



On Appeal

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3CBA welcomes Judge Arianna J. Freeman to the Court

On September 29, 2022, the Senate confirmed Judge Arianna J. Freeman to the United States Court of Appeals for the Third Circuit. Judge Freeman fills the vacancy created when Judge Theodore McKee took senior status.

Judge Freeman joins the Third Circuit after many years at the Federal Community Defender Office for the Eastern District of Pennsylvania, where she handled hundreds of complex habeas matters in capital and non-capital cases arising out of both federal and state convictions. Most recently, Judge Freeman served as the managing attorney of the office’s Non-Capital Habeas Unit from 2016-2022.

Judge Freeman was born in Boston, Massachusetts and raised in New England. She has long ties to the Philadelphia area, having received her B.A. from Swarthmore College in 2001. Judge Freeman received her J.D. from Yale Law School in 2007. From 2007-2009, she clerked for Judge James T. Giles and Judge C. Darnell Jones II, both in the United States District Court for the Eastern District of Pennsylvania. From there, she joined the Federal Defender Office. While there, Judge Freeman also taught as an adjunct professor at Drexel University Thomas R. Kline School of Law.

Judge Freeman received her commission on October 20, 2022. Her investiture ceremony will be held on April 14, 2023. Speakers are expected to include Senator Bob Casey; Brett Sweitzer, Chief of Appeals at the Federal Community Defender Office for the Eastern District of Pennsylvania; Professor Andrea Armstrong of Loyola University New Orleans College of Law; and Jamie J. Brunson, Executive Director of First Person Arts, Inc.

Judge Freeman has already had the opportunity to hear an en banc argument. She looks forward to continuing to immerse herself in the work of the Court and to mentoring her law clerks. “I’m grateful for the warm welcome I’ve received from the whole court community, and I’m honored to have the opportunity to continue my public service work in this new capacity.”

Judge Freeman’s chambers are located in the James A. Byrne United States Courthouse in Philadelphia. The Third Circuit Bar Association congratulates Judge Freeman and welcomes her to the Court.

By [Nilam A. Sanghvi](#) – Pennsylvania Innocence Project, Pittsburgh & Philadelphia, PA



Third Circuit rejects right to public trial claim on plain error review, but offers guidance as to which proceedings must be public

United States v. Gallman, 57 F.4th 122 (3d Cir. 2023)

[Nathan Townsend](#), K&L Gates LLP, Pittsburgh, PA

The Sixth Amendment right to a public trial has more shape to it than other constitutional rights such as due process of law. But as the Third Circuit explained in [United States v. Gallman](#), 56 F.4th 122 (3d Cir. 2023), even the seemingly concrete notion of a public trial begins to blur when applied to a complex proceeding conducted under COVID-19 protocols.

Background

Two Philadelphia police officers pulled over Stacy Gallman after he ran a stop sign. After observing a firearm on Gallman's passenger, the officers removed Gallman and his passenger from the vehicle and handcuffed them. At this point, a second pair of officers arrived, including Jesse Rosinski, who placed Gallman in a patrol car. One of the officers who had pulled Gallman over then discovered a firearm at the base of the driver's seat. The United States then charged Gallman under 18 U.S.C. § 922(g) for being a felon in possession of a firearm.

During a pre-trial suppression hearing, the government disclosed that Officer Rosinski faced an open Philadelphia Police Internal Affairs Division ("IAD") investigation for failure to call a supervisor to a traffic stop. In response, the district court arranged to question the IAD officer about the investigation during Gallman's trial. Subsequently, the government emailed the district court, *ex parte*, an IAD memorandum for *in camera* review. This IAD memorandum concerned a racial profiling complaint, also against Rosinski. The government claimed that it did not need to disclose the memorandum under *Brady v. Maryland* and *Giglio v. United States*, because the IAD had closed the investigation of the complaint prior to Gallman's arrest for lack of foundation.

At trial, the district court held a preliminary conference with the parties before bringing in the jury. There, the court informed Gallman of the government's *ex parte* disclosure. The court told Gallman that it had decided the government did not need to turn over the IAD memorandum pursuant to *Brady* and *Giglio*. Gallman then asked if he could cross-examine Rosinski about the racial profiling allegations. The court denied this request because the allegations were "were not founded at all" and because Rosinski was a "back-up" officer, not the officer who pulled Gallman over. Notably, while this preliminary conference took place, the trial audience sat in a separate room and watched the proceeding from a video feed, a maneuver meant to reduce COVID-19 risk during the trial. The video, however, was apparently turned off at this time.

Later that day, the district court questioned the IAD investigator handling the complaint that Rosinski had not called a supervisor to a traffic stop. This conference also took place outside the presence of the jury and without a video feed for the trial's audience. Both parties questioned the IAD investigator who explained that he had found no merit to the complaint against Rosinski. This meeting did not produce any factual findings or rulings by the district court.

After his conviction, Gallman appealed the supposed denial of his Sixth Amendment right to a public trial because of the two instances in which the video feed was off. He faced plain error review.

Third Circuit's Discussion

The Third Circuit focused on when the Sixth Amendment right to a public trial takes effect. For its first guidepost, the Court (Judge Hardiman writing, joined by Judges Porter and Fisher) noted that the right attaches at suppression hearings where a district court must make factual determinations to decide what evidence a jury can see. Gallman's case aligned with the suppression-hearing precedent in some respect: the district court had made a factual determination that Rosinski was a back-up officer who had not made the initial stop, and thus, Gallman could not cross-examine Rosinski on the racial profiling complaint because it was immaterial.

On the other hand, a second line of precedent holds that the public-trial right does not attach to *Brady* or *Giglio* determinations. And in Gallman's case, the district court had convened the preliminary conference to announce its decision that the IAD memorandum was not *Brady* or *Giglio* material. As a final consideration, the Third Circuit noted that district court had determined the scope of cross-examination at the preliminary conference, an action that many courts had placed outside the scope of the right to a public trial.

For the second conference during which the parties questioned the IAD investigator, the Third Circuit noted several reasons why this proceeding did not resemble a suppression hearing. Those included that the IAD investigator "was not a witness for either party; the hearing was not conducted pursuant to a motion by either party; the parties did not make argument at the hearing; and the Court did not make an evidentiary or other substantive ruling based on [the IAD investigator]'s testimony."

Calling it a "close question," the Third Circuit ultimately stopped short of deciding whether the two proceedings fell on either side of the public-trial right dividing line. Its review of the case law made clear, however, that any violation of Gallman's public trial right was not a "plain" error—a clear or obvious one under current law.

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Conclusion

Some appellate courts play it safe on plain-error review by skipping to the final question of the test: whether, in the appellate court's discretion, the assumed plain error "seriously affects the fairness, integrity or public reputation of judicial proceedings" thus requiring reversal. *United States v. Olano*, 507 U.S. 725, 732 (1993). Resorting to discretion, however, leaves future litigants and trial courts with uncertainty about what might constitute an error. Refreshingly, the Third Circuit in *Gallman* applied the complete plain error test from beginning to end, rather than just the final step. The ruling leaves future parties with better direction on when the Sixth Amendment right to a public trial applies to a proceeding, even if residual uncertainty remains.

Third Circuit holds that an employer's motive for investigating an employee can be considered to establish pretext

Canada v. Samuel Grossi & Sons, Inc., 49 F.4th 340 (3d Cir. 2022)

[Joshua Sallmen](#), Reed Smith LLP, Pittsburgh, PA

In *Canada v. Samuel Grossi & Sons, Inc.*, the Third Circuit held that a factfinder may consider an employer's motive for investigating an employee as part of its consideration of whether an employer's proffered reason for terminating that employee was pretext for unlawful discrimination or retaliation. The decision recognizes a broad scope of evidence that may contribute to a pretext finding as part of a "mosaic" of evidence.

Background

Defendant Samuel Grossi & Sons, Inc. ("Grossi") employed Plaintiff Joseph Canada, a Black man with back ailments including herniated discs and arthritis, for ten years. In the underlying lawsuit, Canada alleged that, during his employment, he was discriminated and retaliated against based on his race and his disability.

The issues began when Canada requested leave under the Family and Medical Leave Act ("FMLA") based on back pain. According to Canada, Grossi employees withheld the requisite forms and otherwise harassed him for seeking leave. Canada eventually obtained the forms, however, and notified Grossi's director of human resources, Elena Osorio, when he intended to be absent for FMLA leave. Osorio testified that she did not affirmatively approve Canada's leave, but he took it "how he wanted" without being assessed attendance points.

Canada later filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination and hostile work environment based on his race. A month later, Canada filed a complaint in the Eastern District of Pennsylvania due to alleged continued mistreatment—this time, including claims of discrimination, retaliation, and hostile work environment based on race and disability. In response, one of the company's owners allegedly told Canada to drop the lawsuit or he would "just have other African-American employees say the opposite of what [Canada was] saying."

A month later, Grossi terminated Canada based on text messages found on Canada's cellphone. When Canada was on vacation, his personal locker—secured by a personal lock—was opened and searched as part of a plan to move a set of lockers that, per Grossi, was blocking a surveillance camera. Osorio saw the cellphone and stated that she believed it to be a company phone given the brand. In an effort to confirm whether it was a company phone, Osorio purportedly guessed the password on the first try and searched the phone. Osorio's search was extensive, finding text messages from more than a year prior that indicated that Canada was communicating with prostitutes on company time. Grossi claimed Canada was soliciting the prostitutes, while Canada stated that he never met with any women and was texting simply as "dumb entertainment." Grossi terminated Canada for a violation of its Employee Conduct and Disciplinary Action Policy.

In response, Canada amended his complaint to state that his termination was retaliation for complaints of race and disability discrimination. The district court granted summary judgment in favor of Grossi on all claims. It disregarded Canada's argument that Grossi's explanation for entering the locker and searching the phone were unbelievable, reasoning that that argument concerned the propriety of the search rather than whether Grossi's non-retaliatory reason for termination—soliciting prostitutes on company time—was pretextual. Canada appealed the district court's grant of summary judgment.

Third Circuit Analysis

A unanimous panel of the Third Circuit—Judge McKee authoring, joined by Judges Restrepo and Fuentes—reversed. The panel found that genuine issues of fact existed to preclude summary judgment, adopting as a matter of first impression the rule that an employer's motivation for investigating an employee can be relevant to pretext.

After an employee establishes a prima facie case of retaliation, followed by an employer establishing a legitimate, non-retaliatory reason for termination, the burden shifts to the employee to establish that the reason is pretext for unlawful retaliation. The employee may do so by pointing to "some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Courts consider the totality of the circumstances when making a pretext determination, including a "broad array of evidence," such as "antagonism by the employer, inconsistencies in the reasons the employer gives for its adverse action, and any other evidence suggesting that the employer had a retaliatory animus when taking the adverse action."

The panel, drawing from a Seventh Circuit decision, held that an employee may defeat summary judgment by providing a "convincing mosaic of circumstantial evidence," which can include evidence of an employer's motivation for investigating an employee.

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Turning to the facts in the case, the panel held that Canada had provided the requisite “mosaic.” In addition to providing evidence that other employees were treated more favorably than Canada, Canada had “shown the overall weakness of Grossi’s argument that the text messages were searched to see if the phone was Grossi’s property” given the availability of easier, less invasive options as well as the depth of the text message search, which went back more than a year. The court found that on balance a jury would more likely view the search as a fishing expedition for a reason for termination than a legitimate search to identify whether the phone was company property.

Conclusion

When an employer terminates an employee due to the findings of an investigation, factfinders will consider the employer’s underlying motive for the investigation in deciding whether the employee has provided a “convincing mosaic” of evidence to undermine a legitimate, non-retaliatory reason for terminating the employee as pretextual.

Third Circuit confirms its jurisdiction to review discretionary remand orders

Dirauf v. Berger, 57 F.4th 101 (3d Cir. 2022)

[Frantz J. Duncan](#)

Schnader Harrison Segal & Lewis LLP, Philadelphia, PA

In [Dirauf v. Berger](#), 57 F.4th 101 (3d Cir. 2022), the Third Circuit analyzed whether it had appellate jurisdiction to review a district court’s decision remanding a removed case to state court.

Background

The case began in New Jersey state court, where the plaintiffs, German investors, sued the defendants, German citizens and New Jersey-based individuals and entities, for an allegedly fraudulent real estate investment venture. The complaint contained 120 state law claims and a single federal claim.

One defendant removed the case to federal court with the consent of the other defendants. Six days later, the plaintiffs voluntarily dismissed their sole federal claim, leaving only the state law claims. On the same day, the district court remanded the case to state court. The defendants then filed a Rule 60(b) motion seeking to vacate the remand order, which the court denied (the “Vacatur Order”). In the Vacatur Order, the court explained that: (1) there was no diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2); (2) the court had no duty to elaborate on why it declined to exercise supplemental jurisdiction; (3) and its initial ruling was correct as the case was only in federal court for seven days and the state court was well equipped to handle the matter. The defendants appealed.

Third Circuit’s Decision

The Third Circuit considered whether it had appellate jurisdiction to review the Vacatur Order. In an opinion authored by Judge Shwartz and joined by Judges Matey and Fuentes, the panel explained that jurisdiction turned on whether the remand was issued pursuant to 28 U.S.C. § 1447(c) and (d) or pursuant to 28 U.S.C. § 1367(c). If a case is remanded based on § 1447(c) and (d), it is predicated on a lack of subject matter jurisdiction or a defect in removal procedure and, as such, there is no appellate jurisdiction. If, however, a case is remanded pursuant to the district court’s discretion under § 1367(c) to refuse to exercise supplemental jurisdiction over state law claims, the appellate court has jurisdiction.

Analyzing the substance of the Vacatur Order and the related order remanding the case to state court, the panel determined that the district court’s remand was ordered pursuant to § 1367(c) as an exercise of its discretion. The panel explained that the district court, in the Vacatur Order, expressly stated that it was declining to exercise supplemental jurisdiction and that this decision was facially warranted because the case, based on over 100 state law claims, had been in federal court only a few days.

The panel also explained that a purported “forum-defendant defect” in removal did not make it arguable that the district court’s ground for remand was the absence of subject matter jurisdiction, because a ruling regarding a removal defect would not have been required if the court remanded solely based on the lack of subject matter jurisdiction.

The panel also looked to post-remand evidence as providing further support for the conclusion that the district court did not remand pursuant to § 1447(c) and (d). Post-remand, the court denied the defendants’ Rule 60(b) motion. If, however, the remand was issued due to a lack of subject matter jurisdiction under § 1447(c) and (d), the district court would not have had jurisdiction to issue any subsequent order. The same is not the case for a remand under § 1367(c). Thus, with a number of reasons supporting its interpretation of the district court’s action, the panel concluded that the district court exercised its discretion under § 1367(c), keeping the Third Circuit’s appellate jurisdiction intact.

The panel also considered another threshold issue—whether the appeal was mooted by the state court’s dismissal of the complaint, without prejudice, for lack of personal jurisdiction. The panel determined it was not. An appeal is moot only if there are events that occur during “the pendency of the appeal that make it impossible for the court to grant any effectual relief whatsoever.” Here, the district court dismissed the case without prejudice, and the plaintiffs retained the ability to appeal from the final judgment. Therefore, a live controversy remained and the appeal was justiciable.

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With appellate jurisdiction and justiciability confirmed, the panel adjudicated the defendants' claims of error based on the district court declining to exercise supplemental jurisdiction. The panel first held that the district court did not err by failing to explain why it declined to exercise supplemental jurisdiction, because the statutory basis for its decision was readily apparent.

Likewise, the district court was not required to provide a more detailed discussion of its reasons for remanding, including specifying how it weighed any alleged forum manipulation. Finally, the defendants failed to preserve their final argument—that the district court did not afford special consideration to their alien status—which was thus forfeited on appeal.

President's Note

[David R. Fine](#)

K&L Gates LLP, Harrisburg, PA

It is an exciting time to be a member of the Third Circuit's bar and of the Third Circuit Bar Association.

The Court has seen a lot of turnover in the past six years. Presidents Trump and Biden appointed half of the Court's currently active judges. (I should note that I'm using "active" only in the most technical sense since so many of the Court's senior judges remain particularly active.) The 3CBA aims to help practitioners learn about these new judges, both by publishing short welcoming articles in this newsletter and with a meet-the-judges CLE program in Philadelphia in September.

The Court has amended its internal operating procedures to underscore that panels have the authority to have the clerk send "focus letters" to counsel in advance of oral arguments to alert them to issues or authority the judges might raise. The Court also published for public comment a proposed rule amendment that would provide that, for an electronically filed document to be date-stamped on a given day, it would need to be filed by 5:00 p.m. (Eastern) that day. As you might have heard or read, a number of people and organizations commented on that proposed rule amendment, many urging the Court not to finalize it. The Board of Governors of the 3CBA, by majority vote, submitted a statement opposing the amendment.

The Third Circuit will shortly host its Judicial Conference in Philadelphia. Beginning on May 10 and lasting until May 12, the conference will include programming about the Court, CLE programs and a number of great social opportunities. The 3CBA will be hosting a reception, a breakfast and a CLE presentation during the conference. The CLE program promises to be both interesting and timely. President-elect Matt Stiegler will moderate a discussion on social-media ethics for judges, lawyers and law professors with Georgia Court of Appeals Judge Stephen Dillard, Benjamin N. Cardozo School of Law Professor Kate Shaw (who is visiting this semester at the University of Pennsylvania Carey Law School) and Houston lawyer Raffi Melkonian. If you're active on social media, you'll no doubt recognize all of those names and their thoughtful approaches to Twitter and social media. There's more information about the conference in this newsletter and on the Court's website (www.ca3.uscourts.gov).

Speaking of websites, I hope you've had a chance to look at the 3CBA's redesigned website (www.thirdcircuitbar.org). Because of the great efforts of our immediate past president, Deena Schneider, the website is updated with a great deal more information and a more user-friendly setup.

As I begin my term as the 3CBA's president, I hope you'll always feel free to be in touch (david.fine@klgates.com) if there are things you'd like the association to do (or to do better) to meet your needs.

Conclusion

Dirauf confirms that when a district court declines to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c), an appellate court retains jurisdiction over the matter. The Court's analysis, moreover, exemplifies how an appellate court will evaluate its jurisdiction—through a textual analysis of the district court's order, compared against the substantive differences between remanding for lack of subject matter jurisdiction and declining to exercise supplemental jurisdiction over state law claims.



2023 Third Circuit Judicial Conference

We are back together for the first time in six years! The Third Circuit Judicial Conference will take place May 10-12, 2023, at Hilton Philadelphia at Penn's Landing. This is the 76th Judicial Conference of the Third Circuit. All judges and attorneys are invited to attend the Conference sessions. Guests are welcome to all social events.

The Judicial Conference will consider the business of the courts and address matters of importance to the administration of justice in the Third Circuit. 28 U.S.C. § 333. Our conference theme is "The Federal Judiciary and the Practice of Law in 2020s: A Prospective Look". The Conference programs have been approved for 12 continuing legal education credits, including 3.5 ethics credits, in Pennsylvania. Approval for continuing legal education credit in other jurisdictions will be sought prior to the Judicial Conference. Programs of interest to both private sector and public interest attorneys will be featured and all sessions will be led by experts and leaders in their respective fields.

Judge and former Homeland Security Secretary Michael Chertoff will be joining Judge Thomas Hardiman for a Fireside Chat about "Information Technology Security—Threats from Insiders and Outsiders." We will examine "The New Normal of Federal Practice Post COVID: Challenges and Advancements" and hear from the Chief District Judges about "What's Going on in the Courts and Tips from the Bench." "New Media and the Law: How the 24-Hour News Cycle, Digitalization, and the Age of Saturation Impacts the Bench and Bar" promises to be very engaging, and we are pleased that ABA President Deborah Enix-Ross will join the "The Oak in the Storms of Politics: Judicial Independence and Public Confidence" panel. "Election Law in Transition: A Discussion on Fairness, Integrity, and What's Next" is certainly a hot topic, and we will explore "Attorney Wellness Post COVID-19" in an interactive session featuring Dr. Kate Weymouth. The Third Circuit Bar Association is presenting "Social Media Ethics," fulfilling the two-hour CLE ethics requirement. "Prosecuting 'The Teflon Don'—Judge John Gleeson on Taking Down John Gotti, America's Most Notorious Gangster" is featured at our Bench Bar Luncheon, with questions from the audience. Our Bench and Bar Conference is also the occasion to present the 2023 American Inns of Court Professionalism Award to a lawyer or judge from the Third Circuit for outstanding character and dedication to the highest standards of the legal profession and the rule of law.

You may click [here](#) to view the full Conference agenda. Please check this agenda regularly as changes to the program and meeting rooms may occur.

Registration for the 2023 Third Circuit Judicial Conference is now open. You may click [here](#) to register.

Notice regarding January 6, 2023 amendments to Third Circuit Internal Operating Procedures

The January 6, 2023 amendments to 3d Cir. I.O.P. 2.1, 2.3, and 2.5 modify time periods applicable to the Court's procedures for scheduling oral argument and subsequent notification to the parties. Although the amendments are effective as of January 6, 2023, some merits panels of the Court are currently in the process of scheduling cases under the prior time frames. As such, the time modification set forth in the amendments will be applicable to the next merits panel to start the submission and scheduling process.

The Order Amending Internal Operating Procedures can be found [here](#).

The Clerk Notice Regarding Amendments can be found [here](#).

SAVE THE DATE

Mark your calendars for an upcoming

"Meet the Judges"

event to be held on

September 28, 2023

in Philadelphia

Details forthcoming



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