

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Case No. 12-1633

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**UNITED STATES OF AMERICA,**

Appellee,

v.

**STEPHEN IANIERI,**

Appellant.

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**APPELLANT'S BRIEF**

and

**JOINT APPENDIX VOLUME I, PAGES 1 to 3**

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December 17, 2012

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## **JURISDICTION**

The district court had jurisdiction over Stephen Ianieri's underlying federal criminal prosecution pursuant to 18 U.S.C. § 3231 and over his supervised release pursuant to 18 U.S.C. § 3583. The district court revoked Ianieri's supervised release and imposed a revocation sentence on February 27, 2012. JA3. Ianieri timely filed a notice of appeal on March 5. JA1. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

## **RELATED CASES AND PROCEEDINGS**

This case has not been before this Court previously, and Ianieri is not aware of any other case or proceeding that is in any way related, completed, pending, or about to be presented before this Court or any other agency, state or federal.

## **STATEMENT OF THE ISSUE**

- I. After Stephen Ianieri's supervised release ended, he committed certain crimes. The district court ruled that Ianieri's post-supervision crimes violated the terms of his supervised release. Did the district court have jurisdiction to revoke supervised release and impose a new sentence based on post-supervision conduct?

## STATEMENT OF THE CASE

Because the procedural history is central to the appeal, it is recounted in more detail in the following section and only summarized here.

In 2004, Stephen Ianieri<sup>1</sup> pled guilty to three counts of bank fraud in violation of 18 U.S.C. § 1344 and was sentenced to 15 months' imprisonment and five years' supervised release. The Honorable Harvey Bartle, III presided at all relevant district court proceedings in this case. Ianieri entered supervised release on July 5, 2005. JA16.

In 2009, Ianieri's probation officer filed notice of multiple violations of the terms of supervised release, including a state arrest in New Jersey for firearm and drug possession. JA16. The district court held a revocation hearing on December 7, 2009. JA20. The court continued the hearing in part and ordered Ianieri to serve three months' home confinement.

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<sup>1</sup> His surname is pronounced "eye-in-YERR-ee."

The court held a second violation hearing on May 25, 2010, to address new violation allegations. JA29, 32. This hearing was resolved by agreement of the parties.

Ianieri's term of supervised release ended on July 4, 2010. JA41.

The district court held a third hearing on December 5, 2011, following Ianieri's conviction on the New Jersey charges. JA42. The court continued the revocation hearing to await disposition of new, post-supervision charges pending in Bucks County, Pennsylvania.

The district court held a fourth and final hearing on February 27, 2012. JA64. The court revoked Ianieri's supervised release based on his convictions in both New Jersey and Bucks County and sentenced him to 18 months' imprisonment, consecutive to the New Jersey sentence.

## STATEMENT OF FACTS

### **A. Ianieri is convicted, imprisoned, and enters supervised release.**

Stephen Ianieri pled guilty to three federal bank fraud charges in 2004 and he was sentenced to 15 months in prison and five years of supervised release. After serving his prison term, Ianieri entered supervised release on July 5, 2005. The first four years of his



supervised release passed without incident. Ianieri ran a construction business and he lived with his wife and son. JA24.

Ianieri's supervised release apparently was subject to several standard terms, including that he commit no crime, attend alcohol or mental health treatment as directed by his probation officer, remain in the judicial district, report regularly to the probation office, comply with the probation officer's instructions and answer her questions truthfully, refrain from excessive alcohol use and drug use, and report any arrest.<sup>2</sup> JA16, 29. If he violated these terms, his release could be revoked and additional imprisonment ordered.

**B. New Jersey charges lead to first violation hearing in 2009.**

On October 28, 2009, with only roughly nine months of supervised release remaining, Ianieri was stopped while driving in

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<sup>2</sup> The judgment and sentence from Ianieri's original conviction appear in the district court docket only as a minute entry, JA10 (E.C.F. # 39). It is not apparent why no written judgment appears in the record. The minute entry on the docket does not state the conditions of supervised release. The terms above are taken from the probation officer's subsequent violation reports. Counsel cannot determine from the district court record whether the court complied with 18 U.S.C. § 3563's requirement that it direct the probation officer to provide Ianieri with a written statement setting forth the conditions of supervised release, or whether Ianieri in fact received such a statement.

Stockton, New Jersey, because his vehicle's license plate light was out. The officer found a loaded weapon behind the driver's seat, an open container of alcohol, and prescription pills. Ianieri was arrested and charged with possessing a weapon and drugs in violation of New Jersey law. JA16-17.

With the New Jersey charges still pending, Ianieri's probation officer filed a notice of violation of the terms of federal supervised release. JA16. The notice alleged several violations: the criminal acts themselves, Ianieri's presence outside the district when arrested, his failure to disclose his arrest and denial of police contact to his probation officer, his recent failure to provide monthly reports, and his apparent intoxication at his most recent probation-officer meeting.

The district court held a violation hearing on December 7, 2009. JA20. At the hearing, Ianieri admitted, "I clearly have a problem with alcohol that's really set me, you know, downward spiral [stet]." JA24. The court continued the hearing to await the outcome in New Jersey and modified supervised release to require three months of home confinement. JA25-26.

**C. Tincum Township charges lead to second hearing in 2010.**

Ianieri was charged with stalking, theft, and harassment in May of 2010 in Tincum Township, Pennsylvania.<sup>3</sup> Ianieri's probation officer filed an addendum to the 2009 violation petition based on the criminal allegations and Ianieri's failure to attend mental health treatment.

The district court held a second violation hearing on May 25, 2010. JA32. The parties announced an agreement that the matter would be resolved by Ianieri remaining in treatment through the end of his supervised release and by his restitution payment being adjusted. JA34-35. The court accepted this disposition. JA37-38. The Tincum Township charges later were dismissed.

**D. Supervised release ends.**

On July 4, 2010, Ianieri's supervised release terminated. JA41. No violation notices were filed between the second hearing and the end of supervision.

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<sup>3</sup> Tincum Township is in Bucks County, Pennsylvania, but these are not the charges referred to by the district court, the parties below, and in this brief as the Bucks County charges. *See infra* at 7, 9-13. The Tincum Township charges were stalking, theft, and harassment, while the Bucks County charges were unlawful taking, receiving stolen property, deceitful business practices, and bad checks.

**E. Ianieri is charged with post-supervision crimes in Bucks County.**

On October 12, 2010—more than three months after Ianieri’s supervised release ended—he was charged in Bucks County, Pennsylvania with theft by unlawful taking, receiving stolen property, deceitful business practices, and bad checks. The alleged offense dates all were August 11, 2010. JA54.<sup>4</sup>

**F. Disposition of the New Jersey charges leads to third hearing in 2011.**

In March of 2011, Ianieri was tried on the New Jersey charges, *supra* at 4-5, and convicted of felony possession of a firearm and bullets. He received an aggregate five-year state sentence. JA44.

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<sup>4</sup> The details for the Bucks County crimes are presented clearly in the state court docket, case number CP-09-MD-0002531-2010 of the Court of Common Pleas of Bucks County, Pennsylvania. The Bucks County docket was not part of the district court record, although, as discussed below, the record did show that the Bucks County arrest occurred in October 2010 and after the end of Ianieri’s supervision. By separate motion, Ianieri will ask the Court to take judicial notice of the Bucks County docket. *See* Fed. R. Ev. 201(b), 1101(a); *see also United States v. Farrell*, 672 F.3d 27, 31 (1st Cir. 2012); *Sanders v. Downs*, 420 Fed. Appx. 175, 179 n.2 (3d Cir. 2011) (unpublished) (per curiam). The docket will be attached to that motion; it is available online through Pennsylvania’s Unified Judicial System website at: <http://ujportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-09-MD-0002531-2010>.

Ianieri currently is serving this New Jersey sentence, which runs until March 2016.

After the New Jersey sentencing, the district court ordered a violation hearing.<sup>5</sup> JA13. The hearing was held on December 5, 2011. JA42. The court found that the New Jersey conviction violated the terms of Ianieri's supervised release. JA50. The court then turned to sentencing and invited Ianieri to speak. Ianieri admitted he had developed a "horrible alcohol problem" and explained his strong interest in getting alcohol treatment while serving his New Jersey sentence. JA51-52. He explained that he had lobbied hard to be admitted to the Therapeutic Communities treatment program, "one of the best in the country." JA52. He explained: "I know I'm dead without it, without getting the help. I'm not willing, my son's 10 now, I'm not willing to give up on them. But I need the help." JA52-53.

Ianieri explained that he would be eligible to participate in alcohol treatment if, and only if, any additional prison sentences he received were concurrent rather than consecutive. Ianieri's only

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<sup>5</sup> There is no indication in the record that the parties or the probation officer initiated this hearing. It appears that the district court acted sua sponte.

request at sentencing, therefore, was that the court run his violation sentence concurrent with his New Jersey sentence. JA52.

The district court then asked the probation officer to respond. She replied that she did not know anything about the Therapeutic Communities program, but that Ianieri would not be eligible for the program until his pending Bucks County charges, *see supra* at 7, were adjudicated. JA53-54. Her point was that if Ianieri received a non-concurrent state prison sentence on the pending Bucks County charges, he would be ineligible for the treatment program anyway and the basis for his request for a concurrent violation sentence would be nullified. Ianieri responded that he tentatively had negotiated a deal for a concurrent sentence on the Bucks County charges. JA55.

The district court decided to defer sentencing pending disposition of the Bucks County charges: “We can see what happens in Bucks County. If he gets a consecutive sentence, then that will moot the whole issue apparently. If he gets a consecutive sentence, then that’s another matter.” JA57.

Two points emerged during the discussion of the Bucks County charges between the probation officer and the court. First, the court had forgotten Ianieri's supervision had ended already:

Ms. Seader: . . . I'd like to share with the Court, we did uncover after Mr. Ianieri's supervision ended, he was arrested—

The Court: *His supervision ended?*

Ms. Seader: In—we stopped supervising him in July.

The Court: Oh, but his—

Ms. Seader: Yes.

The Court: He still has time on his—

Ms. Seader: Yeah, I'm sorry, yes, Your Honor.

The Court: Yeah.

JA53 (emphasis added). More significantly, the court was informed that the Bucks County arrests were “after Mr. Ianieri's supervision ended,” *id.*, from warrants dating from October 2010, JA54.<sup>6</sup>

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<sup>6</sup> The probation officer also mentioned other warrants dated from October 10 and June 5, JA54, but these charge were not mentioned at the subsequent hearing, were not a basis for the court's violation finding, and were not included in any pre-termination violation notice, *see* 18 U.S.C. § 3583(i), and thus are immaterial here.

**G. Fourth hearing in 2012 follows disposition of Bucks County charges; court finds violation based on both Bucks County and New Jersey convictions.**

In January 2012, Ianieri was sentenced in Pennsylvania court on the Bucks County charges to two-to-four years, concurrent with his New Jersey sentence. JA67.

Ianieri's violation hearing re-convened on February 7, 2012. JA64. Unfortunately, in the intervening two months, the lawyers and the judge all apparently forgot that the post-supervision Bucks Country charges were not themselves a basis for violation of supervised release but were relevant instead to whether Ianieri's request for a concurrent sentence for the New Jersey violation was moot.

At the outset of the hearing, the prosecutor asked for a consecutive sentence "for the subsequent violations sustained by the defendant while he was on supervised release. And these convictions I believe occurred both in Pennsylvania and New Jersey." JA66. The court asked what were the convictions. After the prosecutor confused the facts of the Bucks County and New Jersey cases, the probation officer explained, "The Bucks County offenses, Your Honor, are a



theft by unlawful taking and receiving stolen property.” JA67. After summarizing the sentence Ianieri got on the Bucks County charges, she explained that the Bucks County sentence was concurrent to his New Jersey sentence. She recited the facts of the New Jersey conviction. In response to the judge’s question, she repeated that the Bucks County charges were for receiving stolen property and theft by deception and that the sentence was concurrent. JA67-68. The judge asked defense counsel if there was any dispute about the charges, she replied in the negative, and Ianieri confirmed his convictions and sentences. JA69-70.

After an extended discussion about the Therapeutic Communities alcohol treatment program, it emerged that if Ianieri now received a consecutive sentence, he would be eligible for only nine to 12 months of alcohol treatment, but if he received a concurrent sentence he could continue receiving intensive inpatient alcohol treatment through the Therapeutic Communities program until his release from New Jersey custody in March 2016. JA71-81.

The court then asked for the Government’s position. The prosecutor asked for a consecutive sentence, one within the Guideline

range. JA82, 84. The prosecutor's argument at this point focused on the New Jersey conviction; he mentioned the Bucks County conviction only to support his request for a consecutive sentence.

JA83-84.

The district court ruled that Ianieri violated his supervised-release terms based on both the Bucks County and New Jersey crimes: "Mr. Ianieri, I find that you have violated the terms of your supervised release as a result of the commission of crimes in Bucks County, Pennsylvania, and crimes in New Jersey, which we identified the [sic] specificity earlier today." JA86. Defense counsel did not object to this ruling. The judge then stated that supervised release was revoked, and he sentenced Ianieri to 18 months' federal imprisonment, consecutive to the New Jersey sentence. JA91-92.

After the sentence was announced, Ianieri made one request: that the judge recommend him for a treatment program during his federal incarceration. JA92-93.

### **SUMMARY OF ARGUMENT**

The district court exceeded its jurisdiction when it ruled that Ianieri violated the terms of his supervised release by committing the

Bucks County crimes. Because the Bucks County crimes occurred after Ianieri's supervised release ended, they did not violate any release condition and the district court had no power to revoke release on this basis. 18 U.S.C. § 3583(e); *United States v. Cook*, 329 F.3d 335, 338 (3d Cir. 2003). For similar reasons, the district court lacked power to revoke Ianieri's release for violations for which no warrant was issued before the end of his supervision term. § 3583(i). Although the district court also relied on Ianieri's New Jersey crimes to revoke release, its jurisdictional error regarding the Bucks County crimes requires reversal. *United States v. Hernandez-Ferrer*, 599 F.3d 63, 66, 69 (1st Cir. 2010).

## ARGUMENT

**I. The district court acted without jurisdiction when it found that Ianieri had violated the terms of his supervised release based on acts that occurred after supervised release ended.**

Standard of review: the Court's review of jurisdictional issues is plenary. *United States v. Sczubelek*, 402 F.3d 175, 178 (3d Cir. 2005).

**A. Plain error review does not apply to this jurisdictional issue.**

Ianieri did not raise this issue in district court. Generally, issues not raised below are reviewed on appeal for plain error only. *United*

*States v. Duka*, 671 F.3d 329, 352 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2764 (2012). However, when the issue is jurisdictional, review is plenary. *Sczubelek*, 402 F.3d at 178. An assertion that the district court lacked jurisdiction may be raised for the first time on appeal. *United States v. DiSanto*, 86 F.3d 1238, 1244 (1st Cir. 1996); *cf. United States v. Cook*, 329 F.3d 335, 336 n.1 (3d Cir. 2003) (“Because the ground for this appeal is jurisdictional, Cook’s failure to appeal the earlier decision does not affect our jurisdiction.”). The plain-error standard does not apply to jurisdictional issues, because “defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court,” *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see United States v. Farmer*, 419 Fed. Appx. 163, 167 n.4 (3d Cir. 2011) (unpublished) (“The government argues that Farmer did not raise his jurisdictional argument before the District Court and we should accordingly review for plain error. . . . We find no support for the government’s assertion and apply a plenary standard of review.”), *cert. denied*, 132 S. Ct. 454 (2011).

**B. The district court based its violation finding on post-supervision conduct.**

The district court ruled that Ianieri violated the terms of his supervised release by “commission of crimes in Bucks County, Pennsylvania, and crimes in New Jersey, which we identified [with] specificity earlier today.” JA86; JA67-68 (identifying Bucks County crimes as unlawful taking and receiving stolen property). The Bucks County crimes took place in August 2010 and he was charged in October 2010, after Ianieri’s supervised release ended in July 2010. JA53-54.

**C. The district court lacked jurisdiction to revoke supervised release for Ianieri’s post-supervision actions.**

Under 18 U.S.C. § 3583(e)(3), a district court has jurisdiction to revoke supervised release and sentence a defendant who “violated a condition of supervised release.” An act that occurs after supervised release is over does not violate a condition of supervised release. *E.g.*, 18 U.S.C. § 3563(a)(1) (“The court shall provide, as an explicit condition of a sentence of probation—for a felony . . . that the defendant not commit another Federal, State, or local crime *during the term of probation*; . . . .” (emphasis added)).

Accordingly, the district courts lack jurisdiction to find a violation of the terms of supervised release based on post-supervision conduct. *United States v. Cook*, 329 F.3d 335, 338 (3d Cir. 2003) (“The District Court lacked jurisdiction to revoke Cook’s supervised release for violations in the summer and fall of 2001, because his supervised release ended in July 2000....”). A valid revocation may be based only on conduct occurring during the supervision term. *United States v. Naranjo*, 259 F.3d 379, 382-83 (5th Cir. 2001).<sup>7</sup>

**D. The district court lacked jurisdiction to find Ianieri in violation for the Bucks County conviction because no warrant or summons was issued for this violation prior to the expiration of supervised release.**

The district court lacked jurisdiction to find that the Bucks County conviction violated of the terms of supervised release for a second, independent reason. The district court’s violation ruling occurred roughly a year and a half after Ianieri’s supervised release ended. A district court’s jurisdiction to revoke and sentence a

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<sup>7</sup> The district court here also violated Rule 32.1(b)(1)(B)(i) of the Federal Rules of Criminal Procedure, which entitles defendants to notice of the alleged violation. Ianieri received no notice that the Bucks County conviction would be used as a basis for a violation finding. The Court need not reach this error in light of the primary claim.

defendant after supervised release has expired is limited by statute. *See* 18 U.S.C. § 3583(i). Such revocation may occur only “if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.” *Id.* Section 3583’s issuance requirement was not met here: a violation cannot be alleged before expiration when it did not occur before expiration. While warrants issued for other violations prior to the end of Ianieri’s supervised release, this did not establish jurisdiction over this violation. *United States v. Hernandez-Ferrer*, 599 F.3d 63, 66-67 (1st Cir. 2010).

**E. Reversal is required even though the district court also based its violation finding on the New Jersey crimes.**

Because at least one of the district court’s grounds for finding a violation exceeded its jurisdiction, the revocation of supervised release and imposition of sentence cannot stand. “[A] litigant’s failure to clear a jurisdictional hurdle can never be harmless or waived by a court.” *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988). Thus, even assuming for purposes of this appeal that the finding of violation based on the New Jersey conviction is valid, a partially valid

violation finding still requires reversal and remand. *United States v. Hernandez-Ferrer*, 599 F.3d 63, 66, 69 (1st Cir. 2010).

While proof that the error was not harmless is not required, such proof is abundant in this case. Assuming the validity of the New Jersey violation, there is good reason to believe the erroneous Bucks County violation led to a more severe revocation sentence than Ianieri would have received for the New Jersey violation alone. The Bucks County conviction was comparable to the New Jersey conviction: it led to a sentence of two-to-four years, compared to the five-year New Jersey sentence. And the key sentencing decision was whether the violation sentence would run concurrently or consecutively, because that decision determined whether Ianieri would be eligible for ongoing alcohol treatment. The evidence was strong that Ianieri had a serious alcohol problem and was sincere in seeking the intensive, ongoing treatment program that only a concurrent sentence would allow him. The district court took seriously the option of a concurrent sentence: it continued the third violation hearing to get more information about the Therapeutic Communities treatment program and to await the outcome of the Bucks County sentencing. *Supra* at 9. Finally, the



violation sentence the court imposed was three months *longer* than his original prison sentence. On this record, it is likely the district court would have imposed a lesser sentence had it realized that the Bucks County crimes were not a violation of the terms of supervised release.

As in *Hernandez-Ferrer*, “remand is appropriate to allow the district court to decide whether to revoke the appellant’s supervised release based solely on the [other] violations and, if so, to impose a condign sentence.” 599 F.3d at 69.

### CONCLUSION

For the foregoing reasons, the district court’s revocation of supervised release and imposition of imprisonment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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December 17, 2012

## CERTIFICATE OF SERVICE

I, Matthew Stiegler, hereby certify that on December 17, 2012, a copy of Appellant's Brief and Joint Appendix was served on opposing counsel, Thomas M. Zaleski, electronically through this Court's docketing system. I further certify that ten hard copies of the brief were delivered to the Clerk's Office on the same date.

December 17, 2012

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,802 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen-point Equity.

December 17, 2012

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## CERTIFICATIONS OF COUNSEL

1. Undersigned counsel is a member of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).
2. The text of the electronic brief is identical to the text in the paper copies. L.A.R. 31.1(c)
3. The Avast Antivirus virus detection program, version 7.0.1474, has been run on this file and no virus was detected. L.A.R. 31.1(c).

December 17, 2012

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Case No. 12-1633

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**UNITED STATES OF AMERICA,**

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**JOINT APPENDIX VOLUME I, PAGES 1 to 3**

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December 17, 2012

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**UNITED STATES OF AMERICA** :

**v.** : **CRIMINAL NO.: 03-553**

**STEPHEN IANIERI** :

**NOTICE OF APPEAL**

Notice is hereby given that Stephen Ianieri, Defendant above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Judgment of sentence entered on February 27, 2012.

Respectfully submitted,

/s/ Catherine C. Henry  
CATHERINE C. HENRY  
Senior Litigator



**CERTIFICATE OF SERVICE**

I, Catherine C. Henry, Senior Litigator, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have served a copy of the within Notice of Appeal electronically through the Eastern District Clerk's Office Electronic Case Filing and/or by hand delivery, upon Thomas M. Zaleski, Assistant United States Attorney, to his office located at 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106.

/s/ Catherine C. Henry  
CATHERINE C. HENRY  
Senior Litigator

DATE: March 5, 2012

