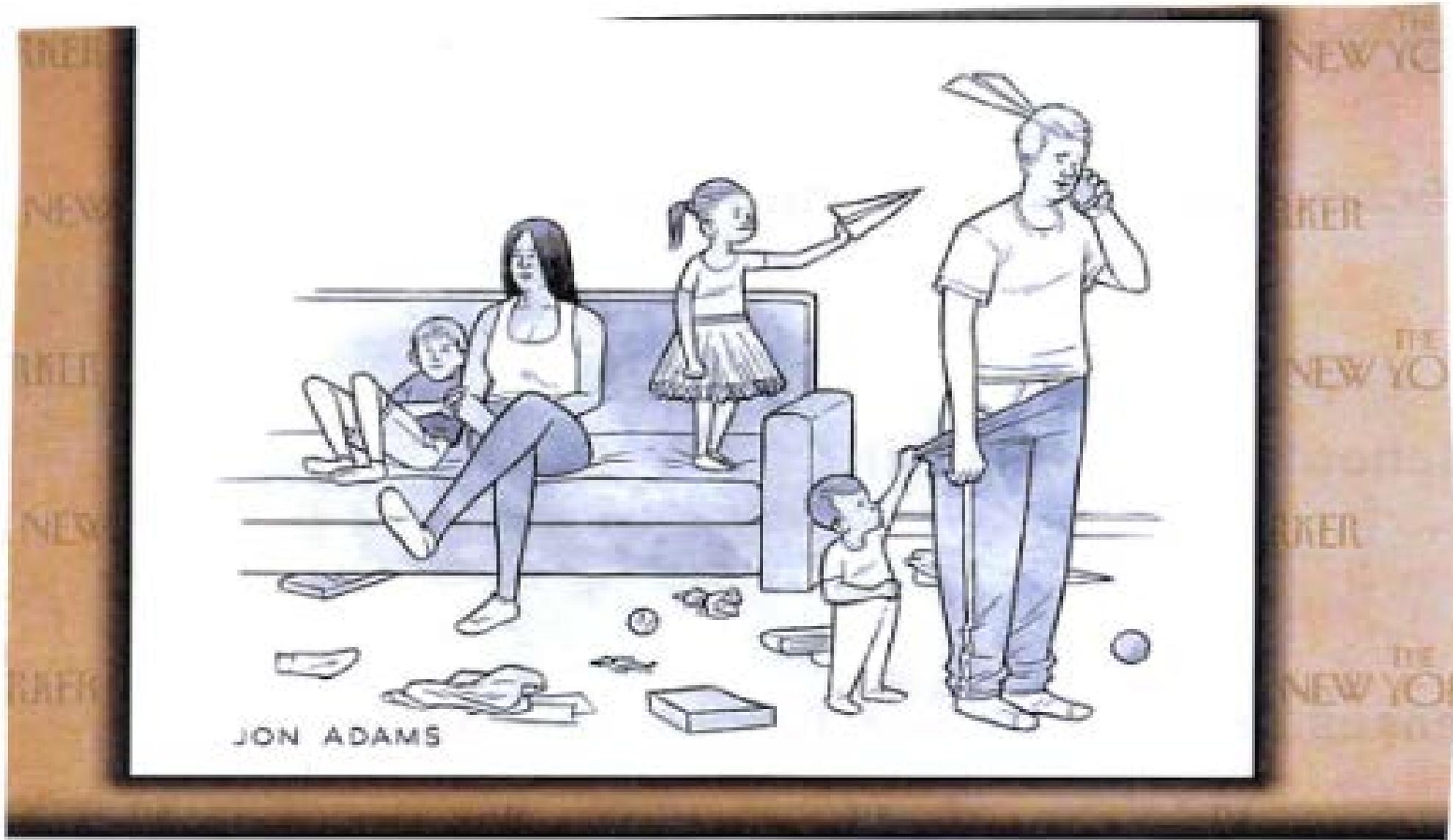


Third Circuit Update—2020

**Federal Public Defender's Office
Middle District of Pennsylvania**

Quin M. Sorenson

**Ronald A. Krauss
Frederick W. Ulrich
Tammy L. Taylor**



"I really don't mind coming into the office to work."

Third Circuit Trends: Criminal Statistics 2019

<u>Appeals:</u>	541 [25% increase]
<u>Opinions:</u>	200 [15% increase]
<i>Precedential:</i>	30
<i>Reversals:</i>	>20
<u>Oral Arguments:</u>	50

Third Circuit Trends: Criminal Anecdotal

Length of Arguments:

Trending longer:
45 min. not unusual

Pre-Argument Letters:

Court more often
contacting counsel to
address particular
cases or legal issues.

Third Circuit

State of the Court—1

Composition of the Court:

→ Court full strength: 14 active judges

→ First Cir. Ct. to “flip” from D. to R.: 6 D ---- 8 R

But unclear how much that will affect decisions

Third Circuit

State of the Court—2

Perhaps modest shift slightly to the right, BUT:

- ✓ Of 3 Trump judges, only 1 w/ideological paper trail.
- ✓ Since 2010, 4 Third Cir. En banc cases decided by one or two votes.
- ✓ In 3-judge panel, 8-6 tilt means little.

*Not Supreme Ct. where every case involves all 9 Justices.
Court “balance” important.*

Third Circuit

State of the Court—3

- ✓ For decades, Third Cir. has been a centrist court.
- ✓ C.J. Smith works hard to maintain identity as strongly collegial.

Third Circuit Court Initiatives—1A

Third Circuit Task Force on Eyewitness Identification

- ✓ Formed 2016 – 20 people, broad range.
- ✓ Address problem of mistaken witness IDs leading to wrongful convictions.
- ✓ Report draws on scientific research on different factors leading to mistaken ID.

Third Circuit Court Initiatives—1B

Third Circuit Task Force on Eyewitness Identification

- ✓ Presents concrete recommendations for best practices:
 - How to interview eyewitnesses.
 - How best to elicit IDs.
- ✓ Report in full on 3d Cir website and published in Temple Law Review

Third Circuit Court Initiatives—2A

Hyperlink Project

Pilot Program: New software to convert Appndx cites in briefs into hyperlinks.

Not required: Clerk will designate you for inclusion.

Practice Alert: Designated at start of case with usual paperwork – separate ECF entry:

“Notice to counsel, pilot project for appendix citation hyperlinking.”

Third Circuit Court Initiatives—2B

Hyperlink Project

BE CAREFUL NOT TO OVERLOOK THIS NOTICE!

- ✓ Be especially carefully if you were not the lawyer originally appointed.
- ✓ Be sure to review case-opening docket entries to see if the Court chose your appeal.

Third Circuit Court Initiatives—2C

Hyperlink Project:

With notice of inclusion, court attaches 15- p. manual explaining how this works.



Court uses standardized format for cites and for how to number Appendix pages: **Appx__** [1 word in text]

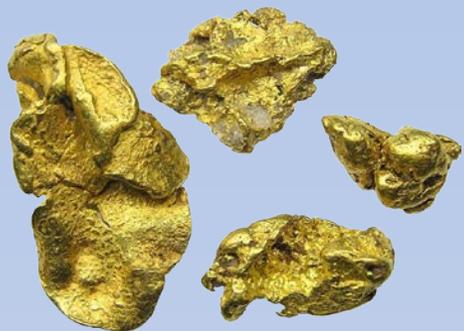
When briefs filed, Clerk's software converts those Appx cites into hyperlinks. **[CASES?]**

Third Circuit

Judges' Appellate Advocacy Tips—1A

2019/2020: Third Circuit Judges in CLEs

*Details in Matt Stiegler's 3d Cir. Blog.



Surprising: CJ Smith takes dim view of Reply Brief.

Usually rehash: Clerks let him know if read-worthy.

Third Circuit

Judges' Appellate Advocacy Tips—1B

CJ Smith: “Enjoys” good brief: *Hemingway* not *Faulkner*.

- Cite state cases as authority for state law.
- If you want oral arg., explain why in brief.

Judge Bibas: Protect your credibility with Court.

- Confront weaknesses head on.
- Respectful tone: “intense presumption” of good faith.
- Intemperate briefs less likely to get oral argument.

Third Circuit

Appellate Advocacy Tips: Oral Arg. by Phone-1

1. Try to identify the Judge's voices.

Listen to audio arguments where judge was on the panel.

2. Make sure you can pronounce judge's names correctly.

Can't read plaques on bench.

3. Speak more slowly than usual—connection issues.

4. Focus on shutting up when Judges are talking.

No verbal cues of starting or stopping to talk.

Third Circuit

Appellate Advocacy Tips: Oral Arg. by Phone-2

5. **Do moot argument by phone.**

6. **Take advantage of invisibility.**

Can use written materials - but don't over-rely on them.

HOW DID YOU
COPE WITH THE
LOSS OF SOCIAL
CONTACT DURING
THE PANDEMIC?



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OF MY LIFE.



7-4-20 2020 Scott Adams, Inc./Dist. by Andrews McMeel

HOW
ABOUT
YOU?



I DIDN'T
WANT TO
BE THE
FIRST TO
SAY IT.



Supreme Court Decisions



Rehaif v. United States, 139 S. Ct. 2191 (2019)

- Held: To convict of unlawful possession of a firearm under 18 U.S.C. § 922(g), prosecution must prove beyond a reasonable doubt both that defendant “knew he possessed a firearm” and “knew he had the relevant status when he possessed it.”
- “Presumption in favor of scienter,” meaning presumption “that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.”
- Statute does not “apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is ‘punishable by imprisonment for a term exceeding one year.’”

United States v. Davis, **139 S. Ct. 2319 (2019)**

- § 924(c) imposes mandatory minimums for possessing/brandishing/discharging firearm in furtherance of a “crime of violence” or “drug-trafficking crime.”
- Two-part definition of “crime of violence.”
 - Elements Clause: Offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.
 - Residual Clause: Offense that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
- Residual clause struck down under ACCA and INA in *Johnson* (2015) and *Dimaya* (2018).
- Held: Residual clause also struck down under § 924(c).
- Kidnapping and conspiracy offenses no longer qualify as § 924(c) predicates.

Categorical Approach

Broad, deferential interpretation of ACCA:

- ***Shular v. United States***, 140 S. Ct. 779 (2020): “serious drug offense” definition for the ACCA does not require that the state offense match certain generic offenses. It only requires that the state offense involve conduct specified in the federal statute.
- ***Stokeling v. United States***, 139 S. Ct. 544 (2019): Overcoming “victim resistance” is “physical force.”
- ***Borden v. United States***, 140 S. Ct. 1262 (2020): cert. grant on whether the force clause in the ACCA includes crimes with a *mens rea* of recklessness.

Fourth Amendment

- ***Kansas v. Glover***, 140 S. Ct. 1183 (2020): Where vehicle owner's license is suspended, a stop is reasonable under Fourth Amendment if officer lacks information negating the inference that the owner is driving.
- ***Mitchell v. Wisconsin***, 139 S. Ct. 2525 (2019): Exigent circumstances "almost always" permit warrantless blood draw when "driver is unconscious and therefore cannot be given a breath test."
 - Exigent circumstances for metabolizing alcohol do not permit warrantless blood draws. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013).
 - Warrantless breath tests are permissible searches incident to arrest for drunk driving. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184-85 (2016).

Defendant may defeat presumption by showing:

- Breath test could be administered;
- Blood would not have been drawn in course of emergency care occasioned by unconsciousness; or
- "Police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."

Third Circuit Decisions

First Step Act – Section 404

- ***United States v. Jackson***, ___ F.3d ___, 2020 WL 3563995 (3d Cir. July 1, 2020): Section 404(a) eligibility turns on a defendant's statute of conviction rather than his actual conduct.
- ***United States v. Easter***, No. 19-2584 (argued Jan. 15, 2020)
- ***United States v. Birt***, No. 19-3820 (argued Apr. 14, 2020)

Fourth Amendment

Wins:

- ***United States v. Bey***, 911 F.3d 139 (3d Cir. 2018): Reasonable suspicion to detain suspect dissipated when he turned to face officers and they saw he didn't fit description (bearded, older, heavier, darker skinned).
- ***Yoc-Us v. Attorney General***, 932 F.3d 98 (3d Cir. 2019): Inquiries into matters unrelated to the justification for the stop (*e.g.*, criminal history questions after traffic stop) may not extend the duration of the stop, even for 20 seconds.

Losses:

- ***United States v. Torres***, 961 F.3d 618 (3d Cir. 2020): defendant stopped by patrol car while walking, police surround him, guns drawn, ordered to the ground, handcuffed, but it's just a brief investigatory detention under *Terry*.
- ***United States v. Greene***, 927 F.3d 723 (3d Cir. 2019): Can an officer patting down a suspect identify a bulge in the suspect's pocket, "by its feel and texture" alone, as a bag of marijuana? Yup.
- ***United States v. McCants***, 920 F.3d 169 (3d Cir. 2019): Reasonable suspicion based on anonymous 911 call describing first-hand observations of ongoing domestic violence.

Maybes:

- ***United States v. Bradley***, 959 F.3d 551 (3d Cir. 2020): Gov't forfeited arguments respecting the suppression of physical evidence based on statements obtained in violation of *Miranda*. But remanded to see if Gov't can save prosecution under inevitable discovery.

Speedy Trial

United States v. Reese, 917 F.3d 177 (3d Cir. 2019):

With less than three weeks left on the defendant's Speedy Trial Act clock, the district court continued the trial *sua sponte* for another two-and-a half months. The Third Circuit held that dismissal was required but left it to the district court to decide first whether re-prosecution would be allowed.

United States v. Williams, 917 F.3d 195 (3d Cir. 2019):

The Third Circuit reversed on Speedy Trial Act grounds here, too, but in this case the panel directed the district court to dismiss with prejudice, precluding re-prosecution. The court joined three circuits in splitting with the Second Circuit and holding that “periods of unreasonable delay of more than ten days in the transport of a defendant to the site of a psychological examination conducted in the course of a proceeding to determine a defendant’s mental competency are non-excludable.”

Speedy Trial cont'd

United States v. Bailey-Snyder, 923 F.3d 289 (3d Cir. 2019):

In a matter of first impression, BOP's placement of a defendant in administrative segregation did not constitute an arrest for purposes of the Sixth Amendment or Speedy Trial Act.

Sentencing

United States v. Rowe, 919 F.3d 752 (3d Cir. 2019)

- ✓ Defendant convicted of distributing/possessing-with-intent-to-distribute >1000 grams of heroin.
- ✓ But government never proved that he distributed 1000 grams in a single unit, nor that he ever possessed 1000 grams at once.
- ✓ Instead, government sought to combine multiple, smaller distributions/possessions that, in total, exceeded 1000 grams.

Rowe, cont'd

- HELD: For purposes of reaching drug quantities triggering mandatory minimums under § 841(b), separate drug distributions (or possessions-with intent-to-distribute) cannot be aggregated.
- ✓ To prove 10-year mandatory minimum for distributing >1000 grams of heroin, government must prove a single distribution on one occasion of >1000 grams of heroin.
 - ✓ Multiple distributions adding up to >1000 g don't count.
 - ✓ Ditto possession with intent to distribute.
 - ✓ Should challenge mandatory minimum charges absent this evidence. (e.g., plea, Rule 29 motion, jury instructions).
 - ✓ Argument that Rowe applies to conspiracy: Agreements to make threshold.
 - ✓ Quantity sales/PWIDs trigger mandatory minimum, but general agreements to sell/PWID that foreseeably add up to threshold quantity do not.

United States v. Chapman,
915 F.3d 139 (3d Cir. 2019)

- ✓ District Court's decision to deny defendant's request for continuance to allow defendant to present supportive letters from his family infringed on defendant's right to allocution during sentencing;
- ✓ remand for resentencing was warranted; and
- ✓ Court of Appeals would exercise its supervisory power to remand defendant's case to different judge for resentencing.

United States v. Daniels, 915 F.3d 148 (3d Cir. 2019)

Defendant's prior Pennsylvania convictions for possession with intent to deliver cocaine constituted predicate “serious drug offenses” under Armed Career Criminal Act (ACCA).

United States v. Portanova, 961 F.3d 252 (3d Cir. 2020)

Applying looser categorical approach to determine whether defendant’s prior conviction “related to” possession of child pornography to trigger mandatory minimum sentence enhancement.

United States v. Torres, 961 F.3d 618 (3d Cir. 2020)

What if the federal drug conspiracy encompasses the state drug conviction – they still count under the ACCA.

- ***United States v. Nasir***, No. 18-2888,
(en banc argument June 24, 2020)

- ***United States v. Reaves***, No. 19-2919
Whether the Sentencing Commission can add—through interpretive commentary—inchoate crimes to the definition of a “controlled substance offense” for the career-offender enhancement under the Sentencing Guidelines?

United States v. Willie Tyler, 956 F.3d 116 (3d Cir. 2020)

- Acquittal in state court on witness murder.
- 3 federal trials and jury convictions: 1996, 2000, 2017
- Serving mandatory life sentence.
- judgment of acquittal granted – *United States v. Tyler*, No. 1:96-CR-0106-JEJ, 2018 WL 10322201 (M.D. Pa. Feb. 14, 2018)
- Released pending gov't appeal – 2018 WL 10322636 (M.D. Pa. Feb. 20, 2018).
- Reversed with dissent by Rendell.
- Rehearing denied; motion to stay mandate pending SCOTUS review.

Compassionate Release

18 U.S.C. § 3582(c)(1)(A)

- Court may reduce term of imprisonment – and may impose probation or supervised release w/ or w/o conditions not to exceed unserved portion of original term of imprisonment:
 - if it finds “extraordinary and compelling reasons.”
 - after considering the 3553(a) sentencing factors.
 - after considering the Sentencing Commission’s policy statement, 1B1.13.
- Only BOP could file the motion until First Step Act of 2018.

Compassionate Release

18 U.S.C. § 3582(c)(1)(A)

- Defendant may file:
 - After fully exhausted all administrative rights to appeal a failure of the BOP to bring the motion; **OR**
 - The lapse of 30 days from the receipt of such request by the warden of the defendant's facility, **whichever is earlier.**

Compassionate Release

- Request to warden starts the clock.
- But what happens if the warden denies the defendant's request within 30 days?

United States v. Petrossi, No. 1:17-CR-0192-CCC (M.D. Pa. Apr. 28, 2020).

United States v. Brooks, No. 4:08-CR-0455-JEJ (M.D. Pa. June 9, 2020).

United States v. Reyes, No. 3:16-CR-0227-RDM (M.D. Pa. June 22, 2020).

United States v. Yanney, No. 4:15-CR-0298-CCC (M.D. Pa. July 2, 2020).

Compassionate Release & COVID-19

- ***United States v. Raia***, 954 F.3d 594 (3d Cir. 2020)

Dicta – “We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like Raia. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP’s statutory role, and its extensive and professional efforts to curtail the virus’s spread.”

- ***United States v. Pawlowski***, ___ F. App’x ___, 2020 WL 3483740 (3d Cir. 2020)

- Denial of compassionate release not an abuse of discretion.
- Jurisdiction of district court when case pending on appeal. (n.3)

Compassionate Release & COVID-19 (as of 7/1/2020)

- **EDPA = 13 grants**
 - *United States v. Rodriguez*, 2:03-CR-0271-AB, 2020 WL 1627331 (E.D. Pa. Apr. 1, 2020).
- **WDPA = 7 grants**
 - *United States v. Somerville*, No. 2:12-CR-0225-NR, 2020 WL 2781585 (W.D. Pa. May 29, 2020).
- **MDPA = 1 grant**
 - *United States v. Foster*, No. 1:14-CR-0324-JEJ (M.D. Pa. Apr. 3, 2020).