

## RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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February 12, 2013  
Christofer Bates, EDPA

### SUPREME COURT

#### I. Unlawful Distribution of Narcotics Causing Death / Proximate Cause

*Burrage v. United States*, --- U.S. ---, 2014 U.S. LEXIS 797 (Jan. 27, 2014).

The government must prove “but-for” causation under 21 U.S.C. § 841(b)(1)(C) in order to trigger the 20-year mandatory minimum penalty and increased statutory maximum for drug trafficking when “death or serious bodily injury results from the use” of the drug. It is NOT sufficient for the government to prove that the defendant’s distribution of drugs is a “contributing cause” of the victim’s death.

### THIRD CIRCUIT

#### I. U.S.S.G. § 2K2.1(a)(2) / Crime of Violence / Categorical Approach / U.S.S.G. § 3A1.2(c)(1) / Assault on an Official Victim

*United States v. Jones*, --- F.3d ---, 2014 U.S. App. LEXIS 509 (Jan. 10, 2014).

(1) The district court erred when it used the modified categorical approach and looked to the *Shepard* documents to determine whether Jones’ conviction for misdemeanor vehicle flight under 75 Pa. Cons. Stat. § 3733(a)(1) constitutes a crime of violence pursuant to U.S.S.G. § 2K2.1(a)(2)’s residual clause. Specifically, the district court erred by looking to the defendant’s admissions during the plea colloquy to determine that his flight involved a dangerous high-speed chase. The Circuit recognized that it has sometimes approved such inquiries in the past, but that it will no longer do so after *Descamps*. Now, the modified categorical approach can only be used when the statute is divisible into alternative elements, and the *Shepard* documents are consulted only to see if they specify which alternative element was the basis for the conviction.

(2) The district court’s *Descamps* error was harmless, however, because the Circuit held that both misdemeanor and felony vehicle flight under § 3733 are categorically crimes of violence under the residual clause.

(3) The term “assault” in the enhancement for assaulting an official victim, U.S.S.G. § 3A1.2(c)(1), is defined according to its common law definition. Common law assault embraces two crimes: (1) attempted battery, or an intentional effort to cause bodily harm which falls short of success; and (2) an act intended to, and reasonably causing the victim to fear immediate bodily harm (such as menacing). Jones’ act of pulling out a gun during flight from the police satisfied neither of these definitions, because the police officer pursuing Jones did not realize he had a gun and therefore did not experience fear.

## **II. SORNA / Classification as a Sex Offender**

*United States v. Brown*, --- F.3d ---, 2014 U.S. App. LEXIS 767 (Jan. 15, 2014).

42 U.S.C. § 16911(5)(C) specifies that an individual convicted of an offense involving consensual sexual conduct is not a sex offender under the Sex Offender Registration and Notification Act (“SORNA”) if the victim was at least 13 years old and the offender was not more than 4 years older than the victim. The term “4 years older” means exactly 48 months or 1,461 days older than the victim.

## **III. Anticipatory Warrants / Rule 41(b) / Warrantless Seizure of Mailed Items**

*United States v. Golson*, --- F.3d ---, 2014 U.S. App. LEXIS 2537 (February 11, 2014).

(1) The anticipatory warrant to search Golson’s residence was issued so a State Trooper could expedite the controlled delivery of a parcel containing marijuana that law enforcement had previously seized and searched pursuant to a warrant. The Third Circuit held that the anticipatory warrant was governed by the Fourth Amendment only. The requirements of Federal Rule of Criminal Procedure 41(b) did not apply because the search was “state in character.”

The search was state in character because: (1) the warrant was issued by a Pennsylvania Magisterial District Judge upon a State Trooper’s application; (2) the warrant indicated there was a violation of Pennsylvania’s Drug Law; (3) Golson could not show bad faith of federal or state officers in obtaining the anticipatory warrant in state court; (4) although federal officers assisted in laying the investigatory groundwork for the warrant, it was the State Trooper who sought its approval; (5) there was no evidence federal agents supervised the search; and (6) despite federal and state officers working together during the search, the seized evidence was placed into the custody of the state police.

(2) The anticipatory search warrant was supported by probable cause notwithstanding the fact that the State Trooper’s affidavit omitted the fact that the officers had replaced the 20 pounds of marijuana in the parcel with only a trace amount. Even after this falsehood of the affidavit was removed by supplying the omitted information into the affidavit, the warrant still made out probable cause to search Golson’s residence.

(3) The anticipatory warrant, which was based on a triggering event, met the two prerequisites of probability: (1) that based on facts existing when the warrant was issued, there was probable cause to believe the contraband would be in the place to be searched when the warrant was executed; and (2) that there was probable cause to believe the triggering event would actually occur.

The first prerequisite was met because a trace amount of marijuana was certain to be present when the warrant was executed, along with a fair probability that other controlled substances, paraphernalia, and records associated with drug sales would be present when law enforcement arrived. The second prerequisite was met because the State Trooper possessed the package containing trace amounts of marijuana and had plans to deliver it to the

residence. Although the occupants of the residence could have refused the package, it was more likely they would accept and open it.

(4) The four-day warrantless seizure of the parcel was reasonable in duration under the totality of the circumstances. The delay in seeking a warrant to search the parcel was reasonable because it was due to the investigation, scheduled leave, and the weekend, when postal operations “cease or slow down considerably.”