

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2014



THE DEFENDER'S MESSAGE

Fiscal Year 2013 was rough for defenders around the country. Both government and private attorneys felt the financial burden. However, we remain committed to indigent defense and hope this newsletter will reinvigorate your indigent defense practice as well. Since we were unable to bring you a newsletter last fall, we decided to make sure this one was brimming with practical tips, recent updates, and a refresher.

Some practical tips include primers on the admissibility of handwriting exemplars and the implications of the Sixth Amendment right to counsel. A couple of cases the U.S. Supreme Court decided last year are now having their impact felt. To that end, two of our articles focus on those cases: *Descamps* and *Alleyne*. Of course, we have added updates regarding new Federal rules and U.S. Sentencing Guidelines that went into effect this year as well as links to Fourth Circuit and U.S. Supreme Court updates. Finally, as a refresher, we have an in-depth discussion about the psychotherapist-patient privilege.

As always, I join the ZA Editors in hoping that you find this information helpful to your practice. I look forward to seeing you at our upcoming Federal Criminal Practice Seminar, held at the McKimmon Center this Friday, May 16th.

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, Joshua Howard, since the last newsletter. These materials include webinar, seminar and workshop opportunities as well as information regarding the hourly fee and statutory maximum increase and the mileage reimbursement decrease.



Seminar BOLO

We do not have a date for our Fall seminar. Please check the Seminar Information page on our website for updates on this and other upcoming seminars.

PRACTICE TIPS

Indivisible, with Liberty And Justice for All



The United States Supreme Court recently addressed the use of the categorical and modified categorical approaches to convictions involving the Armed Career Criminal Act ("ACCA"). *Descamps v. United States*, 133 S. Ct. 2276 (2013). In *Descamps* (pronounced "day-comp"), the Court held that federal sentencing courts are prohibited from applying the modified categorical approach when the state crime in question "has a single, indivisible set of elements." *Id.* at 2282. Moreover, the conviction cannot be used under the ACCA if that indivisible statute "criminalizes a broader swath of conduct than the relevant generic offense." *Id.* at 2281.

But what constitutes a crime with a single, indivisible set of elements? The opinion states that an indivisible statute is "one not containing alternative elements." *Id.* While the Court's definition is helpful, an example will better aid its understanding.

The generic definition of burglary is an "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). This is an example of an indivisible statute because there are no alternative elements. An example of an

alternative element would be if the statute allowed for burglary to occur in a building *or* an automobile. A statute that contains an alternative element is classified as "divisible." *Descamps*, 133 S. Ct. at 2281. Using this hypothetical statute, the court could use the modified categorical approach to look at a limited class of documents, such as indictments and jury instructions, to see if the burglary occurred in a building or an automobile. This would determine if the facts of the conviction would meet the requirements for generic burglary. *Id.*

In *Descamps*, the defendant had previously plead guilty to a California state burglary charge. Years later, federal prosecutors attempted to use the state burglary conviction to enhance the defendant's sentence under the ACCA. However, the California burglary statute did not require unlawful entry for conviction. *Id.* at 2292. In fact, the government conceded that California's statute could include shoplifters and people invited onto the premises as long as they possessed the requisite felonious intent. *Id.* at 2283.

The Court held that California's statute contained indivisible elements, and therefore the modified categorical approach could not be employed. The Court rejected the use of the modified categorical approach even though a conviction under California's statute could potentially include a fact scenario that fits the generic burglary definition. The Court reasoned that because the state did not need to prove that an offender broke and entered in order to obtain a conviction, it cannot serve as a predicate conviction under the ACCA. Furthermore, the Court stated that whether "Descamps did break and enter makes no difference" and "whether he ever admitted to breaking and entering is irrelevant." *Id.* at 2286. The Court reaffirmed that the modified categorical approach can *only* be used on statutes with alternative elements to determine if the facts actually met the generic definition of the corresponding statute.

The next question is whether the *Descamps* decision applies retroactively to previous applications of the modified categorical approach to indivisible statutes. If a U.S. Supreme Court case creates a new criminal rule after a petitioner's case became final, post-conviction relief petitioners generally cannot benefit from the new rule because it was not the law when the decision became final. However, for federal

habeas purposes, if a new U.S. Supreme Court case merely applies an existing rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final. *Taylor*, 529 U.S. at 390–91.

The language in the *Descamps* decision strongly suggests that it is applying an existing rule to a particular set of facts. The Court stated that “our caselaw explaining the categorical approach and its ‘modified’ counterpart all but resolves this case.” *Descamps*, 133 S. Ct. at 2283. Furthermore, the Court stated that it has only ever allowed the modified categorical approach to be applied when a defendant was convicted of violating a divisible statute. *Id.* at 2285. Therefore, it is likely that the *Descamps* decision could be used retroactively for federal habeas purposes to challenge a sentencing enhancement under the ACCA when the modified categorical approach was used to examine a state conviction for an indivisible statute.

Many thanks to Patrick Kuchyt for contributing these helpful tips. Patrick is a rising-third year law student at the Campbell University School of Law and was an extern in the FPD office during the Spring of 2014.



Update on *Alleyne v. United States*

Last summer, the U.S. Supreme Court decided *Alleyne v. United States*, 133 S. Ct. 2151 (2013) (which overruled *Harris v. United States*, 536 U.S. 545 (2002)), holding that facts that raise the statutory mandatory minimum for a crime are considered elements and should be determined by a jury. In *Alleyne*, the defendant was convicted by a jury of using or carrying a firearm, but not brandishing a firearm. *Id.* at 2156. However, at sentencing, the district court found by a preponderance of the evidence that the firearm had been brandished and applied the seven year mandatory minimum sentence. *Id.* The Fourth Circuit affirmed the sentencing decision, citing *Harris* as the authority. *Id.* Ultimately, the U.S. Supreme Court decided that *Harris* was inconsistent with its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* In so holding,

the Court found that the range attached to a particular crime is the penalty; therefore, a change in either the minimum or the maximum alters the penalty and creates a new offense. *Id.* at 2160.

The Court in *Alleyne* also noted the exception for prior convictions that was established by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Id.* at n.1. Since the parties were not contesting *Almendarez-Torres*, the Court declined to address the validity of that case. *Id.* Therefore, the rule in *Alleyne* stands as any fact, except prior convictions, that increase the statutory minimum or maximum sentence must be found by a jury, rather than a judge at sentencing. *Id.* at 2155. Practitioners are advised to continue to watch developing case law, and to preserve the issue of prior convictions should the Court decide to revisit *Almandarez-Torres*.

Many thanks to Katie Corpening for contributing these helpful tips. Katie is a 2014 graduate from Campbell University School of Law (congratulations!) and was an intern in the FPD office during the Summer of 2013.



The Basics of the Psychotherapist-Patient Privilege in Federal Courts



In recent years, there has been a marked increase in the number of people who seek mental health treatment from psychotherapists. Whether the treatment provider is a psychiatrist, psychologist, or sometimes even a social worker, communications between the patient and the treatment provider are often privileged in federal court. Many criminal defendants today have mental health issues that are central to their cases, and often they are subjected to mental health treatment as a condition of probation, pretrial release, or supervised release. When the therapy is court ordered, the claim of psychotherapist-patient privilege can become less successful, though not always. This article provides a basic refresher on the psychotherapist-patient privilege and its

operation under federal law so that you will be best equipped to zealously represent clients who are undergoing mental health treatment.

Under federal law, privileges are not expressly set out in the Federal Rules of Evidence, but rather are governed by the common law as it is interpreted by federal courts. FED. R. EVID. 501. Prior to its recognition by the Supreme Court in *Jaffee v. Redmond*, the psychotherapist-patient privilege existed by statute in all fifty states. 518 U.S. 1, 12–13 (1996). In *Jaffee*, the Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.” *Id.* at 15. The Court recognized that there was a need for a confidential atmosphere of trust between the patient and her therapist; the mere possibility that the patient’s admissions to the therapist would be disclosed would significantly impede psychological treatment.

Although the U.S. Supreme Court recognized the privilege under federal law in *Jaffee*, it expressly left the task of defining the contours of the privilege up to the lower courts. *Id.* at 18. The Fourth Circuit has recognized that the psychotherapist-patient privilege exists in criminal cases. *See United States v. Squillacote*, 221 F.3d 542, 559 (4th Cir. 2000). In order to invoke the psychotherapist-patient privilege to protect her communications, the defendant bears the burden of showing that: (1) the therapist she saw is a licensed psychotherapist; (2) her communications to the therapist were confidential; and (3) that those communications were made during the course of diagnosis or treatment. *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir. 2005).

Confidential Communications

The patient’s statements to the psychotherapist must be confidential in order for the privilege to apply. Therefore, if the patient knows that the psychotherapist is going to convey what the patient has said in a session to third parties, the psychotherapist-patient privilege does not apply. *See United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008). This element comes under scrutiny when there is any type of compulsory therapy. Typically, these mandated therapy sessions carry a requirement that the patient sign a form allowing disclosure of the content of the

sessions to the entity mandating the therapy (whether it be a municipal government, court, probation, or otherwise). When the patient has read and signed such a form, the patient knows that her statements will not be confidential, and thus there is no claim of psychotherapist-patient privilege available.

Statements Made in the Course of Diagnosis or Treatment

Additionally, in order for the psychotherapist-patient privilege to apply, the patient’s statements to the therapist must be made during the course of diagnosis or treatment. This is “a factual determination that rests upon consideration of the totality of the circumstances.” *Romo*, 413 F.3d at 1047. Some important factors in the analysis include the historical nature of the relationship between the patient and therapist, the patient’s purposes in making the statements, and whether the patient explicitly requested or the therapist explicitly provided mental health services. *Id.* Statements made to a therapist may not be privileged on the sole basis that the therapist has previously provided mental health care to the patient; the therapist must be providing mental health care in the particular meeting when the statement was made. *Id.*

In the event that you would like to get your client examined or evaluated by a psychotherapist to provide legal advice regarding your client’s defense, the results would likely not be protected under the psychotherapist-patient privilege. This is because the client would likely not have entered into a treatment relationship with the therapist. There may be room for an argument that the psychotherapist-patient privilege exists, depending on the specific facts and circumstances, but a one-time examination would likely need other grounds to be privileged, and thus, not discoverable. Such grounds can exist in attorney-client privilege. *See United States v. Alvarez*, 519 F.2d 1036, 1045–47 (3d Cir. 1975) (“The effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting. . . . [when] the defendant does not call the expert [as a witness] the same privilege applies with respect to communications from the defendant as applies to such

communications to the attorney himself.”).

Waiver

The U.S. Supreme Court in *Jaffee* made clear in a footnote that “[l]ike other testimonial privileges, the patient may of course waive the protection.” 518 U.S. at 15 n.14. Like any other privilege, it is commonly understood that the party asserting waiver of the privilege has the burden of proving that it has been waived. Again, like waiver of other privileges, waiver of the psychotherapist-patient privilege can be express or implied.

Express waivers in writing are typically easy to identify, and are not usually subject to dispute. If a patient authorizes disclosure of a previously confidential communication, it ceases to be confidential and therefore ceases to be privileged. Implied waiver of the psychotherapist-patient privilege can occur if a party puts her “mental state or condition at issue in the lawsuit as an element of a claim or defense.” *Fields v. West Virginia State Police*, 264 F.R.D. 260, 263B64 (S.D.W. Va. 2010).

Understanding the psychotherapist-patient privilege in federal court is critical to representing any clients who have been treated for mental health conditions, either on their own or as a result of a court order. It is important to know what potential statements your client has made to mental health professionals, and whether assertion of a defense may imply waiver of the privilege. With more and more clients having attended mental health treatment, a firm grasp on the psychotherapist-patient privilege is critical to being a zealous advocate.

Many thanks to Philip Olivier for contributing these helpful tips. Philip is a 2014 graduate from Campbell University School of Law (congratulations!) and was an intern in the FPD office during the Summer of 2013.



Admissibility of Handwriting Exemplars

The Fifth Amendment protects an accused from being compelled to testify against himself or provide testimonial and communicative evidence.



This protection often fails to extend to compelled submissions of handwriting exemplars, as they are treated as non-testimonial hearsay. However, with a careful eye towards how the exemplars are taken and used, and an understanding of the reliability of handwriting comparison, defense counsel may be able to challenge the admissibility of handwriting evidence.

Handwriting exemplars can be testimonial in nature

It is well established that the Fifth Amendment privilege against self-incrimination does not apply to non-testimonial evidence, particularly physical evidence. Handwriting exemplars fall under this non-testimonial category when used as an identifying physical characteristic, and may be used *only* for comparison purposes. See *United States v. Mara*, 410 U.S. 19, 22 (1973).

Once the government extends the use of these exemplars beyond physical identification, however, the privilege can be asserted, as this evidence now has become testimonial in nature. The *Mara* Court warned “if the Government should seek more than the physical characteristics of the witness’ handwriting-if, for example, it should seek to obtain written answers to incriminating questions or signature on an incriminating statement-then, of course, the witness could assert his privilege from compulsory self-incrimination.” *Id.* at n.2. Testimonial uses include the government’s request for a handwriting sample by dictation in order to discover spelling choice; handwriting samples obtained by dictation that reveal a defendant’s cognitive ability; and requiring a defendant to complete a handwriting sample requiring anything more than a “minimal thought process.” *United States v. Campbell*, 732 F.2d 1017, 1021 (1st Cir. 1984); *United States v. Wade*, 1995 WL 464908, *2 (S.D.N.Y. 1995); *Matter of Special Fed. Grand Jury Empanelled Oct. 31, 1985*, 809 F.2d 1023, 1026-27 (3d Cir. 1987).

The reliability of handwriting comparison

After *Daubert* and *Kumho Tire Co., Ltd*, comparisons of non-testimonial handwriting samples must be both relevant and reliable. Therefore, a court should consider the following factors: “1) whether the particular scientific [or technical] theory ‘can be and has been tested’; 2) whether the

theory 'has been subjected to peer review and publication'; 3) the 'known or potential rate of error'; 4) the 'existence and maintenance of standards controlling the technique's operation'; and 5) whether the technique has achieved 'general acceptance' in the relevant scientific or expert community." *United States v. Crisp*, 324 F.3d 261, 266 (4th Cir. 2003) (quoting *Daubert*, 509 U.S. at 593-94.).

The Fourth Circuit, in *Crisp*, joined the Third, Sixth, Eighth, and Eleventh Circuits in finding handwriting comparisons reliable under the *Daubert* standard. For the *Crisp* court, "handwriting comparison analysis has achieved widespread and lasting acceptance in the expert community." *Id.* at 271. Some district courts, however, have rejected handwriting evidence as unreliable. See *United States v. Hines*, 55 F. Supp. 2d 62, 68 (D. Mass. 1999); see also *United States v. Saelee*, 162 F.Supp.2d 1097, 1102-03 (D. Alaska 2001), *United States v. Lewis*, 220 F.Supp.2d 548, 555 (S.D. W.Va. 2002), and *United States v. Brewer*, 2002 WL 596365 (N.D. Ill. 2002). The *Hines* court found handwriting analysis unreliable, as there has been "no meaningful reliability or validity testing," "no peer review," and is not generally accepted by a "financially disinterested independent community." 55 F. Supp. 2d at 68.

Conclusion

Handwriting exemplars that require more than a minimal thought process and reveal an accused's cognitive ability are testimonial in nature, and therefore should be challenged under the Fifth Amendment. Additionally, while handwriting comparison of non-testimonial exemplars is reliable in the Fourth Circuit, other courts disagree, leaving the possibility for further development in this area. Accordingly, there is room for defense counsel to challenge the admissibility and reliability of this evidence.

Many thanks to Molly Hilburn-Holt for contributing these helpful tips. Molly is a 2014 graduate from Campbell University School of Law (congratulations!) and was an intern in the FPD office during the Summer of 2013.



Primer: Sixth Amendment Right to Counsel



Criminal cases are often decided by a suspect's statements in a police interrogation. While many police interrogations occur before a lawyer is appointed, they can also happen after a lawyer's appointment. This article examines the Sixth Amendment right to counsel and the rules that apply to police interrogations after a lawyer has been appointed.

The Sixth Amendment right to counsel guarantees counsel at all critical stages of a prosecution, including police interrogations. See *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). This right attaches to any crime that might lead to actual imprisonment. See *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). The Sixth Amendment goes into effect when formal criminal proceedings (such as an indictment, arraignment, preliminary hearing, etc.) begin against a defendant. See *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

Unlike Fifth Amendment rights, the Sixth Amendment right to counsel is offense specific, which means it only applies to the crime formally charged against the defendant. See *United States v. Alvarado*, 440 F.3d 191, 194 (4th Cir. 2006). Thus, the government does not violate the Sixth Amendment by interrogating a suspect about uncharged crimes. See *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991).

If a suspect is questioned about an uncharged crime, the Supreme Court of the United States has used the *Blockburger* test, which is a double jeopardy test, to determine if the uncharged crime constitutes the same offense as the one to which the Sixth Amendment right attached. See *Tex. v. Cobb*, 532 U.S. 162, 173 (2001). The *Blockburger* test states that two crimes are not the same offense if their elements require proof of different facts. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). The Fourth Circuit has also created five factors to apply when using the *Blockburger* test: (1) The time periods covered by the alleged conspiracies; (2) the places where the conspiracies allegedly occurred; (3) the people charged as coconspirators; (4) the acts allegedly committed in furtherance of the conspiracies, or any other descriptions of the

offenses that indicate the nature and scope of the crimes; and (5) the statutes allegedly violated. *Alvarado*, 440 F.3d at 194. Furthermore, federal and state crimes never qualify as the same offenses because they come from different sovereigns. *Id.*

The government violates the Sixth Amendment when it seeks to admit statements elicited from a defendant in absence of counsel. *See Massiah v. United States*, 377 U.S. 201, 206 (1964). *See also United States v. Henry*, 447 U.S. 264, 274 (1980) (holding that the government violates the Sixth Amendment when it intentionally creates a situation likely to induce the defendant to make an incriminating statement without the assistance of counsel). The remedy for this violation is that any incriminating statement related to the offense to which the right is attached is inadmissible. *See Maine v. Moulton*, 474 U.S. 159, 180 (1985). The Sixth Amendment right to counsel, however, does not exclude physical evidence that is discovered as a result of any statements made during an illegal interrogation. *See Massiah*, 377 U.S. at 206-207.

The Sixth Amendment right to counsel may be waived. *Montejo*, 556 U.S. at 786. The waiver has to be voluntary, knowing, and intelligent. *Id.* Further, counsel does not have to be present for the waiver. *Id.* The police only have to read a defendant his or her *Miranda* rights in order to ensure the waiver is knowing and intelligent before the police can question the defendant without counsel present. *Id.* at 795-96. Since *Miranda* rights can be used to secure a Sixth Amendment waiver, the *Edwards* rule protects defendants after an interrogation begins. *Id.* According to *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), when a defendant requests counsel during an interrogation, the police must stop the interrogation until counsel is present. *Id.* at 787.

As the case law makes clear, the police can interrogate a defendant without counsel present after the Sixth Amendment right to counsel has attached if the interrogation is not related to the crime charged or the police secure an effective waiver. Therefore, practitioners must be vigilant about the police interrogating clients after the Sixth Amendment has attached. Practitioners are advised to (1) carefully review discovery in cases where a police interrogation of the defendant has occurred; (2) examine the cases contained in this article in depth; (3) carefully advise clients about their Sixth Amendment rights; and (4) look for continued developments in this area.

Many thanks to Michael McFarland for contributing these helpful tips. Michael is a rising-third year law student at the Campbell University School of Law and was an extern in the FPD office during the Spring of 2014.



Computer Corner: Don't Let Unsupported Software Leave You Stranded!

Did you know that using unsupported software puts your system and data at risk?

For a hacker, unsupported and widely used software is a logical target. Why is that? When a vendor no longer offers security updates for its software, a hacker knows that an attack will likely be successful wherever the software is in use. Hence, hackers are incentivized to create exploit tools that take advantage of known software vulnerabilities (often slated to be fixed in the vendor-supported version of the software) or even to discover new ones.

What can you do if software you rely upon becomes unsupported? For your personal computer, consider these recommendations:

Upgrade to supported software. Over time, computers running outdated software become increasingly vulnerable as hackers create and share exploit kits. Microsoft, for example, stopped supporting the Windows XP operating system in April 2014 and has repeatedly advised its user base to upgrade as soon as possible.

Replace your computer. Not all hardware is created equal. Often, older computers cannot support newer operating systems and applications. If your computer cannot run a supported version of the software, you may need to replace it. While there is a cost to doing so, hopefully, it is offset by improved computing power and peace-of-mind.

Maintain anti-virus software. Install and maintain up-to-date anti-malware software, and scan your computer for viruses.

While actions can be taken to reduce risk, they cannot replace the benefits of using supported software to reduce overall risk and improve your security. And remember, this advice applies both to applications, such as Adobe Acrobat, and operating systems.

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



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

There were changes to the Federal Rules of Appellate Procedure, Criminal Procedure, and Evidence that went into effect December 1, 2013. A summary of the changes are listed below, and the full text can be found in PDF format at <http://www.uscourts.gov/RulesAndPolicies/rules/current-rules.aspx>.

Appellate Procedure

-Rule 13 (Appeals from the Tax Court) amendment concerns permissive interlocutory appeals from U.S. Tax Court.

-Rule 14 (Applicability of Other Rules to Appeals from the Tax Court) amendment addresses the applicability of the Appellate Rules to both appeals as of right and appeals by permission from the U.S. Tax Court.

-Rule 24 (Proceeding In Forma Pauperis) amendment more accurately characterizes the legal status of the Tax Court as a court where its previous description allowed for confusion whether the Tax Court was a court or an executive branch agency.

-Rule 28 (Briefs) amendment removes the requirement of separate statements of the case and of the facts to reduce confusion and redundancy.

-Rule 28.1 (Cross-Appeals) amendment makes conforming changes (see Rule 28 amendment above) for cross-appeals.

-Form 4 amendments concern applications to proceed in forma pauperis on appeal. The amendments also include technical amendments to bring the form into conformity with changes approved by the Judicial Conference in Fall 1997, but not subsequently transmitted to Congress as a matter of oversight.

Criminal Procedure

-Rule 11 (Pleas) amendment requires a defendant be made aware of potential collateral immigration consequences (such as deportation) to a guilty plea.

-Rule 16 (Discovery and Inspection) amendments are a technical and conforming amendment designed to address what courts correctly treat as "scrivener's error." Clarifies that the 2002 restyling of this rule was not intended to be of any substantive nature with respect to altering the protection afforded to government work product.

Evidence

-Rule 803 (Exceptions to the Rule Against Hearsay - Regardless Whether the Declarant is Available as a Witness) amendment requires actual testimony in place of a currently approved certificate designed to prove that a public record does not exist.

U.S. Sentencing Guideline Amendments

These amendments to the Guidelines went into effect November 1, 2013. The amendments

(and their corresponding U.S.S.G. sections) include:

- Theft of Pre-Retail Medical Products; Trade Secret Offenses (§§ 2B1.1, 2B1.1(b))
- Counterfeit and Adulterated Drugs; Counterfeit Military Parts (§ 2B5.3)
- Taxation (§ 2T1.1)
- Acceptance of Responsibility (two substantive changes) (§ 3E1.1) - This amendment addresses two circuit splits where after the defendant (who demonstrates acceptance and responsibility) receives a 2-level reduction under § 3E1.1(a) is eligible for a third level of reduction under § 3E1.1(b). Whether the court has discretion to deny the third level of reduction, and whether the government has discretion to withhold making a motion based on whether the defendant agrees to waive her right to appeal are both amended.
- Imposition of a Sentence with discretion to run concurrently with or consecutively to other state sentences not yet imposed (§ 5G1.3) - This amendment to the guidelines lends additional support to the Supreme Court's holding that a federal court had discretion to order that a sentence run concurrently with or consecutively to an anticipated, but not yet imposed term of imprisonment. *See Setser v. United States*, 132 S. Ct. 1463 (2012).
- Aiming a Laser at an Aircraft (§ 2A5.2)
- Violation of a Restraining Order (§ 2J1.2)
- Trespassing on Federal Restricted Buildings or Grounds (§§ 2A2.4, 2B2.3)
- Ultralight Aircraft Smuggling Prevention Act (§§ 2D1.1, 2T3.1)
- Interaction between Offense Guidelines in Chapter 2, Part J and Certain Adjustments in Chapter 3, Part C (Adjustments in §§ 3C1.2, 3C1.3, and 3C1.4 apply to § 2J offenses while § 3C1.1 does not)
- Evasion of Export Controls (§ 2M5.1)
- Technical and Stylistic Changes (§§ 2B1.1, 2D1.1, third, it makes several stylistic revisions in the Guidelines Manual to change "court martial" to "court-martial." The changes are not substantive.)

Attorneys are advised to review and familiarize themselves with the full text of these provisions as they provide policy statements that may be helpful during sentencing. For updates on the U.S. Sentencing Guidelines, visit the Sentencing Commission's website at <http://www.ussc.gov/guidelines-manual/guidelines-manual> .

Many thanks to Glen Blumhardt for contributing these helpful tips. Glen is a rising-third year law student at the Campbell University School of Law and was an extern in the FPD office during the Summer of 2013.



LOCAL NEWS

EDNC News



The FPD welcomes U.S. Magistrate Judge Kimberly A. Swank, who was appointed to the bench on September 10, 2013. We extend a warm welcome on her behalf of this office and the panel attorneys from this district.

We send our best wishes to retired U.S. Magistrate Judge William A. Webb, who retired from his position on May 2, 2014.

On August 19, 2013, a ceremony was held to present the portrait of the late U.S. Magistrate Judge David W. Daniel. The portrait was commissioned by Richard C. Nelson; it resides in the U.S. Courthouse Annex in Greenville, NC.



FPD Office News

We bid a fond farewell to several attorneys: Bettina Roberts, Raymond Tarlton, and Andrea Barnes. We also bid a fond farewell to legal assistant, Sylvia Erickson, who we also congratulate as she will soon join the U.S. Probation Office as a clerk in Fayetteville, NC.

E.B. Jackson who, after 15 years of service at the Federal Public Defender's Office and a long career with the state, retired on October 1, 2013.

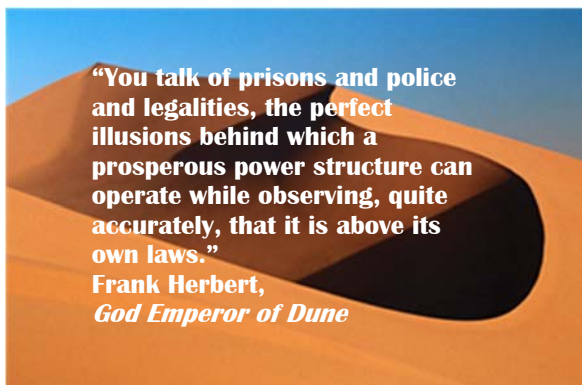
We are pleased to welcome two new legal assistants, April Bunn and Jennifer Carte, who started with our office on May 12, 2014.

Congratulations to Kat Shea and Mike Dowling on the birth of Frances Shea Dowling on November 29, 2013; and to Temicka and Torian Eubanks on the birth of Tori Danielle on December 23, 2013.

*Panel News*

We are pleased to welcome the following attorneys who are training to become panel attorneys: in Cary: Craig M. Cooley; in Raleigh: Karen Griffin; in Warsaw: Hayes Sheffield Ludlum; and in Wilmington: Kate Miller.

The following are new panel attorneys: in New Bern: Richard E. Rowe; in Raleigh: Daniel M. Blau, Damon Chetson, William Michael Dowling, and Raymond C. Tarlton; and in Wilmington: James Blanton.



CALLING ALL READERS!



Is there a topic you would like to see covered in the ZA?

Do you have a suggestion for a news article or a featured section in the ZA?

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

Laura Wasco

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