ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2015

THE DEFENDER'S MESSAGE

While this is a busy time for our district, the legal landscape is changing in very exciting ways. This edition of the Zealous Advocate brings some welcome good news for clients in this district.

We all know that most of the country was focused on the Supreme Court's decision to legalize gay marriage in *Obergefell v. Hodges*. However, on that same day, defenders applauded the High Court's decision in *Johnson v. United States*, which invalidated the residual clause found in the Armed Career Criminal Act. While *Johnson* has received much attention by federal criminal practitioners, the Supreme Court also issued important decisions in *Elonis v. United States*, concerning "true threats," and *Rodriguez v. United States*, concerning canine searches and traffic stops. These articles go beyond the summary holdings and provide a more in-depth analysis of these landmark decisions.

Additionally, we go back to the basics with articles on interpreting plea agreements and determining whether your client is in custody for *Miranda* purposes. These should be a useful refresher and hopefully provide some practical information for representing your clients.

Finally, we round out these articles with some information regarding the U.S. Department of Veterans Affairs and our usual legal updates. As always, we hope that you will benefit from the information and tips provided in this newsletter. The *ZA* Editors and I look forward to seeing you at our upcoming seminar at N.C. State's McKimmon Center on Friday, September 18, 2015.

Thomas P. McNamara
Federal Public Defender

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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 numerous training opportunities; information about Practice Advisory and Sample Motions for *Johnson*; and Training Materials for Electronic Discovery Protocols.

Seminar BOLOs

Our Spring 2016 seminar is set for April 8, 2016 at the McKimmon Center in Raleigh. 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 each seminar.

The U.S. Probation Office Annual Guideline Seminar is set for November 13, 2015 at the McKimmon Center in Raleigh. Additional information is forthcoming.

PRACTICE TIPS

Case Law Update: Johnson v. United States

The legalization of same sex marriage nationwide was not the only notable U.S. Supreme Court decision delivered during the summer of 2015. In late June, the high Court also released its opinion in *Johnson v. United States*; a decision that held the "residual clause" of the Armed Career Criminal Act (ACCA) violated of due process. 135 S. Ct. 2551 (2015). The Armed Career Criminal Act of 1984 sets out that a defendant convicted of being a felon in possession of a firearm (18 U.S.C. § 922(g)) faces a more severe punishment if he has been previously convicted of at least three serious drug offenses or "violent" felonies. 18 U.S.C. 924(e)(1). At that time, the statute defined a "violent felony" as any felony that has an element of force, included one of the act's enumerated offenses, or which fell under the statute's "residual clause." The residual clause included "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The court ruled 8-1 that the residual clause was unconstitutionally vague; a decision that will undoubtedly change the lives of countless people serving prolonged sentences in federal prison across the country.

The facts in *Johnson* involved the application of ACCA's residual clause to Minnesota's offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson was at the center of an FBI investigation, which began in 2010, and focused on his involvement in certain organizations that appeared to have the potential to commit criminal activity. Specifically, Johnson had been rumored to be a "founder" of the Aryan Liberation Movement and was suspected by the government of participating in plots to carry out terrorist acts inside the United States. Johnson disclosed to undercover agents that he had manufactured explosives and that he planned to attack "the Mexican consulate" in Minnesota, "progressive bookstores," and "'liberals.'" He also showed the agents his AK-47 rifle, other semiautomatic firearms, and over a thousand rounds of ammunition.

Johnson pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g), and the government sought an enhanced sentence under ACCA. The government argued Johnson had three previous "violent felonies," one of which was the possession of a short-barreled shotgun. The District Court sentenced Johnson to a 15-year prison term, which was affirmed by the Eighth Circuit Court of Appeals. The Supreme Court then granted certiorari to decide whether Minnesota's offense of unlawful possession of this particular firearm qualified as a felony under ACCA's residual clause.

Justice Scalia delivered the opinion of the Court, in which Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan joined. Justices Kennedy and Thomas filed opinions concurring in the judgment. Justice Alito filed the lone dissenting opinion. The majority held an increased sentence under ACCA's residual clause violates due process. They felt the residual clause left grave uncertainty about how to estimate the risk posed by a crime. J. Scalia posited, "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." The act of imagining "potential risk" was far too speculative a task to be taken on by the court in the majority's opinion.

Similarly, J. Scalia found the residual clause left too much uncertainty about how much risk it takes for a crime to qualify as a violent felony. The residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes of burglary, arson, extortion, and offenses involving the use of explosives. As J. Scalia noted, these offense are "far from clear in respect to the degree of risk each one individually poses." Ultimately, the uncertainty of how to measure the risk posed by a crime, combined with the indeterminacy of how much risk it takes for a crime to be found a violent felony, leads to more "unpredictability and arbitrariness" than the Due Process Clause allows.

J. Scalia and the majority further held that previous cases contradicted the rationale proposed by the Government that the residual clause is constitutional merely because there will be some straightforward crimes that fit, as they clearly pose a "serious potential risk of physical injury to another." The Government and dissent also argued that holding the residual clause as void for vagueness would cast doubt on provisions that use terms such as "substantial risk," "grave risk," and "unreasonable risk." However, as J. Scalia pointed out, those provi-

sions require assessing the riskiness of the conduct in which the individual defendant engaged *on a particular occasion.* The majority stated as a general rule that such laws are not called into question because they are based on a specific, factual occurrence not the riskiness of an idealized, ordinary case of the crime.

Finally, the Government and the dissent pointed to the doctrine of *stare decisis* in arguing against holding the residual clause void for vagueness. J. Scalia responded that *stare decisis* does not require continued adherence to the previous case law in this instance. *Stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles." The Court noted that decisions handed down, under the residual clause, have failed in promoting those specific goals *stare decisis* sets out to achieve.

It will take a concerted effort on the part of both the defense community and the government to assure justice is had for all those charged under § 924 (e). Each prior conviction should be carefully scrutinized and researched to determine whether it qualifies as a violent felony. There certainly appears to be a need to keep current clients from ACCA enhancements by making sure predicates rightly qualify. It is equally important to bear in mind any and all other applications this decision can have on instances where the language of the ACCA residual clause appears in other sentencing provisions. For example, the Career offender guideline, U.S.S.G. §4B1.2, which has identical language to the residual clause definition of a "crime of violence," along with the non-ACCA firearm guideline, U.S.S.G. §2K2.1, supervised release revocations, U.S.S.G. §§7B1.3 and 7B1.4, and the 18 U.S.C. § 16(b) "crime of violence" definition all appear to be subject to challenge. Other statutes with similar language may be implicated as well. It is clear the decision in *Johnson* will have a significant effect not only on clients, but on how defense attorneys approach these cases. Practitioners are advised to read this landmark opinion in its entirety.

The ZA Editors thank M. West Owens, IV for contributing this helpful information. West is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2015.

True Threats and Intent: What changes will Elonis *bring to the table of threats crimes?*

As Federal defense attorneys, we will inevitably spend time with clients who have, for whatever reason, made some kind of inflammatory statement, resulting in a criminal threats charge. What is all too familiar to the defender handling a threats case is that very often the client genuinely does not believe they made the statement intending to harm anyone. However, while the clients do not always understand it—as defenders we know that crimes concerning "true threats" under 18 U.S.C. § 875(c) have always required a general intent to communicate a threat interstate from the objective perspective of the recipient, that is, until *Elonis*. 557 U.S. __ (2015), 135 S. Ct. 2001.

After a separation from his wife, Anthony Elonis used an alias on Facebook to post unsettling "rap lyrics" to his page. *Id*. at 2002. The posts were about his coworkers, his estranged wife, a kindergarten class, and law enforcement officers. *Id*. at 2002. Elonis was indicted for violating 18 U.S.C. § 875(c) by transmitting in interstate commerce a communication containing a true threat. At his trial, Elonis "requested a jury instruction that the government was required to prove that he intended to communicate" the threat. *Id*. Instead, the District Court applied the reasonable recipient standard. On appeal, the Third Circuit upheld the same reasonable recipient standard. *Id*. at 2003.

Finally, the Supreme Court remanded the case under a newer, stricter standard for true threats. *Id*. The Supreme Court recognized that "[f]ederal criminal liability does not turn solely on the results of an act without considering the defendant's mental state," and that Elonis' mental state actually mattered. *Id*. at 2012. Thus, *Elonis* now tells us that under 18 U.S.C. § 875(c), it is not enough to say a reasonable person would find the statements to be genuine threats. The defendant's mental state matters.

This holding represents a drastic change in the way Federal Courts has handled true threats cases in the past. To gain a better understand of *Elonis*, it is important to understand the evolving jurisprudence that preceded it. Until recently, the Fourth Circuit maintained the objective standard for true threats, starting with *United States v. Darby*, where the defendant was convicted under 18 U.S.C. § 875 (c) for making threats by telephone to employees of the I.R.S. 37 F.3d 1059 (4th Cir. 1994). The defendant argued that the indictment was invalid for failing to recite the required element of specific intent. *Id*. The *Darby* court viewed 18 U.S.C. § 875(c) to require general intent. Under the general intent requirement, the government must only establish that the defendant intended to transmit the communication and that the communication contained a true threat, rather than proving the defendant's specific intent to carry out the threat. *Id*.

Later in *United States v. White*, the Fourth Circuit continued to hold that 18 U.S.C. § 875(c) requires a reasonable recipient to be able to interpret the defendant's communication as a threat. 670 F.3d 498 (4th Cir. 2011). White was charged with multiple

counts of communicating true threats under 18 U.S.C. § 875(c) and convicted of two counts of communicating interstate threats under 18 U.S.C. § 875(c). *Id.* On the two convicted counts, White made threats, via telephone and email, from his home in Virginia to victims in both South Dakota and Delaware. *Id*. In both of these circumstances, White made it clear he could access personal information about the recipients, including their addresses, home telephone numbers, spouse names, and the home address of the recipient's parents. *Id*. In both of these cases, the victims felt extreme fear upon receiving the communications. *Id*.

The Fourth Circuit maintained the objective test in *White* and distinguished between a reasonable and unreasonable recipient of the communication. In an acquitted count under 18 U.S.C. § 875(c), White made communications directed at Canadian Civil Rights lawyer, Richard Warman. *Id*. White posted an article on a white supremacist website describing a bombing of a Canadian civil rights activist's home, and stating "Good. Now someone do it to Warman," as well as posting an entry on his own website that included Warman's home address and was entitled, "Kill Richard Warman, man behind human rights tribunal's abuses should be executed." *White,* 670 F.3d at 505. The court found that no reasonable recipient of the communications would have understood those communications "to be a serious expression of an intent to commit an act of unlawful violence." 670 F.3d at 507 (quoting *Virginia v. Black*, 538 U.S. 343, 359, (2003). Whether the communication contained a true threat did not depend on White's subjective intent, but had to be objectively determined by "the interpretations of a reasonable recipient familiar with the context of the communication." *White,* 670 F.3d at 506; (quoting *United States v. Darby*, 37 F. 3d 1059, 1066 (4th Cir. 1994)).

The next step on the road to *Elonis* was the Circuit Split after the Supreme Court's decision in *Virginia v. Black*. 538 U.S. 343, (2003). *Black* lead some circuits to interpret the true threats standard as more subjective. 538 U.S. 343, 123 S. Ct. 1536 (2003). In *Black*, the Court held that a state law prohibiting cross burning with the intent to intimidate was not unconstitutional. *Id.* The Supreme Court did, however, hold that part of the Virginia regulation, the aspect that held cross burning to be per se intent to intimidate, was unconstitutional. *Id*. *Black* was construed by some courts to require a specific intent to threaten, but Circuit Courts interpreted *Black* in different ways. The First Circuit held that the objective test should be applied from the defendant's vantage point rather than the recipient's. *United States v. Clemens*, 738 F. 3d 1 (1st Cir. 2012).

Pre-*Elonis*, only the Ninth Circuit had interpreted the language in *Black* to impose a subjective threat requirement in a criminal threat statute. *United States v. Bagdasarian*, 625 F.3d 1113, 1117 (9th Cir. 2011). The Fourth Circuit maintained the objective general intent standard found in *White* and did not read *Black* to require proof of specific intent, holding "*Black* did not affect a change in the law with regards to threats under 18 U.S.C. § 875(c) and that the reasonable recipient test as set forth in *Darby* should continue to apply." 670 F. 3d 498, 507.

In *Elonis*, Chief Justice Roberts noted that "[t]he fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.' This rule of construction reflects the basic principle that 'wrongdoing must be conscious to be criminal.'" *Elonis* 135 S. Ct. at, 2009 (internal citations omitted).

The standard change for true threats is only good news for true threats clients. While the Supreme Court did not spell out exactly what the new standard for threats will be post-*Elonis*, we at least know that the defendant's mental state is an element of the charge. Federal defenders can now argue for what our clients have been asking for all along—that they didn't intend to threaten when they made inflammatory statements.

The ZA *Editors thank Jamie Rudd for contributing this helpful information. Jamie 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 2015.*

Applying Rodriguez v. United States*: Does it matter?*

Was your client charged with a crime other than which he was stopped? How long did it take law enforcement to develop probable cause? Does it matter? In its most recent "dog sniffs" case, the Supreme Court reiterates limitations on law enforcement to prolong a stop. *See generally Rodriguez v. United States*, 135 S. Ct. 1609 (2015). While applicable to more than "dog sniff" cases, subsequent treatment by lower courts question whether it should apply at all.

On March 27, 2012, Valley Police officers observed a Mercury Mountaineer swerving onto the highway's shoulder in violation of Nebraska law and initiated a stop. *Rodriguez,* 135 S.Ct. at 1612. Following a records check, Officer Struble issued Dennys Rodriguez a warning for driving on the road shoulder. *Id* at 1613. Approximately 20 minutes after the initial stop, Officer Struble had returned all documentation to the driver and issued his written warning. *Id.* At this point, Officer Struble recognized that the "justification for the traffic stop was 'out of the way';" however, he "did not consider Rodriguez

'free to leave.'" *Id.* He requested permission from Mr. Rodriguez to walk his police K-9, Floyd, around the vehicle. Mr. Rodriguez refused. *Id.* Upon refusal, Officer Struble ordered Dennys to turn off the engine and exit the vehicle until a second officer could arrive. *Id.* Less than ten minutes later, a back-up officer arrived allowing Officer Struble to walk Floyd around the car twice. *Id.* On the second passing, Floyd alerted to what was discovered to be a large bag of methamphetamine. *Id.*

Procedural Posture of *Rodriguez*

Following indictment, Mr. Rodriguez moved to suppress the evidence seized on the grounds that the traffic stop was unconstitutionally prolonged without reasonable suspicion. *Id*. at 1614. A United States Magistrate Judge denied the motion concluding that even though there was no reasonable suspicion to extend the stop, the dog sniff was merely a *de minimis* interference with Mr. Rodgriguez's Fourth Amendment rights. *Id.* The Eighth Circuit affirmed, but failed to rule as to whether Officer Struble had reasonable suspicion to extend the stop. *Id.* The Supreme Court granted certiorari to decide "whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." *Id.*

Ruling in *Rodriguez*

The Court reviewed the permissibility of the traffic stop's duration through the lens of *Terry v. Ohio*: (a) the stop's mission and (b) related safety concerns. *See* 392 U.S. 1 (1968). Writing for the majority, Justice Ginsburg recognized the officer's mission as addressing the infractions giving rise to probable cause. "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, 575 U.S. _____. Justice Ginsburg did not, however, turn her back on precedent set in *Illinois v. Caballes*, 543 U.S.405 (2005), and *Arizona v. Johnson*, 555 U.S. 323 (2009). In *Caballes* and *Johnson*, the Court ruled that the Fourth Amendment can withstand certain unrelated inquiries; however, these inquiries may not "measurably extend" the stop's duration. *Id.* at 333.

To rebut the dissent's officer safety argument, Justice Ginsburg uncovered the basis of the Government's safety interest. Here, the basis is not general police safety directly stemming from the stop's mission; rather, the government relied upon a strong interest in curtailing the flow of narcotics on highways. This safety concern is bred out of government policy rather than the officer's mission. The detour itself from the mission creates the danger which officers aim to curtail.

The overarching test established by the majority is that officers may not prolong a stop for unrelated investigation; however J. Ginsburg cautioned that this is not a question of "whether the dog sniff occurs before or after the officer issues the ticket […] but whether conducting the sniff prolongs—*i.e.* adds time to—the stop." *Rodriguez,* 575 U.S. _____ (2015) (internal quotations omitted). Therefore, rather than look at a timeline of the police investigation, lower courts should look at whether the police action was prolonged beyond when the mission had, or reasonably should have, ended.

Takeaways

Dennys Rodriguez's case does not end with this ruling from the high court. His case has been remanded to the Eighth Circuit to determine if reasonable suspicion was present to prolong the stop. Likewise, this decision gives no certainty to the criminal defense attorney hoping to exclude evidence through the logic of *Rodriguez*. In the wake of the decision, many courts have failed to review whether a stop was unconstitutionally prolonged; relying instead on a finding of independent reasonable suspicion. While North Carolina state courts have properly applied the *Rodriguez* ruling in their own cases, *See State v. Leak*, 2015 N.C. App. Lexis 445 (2015)(holding that the officer prolonged the stop by continuing to question the defendant), the Fourth Circuit and District Courts within the Fourth Circuit have yet to address the issue of applying *Rodriguez*. The savvy criminal defense attorney using *Rodriguez* will need to: first, rebut any independent reasonable suspicion; second, identify law enforcement's mission in stopping the client; and finally, show that the police action went beyond when the mission had, or reasonably should have, ended.

The ZA *Editors thank Nolan Perry for contributing this helpful information. Nolan is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2015.*

You Have the Right to Remain Silent: The Custodial Inquiry in the 4th Circuit

The *Miranda* warning remains the most well-known creature born of the Supreme Court. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The vast majority of Americans—marijuana peddlers and district court judges alike—can recite the warning's key features: the "right to remain silent," that "any statement" may be "used as evidence," and the "right to the presence of an attorney (retained or appointed)." *Id.*

Despite the general awareness of the *Miranda* warning, understanding when a warning is required can be challenging. Each case is unique. Knowing when a *Miranda* warning is required, or whether a warning is required at all, can be vital.

According to *Miranda*, the prosecution cannot use statements (whether exculpatory or inculpatory) against the defendant when those statements stem from a "custodial interrogation." *Id.* The prosecution

can use such statements only when it "demonstrates the use of procedural safeguards" that secure the privilege against self-incrimination. *Id.* Essentially, this means that the defendant must have chosen to make a statement despite the use of a *Miranda* warning (the "procedural safeguard"). *Id.*

Yet, what makes an interrogation a "custodial" interrogation? Helpfully, the *Miranda* Court defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Of course, this definition begs another question: what is "custody?"

The meaning of "custody" varies jurisdiction-by-jurisdiction. The Fourth Circuit, for example, has its own string of case law which together define "custody." A recent Fourth Circuit opinion, *United States v. Hashime*, provides a helpful summary of this string of case law, which helps characterize "custody" as it is analyzed in our jurisdiction. 734 F.3d 278 (4th. Cir. 2013).

Hashime is a child pornography case which raises *Miranda* warning issues. *Id.* Factually, the case concerns a man who engaged in the transfer of child pornography via email. *Id.* at 280. Law enforcement discovered the man's address and at 9:00 AM on May 18, 2012, arrived at his front door.

What next ensued was critical to the Fourth Circuit's analysis of whether Faisal Hashime was in "custody," and thus whether he was entitled to a *Miranda* warning. At Hashime's front door, a team of fifteen to thirty law enforcement agents stood with a battering ram. They banged on his entrance and yelled, "'Open the door.'" *Id.* Hashime's aunt obeyed, allowing a stream of gun-drawn officers to spill into the house. *Id.* The officers charged into Hashime's bedroom and took aim where he lay naked and asleep. *Id.*

Officers ordered Hashime out of bed, allowed him to don boxer shorts, and marched him by the arm to the front lawn. *Id.* Hashime was eventually provided additional clothing and taken back inside and down to the basement. *Id.* at 281. It was in the basement, separated from his family, that Hashime was interrogated for three hours. *Id.* Hashime's mother, who remained upstairs, asked for a lawyer for Hashime, but officers refused, stating that Hashime was under arrest. *Id.*

Hashime was not read his *Miranda* rights until after two hours of interrogation. *Id.* During the interrogation, which was secretly recorded, Hashime admitted to having child pornography, stated as to how it was obtained, and informed officers of his computer password and where on his hard drive the pornography was located. *Id.* While Hashime was told that he could leave at any time and he did not have to answer their questions, officers implied otherwise. *Id.* They stressed the importance of Hashime's honesty and cooperation, and they refused to leave Hashime out of police presence. *Id.*

The police, prosecution, and district court each concluded that a *Miranda* warning was unnecessary because Hashime was not in custody. *Id.* at 283. The Fourth Circuit, however, disagreed. *Id.* at 285. In reaching its opinion, the Fourth Circuit outlined eight factors which ought to be considered in the custodial inquiry: (1) the time, place, and purpose of the encounter; (2) the words used by the officer; (3) the officer's tone of voice and general demeanor; (4) the presence of multiple officers; (5) the potential display of a weapon by an officer; (6) whether there was physical contact between officer and defendant; (7) defendant's isolation and separation from family; and (8) physical restrictions. *Id.* (citing *United States v. Day*, 591 F.3d 679, 696 (4th Cir. 2010); *United States v. Griffin*, 7 F.3d 1512, 1519 (10th Cir. 1993); *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990)).

These eight factors, as applied to *Hashime*'s facts, show that Hashime was entitled to a *Miranda* warning: (1) the encounter was at 9:00 AM, at Hashime's home, and for police investigatory purposes; (2) the police stressed their desire for the truth and stated that Hashime must remain in police presence; (3) while the officers' tone and demeanor during the interrogation were relatively calm, the Fourth Circuit states this factor is outweighed by the others; (4) there were fifteen to thirty officers present at the scene; (5) weapons were drawn when officers arrived at Hashime's home; (6) Hashime was held by the arm when removed from the house; (7) Hashime was interrogated in the basement, isolated from his family; and (8) while Hashime was not handcuffed and the basement door was left open, the Fourth Circuit urges the consideration of the larger context, wherein a reasonable person would certainly not have believed they were free to leave. *Id.*

Applying *Hashime's* eight factors is a useful tool in determining whether your client was "in custody" for the purposes of *Miranda*. *Id.*; *see also* 384 U.S. at 444. If your client was "in custody," and law enforcement failed to issue a *Miranda* warning, your client's Fifth Amendment rights may have been violated. U.S. CONST. amend. V; *Miranda*, 384 U.S. at 444. The absence of a *Miranda* warning could serve as a silver lining to an inculpatory interrogation. Without a *Miranda* warning, evidence obtained from an ensuing interrogation is generally inadmissible. 384 U.S. at 444; *United States v. Hargrove*, 625 F.3d 170, 177 (4th Cir. 2010).

The ZA Editors thank Benjamin Brodish for contributing this helpful information. Ben is a recent graduate of Campbell University School of Law and was an extern in the FPD office during the Spring of 2015.

Back to Basics: Using Contract Law to Interpret Plea Agreements

Imagine this: your client is being accused of breaching his plea agreement. You read over the agreement again, and nowhere does it say that your client cannot do what the government claims is a breach. The government argues that it is implied within the language of the agreement. What do you do? How will the court resolve this issue?

Historically, the Fourth Circuit views a plea agreement as a contract between the accused and the government. *United States v. Davis*, 689 F.3d 349, 353 (4th Cir. 2012). Therefore, if a plea agreement is accepted by the court, a judge generally interprets the meaning of the terms in the agreement according to basic principles of contract law. *See United States v. Bowe*, 257 F.3d 336, 342 (4th Cir. 2001); *United States v. Martin*, 25 F.3d 211, 217 (4th Cir. 1994). Since a plea agreement is a contract, the plain and unambiguous terms must be enforced as they are written. *United States v. Tayman*, 885 F. Supp. 832, 835 (E.D. Va. 1995). Additionally, in evaluating a plea agreement, the court will "look to the language of the document, focusing squarely within its four corners." *United States v. Newbert*, 477 F. Supp. 2d 287, 290 (D. Me. 2007) (citing *United States v. Anderson*, 921 F.2d 335, 337-38 (1st Cir. 1990)).

To interpret the meaning of a word within the plea agreement, the court defaults to the "Plain Meaning Rule." Restatement (Second) of Contracts § 212 (1981). The court must start by determining whether the contract, or plea agreement, is ambiguous. The court will use the "Four Corners Rule" to determine if the agreement is ambiguous or not. *Newbert*, 477 F. Supp. 2d at 290. The language is ambiguous if it does not have a definite and precise meaning. Assuming there is an ambiguity, then the court will admit extrinsic evidence to help with interpretation and the party's intent.

Plea agreements, however, are interpreted on a more stringent level compared to commercial contracts. *Spriggs v. United States*, 962 F. Supp. 68, 70 (E.D. Va. 1997). The reason for this is because plea agreements are generally fundamental and Constitutionally-based. *Id*. Thus, the government is held to a higher standard than the defendant. *Id*. Courts also hold the government to a greater degree of responsibility than the defendant for "imprecisions or ambiguities in plea agreements." *United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004) (citing *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)). "The government's heightened responsibility extends beyond the plea negotiation to all matters relating to the plea agreement." *Id*.

Plea agreements affect a defendant's Constitutional rights and the public's confidence in the criminal justice system. *Tayman*, 885 F. Supp. at 835. Accordingly, the government has a special responsibility for ensuring precision in the agreement since it is not difficult for the government to write a plea agreement that explicitly gives it what it wants. *Id*. If the government fails to be explicit, a court must conclude that the defendant has not waived his or her particular right. *Id*.

The issue regarding the interpretation of a plea agreement can occur at any time during a case including after arraignment, at sentencing, or on habeas review. Therefore, keep these principles in mind when having your client look over and sign a plea agreement.

The ZA *Editors thank Danielle Feller for contributing these helpful tips. Danielle is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2015.*

Thank You For Your Service: Defending Military Veterans

The issue of veterans' mental health, specifically post-traumatic stress disorder ("PTSD"), has spilled into the criminal justice system. Many veterans have been prosecuted as "normal" criminals, when the proper course of action could be medical and mental assistance. This is because, for some veterans suffering from PTSD and similar conditions, their offense conduct may be the result of the trauma they experienced in battle. What these veterans need is to access their VA benefits and get on the road to recovery.

In recent years, the Department of Veterans Affairs ("VA") has been under intense media scrutiny over its reported failure to provide adequate services to veterans. With thousands of veterans returning from Iraq and Afghanistan, there is a great need for crucial services such as medical treatment, reintegration assistance, and job placement for those veterans whose military service will end. VA data shows that, of veterans returning home between 2002 and 2009, 46% sought VA services, and 48% of those veterans were diagnosed with a mental health problem.[1] The number of veterans who need mental health treatment but have not sought it out, either due to fear of stigma or failure to recognize their condition, is also significant.[2] With more veterans returning home now and in the immediate future, the VA must be prepared to help these men and women who have fought for our country.

Public opinion plays a role in the way veterans are treated in the criminal justice system. The public largely thinks that the criminal acts of these veterans "stem from a failure of individual character having nothing to do with military service."[3] There is a mis-

conception that World War II veterans came home and began a normal life without problems. However, "historical antecedents . . . show instead that veterans of past wars were afflicted with the same sort of disorders as today's veterans. The difference is that today's veterans are more likely to be prosecuted and punished for conduct that World War II veterans . . . would not have been."[4] A crime committed by a veteran in 1946 might not be prosecuted because people understood the difficulties of readjusting, whereas today, with the American public so far removed from the war effort, the public holds an idyllic view of World War II veterans and believes that a veteran of the Iraq and Afghanistan conflicts who commits a crime simply lacks moral character.[5]

So what can be done to help our veterans? It starts with changing public perception:

> The proper approach . . . recognizes the distinct possibility that but for their decision to join 'the other 1%' by entering the military, veterans – in particular, those who saw combat – very well might not be the people who now find themselves on the wrong side of the law. It involves sociological evaluations to measure the extent to which veterans who, after reentering civilian society, face social problems that were foreign to them before their training and experience in the military. And it involves providing PTSD- and/or [Traumatic Brain Injury]-afflicted veterans' quality medical treatment, rather than declaring them unfit for civilian society and consigning them to prison.[6]

Basically, the public needs to reexamine the myth of the problem-free World War II veteran and gain a deeper understanding of the very real problems all veterans face returning to civilian life. One alterative was espoused in the New York Justice for Our Veterans Act. This bill would create a system for identifying veterans in the justice system.[7] The bill would provide veterans a treatment plan rather than jail time when they commit certain felonies because of PTSD or other psychological factors.[8] Additionally, the bill would help the VA identify what to focus on and would put pressure on the Department of Defense to assist veterans before they end their service.[9]

Another option is Veterans Treatment Court. This program, established in some states, would require regular court appearances, treatment sessions, and substance abuse testing.[10] Many believe veterans benefit from a structured environment similar to their military service, and that, "[w]ithout structure, [struggling veterans] will reoffend and remain in the criminal justice system."[11] This program has a veterans-only docket, which leads to better understanding of veterans' issues and camaraderie among veterans, and it creates one place where veterans can be directed to all of the services they have earned.[12]

The issues veterans face when returning home are complex. Changing public perception is even more difficult. The starting point must be educating the public about the effects combat has on the mental state of military veterans. When the public starts to realize this, compassion will lead to a desire to change the way many veterans go through the criminal justice system. With a better informed public, it will be easier and more popular to institute systemic changes and reassess the way the VA and communities welcome veterans home and help them begin the readjustment process.

For defense attorneys who represent veteran clients, the most important thing to do is talk to the client about his or her military experience. An attorney should ask the veteran about any trouble the client has had after returning home and any medical treatment he or she has received, especially psychological services. In addition, request any documents detailing the client's military service, medical diagnoses, and treatment, both while the veteran was active and after he or she completed military service. By doing this, the attorney can help the court understand any psychological problems the veteran may have and how PTSD may have contributed to the veteran's criminal offense. If the court can see a connection between the veteran's military service and his or her conduct after returning home, it may consider alternatives to jail time or request a diversionary program. The best that an attorney can do for a veteran suffering from PTSD is ensure that the court has all the evidence available to make an informed decision.

1 *Mental Health Effects of Serving in Iraq and Afghanistan*, *PTSD: National Center for PTSD*, U.S. DEPARTMENT OF VETERANS AFFAIRS, (Jan. 3. 2014), http://www.ptsd.va.gov/public/PTSD-overview/reintegration/overview-mental-health-effects.asp.
2 *Id*.
3 Jesse Wm. Barton, *Home Free: Combatting Veteran Prosecution and Incarceration*, 11 JUSTICE POLICY JOURNAL 2, 2 (2014), *available at* http://www.cjcj.org/uploads/cjcj/documents/barton_home_free_final_formatted.pdf.
4 *Id*.
5 *See id*. at 13.
6 *Id*. at 21.
7 Chris Burek, *Bill would consider a veteran's disa-*

bilities when prosecuting certain crimes, THE LEGISLATIVE GAZETTE, June 29, 2015, *available at* http://www.legislativegazette.com/Articles-Top-Stories-c-2015-06-29-92274.113122-Bill-would-consider-a-veterans-disabilities-when-prosecuting-certain-crimes.html.
8 *Id*.
9 *Id*.
10 *What is a Veterans Treatment Court*, JUSTICE FOR VETERANS, http://www.justiceforvets.org/what-is-a-veterans-treatment-court (last visited July 30, 2015).
11 *Id*.
12 *Id*.

The ZA Editors thank Matthew Carlucci for contributing this helpful information. Matt is a second year law student at Duke University School of Law and was an intern in the FPD office during the Summer of 2015.

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. 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.

New Rules and Guideline Amendments

Changes to the Federal Rules of Appellate Procedure and Criminal Procedure take effect on December 1, 2015. The Advisory Committee on the Rules of Evidence has not yet issued proposed rules for public comment.

Appellate Procedure and Forms
There are five sets of proposed amendments to the Federal Rules of Appellate Procedure and Forms:

1. Inmate Filing: Rule 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7
   These Amendments provide inmates an alternative way to establish timely filing. Where the Amendments' procedures are met, the court deems the date the inmate deposited the document into their facility's mail system as the filing date.

2. Tolling Motions: Rule 4(a)(4)
   This Amendment clarifies a circuit split by defining "timely" in Rule 4(a)(4). The Committee adopts the majority view that post-judgment motions made outside the Civil Rules' deadlines are not timely.

3. Length Limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6
   These Amendments impose type-volume limits for documents prepared on a computer. The amended ratio is 250 words per page. However, courts have the discretion to accept longer briefs.

4. Amicus Filing in Connection with Rehearing: Rule 29
   This Amendment adds Rule 29(b) to set rules concerning timing and length for amicus filings regarding rehearing petitions. The default federal rules concerning amicus filings in connection with rehearing petitions can be altered by a local rule or order.

5. Amending the "Three-Day Rule:" Rule 26(c)
   This Amendment excludes electronic services from the "three-day rule."

Criminal Procedure

1. Rule 4. Arrest Warrant or Summons on a Complaint
   This Amendment specifies that a court may take any action authorized by law when an organizational defendant fails to appear in response to a summons. The Amendment also eliminates the requirement of a separate mailing for service of summons to an organizational defendant when the delivery has been made to an officer or agent, unless a statute requires otherwise. The Amendment also prescribes a non-exclusive list of service methods, and permits service at a place not within a United States judicial district.

2. Rule 41. Search and Seizure
   This Amendment has two parts. First, it limits remote access searches for electronic information to the list of permitted extraterritorial searches. Second, it adds the process for providing notice of a remote access search.

3. Rule 45. Computing and Extending Time; Time for Motion Papers
   This Amendment excludes electronic services from the "three-day rule."

Changes to these amendments may be found at http://www.uscourts.gov/rules-policies/pending-rules-amendments.

U.S. Sentencing Guideline Amendments

The following Guideline amendments take effect November 1, 2015. The amendments include:

1. Jointly Undertaken Criminal Activity §1B1.3

This Amendment clarifies the use of relevant conduct in multiple participant offenses by incorporating the three-step analysis, previously in the commentary, into the Guideline itself. While not intended to be a substantive change, this Amendment explains that a defendant is accountable for the conduct of others when the three steps are met.

2. Inflationary Adjustments §§2B1.1 (Theft, Property Destruction, and Fraud), 2B3.1 (Robbery), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 2T4.1 (Tax Table), 5E1.2 (Fines for Individual Defendants), and 8C2.24 (Base Fine)

This Amendment adjusts the Guidelines for inflation. Guidelines referring to monetary tables have also been amended. A special instruction in §§5E1.2 and 8C2.4 provides that offenses committed before November 1, 2015 will still use the fine provisions in effect on November 1, 2014.

3. Economic Crime §2B1.1 (Theft, Property Destruction, and Fraud)

This Amendment intends to better account for harm to victims, individual culpability, and offender's intent based on recent data analysis through four changes. First, the Victims Table has been amended and a non-exhaustive list of factors for courts to consider in determining whether there was substantial financial hardship has been added. Second, the Amendment revises the commentary's definition of "intended loss" to settle a circuit split. Third, the Amendment narrows the focus of §2B1.1(b)(10)(C)'s specific offense characteristic. Fourth, the Amendment revises the rule at Application Note 3(F)(ix).

4. Hydrocodone §2D1.1

This Amendment adopts a marijuana equivalency for hydrocodone, for the purposes of calculating drug quantity in cases involving hydrocodone. It also deletes references to "schedule III" hydrocodone because an administrative action reclassified all hydrocodone products as "schedule II."

5. Mitigating Role §3B1.2

This Amendment provides guidance on whether to apply a mitigating role adjustment and, if applicable, how much of an adjustment applies. It also clarifies that whether the defendant performed an essential or indispensable role in the criminal activity is not determinative of whether he or she is eligible for this adjustment. Similarly, the Amendment revises Note 3 (A) to clarify other kinds of defendants who are not precluded from consideration for a mitigating role adjustment.

6. "Single Sentence" Rule §4A1.2(a)(2)

This Amendment revises commentary, explaining that a prior sentence included in a single sentence should be treated as if it received criminal history points if it independently would have received criminal points when determining predicate offenses.

7. Technical Amendment

This Amendment makes technical updates, including: (1) changes to reflect the editorial reclassification of the U.S. Code; (2) stylistic and technical changes to §3D1.5's commentary; and (3) other clerical changes. Attorneys are advised to review the full text to familiarize themselves with the provisions. For updates visit the U.S. Sentencing Commission's website at http://www.ussc.gov/guidelines-manual/amendments-guidelines-manual .

The ZA Editors thank Mary Scruggs for contributing this helpful information. Mary 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 2015.

LOCAL NEWS

FPD Office News

Congratulations to Devon and Chris Donahue on their recent adoption of Joseph Frances.

We bid a fond farewell to Debra Graves, Senior Trial Attorney and Assistant Federal Public Defender, who retired in August 2015 after more than 16 years of service with the Federal Public Defender's Office.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys: Elizabeth City: John Richard Parker, Jr.; Raleigh: Kyle Abram Smalling, Jessica Vickers; Supply: Preston Brooks Hilton. The following is a new panel attorney: Raleigh: Elliott Abrams.

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