

Notice of Appeal

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

Precedential Opinions of Note

Third Circuit Clarifies Standard of Review to Obtain Hearing on Search Warrant

United States v. Desu (January 7, 2022), No. 20-2962
<http://www2.ca3.uscourts.gov/opinarch/202962p.pdf>
Unanimous decision: Porter (writing), Chagares, and Roth

Background

A jury convicted Defendant of tax fraud after he underreported his cash income from two of his pharmacies. Defendant argued on appeal that the affidavit in support of his search warrant was defective because it contained material omissions and misstatements made in reckless disregard for the truth. This, he claimed, misled the magistrate court in executing the warrant.

Holding

The Court affirmed the district court's denial of Defendant's request for review of the search warrant. For the first time, the Court clarified the two-part standard governing review of such a request. First, the Court assesses — for clear error — a district court's decision regarding alleged false statements made in a warrant application. Second, after putting aside any defective statements, the Court reviews *de novo* a district court's review of a magistrate judge's probable cause determination. At the first step of this analysis, the Court held that Defendant had failed to show that any misstatement was sufficiently defective.

Key Quote

"Taken together, our precedent reveals the standard of review we should apply to a district court's denial of a motion for a *Franks* [*v. Delaware*, 438 U.S. 154 (1978)] hearing. We review for clear error a district court's determination regarding whether false statements in a warrant application were made with reckless disregard for the truth. Next, after putting aside any false statements made with reckless disregard for the truth, we review *de novo* a district court's substantial-basis review of a magistrate judge's probable cause determination." (Slip Op. at 15.)

Court Affirms Co-Defendant Did Not Require A Separate Trial

United States v. Allinson (March 4, 2022) No. 19-3806
<http://www2.ca3.uscourts.gov/opinarch/193806p.pdf>
Unanimous decision: Ambro (writing), Krause, and Bibas

Background

A jury convicted Defendant of federal programs bribery and conspiracy after Defendant steered campaign contributions to the former Mayor of Allentown, Pennsylvania, in exchange for favorable municipal contracts. Defendant appealed his conviction, arguing that a trial alongside the former Mayor unduly prejudiced the Defendant. Defendant further claimed that the trial record failed to show a single conspiracy — as the Government had asserted in its indictment— which constituted an improper variance.



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Holding

The Court upheld Defendant's conviction. The Court first determined that the jury had reasonably compartmentalized the evidence against him. Further, the Court held that Defendant's trial **had** suffered from a variance, and specifically, that the Government had failed to prove that several actors had participated in a single conspiracy with a common goal, instead of multiple independent conspiracies. However, the Court ultimately determined that Defendant did not suffer prejudice from the improper variance because the evidence at trial clearly proved his participation in a single conspiracy to commit federal program bribery.

Key Quote

"But '[n]either a disparity in evidence, nor introducing evidence more damaging to one defendant than others[,] entitles seemingly less culpable defendants to severance.' [] Allinson must instead show real prejudice arising from the joint trial either compromising his trial rights or preventing the jury 'from making a reliable judgment about guilt or innocence.' *United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005) (quoting *United States v. Urban*, 404 F.3d 754, 775 (3d Cir. 2005)). He fails to do so." (internal citations omitted) (Slip Op. at 22.)

Court Holds Defendant Was Not Entitled to Cross-Examination a Second Time

United States v. Pawlowski (March 4, 2022) No. 18-3390

<http://www2.ca3.uscourts.gov/opinarch/183390p.pdf>

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

Background

A jury convicted Edwin Pawlowski — former Mayor of Allentown, Pennsylvania and the co-conspirator in *United States v. Allinson* — of federal programs bribery, mail and wire fraud, Travel Act bribery, and related offenses. Defendant appealed his conviction and sentence after his inability to re-cross-examine a cooperating witness.

Holding

The Third Circuit held that the inability to re-cross the Government's witness did not violate Defendant's Sixth Amendment right. Noting that the Sixth Amendment's Confrontation Clause requires an opportunity to cross-examine the prosecution's witness, in the first instance, the Court determined that the ability to re-cross is more constrained. Instead, a defendant is entitled to re-cross-examination only when new material matters arise from redirect examination. The Court held that the Government's redirect did not meet this condition.

Key Quote

"The Sixth Amendment's Confrontation Clause requires that defendants be given the opportunity to confront and crossexamine the prosecution's witnesses. [] But the right to recross-examination is more limited. A defendant is entitled to recross '[w]hen material new matters are brought out on redirect examination.' *United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991)." (Slip op. 21.)

Voice Identification Evidence Found Reliable

United States v. Hall (March 14, 2022), No. 20-2268

<http://www2.ca3.uscourts.gov/opinarch/202268p.pdf>

Unanimous decision: Smith (writing), Jordan, and Restrepo

Background

A jury convicted Defendant of mail fraud and related crimes after he conspired to file false unemployment claims with his wife. On appeal, Defendant contested the admission at trial of voice identification evidence based on recordings of Defendant. In particular, he argued that the district

court improperly admitted voice-identification testimony from his former probation officer because the probation officer had insufficient contacts with the Defendant. The Defendant also claimed that the investigating officer improperly led the probation officer to identify the Defendant. At trial, the probation officer conceded that, at times, he could not definitively identify the Defendant's voice without additional prompting from the investigating officer to listen to the recordings.

Holding

Rejecting the Defendant's argument, the Court reasoned that the testimony was reliable because the probation officer had repeated conversations with the Defendant — over the course of almost two years — by phone and in-person.

Key Quote

“Thus, Leon’s identification of Hall’s voice was reliable enough to satisfy the requirements of due process as applied to identification evidence. Because Leon learned Hall’s voice under controlled circumstances — during his time supervising Hall as his probation officer — his voice identification at trial met the criteria for identification testimony that our sister circuits have described as ‘uniquely reliable.’” (Slip Op. 19.)

Third Circuit Identifies Non-Exhaustive Factors for Assessing Certification of State-Law Question

United States v. Defreitas (March 21, 2022), No. 20-3115
<http://www2.ca3.uscourts.gov/opinarch/203115p.pdf>
Unanimous decision: Smith (writing), McKee, and Restrepo

Background

Defendant sought sexual favors from an immigrant in exchange for not reporting her, despite knowing that the immigrant was unlawfully present in the U.S. Virgin Islands. A jury convicted Defendant of a federal Travel Act violation and soliciting a bribe in contravention of state law.

Holding

The Court identified several non-exhaustive factors courts should consider in determining whether to certify a question to a state court. The Court first noted that it is improper to certify a state-law question only because the outcome may determine a case. But the Court identified several factors, which taken together, may help assess whether certification is appropriate: (1) the state-law question remains open and will materially impact a case; (2) important state law questions, such as state constitutional issues, should be resolved by state courts; (3) certification should promote judicial efficiency; and (4) certification is generally inappropriate after an adverse judgment. Considering these factors, the Court then declined to certify the question of what constitutes an “official act” for purposes of the state’s bribery law.

Key Quote

“[W]e have a question the resolution of which is uncertain. Yet as a federal court, we are institutionally well situated to resolve it and to provide a well-informed interpretation[.] The question does not implicate important issues of state policy nor of federalism interests. And — again — it was requested only after an adverse judgment. We therefore decline to certify this question to the Supreme Court of the Virgin Islands and now consider the merits.” (Slip Op. at 14.)

Non-Precedential Opinions of Note

United States v. Robinson (January 20, 2022), No. 21-1114

<http://www2.ca3.uscourts.gov/opinarch/211114np.pdf>

The Court affirmed the application of a four-level sentencing enhancement under U.S.S.G. §

2C1.1(b)(3) for offenses involving a public official with high-level decision making authority. Defendant, a Newark police officer, paid kickbacks to the executive director of a non-profit overseeing the City of Newark's water services. The Court held that the enhancement was properly applied because the executive director had authority to make decisions regarding the city's water supply.

United States v. Mitra-Hernandez (January 24, 2022), No. 20-1175

<http://www2.ca3.uscourts.gov/opinarch/201175np.pdf>

A defendant's true identity and immigration file is exempt from the rule warranting suppression of evidence after an unreasonable search-and-seizure. However, this information may be suppressed if a defendant can show egregious violations of his Fourth Amendment rights. The Court held that the Defendant in this case failed to show the requisite egregiousness because he was not stopped solely based on his ethnicity.

United States v. Valenta (January 28, 2022), No. 20-1673

<http://www2.ca3.uscourts.gov/opinarch/201673np.pdf>

Defense counsel failed to file a direct appeal after Defendant claimed he requested one before, during, and after his sentencing. Defendant's plea agreement barred any appeal, except under limited circumstances. The Court determined that the district court improperly denied relief without an evidentiary hearing because the allegations, on their face, presented a colorable claim of ineffective assistance of counsel.

United States v. TidalHealth Nanticoke, Inc. (January 28, 2022), No. 21-2123

<http://www2.ca3.uscourts.gov/opinarch/212123np.pdf>

The Court affirmed dismissal of the Relator's False Claims Act suit, premised in part on alleged violations of the Stark Act. The Relator had alleged that certain medical providers sent prescriptions for medical devices to the Relator's competitors. The Relator had alleged that the providers had almost exclusively referred patients to its competitors, but the Court held that this alone failed to plausibly allege participation in a prohibited referral scheme. "[T]here are many lawful reasons for a prescriber to prefer certain" medical suppliers.

United States v. Hughes (January 31, 2022), No. 21-1465

<http://www2.ca3.uscourts.gov/opinarch/211465np.pdf>

The Court held that the district court erred in denying the Defendant's request to continue *pro se* at his criminal sentencing, without a colloquy.

United States v. Johnson (March 23, 2022), No. 21-1322

<http://www2.ca3.uscourts.gov/opinarch/211322np.pdf>

Citing Federal Rule of Evidence 403, the Court affirmed limiting the scope of inquiry into an officer's Internal Affairs Department investigation from more than seven years earlier. The Court determined that the inquiry failed to provide insight into the officer's truthfulness.
