

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2024

The Defender's Message

We are pleased to provide a variety of articles in this edition of the Zealous Advocate. This edition includes a refresher on Speedy Trial rights, as well as defense arguments for drug conspiracies, and firearm offenses using *Bruen*. Some articles also touch on Fourth and Fifth Amendment arguments on search and seizure of cell phones, 3rd Party Doctrine, and *Midstream-Miranda*. Other articles will touch on developments in the categorical approach as it relates to the Armed Career Criminal Act, *Brady* claims within the habeas context, the use of nitrogen hypoxia in executions, the deference given to U.S. Sentencing Commission commentary, and the implications of retroactive USSC changes to acquitted conduct. Also included are the usual links to updated case law holdings and news around the district.

The Editors and I hope you find these articles useful in your federal practice. Our newsletter is only one of the ways we try to keep our fellow EDNC defenders caught up on recent legal developments. We also provide CLE training programs for attorneys in our district, with the next one taking place in person this fall at the Holiday Inn Resort Lumina in Wrightsville Beach, North Carolina. I look forward to seeing everyone at our next seminar and thank you for the hard work you continue to do for criminal defendants in the EDNC.

G. Alan DuBois
Federal Public Defender



Inside the Fall 2024 Issue

PANEL ATTORNEY INFORMATION....2

PRACTICE TIPS

<i>Pathway for Dismissal—Speedy Trial</i>	<i>2</i>
<i>Drug Conspiracy Defense</i>	<i>3</i>
<i>Bruen Challenges</i>	<i>5</i>
<i>Cell Phone Search and Seizure</i>	<i>6</i>
<i>Third-Party Doctrine</i>	<i>8</i>
<i>Midstream Miranda Warnings</i>	<i>9</i>
<i>ACCA Categorical Approach</i>	<i>11</i>
<i>Napue and Brady Claims</i>	<i>13</i>
<i>Executions by Nitrogen Hypoxia</i>	<i>14</i>
<i>Guidelines Commentary After Kisor</i>	<i>17</i>
<i>Acquitted Conduct in Sentencing</i>	<i>18</i>

LEGAL UPDATES

<i>4th Circuit Update</i>	<i>20</i>
<i>Supreme Court Update</i>	<i>20</i>

LOCAL NEWS..... 20

THE ZEALOUS ADVOCATE

Office of the Federal Public Defender
For the Eastern District of North Carolina
150 Fayetteville Street, Suite 450
Raleigh, NC 27601
Tel: (919) 856-4236
Fax: (919) 856-4477

G. Alan DuBois, Federal Public Defender

April Bunn, Panel Administrator

Vidalia Patterson, Co-Editor, vidalia_patterson@fd.org

Laura S. Wasco, Co-Editor & Layout, laura_wasco@fd.org

Gloria Gould & Melanie Fisher, Design & Layout

PANEL ATTORNEY INFORMATION

Reminders

Please watch for emails our Panel Administrator, April Bunn, sends out regarding any training, CLE opportunities, and new procedures and protocols regarding eVoucher and updates. You can always find the most updated version of the Attorney Manual for eVoucher on the Court's website: <http://www.nced.uscourts.gov/pdfs/AttorneyManual.pdf>

Seminar BOLOs

Registration recently closed for our 2024 EDNC Fall Federal Criminal Practice Seminar at the Holiday Inn Lumina Resort in Wrightsville Beach, North Carolina on November 7-8th. Please save the date for our Spring 2025 Seminar, set for Friday, April 25th at North Carolina State University's McKimmon Center in Raleigh, NC. Additional details, including registration information, will be sent out later and will also be posted to our website.

Panel attorneys previously received an email announcing the United States Probation Office's annual U.S. Sentencing Guidelines training on Tuesday, November 19th at N.C. State University's McKimmon Center. Registration closes Monday, November 4th. Please check email or reach out to April Bunn for more information.



PRACTICE TIPS

The Pathway for a Dismissal from a Speedy Trial Violation

The Sixth Amendment guarantees "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . .".¹ To clarify basic rights for defendants, Congress passed the Speedy Trial Act of 1974.² Although speedy trial rights under the Speedy Trial Act and the Sixth Amendment are related and often overlap, an analysis under each can be distinct in some situations.³ Imagine you show up to meet your client for the first time. You ask him what happened and he angrily responds that the government is accusing him of a crime they said he committed five years ago. After seeing that the indictment was processed five years ago, you may lose hope of any argument relating to a statute of limitations argument. However, there may be hope under the Sixth Amendment because it took the government five years to act on that indictment and arrest warrant. Accordingly, courts have continued to analyze potential speedy trial violations such as the example above under a four-factor balancing test established by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972).⁴ The *Barker* factors include (1) the length of the delay, (2) the reason for the delay,

(3) the defendant's assertion of his right, and (4) the prejudice to the defendant. *Id.* Although each factor can, itself, give rise to a violation of a defendant's constitutional right to a speedy trial, no factor is dispositive of a constitutional claim. Thus, courts have continued to consider each factor through a totality of the circumstances approach.⁵ If a court concludes the defendant has established a violation of his right to a speedy trial under the circumstances, the defendant would have a right to have his case dismissed.⁶ Thus, this analysis can become crucial in adequately and zealously advocating for your client.

When considering a potential speedy trial violation under the Sixth Amendment, the Court must first consider whether the delay between the accusation and trial was enough to trigger a speedy trial analysis.⁷ To properly consider the delay, defense counsel must know when the clock starts to run. Courts have said that for purposes of a speedy trial analysis, the clock begins running with "an arrest, indictment, or other official accusation."⁸ Furthermore, the Supreme Court and circuit courts of appeal have generally found once the clock begins to run, a one year delay between indictment and arrest is presumptively prejudicial.⁹ This one year mark is usually what will trigger a potential speedy trial violation analysis.¹⁰ If the delay is less than one year, a court will probably be reluctant to continue the analysis.

Once a speedy trial analysis is triggered, a court will next consider whether the government had an adequate reason for the delay.¹¹ "The reasons for a trial delay should be characterized as either valid, improper, or neutral."¹² When considering this factor, a court should primarily inquire into the government's intent during the delay.¹³ A valid reason for delay may include a missing witness or a missing defendant.¹⁴ Conversely, an improper reason, such as a deliberate attempt to delay the trial, should be heavily weighed against the government.¹⁵ Lastly, a neutral reason for delay occurs when the government acts negligently in acting on the indictment.¹⁶ A neutral reason will be weighed less heavily, but nevertheless the court will find in favor of the defendant because the government has the responsibility to act on its indictment with due diligence.¹⁷

The reason for the delay can become important when analyzing a potential speedy trial violation. Defense counsel must thoroughly consider why there was a delay between the indictment or arrest and the trial itself. Although a case may seem to have a viable speedy trial violation on the surface due to delay, it may become apparent that reasonable reasons, such as missing witnesses, may require the government to delay. Thus, the reason for the delay should be thoroughly researched to prepare the best defense for your client.

The third factor the court will consider is whether the defendant timely asserted his right to a speedy trial. Although this factor can weigh against the defendant, courts have refused to

weigh the factor if the defendant did not have knowledge of an indictment.¹⁸ However, if there was knowledge of the indictment, or the defendant has begun court proceedings, this factor is weighed heavily against the defendant if he does not assert his speedy trial rights in a timely manner.¹⁹ Although this factor can defeat a potential speedy trial violation argument, it does not arise often because the defendant usually does not know there is an indictment and warrant out for their arrest.

The last factor a court should consider in a speedy trial analysis is the prejudice the defendant suffered because of the delay. Prejudice can be the most difficult factor for a defendant to prove. Although specific examples of prejudice can strengthen an argument for a violation, courts have not required a specific showing of prejudice.²⁰ Courts have allowed arguments such as a weakened defense or anxiety as a result of delayed court proceedings.²¹ In *Doggett*, the Supreme Court concluded that the defendant's Sixth Amendment right to a speedy trial was violated after he was arrested eight years after the indictment.²² Although *Doggett* could not show specific prejudice in his defense, the Court still found in favor of *Doggett* because it recognized that a prejudiced defense is hard to prove and that such a heavy burden should not be on the defendant when the delay is so long.²³ *Doggett* provides a great example of a constitutional speedy trial analysis. Thus, *Doggett* has become the cornerstone for speedy trial analysis using the *Barker* factors. If a defendant has a possible claim for a speedy trial violation, a judge may look for defense counsel to bring up *Doggett* at some point.

In conclusion, it is important for defense counsel to understand the *Barker* factors when considering whether to file a motion to dismiss on speedy trial grounds. To start, defense counsel should consider the delay and whether the delay triggers a speedy trial analysis. If the delay is long enough, defense counsel should then consider the three additional factors and be able to adequately argue those factors in support of a speedy trial violation. Although the Speedy Trial Act does afford guidelines for court proceedings, defendants still have separate rights under the Sixth Amendment, and defense counsel should consider both when government action causes delays in criminal proceedings. A speedy trial violation before an arrest can be rare in federal court, but when there is one, it can be a useful argument in getting a case dismissed.

¹ *United States v. Doggett*, 505 U.S. 647, 651 (1992).

² 18 U.S.C. § 3161 (2023).

³ *United States v. Gonzalez*, 671 F.2d 441, 442 (11th Cir. 1982).

⁴ See generally *Doggett*, 505 U.S. 647.

⁵ *Barker v. Wingo*, 407 U.S. 514 (1972).

⁶ See generally *Doggett*, 505 U.S. 647.

⁷ *Doggett*, 505 U.S. at 651-52.

⁸ *United States v. Woolfolk*, 399 F.3d 590, 597 (4th Cir. 2005).

⁹ *United States v. Villa*, 70 F.4th 704, 713 (4th Cir.

2023).

¹⁰ *Id.*

¹¹ *United States v. Hall*, 551 F.3d 257, 272 (4th Cir. 2009).

¹² *Id.*

¹³ *Id.*

¹⁴ *Barker*, 407 U.S. at 531.

¹⁵ *Id.*

¹⁶ *Hakeem v. Beyer*, 990 F.2d 750, 766 (3d Cir. 1993).

¹⁷ *Id.*

¹⁸ *United States v. Richards*, 707 F.2d 995, 997 (8th Cir. 1983).

¹⁹ *Doggett*, 505 U.S. at 653.

²⁰ *Id.* at 657.

²¹ *United States v. Maldonado-Perez*, 4 F.4th 1, 17 (1st Cir. 2021).

²² *Doggett*, 505 U.S. 647.

²³ *Id.* at 655.

The ZA Editors thank Andrew Hill for contributing this helpful information. Andrew was a third-year law student at Campbell Law and an intern in the FPD office during the Spring of 2024.



Getting Your Drug Dealer a Deal: The Buyer-Seller Agreement Rule as a Defense to Conspiracy

Title 21 of the United States Code Section 841(a) holds that it is “unlawful for any person to knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to . . . distribute . . . a controlled substance.” Within the same subchapter, 21 U.S.C. § 846 states, “[a]ny person who . . . conspires to commit any offense . . . in this subchapter shall be subject to the same penalties as those prescribed for the offense.” Therefore, in many cases, the Government may charge an individual participating in a drug transaction with both the substantive offense of possession with intent to distribute a controlled substance, as well as conspiracy to commit that crime. However, there are limits on when someone involved in distributing drugs may be convicted of a conspiracy in addition to the substantive offense. The buyer-seller agreement rule is one such limitation.

To prove conspiracy, one element “the [G]overnment must demonstrate beyond a reasonable doubt,” is “an agreement between two or more persons to engage in conduct that violates a federal drug law.”¹ The buyer-seller agreement rule states that “mere evidence of a simple buy-sell transaction” does not constitute the agreement necessary to prove conspiracy.² While a simple “buy-sell agreement” is “illegal in itself, [it] is not an agreement to commit an offense.”³ In other words, a buyer-seller agreement is the distribution offense itself, not an agreement to commit the distribution offense—which would constitute a conspiratorial agreement.⁴ For example, when an individual sells a controlled substance to another, he has committed the substantive distribution offense.⁵ Although there is a “bare agreement inherent in the sale,” the

transaction still does not qualify as a conspiratorial agreement.⁶ This is because the bare agreement between the buyer and seller is the substantive offense of distribution, and conspiracy “to commit the distribution offense” would require an additional agreement, “separate from the immediate distribution conduct.”⁷ Thus, the [G]overnment cannot charge conspiracy as a separate offense in simple buyer-seller agreement cases.⁸

A buyer-seller agreement, however, can provide sufficient evidence to support a conspiratorial agreement when there is also “evidence of any understanding reached as part of the buy-sell transaction that either party . . . [would] engage in or assist in further distribution.”⁹ Ergo, when there is a bare agreement to buy and sell controlled substances, and an agreement “made in addition to or beyond” that transaction, a jury may infer a conspiratorial agreement has been made. Then, there is sufficient evidence for “both a distribution violation and a conspiracy violation.”¹⁰

For example, the Fourth Circuit has held a jury may reasonably infer an agreement to engage or assist in further distribution when there is evidence of a continuing buy-sell relationship and “large quantities of drugs,” a continuing buy-sell relationship, and “repeated transactions,”¹¹ or evidence of a buy-sell agreement “involving a consignment arrangement or the ‘fronting’ of drugs.”¹² In fact, “any agreement made in addition to” a “buy-sell transaction” may “support a finding of conspiracy.”¹³ For instance, a conspiracy to distribute may be supported by an agreement “that the parties will . . . regular[ly] participa[te] in such transactions;” “that future transactions will involve particular prices or quantities;” or that the parties to the transaction “will assist each other in drug distribution activities involving customers, suppliers, territories, or the preparation of drugs for distribution.”¹⁴

Because “[c]ircumstantial evidence alone is sufficient to support a conviction for conspiracy,” it is almost always difficult for lawyers to defend against conspiracy charges.¹⁵ Nonetheless, the buyer-seller agreement rule can function as a defense in drug transaction cases when a client is charged with conspiracy to distribute a controlled substance. For instance, a lawyer might concede his client distributed drugs in violation of § 841(a) but argue his client did not conspire to distribute in violation of § 846, since there was no additional agreement for his client to assist or engage in further drug distribution. However, this too can be a difficult claim to support. Thus, when using the buyer-seller agreement rule as a defense, a lawyer should first reinforce the principle that “[d]istribution and conspiracy” are “separate offenses.”¹⁶ Although the Government may “use circumstantial evidence to prove . . . agreement,” the “[G]overnment must take care not to ask the jury to infer agreement based on guilt of distribution alone.”¹⁷ Second, a lawyer should emphasize that the Government is required to prove the existence of this additional conspiratorial agreement

beyond a reasonable doubt.¹⁸ Lastly, a lawyer should attack the facts using case law precedent. For example, if the Government is attempting to claim a drug transaction contained a sufficiently large quantity of drugs to support a conspiracy, a lawyer should point to precedent indicating the quantity of narcotics involved in the case at hand is too low, or that the court considered other factors along with the quantity in precedential cases.¹⁹

Overall, although defending against a charge of conspiracy to distribute controlled substances is an uphill battle rarely won, invoking the buyer-seller agreement rule is one of the most effective tactics a lawyer can employ when his client is involved in individual drug transactions.

¹ *United States v. Gomez-Jimenez*, 750 F.3d 370, 378 (4th Cir. 2014), *as corrected* (Apr. 29, 2014).

² *United States v. Edmonds*, 679 F.3d 169, 174 (4th Cir. 2012).

³ *Id.*

⁴ *Id.*

⁵ *Edmonds*, 679 F.3d at 173-74.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 174.

⁹ *Id.*

¹⁰ *Id.* at 173-74.

¹¹ *United States v. Hackley*, 662 F.3d 671, 679 (4th Cir. 2011), *as corrected* (Dec. 20, 2011) (citing *United States v. Reid*, 523 F.3d 310, 317 (4th Cir. 2008)); *See Reid*, 523 F.3d at 313 (finding a jury could conclude defendant “supplied . . . repeat customers” when defendant sold crack to one individual “‘seven to eight’ times a week,” to a second individual “‘each week’” for six months, to a third “‘well over 50 times’” within five months, and to a fifth person “‘more than twenty times’”); *United States v. Yearwood*, 518 F.3d 220, 226 (4th Cir. 2008) (holding the amount of cocaine and money involved in discussions and transactions “far exceeded the amounts involved in a simple-buyer-seller transaction,” when five ounces of cocaine were sold for \$3,500 in a single transaction, and there were discussions of seven ounces being sold for \$4,900).

¹² *Edmonds*, 679 F.3d at 174; *See United States v. Hicks*, 368 F.3d 801, 804 (7th Cir. 2004) (explaining that fronting drugs consists of initially providing drugs to a co-conspirator “without payment,” but “expecting to be paid” when the drugs are sold).

¹³ *Edmonds*, 679 F.3d at 174.

¹⁴ *Id.*

¹⁵ *Hackley*, 662 F.3d at 679.

¹⁶ *Id.* at 681.

¹⁷ *Id.*

¹⁸ *United States v. Burgos*, 94 F.3d 849, 858 (4th Cir. 1996).

¹⁹ *See Hackley*, 662 F.3d at 680 (citing *Reid*, 523 F.3d at 317) (distinguishing *Reid* because, while *Reid* deemed “4.5 ounces” a large quantity of drugs, *Reid* also involved “‘repeat customers’”).

The ZA Editors thank Bekah Mintz for contributing this helpful information. Bekah was a second-year law student at Campbell Law School and an extern in the FPD office during the Spring of 2024.

A Roadmap for Bruen Challenges

New York Rifle & Pistol Ass'n, Inc. v. Bruen changed the landscape of gun regulation.¹ Following the decision, governments wishing to regulate firearms must affirmatively prove that restrictions on firearm possession and use are constitutional. And they must do so by showing that their regulation is consistent with the historical tradition outlining the right to bear arms.

Federal defense attorneys have always dealt with gun statutes, including before *Bruen*. After *Bruen*, the role of defense attorneys is even greater. Federal defenders brought *United States v. Rahimi*, now before the Supreme Court, to clarify the scope of *Bruen* and challenge parts of 18 U.S.C. § 922.² Gun cases make up a significant portion of federal practice: U.S.S.C. § 2K2.1, the primary firearms sentencing guideline, is the third most frequently applied guideline at sentencing.³ And in the first year after *Bruen*, nearly 80% of challenges under the new test came in criminal cases.⁴

Despite the sea change in the landscape of Second Amendment doctrine, uncertainty about applying *Bruen* abounds. *Rahimi* will likely provide additional clarity for litigants both attacking and defending firearm regulation. For now, defense attorneys can take advantage of this doctrinal uncertainty on behalf of their clients. Even after *Rahimi* clarifies the stricter test, challenging the constitutionality of charges that their clients face will likely continue to be an important potential route for defense attorneys. This article roadmaps how attorneys might use those decisions to advocate for their clients in firearm possession prosecutions and provides a survey of district court decisions that have considered criminal gun cases under *Bruen*'s test.

As a preliminary matter, the test under *Bruen* involves two steps. First, the court must determine that the conduct at issue falls under the Second Amendment's "plain text"—that is, whether the conduct addressed by the statute implicates the right of "the people" to "bear arms." If the plain text of the Amendment is implicated by the conduct, the government has the burden to show a "distinctly similar" historical analogue to the challenged regulation, ideally dating from the founding era. At the second step, the government must show that the challenged regulation is consistent with the nation's historical tradition of firearms regulation. There are two principles to rely on when evaluating whether a historical regulation is sufficiently analogous: whether the two laws burden self-defense in similar ways and whether the two laws are justified on similar grounds.

Bruen's test is broad, but federal courts have reached some consensus on limiting its application. For example, no court has found that machine guns are bearable arms⁵—meaning they fall at the plain-text step of the analysis despite

a colorable argument that machine guns are among "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."⁶ But more uncertainty surrounds large-capacity magazines and firearms with obliterated serial numbers.⁷ Similarly, courts have diverged on whether groups like undocumented immigrants, drug users, or those with felony convictions fall within "the people" whose rights are protected by the Second Amendment.⁸

As the key precursor to *Bruen*, *Heller* notes explicitly that some "longstanding" regulations are "presumptively lawful," including prohibitions on firearm possession by those with felony convictions or mental illnesses.⁹ But, of the potentially "longstanding" regulations mentioned in *Heller*, *Bruen* only mentions sensitive-places doctrine. Whether the other regulations *Heller* found defensible remain so under *Bruen*'s test is still unresolved. But this could be another key area for defense attorneys to take advantage of the uncertainty: even if a regulation would be protected under *Heller*'s "longstanding" carveout, the government must still prove that is so under *Bruen*'s test via historical analogue.

Getting through step one of the *Bruen* test is valuable for defense attorneys, especially because the government has the burden to defend the regulation at step two. That means the most difficult task in the *Bruen* analysis—historical analogy—does not need to be the focus of a challenger's argument. Which analogies are relevant, and how close those analogies must be to satisfy the *Bruen* test, remains unclear. And governments defending their regulations have struggled to walk the line of appropriate historical analogy.¹⁰ Because the government bears the burden of showing similar past regulation, a defense attorney need only poke holes in their analogies.

In many cases, challenges to gun regulation may not be successful, even under *Bruen*. There are meaningful limits, especially at the test's first step. However, the level of uncertainty under current doctrine allows defense attorneys significant room to make creative arguments. Unless and until the test reaches a greater level of coherence, defense attorneys can push against the punitive nature of firearm criminalization.

¹ 142 S. Ct. 2111 (2022).

² *United States v. Rahimi*, 143 S. Ct. 2688, 2688-89 (2023) (mem.) (granting certiorari).

³ United States Sentencing Commission, *What Do Firearms Offenses Really Look Like?* 2 (July 14, 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220714_Firearms.pdf (last visited April 12, 2024).

⁴ Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67, 125 (2023).

⁵ Charles, *Dead Hand*, 73 Duke L.J. at 136.

⁶ *District of Columbia v. Heller*, 554 U.S. 570, 581 (quoting Timothy Cunningham, A New And Complete Law Dictionary 1 (1771)).

⁷ Compare *United States v. Price*, 635 F. Supp. 3d 455, 461 n.3 (S.D. W. Va. 2022) (no historical analogues for regulating removal of serial numbers), with *United States v. Reyna*, No. 3:21-CR-41 RLM-MGG, 2022 WL 17714376, at *4-5 (N.D. Ind. Dec. 15, 2022) (guns with removed serial numbers not within the scope of the Second Amendment); see also *Oregon Firearms Fed'n, Inc. v. Brown*, No. 2:22-CV-01815-IM, 2022 WL 17454829, at *1-2 (D. Or. Dec. 6, 2022) (upholding large-capacity magazine ban).

⁸ Compare *United States v. Riley*, 635 F. Supp. 3d 411, 424 (E.D. Va. 2022) (felons excluded from “the people”) with *United States v. Carrero*, 635 F. Supp. 3d 1210, 1212 (D. Utah 2022) (felons included within “the people”).

⁹ *Heller*, 554 U.S. at 626.

¹⁰ *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *10 (W.D. Tex. Nov. 10, 2022) (“[T]he Government undercuts its argument, thus taking the wind out of its own sails.”).

The ZA Editors thank Lucy Augustine for contributing this helpful information. Lucy was a third-year law student at Duke University School of Law and an extern in the FPD office during the Spring of 2024.



A Primer on Cell Phone Search and Seizure in the Fourth Circuit

Today, 97% of Americans own a cell phone of some kind, and 9 out of 10 own a smartphone.¹ A cell phone will be present or nearby during most interactions with law enforcement. The “element of pervasiveness that characterizes cell phones” means that cell phones carry enough data to reconstruct “[t]he sum of an individual’s private life.”² These realities raise many questions about searches and seizures in the digital age, and courts have given only a few answers.

The Fourth Amendment provides: “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause . . . particularly describing the place to be searched, and the persons or things to be seized.”³ “[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness’”⁴ which “generally requires the obtaining of a warrant.”⁵ There are multiple exceptions to the warrant requirement.⁶

The leading U.S. Supreme Court case on searching a cell phone, *Riley v. California*, requires that, except in rare cases where exigent circumstances permit a warrantless search, “what police must do before searching a cell phone seized incident to arrest is . . . simple—get a warrant.”⁷ While it made clear the need for a warrant to search a cell phone, *Riley* also

left unanswered questions. The Court did not establish what is probable cause for a cell phone search nor articulate a standard limiting the scope of that search. The Fourth Circuit has filled in some of the gaps surrounding search warrants for and of cell phones, plain view searches, and a handful of other issues.

Search Warrants for Cell Phones and Cell Phone Search Warrants

The Fourth Circuit has rejected “the proposition that the ubiquity of cell phones, *standing alone*, can justify a sweeping search for such a device.”⁸ However, an alleged crime “using an electronic communications device” may justify the search.⁹ The Fourth Circuit has held a search warrant allowing officers to search for and seize “digital evidence (computers, mobile phones)” to not be overbroad when the alleged crime involved sending threats via email.¹⁰

Evidence that a suspect was trafficking drugs can provide probable cause for a cell phone warrant.¹¹ In *United States v. Orozco*, police found a suspect driving another person’s car with \$100,000 hidden in a secret dashboard compartment.¹² Orozco tried, with partial success, to eat SD cards found with the money.¹³ The police got a warrant and searched the SD cards and Orozco’s phone, turning up child pornography.¹⁴ The Fourth Circuit found “more than enough” to establish a fair probability of the defendant’s involvement in drug trafficking.¹⁵ This fair probability gave the officers probable cause to search Orozco’s relevant effects for evidence so long as they had some potential connection to the drug trafficking crime.¹⁶ Since there was probable cause he was running drug money, and he was navigating via cell phone at the time he was pulled over, there was sufficient evidence to believe the defendant’s phone would contain evidence of a drug-trafficking conspiracy.¹⁷ The direct evidence “that *this* suspected drug trafficker had evidence of *this* drug-trafficking crime (i.e., the destination of the cash) on his phone . . . supplied a substantial basis for finding probable cause to search the phone.”¹⁸

Cell Phones in Plain View

In some circumstances, the plain view exception allows seizure of cell phones discovered during search warrant executions for other objects. In *United States v. Davis*, law enforcement officers executed a search warrant for and found firearms, cash, cell phones, and illicit drugs.¹⁹ When the defendant challenged the warrant affidavit for lacking evidence to include cell phones in the warrant, the Fourth Circuit agreed.¹⁹ However, the court decided the cell phones were lawfully seized as an instrumentality of drug trafficking in plain view.²⁰ After dispensing with the first two requirements of the plain view exception, the Court turned to the third requirement: whether police found the phone in a context making its incriminating character immediately apparent.²¹ Given the substantial quantities of

illicit drugs, their packaging for distribution, other evidence of drug trafficking, and “the known and obvious connection between drug trafficking and the use of cell phones” the officers had probable cause to associate the cell phone with criminal activity bringing it within the ambit of the plain view exception.²²

The Court went to great pains to explain that they “do not hold that cell phones in plain view may *always* be seized as instrumentalities of a crime.”²³ It emphasized the “nature of the alleged crime and the totality of the evidence” as “critical considerations.”²⁴ The court leaned heavily on its analysis in *United States v. Runner*²⁵ to explain when a cell phone is an instrumentality of a crime. The Court emphasized *Runner*’s need for additional evidence linking a glass stem pipe to criminal use when establishing probable cause.²⁶ For the *Davis* court, a cell phone is an “everyday object” and more evidence must exist for it to adopt an incriminating character.²⁷ The “‘additional evidence or indicators’ of criminality have significant work to do to establish probable cause” for a plain view cell phone seizure.²⁸

A Grab Bag of Other Issues

Forensic cell phone searches at the border are nonroutine border searches; permissible only upon a showing of individualized suspicion.²⁹

Some delays are acceptable between seizing a cell phone and getting a search warrant. Balancing government interest in seizure against the defendant’s possessory interest in the phone, the Fourth Circuit has held a thirty-one-day delay in obtaining a search warrant to be unreasonable.³⁰ However, the Fourth Circuit has upheld a two-day delay as reasonable after a valid exigent circumstances seizure.³¹ A delay between three and thirty days remains a gray area.

A cell phone tossed aside by someone fleeing the police was abandoned property, and the police’s subsequent use of the cell phone amounted to a search, but did not violate the Fourth Amendment.³² This sort of abandonment should not be casually inferred and goes beyond simply losing the device.³³

Cell phones are ubiquitous. In the ten years since *Riley*, courts have begun to grapple with searches and seizures in a digital age. Defense attorneys must be aware of the sparse case law surrounding searches and seizures of cell phones. *Riley* was firm in its commitment to requiring a warrant for a cell phone search. The Fourth Circuit has been generous towards law enforcement by allowing cell phone searches and seizures under the warrant requirement exceptions. When a cell phone has been seized, defense attorneys should insist on a showing of more than just the cell phone’s presence at an arrest site or where a search warrant was served. Where possible, attorneys should maintain that the cell phone was too attenuated from any other suspected crime to justify a search or seizure.

¹ *Mobile Fact Sheet: Tech Adoption Trends*, Pew Research Center (Jan. 31, 2024) <https://www.pewresearch.org/internet/fact-sheet/mobile/> (last visited Apr. 16, 2024).

² *Riley v. California*, 573 U.S. 373, 394-95 (2014).

³ U.S. Const. Amend IV.

⁴ *Brigham City v. Stuard*, 547 U.S. 398, 403 (2006).

⁵ *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

⁶ See, e.g. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (consent searches); *Terry v. Ohio*, 392 U.S. 1 (1968) (investigative stops); *Maryland v. Buie*, 494 U.S. 325 (1990) (protective sweep searches); *United States v. Leon*, 468 U.S. 897 (1984) (good faith exception); *Kentucky v. King*, 563 U.S. 452 (2011) (exigent circumstances); *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery); *Horton v. California*, 496 U.S. 128 (1990) (plain view doctrine); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest).

⁷ *Riley*, 573 U.S. at 403.

⁸ *United States v. Sueiro*, 59 4th 132 (4th Cir. 2023) (emphasis in original).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *United States v. Orozco*, 41 F.4th 402 (4th Cir. 2022).

¹² *Id.* at 405.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 409.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 411 (emphasis in original).

¹⁹ *United States v. Davis*, 94 F.4th 310 (2024).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *United States v. Runner*, 43 F.4th 417 (4th Cir. 2022) (holding that a glass stem pipe is not an “everyday object that could be put to illegal ends” but rather its “predominate purpose” is “to smoke illegal substance” making it reasonable to believe that it was evidence of a crime).

²⁶ *Davis*, 94 F.4th at 320.

²⁷ *Id.*

²⁸ *Id.* (citing *Runner* at 422).

²⁹ *United States v. Kolsuz*, 890 F.3d 133 (4th Cir.

2018); *United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019).

³⁰ *United States v. Pratt*, 915 F.3d 266 (2019).

³¹ *United States v. Burton*, 756 Fed. App’x. 295 (2018).

³² *United States v. Small*, 944 F.3d 490 (4th Cir. 2019).

³³ *Id.*

The ZA Editors thank Regan Metzger for contributing this helpful information. Regan was a third-year law student at UNC School of Law and an extern in the FPD office during the Spring of 2024.



Involuntary Assumption: Where Does the Third-Party Doctrine Stand in the Modern Surveillance Age?

The scope of the Fourth Amendment's protection against unreasonable searches and seizures has been limited by the Third-Party Assumption of Risk doctrine (Third-Party doctrine). The United States Supreme Court has consistently held that one loses their reasonable expectation of privacy where they knowingly expose information to any other person or entity.¹ However, strict application of the Third-Party doctrine in the modern era where private personal information is routinely shared with cellphone providers, internet providers, internet browsing services, application developers, and others may result in *no* information being protected against unreasonable searches and seizures for most current Americans.² In recognition of this reality, several recent Supreme Court cases illustrate the increasing hesitancy of the current Supreme Court to apply this principle to information obtained through technological devices and providers in the age of widespread digital surveillance.³ This article begins by briefly discussing these three cases and their implications for the current state of the Third-Party Assumption of the Risk doctrine. It will then draw from some of the key principles and concerns present in each of these cases to suggest argument language for advocates seeking to challenge evidence obtained through modern technological devices or third-party servers which store their information.

The first Supreme Court case to grapple with how, or if, the Third-Party doctrine should be applied in the modern surveillance age was *United States v. Jones*, which involved the installation of a GPS device to a defendant's vehicle and subsequent location monitoring for 28 days.⁴ The Supreme Court held that the installation and use of the GPS tracking device on the defendant's vehicle, without a warrant, constituted a search which violated the Fourth Amendment.⁵ While the majority opinion focused on common-law trespass principles in holding that a search occurred, two concurring opinions "examined the pervasiveness of the governmental intrusion rather than the physical invasion of the surveillance practice."⁶ Justice Alito's concurring opinion reflected a mosaic understanding of the Fourth Amendment and emphasized the total length of the location monitoring of the defendant (28 days), as opposed to any specific point during the monitoring.⁷ Notably, Justice Sotomayor's concurrence directly addressed the dangers of the Third-Party doctrine in the modern era, stating "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" and that the doctrine is "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."⁸

Two years later, in *Riley v. California*, the Supreme Court once again grappled with applying established Fourth Amendment principles and technological development. In *Riley*, the court held, ab-

sent exigent circumstances, police officers must obtain a search warrant before searching the digital information stored on a smartphone, even if seized from an arrestee's person incident to their arrest.⁹ The court noted that strict application of established doctrine regarding searches incident to arrest would result in the opposite outcome, but distinguished the case by emphasizing the unique nature of smartphones, which can store immense amounts of detailed personal information.¹⁰ While this case did not directly address Third-Party doctrine, it "provided insight into how the Court may analyze technological developments and reinterpret precedent in response" and also sparked hope that the end of the Third-Party doctrine was near.¹¹

Most recently, in *Carpenter v. United States*, the Supreme Court directly ruled on a challenge to the Third-Party doctrine, holding that the government's warrantless acquisition of historical cell-site location information (CSLI) from a cell phone service provider was a search under the Fourth Amendment.¹² In declining to extend the Third-Party doctrine in this case, the majority emphasized "the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection."¹³ Notably, Justice Gorsuch's dissent also recognized that individuals increasingly store private information on third-party servers and argued that someone else having access to personal information does not necessarily lessen a person's interest in keeping it private.¹⁴ This dissent ultimately called for a reexamination of appropriate approaches to Fourth Amendment jurisprudence in the modern age.¹⁵ However, while the *Carpenter* majority did not extend the Third-Party doctrine in this case, the court declined to abandon the doctrine entirely, instead holding that "a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."¹⁶

Because the *Carpenter* majority declined to abandon the Third-Party doctrine entirely, the doctrine's applicability in other cases involving private personal information stored on technological devices and shared with third party technology service providers—such as data stored and shared through products like Apple's iCloud and Google's Google Drive—remains unclear. However, reexamining the overlapping concerns, principles, and emphases of the Supreme Court in *Jones*, *Riley*, and *Carpenter* may provide some helpful guidance. To start, in *Jones* and *Carpenter*, the Supreme Court emphasized the warrantless collection and use of comprehensive, long-term location information, and were more willing to find a search occurred, whether such location information was stored locally on technological devices themselves or obtained through third parties.¹⁷ This concern is rooted in the idea that obtaining location information can reveal the private details characterizing one's life, such as their "familial, political, professional, religious, and sexual associations."¹⁸ Additionally, in *Riley* and *Carpenter*, the Supreme Court focused on the quantity and

quality of the private personal information at issue, with quantity implicating the comprehensiveness of the information and quality implicating the revealing (or nonrevealing) nature of the information.¹⁹ Lastly, each of these cases involved a focus “on the technology itself[,] its revealing nature, its collection process, and its advanced properties compared to surveillance practices in the pre-digital world[,] rather than to whom the information is being provided to.”²⁰

While the Third-Party doctrine has not been completely abandoned, the sharing of information with third-parties is no longer a categorical bar to Fourth Amendment protection when it comes to information originating or stored on technological devices. Instead, third-party exposure appears to be “just a shorthand for one factor in the overall reasonable-expectation-of-privacy analysis - a factor that can be overcome when highly sensitive information is at stake.”²¹ Accordingly, practitioners challenging evidence stored or originating on technological devices collected prior to law enforcement’s obtaining a warrant should rely on the aforementioned cases to argue that a defendant’s sharing information with third parties is not dispositive, and that the defendant retains a privacy interest in the information at issue. In doing so, they should emphasize the sensitivity of the information, the comprehensiveness of the information, and the impossibility of employing such investigative techniques for most of the nation’s history. Advocates may point to specific case information, like the number of records obtained or the duration of the search in doing so. Additionally, if the information is collected automatically, advocates should place special emphasis on the involuntary nature of the data collection. Practitioners should also stay up to date on case law in this area, as several current members of the Supreme Court have signaled their willingness to abandon the Third-Party doctrine entirely.

¹ See *United States v. Miller*, 425 U.S. 435, 443 (1976); *Smith v. Maryland*, 442 U.S. 735, 745 (1979).

² See Charlie Brownstein, Note: *Confronting Carpenter: Rethinking the Third-Party Doctrine and Location Information*, 92 Fordham L. Rev. 183, 184 (2023).

³ See generally, *United States v. Jones*, 565 U.S. 400 (2012); *Riley v. California*, 573 U.S. 373 (2014); *Carpenter v. United States*, 585 U.S. 296 (2018).

⁴ See Shelby McCloskey, Notes & Comment: *Carpenter v. United States: A Systematic Shift in the Fourth Amendment Jurisprudence in the Digital Age*, 17 J. Bus. & Tech. L. 363, 371 (2022).

⁵ *Jones*, 565 U.S. at 404.

⁶ McCloskey, *supra* at 371.

⁷ See *Jones*, 565 U.S. at 430.

⁸ *Id.* at 417.

⁹ *Riley*, 573 U.S. at 401.

¹⁰ See *Riley*, 575 U.S. at 386.

¹¹ Brownstein, *supra* at 198-99.

¹² See *Carpenter*, 585 U.S. at 296.

¹³ *Id.* at 320.

¹⁴ See *id.* at 387-89.

¹⁵ See *id.*

¹⁶ *Id.* at 319.

¹⁷ See *Jones*, 565 U.S. at 415, 430; *Carpenter*, 585 U.S. at 311-12.

¹⁸ See *Jones*, 565 U.S. at 415.

¹⁹ See *Riley*, 575 U.S. at 394; *Carpenter*, 585 U.S. at 320.

²⁰ McCloskey, *supra* at 372.

²¹ Chadwick Lamar, Note: *The Third-Party Doctrine Crossroads: Rules and Direction for a Tech-Savvy Fourth Amendment*, 39 Rev. Litig. 215, 219 (2019).

The ZA Editors thank Grace Thompson for contributing this helpful information. Grace was a third-year law student at UNC School of Law and an intern in the FPD office during the Summer of 2024.



A Deliberate Tactic: Arguing Midstream Miranda Warnings

In April 2023, the Sixth Circuit¹ hesitated in standing alone in a circuit split over whether courts should consider intent in cases of midstream *Miranda* warnings.² While two circuits remain undecided on the issue³ (and one has an intra-circuit split),⁴ the remaining eight federal circuits, including the Fourth Circuit, hold that Justice Kennedy’s concurrence in *Missouri v. Seibert* controls the issue.⁵ While *Seibert* controls how courts analyze the legality of midstream *Miranda* warnings is settled law, what remains unclear is how defense attorneys can best use *Seibert*’s complex plurality opinion to protect their clients’ Fifth Amendment right against coerced, self-incrimination.

Before its holding in *Seibert*, the United States Supreme Court first confronted a midstream *Miranda* issue in *Oregon v. Elstad*.⁶ *Elstad* involved the police investigation of a burglary, which led them to the defendant’s home.⁷ Before reading him his *Miranda* rights, during a very brief initial questioning, the defendant made an incriminating statement that implicated him in the robbery.⁸ The Court disagreed with the defendant’s argument that a confession made once the “cat [was] out of the bag” was inherently involuntary.⁹ Rather, the Court held that “the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion.”¹⁰ Instead, courts should admit voluntarily made statements, looking to “the surrounding circumstances [of the interrogation] and the entire course of police conduct with respect to the suspect . . . [to] evaluate [e] the voluntariness of [the suspect’s] statements.”¹¹

Seibert revisited the Court’s holding in *Elstad*, this time concerning a deliberate two-stage interrogation tactic.¹² In *Seibert*, officers initially questioned the defendant, absent any *Miranda* warnings, and he confessed, while adhering to a procedure designed to elicit such confessions.¹³ After the suspect confessed, the investigating officer would read the suspect their *Miranda* rights and secure a signed waiver of those rights.¹⁴ Then, the officer would go through another round of questioning, often referring to the pre-warning responses, similar to cross-examination, to get the suspect to confess again.¹⁵ The pre-warning confession could be suppressed under *Miranda*, but the post-warning confession could not.¹⁶

Though the Court found this practice unconstitutional, *Seibert*'s rationale controlled no majority. Justice Souter wrote for the plurality, advocating for a fact-specific evaluation of whether "the facts...reasonably support a conclusion that the warnings given" could have served the purpose of *Miranda*.¹⁷ This evaluation involved analyzing "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first."¹⁸

However, most federal circuits treat Justice Kennedy's concurrence as the controlling rationale for *Seibert*. Unlike Souter, whose objective test is familiar to Fourth and Fifth Amendment case law, Kennedy's rationale involves a two-step test with a clear subjective prong.¹⁹ If the police had "deliberately" used this two-stage interrogation tactic, a court should suppress the statement unless the government had implemented sufficient "curative measures."²⁰ Finally, any midstream warning must comply with *Eltstad*'s "voluntary" requirement, though this requirement is separate from the above inquiry.²¹

Although Kennedy's test has been widely adopted, it has been met with much criticism. Critics find that the test poorly protects the Fifth Amendment interest it sets out to guard and is too difficult to administer.²² Both issues stem from Kennedy's requirement that the strategy be "deliberate."²³ This element requires a subjective showing of intent: that police officers actually intended to use the strategy to circumvent *Miranda*.²⁴ Proving this element is almost impossible for defendants, especially against the testimony of officials who can always claim they did not intend to do so.²⁵ Moreover, as the dissent in *Seibert* points out, it is unclear why subjectivity matters.²⁶ Surely there exist scenarios where officials do not intend to violate *Miranda*, but do, and scenarios in which officials intend to violate *Miranda* but do not.²⁷

These concerns have led some to advocate for the plurality's test, which better encapsulates Kennedy's concern in his "curative measures prong." This concern is meant to ensure the *Miranda* warning actually worked. The plurality's test succeeds in this prophylactic measure by "shift[ing] the focus to whether the *Miranda* warnings were effective, as opposed to whether the confession was subjectively voluntary."²⁸ Unfortunately, courts have near unanimous agreement that the holding of *United States v. Marks*, which requires courts to adhere to the "narrowest common rationale" in a plurality agreement as binding precedent, dictates that Kennedy's concurrence control the issue.²⁹ In fact, the Fourth Circuit has already decided this issue.³⁰

However, when confronted with a midstream *Miranda* issue, advocates should not ignore the plurality's opinion entirely. The plurality's logic can be used to bolster arguments made under Kennedy's required framework. By incorporating the plurality's test into Kennedy's, the disadvantages of Kennedy's

concurrence to defendants can be minimized, though not eliminated.

Regarding the first prong of Kennedy's test, whether the two-step interrogation strategy was deliberate, the plurality's opinion supplies several factors which provide objective indicia of subjective intent. Advocates should be willing to point out the true indicator of a police officer's intentions is the officer's actions—not verbal testimony. Relying on verbal testimony alone would be as misguided as asserting that the strategy was employed deliberately simply because it was employed.³¹ Instead, attorneys should be able to point to the length of time occurring between interrogations, the nature of the warning, the length of detention, and other circumstances of the midstream warning to assess if police officers intended to violate *Miranda*. Using this objective-subjective approach means that scenarios where "deliberate" violations are found will more likely be ones where, because of the objective factors at play, the *Miranda* warning was also ineffective.

Advocates can use these same measures to then evaluate, in context, if a given curative measure was sufficient. Simply put, the more the circumstances suggest that police were deliberately trying to render a *Miranda* warning ineffective (by placing interviews far apart or conducting drawn-out, days long interrogations), the greater a showing will be required that it was "cured." It would be difficult to imagine a tortuously long interrogation, stretched out over days, with a *Miranda* warning given at the very end, cured by a simple reminder that confessions (from this point on) are inadmissible absent a defendant's waiver.

In fact, it seems like some courts in the Fourth Circuit are already approaching the curative measures prong with an eye towards the plurality's factors. In *United States v. Khweis*,³² a twenty-six-year-old American was captured by Kurdish forces after he left the country to join ISIL.³³ Though prosecuted domestically, he was interviewed by military agents and the FBI separately.³⁴ The military interviews occurred first, without a *Miranda* warning, though the FBI gave him a *Miranda* warning before their interviews.³⁵ Here, the Fourth Circuit used factors from the plurality to uphold the effectiveness of a curative warning from the FBI, designed to make clear to the defendant that *Miranda* now applied.³⁶ The court found significant that "[t]he Mirandized interviews here began ten days after the unwarned interviews had ended—a period longer than any break during the series of unwarned interviews...the warned interviews were held in a different room than the unwarned interviews. Entirely different...personnel attended the Mirandized interview."³⁷

With these factors, merged from the plurality's test into Kennedy's test, defendants have a better chance of ensuring that courts actually punish officials who deliver ineffective *Miranda* warnings. While this has implications for all criminal prosecutions, midstream *Miranda* issues arise, on a federal level, in national-security adjacent

contexts.³⁸ These scenarios often involve defendants with limited understanding of the American legal system (or even the English language), who are interviewed by multiple government actors across long stretches of time and in multiple countries.³⁹ These factors weigh in defendants' favor when the plurality's factors are taken into account, as these considerations impact defendants' ability to make voluntary legal decisions. With so much at stake in these scenarios, it would be ill-advised to try to meet Kennedy's test on its own terms.

¹ A midstream *Miranda* warning is one delivered after the defendant has already confessed to a crime during a custodial interrogation. A formerly common tactic among police departments was to interrogate a suspect, obtain an inadmissible confession, then provide a *Miranda* warning and obtain the confession again after securing a waiver, making this second confession admissible. See Lucy Ann Hoover, *The Supreme Court Brings an End to the Run Around Miranda*, 74 F.B.I. L. ENFORC. BULL. 26, 32 (2005).

² *United States v. Woolridge*, 64 F.4th 757, 762 (6th Cir. 2023) ("On another day, we should ask whether we must keep our side of this circuit split open.").

³ The First Circuit and D.C. Circuit have not decided this issue.

⁴ The Seventh Circuit has an intra-circuit split over this issue. See *United States v. Hernandez*, 751 F.3d 538, 539-40 (7th Cir. 2014); *United States v. Heron*, 564 F.3d 879, 884-86 (7th Cir. 2009).

⁵ As listed in *Woolridge*, 64 F.4th at 762.

⁶ *Oregon v. Elstad*, 470 U.S. 298 (1985).

⁷ *Elstad*, 470 U.S. at 315.

⁸ *Id.* at 301.

⁹ *Id.* at 311-4,

¹⁰ *Id.* at 314.

¹¹ *Id.*

¹² *Missouri v. Seibert*, 542 U.S. 600 (2004).

¹³ *Seibert*, 542 U.S. at 605-6.

¹⁴ *Id.* at 605.

¹⁵ *Id.*

¹⁶ *Id.* at 606.

¹⁷ *Id.* at 617.

¹⁸ *Id.* at 615.

¹⁹ *Id.* at 622 (Kennedy, J., concurring).

²⁰ *Id.*

²¹ *Id.*

²² See, e.g., Lee Ross Cranin, *The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections*, 112 MICH. L. REV. 453, 458 (2013) (arguing the plurality's test should be favored over Kennedy's for these reasons); Adam Herron, *Miranda: Efficacy, the Question First, Warn Later Approach, and Special Populations*, 66 BAYLOR L. REV. 189, 203 (2014) (arguing that, for these reasons, Kennedy's test unfairly burdens defendants in special populations like the mentally ill or homeless); Colleen Cox, *Crafting a Miranda Exclusionary Rule for Two-Part Interrogations: A Lesson from Missouri v. Seibert on the Value of Deterrence*, 37 ARIZ. ST. L.J. 663, 664 (2005) (arguing the curative measure prong is unnecessary).

²³ Cranin, *supra* note 22, at 464.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Seibert*, 542 U.S. at 626 (O'Connor, J., dissenting).

²⁷ Furthermore, it's unclear if Kennedy's test *actually adds any protection* that would not otherwise be available under *Elstad*, see Cranin, *supra* note 22, at 464 ("If courts aggressively scrutinized post-midstream warning confessions under *Elstad*, then perhaps the ultimate post-*Seibert* analysis would not leave a defendant significantly less protected than he was before.").

²⁸ Cranin, *supra* note 22, at 476.

²⁹ *United States v. Marks*, 430 U.S. 188, 193 (1977). *Wooldridge*, 64 F.4th at 762.

³⁰ *United States v. Mashburn*, 406 F.3d 303, 308-9 (4th Cir. 2005).

³¹ That is, any act can be asserted to be deliberate in the sense that it was chosen over another act.

³² *United States v. Khweis*, 971 F.3d 453 (4th Cir. 2020).

³³ *Khweis*, 971 F.3d at 455. ISIL is an acronym for the terrorist organization: The Islamic State of Iraq and the Levant.

³⁴ *Id.* at 455-7.

³⁵ *Id.*

³⁶ *Id.* at 458.

³⁷ *Id.* at 461.

³⁸ Interestingly, the criminal defendants who are most often involved in these types of "midstream" cases appear to be defendants in cases of international crimes of terrorism, who are interviewed separately by military agents and then the FBI as part of domestic criminal prosecution. See *United States v. Khweis*, 971 F.3d 453 (4th Cir. 2020) (prosecution of twenty-six year old American who was captured by the Kurds after leaving the United States to join ISIL); *United States v. Hasan*, 747 F. Supp. 2d 642 (E.D.V.A. 2010) (prosecution of Somali pirates who mistakenly attacked a United States' Naval Frigate); *United States v. Khatallah*, 275 F. Supp. 3d 32 (D. D.C. 2017) (prosecution of a defendant who played a key role in the attack on the U.S. Special Mission at Benghazi).

³⁹ As was the case in *Khweis*, for example.

The ZA Editors thank Will Knight for contributing this helpful information. Will was a third-year law student at Duke University School of Law and an intern in the FPD office during the Summer of 2024.



Another Wrench in the ACCA Categorical Approach

A recent U.S. Supreme Court decision will have major implications for applying the categorical approach in serious drug offense cases under the Armed Career Criminal Act (ACCA). In *Brown v. United States*, the majority held when determining whether a prior state conviction qualifies as a "serious drug offense" predicate for the ACCA enhancement, courts should look to the state and federal drug definitions *at the time of the prior state offense* while applying the categorical approach.¹

Under the ACCA, defendants convicted under 18 U.S.C. § 922(g) for possession of a firearm with three qualifying predicate offenses are subject to a 15-year mandatory minimum in their sentencing range.² State drug offenses carrying a maximum sentence of at least 10 years involving a substance as defined by the Controlled Substances Act (CSA) qualify as such predicate "serious drug offenses" under the statute.³ However, for a state conviction to qualify as a predicate for the ACCA enhancement it must match the definition of a corresponding federal offense.⁴ For drug convictions to qualify under federal law, the state's def-

inition of the drug in question must be at least as specific as, or more specific than, the definition of that drug provided in the CSA. Otherwise, the fact of a state conviction includes the possibility that the defendant's conduct involved substances not included in the federal statute, disqualifying the offense from becoming an ACCA predicate. This method of comparing federal and state crime definitions is called the categorical approach.

Although the categorical approach survives the decision, the state and federal drug definitions must now match at the time of the prior state conviction for the offense to qualify as an ACCA predicate. While this decision does mean if a state conviction was not a match with the federal drug schedule at the time of that offense it would not qualify as an ACCA predicate, the reverse scenario is much more likely to occur. Defendants will no longer be able to evade ACCA mandatory minimums by relying on reclassification or redefinition of drugs as the understanding of the danger posed by those drugs evolves and the law changes. For the purposes of the ACCA, a defendant's criminal convictions are now frozen in time, and if an older state conviction qualifies an ACCA predicate it will remain as one.

The Court's decision resolves a circuit split by consolidating two similar cases from distinct jurisdictions with different outcomes: *United States v. Brown*⁷ and *United States v. Jackson*⁸. In *Brown*, the defendant challenged the predicate status of several convictions for possession with intent to distribute marijuana from 2008 to 2014.⁹ In 2018, Congress passed the Agriculture Improvement Act, which excluded hemp from the federal definition of marijuana, making it no longer a match with the Pennsylvania law under which *Brown* was convicted.⁸ The Third Circuit upheld a sentence counting the offenses as ACCA predicates, reasoning the subsequent change in the law did not affect the predicate status of the prior offenses.

Jackson arose from similar facts: the defendant had been convicted of cocaine possession in 1998 and 2005, but the federal definition changed in 2015 to exclude a Parkinson's drug.¹⁰ The Eleventh Circuit held the offenses did not qualify as ACCA predicates because the definition of the state drug offense was broader than the new federal definition after 2015, meaning the two did not match.¹¹ The Eleventh Circuit later reversed itself before the case was granted certiorari.¹²

Writing for the majority, Justice Alito addressed the three parties' arguments in turn, ultimately settling on the Government's contention that a conviction should be an ACCA predicate if the state and federal schedules matched at the time the state crime was committed. Relying on *Taylor*, Justice Alito reasoned if the state and federal definitions were a match at the time of the prior state offense, a subsequent change in the drug definition would be irrelevant because the statute's purpose was to target crimes "involv[ing] violence or an inherent risk thereof."¹³ Referencing *United States v. McNeill*, Justice Alito continued to state that the redefinition of a crime does not change a defendant's criminal history.¹⁴ Applying this reasoning, he

argued because the offense carried a risk of violence, "either with law enforcement or with others operating in the same illegal field" at the time it was committed meant subsequent rescheduling of a substance on the federal drug schedule did not vitiate the deterrence and incapacitation purpose of the sentencing enhancement. Here, Justice Alito focuses on the defendant's engaging in conduct that was illegal at the time, reasoning that changes in the law do not change the fact the defendant was willing to engage in such conduct.

The greatest effect of this decision is that a defendant will no longer be able to escape the 15-year ACCA mandatory minimum sentence even if the drug of the conviction is later rescheduled due to an evolving understanding of its effects or chemistry. While the majority was quick to point out that in *Brown* and *Jackson* the defendants were *not* convicted of possessing "hemp or iopflupane,"¹⁶ the substances that were excluded from the updated statutes causing the federal-state mismatch, it declined discussing in its holding whether a defendant convicted of possessing such substances would still be subject to the ACCA enhancement. However, defendants whose state convictions did not match federal schedules at the time will have much stronger arguments against ACCA predicate status now than before, and categorical challenges to predicate status based on the schedules at the time of the prior state conviction will remain as powerful arguments to defend clients from the enhancement.

As a final note, commentators have also highlighted how the decision holds implications for the categorical approach employed when determining Career Offender status under the federal sentencing guidelines.¹⁷ While *Brown* relies specifically on the statutory objectives of the ACCA to reach its holding, practitioners should still remain vigilant of the possibility that its reasoning will be extended to the categorical approach as applied to the Career Offender guideline.

¹ *Brown v. United States*, 144 S. Ct. 1195, 1210 (2024).

² 18 U.S.C. § 924(e)(1).

³ 18 U.S.C. 924(e)(2).

⁴ *Shular v. United States*, 589 U.S. 154, 158 (2020).

⁵ *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022), cert. granted, 143 S. Ct. 2458, 216 L. Ed. 2d 430 (2023), and aff'd, 144 S. Ct. 1195 (2024).

⁶ *United States v. Jackson*, 36 F.4th 1294 (11th Cir.), vacated, No. 21-13963, 2022 WL 4959314 (11th Cir. Sept. 8, 2022), and superseded, 55 F.4th 846 (11th Cir. 2022), cert. granted, 143 S. Ct. 2457, 216 L. Ed. 2d 430 (2023), and aff'd sub nom. *Brown v. United States*, 144 S. Ct. 1195 (2024).

⁷ *Brown*, 47 F.4th 147 at 149.

⁸ *Id.* at 150.

⁹ *Id.* at 155-56.

¹⁰ *Jackson*, 36 F.4th 1294 at 1298.

¹¹ *Id.* at 1306.

¹² *Brown*, 144 S. Ct. 1195 at 1202.

¹³ *Id.* at 1205 (citing *Taylor v. United States*, 495 U.S. 575, 590 (1990)).

¹⁴ *Id.* at 1210 (citing *United States v. McNeill*, 563 U.S. 816, 823 (2011)).

¹⁵ *Id.* at 1205-1206 (citing *United States v. McNeill*, 563

U.S. 816, 823 (2011)).

¹⁶ *Id.* at 1205.

¹⁷ Molly Parmer, *Justices' Repeat Offender Ruling Eases Prosecutorial Hurdle*, Perspectives (May 31, 2024), <https://www.law360.com/articles/1842442/justices-repeat-offender-ruling-eases-prosecutorial-hurdle> (last visited July 22, 2024).

The ZA Editors thank Garrett Anderson for contributing this helpful information. Garrett was a third-year law student at Campbell University School of Law and an intern in the FPD office during the summer of 2024.



Expansion of *Napue* and *Brady* Claims in the Fourth Circuit

Incarcerated individuals commonly attempt to overturn their convictions through writs of habeas corpus. In 2000, 43% of petitions filed by inmates were habeas petitions and 11% of petitions challenged the constitutionality of a conviction.¹ Thus, defense attorneys are frequently interacting with individuals undergoing the habeas process, even if the defense attorney is not directly assisting the petitioner with their claim. These habeas petitions often revolve around prosecutorial misconduct that occurs during an initial trial when the individual is represented by a defense attorney. It is therefore important for defense attorneys to be aware of how landmark habeas cases are interpreted in the Fourth Circuit: both as context to legal claims incarcerated individuals may be pursuing and to recognize potential bad acts of prosecutors during the time of an initial trial.

Two landmark cases frequently cited in habeas petitions involving bad acts of prosecutors are *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959). Both cases implicate Due Process concerns covered under the Fourteenth Amendment. A *Brady* violation occurs when a prosecutor fails to provide a defendant or his attorney with favorable evidence.² A *Napue* violation occurs when a prosecutor knowingly presents false evidence and that false evidence is material to obtaining a conviction.³ While the basic elements of these cases may seem straightforward, they are more far-reaching than just a simple analysis would indicate.

Brady, for example, does not have an intentionality prong: whether a prosecutor intentionally withholds evidence or mistakenly does so does not factor into the analysis. What matters is that favorable evidence material to the conviction was withheld from the defendant and his attorney.⁴ This is of course favorable to defendants; there is no need to prove intent or bad faith of the prosecutor, only that the defendant did not receive the relevant and material evidence. And this is directly contrasted with a *Napue* claim, which *does* require that a prosecutor *knowingly* present false evidence.⁵ But interestingly, such a generous interpretation of an intent prong under *Brady* is not given to petitioners when

evidence is straightforwardly destroyed or unpreserved, as opposed to simply not being turned over. In *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), the Supreme Court stated that when “potentially useful evidence” was not preserved by the state, the lack of preservation (and thus the lack of a possible disclosure to the defendant) was not a constitutional violation unless “a criminal defendant can show bad faith on the part of the police.” And proving bad faith is exceptionally rare: according to some studies, there are only seven cases in which bad faith was established and habeas relief granted due to destruction of evidence.⁶ This is particularly concerning considering the Innocence Project claims the number one problem that it faces in its cases is destruction of evidence.⁷

Like the intentionality prong of *Brady*, the materiality prong under *Brady* is more complicated than it may initially appear. The Fourth Circuit has adopted a materiality test that is seemingly favorable to defendants. *Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547, 548 (4th Cir. 1999) stated the materiality touchstone is a “concern that the suppressed evidence might have affected the outcome of the trial.” The threshold being a “reasonable probability” the proceeding would have had a different result had the evidence been disclosed.⁸ The *Spicer* court held that, while the strength of the prosecution’s case can be a factor in determining materiality, the materiality prong does not evaluate the sufficiency of other evidence.⁹ Rather, the analysis asks “whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”¹⁰

Like the prongs in *Brady*, the prongs under a *Napue* claim are also less than straightforward. A traditional *Napue* claim, again, requires 1) that a prosecutor knowingly 2) present false evidence to the jury and that 3) the evidence be material. But the “knowingly” prong in the Fourth Circuit is more expansive than the simple iteration of the rule indicates. In the Fourth Circuit, the first prong is satisfied when a prosecutor knows *or should have known* the evidence presented was false.¹¹ This is a meaningful distinction: a prosecutor cannot make themselves deliberately unaware about the truth or falsity of evidence in a trial. That they *should have known* about the falsity of evidence imputes some responsibility onto prosecutors to verify the reliability of evidence. Also relevant to the “knowingly” prong is the Fourth Circuit’s finding that the knowledge of prosecutorial actors, such as law enforcement, is imputed to the prosecution for purpose of a *Napue* violation.¹² If a law enforcement officer falsely testifies about certain evidence, that knowledge is imputed to the prosecutor and the first prong is satisfied: the independent lack of knowledge of the prosecutor need not be proven.

Prong two is also broader than covering only objectively false or untrue statements. The Fourth Circuit held it is a *Napue* violation to present not only false evidence, but evidence “not itself factually inaccurate” but that “creates a

false impression of facts which are known not to be true.”¹³ Misleading evidence, not just verifiably false evidence, is therefore covered: if the prosecution knew that a witness was not giving the full account of what happened, for example, failing to correct that testimony would violate *Napue*. Similarly, if an expert witness gave information deliberately designed to confuse or mislead the jury, a prosecutor has a responsibility to correct such behavior.

Finally, the materiality prong of *Napue* is a “low threshold” to pass.¹⁴ *Napue* itself encoded this belief in the original ruling, stating that “a lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.”¹⁵ Thus, a false statement does not have to be so serious as to destroy the entire credibility of a trial: a lie even to the credibility of a witness, as was the case in *Napue*, could satisfy the materiality prong.

These distinctions in *Brady* and *Napue* matter. They can open avenues for habeas relief incarcerated individuals may not be aware of. And they highlight the true scope of actions that prosecutors may partake in that could later be deemed unconstitutional. These cases are therefore relevant to defense attorneys: both because their clients may pursue *Brady* or *Napue* claims, and because both claims stem from prosecutorial misconduct occurring during trials where the misconduct may be witnessed by defense attorneys.

¹ John Scalia, *Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (Jan. 2002).

² *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963).

³ *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

⁴ *State v. Bagley*, 473 U.S. 667 (1985).

⁵ *Napue*, 360 U.S. at 269.

⁶ Teresa Chen, *The Youngblood Success Stories: Overcoming the “Bad Faith” Destruction of Evidence Standard*, 109 W. VA. L. REV. 422 (2007).

⁷ *Id.*

⁸ *Spicer v. Roxbury Correctional Inst.*, 194 F.3d 547, 599 (4th Cir. 1999).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *United States v. Tanner*, 61 F.3d 321, 236 (4th Cir. 1995). See also *Horton v. United States*, 983 F. Supp. 650, 656 (E.D. Va. 1997) (adopting the “should have known” threshold in interpreting a habeas petition).

¹² *French v. Boyd*, 147 F.3d 319, 329 (4th Cir. 1998).

¹³ *Burr v. Jackson*, 19 F.4th 395, 410 (4th Cir. 2021).

¹⁴ *United States v. Meinster*, 619 F.2d 1041, 1051 (4th Cir. 1980).

¹⁵ *Napue*, 360 U.S. at 269-70.

The ZA Editors thank Luke Mears for contributing this helpful information. Luke was a third year law student at Duke University School of Law and an extern in the FPD office during the Spring of 2024.



Navigating Novel Executions by Nitrogen Hypoxia

Nitrogen hypoxia, or nitrogen gas execution, suffocates an individual by forcing them to breathe pure nitrogen.¹ Alabama is one of three states to specifically authorize execution by nitrogen hypoxia.² On January 25, 2024, Alabama became the first state to carry out an execution by nitrogen hypoxia when the state executed Kenneth Eugene Smith, convicted of a murder-for-hire killing in 1988.³ Mr. Smith’s execution took 22 minutes, in which he remained conscious for several minutes, shaking and rattling the gurney he was strapped to.⁴

Alabama attempted and failed to execute Mr. Smith by lethal injection in 2022.⁵ The Department of Corrections called off the execution after spending several hours inserting needles into Mr. Smith, trying to find a suitable vein, and failing to do so.⁶ The Alabama Supreme Court decided the state could again attempt to execute Mr. Smith, which Alabama did after Mr. Smith exhausted his appeal options.⁷

Because of the media attention surrounding Mr. Smith’s case, there has been much discussion on the constitutionality of using nitrogen hypoxia in executions. However, the United States has a long history of capital punishment based on common law principles. In the 1970s, the United States seemed to turn away from capital punishment, only to reinforce and expand its use by 1994. Despite this history, there have been inconsistencies in applying capital punishment by the federal government. Because the United States has the ability to use execution methods authorized by state law, it is possible that executions by nitrogen hypoxia could be used by the United States. Such use would lead to legal challenges, which would likely result in the Supreme Court weighing in.

Inconsistencies since 1791: Changes in the 1970s, 1994, and 2008

While the Eighth Amendment to the U.S. Constitution protects against cruel and unusual punishment, it is silent on the definition of cruel and unusual punishment.⁸ The United States Supreme Court has heard many Eighth Amendment cases, but the Court has never found a method of execution unconstitutional.⁹ Presently, 27 states have authorized execution via lethal injection, electrocution, lethal gas, or firing squad.¹⁰ The remaining 23 states have abolished the death penalty for all crimes.¹⁰ The United States carries out federal executions by lethal injection.¹¹ Additionally, the federal government is allowed to carry out executions in states like New York, where the death penalty is otherwise proscribed.¹²

In 1976, the Court held that capital punishment was constitutional and not considered cruel and unusual because the Framers supported capital punishment and codified the death penalty for certain crimes.¹³ The Court has clarified that the “unnecessary and wanton infliction of pain” is cru-

el and unusual punishment prohibited by the Eighth Amendment.¹⁴ In 2008, the Court offered insight into cruel and unusual punishment in the death penalty context by saying that historically, preempted methods of execution involved the “deliberate infliction of pain for the sake of pain—‘superadd [ing]’ pain to the death sentence through torture and the like.”¹⁵

History: 2020-Present

In 2020, the Office of Legal Policy (OLP), an agency within the Department of Justice (DOJ), “amended its regulations governing the manner of federal executions ‘to provide the Federal Government with greater flexibility to conduct executions in any manner authorized by’ the Federal Death Penalty Act, 18 U.S.C. § 3596.”¹⁶ The Federal Death Penalty Act (“FDPA” or “the Act”) was enacted as a provision in the Violent Crime Control and Law Enforcement Act, commonly known as the 1994 Crime Bill.¹⁷ Like the 2020 amendment proposed by the DOJ, the FDPA also expanded the use of the death penalty. Prior to its passing, the death penalty was prescribed under federal law for thirteen offenses, but the bill expanded this number to sixty offenses.¹⁸ Under the Act, certain non-homicidal, narcotic offenses were punishable by death.¹⁹

In 2002, the constitutionality of the Act was challenged. In *United States v. Quinones*, the U.S. District Court in New York’s Southern District declared the Federal Death Penalty Act unconstitutional.²⁰ The District Court reasoned that because “innocent people are sentenced to death with materially greater frequency than was previously supposed” the Act violated the substantive due process rights of innocent persons.²¹ The court also noted in some cases proof of innocence “does not emerge until long after their convictions[,]” which violates procedural due process.²²

Eight months later, the Second Circuit Court of Appeals overturned the District Court’s decision and reinstated the constitutionality of the FDPA.²³ The Second Circuit criticized the District Court’s decision to consider “evolving standards of fairness and ordered liberty” which does apply to the Eighth Amendment, but not to the Fifth Amendment’s Due Process Clause.²⁴ Further, the appellate court reasoned that (1) Congress was presented with evidence surrounding the likelihood that innocent persons may be sentenced to death prior to the passing of the 1994 Crime Bill and still voted to enact the legislation, and (2) it is well-settled law that capital punishment is not unconstitutional.²⁵ The Supreme Court would deny certiorari and the Act remained in effect.²⁶ In 2008, the Supreme Court struck down provisions of the FDPA and state laws prescribing the death penalty for non-homicidal crimes when the Court held “the death penalty should not be expanded to instances where the victim’s life was not taken.”²⁷

The DOJ’s policy expansion took effect on December 28, 2020, and allowed federal executions by “any other manner prescribed by the law of the State in which the sentence was imposed.”²⁸ By including “any other manner” the federal government

could utilize alternative methods of execution, outside of lethal injection, if allowed under state law.²⁹ This would include electrocution, lethal gas, firing squad, or nitrogen hypoxia.³⁰ The 2020 amendment followed the DOJ’s decision to resume federal executions, which had not taken place since 2003.³¹ Between July 2020 and January 2021,³² the DOJ executed thirteen federal prisoners.

On July 1, 2021, the new Attorney General, Merrick Garland, issued a moratorium on all federal executions until OLP conducted a review of the changes.³³ In 2023, Garland authorized federal attorneys to seek the death penalty in extreme cases, while declining to pursue capital punishment in other cases.³⁴

In January 2024, federal prosecutors in the Western District of New York filed a notice to seek the death penalty in *United States v. Gendron*, marking the first time the DOJ would seek capital punishment under Garland.³⁵ Gendron faces 27 federal charges related to a racially motivated mass shooting at a supermarket in Buffalo, NY.³⁶ Trial is set to commence in September 2025.³⁷ While Garland may have authorized prosecutors to seek the death penalty in this case, his approval does not end the moratorium on conducting executions.

Under the 2020 policy amendment, the federal government can use any method of execution authorized by a state government.³⁸ This could include the use of nitrogen gas in an execution by nitrogen hypoxia in Alabama. Alabama does not have the burden to show that nitrogen hypoxia is constitutional; instead, the person sentenced to death has the burden to show that nitrogen hypoxia is cruel and unusual punishment.³⁹

The Future of Nitrogen Hypoxia

Opponents of execution by nitrogen hypoxia claim that there is not enough scientific research on using nitrogen in executions, there is a high risk of botched executions when using nitrogen, and nitrogen hypoxia is not used as a method of execution anywhere else in the world.⁴⁰ Additionally, the American Veterinary Medical Association has spoken out against using nitrogen hypoxia to euthanize animals because it causes panic and distress.⁴¹ Prior to its completed execution of Mr. Smith, Alabama botched four consecutive executions by lethal injection, calling the state’s protocols into question.⁴²

Should the federal government decide to use nitrogen hypoxia, or any of the other less common execution methods utilized by states, there will undoubtedly be challenges claiming these methods are cruel and unusual punishment and violate the Eighth Amendment. Should federal executions be carried out in the future, the use of other methods may become a reality. Since 2010, lethal injection drugs have been more difficult to procure, as pharmaceutical companies have either stopped producing these drugs or blocked their sale for capital punishment.⁴³ Additionally, many medical professionals have refused to administer

lethal injection drugs because of ethical and moral concerns.⁴⁴ For these reasons states like Alabama have gotten more creative in designating methods of execution.⁴⁵ In 2021, Idaho allowed for prisoners to be executed by firing squad if lethal drugs were not available.⁴⁶ However, three nitrogen gas companies have followed the pharmaceutical companies' lead and prohibited the use of their products in executions.⁴⁷

The extensive history of the Supreme Court, dating back to the 1878 case *Wilkerson v. Utah*, suggests the Supreme Court would not find nitrogen hypoxia unconstitutional.⁴⁸ Since 1878, the Supreme Court has declined to find any method of execution as cruel and unusual punishment over forty times.⁴⁹ In 2019, the Supreme Court, in an opinion by Justice Neil Gorsuch, declined to prevent the execution of Russell Bucklew.⁵⁰ Mr. Bucklew, convicted of murder and rape, suffered from "cavernous hemangioma, which causes vascular tumors—clumps of blood vessels—to grow in his head, neck, and throat."⁵¹ Justice Breyer's dissenting opinion agreed with Mr. Bucklew's allegation that Missouri's protocol, using three lethal injection drugs, would "cause the tumors that grow in his throat to rupture during his execution, causing him to sputter, choke and suffocate on his own blood for up to several minutes before he dies."⁵² The Court, relying on *Baze v. Rees*, rejected this allegation because of its extensive precedent upholding capital punishment and because Mr. Bucklew failed to provide an adequate alternative method of execution.⁵³

Additionally, given the current Court's pattern of relying on precedent, history, and tradition, it is unlikely the Court would find a method of execution to be cruel and unusual punishment when it has never done so in the past.⁵⁴ The best course of action for federal defenders is to rely on the government's decision to typically seek life sentences rather than death sentences and to push back against any efforts to seek the death penalty. Defense attorneys can lobby pharmaceutical companies and nitrogen gas companies to prohibit the sale of their products for use in executions, in addition to requesting amicus curiae from these companies, human rights organizations, and doctors with knowledge in this field. Alabama civil rights attorneys can fight against the state's use of nitrogen hypoxia, which would end all concern for both Alabama and federal defendants. Until such time, defendants like Mr. Smith and Alan Eugene Miller, another Alabama defendant, will be faced with the threat of execution by nitrogen hypoxia.⁵⁵ Mr. Miller, like Mr. Smith, survived a botched execution by lethal injection in 2022, and has filed a lawsuit in federal court seeking to prevent the state's attempt to make him the second individual executed by nitrogen hypoxia.⁵⁶ Unlike Mr. Smith, Mr. Miller can use the graphic depictions from Mr. Smith's execution as evidence that execution by nitrogen hypoxia is cruel and unusual punishment.⁵⁷

¹ Dana G. Smith, *Nitrogen Execution Method Touted as More 'Humane,' but Evidence Is Lacking*, Scientific American (2022) <https://www.scientificamerican.com/article/new-execution-method-touted-as-more-humane-but-evidence-is-lacking/> (last visited April 18, 2024).

² Death Penalty Information Center, *Methods of Execution*, Death Penalty Information Center (2017), <https://deathpenaltyinfo.org/executions/methods-of-execution> (last visited April 18, 2024).

³ Kim Chandler, *Alabama Executes a Man with Nitrogen Gas, the First Time the New Method Has Been Used*, AP News (2024) <https://apnews.com/article/nitrogen-execution-death-penalty-alabama-699896815486f019f804a8afb7032900> (last visited April 18, 2024).

⁴ *Id.*
⁵ Allison Mollman, *Alabama Has Executed A Man With Nitrogen Gas Despite Jury's Life Verdict*, ACLU (2024), <https://www.aclu.org/news/capital-punishment/alabama-has-executed-a-man-with-nitrogen-gas-despite-jurys-life-verdict#:~:text=On%20January%2025%2C%20the%20state,painless%20death%2C%20witnesses%20reported%20Mr> (last visited April 18, 2024).

⁶ *Id.*
⁷ Death Penalty Information Center, *Kenneth Smith Describes Alabama's Failed Attempt to Execute Him*, Death Penalty Information Center (2023), <https://deathpenaltyinfo.org/news/kenneth-smith-describes-alabamas-failed-attempt-to-execute-him> (last visited April 18, 2024).

⁸ U.S. Const. amend. VIII.

⁹ See *supra* note 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² 18 U.S.C. § 3596 (1994).

¹³ *Gregg v. Georgia*, 428 U.S. 153, 177 (1976).

¹⁴ *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

¹⁵ *Baze v. Rees*, 553 U.S. 35, 48 (2008) (citing *Wilkerson v. Utah*, 99 U.S. 130, 134-36 (1879)).

¹⁶ 28 CFR 26.3(a)(4); see also Lisa N. Sacco, *The Federal Death Penalty*, Congressional Research Service (CRS) (2020), <https://sgp.fas.org/crs/misc/IN11474.pdf> (last visited April 18, 2024).

¹⁷ U.S. Department of Justice, *The Federal Death Penalty Act Of 1994*, Criminal Resource Manual, <https://www.justice.gov/archives/jm/criminal-resource-manual-69-federal-death-penalty-act-1994> (last visited April 18, 2024).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *United States v. Quinones*, 205 F.Supp.2d 256 (S.D.N.Y. 2002).

²¹ *Id.* at 257.

²² *Id.* at 257.

²³ *United States v. Quinones*, 313 F.3d 49, 61-62 (2d. Cir 2002).

²⁴ *Id.* at 64-70.

²⁵ Chris Dunn & Arthur Eisenberg, *United States v. Quinones (Challenging Constitutionality Of The Federal Death Penalty Act Of 1994)*, ACLU of New York, <https://www.nyclu.org/en/cases/united-states-v-quinones-challenging-constitutionality-federal-death-penalty-act-1994> (last visited April 18, 2024).

²⁶ *Id.*

²⁷ *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

²⁸ Manner of Federal Executions, 85 Fed. Reg. 75,846, 75,847 (Nov. 27, 2020); see Merrick Garland, *Moratorium on Federal Executions Pending Review of Policies and Procedures*, Office of the Attorney General (2021), <https://www.justice.gov/opa/file/1557511/dl?inline> (last visited April 18, 2024).

²⁹ See *supra* note 2.

³⁰ See *supra* note 2.

³¹ Federal Bureau of Prisons, *Federal Executions*, Federal Bureau of Prisons (2021), https://www.bop.gov/about/history/federal_executions.jsp (last visited April 18, 2024).

³² *Id.*

³³ See Garland, *supra* note 28.

- ³⁴ Sadie Gurman, *Merrick Garland Raises the Bar for Death Penalty*, The Wall Street Journal (2023), <https://www.wsj.com/articles/merrick-garland-raises-the-bar-for-death-penalty-686d6418> (last visited April 18, 2024).
- ³⁵ Notice of Intent to Seek the Death Penalty at 1, *United States v. Gendron*, No. 22-CR-00109 (W.D.N.Y. January 12, 2024).
- ³⁶ Indictment at 1-10, *United States v. Gendron*, 2022 WL 2764306 (W.D.N.Y. July 14, 2022) (No. 22-CR-00109).
- ³⁷ Carolyn Thompson, *Trial Date Set for White Supremacist Who Targeted Black Shoppers at a Buffalo Supermarket*, NBC New York (2024), <https://www.nbcnewyork.com/news/local/trial-date-set-for-white-supremacist-who-targeted-black-shoppers-at-a-buffalo-supermarket/5100148/> (last visited April 18, 2024).
- ³⁸ *Manner of Federal Executions*, 85 Fed. Reg. 75,846, 75,847 (Nov. 27, 2020).
- ³⁹ Michael T. Maerowitz, *Glossip v. Gross: The Insurmountable Burden of Proof in Eighth Amendment Method-of-Execution Claims*, 49 Ariz. St. L. Rev. 279, 297 (2017), https://arizonastatelawjournal.org/wp-content/uploads/2017/06/Maerowitz_final.pdf (last visited April 18, 2024).
- ⁴⁰ Equal Justice Initiative, *Nitrogen Suffocation*, Equal Justice Initiative (2024), <https://eji.org/issues/nitrogen-suffocation/> (last visited April 18, 2024).
- ⁴¹ *Id.*
- ⁴² Jan Hoffman, *Nitrogen Hypoxia: What to Know about This New Method of Execution*, New York Times (Jan. 25, 2024), <https://www.nytimes.com/2024/01/25/health/what-is-nitrogen-hypoxia.html> (last visited April 18, 2024).
- ⁴³ Hanna Seariac, *As Lethal Injection Drugs Run Out, What's the Future of Death Row Executions?*, Deseret News (2024), <https://www.deseret.com/u-s-world/2024/1/25/24042588/alabama-nitrogen-gas-execution-us-lethal-drug-shortage/> (last visited April 18, 2024).
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ Death Penalty Information Center, *Three Largest Nitrogen Gas Manufacturers in the U.S. Prohibit Products from Use in Executions*, Death Penalty Information Center (2024), <https://deathpenaltyinfo.org/news/three-largest-nitrogen-gas-manufacturers-in-the-u-s-prohibit-products-from-use-in-executions> (last visited April 18, 2024).
- ⁴⁸ *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878) (holding that a state law allowing execution by public shooting was not cruel and unusual punishment).
- ⁴⁹ See Maerowitz, *supra* note 39, at 282.
- ⁵⁰ *Bucklew v. Precythe*, 587 U.S. 119, 122 (2019).
- ⁵¹ *Id.* at 126.
- ⁵² *Id.* at 154.
- ⁵³ *Id.* at 136-38.
- ⁵⁴ *Glossip v. Gross*, 576 U.S. 863, 869 (citing *Baze v. Rees*, 553 U.S. 35, 48 (2008)).
- ⁵⁵ Kim Chandler, *Inmate's Lawsuit Seeks to Block Alabama's Bid to Arrange 2nd Execution Using Nitrogen Gas*, AP News (2024), <https://apnews.com/article/death-penalty-alabama-nitrogen-gas-execution-3b13db124250497ee997aef07b57067a> (last visited April 18, 2024).
- ⁵⁶ *Id.*
- ⁵⁷ *Id.*

The ZA Editors thank Cameron Kelshaw for contributing this helpful information. Cameron was a third-year law student at Campbell Law School and an extern in the FPD office during the spring of 2024.

The Guidelines Commentary After *Kisor*: Debating Deference Before the Fourth Circuit

While the United States Supreme Court has clearly defined the advisory nature of the Sentencing Guidelines,¹ the authority of the Guidelines Commentary is less clear. Federal Circuits are split on whether the United States (U.S.) Supreme Court's holding in *Kisor v. Wilkie*, which undermined deference to administrative agencies' interpretations of their own regulations,² altered the level of deference to which courts should afford the commentary to the U.S. Sentencing Commission's Guidelines (the Commentary).³ This widespread disagreement provides advocates with the opportunity to challenge or defend deference to the Commentary depending on their client's situation.

Prior to *Kisor*, the controlling case on the authoritativeness of the Commentary was *Stinson v. United States*.⁴ In *Stinson*, the U.S. Supreme Court held that the Commentary "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, [the corresponding] guideline."⁵ The Court reasoned in *Stinson* that "the guidelines are the equivalent of legislative rules adopted by federal agencies" and as such, the "commentary is akin to an agency's interpretation of its own legislative rules."⁶ When *Stinson* was decided, *Seminole Rock* controlled and required that an agency's interpretation of its own regulations "be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation'" or is otherwise in violation of the Constitution or a federal statute.⁷ Thus, the Court's central holding as to the authoritativeness of the Guidelines Manual directly flowed from the *Seminole Rock* standard, now also referred to as *Auer* deference.⁸

The *Seminole Rock* standard was subsequently undermined in *Kisor v. Wilkie* in which the U.S. Supreme Court limited the scope of *Auer* deference such that it only applies where the regulation being interpreted is "genuinely ambiguous."⁹ The U.S. Supreme Court did not expressly address how *Kisor* affected the Commentary.¹⁰ However, many courts have found *Kisor*'s limited scope also applies to the Commentary. For example, the Eleventh Circuit issued an en banc decision reasoning that since *Stinson* declared the Commentary to be akin to an agency's interpretation of its own legislative rules, any changes to the deference afforded to agency interpretations applies equally to the Commentary.¹¹ The Third, Sixth, and Ninth Circuits have come to similar conclusions.¹²

In contrast, the Fifth Circuit recently joined the First, Second, Seventh, and Tenth Circuits in holding that *Kisor* did not undermine *Stinson* or change how courts should view the authority of the Commentary.¹³ The Fifth Circuit reasoned that, "*Stinson* sets out a defer-

ence doctrine distinct from the one refined by *Kisor*.¹⁴ Accordingly, the Fifth Circuit held it will continue applying the *Stinson* standard, “that the guidelines commentary is ‘authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline[.]’” until *Stinson* is explicitly overturned by the U.S. Supreme Court.¹⁵

The Fourth Circuit has issued two conflicting opinions on *Kisor*’s applicability to the Commentary. In *United States v. Campbell*, a Fourth Circuit panel applied *Kisor* and declined to defer to the Commentary.¹⁶ Twelve days later, in *United States v. Moses*, a separate Fourth Circuit panel held that *Kisor* was inapplicable to the Guidelines Manual and commentary to the Guidelines is still authoritative under *Stinson*.¹⁷ In an opinion dissenting in part in *Moses*, Judge King recognized that *Campbell* was binding on future cases as it was decided first.¹⁸ Still, advocates may have room to argue under *Campbell* that the *Stinson* standard still applies.

In *Campbell*, the Fourth Circuit first found that under *Stinson*, the Commentary at issue need not be followed because it was plainly inconsistent with the Guidelines.¹⁹ It was only after applying *Stinson* that the *Campbell* court applied *Kisor*, stating it made the court’s conclusion “indisputable.”²⁰ The *Campbell* court explained that *Kisor* “‘cabin[ed]’ the circumstances under which courts defer to the agencies’ interpretations of their own rules[.]” and extended that “cabining” to the Commentary.²¹ In applying *Kisor*, the *Campbell* court found that the portion of the Guidelines at issue was not “genuinely ambiguous” and thus the court did not need to defer to the Commentary.²² In its final summary of why it was declining to follow the Commentary, the *Campbell* court cited both *Stinson* and *Kisor*.²³

Because the Fourth Circuit applied both *Stinson* and *Kisor* in *Campbell*, advocates should argue for the use of the standard that is more beneficial to their client. However, advocates must also be prepared to defend their position under *both* standards, regardless of which one is preferable. Additionally, the Fourth Circuit’s internal disagreement over *Kisor*’s applicability to the Commentary, as demonstrated in *Moses*, indicates the issue is worth preserving in case it is reheard en banc. In fact, due to the significant circuit split on the issue, the U.S. Supreme Court may reconsider *Stinson* in light of *Kisor*. Overall, advocates in the Fourth Circuit have flexibility in arguing how much weight the court should afford the Commentary and should watch for further developments in the case law as the issue is unsettled.

United States v. Castillo, 69 F.4th 648, 651 (9th Cir. 2023). For cases finding that *Kisor* left the Commentary’s authority unchanged, see *United States v. Vargas*, 74 F.4th 673, 677-78 (2023); *United States v. Lewis*, 963 F.3d 16, 22-24 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020); *United States v. Smith*, 989 F.3d 575, 584-585 (7th Cir. 2021); *United States v. Maloid*, 71 F.4th 795, 798 (10th Cir. 2023).

⁴ *Stinson v. United States*, 508 U.S. 36, 38 (1993).

⁵ *Id.*

⁶ *Id.* at 45.

⁷ *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

⁸ See *id.*; *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁹ *Kisor*, 588 U.S. at 573. Although it does not directly affect the analysis here, the U.S. Supreme Court’s recent overturning of *Chevron* further illustrates the Supreme Court’s increasing unwillingness to defer to the interpretations of administrative officials. See *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2267-68, 2273 (2024). In fact, *Loper* cited *Kisor* several times to support the Court’s contention that the interpretation of regulatory schemes is best left to the judiciary. *Id. passim*.

¹⁰ See generally *id.*

¹¹ *Dupree*, 57 F.4th at 1275-1277.

¹² *Nasir*, 17 F.4th at 470-471; *Riccardi*, 989 F.3d at 485; *Castillo*, 69 F.4th at 651.

¹³ *Vargas*, 74 F.4th at 677-678; *Lewis*, 963 F.3d at 22-24; *Tabb*, 949 F.3d at 87; *Smith*, 989 F.3d at 584-85; *Maloid*, 71 F.4th at 798.

¹⁴ *Vargas*, 74 F.4th at 678.

¹⁵ *Id.* at 677-78 (quoting *Stinson*, 508 U.S. at 38).

¹⁶ *United States v. Campbell*, 22 F.4th 438, 447 (4th Cir. 2022).

¹⁷ *United States v. Moses*, 23 F.4th 347, 352 (4th Cir. 2022).

¹⁸ *Id.* at 359 (King, J., dissenting in part and concurring in the judgement) (citing *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc)).

¹⁹ *Campbell*, 22 F.4th at 444 (declining to follow commentary which stated that “controlled substance offenses” include attempt crimes).

²⁰ *Id.*

²¹ *Id.* at 445 (citing *Kisor*, 588 U.S. at 579-80).

²² *Id.*

²³ *Id.* at 447.

The ZA editors thank Kathryn Turk for contributing this helpful information. Kathryn was a third-year law student at UNC School of Law and an intern in the FPD office during the Summer of 2024.



Acquitted but Not Forgotten: Controversy of Acquitted Conduct in Sentencing

Currently, under *United States v. Watts*, sentencing courts can consider acquitted conduct when deciding a defendant’s sentence if the Government establishes that conduct by a preponderance of evidence.¹ Simply put, courts can consider not only the charges that led to a defendant’s conviction, but also underlying charges for which the defendant was acquitted at trial. The United

¹ See *Kimbrough v. United States*, 552 U.S. 85, 90 (2007).

² See *Kisor v. Wilkie*, 588 U.S. 558, 573 (2019).

³ For cases finding that *Kisor* limits deference to the Commentary, see *United States v. Dupree*, 57 F.4th 1269, 1275-76 (11th Cir. 2023); *United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021);

States Sentencing Commission (“the Commission”) has submitted proposals that, absent Congressional action, become effective on November 1, 2024. One of the proposed amendments revises §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) to exclude acquitted conduct from the scope of relevant conduct considered when calculating a defendant’s guidelines.² The proposed amendment provides that “[r]elevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court unless such conduct also establishes, in whole or in part, the instant offense of conviction.”³

United States v. Booker is the landmark case that rendered federal sentencing guidelines “effectively advisory.”⁴ In *Booker*, the Court held that the mandatory nature of the Federal Sentencing Guidelines violated defendants’ Sixth Amendment right to a jury trial.⁵ The Court ruled “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”⁶ The ruling in *Booker* led to another landmark case which established the guidelines for sentencing post-*Booker* - *Gall v. United States*.⁷ Per *Gall*, first, a sentencing court must properly determine the guideline range pursuant to 18 U.S.C. § 3553(a)(4).⁸ Second, the court must consider whether any of the guidelines’ departure policy statements apply pursuant to 18 U.S.C. § 3553(a)(5).⁹ Third, the court must consider the factors set forth in 18 U.S.C. § 3553(a) taken as a whole before determining the sentence to be imposed, including whether a variance is warranted.¹⁰

Per the Commission, acquitted conduct is defined as “conduct for which the defendant was criminally charged and acquitted in federal court.”¹¹ *United States v. Watts* upheld the use of acquitted conduct post-*Booker*. In *United States v. Frederickson*, the Court employed the reasoning in *Watts* in deciding whether acquitted conduct was appropriately applied during a revocation hearing.¹² The Court ruled *Watts* was correctly applied, and the government faced a lesser burden at the revocation hearing: disproving self-defense by a preponderance of the evidence.¹³ The use of acquitted conduct to increase a defendant’s sentence has been a serious concern, and current and past United States Supreme Court Justices have urged reconsidering use of acquitted conduct at sentencing.¹⁴ In 2023, the U.S. Supreme Court denied certiorari in *McClinton v. United States*, suggesting it would be appropriate for the Commission to resolve the question of how acquitted conduct is considered under the guidelines.¹⁵ The Commission advised that the amendment’s purpose is to promote respect for the law by addressing the concerns involving the “perceived fairness” of the criminal justice system as discussed in *McClinton*.¹⁶ There, the Court discussed how acquittals have been “accorded special weight,”¹⁷ which includes traditionally treating acquittals as inviolate, even if a judge is convinced the jury was “mistaken.”¹⁸ There were also concerns that using acquitted conduct to increase the guideline range

diminishes “the public’s perception that justice is being done[.]”¹⁹ The argument is that considering acquitted conduct at sentencing contributes to the erosion of the jury-trial right and enlarges the already formidable power of the government, reasoning that defendants who choose to put the government to its proof “face all the risks of conviction, with no practical upside to acquittal unless they . . . are absolved of all charges.”²⁰ Additionally, Justice Sotomayor argued that allowing consideration of acquitted conduct under a preponderance of evidence standard enables the government to receive a “second bite at the apple” with a lower standard of proof.²¹

The proposed amendment removes acquitted conduct from guideline range calculation unless it is established as being in whole or in part of the instant offense of conviction.²² Accordingly, this will affect steps one and two of the current post-*Booker* sentencing process. Importantly, the amendment expressly provides that it does not “abrogate[] a court’s authority under 18 U.S.C. § 3661.”²³ This means that the sentencing court is free to consider acquitted conduct in the final step of the sentencing process by virtue of the statute. Specifically, this statute allows judges to consider factors beyond the specific details of the crime committed. With this amendment’s effective date of November 1, 2024, practitioners whose clients’ guidelines may be adversely affected by acquitted conduct are encouraged to make a downward variance argument during sentencing based on this proposed change.

¹ *United States v. Watts*, 519 U.S. 148, 149 (1997).

² U.S. Sent’g Comm’n, *Proposed Amendments to the Sentencing Guidelines* §1B1.3 (April 30, 2024), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202405_RF.pdf (last visited Aug. 1, 2024).

³ *Id.* at 1.

⁴ U.S. Sent’g Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf#page=2 (last visited Aug. 1, 2024).

⁵ *United States v. Booker*, 543 U.S. 220 (2005).

⁶ *Id.* at 244.

⁷ See *Gall v. United States*, 552 U.S. 38 (2007).

⁸ See n. 4, U.S. Sent’g Comm’n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (summarizing *Gall*).

⁹ *Id.*

¹⁰ *Id.*

¹¹ USSG, *Proposed Amendments to the Sentencing Guidelines* §1B1.3(c).

¹² *United States v. Frederickson*, 988 F.3d 76 (1st Cir. 2021).

¹³ *Id.* at 87.

¹⁴ USSG, *Proposed Amendments to the Sentencing Guidelines* §1B1.3, p.s.

¹⁵ See, e.g., *McClinton v. United States*, 143 S. Ct. 2400, 2401 & n.2 (2023) (Sotomayor, J., Statement respecting the denial of certiorari) (collecting cases and statements opposing acquitted-conduct sentencing).

¹⁶ See *id.* at 2402-03; *id.* at 2403 (Kavanaugh, J., joined by Gorsuch, J. and Barrett, J., Statement respecting the denial of certiorari), *but*

see *id.* (Alito, J., concurring in the denial of certiorari).

¹⁷ *McClinton v. United States*, 143 S. Ct. 2400, 2402-03 (2023), (citing *United States v. DiFrancesco*, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980)).

¹⁸ *DiFrancesco*, 449 U.S. 117 at 130.

¹⁹ *McClinton*, 143 S. Ct. at 2402-03 (Sotomayor, J., Statement respecting the denial of certiorari); see *United States v. Settles*, 530 F.3d 920, 924 (D.C. Cir. 2008) (expressing concern that “using acquitted conduct to increase a defendant’s sentence undermines respect for the law and the jury system”).

²⁰ *United States v. Bell*, 808 F.3d 926, 932 (D.C. Cir. 2015) (Millett, J., concurring in the denial of reh’g en banc).

²¹ *McClinton*, 143 S. Ct. at 2402 (2023).

²² USSG, *Proposed Amendments to the Sentencing Guidelines* §1B1.3, p.s.

²³ USSG, *Proposed Amendments to the Sentencing Guidelines* §1B1.3, p.s.

The ZA Editors thank Sacejewia White for contributing this helpful information. Sacejewia was a third-year law student at North Carolina Central University and an intern in the FPD office during the Summer of 2024.



LEGAL UPDATES

4th Circuit Update

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 <https://www.ca4.uscourts.gov/opinions>.

U.S. 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 and scroll down to download the PDF summary.

LOCAL NEWS

EDNC News

On Friday September 6, 2024, the U.S. District Court celebrated a rededication ceremony of the Alton Lennon Federal Courthouse in Wilmington, North Carolina. The courthouse reopened after sustaining damage from Hurricane Florence in the fall of 2018.



FPD Office News

We bid a fond farewell to Chuck Livingston, investigator, and Patricia (“Paddi”) Rollins, senior paralegal, both of whom retired this fall. Chuck had over 37 years of federal service with the Federal Public Defender’s Office, while Paddi had over 30 years of federal service and worked with our office for over 27 years.

We are pleased to welcome to the Raleigh office: AFD Robert Parrott; Paralegal Nicole Rano; IT/Lit Support Karen Grinstead; Attorney Fellow, Aaron Davison, and Investigators Rashad Peterkin and Shelby Smith; and to the Greenville office: Paralegal Crystal Jenkins.

Panel News

We are pleased to welcome Aden Wilkie of Raleigh, North Carolina, who is training to become a panel attorney.

New to the panel in Raleigh are Sebastian Kielmanovich, Frank O’Hale, and Meaghan O’Connor; and in Cary, Tom Crosby.

If you have a suggestion for an article, we want to hear from you!



Send an e-mail to the Zealous Advocate Editors:
Laura_wasco@fd.org or
Vidalia_Patterson@fd.org