

RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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SUPREME COURT

I. Qualified Immunity / Knock and Talk Investigations

Carroll v. Carman, No. 14-212, 135 S. Ct. 348 (2014).

The Third Circuit had previously held that Officer Carroll violated the Fourth Amendment when he conducted a warrantless search of the Carmans' curtilage by conducting a "knock and talk" investigation at the back door without first attempting to knock on the front door. The Court also held that Officer Carroll was not entitled to qualified immunity in this civil rights suit because the Fourth Amendment's protection of the home's curtilage is well-established.

This per curiam opinion reversed the Third Circuit's finding that the officer was not entitled to qualified immunity, holding that the one prior Third Circuit case the Court relied upon did not clearly establish Officer Carroll violated the Carmans' Fourth Amendment rights. Importantly, the Supreme Court did NOT decide "whether a police officer may conduct a 'knock and talk' at any entrance that is open to visitors rather than only the front door." This appears to leave in-tact, for now at least, the Third Circuit's requirement that officers first attempt to knock at the front door or main entrance when conducting a knock and talk investigation.

THIRD CIRCUIT

I. MTS Statement / Prompt Presentment / Attempt to Secure Cooperation

United States v. Thompson, --- F.3d ---, 2014 WL 6463173 (3d Cir. Nov. 19, 2014).

Under the *McNabb-Mallory* rule and 18 U.S.C. § 3501, a confession is inadmissible if it was obtained more than six hours after the defendant's arrest, but before presentment to a Magistrate Judge, if the Court finds the delay in presentment was unreasonable or unnecessary. The reasonableness standard focuses on whether the delay in presentment was for purposes of interrogation. This rule applies even if the confession was otherwise voluntary.

This case holds that pursuit of a defendant's cooperation is not a reasonable excuse for delay in presentment before a Magistrate Judge. The Court ruled that the district court should have suppressed Thompson's statement, which he made well after the six hour safe harbor period lapsed. Even though part of the delay was reasonable because it was attributable to logistical and/or transportation issues, the bulk of the delay was to secure Thompson's cooperation, and the

agents did not seek a waiver of his presentment right until after he had been in custody for at least twelve hours.

II. Rehearing *En Banc* Granted / *Alleyne* / Structural vs. Harmless Error

United States v. Lewis, 766 F.3d 255 (3d Cir. 2014).

The above-cited panel opinion held that a violation of a defendant's rights to a jury finding on facts necessary to impose a mandatory minimum sentence under *Alleyne v. United States*, 133 S. Ct. 2151 (2013), is not structural and is subject to harmless or plain error review under Federal Rule of Criminal Procedure 52.

This Order grants *en banc* review of the panel decision.

III. Fourth Amendment Standing / Passenger in Automobile / MTS Photo I.D. / Motion to Dismiss 924(c) Count / *Alleyne* and Prior Convictions / Eighth Amendment

United States v. Burnett, --- F.3d ---, 2014 WL 6463173 (3d Cir. Dec. 2, 2014).

- Burnett was the passenger in a getaway vehicle after he and his co-defendant robbed a jewelry store. The driver parked the vehicle in a residential area and the two fled on foot. The police were able to locate the vehicle through channels of investigation. They seized the car and obtained a warrant to search it at the police garage, recovering loot from the robbery and other evidence of the crime. The Court held that a former passenger, who does not own the vehicle and leaves it before the police take possession of it, has no standing to contest a search of the vehicle and seizure of any contraband recovered therein.

NOTE: This does not change the fact that a passenger in a vehicle has standing to challenge the fruits of an illegal vehicle *stop* under *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006).

- The district court correctly ruled that the photographic array in this case was not unduly suggestive. All of the men in the array were light skinned African-American males, were around the same age, had sparse amounts of hair, and had goatees with some graying, just like Burnett.
- The indictment was not deficient for failing to allege the “in furtherance of” element of an offense under 18 U.S.C. § 924(c). Section 924(c) actually creates two types of crimes: (1) using or carrying a firearm during and in relation to an underlying offense, and (2) possessing a firearm “in furtherance of” the underlying offense. Burnett’s indictment charged him with using or carrying a firearm (and brandishing it) during the underlying robbery, so there was no need for the indictment to allege that he possessed it in furtherance of the crime.

- Burnett waived his challenge to the sufficiency of the evidence by making only a conclusory assertion that the government's proof was insufficient. Even if the claim were considered on the merits, the government presented an "avalanche" of evidence, including eyewitness identifications, co-defendant testimony, and DNA evidence.
- The district court did not commit error under *Alleyne v. United States*, 133 S. Ct. 2151 (2013) when it found Burnett was an Armed Career Criminal without his predicate convictions having been set forth as allegations in the indictment and submitted to the jury. The Supreme Court has not extended the *Apprendi* rule to proof of prior convictions, and consequently judges can make findings on prior convictions that lead to enhanced penalties using the preponderance of the evidence standard.
- Burnett's 24 year, within-guideline sentence did not constitute cruel and unusual punishment under the Eighth Amendment because sentence was proportionate to the crime. During the robbery, Burnett terrorized victims with a gun, forced them to the floor, and bound them with ties. He also clubbed a victim who tried to escape, requiring seven surgical staples to the victim's head. This was also not aberrant behavior for Burnett, who had a prior record for violent robberies and assault. Finally, Burnett threatened the arresting officers in this case with a box cutter, resulting in an altercation that led to him getting shot in the chest.