THE ZEALOUS

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2012

THE DEFENDER'S MESSAGE

In this edition of the *Zealous Advocate*, we highlight a myriad of recent legal issues. First, our own Steve Gordon gets down to brass tacks in his editorial on the Sixth Amendment and ineffective assistance of counsel. Additionally, we provide an update on the Fourth Circuit's recent treatment of the Fourth Amendment and give tips on § 4248 litigation. Finally, we fill you in on the latest federal criminal law updates ranging from a note on preserving retroactivity issues involving the Fair Sentencing Act to Fourth Circuit and Supreme Court updates linked on our website.

As always, the Editors and I hope this edition of the *Zealous Advocate* is helpful in your criminal practice. I look forward to seeing all of you at our annual Spring Federal Criminal Practice Seminar on Thursday, May 9th and Friday, May 10th in Wrightsville Beach, North Carolina.

Thomas P. McNamara
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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 October, 2011. These include a number of local and national training opportunities, as well as emails regarding: Your Responsibilities RE: Simmons; Changes to Volume 7 of the Guide to Judiciary Policies and Procedures; Procedures for Crack Retro Panel Appointments; and the CJA Mileage Increase.

If you did not receive some of these materials, please contact Donna Stiles at donna_stiles@fd.org.

Seminar BOLO

The U.S. Probation Office will host Federal Sentencing Guidelines Training in November, 2012 in Raleigh, North Carolina. Additional information will be forwarded to the panel as soon as it is received.

We will hold our annual Fall Federal Criminal Practice Seminar at the McKimmon Center in Raleigh, North Carolina. A date is in the works, and will be posted on our website at http://nce.fd.org under "Seminars."

PRACTICE TIPS

EDITORIAL: Two Supreme Court Decisions—Not Involving Health Care—Worth Knowing About

On March 21, in the quiet before the health care storm that has been dubbed *Marbury v. Medicine*, the Supreme Court handed down a pair of 5-4 decisions that held the Sixth Amendment right to effective assistance of counsel extends to plea bargains. Ninety-seven percent of federal cases are pled out, and the Court said that "plea bargains have become so central to the administration of the criminal justice system" that a plea negotiation "rather than the unfolding of a trial, is almost always the critical point for a defendant."

In the first of the cases, *Missouri v. Frye*, the lawyer never told the client about two plea offers, one of which would have capped the sentence at one year. Frye pled straight up and received three years. *Frye* held that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." To show prejudice from the breached duty, the Court said a defendant must demonstrate (1) that he or she would have accepted the plea, (2) that "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it," and (3) that there was "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

In the second case, *Lafler v. Cooper*, the defendant rejected an offer after the attorney misadvised him about what the state would and would not be able to prove at a trial. Instead of the recommended sentence of 51 to 85 months under the terms of the plea, the defendant ended up with a sentence of 185 to 360 months after the jury convicted him. In the Supreme Court, the parties stipulated that the lawyer's advice constituted ineffective assistance. With respect to showing prejudice, the Court said the defendant had to demonstrate the plea would have been presented to, and accepted by, the court, and that "the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

If the defendant shows prejudice, the problem becomes how to fix the situation. The

Court seemed to say the remedy depends on whether the plea would have affected the conviction or the sentence. In the latter case– where the defendant arguably would have received a lesser sentence under the plea– "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." On the other hand, if "an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice." In such an instance, the prosecution may have to reoffer the plea, the Court said, and the judge would decide whether to vacate the conviction and accept the plea, or to leave the conviction in place.

The Court rejected the idea that its decisions would open "the floodgates to litigation by defendants seeking to unsettle their convictions." As in all things, we'll see.

Many thanks to Steve Gordon for sharing his views on this newsworthy topic.

The 4th on the 4th: How Fourth Amendment Jurisprudence is Evolving in the Fourth Circuit

On March 2, 2011, the Court of Appeals for the Fourth Circuit took a staunch position on reasonable suspicion *Terry* stops in *United States v. Foster,* 643 F.3d 243 (4th Cir. 2011) and seems to have ushered in a new era of stricter interpretations of suspicious activity than previously applied. In *Foster*, an officer stopped Foster's car and approached his SUV based on the knowledge that Foster had prior drug arrests, that Foster was currently under investigation, and that

If you think you are too small to make a difference, try sleeping with a mosquito.
– Dalai Lama XIV

when Foster recognized the officer, his passenger popped up from a crouching position and flailed his arms about. *Id.* at 245. The officer called for backup, and two additional officers arrived, blocking in the SUV with their vehicles. They approached the parked SUV and asked for Foster's license and registration. *Id.* at 245. The officers arrested him after seeing a small bag of white powdered substance when they asked for his license and registration. *Id.* at 245. However, Foster did not try to evade the officers and was not noticeably nervous. *Id.* at 247. Given the totality of the circumstances, the Court held that there was no reasonable suspicion for the stop. *Id.*

While *Foster* does not provide a bright-line test, the Court openly criticized the Government's tendency to skew facts in order to create reasonable suspicion in even the most innocent of situations. *Id.* at 248. The Court stated that it was "deeply troubled by the way in which the Government attempts to spin… largely mundane acts into a web of deception…" and "note[d] our concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity." *Id.* at 248. There has to be more. The Government can no longer "simply label a behavior as 'suspicious' to make it so." *Id.* at 248. There have to be *real* reasons why the behavior is "likely to be indicative of some more sinister activity than may appear at first glance." *Id.* at 248. The Court appears to be raising the threshold for what activities viewed under the totality of the circumstances is suspicious enough behavior to constitute reasonable suspicion.

Four months after *Foster,* the Fourth Circuit renewed its critical stance in *United States v.*

Digiovanni, 650 F.3d 498 (4th Cir. 2011). In *Digiovanni,* a man was stopped by a Trooper driving on I-95 for following a car too closely, in violation of state law. *Id.* at 501. Once stopped, Digiovanni provided the rental contract and driver's license for the car, and the police officer subsequently asked Digiovanni to step out of the vehicle. *Id.* at 502. The officer decided to investigate whether criminal activity was afoot by prolonging the traffic stop in violation of *Terry* based on innocent activities including driving from Florida, a known drug source state, Digiovanni's only having two shirts hanging in the car and no travel bags, and his traveling on I-95, a known drug corridor. *Id.* at 512. The Court stated rather bluntly that the Trooper's "reliance on the hanging shirts borders on the absurd... Equally absurd is [the Trooper's] reliance on the clean car and the hygiene bag in the back seat" because that is considered normal behavior. *Id.* at 512.

The Government was criticized yet again in *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011). Massenburg was stopped along with three other men near an area where a shooting was reported. *Id.* Massenburg was the only one of the four who refused to give consent to the search, and the officers searched him anyway. *Id.* Judge Davis, writing on behalf of the Court, renewed the warnings of *Foster* and stated the "concern is only heightened when the 'mundane acts' emerge from the refusal to consent to a voluntary search... refusing to consent to a search cannot itself justify a nonconsensual search." *Id.* The Court in these cases seems to be adamant that the Government and law enforcement may not spin everyday, mundane events into suspicious activity. Instead, there must exist concrete and particularized reasons *why* the activities are suspicious.

While there have been several Fourth Amendment cases decided since those detailed here, some which ruled in favor of the defendants, and some which have ruled against them, these recent opinions indicate that the Court is now taking a closer look at cases involving Fourth Amendment claims. The practitioner is advised to read these cases in their entirety, as the language employed by the Fourth Circuit, which appears to require a higher level of scrutiny in these cases affecting civil liberties, may prove helpful in drafting suppression motions.

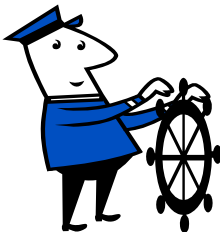
Many thanks to Lindsay Levine for contributing these helpful tips. Lindsay is a third year law student at the North Carolina Central University School of Law and was an extern in the FPD office during the Fall of 2011.

PRESERVE IT: FSA and Retroactivity

President Obama signed the Fair Sentencing Act of 2010 on August 3, 2010, which was designed "to restore fairness to Federal cocaine sentencing." FSA § 1, 124 Stat. at 2372. The Act reduced, and in some cases eliminated entirely, the mandatory minimum prison terms prescribed under 21 U.S.C. § 841 for violations involving cocaine base. Overall, the new mandatory minimums treat cocaine base more harshly in sentencing than powder cocaine at a ratio of about 18:1, rather than the pre-FSA ratio of 100:1. However, despite Congress' recognition that the previous sentencing regime for offenses involving cocaine base was patently unfair, federal courts have been sharply divided on the issue of "pipeline retroactivity," namely, whether the FSA should apply retroactively to defendants whose offense conduct took place before the FSA's effective date, but who are sentenced afterwards. Due to this circuit split, the U.S. Supreme Court granted cert in the cases of *Hill v. United States*, --- S.Ct. ---- (2011), and *Dorsey v. United States*, --- S.Ct. ---- (2011) to settle this issue. The Court heard argument in these cases on April 17, 2012. It is anticipated that a decision will be issued sometime this summer.

To this end, if you have a case involving cocaine base where the government wants the

court to impose the higher pre-FSA mandatory minimum ranges, request to have your case held in abeyance pending the SCOTUS's ruling in *Hill* and *Dorsey*. If you are unsuccessful in this endeavor, make sure to raise your objection in order to preserve this issue.



VICTORY COLUMN: Navigating the Challenges of a § 4248 Case

Taking on a § 4248 case is in many ways a journey. Many of the cases are shrouded in what would politely be described as "an acute set of facts," and the world of § 4248 litigation is in its embryonic stage. While each case presents its own set of challenges, several key issues have remained ubiquitous in § 4248 litigation.

Tip #1- Avoid getting bogged down in the past. A substantial amount of § 4248 litigation is often reserved for detailing the respondent's past. From the respondent's standpoint, it is best not to waste time and energy arguing over details of past offenses. Of course, no party involved can take away the respondent's right to convey sincere remorse for his prior acts and a willingness to change. That considered, the nucleus of the case should be comprised of whether the respondent is fit to rejoin society, not the details of prior offenses.

Tip #2- Take Tip #1 with a grain of salt. Arguing over past convictions has a limited value in § 4248 litigation, but that should not preclude trial teams from preparing for it. Past behaviors will be brought up at trial, and being prepared for such a presentation is invaluable.

Tip #3- Always be forward-thinking. Putting together a release plan for the respondent can be as challenging as the trial itself. The sheer logistics of getting a Social Security card, a driver's license, finding housing that will allow sex offenders, and finding a job to finance it all can be daunting for respondents. Respondents face a serious uphill battle in rejoining a society that is 20 years more advanced than when they last saw it. More importantly, respondents are rejoining society as the furthest outcasts. Due to this challenge, release plans are essential for complying with court orders, and helping respondents move forward.

The Adam Walsh Act was designed to be a proactive law, tying future offenses to present-day respondents. In doing so, all parties involved must approach § 4248 litigation with a forward-thinking mind. Attorneys need to concern themselves with the likelihoods of tomorrow, and the courts must rule knowing the potential repercussions of commitment or release. While it may be challenging emotionally and professionally, a § 4248 case begins like all journeys– by looking towards the future.

Many thanks to the § 4248 legal team in the FPD Office for their input and tireless work. So far, 22 cases have been dismissed by the government before reaching trial, respondents have won 17 out of 32 trials, and 6 cases are awaiting decisions post-trial.

Many thanks to Daniel Watts for contributing these helpful tips. Daniel is an intern in the FPD office and will be attending Elon University School of Law in the Fall.

If you want to be happy, set a goal that commands your thoughts, liberates your energy, and inspires your hopes.
- Andrew Carnegie

COMPUTER CORNER

Securing Your Wireless Network – What You Need to Know to Protect Yourself

Laptop: $1,000.
Wireless router: $100.
Being able to connect to the Internet with peace of mind, knowing that you did it safely: *priceless*.

Wireless networks are inherently unsafe because anyone within range can use them and potentially steal your information if these networks are not set up properly. No matter how friendly you are, you wouldn't let your neighbor read your bank statements and private letters. If you have a wireless network in your house and don't protect it, you could be doing just that. As they come "out of the box", most wireless networks let anyone in range connect to them and that could also let them see your PC and your email. It is worth taking a few extra minutes when setting them up to enable the encryption settings. Briefly, if you don't understand the jargon, WPA is better than WEP. If you don't know what needs to be done to secure them, get help from a technical friend or use a professional from the store where you bought it.

> *To give anything less than your best is to sacrifice the gift.*
> *–Steve Prefontaine, long-distance runner*

Wireless "Hotspots" - Use for Web Surfing Only

A hotspot is an open wireless network that is available (open) to everyone. An example would be the wireless network at your favorite coffee shop. These networks hook computers into the public Internet — handy, but can be dangerous. Because wireless hotspots are for open use, they don't provide protection for your data. When using a wireless hotspot try limiting activity to web surfing only. Always use a good personal firewall and, of course, make sure all your software, including your operating system (like Windows), is up to date and patched. Never use hotspots for online banking, bill paying, or for making purchases that require you to give out confidential information such as a credit card number. Making wise decisions about how you will use wireless services could save you the time, trouble and expense of dealing with stolen information. As the old saying goes, an ounce of prevention is worth a pound of cure.

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

Website Recommendations

Check out this great new resource on competency issues: http://www.mentalcompetency.org/ .

Here is a link to a new GAO report on BOP. It has some interesting and helpful information on RDAP and use of RRCs as well as other mechanisms to reduce prison time (like good time and early release): http://www.gao.gov/products/GAO-12-320 . Highlights at: http://www.gao.gov/assets/590/588283.pdf .

For research-based evidence that will help you fashion sentencing arguments, see Fighting Fiction with Fact: Research to Help Advocate for Lower Sentences: http://www.fd.org/pdf_lib/Fighting%20Fiction%20with%20Fact%20Handout.Final.pdf .

It is never too late to be what you might have been.
–George Elliot

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://www.ca4.uscourts.gov/emailsubscriptions1.asp

Supreme Court Updaate

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.

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.
–Martin Luther King, Jr.

LOCAL NEWS

EDNC News

James L. Corpening, Jr. was recently appointed as the Chief United States Probation Officer for the Eastern District of North Carolina. Additionally, Julie Richards was recently appointed to serve as the Clerk of Court for the Eastern District of North Carolina upon the retirement of Dennis Iavarone on March 2, 2012. We extend James L. Corpening, Jr. and Julie Richards congratulations on behalf our office and Eastern District panel attorneys.

The Federal Bar Association (FBA) has created a new chapter in the Eastern District of North Carolina. Information on the FBA can be found online at http://www.fedbar.org/ .

FPD Office News

Congratulations to: Devon and Chris Donahue on their recent adoption of Alanna Jeanice and Amir Jarell.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys: in Raleigh: Colby T. Berry, Jenna Turner Blue, Charlotte Melody Edwardo, Eric John Gurney, Tamika Henderson, Edd K. Roberts, Drew S. Sprague, William Randall Stroud, and Steven Ervin Webb, II; in Durham: Jessica Marie Major; in Greenville: James Kevin Antinore and Mario E. Perez; in Wilmington: M. Alexander Kinter, Paul Mediratta, and Garron Thomas Michael; in Rocky Mount: David C. Brasswell; in Shallotte: Teresa M. Gibson; in Wilson: Jason R. Page; in Fayetteville: Jonathan Clark Strange; in Warrenton: Susan Morrice Thompson; and in Kinston: Jacob Warner.

The following are new regular panel attorneys: in Raleigh: Byron C. Dunning and Michael K. McEnery; in Fuquay-Varina: Rosemary Godwin.

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.