THE ZEALOUS

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2011

THE DEFENDER'S MESSAGE

Throughout this past winter and spring, our office and the district have seen a number of changes. In our Raleigh office, we have experienced an expansion of office space and staff. In the district, we have seen the addition of a new U.S. Marshal, Scott Parker, and the Marshal Services move to a new space in the Raleigh federal building. Within our circuit, we note the addition of a new circuit court judge from North Carolina, the Honorable Albert Diaz. Our profession, by its very nature, is marked by change.

In this edition of the Zealous Advocate, we hope to help you all keep up with some of these changes. First, we hope to provide you with the means to answer questions from incarcerated clients who may have civil-type claims against the Bureau of Prisons. Additionally, we will update our previous "Preserve It" columns on § 924 (c) and *Pruitt* issues and give you some suggestions for preserving 8th Amendment arguments at sentencing. Finally, we will fill you in on the latest legal updates ranging from our comprehensive analysis of the Fair Sentencing Act to Fourth Circuit and Supreme Court updates linked on our website.

As always, I hope this edition of the Zealous Advocate is helpful in your criminal practice, and I look forward to seeing you at our annual Spring Federal Criminal Practice Seminar on Friday, May 6th at NC State's McKimmon Center.

Thomas P. McNamara
Federal Public Defender

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PANEL ATTORNEY INFORMATION

Previously Distributed Materials

Numerous materials have been distributed through our panel administrator, Donna Stiles, and panel attorney representative, Jim Ayers, since October 2010. These include a number of local and national training opportunities, as well as emails regarding Deconstruction; USSC Notice - Temp. Emergency Amendment on Drug Trafficking Offenses; and Fair Sentencing Act Memo for CJA Panel Attorneys.

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

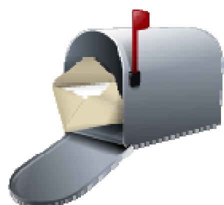
Seminar BOLO

We expect that U.S. Probation will host Federal Sentencing Guidelines Training in the Fall in Raleigh. Additional information will be forwarded to the panel as soon as it is received.

Save the dates: Our Federal Criminal Practice Seminar - Fall 2011 will be held October 20th and 21st, 2011 at the Sheraton in Atlantic Beach, NC. We are looking forward to hosting our seminar in a new location. We will be sending additional information out in September.

PRACTICE TIPS

ADVISING CLIENTS: PRISONER TORT CLAIMS



Have you ever had a client who is incarcerated in the Bureau of Prisons ("BOP") contact you because he is being denied some sort of medical service, has been injured, or has some other complaint that falls within the realm of a civil action? Of course, your first inclination may be to advise him to consult with a civil attorney. However, because obtaining such legal help while behind bars is a challenge, this article should assist you in advising clients about their options for pursuing relief on their own.

BOP has an in-house problem resolution process that is used to resolve inmate claims. This process contains a combination of informal and formal methods. All of this information is available in the Inmate Handbook, however outlined below is the process and manner in which inmates may proceed with a claim-starting with the informal inmate request to a staff member and followed up by the formal administrative remedy process. After discussing the claims process, there is a section on what information should be included in all of the written formal claims, and finally, how to obtain relief when the informal process fails.

<u>BUREAU OF PRISONS INTERNAL CLAIM RESOLUTION PROCESS</u>

Inmate Request to Staff Member: Bureau form BP-Admin-70

BOP form BP-Admin-70, commonly called a "cop-out,"is used to make a written request to a staff member. Any type of request can be made with this form. It can be obtained in the living units from the Correctional Officer on duty. Staff members who receive a "cop-out" will answer the request in a "reasonable" period of time. The answer will be written on the bottom of the request form or typed on a separate sheet of paper.

Formal Administrative Remedy Process

When informal resolution is not successful, a formal complaint may be filed as an administrative remedy. Please note that complaints regarding tort claims, inmate accident compensation, freedom of information or privacy act requests, and complaints on behalf of other inmates are not accepted under the administrative remedy procedure.

The first step of the administrative remedy procedure is the documentation of the informal resolution attempts written on an "Attempt at Informal Resolution" form. Inmates may obtain this form from their correctional counselor or other designated unit staff member. On the "Attempt at Informal Resolution" form, the inmate will briefly state the nature of the problem and list the efforts made to resolve the problem informally. If more than the space provided on the form is required,

one additional 8½" x 11" singled-sided continuation page may be attached. Only one continuation page may be attached to the informal resolution form and one continuation page to the administrative remedy.

Once the form is completed, and if the issue cannot be informally resolved, the Counselor will issue a BP-229/BP-9 form. The inmate will return the completed BP-229/BP-9 along with the "Attempt at Informal Resolution" to his Counselor, who will review the material to ensure an attempt at informal resolution was made. The BP-229/BP-9 complaint must be filed within twenty (20) calendar days from the date on which the basis for the incident or complaint occurred, unless it was not feasible to file within that period of time. Institution staff have twenty (20) calendar days to act on the complaint and to provide a written response to the inmate. This time limit for the response may be extended for an additional twenty (20) calendar days, but the inmate must be notified of the extension.

If the inmate is not satisfied with the response to the BP-229/BP-9, he may file an appeal with the Regional Director. This appeal must be received in the regional office within twenty (20) calendar days from the date of the Warden's signed BP-229/BP-9 response. The regional appeal is written on a BP-230/BP-10 form, and must have a copy of the BP-229/BP-9 form and response attached. The regional appeal must be answered within thirty (30) calendar days, but the time limit may be extended an additional thirty (30) days. The inmate must be notified of the extension.

If the inmate is not satisfied with the response by the Regional Director, he may appeal to the BOP central office. The national appeal must be made on a BP-231/BP-11 form and must have copies of the BP-229/BP-9 and BP-230/BP-10 forms with responses. The appeal must be received in the central office within 30 calendar days of the date the Regional Director signed the BP-230/BP-10 response.

Content of BP-229/BP-9, BP-230/BP-10, & BP-231/BP-11

A properly filed claim and appeal is written in three sections: (1) Statement of Facts; (2) Grounds for Relief; and (3) Relief Requested. A "Statement of the Facts" provides the Counselor and Warden all of the necessary facts. This section needs to include the relevant facts that underlie the particular complaint as well as the brief statement of the steps taken to resolve the complaint prior to filing the BP-229/BP-9.

The "Grounds for Relief" section of the complaint explains to the Counselor and Warden why the inmate deserves to have this complaint remedied based on the facts provided in the Statement of Facts (e.g., the facility has violated BOP policy number 6010.02 and 6031.01, regarding health services administration and patient care, by refusing to provide adequate treatment for the injuries sustained during a slip and fall on the rec yard).

The "Relief Requested" section of the complaint lays out what the inmate is asking the Counselor and Warden to do to rectify the complaint and to ensure that similar situations do not arise in the future (e.g., "I respectfully request transportation to a community medical facility to receive necessary treatment for injuries sustained in the accident.")

FILING SUIT UNDER ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act ("APA") authorizes lawsuits that challenge or demand agency action and seek specific forms of relief. Depending on the claim, the APA may provide an inmate with a way to sue the BOP for relief.

Authority to bring suit is derived from 5 U.S.C. § 701, wherein a person aggrieved by agency action within the meaning of relevant statutes is entitled to judicial review of the agency action. BOP Policies and 18 U.S.C. § 4042(2) outline the duties of the BOP to provide suitable quarters and to provide for the safekeeping and care of all people in the BOP's care (e.g. If an inmate has been denied proper medical treatment, the prison has not provided for the inmate's safekeeping and care. In that situation, the claim can be made that because BOP may have neglected its duty of safekeeping and care, and may have violated BOP policy, this is a grievance that can be reviewed by the courts.)

While a suit filed under APA may provide a remedy, review by the courts is only available if all other adequate remedies have been pursued, such as using the BOP Internal Claim Resolution Process. *See* 18 U.S.C. § 704. This section of the APA

essentially says that if there are other ways for clients to get the BOP to provide relief, those avenues must be explored first. Since BOP has an internal dispute resolution process, inmates must go through that internal process, including all appeals, before filing a lawsuit.

In helping a client determine whether he might have a cause of action under the APA, there are certain policies that would be helpful for the client to review in addition to the statutes already cited. They are as follows:

Policy Number 4200.10- Facilities Operations
Policy Number 6010.02- Health Services Administration
Policy Number 6031.01- Patient Care

FILING SUIT UNDER FEDERAL TORT CLAIMS ACT

For those wrongs that are not addressed by the APA, the Federal Tort Claims Act may provide relief. The United States allows for individuals to bring tort claims for damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government." *See* 28 U.S.C. § 1346(b).

If the negligence of institution staff results in personal injury, property loss, or damage to an inmate, it can be the basis of a claim under the Federal Tort Claims Act. To file such a claim, inmates must complete a Standard Form 95 and mail it to the regional office where the incident occurred. This form is obtained by submitting an Inmate Request to Staff member ("cop-out") to a Counselor or other designated staff member.

Tort claims are not accepted for filing at the institution. It is the inmate's responsibility to mail the claim directly to the Regional Counsel in the regional office having jurisdiction over the institution where the loss or injury occurred. For example, if the loss occurred at USP Big Sandy, then the claim should be mailed to the Mid-Atlantic Regional Office.

A copy of the policy statement on tort claims is maintained in the inmate Law Library of most BOP facilities. Addressees for all of the regional offices, along with institutions in each region are published in Title 28 Code of Federal Regulations (CFR) Part 543. A copy of the CFR is also maintained in the Law Library. Addresses to the regional offices may often be requested from members of the unit team.

If the claim mailed to the Regional Counsel is ultimately denied by BOP, and the inmate has followed all administrative procedures to file that claim, the inmate may then file a complaint in U.S. District Court using the same guidelines as were listed under the section about "Filing Suit Under APA."

While our incarcerated clients must pursue this relief on their own, the information provided here will hopefully help them navigate the complicated procedures involved in obtaining relief.

Many thanks to Thomas Royer for contributing these helpful tips. Thomas is a third year law student at the Campbell University School of Law and was an extern in the FPD office during the Fall of 2010.

PRESERVE IT UPDATE: PRUITT & SIMMONS

Recently, the Fourth Circuit rendered a decision in *United States v. Simmons* concluding that the Supreme Court's decision in *Carachuri-Rosendo* is inapplicable to the *Pruitt* issue. *See United States v. Simmons*,___ F.3d ___, 2011 WL 546425 (4th Cir. 2011). It held that, unlike the analysis rejected in *Carachuri-Rosendo*, the analysis used in these cases do not look to facts beyond the offense of conviction to determine, hypothetically, whether a defendant could have been charged with another offense that would satisfy the requirements at issue. *Id.* Instead, it considers the defendant's actual offense of conviction, and how that offense is "punishable." Thus, because the court looks at the actual offense of conviction to determine whether that offense satisfies the statutory requirement of being "punishable by imprisonment for more than one year," a *Carachuri-Rosendo* analysis is not applicable. *Id.*

Despite this recent ruling, this remains a viable issue for appeal. A Supreme Court decision has not been rendered on this specific issue, and the Fourth Circuit will hear the case *en banc* on Wednesday, May 11, 2011. Therefore, continue to preserve this issue.

Never give up . . . and never surrender.
– Jason Nesmith, Galaxy Quest (1999)

PRESERVE IT UPDATE: SECTION 924(c)

In our Fall 2010 "Preserve It" column, we advised you of the pending 18 U.S.C. § 924(c) issue, which was being considered by the Supreme Court. The Court was asked to resolve the circuit split over the correct interpretation of § 924(c)'s except clause ("Except to the extent that a greater minimum sentence is otherwise provided . . .").

In the consolidated cases of *Abbott v. United States* and *Gould v. United States*, 562 U.S. ___, 131 S.Ct. 18 (2010), the Supreme Court settled a circuit split between the First, Second, and Sixth Circuits, which held that Congress intended that defendants be subject to additional mandatory minimum sentencing only when they were not subject to another greater minimum sentence, and the Third, Fourth, Fifth, Seventh, and Eighth Circuits, which held that Congress intended to broaden the scope of its application of mandatory minimum sentencing; thus, the statement "by any other provision of law" was restricted to only firearm offenses.

Siding with the latter circuits, the Supreme Court held that if it were to accept the notion that concurrent mandatory minimum sentencing should only be applied where a defendant is not subjected to another greater minimum sentence, it would undercut the bill's primary objective, which was "to expand 924(c)'s coverage to reach firearm possession." *Id.* at 20. It further held that such a construction of the statute would create sentencing anomalies because it would often result in no penalty for conduct which § 924(c) makes independently criminal. *Id.* Because such an application of the statute would produce "bizarre" results, which Congress did not intend, *see id* at 27, the Supreme Court determined that § 924(c) offenders shall receive additional punishment for their violation of this provision. *Id.* at 29.

Based on the above, it is no longer necessary to preserve this issue for appeal.

Many thanks to LyTia Blackmon for contributing these helpful tips. LyTia is a third year law student at North Carolina Central University's School of Law and was a pro bono extern in the FPD office during the Spring of 2011.

PRESERVE IT: AN EIGHTH AMENDMENT APPROACH TO NON-CAPITAL SENTENCING

Last year, in *Graham v. Florida,* the Supreme Court held that the Constitution does not allow juvenile offenders to be sentenced to life in prison without the possibility of parole for non-homicide offenses. *See* 560 U.S. __, 130 S.Ct. 2011 (2010). Specifically, *Graham's* holding prohibits a sentence of life without parole (LWOP) for juveniles convicted of offenses other than homicide. *Id.* On the surface, *Graham v. Florida* is seemingly inapplicable to a majority of EDNC cases given its discussion of juveniles and LWOP sentences. In reality, it has great potential for a constitutional argument challenging the length of your clients' sentences, both juvenile and adult.

By finding that people who do not kill, or who do not intend to kill, are relatively less culpable than those who have, the *Graham* Court essentially invites defense attorneys to present mitigating evidence to challenge the lengthy sentences for clients who did not commit homicide. *Id.* at 842. The Court analogized LWOP sentences to death sentences by finding they "share some characteristics . . . that are shared by no other sentences," such as "a forfeiture that is irrevocable" and a deprivation "of the most basic liberties without giving hope of restoration, except perhaps by executive clemency–the remote possibility of which does not mitigate the harshness of the sentence." *Id.* While the *Graham* court applied these arguments to a juvenile, they can and should, be applied to any client whose culpability can be questioned, or at least mitigated. These arguments may also benefit clients facing excessively long sentences, something that can be said for many federal criminal defendants. As such, even if a particular client's case does not seem to precisely mirror the facts at issue in *Graham,* the argument should still be preserved for purposes of appeal.

To bolster its 8th Amendment argument, the *Graham* Court analyzed the four purposes of sentencing–retribution, deterrence, incapacitation, and rehabilitation–in the context

of LWOP sentences for juvenile non-homicide offenders. Some key points from this analysis that would be useful at sentencing include the Courts' findings that:

1. "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender;"
2. sentences must have a legitimate, penological justification in order to be proportionate to the offense;
3. deterrence, in and of itself, is not enough to justify the "grossly disproportionate" sentence of LWOP for an offender whose moral responsibility is diminished;
4. "incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity," as well as the notion that incapacitation is not adequate justification for a LWOP sentence where the defendant's characteristics raise a question as to whether the he or she is, in fact, incorrigible; and
5. people who are sentenced to life in prison without the possibility of parole "are often denied access to vocational training and other rehabilitative services that are available to other inmates."

Clearly, *Graham* does much more than simply apply existing non-capital proportionality precedents to the specific parameters of Graham's claim. On the contrary, the *Graham* Court goes widely outside of the framework that non-capital precedents have established. The Court does so by applying the sort of categorical proportionality review to a non-capital sentence that, up until this point, has been reserved for capital cases. Moreover, *Graham's* case-by-case proportionality approach for non-capital defendants opens the door for a similar approach in cases where clients face arguably disproportionate sentences, as well as for those clients whose level of culpability can be argued down.

Many thanks to Lauren Gebhard for contributing these helpful tips. Lauren is a third year law student at the University of North Carolina School of Law and was an extern in the FPD office during the Summer of 2010.

COMPUTER CORNER

Spring Cleaning: Keyboard and Mouse

The computer keyboard is one of the most germ-infested items in a home or office; often it will contain bacteria. Cleaning it can help remove any dangerous bacteria or other germs. Dirt, dust, hair, and food particles can also build up, causing the keyboard to not function properly.

Procedure: Before cleaning the keyboard or mouse, first turn off the computer. Many people clean the keyboard by turning it upside down and shaking. A more effective method is to use compressed air. Compressed air is pressurized air contained in a can with a very long nozzle. Aim the air between the keys and blow away all of the dust and debris that has gathered there. After the dust, dirt, hair, and food particles have been removed, spray a disinfectant onto a cloth and rub the keys on the keyboard and the mouse. Please remember, **never** spray any liquid on or into the keyboard or mouse itself.

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

It is not the mountain we conquer but ourselves.
–Sir Edmund Hilary

LEGAL UPDATES

4th Circuit Update

For the latest Fourth Circuit update, summarizing decisions published between April 1, 2010 and March 31, 2011, please visit our website at http://nce.fd.org/ and go to "Publications." For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check http://circuit4.blogspot.com. To receive daily published Fourth Circuit opinions, register at http://pacer.ca4.uscourts.gov/opinions/opinion.php hphttp://pacer.ca4.uscourts.gov/opinions/opinion

.htm. Please direct any email questions about the Fourth Circuit Update or the websites listed above to the ZA Editors.

Many thanks to Fran Pratt, Assistant Federal Public Defender for the Eastern District of Virginia, for permitting our reprinting of this comprehensive update.

Supreme Court Update

For the latest Supreme Court update, summarizing Supreme Court decisions published between September 1, 2010 and March 31, 2011, please visit our website at http://nce.fd.org, and go to "Publications." For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com. Please direct any email questions about the Supreme Court Update or the websites listed above to the ZA Editors.

Many thanks to Nicholas Simon and LyTia Blackmon (see above) for contributing to this update. Nick is a third year law student at Duke University School of Law and was an extern in the FPD office during the Spring of 2011.

You must be the change you wish to see in the world.
–Mahatma Gandhi

EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE FAIR SENTENCING ACT

In response to the growing number of inquiries we have received about the Fair Sentencing Act of 2010 ("Act"), we offer you the following article summarizing this new piece of legislation.* In addition to some background information, we take a look at the issues of "pipeline" retroactivity and "full" retroactivity that have pervaded district and circuit court cases.

On August 3, 2010, President Obama signed the Fair Sentencing Act of 2010 into law. The Act was passed by Congress to restore fairness to Federal (crack) cocaine sentencing. *See* Pub. L. No. 111-220, 124 Stat. 2372 (Preamble). The Act amends the Anti-Drug Abuse Act of 1986 by increasing the quantity thresholds that trigger the statutory mandatory minimum penalties for offenses involving cocaine base under 21 U.S.C. §§ 841(b) and 960(b). The quantity triggering the five-year mandatory minimum was increased from 5 grams to 28 grams, and the quantity triggering the 10-year mandatory minimum was increased from 50 grams to 280 grams. *See* Pub. L. No. 111-220, 2. The new quantity thresholds reduced the statutory powder-to-crack ration from 100-to-1 to 18-to-1. For offenses involving more than 50 grams but less than 280 grams of crack, the Act reduced the statutory maximum penalty from life to forty years. While the Act lowers crack sentences, it also increases penalties for certain conduct. The Act does not include a saving provision indicating that Congress intended the old law to apply to pending cases.

In section 8 of the Act, Congress gave the U.S. Sentencing Commission emergency authority, requiring action within no later than ninety days, to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." Pub. L. No. 111-220, 8(2).

On October 27, 2010, the Commission amended the Drug Quantity Table at U.S.S.G. § 2D1.1 to reflect the 18-to-1 drug quantity ratio as now set forth in 21 U.S.C. § 841(b) and 960(b). Pursuant to the amended guideline, offenses involving at least 500 grams of powder cocaine or at least 28 grams of cocaine base are assigned a base offense level of 26, which corresponds to a guideline range of 63 to 78 months' imprisonment at Criminal History Category I. U.S.S.G. § 2D1.1 (Nov. 1, 2010 Supp.). Offenses involving at least 5 kilograms of powder cocaine or at least 280 grams of cocaine base are assigned a base offense level of 32, which corresponds to a guideline range of 121 to 151 months' imprisonment at Criminal History Category I. *Id.* The Commission then extrapolated upward and downward from these triggering amounts so that each base offense level likewise reflects the 18-to-1 ratio. *See id.* The Commission expressly stated that these amendments were intended to "account for" the Fair Sentencing Act's new mandatory minimum sentences, and further that its approach is intended to "ensure that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and

proportionately reflected throughout the Drug Quantity Table." U.S.S.C., Notice of a temporary, emergency amendment to sentencing guidelines and commentary, 75 Fed. Reg. 66, 188, 66, 191 (Oct. 27, 2010); U.S.S.G., App. C, Amend. 748 (Supp. Nov. 1, 2010).

Savings Clause

The circuit and district courts that have refused to apply the Act to criminal conduct that occurred before the effective date of the Act have relied upon the Savings Clause to justify their decisions. Those courts have argued that the FSA does not expressly provide that the previous harsher penalties are extinguished or released, and consequently there is no need to further analyze statutory construction. However, several opinions have argued against this rationale for "pipeline" cases, where defendants have not been sentenced prior to the enactment of the Act. The most notable case that allows for "pipeline" retroactivity is *United States v. Douglas*, No. 09-202-P-H, 2010 WL 4260221 (D.Me. Oct. 27, 2010). The court in *Douglas* found that the Supreme Court's interpretation of the Saving Clause foreclosed the argument that the Fair Sentencing Act does not "release or extinguish" a penalty, which is the concern of the Saving Clause, as well as the argument that the Saving Clause does not apply to remedial or procedural changes, the type of changes made by the Fair Sentencing Act. *Id.* at *4 (*citing* Congress' authority to make its new reform apply only to criminal conduct occurring after the statute's enactment).

The purpose of a savings provision is "to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Warden v. Marrero*, 417 U.S. 653, 659 (1974). Previously, the substitution of a new statute with different penalties would have resulted in termination of all pending prosecutions, even when the statute merely reduced the applicable sentence. In 1947, Congress codified the savings statute at 1 U.S.C. § 109 (the Saving Clause). The statute provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

"Full" Retroactivity

This contemplates a situation in which an offender committed an offense, was convicted, and sentenced before the enactment of the Act. Currently, full retroactivity has not been recognized by the Fourth Circuit. *See United States v. Nelson*, No. 09-4297, 2010 WL 4676614, at *1 (4th Cir. Nov. 18, 2010), *United States v. Glanton*, No. 10-4516, 2011 WL 121560, at *2 (4th Cir. Jan. 14, 2011), *United States v. Wilson,* No. 10-4160, 2010 WL 4561381 (4th Cir. Nov. 12, 2010), *United States v. Evans*, No. 09-5086, 2010 WL 4745624, at *1 (4th Cir. Nov. 23, 2010), and *United States v. McAllister*, No. 10-4387, 2010 WL 4561395, *2 (4th Cir. Nov. 12, 2010). Additionally, no other circuits have recognized full retroactivity.

"Pipeline" Retroactivity

This contemplates a situation in which an offender committed an offense before the enactment of the Act, but has not been sentenced for that offense.

Several jurisdictions and at least one circuit court have refused to recognize pipeline retroactivity. For a full list of these cases, please contact the ZA Editors.

Fortunately, several courts have recognized that the Act is retroactive for pipeline cases, including *United States v. Douglas*. Following the reasoning in *Douglas*, many districts have recognized pipeline retroactivity. Some examples from the Fourth Circuit include: *United States v. Holloway*, 3:04-CR-90 (S.D.W.Va. Dec. 20, 2010), *United States v. Johnson*, No. 3:10-CR-138 (E.D.Va. Dec. 7, 2010), *United States v. White*, No. 6:10-cr-00247 (D.S.C. Feb. 9, 2011), *United States v. Holloway*, No. 3:04-cr-0090 (S.D.W.V. Dec. 20, 2010), *United States v. Johnson*, No. 3:10-cr-138 (E.D. Va. Dec. 7, 2010). For a full list of district court cases outside of the

Fourth Circuit, please contact the ZA Editors.

Letter from Lead Sponsors of FSA to Attorney General Eric Holder

Lead sponsors of the FSA, United States Senators Richard J. Durbin and Patrick J. Leahy, wrote a letter to Attorney General Eric Holder on November 17, 2010. In the letter, the Senators urge the Attorney General "to apply its mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment." The sponsors indicated that their goals in passing the FSA was to "restore fairness to Federal cocaine sentencing as soon as possible," and that "every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust."

The Senators also referred to Judge Hornby's decision in *Douglas*, in which they agree with Judge Hornby's question of "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" (A copy of the letter can currently be found at http://sentencing.typepad.com/files/fair-sentencing-act-ag-holder-letter-111710.pdf).

J. Ponsor's FSA Memo for *United States v. Watts*, - F.Supp.2d - , 2011 WL 1282542 (D.Mass. April 5, 2011)

J. Ponsor's memo criticizes the government's reliance on the General Saving Statute, 1 U.S.C. § 109, and its claim that perpetuation of an obvious injustice is a regrettable but necessary expression of respect for the law, however harsh its consequences. However, J. Ponsor finds this cannot survive a close examination of the Saving Statute itself or its legal context.

The case most heavily relied upon by the government for its interpretation of the Saving Statute, *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 654, 661 (1974), states that when a statute such as the Fair Sentencing Act contains a "specific directive" that can be said "by fair implication or expressly to conflict with § 109," a court is empowered to hold that the new statute supersedes the Saving Statute. *Id.* at 659 n.10 (*citing Great No. R. Co. v. United States*, 208 U.S. 452, 465-66 (1908)) (emphasis supplied). Thirty years after *Marrero*, Justice Scalia, in discussing whether a new statute superseded a prior one, noted that "[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, regardless of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Lockhart v. United States*, 546 U.S. 142, 149 (2004) (Scalia, J., concurring). In short, the savings clause should not be employed to circumvent an act that was drafted to remedy a fundamentally flawed sentencing scheme.

Many thanks to Rashad Hauter for contributing these helpful tips. Rashad is a third year law student at Campbell University's School of Law and was an extern in the FPD office during the Spring of 2011.

** Please note this article, in its entirety, was distributed to all panel attorneys by Donna Stiles in March.*

Winning is overemphasized. The only time it is really important is in surgery and war.
–Al McGuire

LOCAL NEWS

Eastern District News

The FPD welcomes newly seated Fourth Circuit Court of Appeals Judge Albert Diaz. We extend a warm welcome on behalf of this office and the panel attorneys from this district.

Recently, the U.S. Marshal's Service welcomed a new U.S. Marshal, Scott Parker. The Marshal's office in Raleigh's Terry Sanford Building has moved from the 7th floor to the 1st floor, where a new client visitation procedure is now in place and meetings can occur in private meeting rooms. Be sure to stop by and introduce yourself. To see clients, you will need to present a driver's license and bar card when signing in.

FPD Office News

We are pleased to welcome to the Raleigh office: Assistant Federal Public Defender Sonya Allen.

We bid a fond farewell and send congratulations to attorney Kindl Shinn, who has accepted a clerkship position in Charlotte, NC with newly seated Fourth Circuit Judge Albert Diaz. We also bid farewell to John Goad who served as an investigator with the FPD until his retirement in March 2011.

Congratulations to: Andrea (Stubbs) and Ed Barnes on their December 31, 2010 wedding; Eric and Liz Brignac on the birth of Charles Francis on March 9, 2011; and Diana and Rob Pereira on the birth of Jackson Edward on March 20, 2011.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh: Laura Beaver, Damon Cheston, Richard Crouthamel, Michael F. Easley, Jr., Benjamin Turner Many, A. Patrick Roberts, and Alex Ryan Williams; in Durham: E.J. Hurst, Jr., Jonathan Reid Reich, William Chandler Vatavuk, and Syrena N. Williams; in Castle Hayne: Julia Catherine Boseman; in Fuquay-Varina: Jason R. Rosser; in New Bern: Lee W. Bettis, Jr.; in Oriental: Jason Allen Brenner; in Pittsboro: Robert C. Trenkle; in Rocky Mount: Michael Ray Smith, Jr.; in Warrenton: Robert Thomas May, Jr.; and in Wendell: Terry Allen Swaim, Jr.

The following are new regular panel attorneys in Raleigh: Wes J. Camden, Maitri "Mike" Klinkosum, William Andrew LeLiever, and Raymond C. Tarlton; in Durham: Michael Driver, and Renorda Pryor; in Charlotte: Charles Robinson Brewer; in New Bern: Kindelle Morton McCullen; in Oriental: Lawrence Howard Brenner; and in Southport: Harold J. Bender.

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

Many of life's failures are people who did not realize how close they were to success when they gave up.
– Thomas Edison