

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-3689

UNITED STATES OF AMERICA

v.

NICHOLAS RIVERA,
a/k/a Nike

Nicholas Rivera,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-14-cr-00175-001)
District Judge: Honorable Christopher C. Conner

Submitted under Third Circuit L.A.R. 34.1(a)
on March 19, 2019

Before: SHWARTZ, KRAUSE, and BIBAS, *Circuit Judges*

(Opinion filed: April 4, 2019)

OPINION*

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

KRAUSE, *Circuit Judge*.

Appellant Nicholas Rivera appeals his sentence on the grounds that the District Court erroneously applied the career-offender enhancement under § 4B1.1 of the United States Sentencing Guidelines and that it violated Federal Rule of Criminal Procedure 32(i)(1)(A) by failing to verify that he reviewed the Presentence Report (PSR) with his counsel. For the reasons that follow, we will affirm.

I. Background

Rivera pleaded guilty to a one-count superseding information charging him with distribution and possession with intent to distribute heroin and cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1). At Rivera's sentencing hearing, the District Court applied the career-offender enhancement based on his two prior state convictions for possession with intent to distribute narcotics in violation of 35 Pa. Stat. Ann. § 780-113(a)(30). As a result, Rivera's Guidelines range was 151-188 months' imprisonment, and the District Court sentenced him to the bottom of the range. Rivera timely appealed.

On July 5, 2018, a motions panel of this Court granted Rivera's counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), but directed that new counsel be appointed to address, *inter alia*, "whether use of the word 'delivery' in [35 Pa. Stat. Ann.] § 780-113(a)(30) makes the statute potentially broader than the generic controlled substance offense defined by the U.S. Sentencing Guidelines, which does not contain that term." Order, *United State v. Rivera*, No. 15-3689 (3d Cir. July 5, 2018).

However, in the time between the issuance of that order and Rivera's filing of his

opening brief, we issued our opinion in *United States v. Glass*, where we held that “because [35 Pa. Stat. Ann.] § 780-113(a)(30) does not sweep more broadly than [U.S.S.G.] § 4B1.2, it is a ‘controlled substance offense’ and may serve as a predicate offense to a career-offender enhancement under § 4B1.1.” 904 F.3d 319, 324 (3d Cir. 2018).

II. Discussion¹

Rivera makes two arguments on appeal, both of which are unavailing.

First,² recognizing that his argument about the supposed differing scope of “delivery” under Pennsylvania law and federal law is now foreclosed by *Glass*, Rivera contends that *Glass* failed to consider the significance of *Commonwealth v. Donahue*, 630 A.2d 1238 (Pa. Super. Ct. 1993); that *Donahue* demonstrates that Pennsylvania’s definition of “delivery” reaches “a wider range of conduct” than its federal counterpart, “including, most notably, mere offers to buy or sell controlled substances”; and that we therefore should “reconsider and abrogate” *Glass*, Appellant’s Br. 11-12. We decline this invitation.

As a threshold matter, “the holding of a panel in a precedential opinion is binding on subsequent panels” absent intervening authority, which *Donahue* is not. 3d Cir. I.O.P. 9.1 (2018); *see United States v. Tann*, 577 F.3d 533, 541 (3d Cir. 2009). And, in any

¹ The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291.

² We exercise plenary review of an interpretation of the Guidelines and review factual findings for clear error. *See United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007) (en banc).

event, we recently rejected Rivera’s argument on the merits: In *United States v. Daniels*, we explained that *Donahue* does not undermine our conclusion in *Glass* that 35 Pa. Stat. Ann. § 780-113(a)(30) is no broader than the Guidelines’ definition of a “controlled substance offense” because the Guidelines definition, too, “applies not only to a statute that bars distribution of controlled substances, but also to ‘the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.’” *Daniels*, 915 F.3d 148, 152, 163-64 (3d Cir. 2019) (emphasis removed) (quoting *Glass*, 904 F.3d at 322, and U.S.S.G. § 4B1.2 cmt. n.1).³

Second, Rivera argues, concededly on plain error review, that the District Court erred by failing to comply with Rule 32(i)(1)(A), which provides, “[a]t sentencing, the court: (A) must verify that the defendant and the defendant’s attorney have read and discussed the presentence report and any addendum to the report.” Fed. R. Crim. P. 32(i)(1)(A). A party claiming plain error must prove that (1) the court erred; (2) the error was plain; and (3) it “affect[ed] substantial rights.” *United States v. Olano*, 507 U.S. 725, 732 (1993). For “substantial rights” to be affected, “‘the error must have been prejudicial,’ that is, ‘[i]t must have affected the outcome of the district court

³ In *Donahue*, the Pennsylvania Superior Court affirmed the appellant’s conviction as an accomplice for a violation of 35 Pa. Stat. Ann. § 780-113(a)(30), *see Donahue*, 630 A.2d at 270-72, and as we noted in *Daniels*, “Pennsylvania’s law of accomplice liability . . . is essentially identical to the federal approach to liability for aiding and abetting,” 915 F.3d at 164; *see also* Model Penal Code § 2.06(3). Thus, if anything, *Donahue* illustrates that the elements that must be proven for a conviction under 35 Pa. Stat. Ann. § 780-113(a)(30) based on accomplice liability are co-extensive with those required under federal law, reinforcing our holding in *Glass* that a conviction under 35 Pa. Stat. Ann. § 780-113(a)(30) categorically qualifies as a “controlled substance offense” under U.S.S.G. § 4B1.2.

proceedings.”” *United States v. Stevens*, 223 F.3d 239, 242 (3d Cir. 2000) (alternation in original) (quoting *Olano*, 507 U.S. at 734). In addition, the error must “seriously affect[] the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Vazquez*, 271 F.3d 93, 99 (3d Cir. 2001) (en banc) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

We “ha[ve] declined to interpret Rule 32[(i)(1)(A)] as creating ‘an absolute requirement that the court personally ask the defendant if he has had the opportunity to read the report and discuss it with counsel,’” and “[i]nstead, . . . have allowed for a more functional fulfillment of the rule, requiring only that the district court ‘somehow determine that the defendant has had this opportunity.’”⁴ *Stevens*, 223 F.3d at 241 (quoting *United States v. Mays*, 798 F.2d 78, 80 (3d Cir. 1986)). Here, the Government argues that “functional” fulfillment of Rule 32(i)(1)(A) was achieved because, in advance of sentencing, Rivera’s counsel submitted a letter to the U.S. Probation Office, which was attached as an addendum to the PSR, in which he raised certain objections to the PSR and asserted that “[he] and Mr. Rivera have reviewed your [PSR],” Gov’t Br. 21, thereby demonstrating that “prior to the sentencing hearing, the district court had been advised in writing that defense counsel had reviewed the PSR with Rivera.” Gov’t Br. 21-22.

We agree with the Government. While Rule 32(i)(1)(A) requires that the district court verify “[a]t sentencing” the defendant’s review and discussion of the PSR with counsel, we did not specify in *Stevens* that the court must fulfill the Rule’s requirements

⁴ At the time of *Stevens*, the PSR verification requirement was codified as Rule 32(c)(3)(A).

at the sentencing hearing itself; rather, we stated that Rule 32(i)(1)(A) requires the court to do so “before imposing sentence.” 223 F.3d at 241. And the District Court complied with that obligation here: Based on Rivera’s counsel’s submission, the Court was able to verify in advance of sentencing that Rivera reviewed the PSR with his counsel.

Moreover, at the sentencing hearing itself, the District Court implicitly acknowledged that fact by noting that Rivera had submitted objections to the PSR. We therefore perceive no error on the part of the District Court, much less “plain error.”⁵

Accordingly, we will affirm the sentence imposed by the District Court.

⁵ Even assuming error, moreover, Rivera has not demonstrated prejudice or the denial of substantial rights. *See Stevens*, 223 F.3d at 246 (holding that a Rule 32(i)(1)(A) error does not constitute a “structural defect” and will not be corrected “[i]n the absence of any showing of prejudice or the denial of substantial rights caused by th[e] error”).

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District Judge: Honorable Christopher C. Conner

Submitted under Third Circuit L.A.R. 34.1(a)
on March 19, 2019

Before: SHWARTZ, KRAUSE, and BIBAS, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record before the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on March 19, 2019.

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On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the judgment of the District Court dated October 19, 2015, be and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: April 4, 2019

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

NICHOLAS RIVERA

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:14-CR-0175

USM Number: 72213-067

Jonathan W. Crisp, Esquire

Defendant's Attorney

THE DEFENDANT:☒ pleaded guilty to count(s) 1 of the Information☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21:841(a)(1)	Distribution and Possession with Intent to Distribute Heroin and Cocaine	5/6/2014	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☒ Count(s) 1-5 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/19/2015

Date of Imposition of Judgment

/S/ Christopher C. Conner

Signature of Judge

CHRISTOPHER C. CONNER, CHIEF JUDGE, USDC MDPA

Name and Title of Judge

10/19/2015

Date

DEFENDANT: NICHOLAS RIVERA
CASE NUMBER: 1:14-CR-0175

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One Hundred Fifty-One (151) Months. This sentence shall be served consecutively to the anticipated state parole revocation at Cumberland County Docket No. 2517-2004.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that FCI Schuylkill (Minersville, PA) be designated as the place of confinement.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ The defendant is to contact the United States Marshal's Office no later than three days prior to the above date to be notified of the place of confinement.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: NICHOLAS RIVERA

CASE NUMBER: 1:14-CR-0175

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Three (3) Years. (See Page 4 for additional conditions of supervised release.)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and
- 14) the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

DEFENDANT: NICHOLAS RIVERA

CASE NUMBER: 1:14-CR-0175

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall submit to one drug test within 15 days of commencing supervision and at least two periodic drug tests thereafter for the use of a controlled substance.
2. The defendant shall undergo a substance abuse evaluation and, if recommended, the defendant shall satisfactorily complete a program of outpatient or inpatient substance abuse treatment.
3. The defendant shall cooperate in the collection of a DNA sample as directed by the probation officer unless a sample was collected during imprisonment.
4. The defendant shall provide the probation officer with access to any requested financial information.
5. In the event the fine is not paid in full prior to the commencement of supervised release, the defendant shall, as a condition of supervised release, satisfy the amount due in monthly installments of no less than \$50, to commence 30 days after release from confinement.

DEFENDANT: NICHOLAS RIVERA
CASE NUMBER: 1:14-CR-0175

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

Signed: _____
Defendant

Date: _____

Signed: _____
U.S. Probation Officer/Designated Witness

Date: _____

DEFENDANT: NICHOLAS RIVERA
 CASE NUMBER: 1:14-CR-0175

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 1,000.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____	0.00	\$ _____	0.00
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: NICHOLAS RIVERA
CASE NUMBER: 1:14-CR-0175

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- The special assessment is due immediately. During the term of imprisonment, the fine is payable every three months in an amount, after a telephone allowance, equal to 50 percent of the funds deposited into the defendant's inmate trust fund account. In the event the fine is not paid in full prior to the commencement of supervised release, the defendant shall, as a condition of supervised release, satisfy the amount due in monthly installments of no less than \$50, to commence 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.