

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2018



The Defender's Message

If the last few weeks have proven anything, it's that neither wind, nor rain, nor HURRICANE can slow down CJA training in the Eastern District of North Carolina. While Hurricane Florence forced us to relocate our annual two-day seminar from the beach to Raleigh, we are happy to report that we will be able to hold the program as planned on the original dates - October 18th and 19th at North Carolina State University's McKimmon Center. I am very grateful for the folks in our office who scrambled to make this happen because this promises to be a unique and special seminar.

Following up on requests from the panel, this seminar is focused exclusively on practical trial skills, and we have lined up an all-star slate of trial lawyers and trainers as speakers. Similarly, in this edition of the *Zealous Advocate*, we discuss practical concepts such as codefendant confessions and the Confrontation Clause as well as encouraging defenders to challenge the plain smell doctrine when your case does not seem to pass the usual smell test. We also provide tips for preserving double-jeopardy objections as a result of *Gamble v. United States*, give suggestions on representing clients using the affirmative duress defense, and finally, explore cell cite location information and warrant requirements from the Supreme Court's recent *Carpenter* decision.

As always, I want to thank our student contributors and editors for all their hard work in putting this newsletter together and join them in hoping that you will find all the information it contains to be beneficial to you and your practice. While "McKimmon Beach" may not be quite as scenic or relaxing as Atlantic Beach, I know the program will be every bit as good. I look forward to seeing you all at the McKimmon Center this Thursday and Friday.

Alan DuBois
Federal Public Defender



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Reminder

Judge Howard's judicial assistant, Carol Leccesse, retired recently. Accordingly, Judge Howard's chambers has changed the way character letters should be sent for upcoming sentencings. Character letters should no longer be sent via post mail or facsimile.

All character letters should instead be emailed directly to Judge Howard's Criminal Case Manager and Courtroom Deputy, Lisa Lee, at her email address. She will ensure the letters are submitted to Judge Howard. When emailing character letters, please make sure that the subject line reads "Character Letters - Name of Defendant - Case #". If you have questions, please contact April Bunn.

Seminar BOLOs

Our Fall 2018 seminar, set for October 18-19, will take place at N.C. State's McKimmon Center in Raleigh. We look forward to seeing you there!

The U.S. Probation Office Annual Guideline Seminar will be held November 8, 2018 at N.C. State's McKimmon Center in Raleigh. See our website for more information.

Please note that our Spring 2019 Seminar will be a one-day seminar on Friday, April 12th at the NC State Bar in Raleigh. More information and registration information will be emailed to panel members as soon as it has been finalized and also posted to the website.



PRACTICE TIPS

Codefendant Confessions and the Confrontation Clause

Suppose Adam and Barbara rob a bank together and Adam confesses. Further suppose that Adam's confession implicates Barbara, either directly (for instance, by naming her) or indirectly (for instance, by saying that Barbara was in financial trouble). And finally suppose that, as is often the case, the defendants are to be tried jointly. A problem naturally arises: the government will want to use Adam's confession against both defendants. Of course, it can introduce Adam's confession against him without difficulty. But under the Confrontation Clause of the Sixth Amendment, it cannot use Adam's confession against Barbara unless Adam testifies in court—and under the Fifth Amendment, it cannot force him to testify.¹

When evidence is admissible against one defendant but not both, the ordinary approach is to give the jury limiting instructions. But when Adam says, "Barbara helped me rob the bank," can we have any confidence that the jury will ignore this statement when determining Barbara's guilt? Whatever our faith in juries and their willingness to obey the court's instructions, there must be a limit. In *Bruton v. United States*² and its progeny,³ the Supreme Court articulated that limit. The purpose of this article is to explain *Bruton* and to discuss one scenario in which *Bruton* does not apply but codefendant confessions may still be excluded.

In *Bruton*, the Supreme Court considered the simplest form of the hypothetical above. Bruton's accomplice confessed that he and Bruton had robbed a post office.⁴ The trial court instructed the jury that this out-of-court confession was only admissible against Bruton's accomplice, but the jury nevertheless convicted Bruton. The Supreme Court reversed, holding that when one defendant directly accuses the other, "the risk that the jury will not, or cannot, follow instructions is so great" that the government cannot use the confession in a joint trial.⁵

The Court revisited this rule 30 years later. In *Gray v. Maryland*,⁶ it considered a codefendant confession that complied with the letter of *Bruton*. One of Gray's accomplices had confessed, and in this confession had named Gray.⁷ Rather than forego the use of this confession or split one trial into two, the government used a redacted confession (of the form, "I committed the crime with the help of [deleted]"). This, the Supreme Court held, was not enough: the *Bruton* rule applies whenever a confession "obviously refer[s] directly to someone" and invites inferences "that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."⁸

In other words, *Gray* and *Bruton* stand for the proposition that the jury will realize that two and two make four, even when the court asks it not to—but only when the arithmetic really is that simple. *Richardson v. Marsh*⁹ illustrates the bounds of the *Bruton* rule. In *Richardson*, Marsh and her boyfriend were on trial for a robbery-murder.¹⁰ Before the trial, the boyfriend confessed that he, Marsh, and a third person had planned the crime while driving to the victim's home. At trial, the government used this confession against him, redacting it to avoid even indirect reference to Marsh.

Taken alone, then, this confession was harmless to Marsh. But she testified at trial that she was in the car with her boyfriend and the third person. If the jury considered that testimony together with the boyfriend's confession, it could have inferred that Marsh was aware of her boyfriend's plans and therefore was

guilty of first-degree murder. The Supreme Court, upholding Marsh's conviction, nevertheless held that the boyfriend's confession was admissible because it did not "facially incriminate[e]" Marsh.¹¹

As should be apparent, the *Bruton* rule is narrow. To return to the opening hypothetical, if Adam confesses that he robbed a bank and Barbara helped him, there are two ways the government could use this confession at trial. First, it could try Adam and Barbara separately, introducing the confession against Adam at his own trial and subpoenaing Adam at Barbara's trial. Second, it could try Adam and Barbara together, redacting Adam's confession to avoid even indirect references to Barbara. This is permissible even if Adam's confession, taken together with other evidence, incriminates Barbara.

But there is hope yet for Barbara. Adam's confession has a legitimate use (against Adam) and an illegitimate use (against Barbara). You should therefore keep two things in mind even if *Bruton* does not apply. First, the court must instruct the jury to consider Adam's confession only against Adam. Second, codefendant confessions may present a Rule 403 problem. Under Fed. R. Evid. 403, the court may exclude evidence if "its probative value is substantially outweighed" by a risk of "unfair prejudice."¹² Thus, if some portion of Adam's confession is not damaging (or barely damaging) to him, but highly prejudicial to Barbara, the trial court should exclude it.

One word of caution: all of the foregoing assumes that the Confrontation Clause applies. But the Confrontation Clause does not apply to all out-of-court statements, just those a reasonable person would expect to be "available for use at a later trial."¹³ If, for instance, Adam confessed to the police that he and Barbara robbed a bank, the Confrontation Clause would apply. But suppose he instead approached an undercover officer and said, "Barbara and I are robbing a bank. Would you like to help?" This statement would be admissible against Adam and Barbara alike.¹⁴ Moreover, the Confrontation Clause allows the government to introduce an out-of-court statement if the one who made it testifies and is available for cross-examination.¹⁵ Thus, if Adam chooses to take the stand, *Bruton* simply does not apply.

Finally, practitioners should be mindful of four principles for joint trials. First, the Confrontation Clause only applies to codefendant confessions when the codefendant does not take the stand. Second, if the Confrontation Clause does apply, the government cannot introduce a codefendant confession that directly names or clearly refers to your client (the *Bruton* rule). Third, even if

Bruton does not apply, you may be able to exclude portions of the confession under Fed. R. Evid. 403. Finally, even if *Bruton* and Rule 403 do not apply, the Confrontation Clause entitles you to a limiting instruction so that the jury does not use the codefendant's confession against your client.

¹ *Bruton v. United States*, 391 U.S. 123, 135-36 (1968).

² 391 U.S. 123.

³ *Richardson v. Marsh*, 481 U.S. 200 (1987); *Gray v. Maryland*, 523 U.S. 185 (1998).

⁴ 391 U.S. at 124.

⁵ *Id.* at 135.

⁶ 523 U.S. 185 (1998).

⁷ *Id.* at 194-196.

⁸ *Id.* at 196.

⁹ 481 U.S. 200 (1987).

¹⁰ *Id.* at 205-207.

¹¹ *Id.* at 207.

¹² Fed. R. Evid. 403.

¹³ *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004).

¹⁴ See *id.* at 56 (noting that "statements in furtherance of a conspiracy" generally are not testimonial).

¹⁵ See *Bruton*, 391 U.S. at 135-36.

The ZA Editors thank David Hawisher for contributing this helpful information. David is a third year law student at UNC Law School, was an intern in the FPD office during the Summer of 2018, and is presently a pro bono volunteer with the FPD office.



Something Stinks: Time to Challenge the Plain Smell Doctrine

The "plain smell" doctrine is misunderstood, potentially dangerous, and ripe for challenge. Plain smell is the olfactory cousin to "plain view."¹ The doctrine is commonly understood to give law enforcement officers probable cause to search and/or seize a person or vehicle any time they detect the odor of marijuana.² This probable cause is limited, of course, to the identifiable source of the odor and does not usually extend to dwellings.³ The plain smell doctrine has not been expressly sanctioned by the United States Supreme Court, but several Fourth Circuit decisions appear to embrace an interpretation where an officer need only declare he smells marijuana and probable cause to search a person or vehicle automatically follows. This unrestrained reading of case law, however, has the potential to undermine Fourth Amendment protections.

Many criminal cases start with an officer claiming to detect the odor of marijuana emanating from a suspect or his vehicle. Defense attorneys should be challenging these cases with motions to suppress evidence resulting from searches based on these claims, unless two criteria are met. First,

there must be objective facts supporting the officer's assertion he smelled marijuana. Such facts include: the strength of the smell; the detection of the smell at multiple points; the smell's detection by multiple officers; an officer's specialized training and experience; and the discovery of actual marijuana in the search.⁴ Additional factors, other than the nature of the smell, include more general observations about a defendant's behavior and the circumstances of a stop. Second, if no marijuana is found during a search based on the alleged odor of marijuana, the absence should be readily explained by a believable theory. Theories offered by the Government are less believable in situations where defendants subsequently pass drug tests, there was no realistic way to dispose of drugs prior to a search, or other similar circumstances that make any theory about the presence of an odor but the absence of drugs suspicious. If both requirements are not met, an officer's claim about an odor should be discounted and, barring other factors, probable cause found to have not existed.

The closest the Supreme Court has come to endorsing the plain smell doctrine was in *United States v. Johns*.⁵ The Court noted that the doctrine was not before it, but did find the officers had probable cause to search two trucks based, partly, on the odor of marijuana; for this reason, the case is often cited as an implied endorsement of the plain smell doctrine.⁶ A close reading, however, reveals that plain smell advocates should not be so quick to hitch their wagon to *Johns*.⁷ Other than just the smell of marijuana, the officers had other factors supporting a finding of probable cause. First, the trucks in question were followed to a remote airstrip in the desert of Arizona, a mere fifty miles from the U.S.-Mexico border.⁸ Officers observed two small aircraft land, unload, and then quickly depart again.⁹ As officers approached the trucks, they smelled marijuana and saw packages wrapped in dark green plastic and sealed with tape, a common way of packaging large amounts of marijuana for shipment.¹⁰ After the trucks were searched, marijuana was found in the packages.¹¹

Clearly, more was at play in *Johns* than just the smell of marijuana. Many other objective facts supported officers' assertions that they smelled marijuana, including that marijuana was uncovered in the subsequent search. Even if marijuana is not subsequently discovered, however, an officer's claim he smells marijuana can still provide probable cause if there are other objective facts supporting his claim and the absence of marijuana has a believable explanation.

The Fourth Circuit case, *United States v. Humphries*,¹² is a good example of a situation where both of these requirements were in play. In *Humphries*, a defendant was arrested and searched based on officers' claims they smelled

marijuana, but no marijuana was found during the search.¹³ Prior to the search, two police officers watched Humphries pat his waist while talking in a large group in an area of Richmond, Virginia known for drug trafficking.¹⁴ One of the two officers was a sixteen-year veteran and interpreted the pat as a "safety pat" to ensure a weapon was secured.¹⁵ Once officers exited their patrol car, they could instantly smell a "strong" odor of marijuana; that smell followed Humphries as he started moving rapidly away from officers and into his apartment, ignoring orders to stop along the way.¹⁶ After officers finally caught up with Humphries in his apartment, they smelled the marijuana on his breath as they moved him back outside.¹⁷ A search of Humphries's person turned up a firearm in his waistband, Percocets, and an amount of crack.¹⁸

Humphries was loaded with objective facts supporting the officers' assertions that they smelled marijuana. Multiple officers detected a strong odor at multiple points in the open air. The odor followed the defendant, and it was specifically detected on his breath. One of the officers was a sixteen-year law enforcement veteran. Beyond the smell itself, the defendant refused orders to stop, was standing in a large group in an area known for drug trafficking, and patted his waist in a way to suggest he had a weapon, all factors supporting the proposition that a crime was likely being committed. In addition to the objective facts supporting officers' assertions, there was also a believable theory that explained the presence of the smell but the absence of marijuana. The court did not expressly address this point, but the circumstances of the case present at least one believable theory: Humphries could have been smoking as officers approached and quickly disposed of the marijuana cigarette before moving away from the group. For this reason, the absence of marijuana was not detrimental to officers' claims about the presence of its odor.¹⁹

When enough objective facts do not exist to support an officer's claim and an absence of marijuana is not explained, however, a court will and should refuse to credit the assertion. Though such decisions are admittedly rare, they do exist. One of the better studied decisions is *United States v. Nielsen*.²⁰ In *Nielsen*, an officer claimed to smell *burnt* marijuana and used that observation as the justification to search a defendant's car trunk.²¹ The search of the trunk turned up cocaine, but no marijuana, and the defendant subsequently passed a drug test.²² Though the *Nielsen* court did not disturb the district court's decision to credit the officer's claim he smelled marijuana, it did so under a clearly erroneous standard of review and in tepid, skeptical language.²³ At least one E.D.N.C. court also refused to credit an

officer's claim he smelled marijuana when faced with a lack of objective verification and the unexplained absence of marijuana.²⁴

When the search or seizure of a defendant is based on an officer's assertion he smelled marijuana, that claim should not pass without challenge. A claim that is not adequately supported by objective facts should not be credited by a court. When no marijuana is discovered in the subsequent search, the Government must be able to offer a believable explanation as to why the smell was present but the drug was not; without this explanation, the officer's assertion should be discounted. If plain smell cases go unchallenged, the doctrine opens a door for unscrupulous law enforcement officers to skirt normal probable cause requirements with nothing more than a sniff. Defense attorneys have an opportunity to help shut the door to such malodorous behavior.

¹ At the outset, it should be acknowledged that there is some debate about whether a "plain smell" doctrine even exists. What is clear, however, is that case law gives "officers who properly stop cars . . . probable cause to search if they approach the vehicle and recognize the odor of illicit drugs." 1 CRIM. PRAC. MANUAL § 25:108 (2018). This dispute about a de facto doctrine's very existence further highlights the need for its clarification.

² See, e.g., *United States v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004).

³ See, e.g., *United States v. White*, 836 F.3d 437, 441 (4th Cir. 2016); see also Michael A. Sprow, *Wake Up & Smell the Contraband: Why Courts That Do Not Find Probable Cause Based on Odor Alone Are Wrong*, 42 WM. & MARY L. REV. 289, 293-94 (2000).

⁴ See Sprow, *supra* note 3, at 315-16.

⁵ 469 U.S. 478 (1984).

⁶ Sprow, *supra* note 3, at 294.

⁷ See also *id.* at 295 (noting that the greatest reason plain smell advocates should not rely on *Johns* is that the Court did not expressly address the doctrine).

⁸ *Johns*, 469 U.S. at 480.

⁹ *Id.*

¹⁰ *Id.* at 480-81.

¹¹ *Id.* at 481.

¹² 372 F.3d 653 (4th Cir. 2004).

¹³ *Id.* at 656, 659-60.

¹⁴ *Id.* at 655.

¹⁵ *Id.*

¹⁶ *Id.* at 655-56.

¹⁷ *Id.* at 656.

¹⁸ *Id.*

¹⁹ See also *White*, 836 F.3d at 439. In *White*, there was an opportunity for passengers in a car that smelled like marijuana to dispose of any possible drugs when the officer who pulled them over took the driver back to his patrol car. *Id.*

²⁰ 9 F.3d 1487 (10th Cir. 1993).

²¹ *Id.* at 1489.

²² *Id.*

²³ *Id.* ("Based upon the cold record we would not have made the same determination; but, as is the case with essentially all factual findings based upon credibility, we cannot hold that the district court's factual finding is clearly erroneous.").

²⁴ *United States v. Price*, 104 F. Supp. 3d 721 (E.D.N.C. 2015) (J. Boyle). This case also included

other acts by law enforcement that clearly disconcerted the court.

The ZA Editors thank William Walker for contributing this helpful information. Will is a third year law student at UNC Law School and was an intern in the FPD office during the Summer of 2018.



Gamble v. United States: Preserving Double-Jeopardy Objections

"I am sorry, but the federal government has brought charges against you for the same conduct you just faced in state court." Defense attorneys dread the task of explaining to a client why he or she is facing federal prosecution again for the same offense that was prosecuted by the state. It always feels unfair to the clients, which makes it hard to explain why the "separate sovereigns" exception to the Double Jeopardy Clause exists. But there is hope that this task may soon become obsolete. The United States Supreme Court has granted certiorari for *Gamble v. United States*, which asks the Court to overrule the "separate sovereigns" exception to the Double Jeopardy Clause of the Fifth Amendment.¹ While the Double Jeopardy Clause prohibits successive prosecutions for the same offense, the Court has affirmed that the "separate sovereigns" exception applies when "a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates that laws of separate sovereigns."² However, Justices Ginsburg and Thomas have expressed that the exception needs a "fresh examination," suggesting it is an "affront to human dignity" to "try or punish a person for the same offense."³ *Gamble* gives the Court a "clean vehicle" for a reevaluation and urges the Court to restore the original meaning of the Double Jeopardy Clause.⁴

In November 2015, Terance Gamble was pulled over for a broken taillight.⁵ The officer smelled marijuana coming from Gamble's car, prompting a search where the officer discovered marijuana, a digital scale, and a handgun.⁶ Because Gamble was convicted of second-degree robbery in 2008, he was charged and convicted with being a felon in possession of a firearm under Alabama law and subsequently served a one-year sentence.⁷ During the state's prosecution, Gamble was also charged for the same offense by the federal government in the Southern District of Alabama.⁸ Gamble filed a motion to dismiss the indictment because the federal prosecution violated his Fifth Amendment right to be free from double jeopardy.⁹ The motion was denied by the District Court based on the Supreme

Court's "separate sovereigns" exception.¹⁰ Gamble then pled guilty on the condition that he preserve his right to appeal the double jeopardy issue.¹¹ He received a four-year sentence and is set to be released on February 16, 2020.¹² Gamble appealed, and the Eleventh Circuit affirmed the decision below.¹³ The Supreme Court granted certiorari on June 28, 2018.

Because there is a chance that the Court could overrule the "separate sovereigns" exception, defense attorneys should be preserving double-jeopardy objections for cases where the state and federal government try the same offense. First, defense attorneys should file motions to dismiss indictments based on the Double Jeopardy Clause. The motion should be candid about the current precedent of the "separate sovereigns" exception, but note the Supreme Court will be reevaluating the issue. Second, defense attorneys should file notices of appeal in order to keep a direct appeal open. Finally, within ninety days of receiving an entry of judgment or a denial of rehearing by a federal court of appeals or by a state's highest court, 40 copies of a petition for certiorari need to be filed with the Supreme Court Clerk of Court, along with the required docket fee and proof of service on all required parties.

Additionally, defense attorneys should also preserve double-jeopardy objections for supervised release revocation cases. *Ochoa v. United States* is a pending case grouped under *Gamble*, which asks the Court to decide "whether the Double Jeopardy Clause of the Fifth Amendment prohibits the Federal Government from charging, convicting, and sentencing a person who has already been charged, convicted, and sentenced in the court of a State for much of the same conduct."¹⁴ In *Ochoa*, the defendant's supervised release was revoked and he received a two-year sentence for criminal conduct to which he had already pled guilty in state court and had served the imposed sentence.¹⁵ At the revocation hearing, the Government argued that the punishment from the state "was for the conduct itself" and that the revocation and sentencing in federal court "will be for the breach of trust."¹⁶ While the District Court noted that the defendant had accepted responsibility for his actions, the Court also explained that the defendant's offense conduct was "deeply troubling" and "a serious, serious breach of trust."¹⁷ The defendant appealed, and the Court of Appeals for the Fourth Circuit stated that under current law, the defendant's Double Jeopardy Clause challenge "must fail."¹⁸ A petition for certiorari followed.¹⁹ Because *Ochoa* will be decided along with *Gamble*, defense attorneys should also preserve objections for cases where the federal government is seeking revocation and punishment for new criminal conduct that a defendant has already been convicted of and sentenced for in state court.

If the Court does overrule the "separate sovereigns" exception, there are two potential issues that the *Gamble* Petition for Certiorari does not address that might require further litigation. First, it is unclear whether the Double Jeopardy Clause would apply if federal prosecution happens first. If it does, it might prevent states from exercising their police powers. But state defense attorneys should still go through the process of preserving the issue for appeal in light of this uncertainty. Second, it is unclear what could count as the "same" offense under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). For example, it is unclear whether being a felon in possession is the same offense at the state and federal levels since the federal offense has the additional element of requiring the possession of the firearm to affect interstate commerce. If the Court does not address this issue, defense attorneys should start contemplating how to advocate that the jurisdictional element does not make the offense different.

If the exception is overruled, attorneys will also need to rethink best practices. For example, a client may receive a more favorable sentence by pleading early to state charges and attempting to prevent federal prosecution—although not guaranteed—but this would require coordination between state and federal defense attorneys. Until the Court issues a decision, however, it would be wise for defense attorneys to mainly focus on preserving double-jeopardy objections. The Court should issue a decision in *Gamble* later this year or early next year.

¹Petition for Writ of Certiorari at i, *Gamble v. United States*, No. 17-646 (U.S. Oct. 24, 2017).

²*Puerto Rico v. Sanchez Valles*, 136 S. Ct. 1863, 1867 (2016).

³See *id.* at 1877 (Ginsburg and Thomas, J.J., concurring).

⁴Petition for Writ of Certiorari at 6, *Gamble*, No. 17-646.

⁵*Id.* at 3.

⁶*Id.*

⁷*Id.* at 3-4.

⁸*Id.* at 4.

⁹Def.'s Motion to Dismiss. 1:16-cr-00090-KD-B-1, ECF No. 18.

¹⁰Denying Def.'s Motion to Dismiss at 6. 1:16-cr-00090-KD-B-1, ECF No. 21.

¹¹Petition for Writ of Certiorari at 4, *Gamble*, No. 17-646.

¹²*Id.* at 4-5.

¹³*Id.* at 5; see also *United States v. Gamble*, 694 Fed. Appx. 750 (Mem) (11th Cir. 2017), cert. granted, 138 S. Ct. 2707, 2018 WL 3148287 (Mem) (2018) (No. 17-646).

¹⁴Petition for Writ of Certiorari at i, *Ochoa v. United States*, No. 17-5503 (U.S. July 30, 2017).

¹⁵*Id.* at 7-9.

¹⁶*Id.* at 9.

¹⁷*Id.*

¹⁸*Id.* at 10.

¹⁹*Id.*

The ZA Editors thank Alexandra Johnson for contributing this helpful information. Alex is a third year law student at Campbell University Law School and was an intern in the FPD office during the Summer of 2018.



Defending Under Duress

Defenders may note instances, patterns, or threats of physical and emotional abuse surrounding their client's alleged commission of a crime. Defenders who recognize these circumstances should consider raising duress at either the trial or sentencing stage of their client's criminal case. It must be emphasized, however, that a defendant who raises duress as an affirmative defense may be seen as having accepted responsibility for the act.¹ This is because affirmative defenses necessarily involve a defendant's asserting a legal exception to committing conduct that is otherwise a criminal act. Thus, defenders should only introduce such evidence after contemplating the alternatives and discussing the potential consequences with their client.

The court may only allow the defendant to present a duress defense to the jury after proving duress to the court by a preponderance of the evidence.² Importantly, the Supreme Court has not expressly outlined the elements that constitute duress, opting instead to use the lower courts' iterations.³ Nevertheless, the Court has emphasized that "one principle remains constant" - where a defendant had a "reasonable, legal alternative" to the crime or to the harm, duress does not exist.⁴

Under the Fourth Circuit's iteration, as held in *United States v. Crittendon*, the defendant who raises duress or another "justification" defense must show that he: (1) was under unlawful and present threat of death or serious bodily injury; (2) did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm) and; (4) committed the criminal act to avoid the threatened harm, showing a direct causal relationship between the two.⁵

The Fourth Circuit has never recognized a duress defense, and has allowed its sister defense, necessity, only once. In *United States v. Ricks*, the defendant's roommate assaulted him and fled the apartment, leaving a firearm behind on the floor.⁶ After momentarily picking up his roommate's

firearm, placing it on the dresser, and contacting the authorities, Ricks faced a charge under 18 U.S.C. § 922(g) as a felon in possession.⁷ He successfully raised a necessity defense, arguing that the temporary possession was reasonable under the circumstances to avoid further harm.⁸

As an affirmative defense, the defendant must first introduce evidence that the threat was "present" or "in operation at the time of the acts."⁹ This temporal requirement is paramount to a defendant's claim.¹⁰ The defendant's fear must also be "reasonable," or "well-grounded," although these terms do not appear in the statute.¹¹ Merely anticipating the threat or "fear of reprisal" will not suffice.¹² For example, in *United States v. King*, the defendant explained that he lied to the grand jury because, two days prior, someone "took him to a cemetery, made him kneel down in front of an open grave, and suggested that [he] not cooperate with the investigation."¹³ Even under these facts, the Fourth Circuit found that "nothing in the record suggests that the threat to King was imminent[.]"¹⁴

Known as "the keystone of the analysis," the third element of the *Crittendon* test is arguably the most important and likewise extremely difficult to meet.¹⁵ This element demands a close temporal nexus between the harm and the defendant's ability to avoid it through the commission of the crime.¹⁶ In *United States v. Morton*, the Fourth Circuit found that the defendant correctional officer had "time to avoid" an inmate's coercion when an inmate threatened her just two days prior to the crime.¹⁷ Moreover, the Fourth Circuit has rejected a duress defense where a defendant had the opportunity to inform authorities, but chose not to.¹⁸

Although few Fourth Circuit cases examine the second *Crittendon* factor at length, practitioners should be aware that duress only exists when the defendant did not "recklessly place himself" in the way of criminal conduct.¹⁹ In *United States v. Mooney*, the defendant met this element after violating 18 U.S.C. § 922(g) as a felon in possession of a firearm by not "provoking" or "invit[ing] [his wife] to put a gun to his head" before taking it away from her.²⁰ Finally, a direct causal relationship must exist between the threat and the crime.²¹ For instance, in *United States v. Gorham Bey*, the Fourth Circuit denied the defense where "very controlling tactics," "physical and verbal abuse," and "general statements" did not clearly cause the defendant to commit fraud with her husband.²²

Since *Ricks* represents the only successful duress or necessity defense, it must be emphasized that the Fourth Circuit's

interpretation of duress places “a high bar” in front of the defendant.²³ Defenders looking for novel ways to raise duress could take cues from a recent Ninth Circuit case, which extends Justice Breyer’s concurrence in *Dixon v. United States*. In 2015, the Ninth Circuit allowed a defendant to submit evidence of physical and emotional abuse to the jury in order to negate the intent necessary for conspiracy.²⁴ In doing so, the court emphasized that “the phenomena of psychological abuse, coercive behavior, and the ensuing dynamics of power and control . . . that inhere in the abusive relationship” informed their decision to allow such evidence.²⁵ Although practitioners might consider this approach where such abusive relationships are present, the Fourth Circuit has not thus far accepted this interpretation of duress.

At the very least, where the factual circumstances suggest duress or coercion, defenders should raise these mitigating factors at sentencing. The U.S. Federal Sentencing Guidelines permit the court to decrease a defendant’s sentence below the guideline range “[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense.”²⁶ Defenders should take note that the extent of the departure will depend on the reasonableness of the defendant’s actions.²⁷ Furthermore, the Guidelines only recognize coercion that stems from a threat of “physical injury, substantial damage to property, or similar injury,” and prohibit a court from considering economic or financial pressures.²⁸

Ultimately, the decision to raise duress prior to sentencing will depend on the strength of the existing factual circumstances at the time of the alleged crime. Practitioners who believe that the facts could prove duress by a preponderance of the evidence should consider raising the issue during negotiations with the prosecution. However, even defenders with relatively strong circumstances should temper their expectations at trial in the Fourth Circuit. Finally, for all clients experiencing instances of threats or abuse at the time of the alleged crime, defenders should strongly consider moving for a departure at sentencing or a variance citing the nature and circumstances of the offense under 18 U.S.C. § 3553(a)(1).

¹ See *United States v. Dickerson*, 114 F.3d 464, 470 n. 2 (4th Cir. 1997).

² See *Dixon v. United States*, 548 U.S. 1, 15 (2006); *United States v. Bailey*, 444 U.S. 394, 416 (1980).

³ See *Dixon*, 548 U.S. at 5, n. 2.

⁴ *Bailey*, 444 U.S. at 410.

⁵ *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

⁶ See *United States v. Ricks*, 573 F.3d 198 (4th Cir. 2009).

⁷ *Id.* at 201.

⁸ *Id.* at 204.

⁹ *United States v. Perrin*, 45 F.3d 869, 874 (4th Cir. 1995).

¹⁰ See, e.g., *id.*

¹¹ See *United States v. King*, 879 F.2d 137, 139 (4th Cir. 1989); *United States v. Watson*, No. 96-4600, 1997 WL 702276 at *1 (4th Cir. 1997).

¹² See *King*, 879 F.2d at 139.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *United States v. Izac*, 239 Fed. App’x. 1, 3 (4th Cir. 2007).

¹⁶ See *United States v. Morton*, No. 97-4460, 1998 WL 416700 at *1 (4th Cir. 1998).

¹⁷ *Id.*

¹⁸ See *Watson*, WL 702276 at *1.

¹⁹ *Crittendon*, 883 F.2d at 330; See also *United States v. Mooney*, 497 F.3d 397, 407 (4th Cir. 2007).

²⁰ *Id.*

²¹ See *United States v. Gorham Bey*, 373 Fed. App’x. 394, 397-98 (4th Cir. 2010) (unpublished opinion).

²² *Id.* at 397.

²³ *Id.*

²⁴ See *United States v. Haischer*, 780 F. 3d 1277, 1282 (9th Cir. 2015).

²⁵ *Id.*

²⁶ U.S.S.G. § 5K2.12.

²⁷ *Id.*

²⁸ *Id.*; See also *United States v. McCrary*, 887 F.2d 485, 488 (4th Cir. 1989) (overruled on other grounds by *United States v. Underwood*, 970 F.2d 1336 (4th Cir. 1992)).

The ZA Editors thank Caitlin Haff for contributing this helpful information. Caitlin is a third year law student at UNC Law School and was an intern in the FPD office during the Summer of 2018.



Long-Term Cell Phone Monitoring? Get a Warrant!

Cell phones are a pervasive, and in some cases, integral part, of our everyday lives. We use our cell phones to wake up in the morning, check the weather, keep in touch with loved ones, and find the fastest way to work. We carry our phones with us in our bags, purses, and pockets, everywhere we go. The way our phones are able to perform much of these functions is by “continuously connecting to a set of radio antennas called ‘cell sites’.”¹ Cell phones scan for the closest cell site, which can be found on cell towers, flag poles, buildings, and even church steeples. Cell phones connect to cell sites several times a minute, even when the phone is not being used, “with each connection generating a time-stamped record known as cell-site location information (CSLI).”² CSLI has genuine business purposes, ranging from monitoring “roaming charges” to being sold to data brokers. As more cell sites pop-up in an area, the more precise these time-stamped records become.

Because of how they work, our cellphones have become imperfectly precise, ankle-monitoring bracelets. This could be useful in helping someone locate their lost phone or in helping a parent keep track of a child. In those instances, the individual or parent looks at which radio antennas the phone has been connected to

and by extension would know where the cell phone (and therefore the user) has been. However, if you feel a little skittish about this technology, do not worry—you are not alone. That is exactly what happened in *Carpenter v. United States*, where the government used the location-by-location, play-by-play CSLI, to retroactively spy on suspects in a robbery conspiracy.

In *Carpenter*, several men were arrested for robbing a series of stores after one individual confessed to the conspiracy. The informant further told the police that the group had used their cell phones to coordinate and execute the crimes.³ Claiming reasonable suspicion, as was required under the Stored Communications Act, the Government requested the CSLI belonging to the suspects in the conspiracy.⁴ Relating specifically to Timothy Carpenter, the government received 129 days of CSLI or 12,898 location points cataloging Carpenter's movements.⁵ Using this information, the prosecution produced maps that showed Carpenter's movements at the time of the robbery and in closing argument, the prosecutor stated that Carpenter was "right where the robbery was at the exact time of the robbery".⁶ On appeal, Carpenter argued that obtaining his CSLI constituted a search under the Fourth Amendment and required a search warrant supported by probable cause, instead of mere reasonable suspicion.⁷ The prosecution, invoking third-party doctrine,⁸ argued that cell phone users voluntarily convey cell-site data to their carriers and as a result, lack a reasonable expectation of privacy in the CSLI.

In a 5-4 decision, the Supreme Court reached a narrow holding that a warrant, based on probable cause, is generally required to obtain an individual's CSLI. Specifically, (1) "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured by CSLI",¹⁰ (2) long-term monitoring into an "intimate window [of] a person's life" violates one's reasonable expectation of privacy,¹¹ (3) "the location information obtained from [an individual]'s wireless carriers [i]s the product of a search",¹² and (4) "a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."¹³

The Court reached this conclusion by use of the concurrence in *United States v. Jones*.¹⁴ First, the Court acknowledged the third-party doctrine, but distinguished instances such as traveling along public highways, from "more pervasive tracking" over long periods of time.¹⁵ Second, the Court reaffirmed *Riley v. California*,¹⁶ stating that "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society."¹⁷ As such, the Court reasoned that "in no meaningful sense does the user voluntarily 'assume the risk' of turning over their CSLI, especially given that CSLI is 'generated' without any affirmative part of the user beyond powering up their phone."¹⁸ Lastly, heavy in the opinion was Justice Sotomayor's concern about any non-

probable cause based search which relates to an individual's expressive and associational freedoms.¹⁹

Overall, this is good news for not only criminal defendants but everyone who uses cellphones. *Carpenter* follows on the heels of *Riley*, with both cases marking a strong win for civil liberties and privacy advocates as our society moves further into an era of advancing technology. That said, the Court expressly limited *Carpenter*. The Court noted that while the Government will generally need a warrant to access CSLI, exigencies can create exceptions to the warrant requirement, such as pursuing a fleeing suspect or protecting individuals threatened with imminent harm.²⁰ Additionally, the Court explained that *Smith v. Maryland*²¹ and *United States v. Miller*²² are left "undisturbed." Further, *Carpenter*'s holding does not affect conventional surveillance techniques and tools such as security cameras.²³ Lastly, the opinion does not address other, non-CSLI records that incidentally reveal location and collection techniques involving foreign affairs or national security.²⁴

Practitioners should continue to bring Fourth Amendment violation claims on all non-probable cause searches if they are connected to any long-term monitoring of the client, "familial, political, professional, religious, [or] sexual associations,"²⁵ personal-use technology, or digital data. Next, while speculative, one may expect prosecutors to continue using CSLI as an identifying technique in the future. It does not seem likely that *Carpenter* will become a sword for the defense, but more a hurdle for the prosecution. While there may be various factors for a defendant to consider in waiving or requesting a probable cause hearing, in cases related to CSLI, it is hard to say what will be considered probable cause and what will be rejected. In the end, it is important to remember that a client who carried a cell phone with them during the commission of a crime might be identified through that cell phone's location information.

¹ *Carpenter v. United States*, 138 S.Ct. 2206, 2212 (2018).

² *Id.*

³ *Id.* at 2213.

⁴ *Id.* at 2212.

⁵ *Id.*

⁶ *Id.* at 2213.

⁷ *Id.* at 2212.

⁸ Information conveyed to the public or to a third-party diminishes a legitimate and reasonable expectation of privacy, because the third-party could convey the information to the government. See *id.* at 2216-17.

⁹ *Id.* at 2213.

¹⁰ *Id.* at 2217.

¹¹ See *id.*

¹² *Id.*

¹³ *Id.* at 2221.

¹⁴ *Id.* at 2222. (citing *United States v. Jones*, 565 U. S. 400 (2012), five Justices concluding that privacy concerns would be raised by GPS monitoring when

officers attached a GPS monitoring device to a suspect's vehicle, gathering information of all the locations he travelled to over 100 days).

¹⁵ *Carpenter*, 138 U.S. at 2220.

¹⁶ *Id.* (citing *Riley v. California*, 134 S. Ct. 2473 (2014)) (holding that for searches incident to a lawful arrest, cellphones do not constitute a container, and instead, a search warrant is required prior to search the "digital data" of an individual's cell phone or "mini-computer").

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.* at 2217.

²⁰ *Id.* at 2222.

²¹ *Id.* (citing *Smith v. Maryland*, 442 U.S. 735 (1979)) (holding that the installation and use of a "pen register", to determine who was making harassing phone calls, did not constitute a search because the information gathered by the the pen registers was limited and because society understands they "convey" their information to the telephone company whenever they make a call, diminishing one's expectation of privacy)).

²² *Id.* (citing *United States v. Miller*, 425 U.S. 435 (1976)) (holding there is no expectation of privacy in financial records held by a bank where the defendant willingly transmits to a third party [the bank] business records)).

²³ *Id.* at 2220.

²⁴ *Id.*

²⁵ *Id.* at 2217.

The ZA Editors thank Anthony Marin for contributing this helpful information. Anthony is a third year law student at UNC Law School and was an intern in the FPD office during the Summer of 2018.



LEGAL UPDATES

Supreme Court Update

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

4th Circuit Update

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

New Rules and Guideline Amendments

Federal Rules of Appellate Procedure

Changes to the Federal Rules of Appellate Procedure take effect on December 1, 2018. All of the most recent changes to the rules of appellate procedure were included in the Fall 2017 edition of the *Zealous Advocate*. Detailed information about these changes can be found at: <https://www.fjc.gov/content/323845/amendments-federal-rules-practice-and-procedure>.

Federal Rules of Criminal Procedure

Changes to the Federal Rules of Criminal Procedure take effect on December 1, 2018. All of the most recent changes to the rules of criminal procedure were included in the Fall 2017 edition of the *Zealous Advocate*. Detailed information about these changes can be found at: <https://www.fjc.gov/subject/criminal-litigation-procedure>.

Federal Rules of Evidence

There are no new amendments to the Federal Rules of Evidence. Details about the last round of amendments may be found at the following address: <https://www.fjc.gov/subject/evidence>.

E.D.N.C. Local Rules of Criminal Procedure

The comment period on proposed changes to the E.D.N.C.'s Local Rules of Criminal Procedure closed on July 31, 2018. Rules will soon be formally promulgated. Information about the rules may be accessed at the following address: <https://www.nced.uscourts.gov/rules/Default.aspx>.

Change to Notice of First Appearance - Rule 44.1

This change to 44.1(b) requires an attorney to state, in his initial appearance, whether he is appearing as retained counsel, appointed counsel, or in a pro bono capacity.

Change to Magistrate Appeal Filing Fee and Transcript Procedures - Rule 58.1

This change replaces the \$37.00 filing fee for appeals from misdemeanor convictions in Magistrate Court with a reference to the District Court Miscellaneous Fee Schedule. The change also removes the requirement that a magistrate judge certify the accuracy of a transcript made form an audio recording. Finally, the change adds the option for defendants appealing magistrate decisions to include objections to the transcript in their appeals.

Amendments to the United States Sentencing Guidelines

These amendments to the United States Sentencing Guidelines were adopted and promulgated in the last cycle; they become effective on November 1, 2018. Additional

information about these amendments may be found at: <https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2018>.

Though many of these amendments were listed in the Fall 2017 edition of the *Zealous Advocate*, the amendments had not yet been officially adopted. Accordingly, there were some changes from the list included in that edition of the *Zealous Advocate*. The following is the final list of approved amendments. Many thanks to Christina Makarova for providing several of these summaries.

-First Offenders/Alternatives to Incarceration

Alternatives to Incarceration for “Nonviolent First Offenders” - §5C1.1

Consistent with the statutory language in 28 U.S.C. § 994(j), this amendment adds a new application note to §5C1.1 (Imposition of a Term of Imprisonment) directing courts to consider sentences other than imprisonment for “non-violent first offenders” who fall into Categories A or B. A “non-violent first offender” is one “who (1) has no prior convictions or other comparable judicial dispositions of any kind; and (2) did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense.”

Alternatives Other than Electronic Monitoring - §5F1.2

In light of concerns raised by probation officers regarding the heavy resource requirements in electronic monitoring, the amendment deletes language encouraging courts to use electronic monitoring. Instead, it adds the suggestion that courts use other methods of surveillance “if appropriate.” These changes are reflected in the Application and Background sections of §5F1.2 (Home Detention).

-Tribal Issues - Tribal Court Convictions and Court Protection Orders

Tribal Court Convictions - §4A1.3

This Amendment provides a list of relevant factors that courts may consider, in addition to the factors set forth in §4A1.3(a), in determining whether an upward departure based on a tribal court conviction may be warranted.

Court Protection Orders - §1B1.1

This Amendment would include, in the Commentary to §1B1.1 (Application Instructions), a definition of court protection order derived from 18 U.S.C. § 2266(5) (including tribal court protection orders), that is consistent with 18 U.S.C. § 2265(b).

-Bipartisan Budget Act - §2B1.1

This Amendment references the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). In addition, this would amend §2B1.1 to provide an enhancement and/or a minimum offense level of 12

for cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). If the new enhancement is used, however, application of §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may not be used.

-Acceptance of Responsibility - §3E1.1

This amendment revises the Commentary to §3E1.1 and changes how a defendant’s challenge to relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guidelines. Specifically, this amendment specifies that an unsuccessful challenge by a defendant is not necessarily proof that the challenge was 1) frivolous or 2) a false denial.

-Miscellaneous - Criminal Infringement of Copyright or Trademark, Sex Offenders, Chemical Safety, Computer Enhancement in Child Pornography Cases, Justice for All Act

Criminal Infringement of Copyright or Trademark - §2B5.3

This Amendment revised §2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” In addition, this Amendment would also amend the Commentary to §2B5.3 to delete the “counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

Sex Offenders - §2A3.5, §2A3.6

This amendment revises Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2250(b) are referenced to §2A3.5. This amendment also adds a new application note to the Commentary to §2A3.5 providing that, for purposes of §2A3.5(b)(1), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b). Lastly, this Amendment makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the re-designation of 18 U.S.C. § 2250(c) by the International Megan’s Law.

Chemical Safety - §2Q1.1

This amendment changes Appendix A (Statutory Index) so that the new provision, 15 U.S.C. § 2615 (b)(2) is referenced to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. § 2615(b)(1).

Computer Enhancement in Child Pornography Cases - §2G1.3

This Amendment revises the Commentary to §2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

Justice for All Act - §5D1.3

First, this amendment adds a mandatory condition of supervised release to section (a)(6)(A) of §5D1.3 (Conditions of Supervised Release); this brings the Guideline into compliance with statutory changes. Second, the amendment accounts for section 2 of the Justice for All Reauthorization Act of 2016, Pub. L. 114-324 (Dec. 16, 2016), which amended 18 U.S.C. § 3583(d) (relating to conditions of supervised release). The amendment requires that restitution be a condition of supervised release “in accordance with sections 3663 and 3663A of Title 18 of the United States Code, or any other statute authorizing a sentence of restitution.”

-Marihuana Equivalency - §2D1.1

This amendment revises §2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables for determining penalties for controlled substances. It replaces that term throughout the guideline with the term “converted drug weight.” In addition, it changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” The Amendment is not intended as a substantive change in policy. Lastly, this Amendment makes certain clerical changes to reflect the changes to the Drug Equivalency Tables.

-Synthetic Drugs - §2D1.1

This amendment adds a four-level increase, included as §2D1.1(b)(3), if the defendant knowingly misrepresented or knowingly marketed a substance containing fentanyl or fentanyl analogue as a different substance. The amendment also adds exact chemical names for fentanyl in the drug conversion table. Furthermore, in the drug quantity notes and application notes to §2D1.1, the amendment distinguishes “fentanyl analogues” from other substance analogues. Finally, the amendment provides converted drug weights for each (listed below).

New Drug Table Class for Synthetic Cannabinoids and Cathiones (Bath Salts)

The Commission found that synthetic cannabinoids and cathiones comprise the majority of Note 6 computations for drugs not listed in the computation table. This amendment creates new classes of specific drugs to cover all synthetic cannabinoids and cathiones, rather than responding to each new kind of synthetic that may be developed. A class is created for synthetic cathiones, and another is created for synthetic cannabinoids.

“The amendment creates an entry in the Drug Equivalency Tables for the class of synthetic cathiones, providing a marihuana equivalency of 1 gram of a synthetic cathinone (except a Schedule III, IV, or V substance) equals 380 grams of marihuana and applies a minimum base offense level of 12 to the class of synthetic cathiones.”

“The amendment defines the term “synthetic cannabinoid” as “any synthetic substance (other than synthetic tetrahydrocannabinol) that binds to and activates type 1 cannabinoid receptors (CB1 receptors).” The amendment establishes a marihuana equivalency for the class of synthetic cannabinoids of 1 gram of a synthetic cannabinoid (except a Schedule III, IV, or V substance) equals 167 grams of marihuana and applies a minimum base offense level of 12 to the class.”

New Upward and Downward Departures for Synthetic Cathiones and Cannabinoids

Two departures are also included in the amendment: an upward departure based on highly concentrated samples, and a downward departure when the substance in question is demonstrably less potent than most other synthetic drugs.

-Illegal Reentry Guideline Enhancements - §2L1.2

Clarification about When Prior Criminal Conduct Occurred - §2L1.2

This amendment clarifies that enhancements under §2L1.2(b)(2) and (3) for criminal conduct are dated at the time of the relevant underlying conduct, not the date of conviction. Therefore, if a defendant has a conviction for conduct that took place prior to the first order of removal, but the conviction came after the order of removal, the conviction would be counted as occurring prior to the order and would thus be counted under §2L1.2(b)(2). If conduct spans the time period before and after the first order of removal, the conduct is counted as having occurred before the order was issued.

Clarification to What Terms of Imprisonment Count

The amendment also clarifies issues stemming from imprisonment following revocation. If the original criminal conduct for an enhancing crime occurred prior to the first order of removal, then the term of imprisonment includes any prison time incurred as a result of revocation, even if the revocation comes after the order of removal. This means the sentence length can be counted to qualify the conduct under §4A1.1(a), (b), or (c).

-Technical, Clarifying Changes - Several technical changes have been made to keep the guidelines in accord with statutory amendments and other Guideline changes.

The ZA Editors thank William Walker for updating the information contained in this article. Will is a third year law student at UNC Law School and was an intern in the FPD office during the Summer of 2018.

LOCAL NEWS

Eastern District News

We congratulate Chief Judge Terrence W. Boyle, who began his tenure as our Chief United States District Judge on October 15, 2018. We extend our thanks to District Judge James C. Dever III, whose tenure as our Chief Judge ended this past week. We are grateful to Judge Dever for his service this past seven years.

FPD Office News

We are pleased to welcome to the Raleigh office, two new Assistant Federal Defenders: Drew Kukorowski, who joined us in September, and David Wicclair who joined us in October.

We are also pleased to welcome back Assistant Federal Defender Rosemary Godwin, who returned in September.

We send our best wishes to Marshall Ellis, who will be spending one year with the U.S. Sentencing Commission in Washington, D.C.

Congratulations to Halerie Mahan and Sam Costello on their recent nuptials.

Congratulations also go out to Kat Shea and Mike Dowling on the birth of John Thomas on September 10, 2018.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh: Lisa Atwater, Sean Cecil, Shane Davidson, William "Bill" Finn, and Bellanora McCallum; and in Greenville: Johnnie Finch.

The following are new panel attorneys in Raleigh: Lynne Reid and Abraham "Abe" Jones.



"Pumpkin King" by Sutton Wasco



HAPPY HALLOWEEN!