal review of their claims.

Judge McKee concurred separately "to emphasize the weight of the evidence that supports Reeves's claim of actual innocence," noting that his showing is so substantial that a group of former federal judges and prosecutors filed an amicus brief on his behalf.

Joining Shwartz were McKee and Cowen, with McKee also concurring. Arguing counsel were yours truly for the petitioner and Ryan Lysaght of the Dauphin County D.A.'s office for the Commonwealth. Audio of the argument is here.

Update: the Court issued an amended opinion on July 23 that made minor, non-substantive edits to the footnotes in the concurrence. The link in the heading now goes to the amended opinion, the original opinion is here.

This entry was posted in Cases and tagged Concurrences and other non-dissenting separate opinions, Habeas corpus opinions, Reversals on July 23, 2018.

Abdul-Salaam v. Secretary — capital habeas — partial reversal — Chagares

The Third Circuit today held that a capital petitioner was entitled to habeas corpus relief due to ineffective assistance of this penalty-phase trial counsel in failing to investigate and present mitigation. It's a significant capital habeas opinion because it involves a depressingly common scenario in capital cases, where counsel presents a sliver of the available mitigation evidence while failing to uncover the rest of what was available. Today's opinion firmly rejected the arguments that counsel's skepticism about whether he'd *present* certain evidence justified his failure to *investigate* it and that counsel's presentation of morsels of evidence rendered all the evidence he missed cumulative.

Although the opinion didn't emphasize the point, this case is another example of a district court denying a certificate of appealability on a claim that the Third Circuit thereafter granted relief on. In other words, the Third Circuit found that the claim was *meritorious* after the district court decided it was so weak that no reasonable jurist could even debate its merit! What a blunder.

Joining Chagares were Greenaway and Shwartz. The case was decided without oral argument.

This entry was posted in Cases on July 12, 2018.

US v. Ramos — criminal — reversal (for government) — Roth

The Third Circuit today vacated a criminal sentence on the government's appeal, holding that Pennsylvania's crime of second-degree assault with a deadly weapon, 18 Pa. CS § 2702(a)(4), is categorically a crime of violence and that the defendant therefore qualified as a career offender under the advisory Sentencing Guidelines (even though he did not under the ACCA).

Joining Roth were Smith and Hardiman. Arguing counsel were Robert Zauzmer for the government and Arianna Freeman for the defendant.

This entry was posted in Cases and tagged Criminal opinions, Reversals on June 15, 2018.

US v. Welshans — criminal — partial reversal — Restrepo

The Third Circuit today affirmed a defendant's child-pornography conviction but reversed his sentence.

As to the conviction, the court rejected the defendant's argument that it violated due process to allow in evidence and argument that the computer files included "deeply abhorrent" videos and images involving very young children. Although the court agreed that the prosecution committed misconduct that was plain, and agreed that the evidence should have been excluded under Rule 403, it denied relief given the prosecution's overwhelming evidence.

As to the sentence, the panel majority held that the sentencing court erred in applying the Sentencing Guidelines enhancement for obstruction of justice because his acts (moving computer files into the recycling bin when he was told police were on their way) were contemporaneous to his arrest and did not materially hinder the investigation. The majority also held that the government waived the material-hinderance point by first raising it at oral argument.

Joining Restrepo were Ambro in full and Fuentes as to the conviction; Fuentes dissented on the sentencing reversal. Arguing counsel were Renee Pietropaolo for the defendant and Laura Schleich Irwin for the government.

This entry was posted in Cases and tagged Criminal opinions, Reversals on June 14, 2018.

US v. Kalb — criminal — affirmance (for defendant) — Scirica

By statute, the government is allowed to file an interlocutory appeal from an order suppressing evidence; “The appeal in all such cases shall be taken within 30 days after the decision, judgment or order has been rendered and shall be diligently prosecuted.” 18 USC § 3731. In this case, the district court ordered suppression and, more than 30 days later, the government filed a motion to reconsider, which the defendant argued was untimely but the district court denied on the merits. Today, the Third Circuit held that § 3731’s deadline is jurisdictional, and that a motion for reconsideration filed *after* the deadline does not support jurisdiction to review the suppression order; the court also affirmed the denial of the consideration motion because it relied on arguments the government could have made earlier. Thus, today’s opinion is a rare bird, an affirmance in a criminal appeal that comes out in favor of the defense.

Joining Scirica were Jordan and Hardiman. Arguing counsel were Robert Zauzmer of the EDPA US Attorney’s office for the government and Brett Sweitzer of the EDPA federal defender’s office for the defendant, both stellar. The argument audio is [here](#).

This entry was posted in [Cases](#) and tagged [Criminal opinions](#) on [May 31, 2018](#).

US v. Foster — criminal — affirmance — Jordan

The Third Circuit today affirmed two criminal convictions, rejecting five different challenges to their convictions and sentences: a Fourth Amendment issue, a 404(b) admissibility claim, a sufficiency-of-the-evidence challenge to evidence of constructive possession of a firearm, and two firearm-use sentencing-enhancement claims.

Joining Jordan were Schwartz and Krause. Arguing counsel were Renee Pietropaolo of the WDPA federal defender for one defendant, Eleni Kousoulis of the DE federal defender for the other, and Elizabeth Van Pelt of the DE US Attorney’s office for the government.

US v. Shaw — criminal — affirmance — Restrepo

Finally, the Third Circuit upheld a former prison guard’s convictions for sexually assaulting an inmate and obstruction of justice. The court rejected challenges to the sexual-assault instructions (splitting with the Tenth Circuit), the sexual-assault sufficiency, two evidentiary challenges, and a speedy-trial claim.

Joining Restrepo were Smith and McKee. Arguing counsel were Robert Pickett of Pickett and Craig for the defendant and Desiree Grace of the NJ US Attorney’s office for the government.

This entry was posted in [Cases](#) and tagged [Circuit splits](#), [Criminal opinions](#), [Immigration opinions](#) on [May 30, 2018](#).

US v. James — criminal — affirmance — Smith

The Third Circuit today upheld a district court’s ruling a Virgin Islands legislator may be tried for fraud and embezzlement, rejecting the defendant’s argument that his alleged conduct (skimming and phony billing in connection with a legislative project, basically) was protected by legislative immunity.

Joining Smith were McKee and Scirica. Arguing counsel were Vijay Shanker of the DOJ Appellate Section for the government and Brandan Hurson of the USVI FD for the defendant.

[Note: my original post incorrectly stated that the court upheld the defendant’s convictions, but this was an interlocutory appeal and he has not been tried yet. My thanks to Howard Bashman for pointing out the error to me.]

This entry was posted in [Cases](#) and tagged [Criminal opinions](#) on [April 23, 2018](#).

United States v. Grant — criminal / sentencing — reversal in part — Greenaway

In 2012, the Supreme Court held in *Miller v. Alabama* that mandatory sentences of life without parole for juvenile offenders violate the Eighth Amendment. Today, in a major juvenile-sentencing decision, the Third Circuit extended *Miller* to hold that a 65-year sentence for homicide crimes committed at age 16 was unconstitutional. From the introduction:

This case presents several difficult challenges for this Court. It calls upon us to decide a novel issue of constitutional law: whether the Eighth Amendment prohibits a term-of-years sentence for the duration of a juvenile homicide offender's life expectancy (*i.e.*, "de facto LWOP") when the defendant's "crimes reflect transient immaturity [and not] . . . irreparable corruption." *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). Next, if we find that it does, then we must decide what framework will properly effectuate the Supreme Court's determination that the Eighth Amendment affords nonincorrigible juvenile offenders a right to a meaningful opportunity for release. Furthermore, we must take great pains throughout our discussion to account for the substantive distinction that the Supreme Court has made between incorrigible and non-incorrigible juvenile offenders in order to ensure that the latter is not subjected to "a punishment that the law cannot impose upon [them]." *Id.* (quoting *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004)).

Our decision today therefore represents an incremental step in the constitutional discourse over the unique protections that the Eighth Amendment affords to juvenile homicide offenders.

The court held, "A term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform," which the court held includes all non-homicide offenders, "is inherently disproportionate and therefore violates the Eighth Amendment under both *Miller* and *Graham*." The court joined the Seventh, Ninth, and Tenth Circuits, and split with the Eighth, on the applicability of *Miller* and *Graham* to de facto life sentences.

Joining Greenaway were Cowen in part and Padova EDPA by designation. Judge Cowen dissented in part, joining the Eighth Amendment holding in full but disagreeing with the majority's denial of sentencing relief as to additional counts based on the sentencing-package doctrine.

Arguing counsel were Lawrence Lustberg of Gibbons for the appellant and Bruce Keller for the government.

This entry was posted in [Cases](#) and tagged [Criminal opinions](#), [Dissents](#), [Immigration opinions](#), [Reversals](#), [Watch](#) on [April 9, 2018](#).

Bennett v. Superintendent — habeas corpus — reversal — Restrepo

The Third Circuit today ruled in favor of a habeas corpus petitioner, holding that erroneous jury instructions deprived him of due process. [Disclosure: I provided consulting assistance on the appeal to petitioner's counsel.]

The court concluded that the faulty instructions could lead the Pennsylvania jury to believe that a defendant who had no specific intent to kill could still be found guilty of murder based on an accomplice's intent. The language from the instructions is quoted at p.34 of today's opinion. The court's review was de novo because the Pennsylvania courts failed to address the claim during state post-conviction proceedings. The court also held that the Commonwealth waived the harmless-error defense by failing to assert it unequivocally in this appeal.

Joining Restrepo were Ambro and Nygaard. Arguing for the petitioner were Drexel law Appellate Litigation Clinic students Ke Gang and Mischa Wheat, supervised by Richard Frankel. The court thanked the clinic its "skillful pro bono advocacy." Arguing for the Commonwealth was former Vanaskie clerk Christopher Lynett of the Philadelphia DA's Office.

This entry was posted on [March 26, 2018](#).