

## Notice of Appeal

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

### Precedential Opinions of Note

#### Defendants Cannot Move for Compassionate Release Based Solely on Post-Sentencing Cooperation

*United States v. Claude* (October 27, 2021), No. 20-3563  
<http://www2.ca3.uscourts.gov/opinarch/203563p.pdf>  
Unanimous decision: Rendell (writing), Jordan, and Porter

#### Background

Defendant sought compassionate release to reduce his sentence based on his alleged cooperation with the Government in the prosecution of another. The district court denied the request and concluded that, because his motion centered on his alleged substantial assistance to the Government, Federal Rule of Criminal Procedure 35 governed the issue. The district court then determined that Rule 35 relief may only be granted after the Government has moved for relief on the Defendant's behalf.

#### Holding

The Court affirmed the decision. It determined the First Step Act — which altered the procedures related to motions for compassionate release — otherwise left Federal Rule of Criminal Procedure 35 undisturbed. And Rule 35 requires a Government motion before a court may reduce a sentence for post-sentencing cooperation.

#### Key Quote

“As Congress chose, in passing the First Step Act, to change the procedure relating to motions for compassionate release but chose not to change the procedure around motions for a reduction in sentence based on substantial assistance, we must give effect to and ‘respect that choice.’ *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009).” (Slip Op. at 9.)

#### Government May Dismiss False Claims Act Cases Over Relator's Objection

*Polansky v. Executive Health Resources, Inc.* (October 28, 2021), No. 19-3810  
<http://www2.ca3.uscourts.gov/opinarch/193810p.pdf>  
Unanimous decision: Krause (writing), Jordan, and Restrepo

#### Background

Relator filed a *qui tam* action alleging that Defendant caused hospitals to bill the federal government for medically unnecessary inpatient services. The Government initially declined to intervene in the case, and Relator pursued the action on his own. After years of litigation, the Government moved to dismiss the action entirely. The district court granted the Government's motion to dismiss over Relator's objection.

#### Holding



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The Court affirmed. First, agreeing with the Sixth and Seventh Circuits, the Court determined the Government must intervene before seeking to dismiss an action, but it can do so at any point in the litigation after showing good cause. Second, the Court determined the Government must meet the standard for dismissal under Federal Rule of Civil Procedure 41(a) when seeking such dismissal, which, under the circumstances, the Government had done.

## Key Quote

“[W]e conclude that the Government is required to intervene before moving to dismiss and that its motion must meet the standard of Federal Rule of Civil Procedure 41(a).” (Slip Op. at 5.)

## En Banc Court Again Holds Commentary to Sentencing Guidelines Enhancement is Not Entitled Deference

*United States v. Nasir* (November 8, 2021), No. 18-2888

<http://www2.ca3.uscourts.gov/opinarch/182888p1.pdf>

Unanimous decision: Jordon (writing), Smith, McKee, Ambro, Chagares, Hardiman, Greenaway, Jr., Shwartz, Krause, Restrepo, Bibas, Porter, Matey, Phipps, Scirica, Rendell  
Concurrence: Bibas

## Background

A jury convicted Defendant of drug and firearms offenses. At sentencing, the district court applied a career-offender enhancement. The Court determined, *en banc*, that the sentencing enhancement was applied in error. It also granted relief pursuant to *Rehaif v. United States*, 139 S. Ct. 2191 (2019), holding that, under plain error review, the Sixth Amendment mandated a jury-finding of the requisite *mens rea*. The Government appealed to the United States Supreme Court, which vacated the judgment related to the *Rehaif* relief.

## Holding

On remand, the Third Circuit reiterated its initial decision regarding the improper application of the sentencing enhancement. Specifically, the Court held that the text of the Sentencing Guidelines does not contemplate inchoate drug offenses. The district court was wrong to rely on the Guidelines commentary to include an “attempt” crime as a qualifying conviction.

## Key Quote

“[A]s the Supreme Court emphasized in *Kisor* [*v. Wilkie*, 139 S. Ct. 2400 (2019)], the interpretation of regulations ultimately ‘remains in the hands of the courts.’ In light of *Kisor*’s limitations on deference to administrative agencies, and after our own careful consideration of the guidelines and accompanying commentary, we conclude that inchoate crimes are not included in the definition of ‘controlled substance offenses.’” (Slip. Op. at 25) (internal citation omitted).

## Concurrence

Judge Bibas, joined by Judges Ambro, Jordon, Greenaway Jr., Krause, and Restrepo, concurred. The concurring opinion noted: “In *Kisor*, the Supreme Court awoke us from our slumber of reflexive deference[;]” if the Sentencing Guidelines commentary “sweeps more broadly” than the text of the Guidelines, courts must not reflexively defer. (Judge Bibas concurrence at 1.)

## Panel (Re)Affirms Conviction of Charter School Operator

*United States v. Shulick* (November 15, 2021), No. 18-3305

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

Unanimous decision: Fisher (writing), Porter, McKee

## Background

The former owner of a for-profit education company diverted public funding, earmarked to operate

a school for at-risk students, for personal use and the benefit of co-conspirator, Chaka Fattah, Jr. A jury convicted Defendant of embezzlement under 18 U.S.C. § 666, among other related charges.

## Holding

After granting Defendant's petition for panel rehearing, the Court upheld, for a second time, the Defendant's conviction. Defendant argued that the district court erred in instructing the jury that an intentional misapplication, for purposes of § 666(a)(1)(A), can be found even if a victim benefitted from the misuse of funds. The Court rejected the argument and reasoned that the Supreme Court's decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020), did not support Defendant's position. Rather, the *Kelly* Court vacated those defendants' convictions because the Government failed to demonstrate that the **object** of that fraud was property; by contrast, here, Defendant committed a tangible taking of property.

## Key Quote

"*Kelly* did not announce a 'benefit' rule — that a § 666(a)(1)(A) violation may never occur unless the defendant converted property for his benefit and to the detriment of the proper recipient of federal funds. Rather, *Kelly* requires only that property be the 'object' of the scheme." (Slip Op. 27.)

## Court Overturns Defendant's False Statements Conviction

*United States v. Johnson* (November 23, 2021), No. 20-1449

<http://www2.ca3.uscourts.gov/opinarch/201449p.pdf>

Unanimous decision: Matey (writing), Smith, Fisher

## Background

Defendant believed Bill Cosby was innocent of allegations of sexual assault. He impersonated an attorney and filed papers with the district court overseeing an alleged victim's civil lawsuit against Cosby. The papers asserted the victim had engaged in tax fraud. After the incident was referred to the FBI, a jury convicted Defendant of making false statements under 18 U.S.C. § 1001.

## Holding

The Court vacated the conviction and held that the Government failed to prove a critical element of the false statements charge — materiality — or, that the falsified document filed materially impacted a decision actually made by the district court in the civil case. Although the district court struck the filing from the docket, that alone could not support a showing of materiality.

## Key Quote

"[O]nly Congress enjoys the authority to turn conduct into a federal crime. And while the Government presented plenty showing that Johnson's statements were false, it offered no evidence and elicited no testimony from the only individual it proposed as the government decisionmaker — the judge in the underlying litigation—to explain how the filing could influence a judicial decision." (Slip Op. at 3.)

## U.S. Maintains Prosecutorial Authority Over Maritime Violations

*United States v. Vastardis* (December 7, 2021), No. 20-2040

<http://www2.ca3.uscourts.gov/opinarch/202040p.pdf>

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

## Background

Defendant served as chief engineer of a foreign tanker. In violation of maritime law, Defendant falsified ship records to avoid the detection of oil spills during voyages. A jury convicted him of falsifying records in violation of the Sarbanes-Oxley Act, making false statements in violation of 18 U.S.C. § 1001, and maritime offenses.

## Holding

The Court affirmed Defendant's convictions. The Court rejected Defendant's argument that the U.S. Coast Guard lacked jurisdiction to investigate the maritime violations. The Court held that maritime law permits the agency to conduct inspections and determine whether a ship has complied with its requirements while the ship is docked at a U.S. port.

## Key Quote

"Here again, Vastardis argues that § 1001 does not apply because the matter being investigated was not within the jurisdiction of the Coast Guard, and that his conduct was only governed by Liberian law. He is wrong. As the Government correctly notes, the actions relied upon for Count 4 were made during the inspection of the *Evriddiki* while Vastardis was in the Delaware Bay port and thus were subject to the Coast Guard's jurisdiction." (Slip Op. at 28.)

## Court Affirms Conviction for Distributing Drugs Resulting in Death

*United States v. Jacobs* (December 16, 2021), No. 20-1200

<http://www2.ca3.uscourts.gov/opinarch/201200p.pdf>

Unanimous decision: Ambro (writing), McKee, and Smith

Concurrence: McKee

## Background

A jury convicted Defendant of distributing drugs that resulted in death. On appeal, Defendant argued the district court erred in instructing the jury on the proper causation standard related to the crime.

## Holding

The Court affirmed the Defendant's judgment of conviction. The applicable offense statute requires only that a sentence be enhanced if the drug offense results in death; it does not define the requisite causation standard. Thus, the Court determined the district court did not err when offering only a but-for causation instruction. The Court reasoned its precedent did not require a proximate-causation standard.

## Key Quote

"Though the statute does not define whether 'results from' means proximate or actual causation, our Court answered this question in *United States v. Robinson*, 167 F.3d 824 (3d Cir. 1999). The plain language of [21 U.S.C.] § 841(b)(1)(C) 'neither requires nor indicates that a district court must find that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event.' *Id.* at 830." (Slip Op. at 13) (internal citation omitted).

## Concurrence

Judge McKee concurred in the judgment. He noted that, under the Court's highly deferential review of the sufficiency of the evidence, the evidence collectively passed muster, but "only by the narrowest of margins." (McKee concurrence at 1.)

## Defendant's Invocation of Sixth Amendment Right to Self-Representation Requires Greater Scrutiny

*United States v. Taylor* (December 21, 2021), No. 20-3158

<http://www2.ca3.uscourts.gov/opinarch/203158p.pdf>

Unanimous decision: Rendell (writing), Ambro, and Jordon

## Background

A grand jury indicted Defendant of drug-related offenses. During pre-trial proceedings, Defendant

requested that he be allowed to represent himself at trial.

## Holding

The district court misdirected its inquiry when assessing whether Defendant knowingly and voluntarily waived his right to counsel. First, the Court noted a district court's obligation to engage in exacting scrutiny as to whether a defendant understands the consequences of proceeding *pro se*. Second, the Court determined that the district court improperly focused its inquiry on whether Defendant understood the law, rather than inquiring into whether Defendant comprehended his waiver.

## Key Quote

"Because of this 'tension between the right to have counsel and the right to represent oneself,' a 'trial court [shoulders] the weighty responsibility of conducting a sufficiently penetrating inquiry to satisfy itself that the defendant's waiver of counsel is knowing and understanding as well as voluntary.'" (Slip Op. at 9.)

## Non-Precedential Opinions of Note

### *United States v. Lough* (November 19, 2021), No. 20-2297

<http://www2.ca3.uscourts.gov/opinarch/202297np.pdf>

The Court affirmed the denial of Defendant's motion to suppress based on alleged outrageous government misconduct. The Court determined that the use of undercover activity to infiltrate a criminal enterprise does not constitute outrageous conduct, and noted the viability of the outrageous-government-conduct defense "is hanging by a thread."

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