

## RECENT THIRD CIRCUIT AND SUPREME COURT CASES

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November 6, 2014  
Christofer Bates, EDPA

### SUPREME COURT

#### **I. Cert. Granted - Extension of Completed Traffic Stop for Canine Sniff**

*Rodriguez v. United States*, No. 13-9972 (Cert. Granted Oct. 2, 2014).

ISSUE: Whether a police officer may extend an already completed traffic stop for a canine sniff without reasonable suspicion or other lawful justification?

#### **II. Cert. Granted - Confrontation Clause Protection for Statements to a Teacher**

*Ohio v. Clark*, No. 13-1352 (Cert. Granted Oct. 2, 2014).

ISSUES: (1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as testimonial statements subject to the Confrontation Clause.

### THIRD CIRCUIT

#### **I. Supervised Release Revocation / Right to Allocution / Plain Error**

*United States v. Paladino*, --- F.3d ---, 2014 WL 5012694 (3d Cir. Oct. 8, 2014).

The district court committed plain error in denying Paladino's right of allocution at his supervised release revocation hearing. This case establishes that the near *per se* reversal rule for failing to give the defendant a chance to allocute applies even where there was an agreed upon sentence, because the district court could still reject that sentence.

NOTE: This holding would likewise apply in a binding "C-Plea" context at an initial sentencing. *See* FED. R. CRIM. P. 11(c)(1)(C).

## **II. Ineffective Assistance of Counsel / Safety Valve / School Zone**

*United States v. Bui*, --- F.3d ---, 2014 WL 5315061 (3d Cir. Oct. 20, 2014).

Trial counsel provided ineffective assistance when he advised Mr. Bui that if he pled guilty, he would be eligible for a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(f)'s "safety valve" provision. This advice was erroneous because the Third Circuit has longstanding precedent that individuals convicted of distribution of narcotics in a school zone under 21 U.S.C. § 860 are not eligible for safety valve relief. *United States v. McQuilkin*, 78 F.3d 105 (3d Cir. 1996). The district court's guilty plea colloquy failed to remedy counsel's error because the judge never stated that Bui was ineligible for a safety valve reduction. Bui proved prejudice because absent counsel's errors, he would have gone to trial. Without the benefit of a safety valve reduction, he would have gained no benefit from his plea agreement.

The Court declined to address Bui's second claim that counsel was ineffective for failing to investigate the factual basis for the 21 U.S.C. § 860 offense, leaving it to the district court to resolve the factual and legal issues surrounding whether the athletic field near Bui's alleged drug house is a "real property comprising a public . . . secondary school" under the statute.

## **III. Exclusionary Rule / Waiver / Child Pornography / Prejudicial Evidence / Harmless Error / Sufficiency**

*United States v. Franz*, --- F.3d ---, 2014 WL 5565457 (3d Cir. Nov. 4, 2014).

(1) The search warrant for Franz's home was facially valid, but the agents' execution of the warrant violated his Fourth Amendment rights because the case agent refused to provide him with the attachment to the warrant's face sheet setting forth the particularized list of items to be seized, based on his mistaken interpretation of the issuing Magistrate Judge's sealing order. The Third Circuit concluded that this constitutional violation did not warrant exclusion of the evidence. A case-specific analysis of whether the exclusionary rule applies is required in every case. Under the facts of this case, application of the exclusionary rule would provide little deterrent effect and would not justify the costs of suppression. The agent was executing his first search warrant and made an isolated mistake. There was no indication of deliberate, reckless, or grossly negligent conduct. The agent consulted with a prosecutor and relied, albeit mistakenly, upon the Magistrate Judge's sealing order which contained language that was somewhat unclear.

(2) Franz waived his legal challenge to a second search warrant by failing to raise the issue before the district court ruled on his Motion to Suppress. Raising the legal challenge in a Motion for Reconsideration was not sufficient to preserve the issue for appeal.

(3) The district court's initial admission of prejudicial pamphlets containing child pornography was harmless error. The court later struck the pamphlets from the record and provided the jury with thorough curative instructions. The jury's split verdict, finding Franz not guilty of the possession charge the pamphlets were offered to prove, supported a finding that the admission of the pamphlets did not contribute to the jury's finding of guilt on the receipt charge.

(4) Franz's three challenges to the sufficiency of the evidence all failed:

(a) Jurisdictional Element - a rational juror could have concluded the image was downloaded from the internet, which is enough to prove the image traveled in interstate commerce. Additionally, an investigator testified that the image was taken in Connecticut, so its presence on Franz's external hard drive in Pennsylvania also satisfied this element.

(b) Knowing Receipt - although only two images were found on Franz's computer, someone had visited the image on the internet and again in Franz's download folder and then saved it to his external hard drive. Moreover, Franz's computer had only one user profile, he lived alone, and the image was viewed on the computer when the user was logged in as Franz.

(c) "Sexually Explicit Conduct" - the image depicted a "lascivious exhibition of the genitals," because it contained a nine-to-eleven year old girl posing fully nude, sitting on a bed, with her legs spread and her genitals exposed.