ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2016

THE DEFENDER'S MESSAGE

In our newsletter, we often speak of changes in the law. This is probably because the law is an ever-evolving creature. These changes can be spurred by different causes. Usually, there is a new statute enacted or a landmark case decided. In our last edition, we highlighted the victory that was *Johnson v. United States*. Today, we look at an uncertain legal landscape due to one particular event- the loss of *Johnson's* author and great champion of criminal defendants' rights, Justice Antonin Scalia.

In this edition, our own Appellate Chief, Steve Gordon, contributes a thoughtful editorial about the justice's passing and the unpredictable future of criminal law jurisprudence. Justice Scalia's loss may also impact such upcoming Supreme Court cases as *Welch v. United States*, which touches on *Johnson's* retroactivity and *Utah v. Streiff*, which discusses the future efficacy of the Exclusionary Rule. We report on both of these case and their potential impact.

This edition also features articles exploring the Sixth Amendment as grounds for suppression, information about Solitary Housing Units at BOP facilities, tips for using Rule 41 to recover forfeited client property, and our regularly featured case update links and local news.

As always, the *ZA* Editors and I hope that you will find this information helpful to your practice. I look forward to seeing you at our upcoming seminar this Friday, April 8th at N.C. State's McKimmon Center.

Thomas P. McNamara
Federal Public Defender

Inside the Spring 2016 Issue

THE ZEALOUS ADVOCATE

Office of the Federal Public Defender
For the Eastern District of North Carolina
150 Fayetteville Street, Suite 450
Raleigh, NC 27601
Tel: (919) 856-4236
Fax: (919-856-4477

Thomas P. McNamara, Federal Public Defender

Vidalia Patterson, Editor & Layout, vidalia_patterson@fd.org

Laura Wasco, Editor & Layout, laura_wasco@fd.org

Gloria Gould, Design, gloria_gould@fd.org

Donna Stiles, Panel Administrator, donna_stiles@fd.org

PANEL ATTORNEY INFORMATION

Previously Distributed Materials

Previously distributed material mailings to the panel over the last several months include various emails with *Johnson* information; Judge Flanagan's Character Letter Practice Preferences and Procedures; Hourly Fee and Mileage changes for 2016, Revised Local Rules; and DOJ encryption information.

Seminar BOLOs

The Fall 2016 seminar is set for November 3-4, 2016 at the Holiday Inn, Wrightsville Beach. Additional information and registration information will be distributed six to eight weeks before the seminar.

The U.S. Probation Office Annual Guideline Seminar will be held in November 2016 in Raleigh. Additional information and a firm date is forthcoming.

eVoucher Update

Our district is still working to move forward with eVoucher. The program has experienced issues that we hope will be resolved before our District goes live. We will keep you updated as this project moves forward.

PRACTICE TIPS

Johnson v. United States *Update:* Welch v. United States

Last June, the U.S. Supreme Court in an 8-1 decision invalidated the "residual clause" of the Armed Career Criminal Act (ACCA) as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551 (2015) (see the Fall 2015 issue of the *Zealous Advocate* for more information on *Johnson*). This ruling immediately allowed defendants on direct review to contest their ACCA sentences when their previous convictions were "violent felonies" under the "residual clause." However, whether this ruling is, and to what extent, retroactive on collateral review remains a hotly contested issue.

Retroactivity is an incredibly confusing and complicated doctrine, governed by both case law and statutory requirements. While new substantive rules are retroactive on collateral review, new procedural rules generally are not unless they are "watershed rules" that "implicat[e] the fundamental fairness and accuracy of the criminal proceedings." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (citations omitted). However, even if the Court establishes a new substantive rule, that rule is still subject to the requirements of 28 U.S.C. § 2255, which governs federal collateral review.

Without an express statement of retroactivity, circuit courts across the country were left on their own to determine which defendants can receive the benefit of this ruling. A majority of circuits have found that *Johnson* established a new substantive rule and therefore, was retroactive at least on an initial § 2255 motion. *See In re Watkins*, No. 15-5038, 2015 WL 9241176, at *3-*4 (6th Cir. Dec. 17, 2015); *Price v. United States*, 795 F.3d 731, 734-735 (7th Cir. 2015). However, there has been disagreement about whether the Supreme Court already made this new rule retroactive, which would allow for second or successive § 2255 motions. *See In re Rivero*, 797 F.3d 986, 989-991 (11th Cir. 2015); *Pakala v. United States*, 804 F.3d 139 (1st Cir. 2015); Order, *Rivera v. United States*, No. 13-4654 (2d Cir. Oct. 5, 2015), ECF No. 44; *In re Gieswein*, 802 F.3d 1143, 1148-49 (10th Cir. 2015).

To resolve this split, the Supreme Court granted certiorari in an Eleventh Circuit case, *Welch v. United States*, on January 8, 2016. The petitioner in *Welch* pleaded guilty to being a felon in possession of ammunition and a firearm in violation of 18 U.S.C. § 922(g)(1). Brief for the Petitioner at 5, *Welch v. United States,* No. 15-6418. The presentence investigation report alleged that the petitioner had three previous convictions for "violent felonies" that qualified him to be sentenced under ACCA. *Id.* He had one 2003 conviction for felony battery and two 1996 convictions for robbery, or "sudden snatching" under Florida law. *Id.* The petitioner accepted a plea with a mandatory minimum of fifteen years, but reserved the right to challenge his qualification under ACCA. *Id.* at 6. At sentencing, the district court rejected petitioner's argument that these convictions did not qualify as "violent felonies" and sentenced him to the fifteen year minimum. *Id*.

On appeal, the petitioner again challenged whether Florida's robbery statute constituted a "violent felony." *Id.* At that time, under Florida law *any* degree of force transformed larceny into robbery. *Id.* at 7. The Eleventh Circuit specifically acknowledged that ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), did not apply to Florida robbery. *Id.* at 6. However, it ruled that under the "residual clause," Florida robbery constituted a "violent felony" because it "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The Eleventh Circuit, thus, upheld the conviction and the sentence. *Id.*

Now on collateral review, the petitioner filed a *pro se* § 2255 motion in the district court to vacate or otherwise amend his sentence. *Id.* The district court denied the petition and refused to issue a certificate of appealability. *Id.* at 8. The court of appeals also refused to issue a certificate of appealability despite *Johnson's* having been calen-

dared for re-argument to address whether the "residual clause" was unconstitutionally vague. *Id*. at 8. Undeterred, the petitioner filed a *pro se* petition for a writ of certiorari to the Supreme Court, which the Court granted. Upon granting this writ, the Court identified two key issues:

> Whether the district court erred when it denied relief on petitioner's section 2255 motion to vacate, which alleged that a prior Florida conviction for "sudden snatching" did not qualify for Armed Career Criminal Act enhancement pursuant to 18 U.S.C. § 924(e); and
>
> Whether *Johnson v. United States* announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review.

Clearly, through *Welch* the Court seeks to address *Johnson's* retroactivity once and for all. Even though the petitioner in *Welch* was only pursuing his initial § 2255 motion, the Court's ruling could have a much broader impact. If the Court expressly establishes *Johnson* as a new substantive rule that is retroactive, this rule would not only apply to initial § 2255 petitions, it would also allow defendants to overcome the gatekeeping requirements of § 2255(h)(2) and file timely second or successive motions. Thus, individuals who previously exhausted all remedies, may have a second chance for relief.

While oral argument was scheduled for March 30, and an opinion is not expected until near the end of the current term, there is still work to be done. The Court issued its decision in *Johnson* on June 26, 2015. Under § 2255(f)(3) individuals wishing to collaterally attack their sentences in light of *Johnson* have just one year to file their petitions. Consequently, even if the Court rules in favor of retroactivity in *Welch*, a petition will be barred as untimely if it is not filed prior to June 26, 2016. Thus, defenders need to screen past ACCA cases for individuals whose previous convictions were qualified under the "residual clause." While in *Welch*, the Eleventh Circuit specifically articulated that it was relying on the residual clause, other cases may not be as clear. Consequently, it may be necessary to look at whether the convictions can qualify under the elements clause.

The full impact of *Johnson* is yet to be determined. However, it remains a huge victory for federal defendants who were and would have been sentenced under ACCA's "residual clause." Keep an eye out for the Court's decision in *Welch*.

The ZA Editors thank Susanna Wagar for contributing this helpful information. Susanna is a third year law student at the University of North Carolina School of Law and was an extern in the FPD office during the Spring of 2016.

Utah v. Strieff *and the Future of the Exclusionary Rule*

With upcoming U.S. Supreme Court decisions about abortion rights,[1] the scope of the Sixth Amendment's Speedy Trial Clause,[2] and others, the next several months promise to be an exciting period for constitutional law scholars. But what will this year mean for the Fourth Amendment, arguably the most important restraint on governmental power? An important case to follow is *Utah v. Strieff*, argued before the Court on February 22, 2016. The facts of the case are straightforward, but we should not underestimate its importance in determining the future direction of Fourth Amendment jurisprudence. This article begins by providing a background of *Strieff* and the arguments for each side. From there, we will examine *Strieff's* possible impact on exclusionary rule jurisprudence, giving special attention to the possible effect of Justice Scalia's recent passing.

In December 2006, Salt Lake Detective Douglas Fackrell received an anonymous tip about drug sales at a local residence. Over the next week, he conducted "intermittent" surveillance of the house, noticing "short term traffic . . . consistent with drug sales activity." Fackrell saw Edward Joseph Strieff, Jr. leave the residence, but had not seen him enter. Although Fackrell was not sure if Strieff was one of these "short term visitors," Fackrell stopped Strieff for questioning anyway. During the stop, Fackrell called dispatch and discovered Strieff had an outstanding warrant and arrested him. Fackrell then found methamphetamine and drug paraphernalia on Strieff's person during the search incident to arrest. The trial court ruled that although Fackrell had no reasonable suspicion to conduct an investigatory stop, the drug evidence was admissible. Although the Utah Court of Appeals affirmed the trial court's ruling, the Utah Supreme Court held that the drug evidence should have been suppressed because the warrant that was the basis for the arrest was discovered during an unlawful investigatory stop.

"What stops us from becoming a police state and just having the police stand on the corner down here and stop every person, ask them for identification, put it through, and if a warrant comes up, searching them?"[3] asked Supreme Court Justice Sotomayor at oral arguments. Indeed, the ramifications of this case would stretch far beyond its Salt Lake City origins. In high crime areas, it is not uncommon for large segments of the population to have outstanding warrants for traffic and other

minor offenses. A U.S. Department of Justice investigation after the civil unrest in Ferguson, Missouri found that over three-quarters of the town had outstanding arrest warrants, many of which were for traffic offenses.[4] It would undoubtedly "change [police officers'] incentives dramatically" if they were able, without reasonable suspicion, to stop citizens in high crime areas with little fear of subsequent evidence being suppressed.[5] In places like New York City, stop-and-frisk racial disparities have given rise to criticism that *Terry* stops have become a systemic police strategy where a pretextual "reasonable suspicion" can be invented after the discovery of incriminating evidence.[6]

The State of Utah, in its brief, argued that applying the exclusionary rule in this context would "not yield appreciable deterrence," and that Fackrell's action of stopping Strieff was "an objectively reasonable misjudgment."[7] Utah argued that the arrest was an "intervening event," and that the warrant's discovery "all but broke any connection between the prior unlawful stop and the evidence's discovery." Utah, it seems, wants to extend the "intervening circumstances" rule first established in *Wong Sun v. United States*.[8] That rule allows the admission of verbal evidence obtained as the result of a Fourth Amendment violation in certain circumstances where the two events are sufficiently "attenuated." Chief Justice Roberts and Alito both hinted their leanings by noting that in most communities, only small portions of the population have outstanding arrest warrants. When looking at the facts of this case in a vacuum, it may seem reasonable that a *Terry* violation—which, here, may have been an honest police misjudgment rather than a flagrant violation—should not taint a subsequent personal search based on an arrest warrant. However, the implications of this case will likely have much farther-reaching consequences in certain areas where outstanding warrants are common and police motives are not so idealistic.

Of the six justices who asked questions at oral argument, three appeared to side with Strieff (Justices Kagan, Sotomayor, and Ginsburg), while three appeared to side with the State of Utah (Chief Justice Roberts, as well as Justices Alito and Kennedy). Of the two justices that did not speak, Breyer has historically favored preserving the original scope of the exclusionary rule, and Thomas has historically taken the opposite position. The outcome of this case, say some commentators, may be the Court's first 4-4 split since Justice Scalia's passing.[9]

Justice Scalia's death may likely be the deciding factor in *Strieff*, but more broadly, it may change the direction of the Court's jurisprudence with respect to the exclusionary rule. Clearly, Justice Scalia was no fan of the exclusionary rule.[10] In Justice Scalia's view, the exclusionary rule was only created "because we found that it was necessary deterrence in different contexts and long ago."[11] Two major changes since *Mapp v. Ohio*, Scalia argued, have eviscerated the need for a robust exclusionary rule: first, other effective remedies—such as civil suits—are available to victims of Fourth Amendment violations (if not in practice, then at least theoretically). Second, police forces are increasingly professional, well-trained, and well-disciplined. This view, reflected in Justice Scalia's *Hudson v. Michigan* majority opinion, was long in the making. A strict textual interpretation of the Fourth Amendment—requiring only that searches and seizures not be "unreasonable"—seems to have taken hold in the post-Warren Courts[12] more than the judicially-created warrant requirement[13] and exclusionary rule.[14] Beginning with the creation of the good-faith exception to the warrant requirement,[15] the Court has gradually—yet consistently—eroded the exclusionary rule.[16] Were Justice Scalia still alive and voting on this case, *Utah v. Strieff* would likely have created one more hole in a doctrine already resembling a slice of Swiss cheese.

Allies and adversaries alike praised Justice Scalia's legacy as a legal titan who was, perhaps, one of the most transformational figures the Court has ever seen. With Scalia's seat plunging the nation into political brinksmanship, it is currently anyone's guess who will replace him and when he or she will take the bench.[17] The preservation of judicial integrity used to be a primary justification for the exclusionary rule, but the Supreme Court has long abandoned this line of reasoning. *Utah v. Strieff* gives the Court an opportunity to resurrect this reasoning. Although deterring police misconduct has become the main justification for suppressing illegally-obtained evidence, this has been deemed as insufficient justification for the "massive remedy" that is the exclusion of incriminating evidence. Although the Fourth Amendment does not explicitly name the exclusionary rule, United States judicial history is replete with the creation of prophylactic judge-made rules created to preserve the more explicit mandates of the Constitution.[18] The judiciary's legitimacy depends on the courts' discouraging illegal police conduct, because "the government should not profit from its lawless behavior."[19] The administration of justice should be viewed as the long-term goal of the exclusionary rule, with deterrence of unlawful police conduct as only a secondary consideration.

Without an appropriate remedy, the Fourth Amendment prohibition of unreasonable searches and seizures—at least in practice—will not have any discernable effect. With *Utah v. Strieff*, the Court has an opportunity to reverse its longstanding trend eroding the exclusionary rule. While this case is still pending, it would be worth preserving for appeal any situation where the police found an outstanding warrant after an unlawful *Terry* stop, therefore al-

lowing for the admission of incriminating evidence found during the search incident to arrest.[20] Once this opinion is released, it may have significant implications not only for the jurisprudence surrounding *Terry* stops, but also may place an important limitation on the attenuation doctrine. "[T]he criminal goes free, if he must, but it is the law that sets him free."[21]

---

[1] *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, No. 15-274; *Roman Catholic Archbishop of Washington v. Burwell*, No. 14-1505.

[2] *See Betterman v. Montana*, No. 14-1457.

[3] Transcript of Oral Argument at 5, *Utah v. Strieff*, No. 14-1373.

[4] Brief for Respondent at 1, *Utah v. Strieff*, No. 14-1373 (citing U.S. Dep't of Justice, *Investigation of the Ferguson Police Department* 6, 55 (2015).

[5] Transcript of Oral Argument at 7, *Utah v. Strieff*, No. 14-1373 (Kagan, J.).

[6] *See, e.g., Stop and Frisk Data*, N.Y. CIVIL LIBERTIES UNION (last visited March 18, 2016), http://www.nyclu.org/content/stop-and-frisk-data.

[7] Brief for Petitioner at 6, *Utah v. Strieff*, No. 14-1373.

[8] 371 U.S. 471 (1963).

[9] *See, e.g.*, Lawrence Hurley, *Scalia's Absence to be Felt as Supreme Court Returns*, REUTERS (Feb. 21, 2016, 8:04 AM), http://www.reuters.com/article/us-usa-court-cases-idUSKCN0VU0KU; Mark Joseph Stern, *The First Day of the New Supreme Court: Without Antonin Scalia on the Bench, The Court's Liberal Justices Spoke Up and Won Out*, SLATE (Feb. 23, 2016, 7:30 AM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/02/in_the_oral_arguments_for_utah_v_strieff_the_supreme_court_s_liberals_spoke.html ("Following his death last Saturday, the justices appear to be deadlocked, 4-to-4, on Strieff's case and maybe the exclusionary rule itself.")

[10] *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (Scalia, J.).

[11] *Id.* at 597.

[12] Chief Justice Warren, widely regarded as the most influential member of the Court in the last century, presided over the Court during an unprecedented expansion of rights of the accused. *Brown v. Board of Education*, *Miranda v. Arizona*, *Mapp v. Ohio*, and *Gideon v. Wainwright*, are just a few of the opinions decided by the Warren Court. The Courts that followed, especially those led by Chief Justices Rehnquist (1986–2005) and Roberts (2005–present), have been considered much more conservative.

[13] *See Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

[14] *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

[15] *See generally United States v. Leon*, 468 U.S. 897 (1984).

[16] *See generally Heien v. North Carolina*, 547 U.S. __ (2014) (declining to apply the exclusionary rule to evidence seized pursuant to a traffic stop effectuated because of a police officer's reasonable mistake of law); *Herring v. United States*, 555 U.S. 135 (2009) (declining to apply the exclusionary rule to evidence seized pursuant to a search incident to lawful arrest based on an outstanding warrant from another jurisdiction later discovered to be inaccurate); *Hudson v. Michigan*, 547 U.S. 586 (2006) (declining to apply the exclusionary rule to violations of the "knock and announce" rule); *Nix v. Williams*, 467 U.S. 431 (1984) (creating the "inevitable discovery" exception to the exclusionary rule).

[17] At the later drafting stages of this article, Chief Judge Garland of the District of Columbia Circuit had just been nominated.

[18] Indeed, this practice dates back to the earliest judicial opinions of this country. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (arguing that "[i]t is emphatically the province of the judiciary to say what the law is," without giving any express textual authority for judicial review of federal statutes).

[19] *Herring*, 555 U.S. at 152 (Ginsburg, J., dissenting).

[20] In the Seventh and Eighth Circuits, the current case law directs the courts to focus on the seriousness of police misconduct, only mandating suppression if such conduct was flagrant. *See, e.g., United States v. Simpson*, 439 F.3d 490, 495–96 (8th Cir. 2006); *United States v. Green*, 11 F.3d 515, 520–24 (7th Cir.), cert. denied, 522 U.S. 973 (1997). The Supreme Court decision in *Utah v. Stieff*, if decided in favor of Strieff, would have the largest impact on the law of these circuits.

[21] *Mapp*, 367 U.S. at 659 (1961).

The ZA *Editors thank Eric Hinderliter for contributing this helpful information. Eric is a third year law student at the University of North Carolina School of Law and was an extern in the FPD office during the Spring of 2016.*

How to Use the Sixth Amendment Right to Counsel to Suppress Statements

The Sixth Amendment sets out rights related to criminal prosecutions, including an accused's right to be appointed counsel in the event he cannot afford to retain his own attorney. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The right to appointed counsel must be honored in both federal and state prosecutions, as the Supreme Court of the United States has applied this right to the states through the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335 (1963). Just like the rights set out in the Fourth and Fifth Amendments, evidence obtained in violation of the Sixth Amendment right to counsel cannot be used against the defendant at trial. *Massiah v. United States*, 377 U.S. 201 (1964). However, the Sixth Amendment right to counsel is offense-specific, meaning that it "cannot be invoked once for all future prosecutions," as the right does not attach until the initiation of adversarial proceedings. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Adversarial proceedings "include formal charges, indictment, information, arraignment, or preliminary hearings." 27-644 Moore's Federal Practice – Criminal Procedure § 644.30 (2015).

In *Escobedo v. Illinois*, the Supreme Court defined a very limited exception that allows the right to attach prior to formal adversarial proceedings. 378 U.S. 478 (1964). A defendant's Sixth Amendment right is said to be violated where: (1) a police officer has a "focus" on a certain individual and is no longer asking generalized questions to investigate a crime; (2) the suspect has been taken into custody; (3) the officer interrogates the suspect in a way that "deliberately elicits" incriminating statements; (4) the suspect has requested counsel and been denied the request; and (5) the officer does not effectively warn the suspect of his right to remain silent. *Id*.

To determine whether a client's statement is subject to suppression under a Sixth Amendment analysis, there are three questions that must be answered in the affirmative:

> Did the client assert his right to counsel?
>
> If so, was the statement deliberately elicited by police officers who initiated contact after the client asserted this right?
>
> Was the statement made in response to questions about the charge for which the client asserted this right?

(1) Asserting the Sixth Amendment right to counsel. Generally, a request for counsel must be unambiguous in order to halt the interrogation. *Davis v. United States*, 512 U.S. 452 (1994). If the defendant unambiguously asserts his right to counsel and the officer continues to interrogate him in a way that "deliberately elicits" incriminating statements, these statements cannot be used against him in trial. However, if the officer obtains a voluntary, knowing, and intelligent waiver of the defendant's right to counsel, the statements will not be excluded from trial.

(2) Deliberately elicited statements. The Sixth Amendment right to counsel is violated when an officer intentionally creates a situation that is likely to prompt a defendant to make incriminating statements in the absence of his attorney. Determining whether an officer deliberately elicited incriminating statements from your client can be one of the most challenging aspects of writing a motion to suppress involving Sixth Amendment Claims. The analysis is fact specific. To help jumpstart your research, please see the list of cases below.

(3) Deliberately elicited statements must concern the charge for which the client asserted the right. The Sixth Amendment right to counsel is offense-specific and does not attach to uncharged offenses that are factually related to the charged offense. *Texas v. Cobb*, 530 U.S. 1260 (2000). For example, if your client is charged with capital murder and his invoked his Sixth Amendment right to counsel, the officers may not deliberately elicit incriminating statements about the capital murder in your absence. However, the officers could initiate contact with your client to talk about a burglary on the same day as the capital murder.

Case Law: Deliberately Elicited Statements

***Massiah v. United States*, 377 U.S. 201 (1964).** Massiah was indicted on federal narcotics laws, retained counsel, and was released on bail. A few days later, Massiah made several incriminating statements to a co-defendant while in the co-defendant's car. Prior to this conversation, and unknown to Massiah, the co-defendant had allowed a federal agent to install a microphone in the car. The federal agent listened to the entire conversation, and the incriminating statements were used against Massiah at trial. The Supreme Court held that, under the guarantees of the Sixth Amendment, these incriminating statements, elicited by government agents after Massiah's indictment and in absence of his counsel, were inadmissible at trial.

***United States v. Henry*, 447 U.S. 264 (1980).** Henry was indicted for armed robbery and was awaiting trial in jail. Government agents instructed a paid informant to "be alert to any statements made by" his fellow federal inmates, including Henry. The informant had conversations with Henry, and Henry made incriminating statements as a result. Three factors were important to the Supreme Court: (1) the informant was acting under instructions of the government; (2) Henry was not aware that the informant was anything more than a fellow inmate; and (3) Henry was in custody and indicted at the time of the conversation with the informant. This combination of circumstances supported a determination that the informant, acting as a government agent, used his position to deliberately elicit incriminating statements from Henry. Therefore, the statements could not be used against Henry at trial.

***Fellers v. United States*, 540 U.S. 519 (2004).** After Fellers was indicted for conspiracy to distribute methamphetamine, two officers went to his house to arrest him. After the officers informed Fellers why they were at the house, they questioned him about his involvement in the crime, to which Fellers responded by making several incriminating statements. The officers did not inform Fellers of his rights until they transported him back to the police station. The Supreme Court held that because the discussion took place after Fellers had been indicted, outside the presence of counsel, and absent any waiver, the officers had violated his Sixth Amendment right to counsel.

The Sixth Amendment right to counsel is another tool to further protect your client from intentional overreaches by a government agent. While scouring your client's case file for facts that support a Fourth and Fifth Amendment motion to suppress, keep an eye out for circumstances that could support a Sixth Amendment motion to suppress as well.

The ZA Editors thank Ava Britt for contributing this helpful information. Ava is a third year law student at Campbell University School of Law and was an extern in the FPD office during the Fall of 2015.

Get Your Client's Property Back: Tips for a Rule 41(g) Motion

Has a client ever contacted you in hopes of getting their forfeited property returned? Even if their criminal proceedings are terminated, you may still be able to help. This article provides a few tips on how to determine if your motion is valid, and how to help your client through the process.

Fed. R. Crim. P. 41(g) allows a defendant, aggrieved by the deprivation of his property, to move the court to return his property. However, there are four things to look for before you file. You must determine (1) whether your client actually owned the property, (2) whether your client received notice of the forfeiture, (3) whether the government actually possesses the property, and (4), in what district was the property seized.

Does Your Client Own the Property?

You must determine first if your client is actually entitled to the property he seeks. *See United States v. Maez*, 915 F.2d 1466, 1468 (10th Cir. 1990). This can be very simple. Prima facie evidence of this is seizure from the client. *Id.* at 1468. For example, if the property seized was taken from your client's premises, the burden is satisfied. *United States v. Wright*, 197 U.S. App. D.C. 411, 610 F.2d 930, 940-941 (1979). Once the client has shown this, the burden shifts to the government to prove they still need the property. *United States v. Bautista*, No. 98-7614, 1999 U.S. App. LEXIS 11769, at *3 (4th Cir. June 7, 1999).

Did Your Client Get Notice of the Forfeiture?

The government must show it has a legitimate reason for holding onto the property. *Id*. One of the easiest ways the government can show this is by proving your client had an adequate remedy at law. *Id.* This means the defendant had notice of the forfeiture and an opportunity to contest it. *Id*. The government can demonstrate this by showing a certified mail notice and a return receipt. *Matthews v. United States*, 917 F.Supp. 1090, 1106-07 (E.D. Va. 1996). If the government proves this, and your client did not contest the forfeiture, the client has likely lost his chance. *Id*. at 1106.

Does the Government Actually Posses the Property?

A Rule 41(g) motion is only appropriate when the United States government actually possesses the property. *Hill v. United States*, 296 F.R.D. at 414. The government possesses the property "(1) where the government uses the property as evidence in the federal prosecution, or (2) where the federal government directed state officials to seize the property". *Id*.

In What District was the Property Seized?

A post-conviction Rule 41(g) motion is a civil action. *United States v. Morrison*, No. 5:06-cr-00044-RLV-CH-1, 2013 U.S. Dist. LEXIS 78302, at *2 (W.D.N.C. June 4, 2013). However, all actions recovering property in connection with a criminal investigation fall under Rule 41(g), notwithstanding their civil nature. *Id*. The Rule applies when no criminal proceedings are pending, or even contemplated. *United States v. Garcia*, 65 F.3d 17, 20 (4th Cir. 1995). If a complete stranger or third party suffers from a property seizure, they may bring a Rule 41(g) action. *Id*. During a pending criminal case, the court that hears the criminal case, hears the Rule 41(g) motion. Id. However, after the criminal proceedings terminate, the motion must be filed in the district where the seizure occurred. *Id*.

The *Garcia* court addressed the Second and Eighth Circuit's views stating that a post-conviction 41 (g) motion is a civil action, governed under 28 U.S.C. § 1346 (a) (2), rather than a criminal action under 41(g). *Id.* at 20. (citing *Toure v. United States*, 24 F.3d 444, 445 (2d Cir. 1994); *Thompson v. Covington*, 47 F.3d 974, 975 (8th Cir. 1995). *Garcia* rejected their views and held that even though the motion was a civil action, Rule 41(g) still controlled. *Id*.

If your client actually owned the property in question and did not receive adequate notice, he may have a claim. As long as the government possesses the property, and you make sure to file in the correct district, a rule 41(g) motion may help to recover your client's property.

The ZA Editors thank Katy Haran for contributing this helpful information. Katy is a second year law student at the Campbell University School of Law and was an extern in the FPD office during the Spring of 2016.

The "SHU" — When Clients are Held in Solitary Confinement

Solitary Housing Units ("SHU") are where Bureau of Prison ("BOP") Institutions securely separate inmates

from the general inmate population. Inmates in the SHU may be housed either alone or with other inmates. The purpose of the SHU is to help ensure safety, security, and orderly operation of correctional facilities, and protect the public, by providing alternative housing assignments for inmates removed from the general population. (U.S Department of Justice, Federal Bureau of Prisons. Special Housing Units Approved by: Thomas R. Kane, available at http://www.bop.gov/policy/progstat/5270_010.pdf)

The program objectives of SHU are: a safe and orderly environment will be provided for inmates and staff, living conditions for inmates in disciplinary segregation and administrative detention will meet or exceed applicable standards, and accurate and complete records will be maintained on conditions and events in special housing units. *Id*.

When placed in the SHU, an inmate is either in administrative detention status or disciplinary segregation status. *Id.* at 2. Administrative detention status is an administrative status which removes the inmate from the general population when necessary to ensure the safety, security, and orderly operation of correctional facilities, or to protect the public. Administrative detention is non-punitive and can occur for a variety of reasons: pending classification or reclassification, holdover status, removal from general population due to investigation, transfer, protection, or post-disciplinary detention. *Id*. at 3-4. Placement in administrative detention status for protection cases arises out of the following circumstances: victim of inmate assaults or threats, inmate informant, inmate refusal to enter general population, and staff concern. *Id.* at 7. In this type of detention, except for pretrial inmates or inmates in a control unit program, "staff ordinarily, within 90 days of an inmate's placement in post-disciplinary detention, must either return the inmate to the general inmate population or request a transfer of the inmate to a more suitable institution using the proper form. *Id*.

The overriding objective of administrative segregation is to protect inmates and staff by incapacitating high-risk inmates. *See* Kenneth McGinnis, Dr. James Austin, et. al., *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*, 36 (December 2014). It may also serve to deter other inmates from becoming involved in serious rule infractions or in acts of violence for fear of being segregated for long time periods. *Id*. Another alternatively argued position is that using administrative segregation units is either excessively expensive or cost-effective. There is consensus among correctional professionals that segregation units require higher staff-to-inmate ratios and increased presence of medical and mental health staff. Some have also argued that segregation increases the likelihood of mental illness and suicide. *Id.*

The placement of the inmate into SHU will be reviewed by the Segregation Review Official. An initial three-day review is only allowed for administrative detention. *Id.* At this review, the Segregation Review Official will review the supporting records. Following the initial three-day review, there is a seven-day review which applies to both types of detention, administrative and disciplinary. At the seven-day review, the Segregation Review Official will review the inmate's status at a hearing, which the inmate can attend. Following the seven-day review, subsequent reviews of the inmates' records will be performed in their absence by the Segregation Review Official every seven continuous calendar days thereafter. After every thirty days of continuous placement in either type of detention, the Segregation Review Official will formally review the inmate's status at a hearing, and the inmate can attend. *Id.* at 8. However, when an inmate is placed in administrative detention for protection, the Warden or designee must review the placement within two work days of the placement to determine if continued protective custody is necessary. This review includes documents that led to the inmate being placed in protective custody status and any other documents pertinent to the inmate's protection. *Id.* at 7.

The official guidelines for BOP governing conditions of confinement in the SHU state that "living conditions in the SHU will meet or exceed standards for healthy and humane treatment." *Id.* at 8. Those conditions should include an environment that is well-ventilated, appropriately lighted, and heated. Furthermore the inmate should be able to practice necessary hygiene and have access to food, clothing, and personal items necessary for hygiene. *Id*. at 8. Even if in SHU, an inmate will still receive telephone privileges. However, if the inmate has not been restricted from the telephone as a result of a specific disciplinary sanction, then the inmate is allowed to make one phone call per month. As such, they will get one per every 30 calendar days. *Id.* at 10 (citing Part 540, subpart I Inmate Telephone Regulations.)

Mental illness has become increasingly prevalent in the corrections system. According to the Bureau of Justice Statistics (BJS), 45% of federal inmates had some type of mental health problem over the past 12 months. *See* D.J. James and L.E. Glaze, *Mental Health Problems of Prison and Jail Inmates*. Bureaus of Justice Statistics Special Report NCJ 213600. Sep 2006 (revised Dec. 2006). While in SHU, inmates will continue taking their prescribed medications, and a health service staff member will visit the inmate daily to provide necessary medical care. *See* BOP, *Special Housing* at 11. After every 30 calendar days of continuous placement in SHU, mental health staff will examine an inmate. The mental health assessment is centered around two factors: (1) the inmate's adjustment to the surroundings and (2) the threat the inmate poses to self, staff, and other inmates. *Id.* at 12.

Finally, release from the SHU will happen for inmates with administrative detention status when the reasons for the placement no longer exist. When an inmate is in SHU for disciplinary matters, he/she will be released after satisfying the sanction imposed by the Discipline Hearing Officer. *Id.* at 13.

The ZA Editors thank Collin March for contributing this helpful information. Collin is a third year law student at Campbell University School of Law and was an extern in the FPD office during the Fall of 2015.

EDITORIAL

Justice Scalia: An Appreciation

"He was a man. Take him for all in all."
- Shakespeare's Hamlet

Looking back, I have Antonin Scalia to thank for the best times I've had as a defense attorney. Really. The most fun, exciting, and hopeful moments I experienced in this job were because of him. There was that wonderful season of anarchic abandon after *Blakely* when you objected to every enhancement in every presentence report. There was the celebrated end of the residual clause this past June. There was the delicious schadenfreude of *Spears*, a per curiam opinion he clearly authored. Without Justice Scalia, would there be *Apprendi*? *Kimbrough*? Would there be S*immons*?

Provided the person wasn't on death row, Antonin Scalia and Clarence Thomas were often a criminal defendant's best friends. That's a comment I've made often, and for some reason it seems impossible for a lot of people, including lawyers who only do civil work, to understand. We in the defense bar appreciate that the labels "conservative" and "liberal" are often meaningless in criminal cases. Is Justice Breyer a liberal when it comes to the Fourth Amendment? It's complicated, and it gets even more complicated. At the time of his death, it was impossible not to acknowledge the genuine hurt Justice Scalia had caused people. He was excoriated in many quarters, and perhaps he brought a lot of that on with comments that often seemed to go out of their way to be nasty. But if you view criminal justice as a civil rights issue, then what do you say about his legacy? Whether he particularly cared about doing it, he made the system more fair.

Now that Justice Scalia is gone, I wonder if we'll see any more Supreme Court decisions that help our clients. Besides Justice Thomas, who on the Court (and this will include Judge Garland if he ever makes it there) is motivated to further Justice Scalia's Sixth Amendment jurisprudence? Will the Court keep taking the Fourth Amendment seriously?

Regardless of the answers, Justice Scalia's absence will be felt by criminal practitioners for some time. We will surely miss him.

The ZA Editors thank Chief Appellate Attorney Steve Gordon for sharing his views on this newsworthy topic.

If you have a suggestion for an article, we want to hear from you!

Send an e-mail to the Zealous Advocate Editors:
Laura_Wasco@fd.org or Vidalia_Patterson@fd.org

LEGAL UPDATES

4th Circuit Update

For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check http://circuit4.blogspot.com. For daily published Fourth Circuit opinions, visit http://www.ca4.uscourts.gov/opinions/daily-opinions .

Supreme Court Update

For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com.

LOCAL NEWS

EDNC News

We are pleased to announce the start of a new reentry court in Greenville, NC. STAR (Striving to Achieve Recovery) is a voluntary, federal drug treatment court designed for pretrial, presentence, and post-conviction individuals who currently suffer from or have a history of substance abuse and/or addiction. U.S. Magistrate Judge Kimberly Swank and chamber staff, along with individuals from the Federal Public Defender's Office, U.S. Attorney's Office, and U.S. Probation Office, comprise the STAR Team for our district. For more information, contact STAR team member, Laura Wasco at laura_wasco@fd.org.

FPD Office News

We bid a fond farewell to Edwin Walker, Senior Litigator, who retired in January 2016. Ed worked in our office for almost 29 years and had nearly 31 years of combined federal service.

We bid a fond farewell to Elizabeth Luck, Administrative Officer, who returned to work with the Administrative Office of the Courts in November 2015. Elizabeth worked with our office for 11 years.

We congratulate Robert Bell, our new Administrative Officer. Robert was an AFPD for nearly 13 years. In his new title, Robert is the only attorney in the country to serve in this position.

Congratulations to Kat Shea and Mike Dowling on the recent birth of William Shea.

Panel News

We are pleased to welcome the following attorneys to our panel: Elizabeth City: Daniel Patrick Donahue; New Bern: Christopher B. Venters; and Raleigh: Robert J. Higdon.