THE ZEALOUS

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2015

THE DEFENDER'S MESSAGE

In this edition of the *Zealous Advocate*, we recap legal issues and events from the past year. First, we highlight *United States v. Valdovinos*, which features one of the more interesting and helpful Fourth Circuit dissents we have recently read. Additionally, we round-up recent U.S. Supreme Court cases concerning criminal procedure. We also consider the evolving jurisprudence on raising excessive force claims in suppression motions. Finally, we fill you in on the latest legal updates including our comprehensive analysis of the most recent retroactive drug amendment; New Rules and Federal Sentencing Guidelines; and Fourth Circuit and U.S. Supreme Court updates linked on our website.

As always, the Editors and I hope this edition of the *Zealous Advocate* is helpful in your criminal practice, and we look forward to seeing you at our annual Spring Federal Criminal Practice Seminar on Thursday and Friday, March 19th and 20th in Carolina Beach, North Carolina.

Thomas P. McNamara
Federal Public Defender

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THE ZEALOUS ADVOCATE

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PANEL ATTORNEY INFORMATION

Previously Distributed Materials

Mailings to the panel over the last several months include numerous training opportunities; information about hourly rate and mileage reimbursement rates; information on billing paralegal services; proposed NC State Bar Ethics opinion; information about Drug Minus 2 and § 4246 cases.

Seminar BOLO

Please check the Seminar Information page on our website for updates on upcoming seminars.

PRACTICE TIPS

EDITORIAL: United States v. Valdovinos

In July 2014, the Fourth Circuit issued a remarkable opinion in *United States v. Valdovinos*. 760 F.3d 322 (4th Cir. 2014) The case contained both an interesting legal issue and a memorable dissent by Senior Circuit Judge Andre M. Davis. Judge Davis' opinion offers a number of avenues for thinking about 18 U.S.C. § 3553(a) as we present our arguments at sentencing hearings.

Valdovinos involved a state guilty plea to heroin trafficking, a North Carolina Class G felony. With his prior record level, Valdovino's maximum sentence was sixteen months. He pled, however, pursuant to an agreement that "established a binding sentencing range" of only ten to twelve months. "Binding" meant that once the judge decided to accept the plea, the agreement bound the judge as well as the parties to the lower sentencing range. Valdovinos in fact received a term of ten to twelve months, and, after he served it, the United States deported him to Mexico.

You know what happened next.

After Valdovinos pled guilty to illegal reentry, his presentence report included a twelve-level hit on the ground that he had a prior conviction for a "felony drug trafficking offense"–that being the North Carolina conviction for heroin dealing. Valdovinos objected, arguing that because of the binding plea agreement, *his crime* had not been "punishable by more than one year" in prison. The district court overruled the objection, and the issue went to the Fourth Circuit.

The panel's majority opinion characterized Valdovino's argument as "clever, but unpersuasive." It said North Carolina crimes are punishable based upon what structured sentencing prescribes and not the punishment provided for in a plea agreement. In Valdovino's case, the Court of Appeals continued, the Structured Sentencing Act prescribed a maximum imprisonment term of sixteen months, a "felony" for federal purposes. "That the sentence ultimately imposed pursuant to his plea deal was 10 to 12 months' imprisonment is irrelevant," the Court concluded.

Judge Davis disagreed with the majority's legal analysis, but, seemingly of more importance to him, he disagreed with the majority's decision to select the harsher of the two possible outcomes *Valdovinos* presented. The "disagreement as to the outcome in this case," Judge Davis wrote, "stems . . . less over the content and application of relevant precedent and more from a fundamental disagreement regarding our role as arbiters of a flailing federal sentencing regime." "Where, as here," he continued, "we have been presented with a *choice* in how to interpret the interstices of federal sentencing law, and where one choice would exacerbate the harmful effects of over-incarceration that every cadre of social and political scientists (as well as an

ever-growing cohort of elected and appointed officials, state and federal, as well as respected members of the federal judiciary) has recognized as unjust and inhumane, as well as expensive and ineffectual, this insight can and should inform our analysis." (Emphasis in the original).

From there, Judge Davis argues at length that the American criminal justice system's fetish for incarceration has been both a practical and a moral failure. Some of the criticisms he puts forth are by now familiar and pretty-well indisputable. Perhaps the most interesting portion of his discussion is his focus on immigration cases. Judge Davis provides some statistics (for example, that the average federal sentence for non-citizens is 85 months) that he personally solicited from the Bureau of Prisons.

It is this first portion of Judge Davis' dissent that contains a number of arguments, backed up with citations to sources, that are useful for § 3553(a) purposes. He writes, for instance, that no "conclusive data" demonstrates that lower crime rates result from "severe punishment." In fact, Judge Davis says, "[t]he data are, at best, mixed, and there is compelling evidence that severe prison sentences actually make reoffending more likely when offenders reenter society." In short, does a defendant getting hammered really further deterrence or the protection of the public?

After finishing his discussion of the failures of a too-tough-on-crime approach–a discussion that runs some nine pages in the slip opinion–Judge Davis begins his analysis of the specific issue in Valdovinos' appeal. "Any reader who has come this far has my deep appreciation," he begins. Judge Davis then takes on the majority's insistence that *United States v. Simmons* and *Carachuri-Rosendo v. Holder* dictate the result of Valdovinos' case. No, they don't, he argues.

Judge Davis ultimately insists that the panel had "a *choice* in fashioning our rule of decision here, as judges sometimes do." (Emphasis in the original). After discussing the considerations that should inform that choice, he calls the "truly baffling question" why, when an appellate court has a choice in the interpretation it puts on a sentencing law, anyone "would choose to exacerbate, rather than mitigate, the harmful effects of our nation's 'throw-away-the-key' approach to incarceration[.]" "Where there are choices that can be made that would permit progress in the individual case without doing harm to the transcendent legal infrastructure rooted in deductive reasoning," a court "can and should choose that path." Sometimes, Judge Davis concludes, "it requires so little of us to achieve so much."

If you haven't read *Valdovinos*, you should.

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

Crim Pro Round-Up: I [Think] I Know My Rights!

Imagine this is your client's story: Last year, police stopped a car in Raleigh at a routine DWI checkpoint. After the driver stepped out, an empty beer can rolled out of the car and rested at the officers' feet. Probable cause? Check. While the driver was being questioned, a backseat passenger became irate. Furious that her constitutional rights were being violated (they were not), she began yelling obscenities at the officers. In a moment of drunken outrage, she threw a candy bar out of the window, promptly hitting one officer in the face.

We forget how interesting criminal procedure can be. But what if the officers had wanted to take a blood sample of the driver in this case? If this was not a routine checkpoint, would an anonymous tip have been enough for the police to stop the car? Under what circumstances could the police search the driver's cell phone incident to arrest, presumably to find evidence of the beer and candy purchase?

Over the past year, the United States Supreme Court has answered some of these questions. In *Missouri v. McNeely*, the court set forth the analysis that should be used when determining if a warrantless and forced blood sample is valid under the Fourth Amendment. 133 S.Ct. 1552 (2013). In *Navarette v. California*, the Court held that an anonymous tip alone may be sufficient to create reasonable suspicion to conduct a traffic stop. 134 S.Ct. 1683 (2014). Finally, in *Riley v. California*, the court held that police may not, without a warrant, search the contents of a cell phone incident to arrest. 134 S.Ct. 2473 (2014).

Missouri v. McNeely

The rule we get from *McNeely* is that the natural dissipation of alcohol in the blood does not create a per se exigency that justifies taking a warrantless and nonconsensual blood sample in all drunk driving cases. 133 S.Ct. at 1556. Rather, an exigency "must be determined case-by-case based on the totality of the circumstances." *Id.* An exigency likely exists when there has been a car accident. *See Schmerber v. California*, 384 U.S. 757, 771 (1966). Under such circumstances, time might be needed to investigate the crime scene and take the accused to the hospital for treatment instead of obtaining a warrant. *Id.* A key factor is the officer's ability to obtain a warrant within a reasonable timeframe that preserves access to reliable evidence. *McNeely*, 133 S.Ct. at 1568. If, under the totality of the circumstances, there was insufficient time to obtain a warrant, the nonconsensual blood draw may be valid.

Navarette v. California

In *Navarette,* the Supreme Court held that an anonymous tip alone may be sufficient grounds to create reasonable suspicion for officers to conduct a traffic stop. 134 S.Ct. at 1686. Prior to this decision, an anonymous tip rarely demonstrated that the informant had sufficient basis of knowledge or veracity to meet the reasonable suspicion standard. *See Alabama v. White*, 496 U.S. 325, 329 (1990). This rare demonstration finally appeared in the form of an anonymous 911 caller who reported that a truck had run the caller off of the road. 134 S.Ct. at 1686. Here, the court found that the anonymous tip created reasonable suspicion that the ongoing crime of drunk driving was occurring. 134 S.Ct. at 1690. *Navarette* did not overrule *White,* which remains good law and should be distinguished from *Navarette* depending on the individual facts of each case.

The reasonable suspicion standard "takes into account 'the totality of the circumstances.'" *Id.* at 1687 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)). In *Navarette*, the anonymous call met this standard for a number of reasons. First, by reporting that she had been run off the road, the caller demonstrated a sufficient basis of knowledge through her eyewitness account. *Id*. Second, since the report was made contemporaneously with the traffic violation, it gave officers sufficient reason to think the caller was telling the truth. *Id*. at 1689. Finally, that a 911 caller's identity may later be identified, and thus discourage false reports, increased the veracity of the call. *Id.*

Riley v. California

The *Riley* Court held that a warrant must

generally be obtained before searching the contents of a cell phone. *Riley*, 134 S.Ct. at 2485. A warrantless search of a cell phone's contents does not fall within the search incident to arrest exception because such a search does not protect officer safety or preserve evidence from destruction. *Id.* at 2483. *See also Chimel v. California*, 395 U.S. 752, 763 (1969). Data on a phone cannot be used to harm officers or effectuate escape. *Id*. at 2485. This concern can be eliminated by a mere physical inspection of the phone for hidden weapons, such as razors. *Id*. Data on a phone is not susceptible to imminent destruction. *Id*. at 2486. To prevent remote wiping or encryption, officers may simple turn the phone off or remove its battery. *Id*. at 2486-88. Officers could also place the phone in a location that protects it from radio waves and prevents encryption. *Id.*

The *Riley* Court recognized that modern phone capabilities and pervasiveness in everyday life increases the privacy interest at stake. *Id.* at 2489-91. The Court did not agree that cell phones are "material indistinguishable" from other physical items. *Id*. at 2488. As Chief Justice Roberts stated, "[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together." *Id*. Therefore, the search incident to arrest exception to the warrant requirement will not apply to cellular phones as it does to physical items.

This past term, we have a mixed bag of the totality of the circumstances and bright line rules. For a warrantless blood draw, the question is whether or not officers had enough time to obtain a warrant under the totality of the circumstances. Thus, *McNeely* is a win for defense counsel in that it eliminates the possibility of a bright line rule. However, *Navarette* is a surprising loss in that, although the totality of the circumstances test remains, it opens the door for officers to conduct a stop based on an anonymous tip that may not be sufficiently reliable. Still, *Riley* is a win for the defense in that it very clearly protects our client's most intimate and personal cellular data. For a search of a cell phone, we have a bright line rule: generally, officers must obtain a warrant.

Other notable criminal procedure cases from the 2014 term include: *Plumhoff v. Rickard*, 134 S.Ct. 2012 (2013) (qualified immunity for the use of deadly force in a high speed chase); *and Fernandez v. California*, 134 S.Ct. 1126 (2014) (co-tenant's consent to search of home). Attorneys are advised to review and familiarize themselves with the full text of these opinions as they contain critical analysis and explanation.

Many thanks to Kimberly Arch for contributing these helpful tips. Kimi is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2014.

Excessive Force & Suppression: Will the Fourth Circuit Adopt an Emerging Judicial Trend?

Your client's case is not looking good. The government's evidence is strong, and your potential defenses are weak. Then, your client reveals that during the arrest he was repeatedly kicked, punched, Tased, or maybe even bitten by a canine. "Now I have something to work with," you think. Well, not necessarily.

Excessive force claims are properly brought as violations of the Fourth Amendment, and are analyzed under a subjective

"reasonableness" standard. *See Graham v. Connor*, 490 U.S. 386 (1989). There is surprisingly little jurisprudence on whether an excessive force claim applies in a defendant's motion to suppress, especially considering the breadth of case law regarding most facets of the Fourth Amendment. Litigation on this subject has been limited because most excessive force claims are brought in proceedings against the offending officer. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.1(d) (5th ed. 2013). Despite this, there is an emerging trend in the circuits towards denying motions to suppress evidence obtained in an otherwise lawful search and seizure that involved law enforcement's exertion of excessive force. *See, e.g.*, *United States v. Collins*, 714 F.3d 540 (7th Cir. 2013) ("evidence legally seized should not should not suppressed based on the use of excessive force collateral to that seizure"); *United States v. Morales*, 385 Fed.Appx. 165, 167 (3d Cir. 2010) ("when viewed in the suppression context..., [an] excessive use of force argument is immaterial"); *United States v. Watson*, 558 F.3d 702 (7th Cir. 2009) (prohibiting the suppression of evidence seized as a result of excessive force); *United States v. Ankeny*, 502 F.3d 829 (9th Cir. 2007); *United States v. Aguilar*, No. 13 CR 184, 2013 WL 6039289 (S.D. Ill. Nov. 12, 2013). This trend seems to have begun with the Seventh Circuit's decision in *Watson*, which has been consistently followed by cases dealing with suppression motions and excessive physical force claims. *Collins*, 714 F.3d at 544 ("If there has been a pattern developing in other circuits on this issue, that pattern has been to implicitly agree with *Watson*."); accord *United States v. Garcia–Hernandez*, 659 F.3d 108, 113–14 (1st Cir. 2011). It remains unclear where the Fourth Circuit will fall when given occasion to analyze this issue.

The U.S. Supreme Court seems to be moving in this direction as well. Although the High Court has not yet examined a case involving excessive force to an individual's body, the Court has addressed excessive force in the context of search and seizure which resulted in excessive property damage. *United States v. Ramirez*, 523 U.S. 65 (1998). Although the two scenarios differ, both can be properly characterized as an exertion of excessive force by law enforcement. The Court has held that "unnecessary or excessive destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." *Id.* at 71. Analogizing this to unnecessary force while searching a person's body, the Court emphasized that excessive force arguments should not affect the admissibility of evidence. In a suppression motion, so long as the search and seizure were lawful, it does not seem to matter whether or not excessive force was used.

The Fourth Circuit has not explicitly examined the effect of excessive force on a suppression motion's success. However, it has analyzed a suppression motion involving evidence tainted by an unreasonable, sexually invasive search and has found that suppression is the appropriate measure in that scenario. *See United States v. Edwards*, 666 F.3d. 877 (4th Cir. 2011). Although this offers some hope for the aforementioned, hypothetical client, it does not necessarily signal that the Fourth Circuit will move in a different direction than the prevailing trend. *Edwards* is unique in that the search itself (which involved a roadside strip search and use of a knife in an unlit area to cut a plastic bag off of the individual's penis) was found unreasonable, while most excessive force claims involve force incident to an otherwise reasonable search and seizure (for example, when force is used to subdue an individual resisting arrest). For a motion to suppress to be granted, the search or seizure itself must be found unreasonable

due to the force, and the evidence will also likely have to survive an assertion of inevitable discovery. *See Edwards*, 666 F.3d at 887 (suggesting that an inevitable discovery argument should have been raised by the government, even though it was not).

An excessive force claim is generally a weak tool in the context of a motion to suppress. Serving to further weaken such claims is an emerging judicial trend towards declaring excessive force claims inapplicable in the suppression context. Because the subject is not often litigated, the trend has been slow to catch on, and it is still unclear what direction the Fourth Circuit will go when it is first confronts the issue.

Many thanks to Taylor Johnson for contributing these helpful tips. Taylor is a third year law student at the University of North Carolina School of Law and was an intern in the FPD office during the Summer of 2014.

A Glitch in the Matrix: Drug Retroactivity

On April 30, 2014, the United States Sentencing Commission submitted to Congress eight proposed amendments to the federal sentencing guidelines that went into effect on November 1, 2014. This amendment changed the way the § 2D1.1 Drug Quantity Table incorporates statutory mandatory minimum penalties for drug trafficking offenses. When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570 (1986), the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. This amendment reduces by two levels the base offense level assigned to the drug quantity that triggers the statutory mandatory minimum penalty, resulting in corresponding guideline ranges that include the mandatory minimum penalties.

For example, under the former guidelines, offenses involving drug quantities that trigger a statutory mandatory minimum of five years were assigned a base offense level of 26, which corresponded to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. This guideline range exceeded the five-year statutory minimum for such offenses by at least three months. Under the current amendment, offenses involving drug quantities that trigger a statutory mandatory minimum of five years are assigned a base offense level of 24, which corresponds to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I. This guideline range includes the five-year (60-month) statutory minimum for such offenses. Of course, a sentencing court cannot impose a sentence below the statutory minimum absent special circumstances, such as when the government has filed a § 5K1.1 motion for substantial assistance, pursuant to 18 U.S.C. § 3553(e) or under Fed. R. Crim. P. 35.

Additionally, the new guideline retains the minimum offense level of 6 and maximum offense level of 38 for most drug types. Finally, the new guideline amendment makes parallel changes to the quantity tables in § 2D1.11, which apply to offenses involving chemical precursors of controlled substances.

The Commission's rationale for adopting this amendment was three-fold. First, the Commission found that setting base offense levels above the mandatory minimum penalties no longer serves its intended purpose of

providing an incentive for defendants to plead guilty or cooperate with authorities. The Commission attributed this to numerous changes to the guidelines over the years, as well as recent experience with similar reductions in base offense levels for cocaine base (crack) offenses. The Commission made special note of the "safety valve" provision under 18 U.S.C. § 3553(f), enacted by Congress in 1994, which allows a sentencing court to impose a sentence below the statutory mandatory minimum if it finds, among other things, that the defendant truthfully provides all information and evidence the defendant has concerning the offense. The former version of the sentencing guidelines incorporated the "safety valve" provision at § 5C1.2 and provided a two-level reduction for qualifying defendants. The Commission also found that the new guideline would not negatively affect the willingness of defendants to plead guilty or cooperate with authorities. This conclusion was based on studies that found no significant difference in the plea rate and rate at which defendants received substantial assistance departures under § 5K1.1 before and after the 2007 amendment that reduced the base offense level for crack cocaine offenses.

Second, the new drug guideline is intended to address the significant overcapacity and costs of the federal prison system. On the whole, federal prisons are 32% over capacity; federal prisons with the highest security are 52% over capacity. Federal prison spending exceeds $6 billion per year and accounts for over 25% of the Department of Justice's budget. The Commission estimates the amendment would affect approximately 70% of drug trafficking offenders sentenced under § 2D1.1 and would reduce their average sentences by 11 months or 17.7%, from 62 months to 51 months. Additionally, the Commission estimated the amendment would reduce the federal prison population by 6,500 inmates over the next five years. The Commission therefore considered the amendment to be consistent with its mandate under 28 U.S.C. § 994(g), which states that the sentencing guidelines "shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission."

Third, the Commission believed the amendment would not jeopardize public safety. The Commission based this conclusion in large part on studies that compared the recidivism rates for offenders who were released early under the 2007 crack cocaine amendments with the recidivism rates for offenders who served their full sentences. These studies found that the difference in recidivism rates was not statistically significant, suggesting that modest reductions in drug penalties do not increase the risk of reoffending.

On July 18, 2014, the Commission voted unanimously to grant retroactive application of the then-proposed drug guideline amendment to all offenders, subject to a special instruction in the application notes that reduced sentences shall not take effect until November 1, 2015, or later. Accordingly, no offender will be released until a federal judge reviews the case and determines that the offender is not a risk to public safety and that release is otherwise appropriate.

The Commission voted in favor of retroactive application in large part to further the goal of reducing overcapacity and costs in the federal prison system. The Commission estimated that approximately 46,000 inmates would be eligible for reduced sentences, with close to 8,000 eligible for release in November 2015. Additionally, sentences should be reduced by an average of 25 months or 18.8%.

Several organizations, such as the Fraternal Order of Police, the National Association of Assistant United States Attorneys, and the National Narcotics Officers' Associations' Coalition, oppose retroactivity based on concerns

for public safety. The Commission reasoned that delaying the amendment's implementation would address public safety concerns in three ways. First, it would allow the government and judges more time to obtain and review the information necessary to assess an inmate's risk to public safety. Second, delayed implementation would give the Bureau of Prisons more time to ensure inmates have access to transitional services geared toward successful reentry into society. Third, it would allow the Office of Probation and Pretrial Services more time to hire and train additional probation officers in preparation for supervising additional offenders.

In the Eastern District of North Carolina, a standing order was issued appointing the Federal Public Defender's Office to represent inmates sentenced in this district. Accordingly, if you or your client suspect that he or she may be eligible for relief under the new amendment, please contact Laura Wasco to ensure the client's case will be reviewed.

Many thanks to Ruffin Sykes for contributing these helpful tips. Ruffin is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2014.

LEGAL UPDATES

4th Circuit Update

For the latest Fourth Circuit update, please visit our website at http://nce.fd.org/ and go to "Publications." For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check http://circuit4.blogspot.com. For daily published Fourth Circuit opinions, visit http://www.ca4.uscourts.gov/opinions/daily-opinions .

Supreme Court Update

For up-to-date summaries and commentary on Supreme Court criminal cases and federal law, check http://ussc.blogspot.com.

New Rules and Guideline Amendments

Changes to the Federal Rules of Appellate Procedure, Criminal Procedure, and Evidence took effect on December 1, 2014.

Appellate Procedure

-Rule 6 (Appeal in Bankruptcy Cases) amendment concerns appeals from a bankruptcy court to a court of appeals.

Criminal Procedure

-Rule 5 (Initial Appearance-Procedure in a Felony Case) amendment concerns defendants who are foreign nationals and requires consular notification.

-Rule 6 (The Grand Jury- Recording and Disclosing the Proceedings- Exceptions) amendment replaces the citation to 50 U.S.C. § 401a with a citation to 50 U.S.C. § 3003.

-Rule 12 (Pleadings and Pretrial Motions) amendment clarifies which motions must be raised before trial and addresses deadlines for pretrial motions.

-Rule 34 (Arresting Judgment) amendment conforms Rule 34 to Rule 12(b) (Pretrial Motions).

-Rule 58 (Petty Offenses and Other Misdemeanors-Pretrial Procedure) amendment concerns detained foreign nationals and requires consular notification.

Evidence

-Rule 801(d)(1)(B) (Statements That Are Not Hearsay- A Declarant-Witness's Prior Statement) amendment expands the hearsay exemption for certain prior consistent statements.

-Rule 803(6) (Exceptions to the Rule Against Hearsay- Regardless of Whether the Declarant is Available as a Witness- Records of a Regularly Conducted Activity) amendment addresses which party bears the burden to establish the untrustworthiness of the business or public records.

-**Rule 803(7)** (Exceptions to the Rule Against Hearsay- Regardless of Whether the Declarant is Available as a Witness- Absence of a Record of a Regularly Conducted Activity) amendment addresses which party bears the burden to establish the untrustworthiness of the business or public records.

-Rule 803(8) (Exceptions to the Rule Against Hearsay- Regardless of Whether the Declarant is Available as a Witness- Public Records) amendment addresses which party bears the burden to establish the untrustworthiness of the business or public records.

U.S. Sentencing Guideline Amendments

These amendments to the Guidelines went into effect November 1, 2014. The amendments (and their corresponding U.S.S.G. sections) include:

-**Reduction in Term of Imprisonment as a Result of Amended Guideline Range** (§ 1B1.10) - The amendment specifies that if there is a statutorily required minimum sentence, and the court imposed a sentence below the statutorily required minimum sentence pursuant to the defendant's substantial assistance to authorities, then the amended guideline range shall be determined without regard to § 5G1.1 and § 5G1.2.

-**Violence Against Women Reauthorization Act** (§ 2A2.2, § 2A2.3, § 2A6.2, § 2B1.5, § 2B2.1, § 2H3.1, § 2K1.4, § 5D1.1, Appendix A) -This amendment provides new and expanded criminal offenses and increased penalties for crimes pertaining to assault, sexual abuse, stalking, domestic violence, and human trafficking.

-**Drugs** (§ 2D1.1, § 2D1.2, § 2D1.11, § 3D1.5, § 5G1.3) - This amendment revises the offense levels in the drug quantity tables.

-**Marijuana Cultivation Operation** (§ 2D1.1, § 2D1.14, § 3B1.4, § 3C1.1 – This amendment provides an increase in punishment for defendants involved in marijuana cultivation operations on state or federal land or while trespassing on tribal or private land.

-**Felon in Possession** (§ 2K2.1) - This amendment addresses cases in which the defendant is convicted of a firearms offense and also possessed a firearm in connection with another offense (such as murder or robbery).

-**Alien Smuggling** (§ 2L1.1) – This amendment provides examples of the conduct to which § 2L1.1(b)(6) applies.

-**Supervised Release** (§ 5D1.2)- This amendment resolves a circuit split about calculating the guideline term of supervised release when there is a statutory minimum term of supervised release.

-**Other Terms of Imprisonment** (§ 2L1.2, § 2X5.1, § 5G1.3, § 5K2.23) – This amendment addresses cases in which the defendant is subject to another term of imprisonment (such as an undischarged term of imprisonment or an anticipated term of imprisonment).

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/amendments-guidelines-manual.

Many thanks to Rachel Brunswig for contributing these helpful tips. Rachel is a second year law student at the University of North Carolina School of Law and was an intern in the FPD office during the Summer of 2014.

LOCAL NEWS

EDNC News

The FPD welcomes U.S. Magistrate Judge Robert T. Numbers, II, who was appointed to the bench on December 8, 2014. We extend a warm welcome on behalf of this office and the panel attorneys from this district.

FPD Office News

We mourn the loss of long-time legal secretary Vivian (Bee) Hardy-Richardson, who passed away on November 20, 2014 after a brave battle with cancer.

We are pleased to welcome two new Research and Writing Attorneys, Marshall Ellis and Jennifer Leisten, as well as new legal assistant, Wendy Lotfi.

Congratulations to Jay and Jennifer Todd on the birth of James (Jayme) Edward III in February, 2015.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys: Greenville: Ashley Kevitt; Goldsboro: Keith David Rouse; Scotland Neck: Jamal Montez Summey; Wilmington: Julia Catherine Boseman; Raleigh: Jeffrey P. Boykin, Howard Johnson Cummings, and Clarence Colon Willoughby.

The following are new panel attorneys: Fayetteville: H. Gerald Beaver; Warsaw: Hayes Sheffield Ludlam; Raleigh: Elizabeth Dean Hopkins, Mark A. Perry, Jamie Vavonese, and Camden R. Webb.

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:*

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