THE ZEALOUS

# ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2012

## THE DEFENDER'S MESSAGE

In this edition of the *Zealous Advocate*, we get back to the basics. To that end, we have articles that will be a refresher for our seasoned panel and an introduction for our training panel. First, we highlight a few issues you should be on the lookout to preserve in the Armed Career Criminal arena. Next, we touch on a few pearls of advocacy wisdom (gleaned by an inquisitive intern), revisit family law for the basics of marital privilege, and brush up on the Speedy Trial Act. Finally, in usual fashion, we fill you in on the latest federal criminal law updates ranging from the Fourth Circuit and Supreme Court updates linked on our website and a note on new Federal Rules, Sentencing Guidelines, and Local Rules.

The Editors and I hope this edition of the *Zealous Advocate* is helpful in focusing on some of the basics. I look forward to seeing all of you at our annual Fall Federal Criminal Practice Seminar on Friday, November 2, 2012 at the McKimmon Center in Raleigh, North Carolina.

Thomas P. McNamara
Federal Public Defender


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## 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 2012. These include a number of local and national training opportunities, as well as emails regarding: Securing Funds for Clients Now Innocent under *Simmons*; Attempts to Reduce Attorney Travel and Voucher Cutting; Possible Sanctions; Notice of Appearance Reminder; Penalty Sheet Review for Judge Fox; and Judge David W. Daniel's Obituary.

### *Seminar BOLO*

The U.S. Probation Office will host its annual Federal Sentencing Guidelines Training on Friday, November 9, 2012 in Raleigh at the Terry Sanford Federal Building. The seminar is currently at capacity, and there is a waiting list.

The Federal Criminal Practice Seminar - Spring 2013 is currently scheduled for March 14 & 15, 2013 at the Holiday Inn, Wrightsville Beach. Additional information will be provided in late January 2013. Check the Seminar Information page on our website for announcements about upcoming seminars!

## PRACTICE TIPS

### *Preserve It: ACCA – Ambiguities and Evolving Case Law*

As federal laws go, the Armed Career Criminal Act (ACCA) packs a lot of punch. While ACCA has been around awhile, courts have failed to come up with a predictable and uniform analysis to identify qualifying predicate felonies. As such, there are still several issues that defense attorneys should preserve as ACCA case law continues to evolve. The ACCA statute imposes a mandatory 15-year minimum for defendants with qualifying criminal records. *See* 18 U.S.C. § 924(e). Despite the harsh consequences the ACCA imposes, defendants whose criminal records include three "violent felonies," even crimes that look more severe on paper than they were in actuality, are subject to an enhanced minimum sentence. Thus, preserving issues that fall in the gray area may turn out to be more fruitful than one may think.

Courts have struggled to interpret the language in the ACCA, and it is no surprise that defendants have challenged the statute's legitimacy. In fact, a handful of challenges have gone all the way to the United State Supreme Court. *See James v. United States*, 550 U.S. 192 (2007)(holding that attempted burglary is a violent crime as it poses serious potential risk to another), *Begay v. United States*, 533 U.S. 137 (2008)(holding that the residual clause "should be read as limiting the crimes the clause covers to those that are roughly similar, in kind as well as in degree of risked posed" to those explicitly articulated), *Chambers v. United States*, 555 U.S. 122 (2009)(developing a categorical approach for deciding whether previous crimes qualify as ACCA predicates), and *Sykes v. United States*, 131 S.Ct. 2267 (2011)(introducing a modified categorical approach). While the factual inquiry in each case is the same–Does this defendant's specific prior conviction qualify as a predicate ACCA offense?–a number of issues have emerged.

In *James*, the Supreme Court upheld a lower court's decision to use ACCA to enhance a defendant's sentence based on three previous convictions, one of which was an attempted burglary conviction. *James*, 550 U.S. at 192. The decision was sharply divided, and Justice Scalia scolded the Court in a memorable dissent, chastising the majority for leaving lower courts in the dark rather than providing "concrete guidance." *Id.* at 215 (Scalia, A., dissenting). Scalia even suggested that courts may need to recognize the ACCA as "void for vagueness," particularly due to the "shoddy craftsmanship" that went into drafting the residual clause. *Id.* at 230. With that in mind, preserving arguments

that are based on the vague language in the residual clause could prove fruitful in the future if the Court continues to review and develop new analyses to determine which crimes qualify as ACCA predicate offenses.

In addition, several state statutes are difficult to analyze in the ACCA context. In particular, statutes that criminalize multiple behaviors have provoked courts to create complicated analyses to separate specific behaviors that should qualify for ACCA enhancments from other offenses that are non-violent, but criminalized under the same state statute. For example, the Fourth Circuit analyzed a South Carolina's escape statute using a modified categorical approach in *United States v. Bethea*. 603 F.3d 254, 258-260 (2010)*; see also* S.C.Code Ann. § 24-13-410(A). Here, the same statute criminalized (a) unlawfully leaving custody and (b) failing to report to custody. *Id.* at 257-258. Ultimately, the Fourth Circuit held that while failing to report is not inherently a violent felony, unlawfully leaving custody should qualify as a violent felony; as such, the defendant who unlawfully fled from custody, received the mandatory minimum. *Id.* at 260. While *Bethea* sets binding precedent on federal courts with regard to South Carolina's escape statute, the decision does not govern how federal courts must handle similar statutes from other states. So, until the requisite appellate court has decided whether a specific state statute qualifies as a violent felony, independent of any decisions the same appellate court has made regarding similar statutes in other states, attorneys should preserve these issues for appeal.

Finally, since the Court has now begun using the modified categorical approach to analyze criminal statutes that criminalize multiple behaviors, it has yet to apply that logic to analyze inchoate crimes. In reality, not all inchoate crimes are violent felonies, even in situations where the underlying crime would be an inchoate crime. The United States Supreme Court decision in *James v. U.S.* has been the prevailing authority cited by courts that defend decisions to impose the ACCA mandatory minimum for defendants with convictions for inchoate crimes. In *James v. U.S.*, the Court held that attempted burglary qualified as an ACCA predicate offense under the residual clause because the attempted offense "involve[d] conduct that present[ed] a serious potential risk of physical injury to another." 550 U.S. 192, 198 (2007). But with the new, modified categorical approach, not all inchoate crimes follow the *James* opinion's logic. Ultimately, attorneys should preserve these types of issues, as appellate courts could revisit the legitimacy of enhancing defendants for inchoate offenses.

When defending a client at risk of receiving an ACCA minimum sentence enhancement, be sure to preserve appeals for ACCA enhancements that (1) fall under Scalia's "void for vagueness" assertion, (2) are based on prior convictions for state statutes that have not been examined by federal appellate courts, and (3) stem from inchoate crimes that are not violent, even if the underlying crime is violent.

*Many thanks to Allison Brandt for contributing these helpful tips. Allie 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 2012.*

## *Victory Column: The Zealous Manifesto*

In November 2011, I was fortunate enough to begin my internship with the Raleigh FPD office as a 20-something college grad with notions of law school in my mind's eye. I was not all that special from the rest of the lot. I had just completed the humbling process of applying to law schools A through Z, and I wanted to gain

experience while waiting for my (formal) legal education to start in August 2012. Looking back, I would categorize myself as appreciative and eager, but certainly green. Like many of the uninitiated, I was led to believe that quality lawyers were expensive and certainly did not maintain ranks in a public service office. Thankfully, I could not have been more wrong.

In the beginning of my internship, I was cast head-first into the sea of federal criminal defense. I did my best to adjust and to learn along the way, but truly nothing could have prepared me for the adversity criminal defendants face in federal court. Many defendants are in the midst of what is affectionately known as their first "federal tour," and they are written off by mainstream society as outcasts deserving whatever ill comes their way. Seated on the other side of the court room is the full prosecutorial force of the United States government, poised to seek an incarceration period that is better appreciated in terms of decades rather than years.

Perhaps the most terrifying aspect of federal defense work is the threat of having to counsel your client, and at times, his or her family, through the worst days of their lives. The concept of human capital must be appreciated in criminal litigation. Human beings fuel the entire production of a criminal case. Lawyers need to understand their audience, whether it be it a judge or a box of twelve randomly selected peers who may never fully appreciate the moment when they held the Constitution's life in their hands. Moreover, advocates need to empathize with the defendant as a person. It is dangerous to get swept away in the routine of appearing in federal court, becoming comfortably distant as one of the repeat actors. True advocates have the gift of perception, and they are able to see the defendant as the family member, friend, or employee who is facing social execution by way of incarceration. With that understanding, attorneys can effectively advocate and preserve a sense of humanity in what is often a very demonizing process. Attorneys hope their professional skills will enable them to elicit understanding from the other courtroom actors, compelling them to consider the client as a human being. This notion of humanity stirs an unrest in society's subconscious, quietly warning that we or our loved ones could possibly be prosecuted for something that seems worlds away and labeled on the forehead of another.

I quickly came to admire the enthusiastic advocates in my office for tirelessly trudging forward in the name of justice, speaking for those without a voice, and serving even those who were vocally disenchanted with them as attorneys. By observing these attorneys, I gleaned several impressions that I will carry throughout my legal career.

1. True advocacy makes the government prove its case. When an attorney is assigned a case, knowing none of the facts, he or she should presume innocence and anticipate a jury trial. A seasoned attorney referred to this as "starting wide." It is easier to start wide and narrow one's scope as evidence mounts, than to assume guilt and change posture as the trial date approaches. This approach protects the defendant from an erroneous or presumed guilty plea. Operating in a plea-first mindset in the beginning of a case disserves the client; it corrodes the integrity of our system while merely paying lip service to the 6th Amendment right to counsel.

2. It is important to follow your gut, and to devote the necessary time to your case. It is impossible to know on the front end of a case which piece of evidence will make or break a verdict. The remedy for this is to follow your gut instincts, and to log the hours necessary to zealously represent your client. There is nothing wrong with thinking outside of the box,

possibly at the crime scene instead of the office. If lawyers are to properly value human capital in criminal defense, they need to be able to think like a prosecutor, client, co-defendant, judge, and juror.

3. Refresh yourself, maintain perspective, and redefine victory. It is easy for defense attorneys to get burned out in federal court with an overwhelming proportion of cases being resolved in guilty pleas, a select few going to trial, and with only the remaining minutia ending in acquittal. Each case should start new, with fresh perspective. Previous losses or hardships can undermine future efforts with cynicism, ultimately perpetuating the cycle of frustration. To combat this, zealous advocates need to understand their contribution to the system as a whole, and maintain the perspective that they are providing legal representation to those that would not otherwise have it. Not every case is going to end in acquittal; in fact, most cases do not end in this manner. So, attorneys have to redefine victory, measuring value through fair plea agreements and avoided sentencing enhancements. Doing so better enables attorneys to specialize their advice to clients, and better serve them throughout all of their case.

Upon receiving these pearls of wisdom, I gained an insight that transformed me. Somewhere along the way I lost my label of "intern" and became another member in the pursuit of justice. I began to understand and to appreciate just how hard these *appointed* lawyers were working, including our nights, weekends, sunrises, and sunsets. For me it all clicked at 1:00 am on a Saturday morning somewhere between Elizabeth City and Raleigh. Some attorneys and I had stopped at a fast food restaurant to eat after spending the previous eight hours visiting a client in a less than ideal jail cell. I could not believe the lengths these attorneys were going to ensure that they protected their client's constitutional rights at his pending trial. The legal services rendered to that client were not diluted by personal agendas or by places we would have rather been. In the end, justice won; not the defense, not the prosecution, but rather the system as a whole.

In sum, my internship experience can be defined in a number of ways. It is easy to elaborate on notions of experience gained, or stories to tell in my future law school classes, but the most enduring part of my internship is best expressed in a poignant phrase given to me, not as an aspiring lawyer, but as a citizen, "We are all one grand jury away from a federal indictment."

*Many thanks to Daniel Watts for contributing these helpful tips. Daniel is a first year law student at Elon University School of Law and was an intern in the FPD office during the Fall of 2011 through the Summer of 2012.*

## *"The Best Solace of Human Existence:" The Basics of Marital Privilege in Federal Courts*

When you represent a married client, the spouse is often involved in the case in some way. Deciding whether or not the spouse can testify, and on what topics can be critical to your case as well as to your client's relationship. Marital privilege can potentially apply whether the spouse is a co-defendant or merely a witness. It can even apply if your client has recently married or divorced in between the alleged conduct and the trial. This article provides a refresher on the basic framework of marital privilege under federal law to help you to best represent and advise

your married clients.

In federal court, privileges are not codified in the Federal Rules of Evidence but are governed by common law as interpreted by the federal courts. Fed. R. Evid. 501. In *Trammel,* the Supreme Court defined two types of marital privilege: adverse spousal testimony and confidential communications. *Trammel v. United States*, 445 U.S. 40, 53 (1980). These two privileges are distinct both in terms of the types of testimony they cover and when they can be invoked. The adverse testimony privilege applies to any testimony by one spouse against another. The couple must be married at the time of trial, but privileged testimony is not limited to events that occurred during the marriage. The privilege is held by the testifying spouse alone. This means that if one spouse chooses to testify, the partner cannot invoke the privilege to block the testimony. By contrast, the confidential communications privilege only applies to private communications *during* a marriage; it is immaterial whether or not the couple remain married at the time of the testimony. Both spouses hold this privilege and neither can testify unless both agree. Neither privilege can be used when a marriage is found to be fraudulent for the purpose of shielding testimony. Another significant exception in criminal law is for joint criminal conduct. If a statement is related to the planning or commission of any joint crime involving both spouses, it is not privileged under adverse testimony or confidential communications privilege. *United States v. Parker*, 834 F.2d 408, 413 (4th Cir. 1987).

Adverse Testimony

The adverse testimony privilege is broad in the types of testimony it covers. It privileges a witness from giving any adverse testimony against their spouse including testimony regarding statements, circumstances, or actions. If a couple divorces between the time of the relevant conduct and the trial, the privilege does not apply. The presence of a third party does not negate this privilege. For example, consider a case in which a man goes to a party with his wife. At the party he drinks heavily and makes several statements to his wife in front of a crowd, demonstrating his intoxication. On the ride home, he hits a pedestrian in a crosswalk and drives away. Once at home, he tells his wife that he must have been too drunk to notice the crosswalk. At his trial for vehicular homicide, if his wife invokes the adverse testimony privilege, she cannot be compelled to testify about his drunken behavior at the party, his actions during the drive, or his statements after the accident. If the wife chose to testify, her husband could not assert the privilege to block her testimony. An offer of immunity to the testifying spouse in exchange for testimony does not make the testimony involuntary.

Confidential Communications

The confidential communications privilege protects a narrower range of testimony. It does not privilege testimony regarding actions or circumstances. If conduct is not intended to convey a confidential message, then it is not privileged. While marital communications are presumptively private, the presence of third parties destroys the confidential nature of the statements and negates the privilege. The third party exception generally includes the couple's children if they are teenagers or older. If younger children are present, the court must decide if there is evidence that they both heard and understood the conversation. If so, then the privilege cannot be claimed. In the example above, the statements made at the party would not be privileged under confidential communications because of the presence of third parties. The husband's appearance or actions would not be privileged since they were not intended to convey a confidential message. Only the private statements made at home would be

privileged.

A couple need not be married at the time of the testimony to claim the privilege as long as they were married at the time they made the communications. This privilege is not based on the idea of preserving marital harmony, but on the sanctity of private marital communications, which the court calls, "the best solace of human existence." *Trammel*, 445 U.S. at 51. Both spouses hold this privilege and neither can testify unless both agree.

Joint Criminal Conduct Exception

In the Fourth Circuit, there is a broad exception to both types of marital privilege for communications related to a criminal enterprise in which both spouses participate. In *United States v. Parker,* the court stated, "that all communications between a husband and wife that are in any way related to a crime, and made in the course of the spouses' joint planning or participation in that crime, fall within the exception to the marital privilege." 834 F.2d at 413. For the exception to apply, the testifying spouse does not need to be a co-defendant, only a participant. The exception extends to statements made during the formulation and commencement of joint participation in a crime. *Id*. For example, in the hit-and-run hypothetical, if the husband told the wife, "You need to come back to the scene with me and help me hide the body," and the wife agreed, that statement and all subsequent related statements and actions would not be privileged.

An understanding of the rules of marital privilege is necessary to best counsel your client about the role that a spouse could play as a witness in the case. This is important, to build the best possible defense for your client, and to best prepare them for the potential stress of having the spouse testify against them. If a confidential conversation with a spouse can be called "the best solace of human existence," then watching your spouse testify in your prosecution is surely one of life's worst tribulations. With a solid grasp of spousal privilege you can help your client to prepare for and/or prevent a damaging blow to both the case and the marriage.

*Many thanks to Reid Cater for contributing these helpful tips. Reid is a third year law student at the University of Pennsylvania School of Law and was an intern in the FPD office during the Summer of 2012.*


## *The Right to a Speedy Trial*

The concept of a speedy trial is ever present within the practice of criminal law. Though easy to understand, this right often plays a background role. The general right to a speedy trial is found in the text of the Sixth Amendment. Over the years, the meaning of what constitutes a speedy trial has evolved. This change culminated in the creation of the Speedy Trial Act of 1974. While the Sixth Amendment speedy trial mandate applies to both the state and federal systems, the Speedy Trial Act itself only applies federally. At its core, the Act governs the amount of time between (1) an arrest and the indictment and (2) the indictment or first appearance and trial. *See* 18 U.S.C. § 3161.

Under the Speedy Trial Act, an indictment charging an individual with an offense must "be filed within thirty days from the date on which the individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). The Act "requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance. *Zedner v. United States*, 126 U.S. 1976, 1980 (2006); 18 U.S.C. § 3161(c)(1).

When calculating the amount of time that may pass before an indictment or trial, there are certain periods of time that are excluded and do not count when tallying the allotted thirty or seventy days. 18 U.S.C.§ 3161(h)(1). These include, but are not limited to: examinations for mental competency or physical capacity, trials with respect to other charges, delays because the court is considering a proposed plea agreement, and delays for pretrial motions. 18 U.S.C. § 3161(h)(1).

Because the Speedy Trial Act only applies to the federal system, the time period only starts to toll after a defendant is held for federal purposes or by federal mandate. *United States v. Woolfolk*, 399 F.3d 590, 596-97 (4th Cir. 2005). Assuming there is no waiver of the right to a speedy trial, the Speedy Trial Act time periods are triggered at the point of the defendant's federal arrest. *Inquinta v. United States*, 674 F.2d 260, 264 (4th Cir. 1982). "It is only a federal arrest, not a state arrest, which will trigger the commencement of the time limits set in the Act." *Id.* The court in *Woolfolk* notes *Inquinta*'s approval that "if that person is held in state custody at the request of federal authorities, the date of arrest by state officers is controlling." *United States v. Woolfolk*, 399 F.3d 590, 596 (4th Cir. 2005).

Time does not begin tolling simply because a defendant is held by a state system where there is a dual presence of state and federal purposes. *See United States v. Taylor*, 240 F.3d 425, 427-28 (4th Cir. 2001); *Inquinta*, 674 F.2d at 268-69. Moreover, "when an individual is lawfully being held to answer to state charges, a 'criminal complaint coupled with an unexecuted arrest warrant and a federal detainer' do not trigger the Act." *Woolfolk*, 399 F.3d at 595 (*quoting United States v. Thomas*, 55 F.3d 144, 148 (4th Cir. 1995)). According to the Fourth Circuit, the thirty day period starts to run when "the government knew or should have known that the defendant was retained solely to answer federal charges." *Woolfolk*, 399 F.3d at 596-97.

Further, the right to a speedy trial is considered a fundamental right that may be waived using the same criteria as waiving the right to counsel. *See Barker v. Wingo*, 407 U.S. 514, 515, 525–27 (1972). In analogizing a defendant's ability to waive their right to a speedy trial to a defendant's ability to waive right to counsel, the Supreme Court noted that a defendant must "intelligently and understandably reject[]" the offer of counsel. *Id.*

Essentially, the speedy Trial Act is a mandate that no more than thirty days may pass between the federal arrest and the indictment, and that no more than seventy days may lapse between the indictment or first appearance and trial. As long as attorneys within the federal system are aware of the intricacies of the Speedy Trial Act and how it affects clients starting within the state system, one can fairly easily to guard a client's legal interests.

*Many thanks to Patterson Dagenhart for contributing these helpful tips. Patterson is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2012.*

## *Computer Corner: Mobile Phones*

Gone are the days when a mobile phone was analogous to your land line - simply allowing you to make phone calls "on the go." Today, a mobile phone is much more like a computer. It is your pathway to internet surfing, social networking, driving directions, and thousands of mobile applications. With the increased functionality of mobile phones, it is important to protect these devices as they provide a conduit to both work and your own sensitive information.

Implementing the practices below will assist you in improving the security on your mobile phone:

1. Keep unauthorized users out - password-protect your phone.
2. Protect sensitive information - work with your carrier to ensure your mobile phone can be remotely wiped in the event that it is lost or stolen.
3. Be safe - turn off wireless and Bluetooth functions when not needed.
4. Limit exposure - promptly report a lost/stolen device to your carrier.
5. Do not be followed - disable location services and only enable when needed.
6. Remain healthy - only download applications from trusted sources.
7. Stay current - periodically check with the manufacturer to see if a software update, such as a security patch, is available.

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

## LEGAL UPDATES

### *4th Circuit Update*

For the latest Fourth Circuit update, 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.

### *Supreme Court Update*

For the link to the latest Supreme Court update, please visit our website at http://nce.fd.org, and go to "Publications" or for up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com.

### *New Rules and Guideline Amendments*

There are a few proposed changes to the Federal Rules of Criminal Procedure that will go into effect December 1, 2012 unless Congress acts. A summary of the changes are listed below, and the full text can be found in PDF format at http://www.uscourts.gov/RulesAndPolicies.aspx.

Criminal procedure

- Rule 5 (Initial Appearance) - proposed amendment specifies the place of initial appearance for a defendant extradited to the United States.

- Rule 15 (Depositions) - proposed amendment authorizes the taking of depositions outside the U.S. without defendant being present in limited circumstances.

- Rule 37 (New Rule) - articulates procedures for obtaining an indicative ruling.

Below you will find amendments to the United States Sentencing Guidelines. A summary of the amendments as they are given on the website are listed below, and the full text can be found in PDF format at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf

Sentencing Guideline Amendments

- Dodd-Frank/Fraud § 2B1.1(b)(14) and § 2B1.1(b)(17) (This amendment provides a special rule for determining actual loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded

security or commodity).

- BZP (The amendment establishes the equivalency for Benzylpiperazine offenses in the Drug Equivalency Table Provided in Application Note 10(D) in § 2D1.1).

- Safety Valve (This amendment adds a new specific offense characteristic at subsection (b)(6) of § 2D1.11)

- Sentence imposed in § 2L1.2 (This amendment amends the definition of "sentence imposed" in Application Note 1(B)(vii) to §2L1.2)).

- Human Rights § 3A1.5 and §2L2.2(b)(4) (This amendment addresses human rights violators in two areas: defendants who are convicted of a human rights offense, and defendants who are convicted of immigration or naturalization fraud to conceal the defendant's involvement, or possible involvement, in a human rights offense).

- Driving While Intoxicated § 4A1.2 Application Note 5 (This amendment resolves differences among circuits regarding when prior sentences for the misdemeanor offenses of driving while intoxicated and driving under the influence, and any similar offenses by whatever name they are known, are counted toward the defendant's criminal history score).

- Multiple Counts § 5G1.2 (This amendment responds to an application issue regarding the applicable guideline range in cases in which the defendant is sentenced on multiple counts of conviction, at least one of which involves a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range).

- Rehabilitation § 5K2.19 (The amendment responds to the Supreme Court's decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), which, relying in part on 18 U.S.C. § 3661, held that "when a defendant's sentence has been set aside on appeal, a district court at re-sentencing may consider evidence of the defendant's post-sentencing rehabilitation." Accordingly, the amendment repeals the prior policy statement).

- Cell Phone Contraband Act of 2010 § 2P1.2(a)(3) (First, the amendment responds to the Cell Phone Contraband Act of 2010, Pub. L. 111–225 (enacted August 10, 2010), which amended 18 U.S.C. § 1791 (Providing or possessing contraband in prison) to make it a class A misdemeanor to provide a mobile phone or similar device to an inmate, or for an inmate to possess a mobile phone or similar device.)

Local Rule Amendments

- Local Rules 22(d), 25(a), 25(b), 25(c), 30(b), 31(c) & 32(b) were amended effective July 2, 2012, with the new electronic appendix requirement applicable to briefing orders issued on or after July 2, 2012. A summary of the amendments as they are given on the website are listed below, and the full text can be found in PDF format at http://www.ca4.uscourts.gov/pdf/briefapxreq_ca4.pdf

- Local rule 31(d) - The amendment to Local Rule 39(a) reduces the maximum rate for copy costs claimed by a prevailing party for briefs and appendices from $4.00 per original page to $.15 per copy for all filing and service copies required by the court. The proposed amendment aligns the maximum rate with the copy rate generally charged in the Richmond area and encourages economical methods of copying.

- Local Rule 31(d) and 30(b) - The amendments to Local Rule 30(b) consolidate the filing and service requirements for appendices in one local rule, and the proposed amendments to Local Rule 31(d) consolidate the filing and service requirements for briefs in one local rule.

*Many thanks to Darlene Harris for contributing these helpful tips. Darlene is a third year law student at North Carolina Central University School of Law and was an intern in the FPD office during the Summer of 2012.*

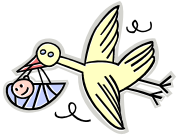
## LOCAL NEWS

### *EDNC News*

We are saddened by the passing of United States Federal Magistrate Judge David W. Daniel on July 20, 2012. Judge Daniel will be greatly missed by everyone in the district.

### *FPD Office News*

We are pleased to welcome to the Raleigh office: Research and Writing Attorney Bettina Roberts, Senior Legal Assistant Davon Murray, Panel Assistant Valerie Vincent, and Assistant Computer Systems Administrator Sam Salargo.



Congratulations to:

Devon and Chris Donahue on the birth of Haley Elizabeth and Zachary Thomas on August 29, 2012.

Shannon and Brian Bennett on the birth of Parker Ryan on October 18, 2012.


### *Panel News*

We are pleased to welcome the following attorneys who are training to become panel attorneys: in Raleigh: Michaela Bostrom, William Michael Dowling, Robert Ward Shaw, David Smyth, and Camden R. Webb; in Chapel Hill: Jeremy Todd Browner and Lynne Louise Reid; in Wilmington: Andrew T. Nettleman; in Hertford: Daniel Patrick Donahue; in Kenansville: Justin Blake Hunter; and in Greenville: Jerauld Paufford.

The following are new regular panel attorneys: in Raleigh: Richard Croutharmel, Joshua B. Howard, and Clay C. Wheeler; in Durham: Brian Aus; in Greenville: Michael C. Fitzpatrick; in Fuquay-Varina: J. Frank Jackson; and in Wake Forest: Sean P. Vitrano.

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*If you have suggestions for news articles, or for topics that you would like to see featured in a future edition of the Zealous Advocate, please contact the ZA Editors.*

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