Third Circuit criminal law decisions – January 2022 to August 31, 2023

Summarized and categorized for District of Delaware Bench-Bar, Sept. 21, 2023*
Peter Goldberger, Ardmore, PA

RIGHT TO COUNSEL/ INEFFECTIVE ASSISTANCE OF COUNSEL

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – Filter team protocol during investigation, including *ex parte* proceedings, ensured that long-term wiretap of dft's cell phone did not violate attorney-client privilege; any error would be harmless, as dft-aplt did not identify any evidence used against him that was privileged or derived from privileged material; ct of app reaffirms that govt can successfully invoke crime-fraud exception to overcome atty-client privilege on no more than a *prima facie* showing. Dft did not suffer IAC at trial from USDJ's appt of co-counsel with undisclosed conflict of interest (early stages of criminal investigation of atty); no indication of prejudice, where atty presented aggressive defense

United States v. Noble, 42 F.4th 346 (3d Cir. 2022) – USDJ did not violate dft's right to self-rep, after being been found mentally competent, by revoking *pro se* status on finding dft forfeited right as obstructionist by refusing for ten months to answer ct's questions, returning all legal mail, and remaining silent in court. USDJ did not abuse discretion by denying FPD motion to withdraw and dft's motion to substitute new counsel.

United States v. Haisten, 50 F.4th 368 (3d Cir. 2022) (2-1 decision) – Dfts entitled to hearing on allegation of IAC under 28 USC §2255 where govt concedes venue not proved at trial on two counts; motion makes "colorable" claim of both deficient performance and prejudice, even though USSG range would have been the same and venue dismissal might have risked second trial in another district.

United States v. Langley, 52 F.4th 564 (3d Cir. 2022) – Dft pleaded to one count w/appeal waiver so long as sentence was five years or less, despite guidelines of 110+. DJ imposed 5 yr mand min. Appointed appellate counsel did not fail to fulfill obligations in moving to withdraw from frivolous appeal (LAR 109.2) by failing to anticipate all arguments advanced in appellant's *pro se* brief nor in filing supplemental *Anders* brief to explain why client's arguments were frivolous. Appellate record sufficiently showed that counsel had diligently searched for and addressed potential issues; court found no others. Frivolous appeal brought in defiance of appeal waiver will be dismissed, not affirmed.

United States v. Banks, 55 F.4th 246 (3d Cir. 2022) – Dft was not denied Sixth Amendment right to self-representation where court found from expert testimony that, while competent to stand trial, he was not psychiatrically able to separate fact from delusions so as to understand risks of waiving counsel.

CONFESSIONS, SEARCH & SEIZURE, GRAND JURY, PRETRIAL BOND / DETENTION

United States v. Desu, 23 F.4th 224 (3d Cir. 2022) – Detailed discussion of procedural aspects of *Franks* motion (false statement or material omission in warrant application), and standards of appellate review. Ct of App analyzes and rejects challenges to 18 claimed misstatements; denial of *Franks* hearing aff'd.

United States v. Hall, 28 F.4th 445 (3d Cir. 2022) – Denial of well-supported pretrial motion to suppress voice identifications as the product of unduly suggestive procedures, in violation of Fifth Amend due process, is affirmed. Identification by a person who knows the suspect well, rather than by the crime victim, is admissible if sufficiently reliable. Jury can assess the identification as an opinion under FRE 901(b)(5). Court bound by *Miller* (1976) "third party doctrine" to reject claimed privacy interest in dft's

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* Characterization of holdings and comments thereon are those of the compiler alone.

bank records obtained from bank by subpoena, reasoning of *Carpenter* (2018) may have undermined, but did not overrule, *Miller*.

United States v. Hurtt, 31 F.4th 152 (3d Cir. 2022) – On appeal from conditional guilty plea (FRCrP 11(a)(2)) to felon in poss of firearm (18 USC §§922(g),924(a)), denial of suppression of firearm reversed. Phila Police unreasonably extended traffic stop (for running stop sign and possible DUI) when officer conducting DUI investigation of driver interrupted process to assist partner who had chosen to half-enter car to question passengers (an off-mission "search" that lacked independent justification), which led to seizure of firearm from dft.

United States v. Cannon, 36 F.4th 496 (3d Cir. 2022) (per curiam) – Use of medical marijuana violates standard condition of federal pretrial bond, notwithstanding physician's certification under Pa Medical Marijuana Act. USDJ has discretion whether to order revocation for violation. No error in revocation where dft moved to modify condition and was denied, and defied repeated warnings to refrain.

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – (1) Order under Stored Communications Act (18 USC §2703) for prospective (real time) Cell Site Location Information (CSLI), falling short of warrant, could not be suppressed, even if it violated 4th Amend, based on good faith exception; distinguishable from historical CSLI under *Carpenter*; no prior precedent required 4Am warrant. (2) Filter team protocol during investigation, including *ex parte* proceedings, ensured that long-term wiretap of dft's cell phone did not violate attorney-client privilege or any constitutional rights, and complied with Wiretap Act ("title III"); any error would be harmless, as dft-aplt did not identify any evidence used against him that was privileged or derived from privileged material; ct of app reaffirms that govt can successfully invoke crime-fraud exception to overcome atty-client privilege on no more than a *prima facie* showing.

United States v. Dyer, 54 F.4th 155 (3d Cir. 2022) – On appeal from conditional plea (FRCrP 11(a)(2)) to felon in poss of firearm (dropping consp to distrib "bath salts" (pentylone/cathinone)), Court holds that even if dist ct erred in applying "plain view" to deny suppression of contents of box seized from dft's son's bedroom, error was harmless, in this procedural posture, where evidence in box did not materially contribute to govt's case against dft and thus could not reasonably have affected a dft's decision to plead.

United States v. Alexander, 54 F.4th 162 (3d Cir. 2022) – Court need not decided legality of "hit and hold" entries into dft's residence and stash house that preceded warrant applications, where govt established applicability of "independent source" (valid warrant later issued and executed based on pre-existing probable cause) and "inevitable discovery" (warrant application was already drafted and clearly showed p/c, when circumstances supposedly dictated premature entries) exceptions to suppression rule.

United States v. Fallon, 61 F.4th 95 (3d Cir. 2023) – Warrant seeking business records relating to any of several alleged fraud schemes was not unconstitutionally general, and in any event good faith exception to suppression rule would apply.

United States v Carey, 72 F.4th 521 (3d Cir. 2023) – Testimony about standard politic procedures supported inventory search justification for vehicle search following crash of rental car and arrest on highway. Girlfriend's voluntary statements during post-crash "knock and talk" provided probable cause for warrant to search their joint residence and sufficient reason to secure the premises while awaiting delivery of the warrant.

United States v. Stanford, 75 F.4th 309 (3d Cir. 2023) – Denial of suppression of fruits of search under warrant affirmed under "good faith" exception where dft failed to make required showing of "knowing or reckless" (or material) falsehoods in affidavit so as to require *Franks* hearing.

United States v. Kramer, 75 F.4th 339 (3d Cir. 2023) – On review of denial of suppression motion, where USDC made no express findings of fact, appellate court will take conflicting facts in light most favorable to govt, even though USDJ said he was "assuming" facts favorable to dft. In this light, wife's discovery of sexually explicit photos on dft's phone, emailing them to herself and later to police, was private search not implicating Fourth Amend.

United States v. Montalvo-Flores, — F.4th —, 2023 WL 5521062 (8/28/23) – Facts elicited on cross-examination of govt witnesses at suppression hearing established unlicensed, unauthorized driver of girlfriend's rental car exercised "dominion and control" by possessing keys and driving with her permission. USDC finding to the contrary was clearly erroneous, so denial of suppression (and conviction) reversed. 2-1 decision.

PROSECUTORIAL & JUDICAL CONDUCT, *BRADY*, ETHICS

United States v. Zayas, 31 F.4th 211 (3d Cir. 2022) – No *Brady* error, because no prejudice, from belated disclosure on second day of 4-day trial of two reports of dft's own post-arrest statements claiming drugs he distributed were packaged differently from drugs believed to have caused fatal overdose.

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – No abuse of discretion in USDJ's refusal, after examining purported *Brady* material in an unrelated case file and finding none, to allow dft to file additional, possibly untimely new trial motion prior to sentencing. Dft not entitled to remand during appeal to explore possible *Giglio* violation involving indictment of cooperating witness in unrelated case while dft's appeal was pending, where any new trial motion would be untimely more than 3 yrs after verdict (FRCrP 33(b)(1)), and in any event potential impeachment was not "material" in after-discovered *Brady* sense of having potential to change verdict.

United States v. Fallon, 61 F.th 95 (3d Cir. 2023) – (1) Dfts fail to articulate how they were prejudiced by delayed disclosure of favorable evidence, defeating *Brady* reversal; (2) Record does not support defense argument on agent misrepresentations to USMJ to obtain warrant; claim of same agent's perjury before grand jury is not basis to argue for dismissal; (3) Curative instruction, underscored in response to jury question, was sufficient after pros referred in rebuttal to document not in evidence.

United States v. Titus, — F.4th —, 2023 WL 5356241(8/22/23) – Striking prosecutor's comment and giving cautionary instruction was sufficient remedy for argument that could be taken as comment on dft's silence; jury is presumed to follow instruction to disregard. Disclosure of failed undercover investigation on even of trial was not too late to comply with *Brady* where dft made effective use of information during trial.

GUILTY PLEAS, PLEA BARGAINING

United States v. Agarwal, 24 F.4th 886 (3d Cir. 2022) – Without having moved to withdraw plea, dft argued on appeal that plea was unknowing after sentencing ct found "loss" from Computer Fraud & Abuse Act (CFAA, 18 USC §1030) was over $3 million (6x dft's contention). Plea agmt left loss amt open for argument. Having made no claim in USDCt that he was misled into pleading, no part of plain error standard for reversal is satisfied.

United States v. Yung, 37 F.4th 70 (3d Cir. 2022) – Dft not entitled to remand to withdraw plea where Ct of Appeals, on appeal from conditional guilty plea to challenge overbreadth of statute, announces a novel limiting construction of the statute not explained to dft at time of plea. Plea is knowing and intelligent including knowing "the nature of the charges," even if court later narrows coverage.

United States v. Kwasnik, 55 F.4th 212 (3d Cir. 2022) – No abuse of discretion rejecting motion to withdraw guilty plea to one count of laundering funds embezzled by dft-atty from clients' trusts based on purported new evidence that someone other than defendant caused one victim's losses, after district court held evidentiary hearing and found evidence was not new. No plain error at sentencing in applying enhancement for abuse of position of trust (USSG §3B1.3), to which defendant stipulated as part of plea agreement, although new case law decided soon after sentencing (*Capps*, CA3 2020), suggests that enhancement did not apply. Guilty plea with sentencing stipulations assumes risk of favorable change in law.

United States v. Stoney, 62 F.4th 108 (3d Cir. 2023) – On § 2255 review, record of guilty plea including factual basis stated in plea agreement, not merely indictment, could be consulted to show that completed Hobbs Act robbery, not merely attempt, was basis for § 924(c) conviction and thus qualified as "crime of violence" under modified categorical approach.

United States v. Rivera, 62 F.4th 778 (3d Cir. 2023) – "Conditional" acceptance of plea with deferment of acceptance of (c)(1)(C) agreement subject to review of PSI under FRCrP 11(c)(3), coupled with finding of guilt, subjects defendant to higher standard for withdrawal of plea ("fair and just reason") not lower standard ("any reason or no reason") that applies prior to acceptance. Dft-aplt failed to show "fair & Just reason" where does not claim innocence, claimed misunderstanding of right to withdraw plea is not objectively reasonable, claim of selective prosecution is not based on any suspect classification, and asserted lack of prejudice to govt cannot alone suffice.

INDICTMENTS, SPEEDY TRIAL, JURY, EVIDENCE, TRIALS

United States v. Desu, 23 F.4th 224 (3d Cir. 2022) – (1) Motion for new trial did not protect against plain error review a forfeited objection to sending defective exhibit out with jury (counsel represented prior to deliberations he had reviewed all exhibits to be sent out). Error not "clear or obvious." (2) Post-trial motion in tax fraud case (failure to report cash receipts) challenging consp-to-defraud counts (18 USC §371) for first time under *Marinello* (2018) (limiting scope of "similar" 26 USC §7212) was untimely under FRCrP 12(b)(3) (motions to dismiss); no abuse of discret in failure of USDJ to find "good cause" for late challenge. (3) No abuse of discret in exclusion of proffered defense evidence of cash spending by dft's partner as irrelevant (FRE 401) where defense theory was illogical. (4) Focus at tax fraud trial on cash skim and resulting understatement of gross revenue did not improperly amend indictment alleging obstruction of IRS determination of "net business income."

United States v. Allinson, 27 F.4th 913 (3d Cir. 2022) – (1) Evidence at trial impermissibly varied from indictment by showing only multiple similar bribery schemes, not the charged single conspiracy. But dft was not prejudiced where govt's trial presentation was compartmentalized with little risk of prejudicial spillover. (2) Relatedly, court did not abuse discretion in refusing severance of defendants; standard instructions were given to require separate consideration. (3) No constructive amendment because indictment did not charge that contributions (bribes) were paid only as rewards for past contracts but also to ensure future ones. (4) Gov't closing mentioning that bribery can occur through a "wink and a nod" did not contradict requirement of "clear and unambiguous," not merely implicit, *quid pro quo*.

United States v. Hall, 28 F.4th 445 (3d Cir. 2022) – At trial for unemployment fraud, no violation of FRE 901 to play known exemplar of dft's voice at post-arrest interview to allow jury to decide whether voice on recorded calls was dft's. Nor did it involve using jurors as experts or witnesses.

United States v. Adams, 36 F.4th 137 (3d Cir. 2022) – General continuance lawful under Speedy Trial Act (18 USC §3161) if ct articulates valid reason, such as appt of substitute counsel, even if ct does not cite statute or recite statutory language; STA clock also stopped for sufficient number of days to avoid violation by several pretrial motions, including *pro se* motions to access discovery and for new counsel, and (taking sides in a Circuit split) gov't motions *in limine* (at least until date when ct says will not resolve MIL until time of trial). Dft did not meet burden on appeal to show plain error from failure to charge jury on knowledge of felon status under *Rehaif*; although dft had never served as much as a year on any of his 4 prior felonies, his coaching of straw purchasers would undermine any claim of ignorance of his own status.

United States v. El-Battouty, 38 F.4th 327 (3d Cir. 2022) – No abuse of discretion in allowing cooperating co-defendant to reference offense he pleaded guilty to as "child exploitation enterprise," same as dft was charged with, where USDJ gave cautionary instruction not to consider as evidence of dft's guilt. No plain error, absent timely objection, in instructions that did not require jury to find particular offenses that were part of required "series" and did not define statutory terms "distributing" and "transporting."

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – (1) Complex case designation with general continuance, setting no specific date for trial, to which dft consented, did not violate Speedy Trial Act (18 USC 3161). (2) Evidence that two dfts were in La Cosa Nostra, with repeated limiting instructions, to show motive and relationships, did not violate FRE 404(b) or 403. Limiting instruction protected co-dfts, as shown by the acquittals of some; likewise, severance was not required. (3) One dft suffered no 6th Am violation by joint trial with his fmr defense atty (who represented himself, and was acquitted); any due process issue from restrictions on ability to put on a full defense due to status of fmr attry was waived by dft's failure to endorse fmr atty's motion for severance or raise it on appeal. (4) No improper constructive amendment where verdict form in RICO conspiracy case (18 USC §1962(d)) narrowed which alleged objects of conspiracy were potetially applicable to each defendant; if anything, charges were narrowed not broadened. (5) Challenge to proof of one object of firearms conspiracy under *Rehaif* fails, because other object was valid and sufficiently supported. (6) Judge's private, on-the-record but *ex parte* conversation with one juror who expressed fear of disclosure of identity was not abuse of discretion under dft's right to be present (or have counsel present), nor did tend to coerce a verdict. (7) That verdict was returned 3 days after jury was reconstituted with alternate, while original jury had not reached verdict in 7 days, did not prove original 11 coerced the substitute alternate. (8) No abuse of discretion in decision not to question jurors about isolated conversation among 3 during ride back to hotel, although questioning is preferred.

United States v. Noble, 42 F.4th 346 (3d Cir. 2022) – At trial for possession of CP by person previously convicted of such offense, ct did not abuse discretion under FRE 414 or 403 by admitting evidence of prior CP conviction. FRE 414 presumes probative value outweighs; ct allowed only documentary evidence and gave limiting instruction. Dft's voluntary statement at prelim hrg before USMJ that First Amend protected his right to "look at or read whatever [he] wants" was admissible against him. Dft's diagnosed mental illness did not bar proper finding of competency to stand trial. Decision not to communicate with counsel did not signify inability to do so. No plain error in ct's sustaining govt objection to dft testifying he was "psychiatrically disabled veteran." Denial of mistrial was not abuse discretion after dft from witness stand objected to a juror "staring at him hatefully." Ct reassigned juror to be alternate, who did not deliberate. Any error harmless.

United States v. Gussie, 51 F.4th 535 (3d Cir. 2022) – Undetected inclusion of a victim on indicting grand jury was not structural error; no prejudice once that indictment was superseded from different GJ. First indictment was "validly pending" as required for superseder outside SOL (18 USC §3282), even though it was "invalid." Governmental misconduct in failing to disclose defect for months did not violate FRCrP 6 or cause prejudice, and thus did not call for dismissal of case.

United States v. Womack, 55 F.4th 219 (3d Cir. 2022) – Agent's trial testimony describing defendants as "group" did not violate FRE 704(b) by expressing opinion on intent to agree, as element of conspiracy charge, and was in any event harmless; unfair prejudice from evidence of carrying or use of firearms did not substantially outweigh probative value under FRE 403, in light of cautionary instruction; no plain error in jury instructions or verdict form explaining attribution of quantities under *Williams* (CA3 2020).

United States v. Gallman, 57 F.th 122 (3d Cir. 2023) – (1) Trial court did not commit plain error under Sixth Amendment Public Trial Clause in failing to ensure that video feed to observers' courtroom during COVID-19 protocol trial was active during early-in-trial discussion of whether defendant would stipulate to existence of prior conviction in felon-in-possession trial, or risk jury learning additional details of prior case, nor during mid-trial discussion of whether defendant could cross-examine arresting officers about alleged racial profiling in traffic stop; cited non-binding precedent falls short of establishing clear consensus to establish that any error was plain. (2) Court did not abuse discretion under FRE 403 in admitting limited evidence of nature of prior conviction and prison sentence imposed as relevant to proof of *Rehaif* element of knowledge of prior conviction, which changed 403 balance discussed in *Old Chief*.

United States v. Fallon, 61 F.th 95 (3d Cir. 2023) – (1) No abuse of discretion under FRE 403 in excluding testimony of proposed defense expert on civil contract law at federal trial alleging business frauds, even though reasonableness of defendants' alleged interpretation was relevant to good faith defense to allegation of fraudulent intent. (2) Court's refusal to charge on principles of contract law was not abuse of discretion under right to "theory of the defense." (3) Neither govt's presentation at trial nor verdict form caused constructive amendment of indictment, given indictment's wording, which cannot be narrowed by examining grand jury proceedings.

United States v. Nucera, 67 F.4th 146 (3d Cir. 2023) – FRE 606(b) bars admission of evidence or inquiry into allegations of race-based animosity and intimidation during jury deliberations, where no evidence indicates jurors voted to convict or acquit based on defendant's race. No error in exclusion of out-of-court statement of victim of charged assault – who was not called by either side – as hearsay and under FRE 403. No plain error due to ambiguity in jury instruction on unanimity, where dft failed to object to final wording after charge was delivered and before jury retired.

United States v Carey, 72 F.4th 521 (3d Cir. 2023) – Indictment's allegation of possession of firearm in aid of drug trafficking allows conviction for any of direct possession, constructive possession, or vicarious possession via either aiding & abetting or *Pinkerton* liability (if trial jury was so instructed).

United States v. Titus, — F.4th —, 2023 WL 5356241(8/22/23) – No error in excluding expert opinion that dft's thinking was "rigid and inflexible." Evidence about mental state that does not go to *mens rea* is inadmissible, and opinion that dft did or did not have statutory *mens rea* violates FRE 704(b). Dft failed to prove ctrm was improperly closed during voir dire, which in any event would not require reversal on plain error review. Trial court's instructions on good faith in "pill mill" case satisfied *Ruan* (S.Ct. 2022). Striking prosecutor's comment and giving cautionary instruction was sufficient remedy for argument that could be taken as comment on dft's silence; jury is presumed to follow instruction to disregard.

SUBSTANTIVE CRIMINAL LAW, SUFFICIENCY OF EVIDENCE

United States v. Allinson, 27 F.4th 913 (3d Cir. 2022) – Evidence of a stream of campaign contributions was sufficient to establish *quid pro quo* federal programs bribery (18 USC §666) of mayor; likewise, evidence of mayor's exercise of power to direct city contracts and appointments established "official acts," even as narrowed by *McDonnell* (2016). Total amount of contributions satisfied statute's $5000 minimum threshold for value of contract.

United States v. Defreitas, 29 F.4th 135 (3d Cir. 2022) – Virgin Islands license enforcement officer charged under Travel Act (18 USC §1952) with using interstate commerce (his cell phone) to arrange the solicitation of a bribe in violation of VI criminal law §403 ("asked for … any emolument, gratuity, or reward, … that was not provided by law ... in exchange for an official act"), that is, to extort a sexual favor in exchange for not reporting V to ICE for unlawful entry. On plain error review, held that reporting or failing to report to ICE was not an "official act," because it was no part of dft's lawful duties as a license compliance officer. Despite absence of on-point precedent, federal or local, plain error standard for reversal is satisfied where evidence does not establish charged offense.

United States v. Zayas, 31 F.4th 211 (3d Cir. 2022) – Detailed review of evidence, including reasonable inferences, shows it was sufficient to support jury's verdict of guilty of drug distribution resulting in death, over dft's arg it did not show that substance he sold to V that day contained fentanyl, which is what killed her. Also sufficient to show conspiracy to distribute with dft's friend who accompanied him to obtain drugs to sell and was with him in car during sale. Dist Ct erred by instructing jury that dft need not have knowledge of recipient's pregnancy to convict for "knowing or intentional" distrib to pregnant person (21 USC 861(f)), but error was harmless based on V being 8 mos. pregnant, several witnesses saying pregnancy was evident, and sale took place outside in July at car (no coat). Evidence insufficient to convict for distrib w/in 1000 ft of playground, where did not estab aspect of definition in 21 USC §860(f) that park or playground be "open to the public," nor was jury charged on "open" element. Also insufficient because testimony showed playground in question was attached to private day care center which was "open to the public" only in the sense that any family could pay to enroll; that does not satisfy statute, whether or not latched fence was actually locked.

United States v. Yung, 37 F.4th 70 (3d Cir. 2022) – On appeal from conditional guilty plea (FRCrP 11(a)(2)) to review denial of motion to dismiss, cyberstalking statute (18 USC § 2261A(2)), as amended in 2013, is saved from invalidation under First Amendment as overbroad (that is, reaching a substantial amount of protected speech) by plausible narrowing construction (despite broad interpretation being the better reading) : so limited, statute penalizes only course of conduct on Internet, with intent to harass or intimidate and causing or reasonably expected to cause substantial emotional distress, that involves causing distress through threatening, intimidating "or the like" that puts a victim in fear of death or bodily injury.

United States v. El-Battouty, 38 F.4th 327 (3d Cir. 2022) – Offense of conducting child exploitation enterprise (18 USC § 2251(d)) requires commission of series of felony violations constituting three or more separate incidents, done "in concert with three or more other persons." Latter element requires involvement of 3 or more others in the whole series, not necessarily in each felony violation.

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – Client whom lawyer knew to be engaged in criminal activity told lawyer he thought he was under surveillance and asked for advice. Lawyer said maybe you are and maybe not; do whatever you think is best. Held: Evidence sufficient to convict lawyer for conspiring with client to commit crime client was committing (transporting firearms to convicted felons). Lawyer's facilitation and transfer of funds (through trust account) for clients' fraudulent scheme to loot a financial institution supported convictions for wire fraud and WF conspiracy.

United States v. Heinrich, 57 F.th 154 (3d Cir. 2023) – On appeal from conditional guilty plea, FRCrP 11(a)(2), pretrial ruling excluding defendant's proffered expert affirmed, where witness would have testified to dft's psychological perception of nude pictures of young children, because 18 USC 2251 – use of child to engage in "sexually explicit conduct" – employs an objective test for what is "sexually explicit," including orchestration by dft of display of 4-yr-old's genitals to create image, as long as dft intends to take a picture of the specified conduct. So construed, statute is neither unconstitutionally vague, or overbroad in violation of First Amend. And dft's proffered expert would be irrelevant.

United States v. Fallon, 61 F.th 95 (3d Cir. 2023) – (1) Evidence at trial was sufficient to show mailings were in furtherance of charged fraudulent scheme; fraud was not complete until victims were sent less than was due to them; **but** (2) In violation of rule against "merger" with underlying fraud scheme, evidence of conspiracy to commit concealment money laundering was insufficient where funds to be concealed were not yet "proceeds" of fraud that dft had received, as required. One count rev'd & judgment remanded for resentencing.

United States v. Stoney, 62 F.4th 108 (3d Cir. 2023) – Completed Hobbs Act robbery, although not attempted robbery (both prohibited by 18 USC §1951), qualifies as "crime of violence" under categorical approach and thus establishes basis for valid § 924(c) conviction after consulting plea documents, per modified categorical approach, to determine precise offense of conviction.

United States v. Kousisis, 66 F.4th 406 (3d Cir. 2023) – DBE fraud deprived governmental unit of property in violation of wire fraud by lying about using minority subcontractor to obtain substantial funds, used in part to pay kickback to named but unused subcontractor; deprivation of honest contracting was incidental, not essence of fraud.

Range v. Atty. General, 69 F.4th 96 (3d Cir. 2023) (en banc) – On declaratory judgment, Second Amendment, as interpreted in *Bruen* (S.Ct. 2022), invalidates prohibition on possession of firearms by convicted felon, as applied to 28-yr-old conviction for food stamp fraud for which pltf served 3 yrs probation and paid $2500 restitution. 11 (9+2 concurring, with 2 in majority also concurring) – 4 (2+1+1) dissenting.

United States v. Stevens, 70 F.4th 653 (3d Cir 2023) – Hobbs Act robbery, as defined in 18 USC §1951(b)(1), does not implicitly import common law elements of "intent to permanently deprive" or "asportation" (take and carry away), overruling Circuit precedent from 1958. Hobbs Act robbery is "crime of violence" predicate for §924(c) count, where committed directly, via aiding and abetting, or through *Pinkerton* co-conspirator liability.

United States v Carey, 72 F.4th 521 (3d Cir. 2023) – Evidence insufficient to prove possession at time and place alleged in indictment of more than 500 grams of cocaine. Possibility and conjecture will not suffice. Evidence of constructive possession of girlfriend's gun supported drug dealer's conviction under §924(c).

United States v. Vepuri, 74 F.4th 141 (3d Cir. 2023) – Dismissal of count charging conspiracy to introduce an unapproved new drug (21 USC §355(b)) affirmed. Cited statute does not clearly encompass govt theory that sourcing an active ingredient from a manufacturer different from the one disclosed to the FDA when it issued its New Drug Approval renders the drug no longer "approved." Approval remained effective until formally withdrawn or suspended.

United States v. Rivera, 74 F.4th 134 (3d Cir. 2023) – Farm Bill of 2018 amended the definition of "marihuana" in CSA to provide that it "does not include" "hemp" with THC below 0.3%. Because this amendment created an "exemption or exception" within the meaning of 21 USC §885(a), the govt does not have any burden to prove that marijuana seized from dft was not "hemp" or that it had a THC level above 0.3%. (Opinion does not cite, and is seemingly inconsistent with, S.Ct. discussion of §885 in *Ruan* (2022).)

United States v. Kramer, 75 F.4th 339 (3d Cir. 2023) – Evidence sufficient to establish attempted witness tampering, 18 USC §1512(b)(1), where dft wrote letter to wife from jail threatening to incriminate her, referencing her cooperation with prosecution as revealed in discovery documents.

United States v. Porat, — F.4th —, 2023 WL 5009238 (8/7/23) – Former Dean of business school committed cognizable wire fraud (18 USC §1343) by using false statements to raise apparent ranking of school, although parties deprived of money (tuition payments) by scheme were different from persons to whom falsehoods were made (ranking service), and even though falsehoods did not go to the essence of the bargain. Nor was it required that scheme be for dft himself to "obtain" victim's property, only to "deprive" victim of property. Detailed concurrence by Krause, J., discusses line between tangible (covered) and intangible rights (not covered) under mail/wire fraud, including distinction between fraud and mere deceit.

United States v. Washington, — F.4th —, 2023 WL 5440527 (8/24/23) – Private contractor providing security at federal building as Protective Services Officer was hnot an "officer of the United States" within the meaning of 18 USC §111, prohibiting assault on federal officer. Nor did evidence should PSO was "assisting an officer" of U.S. at the time of assault, as also prohibited by §111

SENTENCING and SENTENCE MODIFICATION

United States v. Desu, 23 F.4th 224 (3d Cir. 2022) – Under USSG 2T1.1 dft can reduce "tax loss" by bearing burden to show unclaimed deductions or credits. Rejection of figures in dft's sentencing exhibit (report from accounting firm) was not clearly erroneous where dft neither attached nor cited evidence to support asserted figures.

United States v. Zayas, 31 F.4th 211 (3d Cir. 2022) – No error in imposition of two concurrent life sentences for distrib of controlled substance resulting in death, with a prior drug felony, and conspiracy to do so, each of which was mandatory per 21 USC §841(b)(1)(C) & 846. First Step Act changes to recidivist provision of §841(b)(1)(A) and (b)(1)(B) were immaterial, as was any Guidelines issue.

United States v. Dawson, 32 F.4th 254 (3d Cir. 2022) – (1) Inclusion of "attempted transfer" within definition of "delivery" under Pa. drug statute did not sweep more broadly than definition of USSG §4B1.2(b) "career offender" category for "controlled substance offenses" (that is, as not including inchoate offenses); "attempted transfer" is a kind of completed "delivery" (which includes distribution), as it also is under the federal CSA (21 USC §801(8)). (2) Sentencing court's failure to rule on a factual objection to PSI or expressly state it was not relying (whether dft's drug distribution caused a certain death) was forfeited by lack of objection to ct's failure to make ruling. No plain error because record does show USDJ relied on that fact to grant any more of a downward variance.

United States v. Abreu, 32 F.4th 271 (3d Cir. 2022) – Under *Kisor*/*Nasir*, conspiracy to commit robbery is not a "crime of violence" under USSG §2K2.1(a)(4) (enhancement in felon-in-possession sentencing for prior violent convictions) because (as with §4B1.2) definition of COV is extended to inchoate offenses only in Commentary.

United States v. Yung, 37 F.4th 70 (3d Cir. 2022) – Victim's expenses to pay investigator and attorney to find source of and stop campaign of Internet harassment (cyberstalking) were "direct and foreseeable" losses caused by offense and thus subject to restitution under 18 USC §2264(b). But restitution for costs of enhanced security, ordered paid to employer of victim who feared harm but never suffered any, was not authorized by §2264(b) nor by VWPA §3663 because it did not remedy "damage to property."

United States v. Mitchell, 38 F.4th 382 (3d Cir. 2022) – Resolving ambiguity in language, dft was entitled to benefit of First Step Act §403's non-retroactive reform of 18 USC § 924(c) mandatory consecutive sentencing at his *de novo* resentencing, ordered on prior appeal that *vacated* original sentence (as Bibas, J., concurring emphasizes), even though initial sentence was imposed prior to 1SA's effective date. Similarly, 1SA § 401 reform of recidivist-drug sentencing applied. Gov't failed to prove beyond reasonable doubt, as now required, that imprisonment for prior offense ended within last 15 yrs. Non-specific statement of reasons for sentence satisfied 18 USC §3553(c). Remanded for second resentencing.

United States v. Adair, 38 F.4th 341 (3d Cir. 2022) – Leader or organizer adjustment (USSG § 3B1.1(a)) is subject to *Kisor/Nasir* analysis; prior 3d Cir case law premised on Commentary and expanding meaning beyond interpretation of Guideline itself is no longer binding. An "organizer" is one who "generates a coherent functional structure for coordinated criminal activity." A "leader" is a person with high-level directive power or influence over criminal activity." On this basis, application of 4-level increase is affirmed; dft set up network of pill users and connected them with corrupt doctors, and had high-level control over network she organized, although aspects of conduct were that of middle-man and she also networked with larger operation. Govt did not violate §3E1.1(b) by withholding 3d level for AOR based on dft's disputing of 4-level leadership enhancement, because Amendment 775 (allowing denial of 3d level only for lateness affecting govt prep for trial) exceeded USSC authority to interpret and apply 2003 PROTECT Act amendment to §3E1.1. (Circuit split on this issue.) Govt discretion to withhold 3d level can be overturned only if unconst motive; here, none shown.

United States v. Rodriguez, 40 F.4th 117 (3d Cir. 2022) – No clear error in finding dft to be 4-level organizer or leader of drug enterprise with at least five members (USSG § 3B1.1(a)) where he directed others and set prices; no clear error in applying premises enhancement (§2D1.1(b)(12)) where dft supervised use of location and directed activities of others there, although dft was not owner.

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – Court correctly applied grouping rules (USSG 3D) to sentence solely for Group with highest level (43) where all other groups scored at least 9 levels lower. USSG § 2B1.1 is based on loss to victim, not gain to particular defendant. Dft not entitled to credit against loss for value of services provided to business in order to perpetuate the fraud, nor for expenses of fraud scheme. All stockholders could be counted as "victims" where defrauded company lost all value. 30-yr sentence for $14M fraud that destroyed public company was not unreasonable. Joint & several forfeiture order was plain error except as to leaders of conspiracy and scheme; forfeiture otherwise may not exceed amount of proceeds actually obtained by particular dft. Delay between seizure of vessel and vehicle and eventual forfeiture did not violate civil forfeiture law, because it was agreed between govt and dft's then-counsel. Delay (42 months) in effectuated forfeiture of vessel and vehicle implicates due process but was justified by decision to pursue criminal forfeiture where crim case was highly complex and time-consuming.

United States v. Xue, 42 F.4th 355 (3d Cir. 2022) – On govt appeal of sentence, USDJ did not err in finding zero loss under USSG 2B1.1 from theft of trade secrets that Chinese recipients were not shown to have used. Value of research behind stolen dox does not create "loss," actual or intended (but see *Banks*). Crim intent to injure as required for conviction did not necessarily implicate "loss."

United States v. Shields, 48 F.4th 183 (3d Cir. 2022) – On motion to modify crack sentence under First Step Act §404, USDJ was correct (per *Concepcion*) not to recalculate dft's Guidelines entirely, but erred in failing to recognize dft could no longer be considered a career offender and other intervening changes and in refusing to consider dft's alleged post-offense rehabilitation. Not entitled to plenary resentencing hearing, even where original judge was deceased, but new judge erred in not allowing submission of full resentencing memorandum with exhibits. Supplemental PSI recommended but not required.

United States v. Coleman, 66 F.4th 108 (3d Cir. 2023) – On motion to modify crack sentence under First Step Act §404, where dft was convicted of dual-object drug conspiracy (cocaine and crack) but neither pre-*Apprendi* indictment nor judgment identified applicable penalty provision, USDJ must scour official records to determine and specify whether offense of conviction included crack; remanded for finding.

United States v. Norton, 48 F.4th 124 (3d Cir. 2022) – Record did not show that sentencing ct violated due process (no indication of reliance on prosecutor's allegedly false statements); whether dft is "indigent" for purposes of waiving otherwise mandatory $5000 child sex offense assessment (18 USC §3014) looks to ability to pay over duration of sentencing and for 20 yrs after release, not just at time of sentencing.

United States v. Norwood, 49 F.4th 189 (3d Cir. 2022) (2-1 decision) – Restitution imposed under VWPA (18 USC §3663, eff. 1982), in contrast with MVRA (§ 3663A, eff. 1996) (supplementing, not replacing VWPA), expires 20 years from original sentencing judgment, even if defendant wins a later resentencing, and even though dft challenged restitution order in appeal from resentencing on §2255. Jurisdiction in that instance related back to original sentencing, not the §2255 appeal. VWPA, unlike MVRA, does not authorize 20-yr collection period to be extended, such as by govt initiating collection before 20-yr period expires. MVRA is a penal statute; Ex Post Facto thus bars applying it, including its more severe interest provision, to this pre-1996 case.

United States v. Womack, 55 F.4th 219 (3d Cir. 2022) – Prior convictions for "delivery" of cocaine under PA law counted toward "career offender" sentencing, because PA statute was not categorically broader than federal drug statute through inclusion of "administering" controlled substance; court did not clearly err in denying "acceptance of responsibility" reduction (USSG §3E1.1) to dfts who admitted individual sales but stood trial to challenge (unsuccessfully) accusation of membership in conspiracy; quantity attribution at sentencing did not violate *Apprendi* where calculations did not affect statutory maximum; arithmetic error in PSI regarding quantity was harmless where trial evidence supported larger amount; no abuse of discretion in denying to mitigating role reduction to dft who was less involved than others; no clear error in assigning firearm enhancement to dft where possession of firearms by others in conspiracy was foreseeable to him.

United States v. Banks, 55 F.4th 246 (3d Cir. 2022) – Applying *en banc* ruling in *Nasir* (2021), USSC's extension in commentary of concept of "loss" to include "intended loss" was invalid. Imposition of special conditions of supervised release – that dft obtain permission of probation officer to acquire any electronic devices or to engage in larger financial transactions – were not plain error or unduly vague, in light of dft's current and past offenses. Statement of additional conditions in written judgment that were inconsistent with oral pronouncement of sentence were not binding and could be corrected under FRCrP 36; conditions that "may" be invoked by USPO were unripe to challenge on direct appeal. Reference in judgment to fact that requirement to provide DNA sample was last amended in the 2006 Adam Walsh Act did not (falsely) imply that dft was sex offender.

United States v. Upshur, 67 F.4th 178 (3d Cir. 2023) – Unlike the Sentencing Guideline for most theft and fraud cases, USSG §2B1.1 (see *Banks*, *supra*) the tax fraud guideline (§§ 2T1.1, 2T1.4) defines and computes "loss" as including both actual loss and intended loss.

United States v. Kwasnik, 55 F.4th 212 (3d Cir. 2022) – At sentencing on one count of laundering funds embezzled by dft-atty from clients' trusts, no plain error in applying enhancement for abuse of position of trust (USSG §3B1.3), to which defendant stipulated as part of plea agreement, although new case law decided soon after sentencing (*Capps*, CA3 2020), suggests that enhancement did not apply. Guilty plea with sentencing stipulations assumes risk of favorable change in law. Nor was there plain error (or any error) in considering state court default judgment, among other evidence, to calculate victims' $13 million in losses. Even if default judgment was defective, defendant had knowledge at sentencing; further, he failed on appeal to address the other evidence supporting loss determination.

United States v. Fallon, 61 F.th 95 (3d Cir. 2023) – No error in calculation of $95 million restitution based on estimated loss to all victims (as proffered by defendants) rather than being limited to victims who responded to probation office questionnaire.

United States v. Lewis, 58 F.4th 764 (3d Cir. 2023) – Prior conviction for N.J. PWID marijuana was categorical "controlled substances offense" for purposes of enhancing offense level under USSG §2K2.1(a); substance controlled under state law at time of prior offense (*i.e.*, prior to NJ 2019 delisting of hemp) can count even if not controlled by federal CSA at time of federal offense (due to 2018 federal decrim of hemp); circuits are divided on what date to look to.

United States v. Brown, 47 F.4th 147 (3d Cir. 2022) – Prior convictions for PA PWID marijuana counted as categorical "controlled substances offense" for purposes of ACCA sentencing, notwithstanding fed 2018 (post-offense) decrim of hemp. For comparing whether state prior was overbroad relative to fed offense, ct shd look at federal offense as of date of commission. Extensive discussion of when favorable amendment to crim statute will have retroactive effect. Interp of ACCA not necessarily tied to interp of related Guideline.

United States v. Brasby, 61 F.4th 127 (3d Cir. 2023) – Prior conviction for N.J. aggravated assault was categorical "crime of violence" for purposes of enhancing offense level under USSG §2K2.1(a), after applying "modified categorical approach" to determine conviction was based on recklessly causing serious bodily injury; based on treatises and multijurisdictional survey, NJ's heightened recklessness definition suffices to establish generic offense, notwithstanding S.Ct. *Borden* decision.

United States v. Brow, 62 F.4th 114 (3d Cir. 2023) – Dft sentenced to 30 yrs for crack in D.V.I. and then ten years consecutive for voluntary manslaughter in unrelated N.D.Ga. case, administratively aggregated by BOP as a 40-year term, could not receive First Step §404 retroactive crack disparity reduction, because at time seeking relief he had already served 32 years; crack sentence had thus already been fully served and so could not be reduced.

United States v. Perez-Colon, 62 F.4th 805 (3d Cir. 2023) – Two counts for production of different images of child porn of same minor do not group under USSG §3D1.2 ("substantially the same harm" and part "common scheme or plan"); on review for "clear error" (fact), infant daughter of dft's girlfriend living together in motel was under dft's "custody, care or supervisory control," §2G2.2(b(5); court erred in applying §4B1.5(b) 5-level increase for pattern of sexual abuse conduct (not necessarily conviction), but harmless, where dft's prior delinquency adjudication involved sexual abuse conduct that did not match federal touchstone (§2426(b)(1)), because adjustment brought offense level calculation to 48, where 43 is top of chart. No plain error (not "clear or obvious") in basing one count on attempted redistribution of pic of child's genitals that was originally taken for a medical, not "lascivious display" purpose.

United States v. (Tiesha) Henderson, 64 F.4th 111 (3d Cir. 2023) – Prior Pa. conviction for conspiracy to commit robbery was not "crime of violence" for purposes of establishing "career offender" status under USSG, even on plain error review. **Defense concession of point at sentencing was forfeiture not waiver**, where subsequent authority undermined basis for concession. (Both under categorical

approach, and under *Nasir* (unambiguous Guidelines language improperly extended in Commentary).) Dft prejudiced by erroneous starting point even though USDJ sentenced below CO guideline range. Court also erred by including polygraph testing as special condition of supervised release, in non-sex offense case, without giving individualized rationale. May reconsider at resentencing.

United States v. Stanford, 75 F.4th 309 (3d Cir. 2023) – – Applying modified categorical approach, prior Delaware convictions for first and second degree robbery were "crimes of violence" under USSG §4B1.2(a) and thus qualified to increase sentence in §922(g) felon-in-possession case per §2K2.1(a)(4).

United States v. (Darron) Henderson, — F.4th —, 2023 WL 5211335 (3d Cir. 8/15/23) – Applying modified categorical approach, prior Pa. conviction for robbery (subsection (a)(1)(ii) (by threat or fear)) was "crime of violence" under USSG §4B1.2(a) and thus qualified to increase sentence in §922(g) felon-in-possession case per §2K2.1(a)(4).

United States v. Kousisis, 66 F.4th 406 (3d Cir. 2023) – Calculation of "loss" from DBE fraud vacated and remanded to allow offset for fair market value of non-DBE services provided; on remand, court may consider disallowing amount paid that was used for kickbacks. Criminal forfeiture of entire profit vacated and remanded for application of *Bajakajian* Eighth Amendment proportionality factors.

United States v. Santos Diaz, 66 F.4th 425 (3d Cir. 2023) – USDC lacked statutory or inherent authority to impose no-contact order during period of incarceration on account of violation of supervised release, even to protect victim-witness from retaliation or harassment. No abuse of discretion to impose no-contact order as condition of further supervision after incarceration. Roth, J, dissents on sentencing court's inherent authority to protect witness.

United States v. Shaknitz, — F.4th —, 2023 WL 4921841 (3d Cir. 8/2/23) (per curiam) – On dft-aplt's motion for summary action under *Santos Diaz, supra*, judgment vacated and remanded for resentencing where USDJ imposed telephone-only contact with dft's 5-yr-old son during imprisonment as part of oral pronouncement of sentence, even though rephrased in written judgment as (lawful) recommendation to BOP. Oral pronouncement controls over judgment as formal sentence.

United States v. Laird, 67 F.4th 140 (3d Cir. 2023) – Part-time secretary-treasurer of small town held "position of public trust" under USSG § 3B1.3 where town council gave her discretionary and largely unsupervised access to township's funds, and over council's agenda, and allowed her to act as sole point of contact with auditors. USDC did not clearly err in calculating loss by not crediting, as offset to amount of embezzled funds, dft's uncorroborated claim of having legitimately earned much more than she reported to IRS.

United States v. Nucera, 67 F.4th 146 (3d Cir. 2023) – In sentencing for making a false statement to FBI in investigation of race-based police brutality, where jury hung on civil rights and hate-crime counts, cross-reference in applicable fraud guideline (§2B1.1(c)(3)) did not authorize use of civil rights guideline because act of lying did not itself establish or constitute all the elements of that non-conviction offense.

United States v. Harris, 68 F.4th 140 (3d Cir. 2023) – Following initial argument en banc and referral for advisory opinion to Supreme Court of Pennsylvania, panel holds under §2255 that prior conviction for aggravated assault under PA law is not categorical "violent felony" to justify ACCA sentence, because it can be committed by slight force.

United States v. Jenkins, 68 F.4th 148 (3d Cir. 2023) – Applying categorical approach, Pennsylvania offense of assault of protected person is not categorical "violent felony" to justify ACCA sentence, because it can be committed by failure to act, requiring resentencing under §2255.

United States v. Simmons, 69 F.4th 91 (3d Cir. 2023) – On reimposition of supervised release following registration violation by sex offender on lifetime supervision, court was not required to give credit for 21 months already served; life term of supervision was substantively reasonable.

United States v. Garcia-Vasquez, 70 F.4th 177 (3d Cir. 2023) – Enhancement under Sentencing Guideline for illegal reentry for prior "drug trafficking offense" includes prior conviction for conspiracy to distribute drugs, where (in contrast to *Nasir*) term is not expressly defined in Guideline as limited to substantive offenses.

United States v. Jumper, 74 F.4th 107 (3d Cir. 2023) – USDC did not abuse discretion in refusing downward departure or variance on account of dft's medical condition. Bottom-of-guidelines, 78-mo sentence for $2.4 million securities fraud was not substantively unreasonable.

United States v. Hallinan, 75 F.4th 148 (3d Cir. 2023) – Daughter of dft challenged denial of ancillary challenge to criminal forfeiture of later-identified assets court had found to be among dft's "interests in" RICO enterprise, but which dft had transferred to her. Transferee could not challenge lawfulness of underlying forfeiture or identification of asset as forfeitable, and failed to establish that she was a *bona fide* purchaser or held interest superior to govt's (particularly considering "relation back" doctrine). Nor did process deny her any procedural rights granted to third parties by statute (18 USC §1963(*l*); 21 USC §853(n)) or by FRCrP 32.2. Court lacked jurisdiction over denial of motions to quash subpoenas issued to daughter, her bank and her lawyer.

United States v. Titus, — F.4th —, 2023 WL 5356241(8/22/23) – USDC clearly erred in setting drug quantity in "pill mill" case based on unreliable extrapolation.

United States v. Mercado, — F.4th —, 2023 WL 5539264(8/29/23) – USSG § 3E1.1 does not forbid denial of credit for acceptance of responsibility on the basis of defendant's post-plea continued illegal drug use; applying *Nasir*, Commentary permissibly clarifies that denial of credit is not limited to pre-sentence criminal conduct directly relevant to offense of conviction.

APPEALS AND WAIVER OF RIGHT TO APPEAL, JURISDICTION, DOUBLE JEOPARDY

United States v. Agarwal, 24 F.4th 886 (3d Cir. 2022) – Where plea agmt left loss calculation open for argument and waived appeal, no "miscarriage of justice" or other exception to waiver enforcement applied after dft received sentence 4 levels higher due to high (and questionable) loss determination.

United States v. Defreitas, 29 F.4th 135 (3d Cir. 2022) – After thoroughly reviewing pertinent considerations, CA3 declines to certify (LAR 110.1) to Supreme Court of the Virgin Islands the controlling question whether dft's conduct, as proven at trial, violated cited Virgin Islands criminal statute as required to support charged federal Travel Act conviction.

United States v. Hurtt, 31 F.4th 152 (3d Cir. 2022) – Ct of App need not (and here, will not) consider entirely new legal argument for affirmance offered by govt as appellee for first time at oral argument.

United States v. Dawson, 32 F.4th 254 (3d Cir. 2022) – Ct of App will (at least ordinarily) not consider new issue raised for first time in a supplemental brief.

United States v. Abreu, 32 F.4th 271 (3d Cir. 2022) – To preserve issue for appeal, dft must not only raise same legal issue in dist ct but also make substantially the same arguments in support of that issue, albeit they may be reframed and elaborated on appeal and need not cite same authorities.

United States v. Yung, 37 F.4th 70 (3d Cir. 2022) – Waiver of right to appeal any sentence that "does not exceed stat max" did not authorize appeal of legally unauthorized restitution, but enforcement of waiver against that appeal would cause "miscarriage of justice," so permitted. Aplt's argument in the alternative about scope of relief sought in the event of partial victory on appeal is forfeited if "tuck[ed] into a single footnote, without supporting authority or analysis."

United States v. Scarfo, 41 F.4th 136 (3d Cir. 2022) – (1) Co-appellants could adopt others' issues under FRAP 28(i) only by specifying what issue and why it was applicable, not with general reference to 28(i). Aplt could not adopt issue applicable only to a co-aplt, such as sufficiency of evidence to support other aplt's conviction on a certain count. (2) In light of remand for evidentiary hearing on conflict of interest, record was sufficient for Ct of App to take unusual approach of entertaining IAC issue on direct appeal. (3) Arguments advanced in reply but not made in opening brief are forfeited. (4) Issue advanced without citing pertinent authority will not be reviewed.

United States v. Norton, 48 F.4th 124 (3d Cir. 2022) – Dft convicted on two counts of soliciting child for sex received only one $5000 mandatory JVTA assessment under 18 USC §3014, not two as required by *Johnman* (CA3 2020). Court of Appeals will not and cannot order this illegality corrected, as govt did not cross-appeal.

United States v. Norwood, 49 F.4th 189 (3d Cir. 2022) – Deadline for criminal appeals is a mandatory "claim processing rule" but not jurisdictional, so attack on restitution coupled with § 2255 appeal, if not challenged by govt, can proceed as untimely direct appeal.

United States v. Kwasnik, 55 F.4th 212 (3d Cir. 2022) – Court of Appeals lacked jurisdiction to review denial of motions to withdraw guilty plea filed by defendant after appealing from sentence and while direct appeal was pending.

United States v. Rivera, 62 F.4th 778 (3d Cir. 2023) – As a result of ambiguity in plea agreement, waiver of appeal did not bar appeal from denial of motion to withdraw guilty plea. Waiver of right to appeal sentence imposed in accordance with (c)(1)(C) plea did not create miscarriage of justice.

United States v. Nocito, 64 F.4th 76 (3d Cir. 2023) – Court of Appeals lacks jurisdiction over appeal from denial of purported FRCrP41(g) motion for return of property, filed post-indictment by corporations closely affiliated with defendant and directed at document subpoenaed to grand jury, where defendant and corporations allege use of document by govt would violate attorney-client privilege. During 2-1/2 yrs that appeal of 41(g) motion was pending, defendant pleaded guilty in underlying case and was awaiting sentencing at time of Ct of App decision. Appeal did not come within any exception to final judgment rule.

United States v. Dowdell, 70 F.4th 134 (3d Cir. 2023) – Same rules apply to the govt as to the defendant regarding preservation or forfeiture of arguments at a hearing in dist ct and on appeal. USDJ did not abuse discretion in refusing to entertain alternate legal argument against suppression of evidence that prosecutor did not endorse until suggested by court in rendering decision. 2–1 decision.

United States v. Garcia-Vasquez, 70 F.4th 177 (3d Cir. 2023) – Defendant's appeal challenging only Guidelines calculation and thus length of sentence is not moot where defendant has completed sentence and is awaiting deportation. Dist ct would have discretion to reduce term of supervised release to account for overservice of prison term.

United States v. Jumper, 74 F.4th 107 (3d Cir. 2023) – Double Jeopardy Clause does not bar imposition of criminal sentence for securities fraud where dft has previously been sued by SEC and ordered to make disgorgement of profits for same fraud.

POST-CONVICTION REMEDIES

Martin v. Admin. NJ State Prison, 23 F.4th 261 (3d Cir. 2022) – State court's eventual grant of leave to file appeal from denial of state post-conviction petition many years out of time does not render petition "pending" within meaning of AEDPA's statutory tolling rule for one-year SOL for that entire period. Nor was ptr entitled to equitable tolling, which requires showing of diligence and extraordinary circumstances. Denial of habeas petition as untimely affirmed.

Duka v. United States, 27 F.4th 179 (3d Cir. 2022) – Dfts sentenced to 30 yrs under 18 USC §924(c) consecutive to life sentences for conspiracy to murder U.S. soldiers (terrorist plot at Fort Dix). USDJ did not abuse discretion by extending rationale of "concurrent sentence doctrine" to refuse to consider successive §2255 motion under *Welsh* to vacate §924(c) sentences on theory that failed consp to murder no longer qualifies as "crime of violence." Merits panel has authority to expand certificate of appealability beyond what motions panel allowed, but declines to do so.

Becker v. Secy Pa DOC, 28 F.4th 459 (3d Cir. 2002) – AEDPA deference requirement (28 USC 2254(d)) is incorporated into standard for issuance of certif. of appealability. COA denied.

Gaines v. Supt Benner SCI, 33 F.4th 705 (3d Cir. 2022) – Failure of trial counsel to object to lack of no-adverse-inference instruction had valid strategic basis. Grant of habeas reversed.

Lesko v. Secy Pa DOC, 34 F.4th 211 (3d Cir. 2022) (2-1) – Habeas challenge to conviction was not "second or successive" following successful habeas challenge to death sentence. Various claims under *Brady* or IAC rejected either on the merits or as not unreasonably decided in state court.

Williams v. Supt Mahanoy SCI, 45 F.4th 713 (3d Cir. 2022) – Determination of state cts that trial atty was not ineffective for not presenting alternative theories of self-defense or vol mans at murder trial, in addition to alibi, was not unreasonable under 28 USC 2254(d).

Barney v. Admin NJ Prisons, 48 F.4th 162 (3d Cir. 2022) – Determinations of state cts that denial of dft's request to go *pro se* as untimely did not violation 6th Amend, nor was apptd counsel ineffective, were not unreasonable under 28 USC 2254(d).

United States v. Norwood, 49 F.4th 189 (3d Cir. 2022) – Challenge to restitution is not cognizable in §2255 motion because it does not implicate "custody," even when coupled with challenges to imprisonment. But challenge can proceed if govt does not challenge jurisdiction, based on fact that deadline for criminal appeals is not jurisdictional and can thus relate back to original judgment of sentence.

United States v. Bentley, 49 F.4th 275 (3d Cir. 2022) – No entitlement to *Johnson* relief under §2255 (*Welch*) from ACCA sentence, where dft agreed at time of plea he had three prior violent felonies, record did not show reliance on unconstitutional "residual clause." Opposing collateral attack, govt may rely on categorically qualifying priors listed in PSI to which dft had not objected, even if not invoked at originally sentencing. Prior NC B&E convictions qualified based on *Shepard* documents introduced by govt on §2255. Porter, J., concurring, notes that govt did not raise procedural default, but if it did dft wd have to satisfy *Bousley* "cause & prejudice" or "actual innocence" standard.

United States v. De Castro, 49 F.4th 836 (3d Cir. 2022) – dft convicted as illegal alien in possession of firearm, and then deported, not entitled to vacate conviction on writ of error *coram nobis* (28 USC §1651) under *Rehaif* (here, proof of knowledge of immigration status as §922(g) element); where he could have but did not challenge conviction at time of plea and did not make showing of innocence, thus failing 5-part test of *Ragbir* (CA3 2020).

United States v. Haisten, 50 F.4th 368 (3d Cir. 2022) (2-1 decision) – Dfts entitled to hearing on allegation of IAC under 28 USC §2255 where govt concedes venue not proved on two counts; motion makes "colorable claim" of both deficient performance and prejudice.

Kennedy v. Supt Dallas SCI, 50 F.4th 377 (3d Cir. 2022) – Because Superior Ct of PA failed to address fairly presented federal Speedy Trial Clause claim on appeal, and claim was exhausted and not procedurally default, all of which Commw conceded, fed habeas court cd review *de novo*. Unjustified delay of 50 months in commencing trial violated Speedy Trial. Denial of habeas rev'd & discharge ordered.

Freeman v. Supt Fayette SCI, 62 F.4th 789 (3d Cir. 2023) – Admission co-dft's confession at ptr's trial violation Confron Cl but state court determination that error was harmless was not unreasonable under 28 USC 2254(d).

Clark v. United States, — F.4th —, 2023 WL 4986498 (3d Cir. 8/4/23) – USDC granted §2255 motion in "old law" (pre-1987) case to the extent of vacating now-invalid §924(c) sentence consecutive to life term. Held: Appeal challenging only the refusal to conduct full re-sentencing as remedy under §2255 requires a certificate of appealability, but standard for COA is not met. Dismissed for lack of jurisdiction.