THE ZEALOUS

# ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2010

## THE DEFENDER'S MESSAGE

Our purpose in sending out our newsletters is always to provide you with updated information and helpful analysis in the ever-evolving field of federal criminal defense. We strive to keep the newsletter current and fresh, and to that end, we have added two new regular columns that we hope will benefit your practice and help your clients during and beyond your representation.

"Preserve It" will focus on issues that we should all be aware of for appellate purposes. Specifically, we will monitor appellate law, searching for trends that might forecast a change in the legal landscape. We will inform you through this column of issues that should be preserved, not only for direct appeal to the Fourth Circuit, but that eventually may be decided in our clients' favor at the Supreme Court. By preserving these issues now, clients will later reap the benefit of your zealous advocacy.

Our current legal practice has become dependent on computer technology. From drafting a simple motion in MSWord or WordPerfect, to electronically filing appellate briefs, lawyers now use this technology on a daily basis. As such, we have included the "Computer Corner," which will focus on tips for attorneys to keep their computers running smoothly and protect their work product.

Finally, keep in mind that our Fall Seminar will be held October 7th and 8th. This, along with other resources like our website and listserv, is always available to assist in your practice. I hope you will continue to take advantage of these resources, and I look forward to seeing you in Wrightsville Beach.

Thomas P. McNamara
Federal Public Defender

### INSIDE THIS ISSUE



THE ZEALOUS ADVOCATE

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# PANEL ATTORNEY INFORMATION

## *Previously Distributed Materials*

Numerous materials have been distributed through our panel administrator, Donna Stiles, and panel attorney representative, Jim Ayers, since May, 2010. These include: Free Online Training Related to *Padilla v. Kentucky*; Recent Issues Affecting Pending Cases; CJA 21 Forms for Expert and Other Services; Voucher Reminders; ODSTB Adds Search Function to fd.org; *Pruitt* Issue; Introduction to Federal Sentencing; and Increase in Statutory Max for Investigators, etc. If you did not receive some of these materials, please contact Donna Stiles at donna_stiles@fd.org.

## *4248 Civil Commitment Appointment Opportunities*

In the aftermath of the Supreme Court's decision in *United States v. Comstock*, this district now has a growing number of civil commitment cases that require attorney representation. As happens in some of our regular case load, conflicts may arise that will require the appointment of a panel attorney. There will be a brief information session about these cases at our Fall Seminar. Those interested should contact Donna Stiles at donna_stiles@fd.org.

## *Seminar BOLO*


Be on the lookout for our Fall Federal Criminal Practice Seminar, which will be held October 7 and 8, 2010 at the Blockade Runner Resort in Wrightsville Beach, North Carolina. The deadline for registration to attend the Fall seminar has passed, and our capacity limit has been reached. If you are interested in attending, please contact our Panel Administrator, Donna Stiles at donna_stiles@fd.org about being placed on our waiting list.

The U.S. Probation Office will host a Federal Sentencing Guidelines Training on November 5, 2010 in Raleigh. Additional information has been forwarded to the panel; however for more information, please contact Michelle Gray at michelle_gray@ncep.uscourts.gov.

Additionally, please visit our website at http://nce.fd.org for information regarding our upcoming Spring Federal Criminal Practice Seminar, which is typically held at the McKimmon Center in Raleigh, North Carolina.

For more information about seminars, please visit our website at http://nce.fd.org or contact Donna Stiles at donna_stiles@fd.org.

# PRACTICE TIPS

## *PRESERVE IT: SECTION 924("SEE")S RECONSIDERATION*

*Abbott v. United States*, No. 09-479, and *Gould v. United States*, No. 09-7073, two cases from the Third and Fifth Circuits, have been consolidated and are currently before the Supreme Court. *Abbott v. United States*, 130 S. Ct. 1284, *cert. granted, cases consolidated* (2010). In its consideration of *Abbott*, the Supreme Court is poised to settle a circuit split over the correct interpretation of 18 U.S.C. § 924(c)(1). Subparagraph (A) provides that, "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime..." uses, carries, or possesses a firearm in furtherance of any such crime shall be sentenced to an additional mandatory minimum sentence. These additional sentences, if applicable, must run consecutively to the sentence for the predicate offense. 18 U.S.C. § 924(c)(1)(D)(ii).

According to the First, Second, and Sixth Circuits, a literal reading of the statutory language above leads one to believe Congress intended for § 924(c)(1)(A) to apply an additional mandatory minimum sentence only when the defendant is not subject to another, greater minimum sentence mandated by that subsection or by *any* other provision of law. *See United States v. Almany*, ___ F.3d ___, 2010 WL 785648 (6th Cir. 2010); *United States v. Parker*, 549 F.3d 5 (1st Cir. 2008); *United States v. Whitley*, 529 F.3d 150 (2nd Cir. 2008).

However, the Third, Fourth, Fifth, Seventh, and Eighth Circuits have adopted an interpretation of the "exception" clause of § 924(c)(1)(A) as follows: that the 1998 amendment to § 924(c) adding this language was meant to broaden, rather than to narrow, the application of its mandatory minimum sentences for possession, use, or carrying of firearms; and therefore that, when read in context, the phrase "by any other provision of law" is restricted in meaning to only those provisions of law that proscribe firearm offenses, especially subsections (c)(1)(B) and (c)(1)(C) of § 924. *See United States v. Abbott,* 574 U.S. 203 (3rd Cir. 2009); *United States v. London*, 568 F.3d 553 (5th Cir. 2009); *United States v. Easter*, 553 F.3d 519 (7th Cir. 2009); *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001)*; United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000). Consequently, a defendant may be subject to the § 924(c)(1) mandatory minimums even if his underlying offense carries a greater mandatory minimum sentence.

To illustrate the practical implications of the circuit split, consider Defendant X, who has been convicted of possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1), and also of possession of a firearm in furtherance of a drug crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). The § 841 violation carries a ten-year mandatory minimum, while the § 924(c) violation mandates a five-year minimum sentence. Here in the Fourth Circuit, Defendant X would be punished with *both* mandatory minimums, running consecutively, for a total mandatory minimum of fifteen years of imprisonment. However, in the Second Circuit, Defendant X's § 924(c) mandatory minimum of five years would be subsumed by the greater, ten-year mandatory minimum for the underlying drug offense, resulting in a total mandatory minimum of only ten years of imprisonment.

As seen by this illustration, the Supreme Court's forthcoming decision in *Abbott* will have significant consequences for many defendants convicted of violating § 924(c). Of course, for clients whose sentencing occurs in the meantime, it is necessary to preserve this issue for appeal so that they may benefit from any favorable Supreme Court ruling.

*Many thanks to Ryan Coffield for contributing these helpful tips. Ryan is a third year law student at the Washington University School of Law and was an intern in the FPD office during the Summer of 2010.*

## *PRESERVE IT: THE* PRUITT *ISSUE AND ITS POTENTIALLY PROFOUND EFFECT*

This July, you should have received an e-mail from our office alerting you to a recent Supreme Court holding that may be useful in making a *Pruitt* argument for your clients. This article provides additional information to help flesh out and identify potential *Pruitt* issues. If you would like to review a copy of the original email sent in July, please contact Donna Stiles at donna_stiles@fd.org.

What you need to know:

Currently, there is a circuit split concerning whether certain North Carolina convictions are "punishable by imprisonment for a term exceeding one year" for purposes of 18 U.S.C. § 922(g) felonies, and Armed Career Criminal and Career Offender sentencing. The Supreme Court's recent decision in *Carachuri-Rosendo v. Holder* sheds some potentially positive light on this discrepancy in our clients' favor. 560 U.S. —, 130 S.Ct. 2577 (2010) (holding that a specific defendant's conviction, not what a hypothetical defendant could have been charged with, is the starting point for determining whether a conviction is an "aggravated felony" in the context of removal proceedings). Preserving this issue has the potential to significantly decrease the sentence your client is facing, or even circumvent a felony conviction for § 922(g) offenses.

As you may recall, the Sixth Circuit in *United States v. Pruitt* applied another Supreme Court decision, *United States v. Rodriquez*, 553 U.S. 377 (2008), in holding that, "in the context of North Carolina's structured sentencing scheme, an offense of conviction is 'punishable' for a term exceeding one year only if the state court could have sentenced a hypothetical defendant with the same prior record level as the defendant's prior record level to a term exceeding one year." 545 F.3d 416, 419, 421-22 (6th Cir. 2008). Under this analysis, a felony is not punishable by more than a year merely because a hypothetical defendant with the worst criminal history facing the same charges may receive more than a year as punishment. On the contrary, the offense can only be labeled a felony punishable by more than

a year if, when looking at the predicate conviction, this specific defendant could have received more than a year imprisonment as punishment under North Carolina Structured Sentencing. In short, the query is defendant specific. The *Pruitt* decision, which employs the same reasoning as the *Carachuri* court, is in direct contrast to Fourth Circuit precedent. Since its decision in *United States v. Harp*, the Fourth Circuit has maintained that in making the determination of whether a prior conviction was punishable by greater than one year, federal courts must "consider the maximum *aggravated* sentence that could be imposed for that crime upon a defendant with the worst possible criminal history." 406 F.3d 242, 246 (4th Cir. 2005) (emphasis in original).

While preserving this issue, we recommend arguing that *Rodriquez* effectively overruled *Harp* because it found that, when a defendant's criminal history determines the maximum punishment for an offense, the inquiry is defendant specific. 553 U.S. at 388-89. This argument is further bolstered by *Carachuri*, which espouses the same defendant-specific analysis. Therefore, this reasoning remains viable despite the Fourth Circuit's suggestion that *Harp* is consistent with *Rodriquez*. *See United States v. White*, 362 Fed.Appx. 348 (4th Cir. Jan. 25, 2010) (unpublished).

Moreover, after a series of recent developments, this issue appears to be at its most ripe. On June 21, 2010, the U.S. Supreme Court granted cert in the Fourth Circuit cases of *Simmons, Watson, Williams* and *Smith*. Citing *Carachuri*, the Supreme Court vacated the Fourth Circuit's judgments and remanded these cases for further consideration in light of *Carachuri*. *See Simmons v. United States*, __ U.S.__, 2010 WL 2471064 (June 21, 2010); *Watson v. United States*, __ U.S. __, 2010 WL 2471071 (June 21, 2010); *Williams v. United States*, __ U.S. __, 2010 WL 753114 (June 21, 2010), *Smith v. United States*, __ U.S. __, 2010 WL 978690 (June 21, 2010). More recently, the Fourth Circuit granted rehearing and placed in abeyance *United States v. Champion*, No. 09-5084, 2010 WL 2512325 (4th Cir. June 23, 2010) (unpublished) and *United States v. Perry*, No. 09-5062, 2010 WL 2512339 (4th Cir. June 23, 2010) (unpublished), two cases questioning the continued viability of *Harp*. In the order granting rehearing, the Fourth Circuit ordered the cases placed in abeyance pending its decision in *United States v. Simmons*, No. 08-4475.

How to Spot a *Pruitt* Issue:

Because they all involve determinations of crimes punishable by more than a year, the three types of cases in which a *Pruitt* issue may arise include (1) Armed Career Criminal status, (2) Career Offender status; or (3) 18 U.S.C. § 922(g) charge for being a felon in possession of a firearm.

For each client, you should look at their prior convictions and make sure that all of the felonies in question were, in fact, punishable by more than a year. In North Carolina, look for Class I or Class H felony convictions. If such a conviction is used to qualify your client as an Armed Career Criminal, Career Offender, or as a predicate for felon in possession, you must look at the original state judgment and determine whether, under North Carolina Structured Sentencing, your client could in fact have received more than one year imprisonment. For example, a defendant with a conviction for a Class H offense with a prior record level I could not receive more than eight months' imprisonment. See N.C. Gen. St. §§ 15A-1340.17(c)(4) (setting six months as the highest minimum term in the aggravated range and eight months as the highest corresponding maximum). In such a circumstance, it should be argued that, because your particular client could not have been punished by a sentence greater than a year, the conviction cannot serve as a predicate felony. Depending on the case, you may be able to significantly decrease the sentence your client may be facing or, in the case of § 922(g), demonstrate actual innocence.

Based on the foregoing, it may be in your client's best interest to file a motion to continue (in conjunction with a motion to dismiss, where appropriate) so that your client can reap the benefit of any positive Fourth Circuit or Supreme Court decision on this issue.

*Many thanks to Lauren Gebhard for contributing these helpful tips. Lauren is a third year law student at the University of North Carolina School of Law and was an intern in the FPD office during the Summer of 2010.*

*The mark of a man is one who knows he can't control his circumstances–but he can control his responses.*
*–Kelsey Grammar as Frasier Crane, from sitcom, Frasier*

## *IMMIGRATION LAW UPDATE*

Immigration law's nexus with the criminal system is becoming increasingly important. Between April and May of 2010, U.S. Immigration and Customs Enforcement agency (ICE) referred over 4,000 cases to federal prosecutors, its largest number of referrals in any two-month period. Immigration law is an important and complex field with far-reaching consequences for criminal defendants. Below are two immigration law updates from the U.S. Supreme Court and the U.S. Sentencing Commission that should be helpful for the practitioner.

Part 1: What does a defense attorney need to know?

The U.S. Supreme Court held recently in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that defense counsel has a duty to give accurate advice regarding a conviction's immigration consequences. Though born in Honduras, Jose Padilla had lived in the United States for over forty years as a lawful permanent resident. He fought in Vietnam and maintained employment as a truck driver. Padilla was charged with trafficking a large amount of marijuana. Illicit trafficking in a controlled substance by an alien falls within the definition of aggravated felonies under 8 U.S.C. §1101(a)(43)(B), and therefore such a felony renders an alien defendant deportable. However, Padilla's counsel not only failed to advise him of removal (the preferred term for "deportation") as a possible consequence prior to his entering a guilty plea, but also told him that he did not have to worry about immigration status since he had been in the country so long. Padilla pled guilty only to discover that he would be deported. The Court voted 7-2 that such assistance was ineffective.

This opinion falls under recommended reading for any defense attorney. However, the following are key points to remember:

(1) Ask every client where he or she was born. If the answer is not the U.S., then anticipate that removal is a potential consequence.
(2) Be familiar with 8 U.S.C. 1227 (title "Deportable aliens").
(3) Also be familiar with 8 U.S.C. 1101(a)(43), which defines aggravated felonies.
(4) In any case involving the possession or trafficking of drugs, removal is presumptively mandatory.
(5) In any situation in which an offense is clearly deportable based on a reading of 8 U.S.C. 1227, your client should be advised that removal is presumptively mandatory.
6) If you are unsure about the immigration consequences for a charge, inform the client that deportation is a possibility, but that he or she should consult with an immigration lawyer to find out more.

Part 2: New Downward Departure for Cultural Assimilation

Within the burgeoning field of criminal immigration law, illegal reentry cases can be the most discouraging. Under U.S.S.G. §2L1.2, a second-time illegal immigrant's unauthorized presence in the United States qualifies the offender for jail time, followed by a forcible "remand" to the country of origin. However, a proposed Guideline amendment, to be Application Note 8 to §2L1.2, will go into effect November 1, 2010 and will provide for a downward departure based on cultural assimilation. According to the text of the Comment, the defendant may only qualify for the cultural assimilation departure where:
(A) the defendant formed cultural ties primarily with the United States from having resided continuously in the U.S. from childhood,
(B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and
(C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

The following factors are used to determine whether the departure is appropriate:
"(1) the age in childhood at which the defendant began residing continuously in the United States,
(2) whether and for how long the defendant attended school in the United States,
(3) the duration of the defendant's continued residence in the United States,
(4) the duration of the defendant's presence outside the United States,
(5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States,
(6) the seriousness of the defendant's criminal history, and
(7) whether the defendant engaged in additional criminal activity after illegally reentering the United States."

It is recommended to begin requesting this departure now, noting that the Application Note will go into effect in next month.

*Many thanks to Madison Perry for contributing these helpful tips. Madison is a third year law student at the University of North Carolina School of Law and was an intern in the FPD office during the Summer of 2010.*

*Success is going from failure to failure without losing enthusiasm.*
*– Winston Churchill*

## VICTORY COLUMN: POLYGRAPH—AN EXAM THAT MATTERS!

Imagine sitting at home when the police show up at your door and arrest you for a crime you did not commit. This is what happened to one unlucky client, who insisted the police arrested the wrong person. For the attorney appointed to such a case, the question becomes, how do you prove the police arrested the wrong person?

In answering this question, AFPD Suzanne Little first looked at the facts of the case: A woman was robbed at gun point while making a bank deposit for her job. The suspect ran to the get-away car. The police immediately apprehended the get-away driver but were unable to catch the actual robber. In fact, the get-away car contained the driver's license of another individual altogether. In an attempt to locate the armed robber, the police assembled a photo line-up. The victim was shown photos of several different men and identified Ms. Little's client, who lived near the get-away driver and had been previously arrested for a similar crime.

From day one, the client proclaimed his innocence. Determined to prove her client's innocence, Ms. Little prepared to take the case to trial and came up with an innovative idea. Because the get-away driver was the only person who knew the identity of the armed robber, Ms. Little knew that his information, if found credible, would exonerate her client. She therefore communicated with the lawyer for the get-away driver, who informed her of his client's intent to take a plea and cooperate. As part of his cooperation, the driver agreed to identify the actual robber during a polygraph examination. The get-away driver passed the polygraph after identifying the actual robber as the man whose license was found in the get-away car. Since the get-away driver passed the polygraph, the government found the information credible and agreed Ms. Little's client was not the robber. Her client was released and all charges related to this incident were dropped.

This case demonstrates how a traditional tool can be used in a unique way to achieve a great result. Although polygraph exams are typically not admissible at trial, they can be helpful in other settings. It's important to remember to use your creativity and all resources at your disposal in mounting your defense.

*Many thanks to Correy Brannen for contributing these helpful tips. Correy is a second year law student at North Carolina Central University School of Law and worked as an intern at the FPD office during the Summer of 2010. Additional thanks to AFPD Suzanne Little for contributing to this article. If you have a success story to share or know of someone who does, please email your submissions to vidalia_patterson@fd.org or laura_wasco@fd.org. Your submission should include a brief description of the victory and identify any tips or lessons learned.*

## COMPUTER CORNER

Tips on creating a secure password…

Most people frequently use passwords that are based on personal information and are easy to remember. However, that can make it easier for an attacker to guess or "crack" them. Although intentionally misspelling a word ("tyme" instead of "time") offers some protection against dictionary attacks, I suggest creating longer passwords because they are more secure than shorter ones (there are more characters to guess). Additionally, consider combining numbers and special characters in your password to make it more complex. Don't assume that once you've developed a strong password you should use it for every system or program you log into. If an attacker does guess it, he would have access to all of your accounts.

Protecting your password…

Now that you've chosen a password that's difficult to guess, you have to make sure not to leave it somewhere for others to find. Writing it down and leaving it in your desk, next to your computer, or, worse, taped to your computer, makes it easy for someone who has physical access to your office. Don't tell anyone your passwords, and watch for attackers trying to trick you through phone calls or e-mail messages requesting that you reveal your passwords.

Finally, remember to frequently update and change your passwords.

*Many thanks to Computer Systems Administrator, Gloria Gould for contributing these helpful tips.*

*The best way to predict the future is to create it.*
*–Peter F. Drucker*

# LEGAL UPDATES

## *4th Circuit Update*

For the latest Fourth Circuit update, summarizing decisions published between April 1, 2010 and August 31, 2010, please visit our website at http://nce.fd.org/ and go to "Publications." For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check http://circuit4.blogspot.com. To receive daily published Fourth Circuit opinions, register at http://pacer.ca4.uscourts.gov/opinions/opinion.phphttp://pacer.ca4.uscourts.gov/opinions/opinion.htm. Please direct any email questions about the Fourth Circuit Update or the websites listed above to laura_wasco@fd.org.

*Many thanks to Charles Yeh and Thomas Royer for contributing this update. Charles is a recent graduate from Duke University School of Law and is currently a pro bono intern in the FPD office. Thomas is a third year law student at Campbell University School of Law and is currently an extern in the FPD office.*

## *Supreme Court Update*

For the latest Supreme Court update, summarizing Supreme Court decisions published between April 1, 2010 and August 31, 2010, please visit our website at http://nce.fd.org, and go to "Publications." For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com. Please direct any email questions about the Supreme Court Update or the websites listed above to laura_wasco@fd.org.

*Many thanks to Thomas Royer (see above) and Sam de Villiers for contributing this update. Sam is a third year law student at Duke University School of Law and is currently an extern in the FPD office.*

# LOCAL NEWS


## *Eastern District News*

The FPD welcomes newly seated Fourth Circuit Court of Appeals Judge James A. Wynn, Jr. We extend a warm welcome on behalf of this office and the panel attorneys from this district.

## *FPD Office News*

Our office has expanded with several new staff members. We are pleased to welcome to the Raleigh office: Paralegals, Dean Ross (who is also an attorney) and Christine Krencicki; and Investigator, Lynette Norfleet.

Congratulations go out to Lauren and Jason Brennan on the birth of Finley Claire on July 18 and Jennifer Dominguez and Nate Spilker on the birth of Henry Emilio on July 29.

## *Panel News*

We are pleased to welcome the following attorneys who are training to become panel attorneys: in Raleigh, Matthew Ryan McKaig, Christina P. Medlin, John Alfred Parris, and Brandon Todd Wells; in Oriental, Lawrence Brenner; in Erwin, Christopher David Munz; and in Roanoke Rapids, Sammy Davis Webb.

The following are new panel attorneys: in Raleigh, J. Allen Crumpler, Jeffrey William Gillette, and Amanda B. Mason; in Greenville, Neil Wallace Morrison and Mark D. Stewart; in New Bern, Rebecca A. Scherrer; in Smithfield, Marcia Kaye Stewart; and in Wilmington, Joel Merritt Wagoner.

*There is an option still left to the United States of America, that it is in their choice and depends upon their conduct, whether they will be respectable and prosperous or contemptible and miserable as a Nation.*
*–George Washington*