

CRIMINAL PROCEDURE — SENTENCING — A DEFENDANT WHO PLEADS GUILTY TO ONE COUNT OF WIRE FRAUD AND ONE COUNT OF TAX EVASION IS NOT NECESSARILY ENTITLED TO GROUP THE OFFENSES FOR SENTENCING PURPOSES — *United States v. Vitale*, 159 F.3d 810 (3d Cir. 1998).

Francis X. Vitale acquired and restored antique clocks to display in his museum-like gallery in Spring Lake, New Jersey. *See United States v. Vitale*, 159 F.3d 810, 812 (3d Cir. 1998). In addition to restoring clocks, Vitale was employed for more than thirteen years by Engelhard Corporation, a manufacturer of specialty chemical and metal products. As vice president of strategic development and corporate affairs, Vitale controlled multi-million dollar budgets and possessed authority to approve more than a million dollars for international marketing expenditures. While employed by Engelhard, Vitale sent fabricated invoices to the cash-management office. The office then received authorization to wire money to the vendors listed on the invoice. These vendors were not part of the specialty chemical and metal products trade, but, rather, were antique clock dealers from whom Vitale purchased merchandise for his gallery. In addition to fabricating the invoices, Vitale convinced Dimensional Marketing, Inc. to wire funds and send checks to vendors under the pretense that Engelhard was experiencing budgeting problems. In reality, however, these payments went to clock vendors. Moreover, Vitale failed to report the embezzled money on his income tax returns.

Upon discovering the criminal activity, Engelhard confronted Vitale. Vitale confessed to the crimes and made full restitution by selling his clock collection. In addition to cooperating with Engelhard, Vitale volunteered with the Boys & Girls Club of Trenton/Mercer Counties in 1997. Furthermore, Vitale participated in psychiatric counseling. Vitale's treating physician, Dr. Ventano, determined that Vitale's obsession with antique clocks, "not greed or accumulation of wealth," motivated his criminal activities. The doctor believed that this obsession dominated Vitale's ability to distinguish between right and wrong and rendered him unable to control his own actions.

Subsequently, Vitale was charged with wire fraud and tax evasion based upon his embezzlement of roughly \$12 million from Engelhard. *See id.* at 812-13. On September 30, 1997, he pleaded guilty to one count of each charge, pursuant to a plea agreement. *See id.* at 812. On the wire

fraud count, Vitale was charged with causing an illegal wire transfer of \$407,223.80 from Engelhard's account to a clock dealer in Switzerland. On the tax evasion count, Vitale was charged with failing to pay more than \$1.2 million in income tax based upon a taxable income of more than \$3.7 million.

The United States District Court for the District of New Jersey denied Vitale's argument that his wire fraud and tax evasion counts should be grouped for sentencing purposes. *See id.* Accordingly, the court determined Vitale's sentence under the United States Sentencing Guidelines' (U.S.S.G.) multiple-count rules by increasing Vitale's greater adjusted offense level of twenty-five for the wire fraud count by two levels and deducting three levels for acceptance of responsibility, for a total offense level of twenty-four. *See id.* The court indicated that this level, coupled with Vitale's Criminal History Category of I, produced a sentence in the range of fifty-one to sixty-three months in jail. *See id.* Furthermore, the court refused Vitale's downward departure requests for alleged government manipulation of the charging documents and for his alleged diminished mental capacity. *See id.* at 812-13. Pursuant to U.S.S.G. § 5K2.0 (1998), however, the court accepted Vitale's motion for a downward departure from the sentencing guidelines based upon his acceptance of responsibility, efforts at restitution, community service, and rehabilitation following the offense. *See id.* at 813. The court ultimately sentenced Vitale to "thirty months in prison (concurrent on counts one and two), two years of supervised release (also concurrent on counts one and two), and 500 community service hours." *Id.*

In an opinion by Judge Sloviter, the United States Court of Appeals for the Third Circuit affirmed the district court's judgment of conviction and sentence. *See id.* at 816. First, noting its deference to the district court's grouping decision, the appellate court reviewed the factual findings for clear error and exercised plenary review over the court's interpretation of the Sentencing Guidelines to affirm the impropriety of grouping the counts of tax evasion and wire fraud. *See id.* at 813. Second, the appellate court noted that, absent any legal error, it lacked jurisdiction to consider whether the district court properly exercised its discretion when refusing a motion for downward departure based on an alleged manipulation of charging documents. *See id.* at 816. Finally, the appellate court determined that it also lacked jurisdiction to review the district court's refusal to grant a motion for downward departure based on alleged diminished mental capacity when the lower court did not misinterpret its authority, nor did it commit an error of law. *See id.*

Rejecting Vitale's statutory grouping argument, the court held that wire fraud did not "embod[y] conduct that is treated as a specific offense

characteristic of the tax evasion count” thus requiring grouping under the Sentencing Guidelines. *Id.* at 813 (quoting U.S.S.G. § 3D1.2 (1998), which states that “[a]ll counts involving substantially the same harm shall be grouped together into a single Group”). The court explained that the Sentencing Commission classified the failure to report criminally derived income as a specific offense characteristic of tax evasion only to deter the concealment of such income. *See id.* (citing *United States v. Astorri*, 923 F.2d 1052, 1057 (3d Cir. 1991)). Using the classification as a basis for grouping, the court elaborated, would eliminate this deterrent effect. *See id.* The court further reasoned that grouping was not necessary because (1) Vitale pled guilty to both counts and each count involved different victims, different harms, and different conduct; and (2) tax evasion constituted criminal conduct beyond that included in the fraud count. *See id.* at 813-14. The court, therefore, concluded that the counts were not so closely related that grouping was required. *See id.* at 814.

When considering the policies underlying the Sentencing Guidelines, the court reiterated the conclusion that evading taxes constituted significant additional criminal conduct beyond wire fraud. *See id.* at 815. Although recognizing the Sentencing Commission’s goal of preventing multiple punishments for the same crime, the court professed a fear that unreasonable application of the grouping portion of the guidelines would leave certain crimes unpunished. *See id.* Thus, the court deemed the offenses of tax evasion and wire fraud as patently unrelated and refused to group them together for sentencing purposes. *See id.*

The court also rejected Vitale’s argument that the counts should be grouped as charges of embezzlement and tax evasion. *See id.* at 814. Vitale contended that the propriety of grouping these two counts was left open in *United States v. Lieberman*. *See id.* (citing *United States v. Lieberman*, 971 F.2d 989 (3d Cir. 1992)). *See id.* Noting that Vitale was never charged with embezzlement, the court quickly rebuffed *Lieberman* as inapposite. *See id.*

The court denounced Vitale’s textual argument, as well. *See id.* at 815. The court recognized that such an argument would require interpreting “conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts,” as any adjustment made to an offense level. *Id.* at 814 (quoting U.S.S.G. § 3D1.2(c)). Considering the practical consequences of the two-level enhancement in the tax evasion count, the court observed that the adjustment had no effect upon the ultimate sentence. *See id.* The court explained that such an insignificant adjustment did not rise to the level of the “adjustment” referred to in the Sentencing Guidelines. *See id.* at 815 (citing U.S.S.G. § 3D1.2(c)). Moreover, the court emphasized this point by de-

clining to apply the Fifth Circuit reasoning that would allow a grouping even where the tax evasion enhancement does not effect the ultimate offense level. *See id.* (citing *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997)). Accordingly, the court rejected the textual argument. *See id.*

After rejecting Vitale's grouping arguments, the appellate court considered the denial of his motion for downward departure based on alleged governmental manipulation of the charging documents and diminished capacity. *See id.* at 816. Although recognizing that the district court maintains the authority to depart from the Sentencing Guidelines when grouping is unavailable, the appellate court stated that departure in such circumstances is not required. *See id.* According to the majority, the lower court understood its power to depart, but simply chose not to exercise it. *See id.* The appellate court, therefore, announced that it lacked jurisdiction to review the refusal of downward departure for manipulation of the charging documents because the lower court had not committed any legal error. *See id.*

Finally, the court noted Vitale's argument that the lower court failed to acknowledge its power to grant a downward departure based on diminished capacity. *See id.* Reviewing the refusal for abuse of discretion, however, the appellate court noted that the district court considered prior case law, as well as the facts at bar. *See id.* Thus, finding no misinterpretation of authority and no error of law, the appellate court once again submitted to its lack of jurisdiction. *See id.*

Senior District Judge Fullam concurred in the judgment, but opined that the majority's reasoning and elaboration were faulty. *See id.* at 817 (Fullam, J., concurring). Judge Fullam declared that grouping was required under the circumstances because the criminal conduct in mail fraud was a specific offense characteristic of the tax charge. *See id.* The judge disagreed with the majority that the grouping would undermine the goal of preventing concealment of criminal income by eliminating the heavier punishment placed on tax evasion. *See id.* According to Judge Fullam, the goal appeared to be undermined here only because the tax evasion count carried a lesser sentence. *See id.* Judge Fullam clarified that if the tax count, rather than the fraud count, had carried a higher guideline range, then the two-level enhancement would have been significant under the majority analysis. *See id.* Therefore, Judge Fullam advocated the use of a bright-line test to determine whether counts should be grouped for sentencing purposes. *See id.* Despite this analytical disagreement, Judge Fullam conceded to the binding precedent set by the panel opinion in *United States v. Astorri*, 923 F.2d 1052 (3d Cir. 1991).

Unlike Judge Fullam, the *Vitale* majority looked at the practical effect that grouping would have on the underlying goals of the Sentencing Guide-

lines. By grouping the tax evasion count into the wire fraud count, the deterrent effect would be lost under these circumstances. Concededly, Judge Fullam states correctly that the deterrence element would not be lost if the fraud count were higher, but in the present case, fraud was the lower count. Therefore, the appellate court was correct in holding that the element of deterrence would be lost with grouping. Moreover, even if the wire fraud count were higher, the crime of tax evasion would still be left unpunished if the counts in the present case were grouped because that count would be lost within the wire fraud sentence. The Sentencing Guidelines were meant to simplify multiple count sentencing, not to eliminate punishment for some of the crimes.

Judge Fullam also suggested the use of a bright-line test that would always group tax evasion with the conduct producing the income. The case at bar, however, presented a situation that precluded the use of such a convenient test. As indicated, by automatically grouping tax evasion with the activity producing the income, the criminal tax evasion would be left unpunished in certain situations. Such a result would be an unreasonable way to interpret the Sentencing Guidelines.

Vitale pleaded guilty to the separate counts of wire fraud and tax evasion. Each of these activities harmed different people during different transactions. Therefore, each count should be punished individually. Moreover, Vitale was granted downward departures for restitution paid, accepting responsibility, and community service. Therefore, justice dictates that Vitale should serve the remaining sentence for each of the crimes to which he pled guilty. Defendants cannot be permitted to use grouping simply as a means to lower sentences. This mechanism prevents defendants from receiving multiple punishments for the same crimes or activities, but when the crimes are unrelated, it should not create a technical loophole to reduce sentences. Fortunately, the majority mended this loophole before Vitale successfully squirmed through it.

Taryn Leigh Decker

HANDICAPPED PERSONS — INDIVIDUALS WITH DISABILITIES EDUCATION ACT — NON-ATTORNEY PARENTS HAVE NO RIGHT TO REPRESENT THEIR CHILD IN AN ACTION UNDER THE IDEA BECAUSE THE ACT DOES NOT CREATE JOINT RIGHTS IN THE PARENT AND CHILD — *Collinsgru v. Palmyra Bd. of Educ.*, No. 96-5807, 1998 WL 806416, at *1 (3d Cir. Nov. 23, 1998).

Robert and Maura Collinsgru (the Collinsgrus) and their son Francis lived in Palmyra, New Jersey where Francis attended the Palmyra Public Schools. *See Collinsgru v. Palmyra Bd. of Educ.*, No. 96-5807, 1998 WL 806416, at *1 (3d Cir. Nov. 23, 1998). The Collinsgrus believed that Francis had a learning disability and that he required an education that would accommodate his special needs. Contrary to the Collinsgrus's belief, the School Board's Child Study Team determined that Francis was not eligible for special education accommodations.

Under the Individuals with Disabilities Education Act (IDEA), the Collinsgrus sought administrative relief. *See id.* (citing 20 U.S.C. §§ 1400-1491 (1994 & Supp. 1997)). The Collinsgrus presented their case to the Administrative Law Judge (ALJ) without representation from legal counsel, as expressly permitted in the IDEA. *See id.* (citing 20 U.S.C. § 1415 (h)(1)). After a nineteen-day hearing, the ALJ decided that Francis's learning disabilities were not severe enough to entitle him to special education services. *See id.*

Subsequently, the Collinsgrus continued the matter pro se and filed a civil action in the United States District Court for the District of New Jersey. *See id.* at *2. The Collinsgrus's complaint initially alleged the following: (1) The Palmyra School Board (Board) conducted an inadequate evaluation of Francis; (2) The Board interfered in the evaluation; (3) The ALJ "manufactured" testimony; and (4) The ALJ's ruling was tainted by the state Commissioner of Education's opinion that far too many children were "being labeled as learning disabled." *See id.* In response, the Board filed its answer as well as an objection to the Collinsgrus's decision to represent Francis pro se. *See id.* The Collinsgrus then amended the complaint to state that they were asserting both their parental rights and their son's rights in accordance with the IDEA. *See id.* Although the Collinsgrus would have preferred legal representation, they recognized that they did not qualify for appointment of counsel under the *in forma pauperis* statute. *See id.* (citing 28 U.S.C. § 1915 (1994)). Further, due to the serious nature

of the case, the Collinsgrus could not afford representation nor could they obtain counsel on a contingent fee or pro bono basis. *See id.*

The district court ruled that the Collinsgrus could not represent Francis pro se in the civil suit. *See id.* The district court further rejected the Collinsgrus's assertion that the challenge to the ALJ's ruling was premised upon their rights as parents. *See id.* The court thereby held that Francis was the party and that an attorney must represent him. *See id.* The Collinsgrus were given thirty days to retain counsel for Francis and upon their failure to do so, the District Court dismissed Francis's claim pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute. *See id.* The Collinsgrus petitioned the district court to certify an interlocutory appeal under 28 U.S.C. § 1292(b), but the court denied the petition. *See id.* (citing 28 U.S.C. § 1292(b) (1994)). The district court, however, advised the Collinsgrus to seek interlocutory review under 28 U.S.C. § 1291, the collateral order exception. *See id.* (citing 28 U.S.C. § 1291 (1994)). The Collinsgrus subsequently filed a motion asking the district court to clarify those claims that they could commence as parents and those that only Francis could commence. *See id.* To avoid proffering an advisory opinion, the district court declined to answer. *See id.*

The Collinsgrus then appealed to the United States Court of Appeals for the Third Circuit. *See id.* at *3. The Third Circuit affirmed the district court's decision, thereby holding that Congress did not intend the IDEA to "create joint rights in parents." *Id.* at *13. Thus, the court held that non-attorney parents may not represent their children in federal court under the IDEA. *See id.*

Judge Becker, writing for the majority, commenced the analysis by determining the jurisdictional issues. *See id.* at *3. The court explained that its jurisdiction over interlocutory appeals under 28 U.S.C. § 1291 exists only if the appeal meets the collateral order exception to the finality requirement of § 1291. *See id.* The majority first considered whether the issue of parents representing their children under the IDEA could be reviewed under the collateral order exception. *See id.*

In analyzing whether the issue met the requirements of the collateral order exception, the court utilized the collateral order exception test established in *In re Ford Motor Co.* *See id.* (citing *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997)). *See id.* The court stated that an appellant could appeal a non-final order if the order: (1) conclusively determines the question disputed; (2) resolves an important issue distinctly separate from underlying dispute; and (3) is unreviewable by an appellate court from a final judgment. *Id.*

The majority quickly disposed of the first prong by stating that the district court order denying the Collinsgrus the right to represent their son

pro se in an IDEA action in federal court eliminated any further opportunity for the Collinsgrus to dispute the issue of representation. *See id.* The majority then determined that the appeal satisfied the second prong. *See id.* The court concluded that the issue of whether the Collinsgrus could represent their son was separate from the underlying issue — whether Francis was improperly denied special education services under the IDEA. *See id.* The court further noted that in satisfying the second prong it was necessary “to examine the importance of the issue to be reviewed.” *Id.* at *4. The court stated that “we must balance the importance of the Collinsgrus’s right to represent their son in these proceedings with our interests in finality and in avoiding piecemeal appeals.” *Id.* The court recognized that the resolution of the Collinsgrus’s question was necessary to adjudicate their claims in district court. *See id.* Further, Judge Becker acknowledged that parents’ rights to represent their children under the IDEA were crucial to the functioning of the IDEA. *See id.* Accordingly, the majority determined that the Collinsgrus’s interests outweighed the court’s interest in finality. *See id.*

In resolving the third prong of the test, the court recognized the Supreme Court’s restrictions on interlocutory appeals regarding issues of legal representation. *See id.* The court, however, aligned with the Eleventh Circuit, which distinguishes between those appeals regarding legal representation and those regarding pro se representation. *See id.* Judge Becker emphasized the importance of an individual’s right to appear pro se and acknowledged that by denying a party the right to appear pro se, the court may create an irreparable injury. *See id.* The majority additionally maintained that the denial of the right to appear pro se was the same as a denial of the right to proceed *in forma pauperis*, a question which is immediately appealable. *See id.* at *5. Further, the court stated that “these orders effectively close the courthouse door to litigants, [because] the majority of courts to consider the issue have held that orders denying leave to proceed pro se are immediately appealable.” *Id.*

In finding that the question of whether a parent could represent his child following an administrative procedure under the IDEA satisfied the collateral order exception requirements, the court determined that it had jurisdiction to hear the Collinsgrus’s appeal. *See id.* The court articulated that in reviewing a district court’s dismissal for failure to prosecute, the court would utilize an abuse of discretion standard. *See id.* Because the order was premised upon the statutory construction of the IDEA, however, the court stated that plenary review was the appropriate standard. *See id.*

Judge Becker proceeded to address the right to proceed pro se and, first, noted that a party has the right to proceed on his own behalf in federal court. *See id.* The court contrasted this right to Rule 17 of the Federal

Rules of Civil Procedure, which states that minors do not have the same right to represent themselves in a legal action. *See id.* The majority indicated that in accordance with Rule 17(c), “a representative or guardian may sue or defend on behalf of the infant.” *Id.* (quoting Fed. R. Civ. P. 17(c)). The court noted, however, that the Third Circuit would follow its well-established precedent that “the right to proceed pro se in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court.” *Id.* (citing *Osei-Afriyee v. Medical College of Pennsylvania*, 937 F.2d 876 (3d Cir. 1991)). In support of this view, the majority noted its decision in *Osei-Afriyee*, in which the court vacated a district court judgment because a non-attorney parent had represented his children in a tort action. *See id.* at *6. Judge Becker stated that the court in *Osei-Afriyee* held that the non-attorney parent’s lack of experience and legal training resulted in the statute of limitations tolling on a tort claim. *See id.* (citing *Osei-Afriyee*, 937 F.2d at 882). The majority further noted that the *Osei-Afriyee* court held that the children could wait until they reached the age of majority and proceed pro se, but their non-attorney parent could not represent them in federal court. *See id.* (citing *Osei-Afriyee*, 937 F.2d at 883).

Judge Becker asserted two important policy considerations underlying the court’s ruling as to the Collinsgrus. *See id.* First, the strong state interest in regulating the practice of law protects the represented party by ensuring a minimal level of competence and protects his opponents and the court from “poorly drafted, inarticulate, or vexatious claims.” *Id.* Second, the court recognized that a licensed attorney will be more skilled in the practice of law and, further, will be subject to malpractice and professional rules of conduct to which a non-attorney is not exposed. *See id.*

In addition to the policy considerations, the court declined to recognize a right of parents to represent their children in light of congressional intent and common law. *See id.* First, the majority honored the well-established presumption that unless Congress indicates the contrary, common law principles will apply to achieve the statutory purpose. *See id.* The court, failing to find any statutory language in the IDEA that provided non-attorney parents with a right to represent their children, noted “that a non-lawyer may not represent another person in court is a venerable common law rule.” *Id.* at *7.

Finally, the court utilized the canon of *expressio unius est exclusio alterius*, which reflects the notion that an express provision in a statute indicates congressional intent to exclude similar provisions not specifically mentioned in the statute. *See id.* Thus, the majority rejected the right of a parent to represent his child in federal court. *See id.* The majority concluded that, in the IDEA, Congress explicitly provided that parents could

represent their children in the administrative proceedings; however, the statute did not provide for representation in federal court. *See id.* The majority determined that Congress intended to permit parental representation only in the administrative proceedings. *See id.*

The majority then addressed the Collinsgrus's argument that because the IDEA claim involves the education of their son, and because the Collinsgrus, as parents, are responsible for their son's education, they are the true parties to the case and, thus, they should be able to proceed pro se. *See id.* at *8. The court looked to the congressional intent of the IDEA to resolve the Collinsgrus's contention that the IDEA provided the "authority for them to represent not only their own rights and interests, but also, albeit indirectly, those of their son in proceedings before the district court." *Id.*

In interpreting the IDEA, the court indicated that it would interpret that statute by looking at its plain language. *See id.* at *9. Further, the court noted, if the language was ambiguous, the court would analyze its legislative history with the ultimate goal of ascertaining the congressional intent of the IDEA. *See id.* In reviewing the plain language of the IDEA, the court acknowledged that the statute expressly provided parents with (1) the right to represent their children in the administrative proceedings and (2) a right of action to bring a civil suit in federal court following the administrative proceedings. *See id.* at *8. The majority carefully analyzed four areas of the IDEA that the Collinsgrus argued created a joint right of action. *See id.* at *10. The court noted that the four sections of the IDEA provided parents with the right to attorney fees and included language mentioning rights of handicapped children and their parents under the IDEA. *See id.* Although the language may suggest that Congress intended that parents and children would share the same substantive rights under the IDEA, the court concluded that it could also be interpreted that parents did not share in those same rights. *See id.* at *11. Therefore, the majority determined that the plain language of the statute was ambiguous, thus forcing the court to look to the legislative history of the IDEA. *See id.*

The majority next noted that the legislative history also did not indicate a congressional intent to create joint rights in parents. *See id.* The court found brief comments in the legislative history that suggested that the parents had procedural rights to represent the interests of the child, but that the substantive rights under the IDEA belonged only to the child. *See id.* Because the legislative history offered no further indications of a joint right in the parent, the majority determined that Congress did not intend "parents to have joint rights with their children under the IDEA." *Id.* at *12.

The Third Circuit particularly referred to the Eleventh Circuit's opinion, which stated that absent such congressional intent, the court would

rule that non-attorney parents may not represent their child pro se. *See id.* (citing *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997)). The court further noted that the Eleventh Circuit would proceed in that manner because “it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents.” *Id.* (quoting *Devine*, 121 F.3d at 582).

Finally, the majority examined policy arguments presented by the Collinsgrus. *See id.* The court agreed with the Collinsgrus that often parents are the only advocates for a child’s right because many attorneys are reluctant to accept this type of case without a large retainer. *See id.* The majority noted, however, that based upon its analysis and the fact that Congress provided for attorney fees in the IDEA, parents cannot represent their children in IDEA actions in federal court. *See id.* The majority also rejected the argument that the IDEA commingles the rights of parents and their children such that the parents have an interest in every IDEA claim commenced. *See id.* at *13. In rejecting this argument, the majority acknowledged that a disabled child with no parents could commence an IDEA claim and that a parent has no rights under the IDEA without a disabled child. *See id.* Therefore, the court stated that “the rights at issue here are divisible, and not concurrent.” *Id.*

Judge Roth concurred in the majority’s conclusion that the IDEA issue was immediately appealable under the collateral order exception. *See id.* (Roth, J., concurring and dissenting). Judge Roth dissented, however, from the majority’s conclusion that the Collinsgrus did not possess joint rights with their child under the IDEA and consequently could not proceed pro se in federal court. *See id.* Judge Roth asserted that the rights of parents and children are “overlapping and inseparable” and that, because of the parents’ responsibility to support their children’s education rights, parents are real parties and should be entitled to pursue both their interests and their child’s interests. *See id.*

In analyzing the purpose of the IDEA, Judge Roth noted that the IDEA was enacted to ensure appropriate education services for learning-disabled children and that parents play an “integral role . . . in effectuating [the] educational goals.” *Id.* at *14 (Roth, J., concurring and dissenting). The judge opined that establishing joint rights would support the purpose of the IDEA. *See id.* In support of this view, Judge Roth first looked to the IDEA’s procedural safeguards. *See id.* The judge declared that the IDEA provides parents with (1) the right to be involved in the evaluation process by providing access to all relevant records from the education agency; (2) the right to independent evaluations; and (3) an opportunity to file complaints on any matter related to the evaluation or educational placement of the child. *See id.* (citing 20 U.S.C. § 1415 (b)(1)(A) & (C)).

Judge Roth observed that this protection indicates a congressional intent to have parents “play an active and informed role in the evaluation and education of their children.” *Id.* The judge also noted that the IDEA allows for administrative proceedings during which parents can act as advocates for their children and the right to bring an action in federal court based on the decisions in the administrative proceeding. *See id.* at *15 (Roth, J., concurring and dissenting).

Although the statute does not expressly state the role of parents in IDEA actions in federal court, Judge Roth interpreted the IDEA to “reflect[] the practical recognition that parents are the persons who are vested with the authority and the obligation to oversee their child’s education and to enforce their child’s rights under the [IDEA].” *Id.* Further dissenting, the judge asserted that although the IDEA does not expressly provide pro se rights, the legislative intent indicates that parental involvement is not to be limited to administrative proceedings where pro se rights are explicit. *See id.* at *16 (Roth, J., concurring and dissenting). The judge stated that, absent clear congressional intent, it was incomprehensible that parents who have rights during administrative proceedings do not have the right to challenge the decisions of the proceedings. *See id.*

Judge Roth also referenced the IDEA’s fee-shifting provisions that provide attorney fees to parents. *See id.* In analyzing the legislative history of these provisions, Judge Roth noted that “‘Congress’ original intent was that due process procedures, including the right to litigation if that becomes necessary be available to all parents.’” *Id.* (quoting Handicapped Children’s Protection Act of 1986, S. Rep. No. 99-112, at 2, *reprinted at*, 1986 U.S.C.C.A.N. 1798, 1799). Further quoting from the Senate Committee Report, Judge Roth stated that “‘the parents or legal representative of handicapped children must be able to access the full range of available remedies in order to protect their handicapped children’s educational rights.’” *Id.* (quoting S. Rep. No. 99-112 at 17, *reprinted at* 1986 U.S.C.C.A.N. at 1806). The judge also agreed with the Collinsgrus’s argument that the fee-shifting provisions were deficient because they were unable to retain counsel and thus were left only with the option to appeal the administrative order pro se. *See id.*

Finally, Judge Roth rejected the majority’s reliance on *Osei-Afriyee*, stating that the nature of a tort claim is significantly different from that of an IDEA claim. *See id.* at *17 (Roth, J., concurring and dissenting). The judge found that an IDEA appeal, if not disposed of in a timely fashion, could have serious consequences whereas a tort claim commenced by a minor is tolled until the minor reaches the age of majority. *See id.* Judge Roth concluded that because the procedural safeguards in the IDEA preserve parents’ responsibility in the education of their child and the special

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responsibility parents have in enforcing their child's educational rights, the IDEA creates a joint right shared by parents and their children. *See id.* at *16 (Roth, J., concurring and dissenting).

The majority's analysis of the common law, the statutory language, legislative history, Third Circuit precedent, and policy considerations strongly supports its conclusion that non-attorney parents may not represent their children in federal court and that the IDEA does not create a joint right in parents. Although the majority position is well supported, the opinion is perhaps more functional in theory than in reality. Parents of disabled children possess a significant burden, both emotionally and financially, in providing an adequate quality of life for their children. The majority's opinion works well in theory when a parent can afford to retain an attorney to appeal an administrative proceeding. When parents cannot afford legal representation or to retain counsel *in forma pauperis*, or on a pro bono basis, and cannot represent their child pro se, the IDEA is rendered useless and can no longer support its goal of providing disabled children with their right to special education services.

Richard P. Diegnan Jr.

CRIMINAL LAW — MALICIOUS PROSECUTION — AN OVERTURNED MUNICIPAL COURT CONVICTION DOES NOT PREVENT A PLAINTIFF FROM SUING A POLICE OFFICER IN A 42 U.S.C. § 1983 MALICIOUS PROSECUTION ACTION — *Montgomery v. De Simone*, 159 F.3d 120 (3d Cir. 1998).

Officer Jeffrey De Simone arrested defendant-appellant, Rosemary Montgomery on September 30, 1992, for speeding, drunk driving, and refusing to submit to a breathalyzer test. *See Montgomery v. De Simone*, 159 F.3d 120, 122 (3d Cir. 1998). At Montgomery's municipal trial, Officer De Simone testified that Montgomery was speeding based on a radar reading and his own observation. De Simone further testified that, after Montgomery failed several sobriety tests, he directed her to drive to a vacant lot across the street and wait while he attended to a second car that had asked for directions. De Simone's testimony indicated that he subsequently took Montgomery to the police station and there informed her for the first time that she was under arrest.

Montgomery's testimony, however, painted a considerably different picture of events. Her testimony stated that she merely had one Irish coffee before driving, she was not speeding, and she did not fail any sobriety tests. *See id.* at 122-23. Furthermore, Montgomery contended that De Simone ordered her to drive to an empty parking lot across the street, where the officer pulled up behind her five to ten minutes later with his overhead lights off. *See id.* at 123. Montgomery claimed that De Simone's demeanor changed and that he asked her if she liked police officers and ever dated them. Montgomery testified that after she tried to change the subject, De Simone offered to give her a ride to the station where she could make a telephone call.

In the criminal suit against Montgomery, the municipal judge held that there was probable cause for De Simone to make the stop and the arrest based solely on De Simone's testimony. Furthermore, the municipal judge found Montgomery guilty of speeding, drunk driving, and refusing to submit to a breathalyzer test. Montgomery appealed and a trial de novo was held on February 4, 1994, in the Superior Court of New Jersey. The superior court reversed Montgomery's convictions and entered verdicts of not guilty on all charges.

Montgomery filed a complaint on February 1, 1995, in the United States District Court for the District of New Jersey alleging (1) a § 1983 action for malicious prosecution, (2) § 1983 false imprisonment and false

arrest claims, and (3) § 1983 claims against the police department and the township based on De Simone's actions. *See id.* The district court granted summary judgment in favor of Officer De Simone as to Montgomery's § 1983 malicious prosecution claim because the municipal court had reasonably concluded that probable cause existed for Montgomery's arrest. *See id.* The court also held that the § 1983 false imprisonment and false arrest claims were time barred by the two-year statute of limitations. *See id.* Lastly, the court granted summary judgment in favor of the municipality on the § 1983 claims because of a lack of evidence to raise a genuine issue of material fact. *See id.* Subsequently, Montgomery timely filed an appeal. *See id.*

The United States Court of Appeals for the Third Circuit, examining the record de novo, reversed in part and affirmed in part. *See id.* at 122. The appellate court reversed the order granting summary judgment of the § 1983 malicious prosecution claim against Officer De Simone, holding that an overturned municipal court conviction does not decisively establish probable cause for purposes of a § 1983 malicious prosecution claim. *See id.* The court, therefore, remanded the case, finding that Montgomery did raise a genuine issue of material fact concerning probable cause. *See id.* Finally, the court affirmed the orders granting summary judgment of the § 1983 false imprisonment and false arrest claims and the § 1983 claims against the municipal defendants. *See id.*

Writing for the majority, Judge Mansmann initially explained that in order to prevail on a § 1983 claim for malicious prosecution Montgomery must prove, among other things, "an absence of probable cause for the initiation of the proceedings against her." *Id.* at 124. The judge noted that the issue of probable cause in a § 1983 claim is usually one for the jury. *See id.* In examining the appropriateness of summary judgment, the court articulated that it must examine Montgomery's evidence concerning probable cause and, after applying any necessary presumptions, determine whether there is a genuine issue of material fact as to whether De Simone had probable cause to stop and arrest Montgomery. *See id.*

Next, the court scrutinized the common-law rule that a conviction presumptively proves the existence of probable cause unless the conviction was attained through perjury, fraud, or corruption. *See id.* While exploring the origin of the presumption from the Restatement of Torts, Judge Mansmann recognized that the presumption was developed in cases against private citizens, not cases against police officers. *See id.* (citing Restatement (Second) of Torts § 667(1) (1977)). Furthermore, the judge noted that not all state courts observe this rule and that the Supreme Court has not yet decided whether common-law rules apply to § 1983 claims. *See id.* After considering the Supreme Court's approach involving the application

of common-law rules to § 1983 actions, the Third Circuit concluded that it is necessary to examine the “policies that [the common-law rule] serves and its compatibility with the purpose of § 1983.” *Id.* at 124-25 (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981)).

The majority continued its discussion of the common-law presumption by rejecting a Second Circuit decision in *Cameron v. Fogarty* that applied the presumption to a § 1983 claim. *See id.* at 125 (citing *Cameron v. Fogarty*, 806 F.2d 380 (2d Cir. 1986)). The judge reiterated the Third Circuit’s holding in *Rose v. Bartle*, in which the court expressly criticized *Cameron*’s policy considerations. *See id.* (citing *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989)). Judge Mansmann concluded that the common-law presumption that an overturned municipal conviction establishes probable cause conflicts with the policies of the Civil Rights Act (Act) and, thus, does not apply to a malicious prosecution action under § 1983. *See id.*

The court buttressed this holding by examining the purpose of the Civil Rights Act. *See id.* Judge Mansmann articulated that the aim of the Act is to safeguard citizens from the abuse of power by state actors. *See id.* The Act accomplishes this, the judge explained, by interposing the federal courts between the people and the states. *See id.* (citing *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)). The judge quoted the Supreme Court’s language in *Mitchum* explaining the purpose of the Act: “[Congress] realized that state [courts] might, in fact, be antipathetic to the vindication of [federally created] rights.” *Id.* (quoting *Mitchum*, 407 U.S. at 242). Accordingly, Judge Mansmann held that the common-law presumption undermines a central purpose of the Act — to interject the federal courts, as protectors of federal rights, between the people and the sovereignty of the states. *See id.*

Examining the evidence without the common-law presumption, the court concluded that Montgomery raised a genuine issue of material fact, based on her testimony, as to whether probable cause existed for De Simone’s stop and arrest. *See id.* at 125-26. Therefore, Judge Mansmann reversed the grant of summary judgment on Montgomery’s § 1983 malicious prosecution claim. *See id.* at 126.

The majority next addressed the two-year limitations period applicable to the § 1983 false imprisonment and false arrest claims. *See id.* The judge acknowledged that both parties agreed that the two-year period is applicable. *See id.* Judge Mansmann stated that the issue, however, is when the period began to run. *See id.* To resolve this question the judge instructed that under federal law the period begins to run when the plaintiff “knows or has reason to know of the injury which is the basis of the § 1983 action.” *Id.* (quoting *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991)). The majority observed that a false arrest claim covers

damages only for the time period of detention. *See id.* Additionally, the court explained that a claim for false imprisonment relates only to Montgomery's arrest and the few hours immediately following her arrest. *See id.* The court concluded that Montgomery reasonably knew of her injuries on the night De Simone arrested her and, therefore, the two-year limitation period for the § 1983 false imprisonment and false arrest claims began to run on that night. *See id.* Thus, the judge held that the district court was correct in dismissing these two claims due to the running of the statute of limitations. *See id.*

Finally, Judge Mansmann reviewed Montgomery's claim that the municipality was liable under § 1983 for De Simone's conduct. *See id.* The judge held that municipal defendants may be liable under § 1983 only when an official custom or policy resulted in a constitutional deprivation. *See id.* (citing *Monell v. Department of Social Services of New York*, 436 U.S. 658, 691-94 (1978)). The court elaborated that a constitutional violation results only when a municipality's failure to instruct police officers rises to the level of deliberate indifference. *See id.* at 126-27. The judge noted that Montgomery's claims against the municipality that she was harassed and unlawfully detained by De Simone rest on proving the municipality's failure properly to train, control, or discipline its officers. *See id.* at 127. The majority, therefore, affirmed the district court's grant of summary judgment on these claims, concluding that since Montgomery did not point to any inadequacy of the police training program, and since she did not demonstrate that the municipality encouraged De Simone's actions, her claims under § 1983 against the municipality must fail. *See id.*

Judge Roth agreed with the majority's decision to affirm the dismissal of Montgomery's false imprisonment, false arrest, and municipality claims, but dissented from the majority's decision to reject the common-law/Restatement of Torts presumption regarding probable cause. *See id.* at 127 (Roth, J., concurring and dissenting). More specifically, the judge maintained that a conviction should, even if ultimately overturned, presumptively establish probable cause to initiate the original prosecution in the context of a § 1983 claim. *See id.* Furthermore, the judge stipulated that this common-law rebuttable presumption does not offend the purposes of § 1983. *See id.*

Judge Roth first recounted that the superior court judge reversed Montgomery's convictions because the evidence could not prove Montgomery's guilt beyond a reasonable doubt. *See id.* at 128 (Roth, J., concurring and dissenting). Judge Roth explained that the superior court found, in part, that the radar evidence of speeding was inadmissible. *See id.* The judge speculated that if a failure to prove guilt beyond a reasonable doubt could nullify a finding of probable cause, every successful appeal would

provoke a malicious prosecution claim. *See id.* Further, Judge Roth urged that inadmissibility of evidence should have no bearing on whether Montgomery's prosecution was reasonable in the first place. *See id.* Consequently, the judge opined that the municipal court's finding of probable cause to commence the proceeding should not be dislodged because of a reversal based on insufficient evidence. *See id.* Judge Roth supported this argument by explaining that a reversal for insufficient evidence is not identical to a ruling that the conviction was produced corruptly or fraudulently. *See id.*

Turning to the Second Circuit case *Cameron v. Fogarty*, Judge Roth noted that the majority, following precedent set in *Rose v. Bartle*, questioned *Cameron's* holding as not reflecting the "proper accommodation" between societal and individual interests. *See id.* (citations omitted). Judge Roth distinguished both *Rose* and *Cameron*, however, in that they involved claims for false arrest. *See id.* The judge stressed that a false arrest claim depends on whether there has been an illegal arrest, whereas a malicious prosecution claim depends on the propriety of the proceeding itself being commenced with probable cause. *See id.* at 128-29 (Roth, J., concurring and dissenting). Judge Roth thus opined that the concerns in *Rose* do not carry over to the present case. *See id.* at 129 (Roth, J., concurring and dissenting).

The judge refuted the majority's notion that a municipal conviction would "wipe out" a § 1983 claim by noting that the common-law rule merely raises a rebuttable presumption. *See id.* Judge Roth concluded by stating that the presumption may be rebutted by showing that the conviction was established through coercion or fraud, both of which are behaviors that § 1983 seeks to guard against. *See id.*

The majority's concern that the common-law presumption infringes upon the purposes of the Civil Rights Act is understandable and, given that the trial de novo reversed Montgomery's convictions, this holding appears reasonable. The Civil Rights Act is undoubtedly necessary to protect individuals from state actors' misuse of power. *See id.* at 125. One could make a good argument, however, that this court went beyond its jurisdiction by interposing itself between Montgomery and the state court system. The state court system operates under the same basic tenets as the federal court system, those of honesty, integrity, and justice. The Third Circuit's decision to negate the municipal court's finding of probable cause, however, seems to undermine the municipal court system and to imply that the municipal court may not have acted with impartiality. Furthermore, the majority's holding that a reversed conviction eliminates the municipal judge's finding of probable cause for purposes of a § 1983 malicious prosecution claim is illogical because if only the conviction is reversed, the

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municipal judge's factual finding of probable cause should still be relevant.

Application of the common-law presumption of probable cause would have been the better result in this case. As Judge Roth observed, this result will not encourage every defendant who has a successful appeal to pursue a § 1983 malicious prosecution claim. Additionally, the common-law presumption does not threaten the purposes of the Civil Rights Act. Rather, it accords proper strength to the municipal court, and it is a rebuttable presumption that may be overcome by evidence that the prosecutor did, in fact, lack probable cause.

Walter J. Dorgan III

FOURTH AMENDMENT PROTECTIONS — SEARCH AND SEIZURES — LAW ENFORCEMENT OFFICERS' CONDUCT DURING A CIVIL EVICTION IS OBJECTIVELY REASONABLE WHEN THEY AGGRESSIVELY ENTER PREMISES WITH REASON TO BELIEVE THAT THE PERSONS TO BE REMOVED MIGHT POSE A THREAT TO THE PHYSICAL SAFETY OF THE OFFICERS — *Mellott v. Heemer*, 161 F.3d 117 (3d Cir. 1998).

Bonnie and Wilkie Mellott owned land in Pennsylvania on which they lived and operated a dairy farm. *See Mellott v. Heemer*, 161 F.3d 117, 119 (3d Cir. 1998). In 1989, the Mellotts filed for bankruptcy and three years later their property was purchased at a public auction. The bankruptcy court directed the Mellotts to vacate the premises by December 10, 1992. Following three orders from the bankruptcy court directing the Mellotts to abandon the property, they refused. Deputy marshals from the United States Marshal Service posted notices at the Mellott's home on December 31, 1992, ordering them to remove themselves and their possessions from the premises by January 5, 1993. Their son Kirk, who also lived on the property in a separate house, found a similar notice on his door that same day. Kirk admitted that he understood the notice as one ordering him to vacate the premises.

The Mellotts continued to refuse to abandon the premises. On January 11, 1993, the bankruptcy court ordered the United States Marshal Service to secure the land and remove all individuals from the premises. Deputy Marshal Don Heemer and five additional deputy marshals who were assigned to remove the Mellotts were provided with the following information before the eviction: a county supervisor from the Farmers Home Administration reported that Wilkie Mellott chased him off the Mellott property with a pick up truck, displayed a handgun after he drove the supervisor off the land, and threatened to shoot at any federal agent who stepped on his property. *See id.* at 119-20. The county supervisor stated that he believed his life had been endangered by the encounter. *See id.* at 120. Deputy Marshal Heemer also learned that the Mellotts supposedly owned many firearms. *See id.* Further, Heemer learned that Kirk Mellott was considered unstable subsequent to a head injury and that he had previously told two other deputy marshals that his family would not vacate their property.

On January 21, 1993, the marshals, along with two state troopers, proceeded to the Mellott residence. The marshals wore bullet-proof vests and were authorized to utilize a short shotgun and a semi-automatic rifle

during the eviction procedure due to concerns that they would face armed resistance from the Mellotts. When the marshals knocked on the front door, Bonnie Mellott opened the door and Deputy Marshal Heemer entered the home, aimed his gun at Bonnie's face, and shoved her into a chair. Heemer kept the gun pointed at Bonnie for the duration of the eviction. Deputy Marshal David Seich walked in next, pointed his shotgun at Wilkie Mellott, and told him to remain still and keep quiet. The evidence demonstrated that prior to the eviction, the marshals knew that Wilkie was recuperating from heart surgery. Following Seich, two additional marshals and a state trooper entered the Mellott home.

Also on the premises during this encounter were Jackie Wright, a Mellott family friend, and Michelle Hollinshead, a radio reporter. Wright was present in the room with Bonnie and Wilkie when the marshals entered the premises. At the time, Hollinshead was speaking with the local sheriff on a telephone in the kitchen. According to Hollinshead, one of the marshals speedily entered the kitchen, put his semi-automatic gun in Hollinshead's face and demanded that she hang up the phone. When Hollinshead refused, the marshal placed his gun "to the back of her head" and told her to "[s]hut the hell up and hang up the phone." *Id.* (citations omitted). Hollinshead complied and the marshal, with his gun to Hollinshead's back, shoved her toward the room where the others were being held.

Meanwhile, Wilkie Mellott said he did not feel well and asked for his medicine. *See id.* at 120-21. When Bonnie attempted to retrieve it, Deputy Marshal Heemer forced her back in her chair and asked where the medicine was kept. Heemer then retrieved the medicine and handed it to Wilkie. *See id.* at 121.

At some point, Bonnie overheard the marshals discussing their plans to get Kirk Mellott from his home on the property and she offered to go with them. The marshals refused her offer but stated instead that Wright could accompany them. Before the marshals left for Kirk's house they ordered Bonnie and Wilkie off the property and Deputy Marshal Heemer allegedly advised them to drive away or they would be shot.

After Bonnie and Wilkie vacated the premises, the marshals went to Kirk's home. Wright accompanied them in his own vehicle. Upon arriving at Kirk's home, the marshals informed Wright that he would enter the home ahead of the marshals. One marshal informed Wright "that if anything goes wrong . . . you're going to be the first one to go down." *Id.* (citation omitted). As they proceeded into the home, Wright felt a gun pointed in his back. Without knocking, Wright entered and found Kirk sitting in the living room holding a bag of his belongings. Deputy Marshal Heemer confronted Kirk, pointed his gun at Kirk's chest, grabbed his arm,

and “spun him around and pushed him up against the wall.” *Id.* (citation omitted). Following a search of Kirk’s bag and a sweep of the home, the marshals ordered Kirk and Wright off the property.

The plaintiffs, Bonnie, Wilkie, and Kirk Mellott, Michele Hollinshead, and Jackie Wright, filed suit in federal district court in Pennsylvania and alleged that the marshals violated their right under the Fourth Amendment to be free from unreasonable seizures, and their substantive due process rights under the Fifth Amendment. *See id.* Claiming an entitlement to qualified immunity, the marshals moved for summary judgment. *See id.*

The district court denied the summary judgment motion. *See id.* According to the district court, material issues of fact existed as to whether the marshals infringed upon the plaintiffs’ rights under the Fourth and Fifth Amendments by exercising excessive force while evicting the Mellotts, and whether it was reasonable for the marshals to believe that their behavior did not offend clearly established law. *See id.*

The United States Court of Appeals for the Third Circuit reversed the district court. *See id.* The court noted that the marshals are entitled to qualified immunity if, at the time they acted, it was reasonable for them to believe that their actions did not violate clearly established constitutional rights enjoyed by the plaintiffs. *See id.* In view of this standard, the court found that the marshals had acted in an objectively reasonable manner when they evicted the Mellotts and further concluded that Wright was not seized for purposes of the Fourth Amendment. *See id.* at 123, 125. Therefore, the Court held that the plaintiffs had failed to show any violation of a constitutionally protected right that would prohibit the marshals from enjoying qualified immunity. *See id.* at 121.

Writing for the majority, Judge Alito began by noting that all of the plaintiffs’ claims must be analyzed under the Fourth Amendment. *See id.* Relying on Supreme Court precedent, Judge Alito stated that all claims involving law enforcement officers who have allegedly used excessive force in the seizure of a free person are to be examined under the Fourth Amendment and its accompanying “reasonableness” standard, rather than substantive due process. *See id.*

In order to succeed on an excessive force claim, Judge Alito asserted that a plaintiff must show that the use of force by a defendant was not objectively reasonable. *See id.* at 122. Applying this standard, the judge indicated, required that attention be directed to the circumstances and facts of each case, including “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Also important to this analysis, Judge Alito added, is the number of people the

officers confront and whether the physical force used led to any injury. *See id.* In balancing these considerations, the court advised that the reasonableness of the use of force must be assessed from the viewpoint of a reasonable officer at the scene, who often has to make immediate judgments under tense and uncertain conditions. *See id.*

The court next recounted *Sharrar v. Felsing*, in which the court held that the conduct of twenty law enforcement officers who made four suspects in a violent crime lay face-down on the ground and allegedly held guns to their heads and threatened to “blow [their] brains out” should they move, was not a violation of the Fourth Amendment. *See id.* (quoting *Sharrar v. Felsing*, 128 F.3d 810, 816, 821 (3d Cir. 1997)). Judge Alito, noting that the *Sharrar* court found the official conduct extreme, mentioned the marshals’ position that their conduct cannot be found unlawful due to the fact that the Mellott’s claims of force are minimal when compared to the allegations of force in *Sharrar* that were constitutionally permissible. *See id.* The judge noted, however, that mere comparison between the Mellott’s case and *Sharrar* is not enough to reach the court’s reasonableness determination. *See id.* Such a determination, the court asserted, must hinge on particular facts and circumstances that the marshals faced in this case. *See id.*

Turning to the “severity of the crime” element of *Graham*, Judge Alito explained that the marshals were not sent to the Mellott home to arrest them for committing a violent crime, but to remove them from their formerly owned property. *See id.* Furthermore, the court acknowledged that there was no evidence of any active resistance throughout the eviction, but the court did observe that Hollinshead’s refusal to hang up the phone after the first request was a factor that weighed in the marshals’ favor in regard to their conduct subsequent to her refusal. *See id.* at 123 n.4. Continuing, the court concluded that the *Graham* factor pertaining to the threat to an officer or individual’s safety was significant in the court’s determination that the marshals’ alleged conduct throughout the eviction was objectively reasonable. *See id.* at 122-23.

Judge Alito related the warnings the marshals had been given prior to the eviction: that Wilkie had threatened to shoot at any federal agent stepping on his land, that Wilkie reportedly owned a number of firearms and chased the county supervisor off his land with a truck, and that Kirk was viewed as mentally unstable. *See id.* at 123. In view of such admonitions, Judge Alito concluded that the marshals had good reason to anticipate an armed confrontation and, therefore, in light of their own safety, it was objectively reasonable for them to load and aim their guns. *See id.* Emphasizing the need to consider the tense and uncertain conditions officers face when they act, the court drew attention to the fact that the marshals, upon

entering the Mellott home, not only encountered Bonnie and Wilkie, but Jackie Wright, who was unidentified at the time. *See id.* Furthermore, the court pointed out that the marshals heard an unknown voice (Hollinshead) in another room and had no way of knowing to whom she was speaking. *See id.* Judge Alito suggested that the marshals could reasonably have feared that Hollinshead was contacting a cohort of the Mellotts and further hinted at the importance of Kirk Mellott's absence. *See id.* The court also contrasted the fact that in *Sharrar* twenty officers were present to deal with only four people found in one location, whereas in the present case there were fewer than ten officers present to confront five individuals, not all of whom were encountered at the same spot at the same time. *See id.*

Continuing with the factor of whether the official force led to physical injury, the court acknowledged that Wilkie had chest pains but that the marshals provided him with his medication and that there were no further complications. *See id.* Moreover, Judge Alito indicated that there was no evidence of any physical injury to Bonnie Mellott on the two occasions when the marshals pushed her into a chair. *See id.* In light of all these factors, the court concluded that the force applied by the marshals was objectively reasonable. *See id.*

Next, Judge Alito briefly addressed arguments raised by the dissenting opinion. *See id.* The judge dismissed the contention that the present case was similar to *Baker v. Monroe Township*, in which officers violated the Fourth Amendment when they pointed guns at and handcuffed a woman and her three children upon their visit to a home that was the subject of a police raid. *See id.* (citing *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995)) The court explained that *Baker*, unlike the Mellott eviction, was devoid of any evidence that would suggest to the officers that force was necessary. *See id.* at 123-24. Continuing, the court bluntly asserted that its job in *Mellott* was to apply constitutional standards, rather than norms of appropriateness when observing Deputy Marshal Heemer's admission that his aiming a gun at an unarmed individual was inappropriate behavior. *See id.* at 124 (citing *Elder v. Holloway*, 510 U.S. 510, 515 (1994)). Next, Judge Alito noted that the marshals were reasonable in fearing for their safety, even though they entered into a rather peaceful scene, because they might have thought that there were weapons concealed in the living room that the suspects could retrieve. *See id.* Further, Judge Alito opined that even if Wilkie Mellott had assured the marshals that all firearms had been removed from the premises, an officer concerned for his own safety could have been reasonably skeptical. *See id.*

Finally, the court addressed Jackie Wright's claim. *See id.* The court recounted Wright's allegation that the marshals infringed upon his constitutional rights when they used him as an unwilling "human shield" to enter

Kirk Mellott's house. *See id.* The court rejected this claim, finding that Wright had not been seized for Fourth Amendment purposes. *See id.* Such a seizure only occurs, the court reported, when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* (quoting *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991)). Judge Alito observed that the marshals did not restrict Wright's freedom when he accompanied them to retrieve Kirk because Wright volunteered to accompany the marshals. *See id.* In order to succeed on summary judgment, the court indicated that Wright would have had to highlight some evidence demonstrating that he had changed his mind and chose not to accompany the marshals to retrieve Kirk and that the marshals then compelled him to do so. *See id.* at 124-25. The court noted that no evidence had been presented to establish that Wright asked to leave or stay outside Kirk's home or that the marshals themselves told Wright that he could not leave or remain outside. *See id.* at 125. Furthermore, the court stated that the alleged statement of the marshal telling Wright that he was going to enter the house first and that Wright felt a firearm in his back were not sufficient to impart to a reasonable person in a similar position that he was not allowed to leave. *See id.* The court suggested it was likely that a person voluntarily entering a home before officers with drawn guns, would feel a weapon on his back. *See id.*

Having concluded that no Fourth Amendment seizure of Wright had occurred, Judge Alito added that even if a seizure had occurred, the marshals would still enjoy qualified immunity. *See id.* In reaching this conclusion, the court explained that reasonable law enforcement officers in the marshals' position could easily conclude that a reasonable person in Wright's circumstances would not believe that his freedom was restricted. *See id.*

In a dissenting opinion, Judge Rendell announced that the reasonableness of the marshals' behavior during the eviction is a jury question. *See id.* (Rendell, J., dissenting). The dissent criticized the majority for ignoring the Third Circuit's most recent Fourth Amendment jurisprudence articulated in *Baker v. Monroe Township*. *See id.* (citing *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995)). The *Baker* court, Judge Rendell explained, concluded that a Fourth Amendment violation could have been found based on testimony demonstrating that prior to a drug raid police stopped three people visiting the subject home, ordered them to lie on the ground, handcuffed them, drew their guns, and detained them for fifteen to twenty-five minutes. *See id.* at 126 (Rendell, J., dissenting). Judge Rendell noted that the police in *Baker* had encountered a benign scene of individuals visiting family and, thus, there was nothing to prompt the officers to apply the force allegedly used. *See id.*

The dissent argued that *Baker* was similar to the Mellott's case. *See id.* Judge Rendell called attention to the admission by the police in *Baker* that handcuffing the persons involved was inappropriate until they were under arrest. *See id.* Similarly, Judge Rendell noted that in the present matter, Deputy Marshal Heemer admitted that aiming a gun at an unarmed person was similarly inappropriate. *See id.* According to the judge, the marshals came upon a peaceful scene, there was no indication of any resistance by the Mellotts, and there was no evidence to suggest that the marshals needed to execute the force allegedly used. *See id.*

The dissent further opined that a jury could conclude that the chances of violence toward the marshals were minor since only one witness (the county supervisor) had witnessed any aggression exhibited by the Mellotts. *See id.* Related to this point, Judge Rendell illuminated some facts that he believed could color a fact finder's perception of the context of the case. *See id.* The judge observed that the marshals were aware that, at the time of the eviction, the Mellotts were in the process of suing the Farmers Home Administration and, thus, trying the patience of federal agencies. *See id.* Moreover, the judge mentioned that testimony from Bonnie Mellott noted that the bankruptcy court judge stated that he intended to "make an example' of them." *Id.* at 126 n.1 (Rendell, J., dissenting).

Continuing, Judge Rendell noted that any fear the officers might have had upon arriving at the Mellott home should have dissipated when they encountered a "pastoral scene" of people sitting silently in a living room and the officers should have "adjust[ed] their response" accordingly. *See id.* at 126 (Rendell, J., dissenting). Further, the judge explained that Deputy Marshal Heemer testified that Wilkie assured the marshals that no one else was present in the home and that all weapons had been removed from the premises. *See id.* Thus, Judge Rendell concluded that a jury may not have clearly determined that the force executed by the marshals from that point was objectively reasonable. *See id.* Additionally, the judge maintained that Wilkie Mellott could have had a seizure during the exhibition of force. *See id.*

Finally, the dissent, as the majority had, referred to *Sharrar*, which bordered on a Fourth Amendment violation when the police exhibited "Rambo-type" behavior in rounding up violent crime suspects. *See id.* at 126-27 (Rendell, J., dissenting) (citing *Sharrar*, 128 F.3d at 822). Judge Rendell then maintained that the Mellott's case also bordered on a Fourth Amendment violation, if not actually constituting a violation itself, because marshals were executing a civil eviction but utilized tactics the dissent branded as "Gestapo-like." *See id.* at 127 (Rendell, J., dissenting). In view of these considerations, Judge Rendell urged that the majority acknowl-

edge that genuine issues of fact regarding the reasonableness of the marshal's conduct existed. *See id.*

The *Mellott* case is an excellent illustration of the difficulties of balancing the need for effective law enforcement against the constitutional right to be free of unreasonable seizures. The *Mellott* case could be a rallying point for defenders of aggressive police conduct under the guise of officer safety, as well as for those who decry many law enforcement officers as disdainful of personal liberty. Because Fourth Amendment jurisprudence allows for varying interpretations of the reasonableness of police conduct, a jury could have differed as to the degree of reasonableness of the marshals' conduct. In light of the warnings given to the marshals prior to the eviction, however, the Court of Appeals correctly determined that the official conduct was objectively reasonable.

What is striking about the majority's opinion is the implicit acknowledgment that there exists a difference between appropriateness and reasonableness. The court quickly dismissed Deputy Marshal Heemer's admission that his pointing a gun at an unarmed person was inappropriate. It is possible, however, that if an officer admits the conduct to be inappropriate, a reasonable trier of fact may view the behavior as objectively unreasonable. The court most likely chose not to explore such a distinction because of its recognition of the difficulty police have in making immediate decisions in scenarios with potentially dangerous variables. Thus, even in view of Heemer's admission, Judge Alito looked to the reasonableness of the entire course of conduct rather than focusing on one particular act or omission by the marshals. The majority decision appears to reflect a policy judgment giving police officers extreme deference.

The judgment of the court was reasonable given the course of conduct of the Mellotts, as the marshals understood (i.e., chasing officers off their property and threatening to shoot at federal agents), and the frame of mind of the marshals at the time of the eviction. Further, even if in hindsight an officer concedes that one act was inappropriate, deference should be given to the intense and evolving circumstances confronting the officers.

Judge Rendell's dissent suggests that once Wilkie Mellott assured Heemer that the firearms had been removed from the property, the resulting force applied by the marshals cannot clearly be viewed as objectively reasonable. Such a suggestion cannot withstand earnest evaluation. The dissenting judge does not explain why the officers should have had any good faith reason to accept Wilkie's assertions when the Mellotts themselves failed to respect a succession of court orders demanding their extrication from the property. It strains logic to urge acceptance of a proposition that firearms have been removed from the property when the crux of

the case is that the very man making the statement refuses to remove himself and his belongings from the property.

Mellott should be seen as a very narrow holding since the Third Circuit affirmed its commitment to evaluate Fourth Amendment matters on the elements and conditions of each particular case. Because of the adherence to this approach, *Mellott* should not be misinterpreted as a justification for excessive police force in other routine law enforcement operations.

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LABOR LAW — STATUTE OF LIMITATIONS — AN UNTIMELY MOTION FOR RECONSIDERATION, ADDRESSED TO A UNION'S ADMINISTRATIVE BODY, DOES NOT TOLL THE SIX-MONTH STATUTE OF LIMITATIONS UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT — *Williams v. Chrysler*, No. 98-7108, 1998 WL 871026 (3d Cir. Dec. 16, 1998).

On June 23, 1987, Charles Williams was employed by Chrysler Corporation (Chrysler) as an assembly worker at the Newark, Delaware assembly plant when Chrysler terminated him for excessive absenteeism. *See Williams v. Chrysler*, No. 98-7108, 1998 WL 871026, at *1 (3d Cir. Dec. 16, 1998). Chrysler maintained that it terminated Williams in accordance with the Chronic Absentee Procedure, incorporated in the collective bargaining agreement between Chrysler and Williams's labor union, United Automobile, Aerospace and Agricultural Implement Workers of America (Union). The Chronic Absentee Procedure, however, excluded certain illnesses that were not to be considered in calculating an employee's absentee rate. Williams argued that his absenteeism was due to excludable illnesses and, thus, his termination violated the collective bargaining agreement. Williams requested that the Union begin grievance procedures on his behalf. Despite conducting many of the grievance processes, the Union withdrew the grievance on June 30, 1988, and refused to arbitrate the termination issue based upon a finding that the grievance lacked merit.

The Union's constitution outlined the proper appeal procedures Williams could commence to challenge the withdrawal of his grievance. Specifically, Williams was required to appeal the withdrawal of his grievance internally before he could sue the Union in federal court. Following the proper procedure, Williams appealed the withdrawal of his grievance to the Union's public review board, which rejected the appeal on January 9, 1996. *See id.* On April 26, 1996, Williams filed a motion for reconsideration based on his belief that the review board had misinterpreted the guidelines, as well as the illnesses from which he suffered. *See id.* at *2. On August 21, 1996, the review board denied the motion for reconsideration, noting that the motion was untimely and lacked merit. *See id.*

On February 19, 1997, Williams sued Chrysler and the Union under both federal and state law in the United States District Court for the District of Delaware. *See id.* First, Williams alleged that both Chrysler and

the Union violated section 301 of the Labor Relations Management Act (LMRA), 29 U.S.C. § 185 (1994). *See id.* Williams alleged that in terminating him, Chrysler violated the collective bargaining agreement. *See id.* Williams further alleged that the Union violated its own duty of fair representation by withdrawing his grievance against Chrysler. *See id.* Next, Williams asserted that both Chrysler and the Union had breached the implied covenant of good faith and fair dealing under Delaware state contract law. *See id.* Finally, Williams alleged that Chrysler violated section 510 of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1140 (1994) because Chrysler terminated Williams in an attempt to deprive him of health insurance and disability benefits. *See id.*

The district court granted the defendants' motions for summary judgment on both the federal and state law claims, ruling that Williams's claims were barred by the statute of limitations. *See id.* Regarding the section 301 claim, the district court held that the claim ripened subsequent to the review board's initial rejection of Williams's appeal on January 9, 1996. *See id.* Further, the district court noted that the Union's constitution did not require Williams to request reconsideration of the review board's decision to exhaust his administrative remedies. *See id.* Thus, according to the district court, Williams's motion for reconsideration "could not toll the six-month statute of limitations applied to section 301 claims." *Id.* The district court concluded that Williams's section 301 claim was time-barred due to his failure to file suit within six months from the Union review board's January 9, 1996, rejection of his appeal. *See id.*

The district court addressed the ERISA and state contract law claim together and found that Williams could have commenced both claims when Chrysler terminated him on June 23, 1987. *See id.* The district court relied upon precedent in determining that a three-year statute of limitations was applicable to both claims and that Williams's claims were time barred. *See id.* Williams subsequently appealed the order granting summary judgment on all claims. *See id.*

In affirming the district court's summary judgment order, the United States Court of Appeals for the Third Circuit held that "an untimely motion for reconsideration pursuant to a union internal appeal procedure cannot toll the six-month statute of limitations" under section 301 of the LMRA. *Id.* at *4.

Writing for a unanimous court, Judge Greenberg posited that a court of appeals may conduct a plenary review of a district court's granting of a summary judgment motion. *See id.* at *3. Further, the appellate court noted that as a matter of law, a court should grant a moving party's motion for summary judgment only when no genuine issue of material fact exists. *See id.* (citing Fed. R. Civ. Pro. 56(c)). Elaborating on the summary judg-

ment standard, Judge Greenberg explained that a court should not grant a summary judgment motion where, based upon the evidence, a reasonable jury could find in favor of the non-moving party after all reasonable inferences are drawn in favor of the non-moving party. *See id.* (citing *Hilfirtly v. Shipman*, 91 F.3d 573, 577 (3d Cir. 1996)).

Noting that Williams's claims against Chrysler and the Union were "a hybrid action" under section 301 of the LMRA, the court affirmed the district court's application of a six-month statute of limitations to the section 301 claim. *See id.* (citing *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983)). Judge Greenberg recognized that the appellate court was bound by the review board's finding that Williams's reconsideration motion was untimely. *See id.* Because the parties agreed that the statute of limitations was six months, the only question remaining was from what point in time the claim actually accrued. *See id.* Thus, the judge observed that the "determinative question . . . [was] whether untimely requests for reconsideration toll the statute [of limitations]." *Id.* The judge declared that the review board's finding was correct based upon an express reading of its rules that provide a thirty-day time limitation for a party to file a request for reconsideration of a review board's decision. *See id.*

The court held that the six-month statute of limitations applicable to a section 301 claim could not be tolled by an untimely motion for reconsideration. *See id.* at *4. The court observed that a ruling declaring that an untimely request tolls the statute of limitations period allows for indefinite delays in seeking reconsideration. *See id.* Recognizing that Williams was not intentionally late in filing his motion for reconsideration, the judge opined that allowing Williams's claims to toll the statute of limitations for seven months would only invite late filings of motions for reconsideration. *See id.*

Next, the court addressed Williams's argument that the review board's failure immediately to reject his motion led him to believe that his motion had been taken under consideration within the six-month time limit. *See id.* The court explained that Williams believed Chrysler and the Union were estopped from asserting that the statute of limitations was not tolled based upon his untimely motion for reconsideration. *See id.* In finding Williams's estoppel argument "unpersuasive," Judge Greenberg stated that "[i]t would hardly be sensible to say that [a body] can genuinely deny reconsideration only when it gives the matter no thought" *Id.* (quoting *Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'r*, 482 U.S. 270, 281 (1987)). The court further refuted Williams's estoppel argument because, assuming the estoppel claim was meritorious, Williams failed to argue it at the district court level and thereby waived his right to

assert such argument on appeal. *See id.* Finding that Williams failed to commence his section 301 claim within the six-month time period, the judge concluded that the claim was time-barred. *See id.*

Finally, the court addressed Williams's ERISA and state contract law claims. *See id.* Responding to Williams's concession at oral argument that the success of the ERISA and contract claims relied upon a successful section 301 claim, the court summarily rejected both the ERISA and contract claims because of the negative disposition of his section 301 claim. *See id.* Judge Greenberg noted that because the failed section 301 claim precluded Williams from bringing either the ERISA or state contract law claims, the court would not address the issue as to whether either of these claims were time-barred. *See id.* The court thus upheld the district court's granting of the summary judgment motions on all claims. *See id.* at *5.

The Third Circuit's conclusion that an untimely motion for reconsideration cannot toll the six-month statute of limitations applicable to section 301 claims was the correct decision. Definite and uniformly applied statutes of limitations on causes of action and appeals are necessary in order to ensure timely adjudication of claims. Not only does the timely adjudication of claims ensure fairness to a defendant, it empowers a plaintiff to bring suit supported by readily available evidence and witnesses that might not otherwise be available if a long time period lapses from the time a claim ripened. In furtherance of the need for clarity in application of statutes of limitations, the holding in *Williams* provides a clear and unambiguous standard that plaintiffs bringing section 301 claims may utilize in determining when they must appeal a decision of a union review board.

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