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Editors' Preface and Precedential Opinion Summary

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EDITORS' PREFACE

IN 1973, the VILLANOVA LAW REVIEW launched the *Third Circuit Review*, a special compendium within the LAW REVIEW intended to survey precedential opinions issued by the U.S. Court of Appeals for the Third Circuit.¹ In 2019 as we celebrate the *Third Circuit Review*'s 46th anniversary, we use this opportunity to recount the *Third Circuit Review*'s robust history, highlight distinguished contributors, and consider how the *Third Circuit Review* may continue to provide value to our academic and practitioner community.

When launching the *Third Circuit Review*, Volume XIX's editors asked Collins J. Seitz, then Chief Judge for Third Circuit, to write an introduction.² Chief Judge Seitz identified a few guiding principles so that editors, by "combining analysis with perspective," could provide maximum value "both to the judiciary and to the law."³ While Chief Judge Seitz welcomed critical analysis of the court's opinions, his charge to the VILLANOVA LAW REVIEW was not simply for editors to recite the court's facts and holdings, or to analyze its reasoning. Instead, Chief Judge Seitz wrote that editors were empowered to broadly contemplate the state of the law and the "particular faults or virtue of each decision" free from practical realities that constrain judicial decision-making.⁴ In other words, the *Third Circuit Re-*

1. *See Forward*, 19 VILL. L. REV. 277 (1973). According to Volume XIX's editors, the Third Circuit at that time was one of the few courts of appeals that did not have "the dubious honor of having its opinions systematically subjected to the well-meant, and, hopefully, studied analysis and criticism of fledgling members of the legal community." *Id.* at 277. We are grateful to our predecessors for having the foresight to position the VILLANOVA LAW REVIEW to undertake such a responsibility. We share their goal to further the *Third Circuit Review*'s legacy "in the hope that it will be of benefit to practicing members of the bar, to the bench, and to the academic community." *Id.*

2. *Id.* at 277.

3. *See Collins J. Seitz, Introduction*, 19 VILL. L. REV. 279 (1974); *Forward*, 19 VILL. L. REV. 277 (1973).

4. *See id.* at 280 (identifying practical restraints as "precedent, the contentions of the parties before them, and the state of the record"). Chief Judge Seitz continued:

At the same time, the reviewers must realize that their own mandate is broader than ours. If a decision is correct, but the statute that controls it

view could become a beacon of intellectual activity providing authors with space to consider the law not only as it is, but the law as it should be.

Over the years, the structure of the *Third Circuit Review* has evolved considerably. Originally the project was led by a dedicated *Third Circuit Review* Editor and it analyzed opinions by category, focusing on federal matters like admiralty and maritime law, constitutional law, federal jurisdiction and procedure, government regulations, and federal statutes like the Clean Air Act and Title VII of the Civil Rights Act.⁵ Members of the bar occasionally contributed, and in 1979, six years after the *Third Circuit Review*'s inaugural edition, editors decided to focus on publishing student works, "both conventional 'casenotes' for reviews of single decisions and more expansive 'mini-comments' and 'comments' for analyses of broader areas of the law."⁶

These casenotes were originally organized by topic.⁷ This topical categorization and the *Third Circuit Review* Editor position eventually faded away as the *Third Circuit Review* began to feature longer, student-written articles analyzing five or six discrete precedential opinions.⁸ Titled case-

illogical, the reviewers are obligated to bring to light the harmful consequences that should require legislative action. Such "in terrorem" arguments are often made by attorneys to dissuade judges from following admittedly controlling law. It is as proper for law reviews to employ these arguments in calling for legislative change as it would be improper for judges to accede to them in deciding cases. Similarly, law reviews are free to call for the reversal of a precedent that, if made by our court, binds our panel or, if a Supreme Court decision, binds our circuit en banc as well.

Id.

5. See, e.g., Various Editors, *Admiralty and Maritime Law*, 19 VILL. L. REV. 281 (1973); Various Editors, *Federal Jurisdiction and Procedure*, 19 VILL. L. REV. 325 (1973); Various Editors, *Federal Jurisdiction and Procedure*, 19 VILL. L. REV. 325 (1973); Various Editors, *Federal Statutes and Government Regulation*, 19 VILL. L. REV. 340 (1973); Kenneth A. Jacobsen, *Administrative Law - Administrative Procedure Act - Standing to Challenge Agency Action Requires a Showing That the Plaintiff Has Suffered Injury in Fact to a Protected Interest from the Face of the Particular Statutory Provision Allegedly Violated, or When Protective Intent is Clear from Its Legislative History*, 23 VILL. L. REV. 580 (1978); Various Editors, *Criminal Law*, 24 VILL. L. REV. 263 (1979).

6. Dieter G. Struzyna, *Third Circuit Review - Preface*, 24 VILL. L. REV. 193 (1979); see also, e.g., Barbara A. Schneller, *Editor's Preface*, 26 VILL. L. REV. 557 (1981) (retaining student-authored format); Gary A. Rome, *Federal Practice and Procedure - Comment - Appealability and Finality in the Third Circuit - Is the United States Supreme Court More Appealing Than the Third Circuit*, 25 VILL. L. REV. 884 (1980).

7. See, e.g., Various Editors, *Miscellaneous*, 26 VILL. L. REV. 861 (1981); Various Editors, *Constitutional Law*, 27 VILL. L. REV. 616 (1982); Anne P. Stark, Editor's Preface, 27 VILL. L. REV. 595 (1982).

8. See Frances M. Visco, *Editor's Preface*, 28 VILL. L. REV. 649 (1983) (explaining that length of student-written work has increased); see also Carolyn J. Warter, *Civil Rights - Title VI - The Exhaustion of Administrative Remedies is Not a Prerequisite to a Private Right of Action Under Title VI*, 28 VILL. L. REV. 693 (1983); Esther L. Bachrach, *Materiality of Misrepresentations Made on Visa Applications in Light of Current Congressional Policy*, 31 VILL. L. REV. 1046 (1986); Mary J. Mullany, *Health Law - Provider Challenge to State Medicaid Reimbursement Plan*, 37 VILL. L. REV. 1081 (1992); Christine M. Kovan, *Disability Law - Susquenita School District v. Raelee S., Pendent Place-*

notes or casebriefs, these student articles often combined critical legal analysis with practical advice for litigating attorneys.⁹

Despite the focus on publishing student pieces, articles submitted by nonstudent authors were occasionally included in various issues.¹⁰ In 1997, for example, the *Third Circuit Review* published a “*Report of the Third Circuit Task Force on Equal Treatment in the Courts*,” authored by the Commission on Gender and the Commission on Race & Ethnicity.¹¹

Additionally, numerous judges have contributed to the *Third Circuit Review* throughout its history.¹² United States Supreme Court Justice William J. Brennan wrote the introduction to the 1974–1975 issue to honor Albert Branson Mars, a jurist who served on the Third Circuit, as well as the Emergency Court of Appeals and as a district judge.¹³ Justice Brennan reprised his role in the 1976–1977 issue by authoring a dedication to Third Circuit Judge John Biggs, Jr.¹⁴

In 1983, the *Third Circuit Review* was dedicated to William H. Hastie, a former Governor of the Virgin Islands and Third Circuit Judge and Chief Judge Seitz authored an honorary introduction.¹⁵

In 1983, Chief Judge Seitz reprised his role to evaluate the *Third Circuit Review*'s purpose in celebration of its 10th anniversary.¹⁶ He en-

ment and Financial Responsibility Under the Individuals with Disabilities Education Act: The Third Circuit's Extension of Burlington, 42 VILL. L. REV. 1867 (1997).

9. See, e.g., Anna M. Maloney, *Semerenco v. Cendant Corp.: The Third Circuit Clarifies the Securities Exchange Commission's Rule 10B-5 in the Context of Public Misrepresentations*, 47 VILL. L. REV. 1171 (2002); Anthony D. Foti, *Could Jesus Serve on a Jury - Not in the Third Circuit: Religion-Based Peremptory Challenges in United States v. Dejesus and Bronshtein v. Horn*, 51 VILL. L. REV. 1057 (2006); Brian J. Boyle, *Bright-Line Rules and Inefficient Markets: The Third Circuit's 10b-5 Materiality Doctrine is Ripe for Revision*, 57 VILL. L. REV. 683 (2012); Carina M. Meleca, *An "Officer" and a G[old]man: The Third Circuit Finds Ambiguous Corporate Titles Jeopardize Right to Advancement Under Delaware Law in Aleynikov v. Goldman Sachs Group, Inc.*, 60 VILL. L. REV. 781 (2015). The first casebrief appears to have been published in 1993. Robert Ebby, *Constitutional Law - When Does Guilty of Third Degree Murder Equal Not Guilty by Reason of Insanity*, 38 VILL. L. REV. 1153 (1993). Additionally, when the VILLANOVA LAW REVIEW launched *Tolle Lege* in 2012, casenotes analyzing Third Circuit opinions were also published online. See, e.g., Douglas A. Behrens, *Blinded by the Light: The Third Circuit Curtails the Independent Ricci Defense in NAACP v. North Hudson Regional Fire & Rescue*, 58 VILL. L. REV. TOLLE LEGE 1 (2012).

10. See, e.g., Gerald Seipp, *Third Circuit's New Role as Activist Court on Immigration Issues*, 51 VILL. L. REV. 981 (2006).

11. *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355 (1997).

12. Indeed, in 1981, editors began publishing the list of judges currently serving on the circuit; a practice that remained until 1998. See, e.g., Various Editors, *Judges of the Court/Table of Cases*, 26 VILL. L. REV. 558 (1981); Various Editors, *Judges of the Court/Table of Cases*, 27 VILL. L. REV. 596 (1982).

13. See William J. Brennan Jr., *Dedication to Albert Branson Maris*, 20 VILL. L. REV. 403 (1974).

14. William J. Brennan Jr., *Third Circuit Review: Dedication*, 22 VILL. L. REV. 579 (1976).

15. Collins J. Seitz, *Dedication to William H. Hastie*, 21 VILL. L. REV. 431 (1976).

16. Collins J. Seitz, *Introduction*, 28 VILL. L. REV. 651 (1983).

couraged editors to scrutinize the *Third Circuit Review's* utility and purposefully consider “every aspect of its editorial process, from the selection of the topics or opinions it will explore to the legal analysis it offers its readers.”¹⁷ He encouraged editors to avoid simply picking cases for the mere fact that they lend themselves to criticism, and instead focus on the in-depth, probing legal analysis that presents the facts of a case fairly and objectively analyzes the court’s proposition.¹⁸

The next judicial introduction came from Third Circuit Judge Ruggero J. Aldisert in 1985.¹⁹ He provided the following suggestion to “increase the quality of professional criticism”:

If opinion writing is a fine art, writing a criticism is an even finer one. First, it is essential that the analyst pinpoint the exact legal dispute between the parties. Second, if the critic casts stones at the opinion writer’s reasoning, the stone thrower should recognize the distinctions among the court’s reasoning process, the weight given to the arguments, and the court’s exercise of value judgment. To implement these suggestions, the critic must fully understand the nature of the judicial decisionmaking process, as well as the sophisticated structure of “legal reasoning.”²⁰

Third Circuit Judge Doloris K. Sloviter echoed many of Judge Aldisert’s points when providing the introduction of the 20th anniversary issue of the *Third Circuit Review* in 1993.²¹ She specifically questioned the *Third Circuit Review's* topic selection process, noting the reasons certain cases were chosen to be critiqued were “not always clear.”²² She nevertheless applauded the topical categorization of student critiques because it allowed “the law review to study the unique culture that each court develops over time.”²³ In that spirit, she suggested the LAW REVIEW undertake greater in-depth analyses over broader areas of the law in addition to retaining the casenote format to analyze specific opinions.²⁴

In 1995, Chief Judge Seitz appeared once again in the *Third Circuit Review*, but this time, as the recipient of five tributes honoring his status as a giant within the legal field. Tributes honoring Chief Judge Seitz were authored by United States Supreme Court Chief Justice William Rehn-

17. *Id.*

18. *Id.*

19. Ruggero J. Aldisert, *Introduction*, 30 VILL. L. REV. 828 (1985).

20. *Id.* at 828.

21. Doloris K. Sloviter, *Introduction*, 38 VILL. L. REV. 1089 (1993)

22. *Id.* at 1089–90. (“Some years the Annual Review has featured cases that would be on any objective observer’s list of the most significant recent Third Circuit cases. Surprisingly, other equally, if not more, influential decisions have been overlooked.”).

23. *Id.* at 1090.

24. *Id.* at 1089–90.

quist,²⁵ United States Supreme Court Associate Justice William J. Brennan, Jr.,²⁶ Chief Justice of the Delaware Supreme Court E. Norman Veasey,²⁷ Judge Sloviter,²⁸ and one of Chief Judge Seitz's former law clerks, Beth Nolan.²⁹

The next judicial contribution arrived in 2002, provided by Edward Becker who, at that time, served as Chief Judge for the Third Circuit.³⁰ Chief Judge Becker's forward provided an overview of the history and practices of appellate mediation within the Third Circuit.³¹

The *Third Circuit Review* last published a judicial author in 2012. In his introduction to the *Third Circuit Review*, Third Circuit Judge D. Michael Fisher illuminated aspects of appellate judging that he contends may not be readily apparent to readers of legal scholarship.³² Emphasizing the collegial nature of the appellate bench, Judge Fisher explained how judges work together to arrive at a particular ruling and how opinions are circulated among judges before they are ultimately published.³³ He also explained that because the court relies on litigants and their advocates to "identify gaps in the law and present arguments for why and how they should be filled," the court is not well-positioned to opine on "ancillary areas of the law," preferring instead to opine on the issues directly before it.³⁴

Reflecting on the contributions made by judges, practitioners, and students, we are grateful that the *Third Circuit Review* has endeavored to sustain a rich body of scholarly analysis. As we continue to move the *Third Circuit Review's* legacy forward, we are reminded of Chief Judge Seitz's original charge to combine analysis with perspective to provide value to our legal audiences.

25. William H. Rehnquist, *Tribute to Judge Collins J. Seitz*, 40 VILL. L. REV. 545 (1995).

26. William J. Brennan Jr., *The Courage of Collins Seitz*, 40 VILL. L. REV. 547 (1995).

27. E. N. Veasey, *Collins Jacques Seitz Paradigm of Principle, Passion, Professionalism and Persuasion*, 40 VILL. L. REV. 559 (1995).

28. Dolores K. Sloviter, *Tribute to Collins J. Seitz: A Kind Man*, 40 VILL. L. REV. 553 (1995).

29. Beth Nolan, *Master of the Craft: A Tribute to Collins J. Seitz*, 40 VILL. L. REV. 565 (1995).

30. Edward R. Becker, *Foreword*, 47 VILL. L. REV. 1055 (2002).

31. *Id.*

32. D. M. Fisher, *Issues in the Third Circuit: Introduction*, 57 VILL. L. REV. 675 (2012) ("What I find intriguing in this issue of the Villanova Law Review is its focus on outcomes. That is, the case comments presented here provide insight into the substance of our opinions, but, through no fault of the authors or editors, can offer very little about how we got there. This is not a flaw, but rather a simple reality: the decision-making process of an appellate court is not entirely reflected in the text of an opinion, though the ultimate decision is.")

33. *Id.* at 678.

34. *Id.* at 680.

After speaking with judges and their law clerks, as well as practitioners and professors, we believe those who tune in to the Third Circuit's decisions would appreciate an effort that contemplates the Third Circuit's jurisprudence in its totality. By an analogy, this effort would provide for the Third Circuit what the GEORGETOWN LAW JOURNAL's *Annual Review of Criminal Procedure* provides for the criminal law community.³⁵ Thus, we are enthusiastic to carry on the tradition of the *Third Circuit Review*'s student-written casebrief model with a new feature titled the "Precedential Opinion Summary."

The Precedential Opinion Summary amalgamates precedential opinions issued over the prior year, publishes their holdings, and provides insight as to how those holdings fit within the broader context of the Third Circuit's jurisprudence. Opinions that either decided issues of first impression, received en banc consideration, or attracted concurring or dissenting opinions are highlighted.

Creating such a summary facilitates five objectives. First, the summary renders a service that no legal resource currently provides by simply housing Third Circuit precedential holdings in one quickly-accessible location.³⁶ Second, the summary helps scholars ascertain which areas of the law are categorically receiving precedential attention, answering Judge Sloviter's call to pinpoint which legal doctrines remain stagnant and which continue to evolve. Third, by identifying the opinions receiving a concurrence or dissent, the summary identifies principles that remain unresolved internally within the circuit or that may be subject to further dispute outside of it. Fourth, when practitioners confront unfamiliar legal questions, they can use the summary to jumpstart legal research. Fifth, the summary aids those who must track circuit law developments by providing notice of a new or changed rule.³⁷

35. See *About the Annual Review of Criminal Procedure*, GEORGETOWN LAW, <https://www.law.georgetown.edu/georgetown-law-journal/in-print/arcp/> [https://perma.cc/2M7Z-FRDA] (last visited Nov. 15, 2018).

36. This fittingly comports with Villanova Law Library being a long-standing repository of Third Circuit opinions. See *Opinions of the United States Court of Appeals for the Third Circuit*, VILLANOVA UNIVERSITY CHARLES WIDGER SCHOOL OF LAW, <https://digitalcommons.law.villanova.edu/thirdcircuit/> [https://perma.cc/8BX B-ZTT3] (last visited Nov. 15, 2018) ("As the official backup archive for the United States Court for the Third Circuit, Villanova University School of Law maintains digital copies of all opinions filed by the Court since May of 1994.").

37. For example, consider the value of such notice to jurists and practitioners in routine criminal sentencing. In *United States v. Azcona-Polanco*, 865 F.3d 148 (3d Cir. 2017), the Third Circuit held that when imposing conditions of supervised release upon a deportable immigrant, the district court must "explain and justify" its decision in open court "so that the appellate court is not left to speculate about the reasons." *Id.* at 153 (internal quotation marks and citations omitted). Notice of *Azcona-Polanco*'s mandate would be of obvious value to district court judges who must adhere to the Third Circuit's directives when administering sentencing colloquies, as well as to the government and defendants who rely on decisions like *Azcona-Polanco* when preparing for hearings.

The *Third Circuit Review's* Precedential Opinion Summary also honors the VILLANOVA LAW REVIEW maxim of “Tolle Lege.” Translated from Latin to English, Tolle Lege means “take up and read.” This phrase honors the Augustinian roots of Villanova University and can be directly traced to St. Augustine’s conversion to Christianity. Upon hearing the instruction to take up and read, Augustine quite literally took up St. Paul’s Letter to the Romans and simply read it. This momentary decision to merely read proved to be life changing for Augustine—and subsequently for all those who have since subscribed to Augustinian values.

The VILLANOVA LAW REVIEW and the Third Circuit Precedential Opinion Summary approach legal scholarship through the lens of Tolle Lege—striving to contribute relevant commentary that encourages the legal community to take up and read. By embracing the Tolle Lege perspective, we strive to add value to the legal community by challenging students, practitioners and jurists alike to apply arguments, analysis, and theory in a way that positively impacts our world.³⁸

Guided by these objectives and our mandate to survey precedential law within the circuit, the Precedential Opinion Summary took its maiden voyage in Volume LXIII. While we have set forth the summary’s initial structure, we in no way hope that structure remains stagnant. We encourage future VILLANOVA LAW REVIEW editors to further improve upon the Precedential Opinion Summary’s format so that both the summary and the entire *Third Circuit Review* remain responsive to the needs of the academic and practitioner community. We of course welcome all feedback in this endeavor.

38. See VILLANOVA UNIVERSITY OFFICE FOR MISSION & MINISTRY, TOLLE LEGE, xi (2d ed. 2016), https://www1.villanova.edu/content/dam/villanova/mission/m_andm_assets/2016FINALFULLCOVER.pdf [https://perma.cc/N9JX-9VWF]. In 2012, the VILLANOVA LAW REVIEW cemented its commitment to the Tolle Lege perspective when it introduced its online companion to the traditional print edition—appropriately titled VILLANOVA LAW REVIEW TOLLE LEGE. All articles published on the online companion are provided a citation of VILL. L. REV. TOLLE LEGE. Since 2012, VILLANOVA LAW REVIEW TOLLE LEGE has expanded the Law Review’s ability to contribute scholarship to the legal profession and encourage others to take up and read the knowledge that exists in our world. Students, scholars, attorneys, judges, and even lay individuals need not look any further than the *Tolle Lege* citation itself to propel them in their scholarly endeavors. Several articles providing in depth analysis of Third Circuit decisions can also be found on VILLANOVA LAW REVIEW TOLLE LEGE. See, e.g., Robert Turchick, *Is the FTC Playing Fair? The Third Circuit’s Decision in FTC v. Wyndham Worldwide Corp. Furthers Agency’s Data Security Efforts but Creates Tension for Smaller Businesses*, 61 VILL. L. REV. TOLLE LEGE 71 (2016); Travis Dunkelberger, *Third Circuit Takes the Wind Out of Frivolous Litigators’ Sails in Fair Wind Sailing, Inc. v. Dempster*, 60 VILL. L. REV. TOLLE LEGE 121 (2015); John D’Elia, *Keeping FLSA’s Promises: The Third Circuit Extends the Law’s Reach to More Joint Employers, Successors, and Supervisors in Thompson v. Real Estate Mortgage Network*, 60 VILL. L. REV. TOLLE LEGE 93 (2015); Keely Collins, *The Third Circuit Lays Another Trap for Unsuspecting Employers: Lupyan v. Corinthian Colleges Inc.*, 60 VILL. L. REV. TOLLE LEGE 47 (2015). For additional publications discussing Third Circuit precedent visit villanovawlawreview.com.

On behalf of Volumes LXIV and LXV, we thank the students, faculty advisors, and contributors who have grown the *Third Circuit Review* over the past forty-six years. It is in their honor that we answer Chief Judge Seitz's charge by charging forward.

Timothy J. Muyano
Editor-in-Chief, Volume LXIV

Thallia Malespin
Executive Editor, Volume LXIV

Matthew D. Venuti
Editor-in-Chief, Volume LXV

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Executive Editor, Volume LXV

THIRD CIRCUIT REVIEW: PRECEDENTIAL OPINION SUMMARY

The Precedential Opinion Summary collects precedential opinions issued by the U.S. Court of Appeals for the Third Circuit between January 1, 2018 and December 1, 2018. This compilation is designed to serve as a research tool rather than provide comprehensive analysis on any particular opinion. The summary is organized into two parts, civil and criminal matters, and within each part by issues of first impression, cases heard en banc, decisions with concurrences or dissents, and an appendix of opinions arranged by subject matter.

CIVIL MATTERS

Issues of First Impression

CLAYTON ACT § 4 – ANTITRUST STANDING – The Third Circuit discussed standing to pursue a cause of action by the purchaser of a product against a seller when the product is in some manner connected to a price-fixing conspiracy in the case of *In re Processed Egg Products Antitrust Litigation*.³⁹ Chief District Judge Stark, writing on behalf of Judge Fuentes and Chief Judge Smith, held that because the plaintiffs, as purchasers, were pursuing claims against the parties that conspired in selling price-fixed products, the plaintiffs were directly harmed.⁴⁰ Therefore, the plaintiffs had standing to pursue claims for antitrust violations.⁴¹ The direct line between the plaintiffs and the defendants in violation of the antitrust laws

39. 881 F.3d 262 (3d Cir. 2018) (Stark, C.J.).

40. *Id.* at 274.

41. *Id.*

made the case distinct from cases relied on by the district court where the connection between the plaintiffs and defendants was far more attenuated, which led the district court below to grant summary judgment for the defendants.⁴² The Third Circuit reversed the order for summary judgment and remanded the case for further proceedings.⁴³

CIVIL PROCEDURE – REMOVAL – In *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*,⁴⁴ the Third Circuit considered whether a defendant could properly remove an action to federal court in spite of the forum defendant rule when removal was issued prior to formal acceptance of service of process.⁴⁵ Judge Chagares, joined by Judge Jordan and Judge Fuentes, held that removal was appropriate after conducting a statutory analysis of 28 U.S.C. § 1441.⁴⁶ Next, the court decided that the district court did not err by “declining to remand the matter on grounds of preclusion.”⁴⁷ Finally, given the finding that the district court had proper jurisdiction, the court considered whether the district court properly dismissed the plaintiff’s claim.⁴⁸ In analyzing the Uniform Contribution Among Tort-feasors Act, the court held that the claim was improperly dismissed and accordingly reversed in part.⁴⁹

EMINENT DOMAIN – TAXI MEDALLION AS PROPERTY INTEREST – In *Newark Cab Association v. City of Newark*,⁵⁰ the Third Circuit considered whether taxi medallions constituted a recognizable property interest of the plaintiffs.⁵¹ Judge Chagares, joined by Judge Hardiman and Judge Jordan, noted that the plaintiffs’ Fifth Amendment Takings Clause claim and substantive due process claim failed because under New Jersey law the plaintiffs held no cognizable property interest in a taxi medallion.⁵² The court also found that the plaintiffs’ equal protection claim, state law claim of breach of contract, and equitable claims failed and affirmed the district court’s dismissal of those claims.⁵³ In issuing its opinion, the Third Circuit joined the Eighth Circuit in holding that “taxicab licenses themselves do not carry an inherent property interest guaranteeing the economic benefits of using the taxicab license.”⁵⁴

ENVIRONMENTAL LAW – WATER QUALITY CERTIFICATION – In *Delaware Riverkeeper Network v. Secretary of the Pennsylvania Department of Environmental*

42. *Id.*

43. *Id.* at 277.

44. 902 F.3d 147 (3d Cir. 2018) (Chagares, J.).

45. *Id.* at 152.

46. *Id.* at 151–54.

47. *Id.* at 154.

48. *Id.* at 154–56.

49. *Id.*

50. 901 F.3d 146 (3d Cir. 2018) (Chagares, J.).

51. *Id.* at 151.

52. *Id.* at 151–56.

53. *Id.* at 156–63.

54. *Id.* at 153 (citing *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 508 (8th Cir. 2009) (internal quotation marks omitted)).

Protection,⁵⁵ Judge Hardiman, writing for Judge Jordan and Judge Scirica, ruled on two matters of first impression before the court.⁵⁶ The first was whether the court's jurisdiction to hear cases under the Natural Gas Act required finality of the underlying agency action.⁵⁷ The panel held that it has jurisdiction to hear only final agency action under the Act, noting the "longstanding presumption that Congress intends judicial review over only final administrative action."⁵⁸ The second issue of first impression was whether the availability of a Water Quality Certification review by the Environmental Hearing Board (EHB) rendered the initial certification by defendants non-final.⁵⁹ The court noted two features of the EHB review process that indicate the initial certification constitutes a final action: (1) the review does not prevent the defendants' decision from taking immediate effect, and (2) the review before the EHB is *de novo*.⁶⁰ As such, the court held that the defendants' initial Water Quality Certification does constitute final agency authority, bringing it within the ambit of judicial review under the Natural Gas Act.⁶¹

FAIR DEBT COLLECTION PRACTICES ACT – In *Levins v. Healthcare Revenue Recovery Group LLC*,⁶² the Third Circuit discussed the appropriate standards for bringing claims under several sections of the Fair Debt Collection Practices Act (FDCPA).⁶³ Judge Jordan, joined by Judge Ambro and Judge Vanaskie, held that the petitioners stated a valid claim under section 1692e(14) of the Act because the debt collection company left an abbreviation of its full name in the voicemail in question, and it therefore did not identify its full business name in violation of the FDCPA.⁶⁴ In reaching this holding, the court cited the fact that "at this early stage in the case . . . the [plaintiffs] have plausibly alleged facts" suggesting that the company misrepresented itself while trying to collect its debt, and cited similar cases from the Fifth and Ninth Circuits.⁶⁵ However, the court held that the petitioners did not state a claim under subsection d(6) or e(10) of the FDCPA.⁶⁶ Therefore, the court vacated the dismissal of the e(14) claim, but affirmed the district court's dismissal of the other claims discussed.⁶⁷

FAIR DEBT COLLECTION PRACTICES ACT – HIGHWAY TOLLS – In *St. Pierre v. Retrieval-Masters Creditors Bureau*,⁶⁸ the Third Circuit addressed for the

55. 903 F.3d 65 (3d Cir. 2018) (Hardiman, J.).

56. *Id.* at 68.

57. *Id.*

58. *Id.* at 71.

59. *Id.* at 71–72.

60. *Id.* at 72.

61. *Id.* at 74–75.

62. 902 F.3d 274 (3d Cir. 2018) (Jordan, J.).

63. *Id.* at 279–84.

64. *Id.* at 280–81.

65. *Id.* at 281.

66. *Id.* at 282–84.

67. *Id.* at 284.

68. 898 F.3d 351 (3d Cir. 2018).

first time whether unpaid highway tolls constitute the type of debt obligation that could support a consumer claim under the Fair Debt Collection Practices Act (FDCPA).⁶⁹ Judge Krause, joined by Judge Greenaway, Jr., and Judge Jones, found that this type of debt could not support a consumer claim under the FDCPA.⁷⁰ Invoking its own three-part test to determine if the unpaid tolls constituted a debt, the court asked (1) whether the obligation arose from a transaction, (2) what property was the subject of the transaction, and (3) whether that property is primarily for “personal, family, or household purposes.”⁷¹ After finding affirmatively for the first factor, the court determined that the property—services rendered in exchange for highway tolls—was not primarily for personal, family, or household purposes.⁷² Thus, the court held that the unpaid tolls did not amount to a “debt” actionable under the FDCPA.⁷³

FEDERAL RULE OF CIVIL PROCEDURE 41(D) – AWARD OF ATTORNEY’S FEES – In *Garza v. Citigroup, Inc.*,⁷⁴ the Third Circuit discussed whether “costs” awarded under Federal Rule of Civil Procedure 41(d) may include an award of attorney’s fees from a voluntarily dismissed case.⁷⁵ Chief Judge Conti, joined by Judge Ambro and Judge Krause, held that “the drafters of Rule 41(d) left the definition of costs open-ended in the rule and only by statutory authority can it be expanded to include attorneys’ fees.”⁷⁶ The court therefore affirmed the holding of the district court due to the absence of such statutory language allowing the award.⁷⁷ In reaching this holding, the Third Circuit was persuaded by decisions of the Seventh and Fourth Circuits on the same issue, but notably declined to follow the district court’s reliance on a similar Sixth Circuit case which deemed costs to never include attorney’s fees.⁷⁸ The court likewise rejected the reasoning of the Eighth Circuit, which held attorney’s fees may always be awarded as costs under 41(d).⁷⁹

IMMIGRATION – COMMODITIES EXCHANGE ACT – In *Wang v. Attorney General of the United States*,⁸⁰ the Third Circuit discussed whether section 6b(a)(1)(B) of the Commodities Exchange Act requires proof of materiality for purposes of determining an individual’s status under the Immigra-

69. *Id.* at 356.

70. *Id.* at 364.

71. *Id.* at 360–61.

72. *Id.* at 362–63.

73. *Id.* at 364.

74. 881 F.3d 277 (3d Cir. 2018) (Conti, C.J.).

75. *Id.* at 281.

76. *Id.* at 283.

77. *Id.* at 284.

78. *Id.* at 282.

79. *Id.* at 281 (citing *Evans v. Safeway Stores, Inc.*, 623 F.2d 121 (8th Cir. 1980)).

80. 898 F.3d 341 (3d Cir. 2018) (Nygaard, J.) (petition granted and remanded).

tion and Nationality Act.⁸¹ Judge Nygaard, joined by Judge Chagares and Judge Jordan, joined the Seventh Circuit in holding that the provision does not require proof of the materiality of the defendant's fraud or deceit.⁸² Using a natural language approach to statutory interpretation, the court concluded that the words within the statute did not carry with them a requirement of materiality.⁸³

IMMIGRATION – JURISDICTION STRIPPING – In *Osorio-Martinez v. Attorney General of the United States*,⁸⁴ the Third Circuit considered whether a provision of the Immigration and Nationality Act (INA) that strips federal courts of jurisdiction to review expedited removal orders is an unconstitutional suspension of the writ of habeas corpus as applied to special immigrant juvenile (SIJ) designees seeking review.⁸⁵ Judge Krause, also writing for Judge Ambro and Judge Scirica, held that the INA jurisdiction-stripping provision violates the Suspension Clause as applied to the SIJ designees.⁸⁶ The court applied the two-part analysis of *Boumediene v. Bush*⁸⁷ to assess whether any attribute or circumstance barred the petitioners from invoking the Suspension Clause as well as any substitute procedures for habeas corpus.⁸⁸ The court concluded that by satisfying the rigorous congressional criteria for SIJ status, the petitioners demonstrated significant connections with the United States and earned statutory and procedural protections.⁸⁹ As such, they were entitled to invoke the Suspension Clause to petition for a writ of habeas corpus, but the expedited removal scheme did not offer adequate substitute process for the writ.⁹⁰ Therefore, the INA's jurisdiction-stripping provision unconstitutionally suspended the writ as applied, and the district court retained jurisdiction to evaluate the petitioners' claims on remand.⁹¹

INSURANCE – FEE SHIFTING STATUTE – In *Clemens v. New York Central Mutual Fire Insurance Co.*,⁹² Judge Greenaway, Jr., writing for Judge Restrepo and Judge Bibas, affirmed the District Court for the Middle District of Pennsylvania in rejecting, in whole, the plaintiff's request for over \$900,000 in attorney's fees.⁹³ In doing so, the court formally adopted the position that fee-shifting statutes that provide judges with the discretion to award fees also permit a judges to deny in whole a request for fees where

81. *Id.* at 344.

82. *Id.* at 348.

83. *Id.*

84. 893 F.3d 153 (3d Cir. 2018) (Krause, J.).

85. *Id.* at 158.

86. *Id.*

87. 553 U.S. 723 (2008).

88. *Osorio-Martinez*, 893 F.3d at 166.

89. *Id.* at 167.

90. *Id.*

91. *Id.* at 167, 178.

92. 903 F.3d 396 (3d Cir. 2018) (Greenaway, Jr., J.).

93. *Id.* at 398.

the fees are “outrageously excessive.”⁹⁴ The panel found that the district court had not abused its discretion when, forced to rely on the plaintiff’s counsel’s “recrea[tion]” of his time records, the judge found 87% percent of the charges to be “vague, duplicative, unnecessary, or inadequately supported by documentary evidence.”⁹⁵ As such, the court was within its discretion to wholly deny the request for attorney’s fees given the “excessive nature of the request” at the outset.⁹⁶

INSURANCE – TITLE INSURANCE – In *Lupu v. Loan City, LLC*,⁹⁷ Judge Ambro, writing for Judge McKee and Judge Restrepo, determined the duty a real estate title insurer owes to an insured when the borrowers assert claims against the insured.⁹⁸ The insured in this case filed a claim with its title insurer after the plaintiff filed a third amended complaint.⁹⁹ However, the third amended complaint did not contain the allegations for which the insured sought coverage under the policy, and Pennsylvania has adopted the rule that the obligation of the insurer extends only to those allegations within the “four corners” of the complaint.¹⁰⁰ Notwithstanding, the court held that the insurer’s duty to defend arose when the plaintiff filed a fourth amended complaint, which *did* contain allegations that would be covered under the insurer’s policy.¹⁰¹ Finally, the court held that the “in for one, in for all” rule that is applied to general liability insurance does not apply to title insurance, meaning the title insurer need only indemnify the insured for the individual allegations that are covered under the policy.¹⁰²

LABOR AND EMPLOYMENT – COLLECTIVE BARGAINING AGREEMENTS – In *Cup v. Ampco Pittsburgh Corp.*,¹⁰³ the Third Circuit contemplated whether retirees qualified as employees under a collective bargaining agreement, and ultimately held that the “parties’ dispute over retiree medical benefits is not subject to Section 6 of the CBA, [and therefore] it is not arbitrable.”¹⁰⁴ Judge Hardiman, joined by Chief Judge Smith and Judge Restrepo, reached this holding after considering how precedent requires that CBAs “be interpreted ‘according to ordinary principles of contract law.’”¹⁰⁵ Therefore, because the collective bargaining agreement did not contain provisions regarding retiree health benefits, and the memoran-

94. *Id.*

95. *Id.* at 399–400.

96. *Id.* at 400.

97. 903 F.3d 382 (3d Cir. 2018) (Ambro, J.).

98. *Id.* at 385.

99. *Id.* at 388.

100. *Id.* at 392.

101. *Id.* at 393.

102. *Id.* at 394.

103. 903 F.3d 58 (3d Cir. 2018) (Hardiman, J.).

104. *Id.* at 65.

105. *Id.* at 62–65 (quoting *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015)).

dum of agreement did not incorporate arbitration, the district court erred in compelling arbitration for suit brought by the retirees.¹⁰⁶

PRODUCTS LIABILITY – MEDICAL DEVICES – In *Shuker v. Smith & Nephew PLC*,¹⁰⁷ the court considered whether the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act preempted state law claims when a medical device is comprised of multiple components and not all components in the device are subject to the same regulations.¹⁰⁸ Judge Krause, joined by Judge Jordan and Judge Greenway, Jr., held that when determining whether a device is subject to a particular regulation, the court should assess the individual component at issue rather than the device as a whole.¹⁰⁹ The court reasoned that the Federal Food, Drug, and Cosmetic Act defines the term “device” as “not simply a finished ‘instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article,’ but also ‘any component, part, or accessory’ of that article.”¹¹⁰ The panel affirmed the district court’s finding that non-parallel state law regulations apply to this set of facts.¹¹¹

REHABILITATION ACT – In *Berardelli v. Allied Services Institute of Rehabilitation Medicine*,¹¹² the Third Circuit determined as a matter of first impression whether the Rehabilitation Act mandate of “reasonable accommodations” generally requires that individuals with disabilities be permitted to be accompanied by their service animals and “renders such requested accommodations *per se* reasonable in the ordinary course.”¹¹³ The court found the service animal regulations were equally relevant to the interpretation of the Rehabilitation Act as they are to the interpretation of the Americans with Disabilities Act (ADA).¹¹⁴ Thus, the court concluded, as under the ADA, an accommodation for a service animal under the Rehabilitation Act is “*per se* reasonable.”¹¹⁵

SECTION 1983 – FIRST AMENDMENT ASSOCIATIONAL CLAIMS – In *Palardy v. Township of Millburn*,¹¹⁶ the Third Circuit considered whether “public concern” and “private citizen” requirements for public employee free speech claims apply to a pure association claim arising from union affiliation.¹¹⁷ Judge Siler, writing on behalf of the court, joined the Fifth and Eleventh Circuits in holding that the “public concern” requirement from

106. *Id.* at 65.

107. 885 F.3d 760 (3d Cir. 2018) (Krause, J.).

108. *Id.* at 764.

109. *Id.* at 772.

110. *Id.* (quoting 21 U.S.C. § 321(h)).

111. *Id.* at 775.

112. 900 F.3d 104 (3d Cir. 2018) (Krause, J.).

113. *Id.* at 120.

114. *Id.*

115. *Id.*

116. 906 F.3d 76 (3d Cir. 2018) (Siler, J.).

117. *Id.* at 81.

*Connick v. Meyers*¹¹⁸ does not apply to associational claims because the union activity of public employees is “inevitably” of public concern.¹¹⁹ Turning next to the “private citizen” requirement from *Garcetti v. Ceballos*,¹²⁰ the Third Circuit explained that the requirement applied only to statements made pursuant to an employee’s official duties, and that union membership is not a spoken statement or an official duty of a public employee.¹²¹ Concluding that neither *Connick’s* nor *Garcetti’s* requirements bar an associational claim, the Third Circuit reversed the district court’s determination that Palardy had not satisfied a showing of constitutionally-protected conduct.¹²² Instead, the Third Circuit held that Palardy’s union membership was worthy of constitutional protection.¹²³

SECTION 1983 – EIGHTH AMENDMENT CLAIM – In *Ricks v. Shover*,¹²⁴ the Third Circuit considered whether a prison guard sexually abusing an inmate can result in a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.¹²⁵ Judge Rendell, writing on behalf of Judge Chagares and Judge Scirica, held that “prison sexual abuse can violate the Constitution.”¹²⁶ To constitute an Eighth Amendment violation, the Third Circuit required that the incident “be objectively, sufficiently intolerable and cruel, capable of causing harm, and the official must have a culpable state of mind.”¹²⁷ For the objective prong, the court declined to adopt a zero tolerance approach to all sexualized touching in prison.¹²⁸ The Third Circuit joined the Second, Seventh, Ninth, Tenth, and Eleventh Circuits in making this determination, and permitted Ricks to re-plead his previously-dismissed sexual abuse claim under this standard.¹²⁹

SECTION 1983 – FOURTEENTH AMENDMENT – ADA CLAIM– In *Haberle v. Troxell*,¹³⁰ the Third Circuit discussed whether, as a general rule, the ADA applies to arrests.¹³¹ Judge Jordan, writing for the majority, held that “police officers may violate the ADA when making an arrest by failing to provide reasonable accommodations for a qualified arrestee’s disability, thus subjecting him to discrimination.”¹³² The court went on to state that “the

118. 461 U.S. 138 (1983).

119. *Palardy*, 906 F.3d at 82.

120. 547 U.S. 410 (2006).

121. *Palardy*, 906 F.3d at 83–84.

122. *Id.* at 84.

123. *Id.*

124. 891 F.3d 468 (3d Cir. 2018) (Rendell, J.).

125. *Id.* at 471.

126. *Id.* at 473.

127. *Id.* at 475.

128. *Id.* at 477.

129. *Id.* at 473, 479.

130. 885 F.3d 170 (3d Cir. 2018) (Jordan, J.).

131. *Id.* at 178.

132. *Id.* at 180.

ADA can indeed apply to police conduct during an arrest.”¹³³ The Third Circuit joined the Fifth, Eighth, and Eleventh Circuits in making this determination.¹³⁴

SECTION 1983 – ABSOLUTE QUASI-JUDICIAL IMMUNITY – In *Russell v. Richardson*,¹³⁵ the Third Circuit addressed whether court marshals are entitled to absolute quasi-judicial immunity for their official acts in enforcing and executing a court order.¹³⁶ Judge Krause, writing on behalf of the court, held “quasi-judicial immunity extends only to the acts authorized by the court order, i.e., to the execution of a court order, and not to the manner in which it is executed.”¹³⁷ The Third Circuit noted that immunity is a functional question, and concluded that lawfully entrusted functions of court marshals are fully protected by quasi-judicial immunity, but that “the use of excessive force in the performance of those functions is neither at the direction of the judge . . . nor a duty incident to the execution of the judge’s order.”¹³⁸ The Third Circuit affirmed the district court’s decision to deny the court marshal quasi-judicial immunity in this case because his actions were outside the scope of his quasi-judicial function.¹³⁹ The Third Circuit joined the Seventh, Ninth, and Tenth Circuits in making this determination.¹⁴⁰

SECTION 1983 – EXCESSIVE ATTORNEY’S FEES – In *Young v. Smith*,¹⁴¹ the Third Circuit considered “whether 42 U.S.C. § 1988(b) permits courts to ‘deny a request for [attorney’s] fees in its entirety when the request is so outrageously excessive that it shocks the conscience of the court.’”¹⁴² Judge McKee, writing for the court, noted that under section 1988(b) a court may allow the prevailing party in a civil rights action to collect reasonable attorney’s fees.¹⁴³ Judge McKee also wrote that a court has the discretion to deny attorney’s fees to a prevailing party based on counsel’s misconduct.¹⁴⁴ The Third Circuit previously held that under Pennsylvania’s Bad Faith Statute, a court has the discretion to deny a fee petition when the amount requested is “outrageously excessive.”¹⁴⁵ The court formally applied the holding of that case to fee petitions filed pursuant to section 1988, thereby affirming the district court’s decision and joining the First, Fourth, and Seventh Circuits, opining that “a court may deny

133. *Id.*

134. *Id.*

135. 905 F.3d 239 (3d Cir. 2018) (Krause, J.).

136. *Id.* at 247–48.

137. *Id.* at 250.

138. *Id.* at 251 (citation omitted).

139. *Id.* at 245, 251.

140. *Id.* at 249.

141. 905 F.3d 229 (3d Cir. 2018) (McKee, J.).

142. *Id.* at 235 (alteration in original) (quoting *M.G. v. E. Reg’l High Sch. Dist.*, 386 F. App’x 186 (3d Cir. 2010)).

143. *Id.* at 234.

144. *Id.*

145. *Id.* at 235–36 (citing 42 PA. CONS. STAT. § 8371 (2019)).

a request for attorney's fees *in toto* where the request is so outrageously excessive that it shocks the conscience of the court."¹⁴⁶

En Banc

ADMINISTRATIVE LAW – TENANT'S RIGHTS – In *Hayes v. Harvey*,¹⁴⁷ the Third Circuit, sitting en banc, considered whether a defendant landlord could evict a family who had secured tenancy with a previous landlord under enhanced voucher tenancy in conjunction with the federal housing assistance program and 42 U.S.C. § 1437f(t)(1)(B).¹⁴⁸ The court held that by interpreting the statute and consulting legislative history and Supreme Court precedent, the enhanced voucher program intended to grant “tenants a right to choose to stay in their housing developments such that their landlords may not evict them without cause, even at the end of a lease term.”¹⁴⁹ The court also noted that other courts have held similarly, and that HUD's guidance provides for similar outcomes.¹⁵⁰ After holding that the family had a right to stay in their apartment, the court continued to consider under what circumstances eviction would be appropriate under 42 U.S.C. § 1437f.¹⁵¹ Proceeding to discuss what constitutes “good cause,” the court remanded the case to the district court for factual findings on whether good cause existed in this case.¹⁵² Judge Fisher writing for the dissent, joined by Judge Hardiman, argued that Congress could not have intended to give tenants the right to remain.¹⁵³

CIVIL PROCEDURE – JURISDICTION – In *Vooyo v. Bentley*,¹⁵⁴ the Third Circuit, sitting en banc, considered whether the court had jurisdiction to review a decision of the Supreme Court of the Virgin Islands.¹⁵⁵ Judge McKee, writing for the majority, noted that the key consideration in this case was statutorily examining H.R. 6116, enacted by Congress to revoke the Third Circuit's jurisdiction of review for “all ‘cases commenced on or after’ December 28, 2012.”¹⁵⁶ The primary issue was whether the date given in H.R. 6116 referred to the date a suit is filed or the date a final decision is issued in the Virgin Islands.¹⁵⁷ The Third Circuit had previously visited this issue in *Bason v. Government of the Virgin Islands*,¹⁵⁸ hold-

146. *Id.* at 236.

147. 903 F.3d 32 (3d Cir. 2018) (Greenaway, Jr., J.) (Fisher, J. dissenting) (en banc).

148. *Id.* at 36–58.

149. *Id.* at 45.

150. *Id.* at 46–48.

151. *Id.* at 48–49.

152. *Id.*

153. *Id.* at 58 (Fisher, J., dissenting).

154. 901 F.3d 172 (3d Cir. 2018) (McKee, J.) (Bibas, J. dissenting) (en banc).

155. *Id.* at 174.

156. *Id.*

157. *Id.*

158. 767 F.3d 193 (3d Cir. 2014).

ing that jurisdiction existed so long as suit was filed before the date noted.¹⁵⁹ Here, however, the court elected to overrule that decision and hold that “Congress intended for the effective date for H.R. 6116 to apply to the date an appeal from a final decision of the Virgin Islands Supreme Court is filed and not to the date a suit is filed in the Superior Court.”¹⁶⁰ Therefore, the court held that it did not have jurisdiction to hear the appeal.¹⁶¹ Dissenting, Judge Bibas asserting that stare decisis mandates the court retain jurisdiction to hear the appeal.¹⁶²

Split Decisions

CONSTITUTIONAL LAW – ARTICLE III STANDING – In *In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, & Liability Litigation*,¹⁶³ Chief Judge Smith, writing for Judge Chagares, affirmed the District Court for the District of New Jersey in dismissing the plaintiff’s products liability claim against the defendant.¹⁶⁴ In doing so, the court held for the first time that a plaintiff cannot claim that a purchase decision of a correctly functioning product, in and of itself, could constitute “economic harm” where there was no further allegation that the plaintiff “failed to receive the economic benefit of her bargain.”¹⁶⁵ Accordingly, the plaintiff’s ex post facto wish that she had not purchased a product that worked as intended, without more, did not meet the injury requirement of Article III of the United States Constitution.¹⁶⁶ The court found that the plaintiff’s theory of injury did not fit into “any one of the three recognized theories of economic injury: (1) alternative product; (2) premium price; and (3) benefit of the bargain,” and accordingly the court dismissed the complaint.¹⁶⁷ Judge Fuentes, in dissent, argued that the third theory was applicable to plaintiff’s case insofar as she did not receive the benefit of the bargain.¹⁶⁸ The dissent termed the safety of the product a “key element” of the bargain that the defendant misrepresented.¹⁶⁹ By virtue of the misrepresentation of the material element of the bargain, the dissent argued that the plaintiff did allege a proper injury-in-fact sufficient to survive Article III scrutiny.¹⁷⁰

159. *Vooy*, 905 F.3d at 174–75.

160. *Id.* at 175–76.

161. *Id.* at 195.

162. *Id.* (Bibas, J. dissenting).

163. 903 F.3d 278 (3d Cir. 2018) (Smith, C.J.) (Fuentes, J., dissenting).

164. *Id.* at 280–81.

165. *Id.* at 281.

166. *Id.* at 290.

167. *Id.* at 282.

168. *Id.* at 294 (Fuentes, J., dissenting).

169. *Id.* (Fuentes, J., dissenting).

170. *Id.* (Fuentes, J., dissenting).

EDUCATION – INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) – In *Rena C. v. Colonial School District*,¹⁷¹ the Third Circuit discussed whether a public school district's decision to pay tuition to a private school fulfilled its obligation to provide a free and appropriate public education.¹⁷² Judge Fisher, joined by Judge Nygaard and Judge Greenaway, Jr., held that “by agreeing, without limitation, to pay tuition at a private school, the school district, as the local educational agency, agrees that the private school placement is appropriate and that paying tuition there fulfills its obligation to provide a free and appropriate public education.”¹⁷³ The court also addressed “whether or not the absence of attorney’s fees provides substantial justification for rejecting a ten-day offer.”¹⁷⁴ The court did not read the IDEA as forcing parents to “decide between the resolution of a placement dispute and paying for the attorney who assisted in achieving an appropriate placement for the student.”¹⁷⁵ Judge Fisher held that “[a] school district seeking to settle a dispute in which a lawyer has been involved should acknowledge that the parent has accrued attorney’s fees and should clearly state if its offer includes the payment of any fees.”¹⁷⁶ The Third Circuit disagreed with the Fifth Circuit’s holding that “the absence of attorney’s fees in a settlement offer did not substantially justify the parent’s rejection.”¹⁷⁷ Judge Greenaway, Jr., concurring in the decision, wrote separately to “discuss the difficulties certain kinds of ten-day offers can create for school districts, parents, and, ultimately, courts.”¹⁷⁸

FEDERAL TORT CLAIMS ACT – TSA LIABILITY – In *Pellegrino v. United States Transportation Security Administration, Division of Department of Homeland Security*,¹⁷⁹ the Third Circuit considered, as a matter of first impression among all United States Circuit Courts, whether Transportation Security Administration screeners are “investigative or law enforcement officers” under the Federal Tort Claims Act (FTCA).¹⁸⁰ Judge Krause, joined by Judge Scirica, held that TSA screeners are not “investigative or law enforcement officers,” and thus affirmed the district court’s judgment that the defendant TSA agents are not included within the FTCA’s waiver of federal sovereign immunity for intentional acts committed by law enforcement.¹⁸¹ Looking to the text of the FTCA, legislative intent, and policy, the court concluded that “investigative or law enforcement officers”

171. 890 F.3d 404 (3d Cir. 2018) (Fisher, J.) (Greenaway, Jr., J., concurring).

172. *See id.* at 416.

173. *Id.*

174. *Id.* at 418.

175. *Id.* at 419–20.

176. *Id.* at 420.

177. *Id.* at 419 (citing *Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201, 210 (5th Cir. 2011)).

178. *Id.* at 420 (Greenway, Jr., J., concurring).

179. 896 F.3d 207 (3d Cir. 2018) (Krause, J.) (Ambro, J., dissenting).

180. *Id.* at 209.

181. *Id.* at 230.

was meant to refer only to “*criminal* law enforcement officers, not to federal employees who conduct only administrative searches.”¹⁸² Judge Ambro, in dissent, argued that the term should instead be read to include any officer with legal authority to execute searches for violations of federal law.¹⁸³ Petition to rehear the case en banc has been granted.¹⁸⁴

IMMIGRATION – REMOVAL PROCEEDINGS AND DETENTION – In *Guerrero-Sanchez v. Warden York County Prison*,¹⁸⁵ the Third Circuit considered whether “the detention of an alien . . . who has a reinstated order of removal but is also pursuing withholding-only relief [is] governed by § 1226(a) or § 1231(a)?” Furthermore, if section 1231(a) controlled, the court need also answer “does § 1231(a)(6) compel an implicit bond hearing requirement after prolonged detention?”¹⁸⁶ Judge Greenaway, Jr., writing for the court, held that section 1231(a), the “post-removal” statute, governs the detention of an alien with a reinstated order of removal.¹⁸⁷ The Third Circuit reasoned that when a reinstated order of removal is in place, “withholding-only proceedings do not disturb the underlying order of removal; rather, they only potentially impede the order’s execution with respect to a specific country” because “a removal order is unquestionably final when it is first entered.”¹⁸⁸ Furthermore, the Third Circuit held that section 1231(a)(6) implicitly requires that all aliens facing prolonged detention under that provision are entitled to a bond hearing and are entitled to be released from detention “unless the government establishes that the alien poses a risk of flight or a danger to the community.”¹⁸⁹ Therefore, the Third Circuit affirmed the district court’s ruling that the defendant receive a bond hearing and be subsequently released, but on different statutory grounds; the district court invoked section 1226(a), and the Third Circuit invoked section 1231(a) and section 1231(a)(6).¹⁹⁰ In his concurrence, Judge Rendell agreed with the majority’s reasoning and result, but noted that neither statute adequately addressed how to evaluate the detention of an alien with a reinstated removal order, and called for legislative clarification for this limited circumstance.¹⁹¹ The Third Circuit joined the Ninth Circuit in holding that section 1231(a) is the appropriate statute to apply in this circumstance.¹⁹²

182. *Id.* at 225.

183. *Id.* at 232 (Ambro, J., dissenting).

184. *Pellegrino v. U.S. Transp. Sec. Admin., Div. of Dep’t of Homeland Sec.*, 904 F.3d 329 (3d Cir. 2018).

185. 905 F.3d 208 (3d Cir. 2018) (Greenaway, Jr., J.) (Rendell, J., concurring).

186. *Id.* at 211.

187. *Id.*

188. *Id.* at 216–17.

189. *Id.* at 224.

190. *Id.* at 211.

191. *Id.* at 228 (Rendell, J., concurring).

192. *Id.* at 227.

*Appendix of Precedential Civil Opinions**Administrative Law*

Penn. Dep't of Human Servs. v. United States, 897 F.3d 497 (3d Cir. 2018) (Greenberg, J.) (affirmed) (concluding that the United States Department of Health and Human Services Departmental Appeals Board's decision to uphold the Centers for Medicare & Medicaid Services' refusal to reimburse the costs of provider training programs complied with the Administrative Procedures Act).

Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm'n, 894 F.3d 509 (3d Cir. 2018) (Jordan, J.) (Scirica, J., concurring) (vacated and remanded) (holding Delaware River Basin Compact's provision granting Delaware River Basin Commission authority to review "projects" undertaken in the Basin was ambiguous and remanded on issue of intent of Compact's framers).

Americans with Disabilities Act

Geness v. Cox, 902 F.3d 344 (3d Cir. 2018) (Krause, J.) (affirmed in part and reversed in part) (remanding case to district court to reinstate claims against the state of Pennsylvania for violations of ADA and due process after plaintiff spent nine years in jail "for a crime that may not have occurred," but affirming district court's dismissal of section 1983 claim).

Vorchheimer v. Philadelphian Owners Ass'n, 903 F.3d 100 (3d Cir. 2018) (Bibas, J.) (finding plaintiff did not plausibly plead necessity of a specific accommodation in reasonable accommodation case where defendant offered four alternative accommodations).

Antitrust Law

Lifewatch Servs. Inc. v. Highmark Inc., 902 F.3d 323 (3d Cir. 2018) (Ambro, J.) (reversing and remanding, holding that plaintiff company which created cardiac heart monitors had stated claim that the Sherman Act was designed to protect when there was circumstantial evidence of agreement between defendants by parallel conduct).

Phila. Taxi Ass'n, Inc v. Uber Techs., Inc., 886 F.3d 332, 339 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 211 (2018) (affirmed) (affirming failure to state a claim because conduct did not constitute monopolization under Sherman Act or an antitrust injury; the claim failed to set forth allegations that demonstrated: (i) harmful, anticompetitive product, (ii) specific intent to monopolize, or (iii) the dangerous possibility of achieving monopoly power).

Attorney's Fees

Carroll v. E One Inc., 893 F.3d 139 (3d Cir. 2018) (Smith, J.) (affirming district court's decision to award attorney's fees and costs pursuant to Federal Rule of Civil Procedure 41(a)(2) after plaintiffs' attorney failed to

perform meaningful pre-suit investigation and repeatedly brought meritless claims then voluntarily dismissed them with prejudice after costs were incurred).

Bankruptcy

In re Arctic Glacier Int'l, Inc., 901 F.3d 162 (3d Cir. 2018) (Bibas, J.) (affirmed) (holding res judicata effect of foreign debtor's confirmed plan precluded claims asserted by unit purchasers, releases in foreign debtor's confirmed plan barred claims asserted by unit purchasers, and enforcement of releases did not violate due process rights of unit purchasers).

In re Energy Future Holdings Corp., 904 F.3d 298 (3d Cir 2018) (Greenaway, Jr., J.) (Rendell, J., dissenting) (affirming bankruptcy court's amendment of approval order where a clear or manifest error existed in original order with respect to a merger termination fee that was central to the relevant legal calculus).

In re Tribune Media Co., 902 F.3d 384 (3d Cir. 2018) (Ambro, J.) (holding claimant who filed proof of claim against debtor in bankruptcy court consented to the court's jurisdiction over his claims and affirming dismissal of his claims).

In re W.R. Grace & Co., 900 F.3d 126 (3d Cir. 2018) (Ambro, J.) (affirmed in part, vacated in part, and remanded) (holding policies did not have to be specifically listed in order for asbestos-related claims asserted against insurer based on its worker's compensation policies to be covered by channeling injunction, and "derivative liability" requirement should not be interpreted to permit the injunction of only direct actions against debtor's insurers).

Crystallex Int'l Corp. v. Petróleos de Venez., S.A., 879 F.3d 79 (3d Cir. 2018) (Rendell, J.) (Fuentes, J., dissenting) (holding that a transfer by a non-debtor subsidiary to its parent corporation was not a fraudulent transfer under the Delaware Uniform Fraudulent Transfer Act).

In re Phila. Entm't & Dev. Partners, LP, 879 F.3d 492 (3d Cir. 2018) (Greenberg, J.) (reversed and remanded) (reversing the bankruptcy court's holding that the *Rooker-Feldman* doctrine barred its review of fraudulent transfer claims).

Civil Procedure

Doe v. Boyertown Area Sch. Dist., 890 F.3d 1124 (3d Cir. 2018) (McKee, J.) (affirming denial of preliminary injunction against enforcement of bathroom policy where plaintiffs failed to establish likelihood of success or the risk of irreparable harm).

GBForefront L.P. v. Forefront Mgmt. Grp., LLC, 888 F.3d 29 (3d Cir. 2018) (Jordan, J.) (holding courts must distinguish between business trusts and traditional trusts for purposes of establishing diversity jurisdiction).

Gonzalez v. Corning, 885 F.3d 186 (3d Cir. 2018) (Hardiman, J.) (affirmed) (denying plaintiff's motion for class certification as not justiciable under Article III because plaintiffs could not meet the commonality requirement).

Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467 (3d Cir. 2018) (Smith, C.J.) (reversed and remanded) (holding that plaintiffs have Article III standing but failed to satisfy Federal Rule of Civil Procedure 23(a) because the "relaxed" Rule 23 standard is no longer the law followed by the Third Circuit).

Paladino v. Newsome, 885 F.3d 203 (3d Cir. 2018) (Fuentes, J.) (affirmed in part, vacated in part, and remanded) (holding district court did not err in finding that plaintiff did not exhaust available administrative remedies for his Eighth and Fourteenth Amendment claims; there was no genuine issue of material fact concerning plaintiff's excessive force claim because he submitted grievance forms that specifically alleged excessive force; the district court erred in resolving factual disputes concerning the exhaustion of administrative remedies because the court did not provide adequate notice).

Walsh v. Defenders, Inc., 894 F.3d 583 (3d Cir. 2018) (Greenberg, J.) (affirmed) (holding district court properly remanded class action to New Jersey Superior Court for lack of jurisdiction under local controversy exception to Class Action Fairness Act, finding defendant was a local defendant against whom significant relief was sought, and whose conduct provided a significant basis for plaintiffs' claims).

Commercial Law

Krieger v. Bank of Am., N.A., 890 F.3d 429 (3d Cir. 2018) (Krause, J.) (reversing district court and holding that plaintiff sufficiently pleaded claim under Fair Credit Billing Act and Truth in Lending Act in alleging that bank wrongfully refused to remove unauthorized credit card charge).

MacDonald v. Cashcall, Inc., 883 F.3d 220 (3d Cir. 2018) (Schwartz, J.) (affirming district court's determination that an entire loan agreement was unenforceable because the arbitration forum listed in the forum selection clause was nonexistent and the forum selection clause was not severable from the rest of the agreement).

Panico v. Portfolio Recovery Assocs., LLC, 879 F.3d 56 (3d Cir. 2018) (Restrepo, J.) (reversed and remanded) (holding Delaware's tolling statute did not toll the Delaware statute of limitations in a lawsuit filed in another jurisdiction, against an out-of-state party, based on agreements governed by Delaware law).

Reading Health Sys. v. Bear Stearns & Co., 900 F.3d 87 (3d Cir. 2018) (Roth, J.) (affirmed) (finding court does not have to transfer action based on forum-selection clause if clause is invalid or if the clause does not cover action or claims that defendant is seeking to transfer).

Constitutional Law – First Amendment

Conard v. Penn. State Police, 902 F.3d 178 (3d Cir. 2018) (Greenberg, J.) (reversing district court’s dismissal of plaintiff’s First Amendment violation case against her former employers after finding plaintiff “adequately alleged retaliatory conduct by defendants that satisfies” all three prongs of *Mirabella* test, and remanding case for reconsideration).

Corporate Law

City Select Auto Sales Inc. v. David Randall Assocs., Inc., 885 F.3d 154 (3d Cir. 2018) (Hardiman, J.) (affirmed) (holding officer of a corporation could be held liable under the Telephone Consumer Protection Act (TCPA) for unsolicited faxes sent on behalf of the corporation; the use of the phrase “significant level” in the jury instructions did not misstate the law because the word “significant” does not create a higher burden of proof; the district court’s explanation of the word “significant” to the jury was appropriate because the court explained it in the context of the requirement that the officer exercised active oversight of, or control over, the conduct that violated the TCPA).

Clientron Corp. v. Devon IT, Inc., 894 F.3d 568 (3d Cir. 2018) (Greenaway, Jr., J.) (vacated and remanded) (holding district court erred in piercing corporate veil to hold shareholder of defendant corporation personally liable for portion of the judgment as sanction for misconduct in discovery).

Education Law

K.D. ex rel. Dunn v. Downingtown Area Sch. Dist., 904 F.3d 248 (3d Cir. 2018) (Bibas, J.) (affirmed) (finding school district did not violate student’s rights under IDEA because the school provided individualized education programs that were “reasonably calculated . . . in light of the child’s circumstances”).

Energy Law

Adorers of the Blood of Christ v. Fed. Energy Regulatory Comm’n, 897 F.3d 187 (3d Cir. 2018), *cert. denied, sub nom. Adorers of the Blood of Christ, U.S. Province v. FERC*, 139 S. Ct. 1169 (2019) (Greenaway, Jr., J.) (affirming district court’s dismissal of the petitioner’s claim alleging a Religious Freedom Restoration Act violation because under the Natural Gas Act “no entity may seek judicial review of a [Federal Energy Regulatory Commission] order unless it first sought rehearing from the agency”).

Township of Bordentown, N.J. v. FERC, 903 F.3d 234 (3d Cir. 2018) (Chagares, J.) (finding plaintiff’s Federal Energy Regulatory Commission claims lacked merit, finding New Jersey Department of Environmental Protection (NJDEP) incorrectly determined that it was preempted from

providing a hearing to plaintiff to challenge issuance of pipeline permit, and remanding to NJDEP for such a hearing).

Environmental Law

Giovanni v. U.S. Dep't of the Navy, 906 F.3d 94 (3d Cir. 2018) (Jordan, J.) (Bibas, J., concurring) (affirmed in part, vacated and remanded in part) (barring claim for health assessment because the claim challenged ongoing cleanup effort but finding medical monitoring claim not barred by sovereign immunity because it was not challenged under CERCLA).

Penn. Dep't of Envtl. Prot. v. Trainer Custom Chem. LLC, 906 F.3d 85 (3d Cir. 2018) (Jordan, J.) (affirmed in part, vacated in part, and remanded) (finding the text and structure of CERCLA and HASCA require defendant to be responsible for "all costs" involving environmental cleanup of its property, including costs incurred before defendant acquired the property).

Trinity Indus., Inc. v. Greenlease Holding Co., 903 F.3d 333 (3d Cir. 2018) (Jordan, J.) (affirmed in part, vacated in part, and remanded) (finding district court's pollution cleanup cost allocation flawed where it used volumetric data as a proxy for costs, failing to consider that some remediation measures cost more than others).

Fair Debt Collection Practices Act (FDCPA)

Rotkiske v. Klemm, 890 F.3d 422 (3d Cir. 2018) (en banc) (Hardiman, J.) *cert. granted* 139 S. Ct. 1259 (2019) (holding Fair Debt Collection Practices Act (FDCPA) one-year limitations period begins to run when would-be defendant violates the FDCPA, not when potential plaintiff discovers or should have discovered violation).

Schultz v. Midland Credit Mgmt., 905 F.3d 159 (3d Cir. 2018) (Vanaskie, J.) (reversed and remanded) (holding debt collection letter that claimed debt forgiveness would be reported to Internal Revenue Service may constitute a violation of FDCPA because letter was misleading).

Tatis v. Allied Interstate, LLC, 882 F.3d 422 (3d Cir. 2018) (Hardiman, J.) (vacated and remanded) (holding that under the Fair Debt Collection Practices Act a collection letter that makes a "settlement offer" potentially violates the Act's prohibitions on misleading or deceptive representations).

Tepper v. Amos Fin., LLC, 898 F.3d 364 (3d Cir. 2018) (Ambro, J.) (affirmed) (finding FDCPA debt collector that also met FDCPA definition of creditor was still a debt collector for purposes of the FDCPA).

False Claims Act

United States ex rel. Palmer v. C&D Techs., Inc., 897 F.3d 128 (3d Cir. 2018) (Greenberg, J.) (affirmed in part, vacated in part, and remanded) (holding that district court in a False Claims Act action does not per se abuse its discretion in reducing attorney's fees below amount opposing

party accepts as reasonable, but remanding on issue of whether prevailing party may recover attorney's fees incurred in litigating dispute over attorney's fees).

United States ex rel. Silver v. Omnicare, Inc., 903 F.3d 78 (3d Cir. 2018) (Chagares, J.) (reversed and remanded) (holding False Claims Act's public disclosure bar is not implicated "where a realtor's information permits an inference of fraud that could have not been supported by the public disclosures alone").

Federal Preemption

Lupian v. Joseph Cory Holdings, LLC, 905 F.3d 127 (3d Cir. 2018) (Chagares, J.) (affirmed) (ruling IWPCA not superseded by FAAAA because impact of IWPCA's wage regulation is too remote from FAAAA's deregulatory objectives regarding motor carriers).

Federal Tort Claims Act

Sconiers v. United States, 896 F.3d 595 (3d Cir. 2018) (Greenaway, Jr., J.) (affirming district court's denial of plaintiff's claims because she failed to file her claims within six months of the agency's written denial as required under the Federal Tort Claims Act).

Freedom of Information Act

Biear v. Attorney Gen. U.S., 905 F.3d 151 (3d Cir. 2018) (Fuentes, J.) (affirmed in part, reversed in part) (finding appellant exhausted administrative remedies and district court should have exercised jurisdiction because claim against FBI for failing to produce documents did not become moot simply because FBI produced those documents).

Healthcare Law

Pennsylvania v. President U.S., 888 F.3d 52 (3d Cir. 2018) (Hardiman, J.) (reversing district court and granting intervenor's motion to intervene because it had sufficient interest in protecting religious exemption from Affordable Care Act's contraceptive mandate and its interests were not adequately represented by federal government).

Immigration Law

Bakran v. Sec'y, U.S. Dep't of Homeland Sec., 894 F.3d 557 (3d Cir. 2018) (Shwartz, J.) (affirmed in part, vacated in part) (holding there is no federal constitutional right for person convicted of sex offense to sponsor foreign spouse's immigration application, but vacating for lack of jurisdiction the district court ruling upholding certain protocols used to enforce Adam Walsh Child Protection and Safety Act, as protocols are committed to exclusive discretion of Secretary of Homeland Security and are thus nonreviewable).

Bonilla v. Sessions, 891 F.3d 87 (3d Cir. 2018) (Shwartz, J.) (denying review of immigration judge's conclusions that immigrant did not meet reasonable fear test for asylum where immigrant failed to show deprivation of rights or prejudice arising from failure of counsel to attend asylum hearing).

Borbot v. Warden Hudson Cty. Corr. Facility, 906 F.3d 274 (3d Cir. 2018) (Hardiman, J.) (affirmed) (finding plaintiff was not entitled to new bond hearing as he failed to demonstrate how his detention under section 1226(a) was unreasonably prolonged due to government delay or some other cause).

Lewin v. Attorney Gen. U.S., 885 F.3d 165 (3d Cir. 2018) (Jordan, J.) (review denied) (declining petition for review because petitioner's conviction constituted an aggravated felony under the INA).

Mondragon-Gonzalez v. Attorney Gen. U.S., 884 F.3d 155 (3d Cir. 2018) (Vanaskie, J.) (denying petition for review of the Board of Immigration Appeals' decision that appellant's conviction of unlawful contact with a minor was grounds for removal because the decision was consistent with Congress's intent to make crimes that harm children deportable offenses).

Ricketts v. Attorney Gen. U.S., 897 F.3d 491 (3d Cir. 2018) (Jordan, J.) (motion to transfer granted) (holding that the Second Circuit has sole appellate jurisdiction because United States District Court for the Eastern District of New York made petitioner's nationality determination).

Saravia v. Attorney Gen. U.S., 905 F.3d 729 (3d Cir. 2018) (Fuentes, J.) (petition granted) (granting petition to review Board of Immigration's order denying application for asylum when Board failed to provide appellant with notice and opportunity to corroborate claim).

S.E.R.L. v. Attorney Gen. U.S., 894 F.3d 535 (3d Cir. 2018) (Jordan, J.) (petition for review denied) (upholding Board of Immigration Appeals' interpretation of "particular social group" under Immigration and Nationality Act).

Tima v. Attorney Gen. U.S., 903 F.3d 272 (3d Cir. 2018) (Bibas, J.) (denying plaintiff's petition for review where removal charge is based on a post-admission crime because fraud waiver does not reach post-admission crimes).

Williams v. Attorney Gen. U.S., 880 F.3d 100 (3d Cir. 2018) (Smith, C.J.), *cert. denied, sub nom. Williams v. Attorney Gen. U.S.*, 139 S. Ct. 863 (2019) (denying a petition for review when lawful permanent resident was "properly found removable" for his forgery conviction, considered an aggravated felony).

Insurance Law

Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield, 890 F.3d 445 (3d Cir. 2018) (Krause, J.) (holding that managed healthcare insurance contract clauses prohibiting insureds from assigning claims to third parties are enforceable under Employee Retirement Income Security Act).

Migliaro v. Fid. Nat'l Indem. Ins. Co., 880 F.3d 660 (3d Cir. 2018) (Rendell, J.) (affirmed) (concluding that written rejection of proof of loss claim amounts to denial when “based on it, the policyholder files suit against the carrier, thereby accepting the written rejection of a proof of loss as a written denial of the claim”).

Intellectual Property Law

Tanksley v. Daniels, 902 F.3d 165 (3d Cir. 2018) (Fisher, J.) (affirmed) (affirming district court’s dismissal of copyright infringement claim after finding three-episode series created by plaintiff was not substantially similar to popular TV series *Empire*, despite the fact that defendant had a copy of the script and DVD of plaintiff’s series).

Labor and Employment Law

Bradley v. W. Chester Univ. of Pa. State Sys. of Higher Educ., 880 F.3d 643 (3d Cir. 2018) (Brann, J.), *cert. denied*, 139 S. Ct. 167 (2018) (affirming district court’s grant of summary judgement but finding employee’s statement was not protected by First Amendment because “speech was made as a government employee and not a citizen” and affirming district court’s dismissal because university was entitled to Eleventh Amendment sovereign immunity after analyzing the *Fitchik* factors).

DiFiore v. CSL Behring, LLC, 879 F.3d 71 (3d Cir. 2018) (Fisher, J.) (affirmed) (holding that “an employee’s protected activity must be the ‘but-for’ cause of adverse actions to support a claim of retaliation under the [False Claims Act].”).

Gillispie v. Regionalcare Hosp. Partners, Inc., 892 F.3d 585 (3d Cir. 2018) (McKee, J.) (affirmed) (affirming district court’s grant of summary judgement to hospital against hospital employee who brought action under the whistleblower protection provision of the Emergency Medical Treatment and Active Labor Act).

Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113 (3d Cir. 2018) (Shwartz, J.) (affirmed) (holding judicial interpretation of pastor’s employment contract with church would entangle the court in religious doctrine in violation of Establishment Clause).

Minarsky v. Susquehanna Cty., 895 F.3d 303 (3d Cir. 2018) (Rendell, J.) (vacated and remanded) (rejecting district court’s holding that plaintiff’s reporting delay caused by subjective fear of retaliation satisfied second prong of the *Faragher-Ellerth* affirmative defense for purposes of summary judgment).

Maritime Law

In re Frescati Shipping Co., Ltd., 886 F.3d 291 (3d Cir. 2018) (Smith, J.) (affirmed in part, reversed in part, and remanded) (determining “[t]he District Court’s judgment in favor of Frescati on the breach of contract claim and the prejudgment interest award will be affirmed. The District

Court's judgment in favor of Frescati on the negligence claim will be vacated. The District Court's judgment in favor of the United States will be affirmed in part with respect to CARCO's liability on the subrogated breach of contract claim, but the judgment will be reversed and remanded for further proceedings in light of our equitable recoupment ruling for the purpose of recalculating damages and prejudgment interest. The District Court's order . . . denying CARCO's motion for partial summary judgment on its limitation of liability defense, will be affirmed").

Liberty Woods Int'l, Inc. v. Motor Vessel Ocean Quartz, 889 F.3d 127 (3d Cir. 2018) (Roth, J.) (Ambro, J., concurring) (affirmed) (holding Carriage of Goods by Sea Act (COGSA) does not create substantive right to in rem suits, and, thus, bill of lading's forum selection clause requiring suit to be brought in jurisdiction which disallowed in rem suits does not violate COGSA).

Racketeer Influenced and Corrupt Organizations Act (RICO)

Humphrey v. GlaxoSmithKline PLC, 905 F.3d 694 (3d Cir. 2018) (McKee, J.) (affirmed) (determining plaintiffs could not bring private right of action under RICO because plaintiffs did not satisfy "domestic injury to business or property" requirement).

Section 1983 - Bivens

Brown v. Sage, 903 F.3d 300 (3d Cir. 2018) (Fuentes, J.) (Chagares, J., concurring in part and dissenting in part) (reversed) (holding Third Circuit precedent, as opposed to precedent from circuit in which cases occurred, must be used to determine whether prior cases count as strikes for purpose of denying party to file *in forma pauperis*)

Section 1983 – Eighth Amendment

Holland v. Rosen, 895 F.3d 272 (3d Cir. 2018) (Ambro, J.), *cert. denied*, 139 S. Ct. 440 (2018) (affirmed) (holding U.S. Constitution does not provide right to cash bail or corporate surety bonds as alternative to non-monetary conditions of pretrial release, thus criminal defendant failed to demonstrate sufficient likelihood of success on the merits to support preliminary injunction challenging New Jersey Criminal Justice Reform Act under Fourth, Eighth, and Fourteenth Amendments).

Jutrowski v. Township of Riverdale, 904 F.3d 280 (3d Cir. 2018) (Krause, J.) (affirmed in part, reversed in part and remanded) (holding plaintiff alleging unconstitutional conduct by multiple officers must establish the personal involvement of each under section 1983; however, plaintiff may maintain claim that officers conspired to cover up the conduct).

Section 1983 – Excessive Force

Murray v. City of Philadelphia, 901 F.3d 169 (3d Cir. 2018) (Chagares, J.) (appeal dismissed) (dismissing appeal for consideration of section 1983)

claim brought pro se by representative of the estate, because a pro se non-attorney representative of estate cannot represent other parties in federal court).

Section 1983 – Fourth Amendment

Nguyen v. Pennsylvania, 906 F.3d 271 (3d Cir. 2018) (Bibas, J.) (affirmed) (finding statute of limitations barred plaintiff's section 1983 claim for unreasonable search and seizure when limitations period began when search occurred rather than when court invalidated the search).

Section 1983 – Fourteenth Amendment

Augustin v. City of Philadelphia, 897 F.3d 142 (3d Cir. 2018) (Hardiman, J.) (reversed and remanded) (holding system of liens used by Philadelphia to collect unpaid gas bills, combined with remedies available to plaintiff-landlords under the Pennsylvania Municipal Claim and Tax Lien Law, does not violate due process).

Judge v. Shikellamy Sch. Dist., 905 F.3d 122 (3d Cir. 2018) (Hardiman, J.) (affirmed) (finding plaintiff was not deprived of procedural due process rights via alleged constructive discharge because she voluntarily resigned from her position of employment).

Section 1983 – Qualified Immunity

Bland v. City of Newark, 900 F.3d 77 (3d Cir. 2018) (Hardiman, J.) (reversed) (determining court lacked jurisdiction to review district court's consideration of expert testimony and officers who used deadly force were entitled to qualified immunity from excessive force claims).

Kane v. Barger, 902 F.3d 185 (3d Cir. 2018) (Fuentes, J.) (reversed) (reversing district court's grant of summary judgment on grounds of qualified immunity for police officer who engaged in sexual misconduct with an assault victim).

Karns v. Shanahan, 879 F.3d 504 (3d Cir. 2018) (Chagares, J.) (Roth, J., dissenting) (affirmed) (affirming district court's grant of summary judgment on the grounds that "NJ Transit [is] an arm of the state and, thus, entitled to Eleventh Amendment immunity").

Sauers v. Borough of Nesquehoning, 905 F.3d 711 (3d Cir. 2018) (Jordan, J.) (Vanaskie, J., concurring in part and dissenting in part) (vacated) (finding officer had qualified immunity when officer did not have fair warning that he could be subject to constitutional liability during a reckless police pursuit because standard was not yet clearly established).

Walker v. Coffey, 905 F.3d 138 (3d Cir. 2018) (Roth, J.) (affirmed in part, vacated in part, and remanded) (holding prosecutors were entitled to qualified immunity because it is not clearly established that an employee has the right to keep contents of work emails free from law enforcement search under the Fourth Amendment, especially when the employer produces the emails to law enforcement).

Securities Law

In re Hertz Glob. Holdings Inc. Sheet Metal Workers Local Union 80 Pension Tr. Fund, 905 F.3d 106 (3d Cir. 2018) (Jordan, J.) (affirmed) (dismissing putative securities fraud class action suit against corporation when plaintiff-shareholders could not adequately demonstrate “strong inference of scienter required by PSLRA”).

Taksir v. Vanguard Grp., 903 F.3d 95 (3d Cir. 2018) (Chagares, J.) (affirmed) (finding overcharged commissions do not constitute omission of a “material fact” and thus plaintiff’s breach of contract claims were not preempted by Securities Litigation Uniform Standards Act).

Tax Law

Spireas v. Comm’r of Internal Revenue, 886 F.3d 315 (3d Cir. 2018) (Hardiman, J.) (Roth, J., dissenting) (affirmed) (holding royalties received under a patent license agreement should be treated as ordinary income as opposed to capital gains because not “all substantial rights” to the patent were transferred under the transaction).

Telephone Consumer Protection Act

Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018) (Roth, J.) (affirmed) (affirming district court’s grant of summary judgment in favor of Yahoo because plaintiff did not present evidence as to Yahoo’s capacity to function as an autodialer in violation of the Telephone Consumer Protection Act).

Title IX

Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018) (McKee, J.) (affirmed) (holding district court properly refused to enjoin the defendant school district’s policy of “allowing transgender students to use bathrooms and locker rooms that are consistent with the students’ gender identities” because “the presence of transgender students in the locker and restrooms is no more offensive to constitutional or Pennsylvania-law privacy interests than the presence of the other students who are not transgender” and their presence does not violate Title IX).

Transportation

Pellegrino v. U.S. Transp. Sec. Admin, Div. of Dep’t of Homeland Sec., 904 F.3d 329 (3d Cir. 2018) (Smith, C.J.) (vacated) (vacating opinion and judgment entered July 11, 2018 and granting petition for rehearing).

CRIMINAL MATTERS

Issues of First Impression

CONSTITUTIONAL CHALLENGES – FOURTH AMENDMENT – In *United States v. Clark*,¹⁹³ the Third Circuit held that police officers had impermissibly extended a traffic stop when they questioned the driver and passenger on their previous criminal records, and that evidence seized during the stop was thus seized impermissibly.¹⁹⁴ Judge Greenberg, joined by Judge Jordan and Judge Vanaskie, noted that “[a] traffic stop becomes unlawful when it ‘last[s] . . . longer than is necessary’ to complete its mission.”¹⁹⁵ In its analysis, the court noted that after officers at the stop confirmed that the driver had a valid license, tasks related to the mission of the stop were “complete” and that any questioning related to the driver or passenger’s criminal history was not tied to the mission of the stop.¹⁹⁶ Thus, the court affirmed the district court’s ruling that the stop was impermissibly extended as well as its grant of the motion to suppress a handgun seized from the vehicle after the “traffic-stop’s mission concluded.”¹⁹⁷

GENERAL CHALLENGES TO CONVICTION – Judge Chagares, writing for Judge Scirica and Judge Rendell, dealt with numerous issues of first impression relating to challenges brought by defendants to their convictions in *United States v. Gonzalez*.¹⁹⁸ Foremost, the court determined that the district court was not required to give the jury a specific unanimity instruction with respect to means of the crime charged.¹⁹⁹ In doing so, it held that the mens rea and individual acts requirements of the cyberstalking statute constituted means and not elements, leaving them outside of the ambit of charges that would require specific unanimity instructions.²⁰⁰ Second, the court held that the district court properly constructed a “death results” instruction by including both proximate and actual cause elements under two different theories of liability.²⁰¹ Next, the court held that the defendant could not claim protected speech as a defense because her speech constituted either (1) defamatory speech or (2) speech integral to engaging in criminal conduct.²⁰² In finding that the cyberstalking statute as applied to the defendants did not violate the First Amendment, the court noted it was in accord with many of its sister circuits.²⁰³ Finally, in an evidentiary ruling, the court determined that the Federal Rule of

193. 902 F.3d 404 (3d Cir. 2018) (Ambro, J.) (affirmed).

194. *Id.* at 411.

195. *Id.* at 410 (alterations in original) (quoting *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015)).

196. *Id.* at 411.

197. *Id.*

198. 905 F.3d 165, 174 (3d Cir. 2018) (Chagares, J.) (affirmed).

199. *Id.* at 185.

200. *Id.* at 186.

201. *Id.* at 189.

202. *Id.* at 192.

203. *Id.* at 193–94.

Evidence 803(4) hearsay exception extended beyond physicians and covered statements the defendant made to a mental health professional or therapist.²⁰⁴

HABEAS PETITIONS – FEDERAL DETAINEES – In *Reese v. Warden Philadelphia FDC*,²⁰⁵ the Third Circuit addressed whether a federal detainee may challenge their pretrial detention via a section 2241 habeas petition.²⁰⁶ Judge Fuentes, writing for the court, joined the Fifth and Seventh Circuits in holding that “a federal detainee’s request for release pending trial can only be considered under the Bail Reform Act and not under a section 2241 petition for habeas relief.”²⁰⁷ The Third Circuit reasoned that although section 2241 grants district courts the authority to entertain writs of habeas corpus filed by prisoners claiming to be in custody in violation of the Constitution, courts have long stressed that “defendants should pursue the remedies available within the criminal action.”²⁰⁸ In particular, Judge Fuentes noted, “[f]unneling requests for pretrial relief through the criminal action encourages an orderly, efficient resolution of the issues, maintains respect for the appellate process, and prevents duplication of judicial work and judge-shopping.”²⁰⁹ The Third Circuit therefore affirmed the district court’s ruling that a habeas petition was not a proper vehicle to challenge pre-trial detention of a federal detainee, as the Bail Reform Act provides a comprehensive scheme governing pretrial-release decisions.²¹⁰

SENTENCING – In *United States v. Peppers*,²¹¹ the Third Circuit determined whether current post-sentencing law may be used when determining which Armed Career Criminal Act (ACCA) clauses a defendant’s prior convictions may implicate.²¹² Previously, the Seventh and Eleventh Circuits held that only case law existing at the time of a defendant’s sentencing may be used to decide the merits of the defendant’s *Johnson* claim.²¹³ The Eleventh Circuit has since changed and concluded that courts can use case law post-dating a defendant’s sentence when deciding the ACCA clauses into which that defendant’s prior convictions may fall.²¹⁴ The Third Circuit joined the Eleventh Circuit, finding post-sentencing cases may be used to support the defendant’s claim.²¹⁵

204. *Id.* at 200.

205. 904 F.3d 244 (3d Cir 2018) (Fuentes, J.) (affirmed).

206. *Id.* at 245.

207. *Id.*

208. *Id.* at 246.

209. *Id.* at 247.

210. *Id.* at 247.

211. 899 F.3d 211 (3d Cir. 2018).

212. *Id.* at 227.

213. *Id.* at 228–29.

214. *Id.*

215. *Id.* at 230.

SENTENCING – EIGHTH AMENDMENT – CRUEL AND UNUSUAL PUNISHMENT – In *United States v. Grant*,²¹⁶ the Third Circuit determined whether “the Eighth Amendment prohibit[s] term-of-years sentences for the entire duration of a juvenile homicide offender’s life expectancy when the defendant’s ‘crimes reflect transient immaturity [and not] . . . irreparable corruption.’”²¹⁷ This case follows the Supreme Court’s decision in *Miller v. Alabama*,²¹⁸ which held that “mandatory [life without parole] sentences for juvenile homicide offenders violate[] the Eighth Amendment.”²¹⁹ The district court at resentencing, following *Miller*, “determined that Grant’s upbringing, debilitating characteristics of youth, and post-conviction record sufficiently evidenced that he was not incorrigible and that a [life imprisonment without parole] sentence was therefore inappropriate under *Miller*.”²²⁰ The lower court limited its review to the “RICO conspiracy and racketeering counts” because those “received a mandatory life sentence.”²²¹ As a result, the lower court left in place the sentences for the remaining convictions and imposed on Grant a new sentence of sixty-five years without parole, or a release age of seventy-two.²²² Grant appealed, arguing that the sentence was “de facto [life imprisonment without parole]” and thus a violation of his Eighth Amendment rights.²²³ The Third Circuit, in evaluating Eighth Amendment Supreme Court precedent, held that “a term-of-years sentence without parole that meets or exceeds the life expectancy of a juvenile offender who is still capable of reform is inherently disproportionate and therefore violates the Eighth Amendment”²²⁴ This holding “has also been adopted by a plurality of [other circuit] courts[,]” including the Seventh Circuit, Ninth Circuit, and Tenth Circuit with only the Eight Circuit holding otherwise.²²⁵

Sentencing – Sentence Enhancement – In *United States v. Glass*,²²⁶ the Third Circuit stated, “We have yet to determine whether or in what circumstances state statutes that criminalize offers to sell constitute controlled substance offenses for purposes of enhancement under the [United States Sentencing] Guidelines.”²²⁷ The court noted that a state conviction does not qualify as a controlled substance offense if the ele-

216. 887 F.3d 131 (3d Cir. 2018) (Greenaway, Jr., J.) (Cowen, J., concurring in part and dissenting in part), *reh’g en banc granted, opinion vacated*, 905 F.3d 285 (3d Cir. 2018).

217. *Id.* at 135 (alteration in original) (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)).

218. 567 U.S. 460 (2012).

219. *Grant*, 887 F.3d at 136.

220. *Id.* at 136–37.

221. *Id.* at 136.

222. *Id.*

223. *Id.* at 142.

224. *Id.*

225. *Id.* at 145–46.

226. 904 F.3d 319 (3d Cir. 2018) (Vanaskie, J.) (affirmed).

227. *Id.* at 322.

ments of the offense are broader than those listed in the sentencing guidelines.²²⁸ Judge Vanaski, writing for the court, outlined that the First, Second, Seventh, and Tenth Circuits all held that state statutes expressly criminalizing an offer to sell are not broader than the guidelines.²²⁹ The Third Circuit, however, declined to rule on this specific issue and instead pointed out that the statute in question did not mention offers to sell drugs.²³⁰ Judge Vanaski stated, “[a]ssuming a state statute that criminalizes a mere offer to sell sweeps beyond [the guidelines] we are not convinced that the statute at issue here . . . crosses that line.”²³¹ The Third Circuit ultimately affirmed the district court’s decision to apply the enhancement because the statute in question was not broader than the guidelines and so “it is a controlled substance offense and may serve as a predicate offense to a career-offender enhancement.”²³²

SENTENCING – SENTENCE ENHANCEMENT – In *United States v. Mayo*,²³³ the Third Circuit addressed whether the defendant’s previous convictions qualified as requisite crimes for a sentencing enhancement under the Armed Career Criminal Act (ACCA).²³⁴ Judge Jordan, joined by Judge Chagares and Judge Fuentes, determined that there was jurisdiction for Mayo’s motion under precedent established in *United States v. Peppers*.²³⁵ Next, the court applied the categorical approach to classifying Pennsylvania aggravated assault as a violent felony by comparing it to the ACCA’s element of physical force.²³⁶ The court noted that the Pennsylvania conviction requires bodily injury and observed physical force and bodily injury do not necessarily equate neatly; thus, the court held that the defendant’s conviction for aggravated assault under Pennsylvania law does not qualify as a violent felony and remanded his case for resentencing.²³⁷ In its reasoning, the court noted that the Fourth and Fifth Circuits have reached similar conclusions.²³⁸

Split Decisions

HABEAS CORPUS – INEFFECTIVE ASSISTANCE OF COUNSEL – In *Reeves v. Fayette SCI*,²³⁹ the Third Circuit discussed what type of evidence is considered “new evidence” under the actual innocence standard, which holds

228. *Id.* at 321.

229. *Id.* at 322.

230. *Id.*

231. *Id.*

232. *Id.* at 324.

233. 901 F.3d 218 (3d Cir. 2018) (Jordan, J.) (vacated and remanded).

234. *Id.* at 220–21.

235. *Id.* at 223–24.

236. *Id.* at 224–30.

237. *Id.* at 230–31.

238. *Id.* at 229–30.

239. 897 F.3d 154 (3d Cir. 2018) (Shwartz, J.) (McKee, J., concurring) (vacated and remanded).

that an untimely habeas petition is not barred when a petitioner makes a “credible showing of actual innocence.”²⁴⁰ Judge Shwartz, joined by Judge McKee and Judge Cowen, held that “when a petitioner asserts ineffective assistance of counsel based on counsel’s failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence” this is considered “new evidence” under the actual innocence standard.²⁴¹ Judge Shwartz reasoned that this limited approach “ensures that reliable, compelling evidence of innocence will not be rejected” and “is consistent with the Supreme Court’s command that a petitioner will pass through the actual innocence gateway only in rare and extraordinary cases.”²⁴² The Third Circuit joined the First, Second, Sixth, Seventh, and Ninth Circuits in making this determination.²⁴³ The court vacated the district court’s ruling and remanded for further proceedings consistent with this opinion.²⁴⁴ Judge McKee wrote separately to highlight the weight of the evidence that supported the petitioner’s claim of actual innocence and the questionable nature of the investigation that resulted in his conviction.²⁴⁵

PRISONER LITIGATION REFORM ACT – In *Rinaldi v. United States*,²⁴⁶ Judge Krause, writing for Judge Fuentes, decided three matters of first impression: (1) the showing required to establish administrative remedies were not “available” under the PLRA, (2) whether a full examination of a procedurally defaulted claim constitutes “exhaustion” under the PLRA, and (3) whether cellmate assignments fall under the discretionary function exception of the Federal Tort Claims Act (FTCA).²⁴⁷ The district court found that both of the plaintiff’s PLRA claims were barred for a lack of exhaustion of administrative remedies, and it further found that the FTCA claim was barred by the discretionary function exception.²⁴⁸ The majority of the Third Circuit panel held the plaintiff could show that an administrative remedy was unavailable to him where, by virtue of intimidation, (1) he was actually deterred from lodging a grievance and (2) the threat would deter a reasonable inmate from doing so.²⁴⁹ The court remanded the First Amendment claim for proceedings regarding the “availability” of the administrative remedy.²⁵⁰ On the second issue, the court held that, although the plaintiff failed to follow the formal grievance process for his Eighth Amendment claim, he had still exhausted his adminis-

240. *Id.* at 160.

241. *Id.* at 164.

242. *Id.* at 164.

243. *Id.* at 161–62.

244. *Id.* at 165.

245. *Id.* at 165–66 (McKee, J., concurring).

246. 904 F.3d 257 (3d Cir. 2018) (Krause, J.) (Scirica, J., concurring in part and dissenting in part) (affirmed in part and vacated and remanded in part).

247. *Id.* at 262.

248. *Id.* at 264.

249. *Id.* at 269.

250. *Id.* at 270.

trative remedies by virtue of the full review of his claim on the merits by the Regional Director.²⁵¹ Finally, the court held that the assignment of cellmates meets the “discretionary function test” and is thus exempt under the FTCA.²⁵² Judge Scirica, writing in dissent, took issue with the court’s holding as to the Eighth Amendment claim.²⁵³ He argued that a review on the merits should not excuse the procedural deficiencies of the plaintiff’s Eighth Amendment claim and would therefore have found that the plaintiff did not exhaust his administrative remedies.²⁵⁴

Appendix of Precedential Criminal Opinions

Appellate Procedure

United States v. Goldstein, 902 F.3d 411 (3d Cir. 2018) (Roth, J.) (granting petition for rehearing with respect to Supreme Court’s decision in *Carpenter v. United States*).

United States v. Kalb, 891 F.3d 455 (3d Cir. 2018) (Scirica, J.) (affirmed) (holding that federal appellate courts lack jurisdiction to consider appeal because untimely motion for reconsideration, even if decided on merits, does not toll criminal statutory appeal period).

United States v. Renteria, 903 F.3d 326 (3d Cir. 2018) (Fuentes, J.) (affirmed) (declining to adopt “reasonable foreseeability” test for venue under traditional venue inquiry, finding venue proper).

Criminal Motions, Motions to Suppress

United States v. Clark, 902 F.3d 404 (3d Cir. 2018) (Ambro, J.) (affirmed) (affirming motion to suppress handgun seized during traffic stop because stop was effectively completed once officer confirmed driver’s authority to operate vehicle, and subsequent questioning about criminal activity to car passenger went beyond inquiry incident to traffic stop).

United States v. De Castro, 905 F.3d 676 (3d Cir. 2018) (Vanaskie, J.) (affirmed) (finding officer’s request for defendant to remove hands from pockets did not constitute a seizure under the Fourth Amendment when officer spoke in conversational tone, was not demonstrating authority, and did not use intimidating conduct).

United States v. Foster, 891 F.3d 93 (3d Cir. 2018) (Jordan, J.) (affirmed) (affirming two felon in possession of firearm convictions and sentences, where (1) officers had reasonable suspicion to stop, question and detain defendant; (2) testimony regarding prior wrong acts supported motive rather than propensity; (3) evidence sufficiently supported jury verdict finding defendant guilty of constructive firearm; and (4) presence and possession of firearms properly enhanced defendants’ sentences).

251. *Id.* at 272.

252. *Id.* at 273–74.

253. *Id.* at 274 (Scirica, J., dissenting).

254. *Id.* at 279–80 (Scirica, J., dissenting).

United States v. Hird, 901 F.3d 196 (3d Cir. 2018) (Nygaard, J.), amended and superseded on reh'g en banc, 918 F.3d 322, (affirming in part, vacating in part, and remanding) (affirming that district court's decision to dismiss motion requesting charges of mail and wire fraud dismissed; affirming perjury convictions of three appellants; but remanding one defendant's case for resentencing when judge gave sentence in line with obstruction charge instructions instead of correct charge (making false statements to the FBI)).

United States v. James, 888 F.3d 42 (3d Cir. 2018) (Smith, C.J.) (affirmed) (declining motion to dismiss indictment or suppress evidence due to defendant's inability to establish legislative immunity under Organic Act of the Virgin Islands for his conversion of legislative funds for personal use).

United States v. Noel, 905 F.3d 258 (3d Cir. 2018) (Krause, J.) (affirmed) (holding motion for new trial was properly denied because defendant failed to establish that motion was grounded on "newly discovered evidence" and because defendant failed to produce evidence that a "specific, non-speculative impropriety" had occurred).

United States v. Thomas, Jr., 905 F.3d 276 (3d Cir. 2018) (Greenaway, Jr., J.) (affirmed in part, vacated in part, and remanded) (holding motion to unseal court records was properly denied, in spite of presumptive right of access to plea hearing documents under First Amendment, because compelling government interests of national security would be impaired by permitting full access to those documents).

United States v. Werdene, 883 F.3d 204 (3d Cir. 2018) (Greenaway, Jr., J.) (Nygaard, J., concurring) (affirmed) (affirming magistrate judge's motion to suppress because the judge was detached and neutral when determining that the warrant was supported by probable cause and thus the good faith exception to the exclusionary rule applied).

Due Process

United States v. Welshans, 892 F.3d 566 (3d Cir. 2018) (Restrepo, J.) (Fuentes, J., concurring in part and dissenting in part) (affirmed in part, vacated in part, remanded) (holding prosecutorial misconduct occurred, but did not render trial fundamentally unfair, and that obstruction of justice enhancement was improperly applied at sentencing hearing).

Fourth Amendment

United States v. Green, 897 F.3d 173 (3d Cir. 2018) (Fisher, J.) (affirmed) (holding that traffic stop did not violate defendant's Fourth Amendment rights because the officer had reasonable suspicion that the defendant was speeding and "had a 'particularized and objective' basis for suspecting that [the defendant] was engaged in criminal activity" so "extending the traffic stop to facilitate a dog sniff was permissible").

United States v. Foster, 891 F.3d 93 (3d Cir. 2018) (Jordan, J.) (affirmed) (affirming two felon in possession of firearm convictions and sentences, where (1) officers had reasonable suspicion to stop, question and detain defendant; (2) testimony regarding prior wrong acts supported motive rather than propensity; (3) evidence sufficiently supported jury verdict finding defendant guilty of constructive firearm possession; and (4) presence and possession of firearms properly enhanced defendants' sentences).

United States v. Williams, 898 F.3d 323 (3d Cir. 2018) (Roth, J.) (Hardiman, J., concurring in part and concurring in judgment) (Fisher, J., concurring in part) (affirmed) (holding the Fourth Amendment allows the subject of a consensual search to terminate search by withdrawing his consent but the subject here did not withdraw consent before police found illicit drugs).

Habeas Petitions

Abdul-Salaam v. Sec'y of Pa. Dep't of Corr., 895 F.3d 254 (3d Cir. 2018) (Chagares, J.), *cert. denied*, 139 S. Ct. 851 (2019) (reversed in part and remanded) (reversing in part district court's denial of habeas petition challenging death sentence and remanding for issuance of writ of habeas corpus directed to penalty phase on basis of ineffective assistance of counsel).

Bennett v. Superintendent Graterford SCI, 886 F.3d 268 (3d Cir. 2018) (Restrepo, J.) (reversed and remanded) (reversing the denial of habeas corpus and remanding to grant a conditional writ of habeas corpus because the adjudication on the merits claim did not apply to petitioner's due process challenge; finding incorrect jury instructions were not harmless and were in violation of petitioner's due process).

Greene v. Superintendent Smithfield SCI, 882 F.3d 443 (3d Cir. 2018) (Vanaskie, J.) (affirmed) (holding that "alleged ineffectiveness of PCRA [Pennsylvania Post Conviction Relief Act] counsel cannot overcome the consequence of the failure to present the IAAC [Ineffective Assistance of Appellate Counsel] claim to the state courts").

Mitchell v. Superintendent Dallas SCI, 902 F.3d 156 (3d Cir. 2018) (Greenberg, J.) (affirmed) (affirming district court's denial of defendant's petition for a writ of habeas corpus and declining to apply Confrontation Clause to admission of jailhouse testimony, because statements were not testimonial).

Immigration

Moreno v. Attorney Gen. of U.S., 887 F.3d 160 (3d Cir. 2018) (Vanaskie, J.) (petition denied) (denying petition for review of deportation order following conviction for possession of child pornography because the "least culpable conduct punishable" is one of moral turpitude and the statutory consequence is deportation).

Jury Issues

United States v. Fattah, 902 F.3d 197 (3d Cir. 2018) (Smith, J.) (affirmed in part, vacated in part, reversed in part, and remanded in part), *amended and superseded on reh'g*, 914 F.3d 112 (3d Cir. 2019) (holding the juror's dismissal was warranted, the bribery convictions would be vacated and remanded, the evidence was sufficient to support Congressman's conviction for conspiracy to commit fraud, prohibiting defendant from pursuing certain testimony was harmless error, and evidence was sufficient to establish that three defendants made false statements to a mortgage lending business).

United States v. Johnson, 899 F.3d 191 (3d Cir. 2018) (Fisher, J.) (affirmed) (determining the error regarding lack of jury finding of brandishing of firearm as basis for increasing mandatory minimum sentence for aiding and abetting during crime of violence did not affect defendant's substantial rights, as would be required for reversal on plain error review and armed bank robbery qualified as predicate crime of violence).

Sentencing

Martinez v. Attorney Gen. of U.S., 906 F.3d 281 (3d Cir. 2018) (Bibas, J.) (petition denied) (denying petition for review when New Jersey attempt law is coextensive with federal law by both holding solicitation as substantial step to corroborate actor's criminal purpose and, at date of petitioner's conviction, the federal list of controlled substances was identical to New Jersey's).

United States v. Abdullah, 905 F.3d 739 (3d Cir. 2018) (Jordan, J.) (affirmed) (holding conviction for third-degree aggravated assault with a deadly weapon is a crime of violence under sentencing guidelines and career-offender enhancement was appropriate).

United States v. Douglas, 885 F.3d 124 (3d Cir. 2018) (Greenaway, Jr., J.) (Hardiman, J., dissenting) (Schwartz, J., dissenting) (reversed and remanded) (holding district court erred in imposing a section 3B1.3 sentencing enhancement because defendant's position as an airline mechanic did not involve the necessary professional or managerial discretion section 3B1.3 requires).

United States v. Douglas, 885 F.3d 145 (3d Cir. 2018) (Shwartz, J.) (affirmed in part, reversed in part, and remanded for resentencing) (holding district court did not err in finding the defendant responsible for trafficking 450 kilograms of cocaine based on co-defendant's testimony and documentary evidence because evidence was sufficient to support the finding; district court erred in applying the section 3C1.1 sentencing enhancement because the government failed to offer proof showing that the defendant willfully obstructed or impeded the administration of justice; district court erred in calculating the appropriate Guideline range because it improperly applied the section 3C1.1 sentencing enhancement when determining the defendant's sentence).

United States v. Foster, 891 F.3d 93 (3d Cir. 2018) (Jordan, J.) (affirming two felon in possession of firearm convictions and sentences where (1) officers had reasonable suspicion to stop, question and detain defendant, (2) testimony regarding prior wrong acts supported motive rather than propensity, (3) evidence sufficiently supported jury verdict finding defendant guilty of constructive firearm, and (4) presence and possession of firearms properly enhanced defendants' sentences).

United States v. Green, 898 F.3d 315 (3d Cir. 2018) (Chagares, J.) (affirmed) (holding that Supreme Court opinion in *Johnson v. United States*, that residual clause in Armed Career Criminal Act's definition of violent felony was unconstitutionally vague, did not start anew the one-year limitations period for motion to vacate sentence based on vagueness challenge to similar residual clause in mandatory sentencing guidelines).

United States v. Holena, 906 F.3d 288 (3d Cir. 2018) (Bibas, J.) (vacated and remanded) (finding conditions of appellant's sentence contradict one another, violate First Amendment, and were more restrictive than necessary where the conditions lasted until appellant's death, and were therefore not "narrowly tailored sanctions" that were not tailored to adequately match appellant's conduct).

United States v. Metro, 882 F.3d 431 (3d Cir. 2018) (Jordan, J.) (vacating sentence imposed by district court and remanding for resentencing because the lower court did not address critical factual disputes to determine the scope of conduct for which the defendant could actually be held accountable).

United States v. Ramos, 892 F.3d 179 (3d Cir. 2018) (Roth, J.) (vacated and remanded) (holding defendant should have been categorized as career offender for sentencing purposes under the Guidelines based on prior conviction for crime of violence).

United States v. Rivera-Cruz, 904 F.3d 324 (3d Cir. 2018) (Hardiman, J.) (affirmed) (holding 18 U.S.C. § 3582(c)(2) sentencing reduction remedy is unavailable to defendant whose sentencing guidelines range is replaced by a statutory maximum because the Supreme Court recently held the same for a statutory minimum and Third Circuit recognized no material difference).

United States v. Schonewolf, 905 F.3d 683 (3d Cir. 2018) (Fuentes, J.) (affirmed) (finding appellant's sentence was not legally erroneous and did not violate Sentencing Reform Act or *Tapia v. United States*, 564 U.S. 319 (2011), when no indication district court imposed sentence to ensure appellant received drug treatment).

United States v. Van Huynh, 884 F.3d 160 (3d Cir. 2018) (Hardiman, J.) (affirmed) (holding district court's calculation of the defendant's seventy-month sentence for pleading guilty to commit bank and wire fraud was proper because the Government did not breach its plea agreement with the defendant at the sentencing hearing; the district court did not err in

finding that the defendant's actions qualified him for a sentencing enhancement under section 2B1.1(b)(10)(A) of the Guidelines).

Sixth Amendment – Ineffective Assistance of Counsel

Preston v. Superintendent Graterford SCI, 902 F.3d 365 (3d Cir. 2018) (Rendell, J.) (holding ineffective assistance of counsel claim may be excused from procedural default but ultimately finding plaintiff's claim failed under *Strickland* analysis).

Richardson v. Superintendent Coal Township, 905 F.3d 750 (3d Cir. 2018) (Bibas, J.) (reversed and remanded) (finding sentencing judge did not question plaintiff to ensure he voluntarily and intelligently waived his Sixth Amendment right on second day of sentencing and plaintiff was prejudiced by his attorney's failure to challenge error post-sentencing).

Workman v. Superintendent Albion SCI, 903 F.3d 368 (3d Cir. 2018) (Fuentes, J.) (excusing defendant's procedural default on ineffective assistance of trial counsel claim where his post-conviction assistance was ineffective and trial counsel's assistance was "manifestly ineffective").

Sufficiency of the Evidence

United States v. Shaw, 891 F.3d 441 (3d Cir. 2018) (Restrepo, J.) (affirming former corrections officer's conviction and sentence for aggravated sexual abuse against female inmate where erroneous jury instruction did not significantly mislead jury, and where evidence sufficiently established use of force).

United States v. Wilson, 880 F.3d 80 (3d Cir. 2018) (Jordan, J.), *cert. denied*, *sub nom Wilson v. United States*, 138 S. Ct. 2586 (2018) (affirming district court's sentencing of a defendant as a career-offender because unarmed bank robberies count as crimes of violence).