The **Zealous**

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2019

The Defender's Message

We are excited about being back at the beach for this year's Fall Criminal Practice Seminar! This year, we are at a different location in Beaufort, North Carolina at a brand new hotel.

In this edition of the ZA Newsletter, we begin with an article that provides some outside-the-box approaches to arguing against the career offender enhancement. We have also included a couple of articles regarding recently filed Supreme Court opinions, including *United States v. Davis*, which rounds out the court's take on the residual clause in the crimes of violence context, and *United States v. Haymond* and *United States v. Gamble*, which demonstrate how the court can both give and take away from defendants who face double punishment for the same conduct. In an effort to provide a refresher on an issue we rarely consider, we have an article on proper venue in federal criminal court. Finally, as we do each year around this time, we have included the latest amendments to rules of evidence, appellate procedure, criminal procedure and local rules in addition to links to Fourth Circuit and Supreme Court updates.

As always, the ZA Editors and I hope that you will find this information helpful to you and your practice. We look forward to seeing you at our upcoming seminar this Thursday and Friday, October 3rd and 4th, in Beaufort, North Carolina.

Alan DuBois
Federal Public Defender

Beaufort Hotel

Inside the Fall 2019 Issue

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PANEL ATTORNEY INFORMATION

Reminder

Please be sure to read the emails that are distributed by FPD Panel Administrator, April Bunn. Note that the application deadline for new panel members is November 15, 2019. Also keep in mind the new policy of reapplying for panel membership every three years. April will notify CJA panel attorneys via email when applications need to be renewed. When you receive this email, please be sure to send in your application. Please direct questions to April_Bunn@fd.org.

Seminar BOLOs

Our Fall 2019 Seminar is set for October 3-4 and will be held at Beaufort Hotel in Beaufort, N.C. We look forward to seeing you there!

The U.S. Probation Office's Annual Guideline Seminar will be held November 14, 2019 at N.C. State's McKimmon Center in Raleigh. An invitation to the seminar was sent out to CJA panel attorneys on September 11, 2019. **Please be sure to register through the United States Probation Office for this seminar**.

Please note that our Spring 2019 Seminar will be May 1, 2020 at N.C. State's McKimmon Center. Information about the Spring Seminar will be sent out later via email and will also be posted to our website.

PRACTICE TIPS

Challenging the Career Offender Enhancement: Making a Case Against §4B1.1

As many federal defense attorneys are well aware, the United States Sentencing Guidelines (USSG) contain a provision that, under certain circumstances, labels a defendant a "career offender" and skyrockets his advisory[1] and presumptively reasonable[2] guideline sentencing range. To qualify as a career offender, a person must be at least 18 years old at the time of the offense, the offense must be "a crime of violence or a controlled substance offense", and the defendant must have at least two prior felony convictions that are also crimes of violence or controlled substance offenses.[3]

This article points to sources which might help practitioners as they argue against the court's imposing the career offender enhancement, especially in low-level drug cases.[4] To that end, it offers sources in support of three main arguments against the career offender designation: (1) longer prison sentences do not reduce recidivism rates; (2) the enhancement is disproportionately applied to African-American defendants; and (3) in most low-level drug cases, a longer prison sentence neither protects the public from harm nor promotes respect for the law.

1. *Longer prison sentences do not reduce recidivism rates*

The first—and strongest—argument against the career offender enhancement is that a longer prison sentence does not reduce recidivism rates in drug cases, even for repeat offenders. In fact, the recidivism rate for defendants who fall within the career offender guideline range for their drug convictions is closer to the recidivism rate for people with criminal history scores at or near where career offenders would be without the enhancement.[5] Some researchers and criminologists have found that people who receive prison sentences for drug crimes recidivate sooner than people who receive probation for the same or similar crimes.[6] There is a deterrent effect "in the sense that there is less crime with a criminal justice system than there would be without one," but there is no evidence that longer sentences reduce crime any more than shorter sentences.[7]

A study in New Jersey found that the main benefit of a longer prison sentence is individual incapacitation.[8] Individual incapacitation is certainly an important goal of punishment, but after considering post-release recidivism rates and the rapid, perhaps even real-time, replacement of street-level drug dealers, one wonders if it accomplishes as much as some may think it does. Incapacitating low-level, street corner drug dealers stops "little if any drug selling" because this type of crime is like the Greek monster, Hydra: cutting off one head only spurs the growth of two more.[9] Furthermore, long prison sentences are not necessary to discourage low-level drug offenders who have minor criminal backgrounds from recidivating.

General deterrence and predictions of future dangerousness do not necessarily justify extended detention because those issues do not relate to the individual defendant and his individual crime. Even if general deterrence is an acceptable sentencing factor to consider, it may not be an effective one: most people do not know the penalties for the crimes they commit.[11]

Section 4B1.1 is not going anywhere, and its imposition is presumptively reasonable if the defendant meets the age and criminal history benchmarks. However, for clients with low-level and nonviolent criminal pasts, a longer sentence is an unnecessary imposition on public resources and individual liberties.

2. *The career offender enhancement promotes racial disparity at sentencing*

Second, the Sentencing Commission has noted that the career offender enhancement in

drug cases exacerbates racial disparity at sentencing and has other unfair effects that are not justified by the statutory purposes of sentencing.[12] In 2004, the Sentencing Commission stated that repeat drug dealers bear the brunt of the enhancement's disparate impact on minority defendants.[13] In 2016, the Commission reported that while 20.4% of people sentenced that year were African-American, African-American defendants made up 58.7% of the career offender population.[14]

Our sister courts in the Fourth Circuit acknowledge this effect. For example, in *United States v. Moreland*, the Southern District of West Virginia characterized the career offender guideline as "mechanical" and an "artificial offense level and criminal history in place of each individual defendant's precise characteristics."[15] The Court further warned that the career offender guideline "ignores the severity and character of the predicate offenses."[16] After *Booker*, a growing number of courts have exercised discretion and declined to enhance drug sentences using the career offender guideline.[17]

3. *The career offender enhancement neither protects the public nor upholds respect for the law*

Third, a handful of cases from outside the Fourth Circuit support the idea that the guidelines (specifically the career offender enhancement) do not always protect the public and uphold respect for the law. In *United States v. Fernandez*, the Eastern District of Wisconsin noted that the guidelines do not satisfy sentencing purposes when the defendant's prior offenses are "minor and remote".[18] In *United States v. Serrano*, the Southern District of New York exercised its discretion and did not impose the career offender enhancement because the defendant's prior convictions were old and he served very little time for them when he committed the crimes.[19]

We see a lot of sentencing enhancements in the Eastern District. There is wiggle room for creative lawyering. The career offender designation is advisory and, although it is presumptively reasonable, discretion to apply it remains with the court.[20] Attorneys are encouraged to argue that judges should refrain from imposing the career offender enhancement, especially in low-level drug cases, because longer prison sentences do not reduce recidivism rates, the enhancement is disproportionately applied to African-American defendants—in direct conflict with the USSG's mission to create fair sentencing across the country—and more prison time neither protects the public from harm nor promotes respect for the law.

[1] *United States v. Booker*, 543 U.S. 220 (2005).
[2] *Rita v. United States*, 551 U.S. 338 (2007).
[3] United States Sentencing Comm'n, *Guidelines Manual §4B1.1* (November 2018).
[4] For an argument against the "crimes of violence" part of USSG §4B1.1 as it currently stands, *see* Veronica Saltzman, Note, *Redefining Violence in the Federal Sentencing Guidelines*, 55 HARV. J. ON LEGIS. 525 (2018).
[5] Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1175 (2010).
[6] *Id.* at 1152.
[7] Amy Baron-Evans, *Sentencing by the Statute* (Apr. 29, 2009) (unpublished manuscript, on file with the Office of Defender Services Training Branch).
[8] Don M. Gottfredson, Nat'l Instit. Of Justice, U.S. Dep't of Justice, *Effects of Judges' Sentencing Decisions on Criminal Careers* (1999).
[9] *See, e.g.*, U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-134 (2004) [Hereinafter *Fifteen Year Report*].
[10] U.S. Dep't of Justice, *An Analysis of Non-Violent Drug offenders with Minimal Criminal History* (1994).
[11] *See* Russell, *supra* n. 5, at 1154-1155. *See*, *e.g.*, Gary Kleck et al., The Missing Link in General Deterrence Research, 43 Criminology 623 (2005).
[12] Russell, *supra* n. 5, at 1176.
[13] *Id.* at 1173. *See also Fifteen Year Report*, *supra* n. 9.
[14] U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases Fiscal Year 2016* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf; U.S. Sentencing Comm'n, *Quick Facts: Career Offenders*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY16.pdf.
[15] 568 F. Supp. 2d 674, 687 (S.D. W. Va. 2008).
[16] *Id.*
[17] Russell, *supra* n. 5, at 1176.
[18] 436 F. Supp. 2d 983, 989-90 (E.D. Wis. 2006).
[19] No. 04CR.424-19, 2005 WL 1214314, at *8 (S.D.N.Y. May 19, 2005).
[20] *Compare* USSG §4B1.1 *with* 18 U.S.C. § 851 (2018) (where the court *must* impose a higher statutory minimum sentence upon the government's motion and showing of requisite facts).

The ZA Editors thank Clarke Martin for contributing this helpful information. Clarke is a third year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2019.

Cleaning Up the Residue: SCOTUS Strikes Down § 924(c)'s Residual Clause

In June, the Supreme Court decided *United States v. Davis*, holding that 18 U.S.C. § 924(c)(3)(B)'s residual clause defining "crime of violence" is void for vagueness.[1] Now, only those prior convictions that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another" will

qualify as "crimes of violence" for purposes of this enhanced penalty[2]

Writing for the majority, Justice Gorsuch situated *Davis* as the third part of a trilogy that includes *United States v. Johnson*[3] and *Sessions v. Dimaya*.[4] In *Johnson*, the Court struck down a similar residual clause in the Armed Career Criminal Act ("ACCA"), which defined a "violent felony" as any crime that "is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*."[5] (Invalidated provision emphasized). There, the Court found the residual clause unconstitutionally vague because it left the lower courts without sufficient guidance to determine both (1) how to estimate the risk posed by a crime and (2) how much risk it takes for a crime to qualify as a violent felony.[6] This, the Court said, "denies fair notice to defendants and invites arbitrary enforcement by judges."[7]

Last year, in *Dimaya*, the Court struck down the statutory provision of 18 U.S.C. §16(b) (aggravated felonies for immigration purposes) defining a "crime of violence," in part, as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[8] There the majority found the statute materially indistinguishable from the one at issue in *Johnson*: "every offense that could have fallen within the ACCA's residual clause might equally fall within 18 U.S.C. § 16(b)."[9]

This time, the Court encountered a residual clause redolent of the clause *Dimaya* struck down, defining a "crime of violence," in relevant part, as "a felony.... that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[10] As in *Johnson* and *Dimaya*, the *Davis* Court criticized the residual clause, which requires the lower courts to apply the "categorical approach" to prior convictions: "judges had to disregard how the defendant actually committed his crime. Instead, they were required to imagine the idealized 'ordinary case' of the defendant's crime and then guess whether a 'serious potential risk of physical injury to another' would attend its commission."[11]

Now, with § 924(c)'s residual clause invalidated, the government will have to rely on the force clause and prove that the crime charged "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Accordingly, the Fourth Circuit will have to consider which crimes count as "crimes of violence" under the force clause.

To the chagrin of the dissent, *Davis* has opened the door for challenges to past § 924(c) convictions. Much like *Johnson*, this case's holding will be retroactive. However, Justice Gorsuch admonished that, in practice, this will not necessarily mean lighter sentences for defendants, since "courts of appeals 'routinely' vacate the defendant's entire sentence on all counts 'so that the district court may increase the sentences for any remaining counts' if such an increase is warranted."[12]

Now, the pertinent question is: which crimes used to qualify under the residual clause, but now are no longer "crimes of violence" because they do not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another"? A recent example is the Fourth Circuit's decision in *Simms*, which held that conspiracy is not a "crime of violence" under the force clause.[13] Finally, because the elements of kidnapping do not require the use of force, kidnapping no longer qualifies as a predicate offense for § 924(c) convictions. *See United States v. Mathis,* 932 F.3d 242 (4th Cir. 2019).

Generally, offenses that the courts have held to be "crimes of violence" under § 16(b)'s or § 924(e)'s force clauses will also be crimes of violence under the force clause of § 924(c), because the statutory force clauses are materially indistinguishable.[14] After *Dimaya*, the force clause is the only surviving provision of § 16(b). Accordingly, any "crime of violence" for § 16(b) purposes will also qualify as a "crime of violence" under § 924(c).

Making predictions based on the ACCA, in contrast, is slightly more complex; in addition to its force clause, the ACCA enumerates certain crimes that qualify as "violent felonies" without regard for the use of force: "burglary, arson, or extortion, [or any crime that] involves use of explosives."[15] Due to this additional provision, practitioners cannot assume that all "violent felonies" under ACCA will necessarily count as "crimes of violence" under § 924(c) without first cross-referencing the offense with ACCA's enumerated crimes. For example, even though burglary remains a "violent felony" for ACCA purposes, it is no longer a "crime of violence" under the force clauses of § 924(c) or § 16(b).[16]

For other offenses, the Fourth Circuit will have to determine whether each given crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." For example, the Fourth Circuit held that Hobbs Act robbery is a "crime of violence," in accordance with every other circuit to consider the issue.[17]

Because the force clauses in *Davis*, *Dimaya*, and *Johnson* are analogous, the test for which crimes qualify as "crimes of violence" for § 924(e) force clause purposes will almost certainly be used in the § 924(c) context as well. That test was developed in *Stokeling*,[18] which held that the term "physical force," as used in the ACCA, means "violent force – that

is, force capable of causing physical pain or injury to another person."[19]

Ultimately, *Davis* is a win for due process advocates because it will require the courts to clarify which predicate convictions give rise to criminal liability under § 924(c). In the coming months, practitioners should keep their eyes on the Fourth Circuit as it is made to decide whether specific crimes pass the force clause's elements test in § 924(c) cases.

[1] *United States v. Davis*, 139 S.Ct. 2319 (2019).
[2] 18 U.S.C. § 924(c)(3)(A).
[3] *Johnson v. United States*, 135 S.Ct. 2551 (2015).
[4] *Sessions v. Dimaya*, 138 S.Ct. 1294 (2018).
[5] 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).
[6] *Johnson*, 135 S.Ct. at 2557-58.
[7] *Id*. at 2557.
[8] 18 U.S.C. § 16.
[9] *Dimaya*, 138 S.Ct. at 1220.
[10] 18 U.S.C. § 924(c)(3)(B).
[11] *Davis*, 139 S.Ct. at 2326 (internal citation omitted).
[12] *Id.* at 2336 (quoting *Dean v. United States*, 137 S.Ct. 1170, 1176 (2017)).
[13] *Id.* at 2332 (citing *United States v. Simms*, 914 F.3d 229, 247-48 (4th Cir. 2019)).
[14] *Id.* at 2329 ("[W]e normally presume that the same language in related statutes carries a consistent meaning.") (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)).
[15] 18 U.S.C. § 924(e).
[16] *Davis*, 139 S.Ct. at 2334.
[17] *See United States v. Mathis,* 932 F.3d 242 (4th Cir. 2019).
[18] *See United States v. Dinkins*, 928 F.3d 349 (4th Cir. 2019) (affirming *Stokeling*, 139 S.Ct. 544 (2019) (providing test to evaluate whether state crimes qualify as "violent felonies" under 924(e)).
[19] *Stokeling v. United States*, 139 S.Ct. 544, 549 (2019).

The ZA Editors thank Nicholas Lynch for contributing this helpful information. Nicholas is a third year law student at Duke Law School and was an intern in the FPD office during the Summer of 2019.

A Second Bite at the Apple? The Supreme Court decides Haymond *and* Gamble

The Fifth Amendment proclaims: "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. Meanwhile, the Fifth and Sixth Amendments recognize that "only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *United States v. Haymond*, 139 S.Ct. 2369, 2373 (2019). In June, the Supreme Court carved out contrasting exceptions and limitations that affect the Government's ability to get a second bite at the punishment apple.

On June 26, 2019, the Supreme Court released its long-awaited decision in *United States v. Haymond*, recognizing that in the supervised release context, facts found by a judge by a preponderance of evidence that increase the mandatory minimum sentence beyond what a jury has found, violate the defendant's right to a trial by jury. Andre Haymond served 38 months for possession of child pornography and was then placed on supervised release. While on supervised release, Haymond was again found in possession of child pornography. Seeking revocation and a new prison sentence, the Government brought Mr. Haymond back in front of a district judge. The judge found that Mr. Haymond violated the terms of his release by a preponderance of the evidence. Importantly, the ordinary punishment for Mr. Haymond's revocation was between zero and two years. Yet, under U.S.C. 18 § 3583(k), "if a judge finds by a preponderance of the evidence that a defendant was in possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life." *Haymond*, 139 S.Ct. at 2374. In a plurality opinion, the Court vacated the District Court's judgment and recognized a defendants' right during a revocation hearing to have each factual element that prompts an enhancement to be found beyond a reasonable doubt, not just by a preponderance of the evidence. *Id.*

Prior to this decision, the Government would have been able to muddle through with a lower standard of proof to revoke a defendant and impose an additional sentence. This allowed individuals to be subjected to criminal punishment but at a lower standard than is constitutionally prescribed. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013) ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.") Since the Government could achieve the desired additional incarceration time by only a preponderance of evidence standard, prior to *Haymond* there was no point in having a jury deliberate based on the beyond a reasonable doubt standard. *Haymond*, 139 S.Ct. at 2381 (2019) ("But why bother with an old-fashioned jury trial for a new crime when a quick-and-easy 'supervised release revocation hearing' before a judge carries a penalty of five years to life?"). Thus, prior to *Haymond*, there was very little to safeguard against an additional incarceration sentence imposed without a jury's consent.

While the Supreme Court's decision in *Haymond* counts as a win for defendants' rights, unfortunately the Court has been anything but consistent on the rights stemming out of the Fifth (and Sixth) Amendments. In the

same month that the Court struck down the principle of re-punishing an individual with lower standards of proof as unconstitutional in the supervised release revocation context, it affirmed the ability of state courts to punish the same crime prosecuted in federal courts.

On June 17, 2019, the Supreme Court reaffirmed an expansive exception to the infamous Double Jeopardy clause that arguably swallows the rule entirely. *United States v. Gamble* solidified the separate sovereign principle which allows both an individual state and the federal government to each get "a bite at the apple" – effectively allowing for an individual to be dragged through both federal and state systems to be simultaneously punished for the same conduct. In short, *Gamble* rubber-stamps the idea that a defendant can be tried for the exact same offense in both the federal and state system without violating the Double Jeopardy clause.

Gamble exemplifies the double punishment that is possible when separate sovereigns are able to prosecute an individual for the same offense. As Justice Kagan explained during oral arguments: "both sovereigns are understood to have significant interests, that they have the capacity to pursue." Oral Arg. Tr. P. 38 lines 10-12. By way of brief background, Mr. Gamble was sentenced to one year of incarceration by the state of Alabama for being a felon in possession of a pistol. Subsequently, the federal government charged Mr. Gamble for the same conduct, as a felon in possession of a firearm under 18 U.S.C. § 922(g)(1). *Gamble v. United States*, 139 S.Ct. 1960, 1963 (2019). Gamble filed a motion to dismiss claiming a Double Jeopardy clause violation. *Id.* With its hands tied, the U.S. District Court acknowledged that Mr. Gamble's second prosecution was viable. Mr. Gamble entered a conditional guilty plea and began his additional three-year incarceration term for his federal conviction. *Id.* at 1963.

The precedent supporting the separate sovereign exception is entrenched in American jurisprudence, as the *Gamble* opinion points out. Since the Court's 1922 decision proclaiming: "an act denounced as a crime by both national and state sovereigns is an offense against the peace and dignity of both and may be punished by each," the Supreme Court has been unwilling to overrule precedent. *United States v. Lanza*, 260 U.S 377 (1922). Mindfully, this roaring support of separate and dual sovereigns came prior to incorporation of the Bill of Rights to the states. In total, the Supreme Court has upheld the federal government's ability to prosecute the same offense that a state government has prosecuted for 170 years. *See Gamble*, 139 S.Ct. at 1970. The Court again considered the exception to the Double Jeopardy clause over thirty years after *Lanza* when a petitioner was convicted by the state of Illinois and subsequently the federal government. *Abbate v. United States*, 359 U.S. 187, 188 (1959). The Court maintained that it did not run afoul of the Fifth Amendment's Double Jeopardy clause to allow two sovereigns to each punish a "breach of a [prohibited act]." *Id.* at 193.

In terms of advising clients, *Gamble* and *Haymond* require different strategies. Fortunately, *Haymond* provides protection to your client in the revocation context, by preventing judge found facts from pushing a client's sentence above the statutory range. For example, a judge's finding an aggravating fact by a preponderance of the evidence that a jury did not find beyond a reasonable doubt cannot be used to enhance your client's sentence above what is statutorily appropriate under § 3583(k). *Haymond*, 139 S.Ct. at 2323 (2019). For *Gamble,* ensure that your clients are aware that both state and federal authorities could punish them. However, be diligent in comparing the elements to ensure that all elements are met in both cases. While a discrepancy between the two charges likely will not change the ability of both sovereigns to prosecute, often the federal charges require additional elements that are worth noting. Namely, federal cases require an interstate nexus that state cases do not, which often arises for Hobbs Act and felon in possession of firearm or ammunition cases. Also, remember that *Gamble* cases may arise during plea negotiations with a federal prosecutor, and case law is not in your client's favor to dispute separate prosecutions. For federal criminal defense attorneys, these decisions are a mixed bag: *Haymond*'s recognition of supervised release rights signifies a major win, but *Gambles'* affirmation of the separate sovereign doctrine is a major loss. Ultimately, it rests on defense attorneys' shoulders to zealously advocate for their client's Fifth and Sixth Amendment rights. While we cannot protect clients from dual prosecution, we can remind the Government to rise to the standards set in *Haymond.*

The ZA Editors thank Morgan Welge for contributing this helpful information. Morgan is a third year law student at Campbell Law School and was an intern in the FPD office during the Summer of 2019.

Navigating Proper Venue

You are assigned a new case and promptly look through the file exploring what avenues will provide the best defense for your client. You may consider whether there are arguments for pre-trial release, or whether there are possible motions to suppress, all viable questions that will help your client. But how much attention is given to venue? Facially, venue may appear to be a straightforward concept; however, it can be problematic in some cases. When exploring the best methods to advocate zealously for your

client, it is important not to overlook venue. Venue can be a catalyst that influences the case from the very beginning.

The Constitution provides that the "[t]rial of all Crimes . . . shall be held in the State where the Crimes shall have been committed."[1] Federal Rule of Criminal Procedure 18 reflects this Constitutional guarantee by stating the defendant "must [be] prosecute[d] in the district where the offense was committed," unless a statute or Federal Rules of Criminal Procedure provide otherwise.[2]

Despite being a Constitutional right, proper venue can be waived. If the indictment conspicuously contains a venue defect, but the defendant fails to make a pre-trial objection to venue in district court, the objection to venue is deemed waived.[3] However, if the indictment alleges proper venue, the government has the burden of proving venue by a preponderance of the evidence.[4] If the government fails to meet this burden during trial, an objection to venue may be raised "at the close of evidence."[5] A defendant's failure to raise a venue objection at the proper time constitutes a waiver.[6] Additionally, the objection need not be in writing.[7]

In *United States v. Stewart*, the defendant stated in court that he was in a similar position as his co-defendant when it came to proper venue.[8] The co-defendant filed a written motion objecting to venue; however, Stewart did not.[9] Despite the government's contentions that Stewart's objection to venue was improper, the Fourth Circuit found the defendant's verbal statement regarding improper venue was sufficient to preserve the issue for appeal.[10] If you think venue may be improper, do not miss the appropriate time to object.

Upon a timely objection to venue, the district court must then determine whether venue is in fact proper. Courts turn to the criminal statute to make this determination. Some criminal statutes contain a venue provision, such as 18 U.S.C. § 1956, which prohibits the laundering of monetary instruments. This statue specifies that prosecution for violating this statute "may be brought in any district in which the financial or monetary transaction is conducted."[11] If the criminal statute contains a venue provision, the specific venue provision governs.[12]

However, if the criminal statute is missing a venue provision, the Fourth Circuit determines proper venue by examining the elements of the offense and the prohibited conduct.[13] The court may consider "key verbs or actions sanctioned by the statute" in determining the essential elements of the offense.[14] The Supreme Court has stated that key verbs and essential conduct cannot be the sole consideration, and courts must also consider "other relevant statutory language."[15] After determining the essential elements of the offense, the district court must then determine where "the criminal conduct was committed," because venue is proper "only in a district in which an essential conduct element of the offense took place."[16]

Determining where the essential conduct was committed can be problematic. In *United States v. Sterling*, the defendant was convicted in the Eastern District of Virginia for transmitting classified defense information.[17] At the close of evidence, Sterling moved for a judgement of acquittal, based partly on the Eastern District's being an improper venue.[18] The trial court denied Sterling's motion.[19] On appeal, the Fourth Circuit determined that to prove venue was proper in the Eastern District of Virginia the government had to show that Sterling willfully communicated, delivered, or transmitted a classified letter in the district.[20] Lacking any evidence that Sterling committed an essential element of the offense in the Eastern District of Virginia, the government relied on a presumption that since Sterling lived in the Eastern District of Virginia the process of transmitting the classified document began in that district.[21] The Fourth Circuit rejected the argument and noted that "there is no rule of law that establishes such a presumption."[22] The court found that the government failed to establish that Sterling committed an essential element of the offense in the Eastern District of Virginia, thus venue was improper and one of Sterling's charges was dismissed.[23]

Another challenging factor in determining where the offense took place arises when the conduct spans across multiple districts. Chapter 18, section 3237 of the United States Code governs offenses beginning in one district and completed in another. Pursuant to § 3237, any offense begun in one district and completed in another, or committed in multiple districts can be prosecuted in any district in which the offense began, continued, or was completed.[24] Thus, defendants may be prosecuted in a district in which they never set foot, as was the case in *United States v. Johnson*.

In *Johnson*, the defendant submitted fraudulent forms to the Securities Exchange Commission (SEC) in Washington, D.C.[25] Johnson was indicted in the Eastern District of Virginia despite having no contact with the district. Upon the forms' submission, they were transmitted to SEC servers located in Alexandria, Virginia.[26] Johnson contended that venue was improper because he could not have foreseen the forms' transmission to the Eastern District of Virginia and that he submitted the forms in the District of Columbia.[27] The specific venue provision for securities fraud offenses is found in 15 U.S.C. § 78aa and provides that venue is proper "in the district wherein any act or transaction constituting the violation occurred."[28] Based on the plain language of the statute, the Fourth

Circuit held that the transmission of the fraudulent forms to the servers in Virginia was sufficient to establish proper venue in the Eastern District of Virginia.[29] Thus, Johnson's prosecution took place in this district despite his having no physical contacts there.

Venue can be a tricky terrain to travel; however, raising an improper venue objection may lead to dismissed charges for your client. It is imperative to be aware of when and on what basis to make proper venue objections, lest they be deemed waived. Additionally, understanding how lower courts determine which venue is proper will assist in determining whether to challenge the venue in your client's case.

[1] U.S. Const. Article III §2, cl. 3.
[2] Fed. R. Crim. P. 18.
[3] *United States v. Engle*, 676 F.3d 405, 413 (4th Cir. 2012); *see also United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Santiesteban*, 825 F.2d 779, 783 (4th Cir. 1987).
[4] *United States v. Sterling*, 860 F.3d 233, 241 (4th Cir. 2017).
[5] *Collins*, 372 F.3d at 633.
[6] *Engle*, 676 F.3d at 412.
[7] *United States v. Stewart*, 256 F.3d 231, 238 (4th Cir. 2001).
[8] *Stewart*, 256 F.3d at 238.
[9] *Id.*
[10] *Stewart*, 256 F.3d at 239.
[11] 18 U.S.C. § 1956 (c)(i).
[12] *United States v. Sanchez*, 2018WL4760844 (Oct. 2, 2018 W.D. N.C.).
[13] *United States v. Sterling*, 860 F.3d 233, 241 (4th Cir. 2017).
[14] *United States v. Sterling*, 860 F.3d 233, 241 (4th Cir. 2017) (quoting *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279-80 (1999)).
[15] *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279-80 (1999).
[16] *Sterling*, 860 F.3d at 241 (quoting *United States v. Villarini*, 238 F.3d 530, 533-34 (4th Cir. 2001)).
[17] *Id.* at 240.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 243-44.
[21] *Id.* at 244.
[22] *Id.*
[23] *Id.*
[24] 18 U.S.C. § 3237(a).
[25] *United States v. Johnson*, 510 F.3d 521 (4th Cir. 2007).
[26] *Id.* at 523.
[27] *Id.* at 526-27.
[28] 15 U.S.C. § 78aa.
[29] *Johnson*, 510 F.3d at 525.

The ZA Editors thank Jennifer Davis for contributing this helpful information. Jennifer is a third year law student at Campbell Law School and was an intern in the FPD office during the Summer of 2019.

LEGAL UPDATES

Supreme Court Update

For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com. Be sure to click on "U.S. Supreme Court Case Summaries" under Links and Resources.

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.

New Rules and Guideline Amendments

Federal Rules of Appellate Procedure

Changes to the Federal Rules of Appellate Procedure take effect on December 1, 2019.

A number of rules are amended to provide language allowing for electronic filing and service: **Rule 3**, Appeal as a Right—How Taken; **Rule 5**, Appeal by Permission; **Rule 13**, Appeals from the Tax Court; **Rule 21**, Writs of Mandamus and Prohibition, and Other Extraordinary Writs; **Rule 25**, Filing of Service; and **Rule 39**, Costs.

Computing and Extending Time: **Rule 26** is amended to clarify language to express that three days are added in computing time under the Rules when a paper is not served electronically or delivered on the date stated in the proof of service.

Disclosure Statements: **Rule 26.1** is amended to help judges determine whether recusal is appropriate due to personal interests. It adds nongovernmental corporations seeking to intervene on appeal to file disclosure statement, requires the government to identify organizational victims, and requires disclosure of the names of all debtors in a bankruptcy case. **Rule 28**, Briefs, and **Rule 32**, Form of Briefs, Appendices and Other Papers, are amended to reflect the changes in Rule 26.1.

Federal Rules of Criminal Procedure

Changes to the Federal Rules of Criminal Procedure take effect on December 1, 2019.

Rule 16.1, Pretrial Discovery Conference: This proposed new rule requires the government and defense attorney to confer no later than 14 days after arraignment to schedule pretrial disclosure. The rule only applies when a defendant is represented by counsel. One or more parties may request the court determine or modify disclosure.

Federal Rules of Evidence

The noted change to the Federal Rules of Evidence will take effect on December 1, 2019.

Rule 807, Residual Exception (Hearsay): This amendment fixes a number of problems courts have encountered in applying the rule. One change is the removal of the equivalence standard of trustworthiness, which has been changed to a totality of the circumstances standard. Four changes have been made to the notice provision. (1) The "substance" of the statement must be disclosed, (2) the proponent's address is no longer required, (3) the pretrial notice must be in writing, and (4) the pretrial notice now includes a good cause exception. The committee note from the Judicial Conference is helpful and can be found at https://www.uscourts.gov/sites/default/files/2019-04-25-congressional_rules_package_final_0.pdf.

Proposed Amendments to the E.D.N.C. Local Rules of Criminal Procedure

Rule 12.3, Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation: This amendment requires that a party file a disclosure statement within 28 days of an initial appearance, rather than filing at the time of the initial appearance.

Rule 47.1, Motion Practice: This new section specifies that Local Civil Rules 7.1 and 7.2 govern motion practice in proceedings under 28 U.S.C. § 2255.

Rule 47.2, Motion Practice: This amendment allows parties to make filings under either a word limit or a page limit, unless otherwise ordered by the court. Memoranda in support of or in opposition to a motion shall not exceed either thirty pages or 8400 words.

Amendments to the United States Sentencing Guidelines

The U.S. Sentencing Commission published the following amendments for public comment, which closed on March 15, 2019. The proposed amendments have since been submitted to Congress. More information can be found at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf.

§ 1B1.10, Reduction in Term of Imprisonment: This proposed amendment has two parts. Part A revises the Guidelines to align with the decision in *Koons v. United States*, 138 S. Ct. 1783 (2018) (holding that defendants whose initial guideline ranges fell entirely below a statutory mandatory minimum penalty, but who were originally sentenced below that penalty pursuant to a government motion for substantial assistance, are ineligible for sentence reductions under 18 U.S.C. § 3582(c)(2)). Part B aims to resolve a circuit split over whether a court can reduce a sentence below an amended guideline range to reflect departures other than substantial assistance that the defendant received at his original sentencing. In Part B, the U.S. Sentencing Commission sought comment on which approach of a circuit split to adopt: one approach would only consider a substantial assistance departure while the other approach would consider all departures and variances. Comments are closed and the Commission's decision is forthcoming.

§ 4B1.2, Career Offender Definition: This proposed amendment has four parts. Part A provides that, in making the determination of whether a conviction is a "crime of violence" or a "controlled substance offense," a court shall consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction. Part B addressed the concern that certain robbery offenses no longer constitute a "crime of robbery" because these offenses do not meet the generic definition of robbery. Part C amends the Guideline to address technical issues in the commentary provision. Part D amends the definition of "controlled substance offense" to include offenses involving an offer to sell a controlled substance.

§ 4B1.4, Armed Career Criminal: This amendment clarifies that an enhancement applies "regardless of whether such offense resulted in a conviction[.]"

§ 2L1.2, Unlawful Entering or Remaining in the United States: This amendment clarifies the meaning of "robbery" in the commentary to the traditional meaning of "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining."

§ 2G1.1, Promoting a Commercial Sex Act or Prohibited Sexual Contact with an Individual Other than a Minor: This amendment updates the statutes referenced in the commentary and clarifies an applicable statute under the specific offense characteristics.

§ 2G1.3, Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor: This amendment adds an "apply the greater" instruction that increases for reckless disregard for conduct contributing to sex trafficking; it also updates the statutes referenced in the commentary and application notes. **§ 3D1.2**, Groups of Closely Related Counts, is amended to include § 2G1.3.

§ 5F1.7, Shock Incarceration Program: This amendment includes technical changes and updates the history of shock incarceration programs in the commentary.

Technical changes have been made to the following Guidelines that do not impact their meaning:

§ 2K1.3, Unlawful Receipt, Possession, or Transportation of Explosive Materials;

§ 2K2.1, Unlawful Receipt, Possession or Transportation of Firearms or Ammunition;

§ 2S1.1, Laundering of Monetary Instruments

§ 4A1.1, Criminal History Category;

§ 4A1.2, Definitions and Instructions for Computing Criminal History;

§ 5K2.17, Semiautomatic Firearms Capable of Accepting Large Capacity Magazine;

§ 7B1.1, Classification of Violations;

§ 2N2.1, Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, Agricultural Product, or Consumer Product;

§ 2N1.1, Tampering or Attempting to Tamper Involving Risk of Death or Bodily Injury;

§ 2A5.2, Unsafe Operation of Unmanned Aircraft

§ 2X5.2, Class A Misdemeanors;

§ 2A2.4, Obstructing or Impending Officers;

§ 2M4.1, Failure to Register and Evasion of Military Service;

§ 2M5.1 Evasion of Export Controls;

§ 2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking;

§ 2A4.2, Demanding or Receiving Ransom Money;

§ 2A6.1, Threatening or Harassing Communication;

§ 2B3.2, Extortion by Force or Threat of Injury or Serious Damage;

§ 1B1.11, Use of Guidelines Manual in Effect on Date of Sentencing;

§ 3D1.1, Procedure for Determining Offense Level on Multiple Counts; and

§ 5G1.3, Imposition of A Sentence on a Defendant Subject to an Undischarged Term of Imprisonment.

The ZA Editors thank David Joyner for contributing this helpful information. David is a third year law student at Campbell Law School and was an extern in the FPD office during the Summer of 2019.

LOCAL NEWS

Eastern District News

On Friday, June 7, 2019, a ceremony was held to present the portrait of the late Senior U.S. District Judge James Carroll Fox. The portrait currently resides in Courtroom 2 of the Terry Sanford Federal Building in Raleigh, N.C.

FPD Office News

We are pleased to welcome back Assistant Federal Defender Marshall Ellis, who returned in September after spending one year with the U.S. Sentencing Commission in Washington, D.C.

Congratulations to Sayre Ellis and Steve Doherty on the birth of Cole Ellis on June 21, 2019.

Congratulations also go out to Halerie and Sam Costello on the birth of Penelope "Penny" Arlene on September 25, 2019.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh: Marquis Bradshaw, Peter Frost, Shepard O'Connell, Robert Parrott, James "Jimmy" Wilson; and in Greenville: Jarrette Pittman.

The following are new panel attorneys in Raleigh: Shana Fulton, Joseph Houchin, Meredith Hubbard, Bellanora McCallum; in New Bern: Kenneth Crow; and in Greenville: Mark Stewart.

If you have a suggestion for an article, we want to hear from you! Send an e-mail to Zealous Advocate Editors:
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