

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2019



The Defender's Message

In this edition of the Zealous Advocate, we have several articles that we hope will inform you about changes in the law. In these contentious times, it is good to be reminded that folks across the political spectrum can still find areas of agreement and come together for the common good. I'm not sure many of us would have guessed that the most fertile ground for bipartisan cooperation would be criminal justice reform, but with passage of the landmark First Step Act this, indeed, proved to be the case. Our article about the First Step Act provides basic information summarizing the various changes this new law brings to our practice.

We also have articles that may be helpful at sentencing, including information on the effect of incarceration on defendant mothers and their children, the latest Fourth Circuit decision on guideline calculations involving access device fraud, and an article discussing the Fourth Circuit's interpretation of the Armed Career Criminal Act post-*United States v. Johnson*. Given that our clients often ask about suppression motions in their cases, we are also featuring several articles probing Fourth Amendment issues including unprovoked flight under the reasonable suspicion standard, the expansive nature of protective sweeps, and how to challenge law enforcement entries into a home to execute search warrants.

As always, the ZA Editors and I hope that you will find this information helpful to you and your practice. I look forward to seeing you at our upcoming seminar this **Friday, April 12th at the N.C. State Bar Center in Downtown Raleigh.**

Alan DuBois
Federal Public Defender



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Reminder

On February 22, 2019, Panel Attorneys were sent a letter from the Administrative Office of the United States Courts regarding increases in CJA Hourly Rates and Case Maximums. If you need a copy of the letter, please contact FPD Panel Administrator, April Bunn, at April_Bunn@fd.org.

Seminar BOLOs

Our Spring 2019 Seminar, set for April 12th, will be held at the North Carolina State Bar and will be an all-day event. The North Carolina State Bar is located at 217 E. Edenton Street, Raleigh, N.C. We look forward to seeing you there!

Please note that our Fall 2019 Seminar will be a two-day seminar on Oct 3-4th at Atlantic Beach, NC. Information regarding registration and reservations will be sent out by June and will also be posted to our website.



PRACTICE TIPS

One Step Forward? What You Need to Know About the First Step Act

In December 2018, President Trump signed the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person ("FIRST STEP") Act into law. The Act is a criminal justice reform law that impacts sentencing and the federal prison system in several ways including: reducing mandatory minimums for drug offenses while narrowing the definition of drug priors (Section 401); enhancing safety valve provisions (Section 402); preventing "stacking" for first-time § 924(c) offenders (Section 403); allowing certain eligible defendants to petition for a reduced sentence under the Fair Sentencing Act of 2010 (Section 404); revising the process for prisoners to apply for compassionate release (Section 603); and altering the calculation of good time credits and introducing earned time credits (Section 101). However, the Act includes an extensive list of offenses that render a prisoner ineligible for earned time credits.

Section 401 of the Act reduces the mandatory minimum for drug offenses and thus limits the effect of prior felony drug convictions. Before the FIRST STEP Act, there was a mandatory life sentence for a third drug offense under 21 U.S.C. §§ 841 and 851. The mandatory minimum has been reduced to 25 years and prior convictions now only include "felony drug offenses" or "serious

violent felon[ies]." First Step Act of 2018, P.L. 115-391, § 401(a), 132 Stat. 5194, 5220-21. Similarly, before the Act, there was a 25-year mandatory minimum for a second drug offense under sections 841 and 851. This has been reduced to a 15-year mandatory minimum with the amended definition of prior offenses. *Id.* This section applies to defendants whose offenses were committed before December 21, 2018, but had not been sentenced as of the date of enactment. § 401(c).

The Act also expanded the safety valve provisions for drug mandatory minimums giving federal judges more discretion. Previously, defendants with no more than one criminal history point were eligible for a below mandatory minimum sentence under 18 U.S.C. § 3553(f). Section 402 expands this provision to those who do not have "(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines; (B) a prior 3-point offense . . . ; and (C) a prior 2-point violent offense" § 402(a)(1). The new safety valve extends to offenses committed under 46 U.S.C. §§ 70503 or 70506 involving manufacture, possession, and distribution of controlled substances on the high seas under the Maritime Drug Law Enforcement Act. *Id.* This section applies to convictions entered on or after the date of enactment. § 402(b).

Section 403 of the Act amends 18 U.S.C. § 924(c) by striking "second or subsequent conviction under this subsection" and inserting "violation of the subsection that occurs after a prior conviction under this subsection has become final" § 403(a). Given the title of Section 403, "Clarification of Section 924(c) of Title 18, United States Code," Congress is unambiguously expressing the true legislative intent behind § 924(c)(1)(C). It was not the intent to "stack" sentences for multiple charges stemming from the same course of conduct. Previously, the Supreme Court misinterpreted congressional intent in *Deal v. United States*, 508 U.S. 129 (1993) and permitted stacking for defendants sentenced for two § 924(c) violations during the same proceeding. Thus, the Act establishes that the 25-year mandatory minimum for second or subsequent convictions does not apply to defendants in their first § 924(c) proceeding, even if they will be sentenced for two § 924(c) violations in the same proceeding. This section applies to offenses committed before December 21, 2018 if the sentence had not been imposed as of that date. § 403(b).

Defendants sentenced for crack cocaine before the Fair Sentencing Act of 2010 was passed whose conviction would have been reduced by the Act can now petition for relief. § 404. Therefore, the Act applies the Fair Sentencing Act retroactively. Defendants sentenced before August 3, 2010 with the former weight thresholds can petition for resentencing

under the Fair Sentencing Act, but as with prior retroactive drug weight resentencings, the court is not required to reduce the sentence. § 404(c). The Bureau of Prisons (“BOP”), the Government, and the court are also authorized to make a motion for a reduced sentence under this section. § 404(b).

In addition, the process to request compassionate release has been revised. Prior to the Act, the BOP could deny a prisoner’s request for compassionate release and refuse to file a motion with the court. Prisoners were unable to appeal the BOP’s denial of compassionate release. Now, prisoners can appeal the denial directly to the court after they have “fully exhausted all administrative rights to appeal a failure of the BOP to bring a motion . . .” or 30 days after they have filed their request with the warden, whichever is earlier. § 603(b)(1). Also, within 72 hours of a terminal diagnosis, BOP must notify the prisoner’s attorney, partner, and family and inform them that they may submit a request for the prisoner’s compassionate release. § 603(b)(3). If asked, BOP staff must assist the prisoner with their compassionate release request. *Id.*

The Act also impacts good time credits which reduce a prisoner’s sentence. Prisoners can receive 15% good time credit for good behavior, but the BOP has been calculating the credits so that prisoners can receive up to 47 days off their sentence per year. The Act increases the credit to 54 days per year of the sentence imposed. § 102(b)(1). Aside from those serving a life sentence, all prisoners are eligible for good time credits. Prisoners have already unsuccessfully attempted to take advantage of the increased credits arguing that the provision became effective immediately.¹ However, the BOP and Department of Justice (“DOJ”) position is that good time credits go into effect on the same date as the risk assessment program and earned time credit provisions, which is 210 days after enactment. § 101(a).

While the FIRST STEP Act introduces earned time credits, which impact supervised release and time in prerelease custody, it also includes a long list of prisoners who are ineligible for this incentive. § 101(a). Depending on risk level, earned time credits are available to a prisoner “who successfully completes evidence-based recidivism reduction programming or productive activities[.]” *Id.* Participation in one of these programs gives 10 days of earned time credits for every 30 days of successful participation. *Id.* These credits can be redeemed when the earned time is equal to the remainder of their imposed term of imprisonment and the risk-assessment has determined the prisoner to have a minimum or low risk of recidivism. § 102(b). However, there are over sixty enumerated convictions that

render a prisoner ineligible. § 101(a). These range from heroin and methamphetamine traffickers who played a leadership role in the offense, fentanyl traffickers, all § 924(c) offenders, and sex offenders to certain violent offenders. *Id.* Further, non-citizens subject to deportation are ineligible. *Id.*

Practitioners in the Eastern District of North Carolina are advised to contact Laura Wasco, the Federal Public Defender office’s section 404 point person, for updated litigation guidance on Fair Sentencing Act cases. In addition, prepare clients that they may be ineligible for earned time credits and discourage them from filing pro se motions under this Act as many provisions only provide one opportunity for relief.

¹ See *Schmutzler v. Quintana*, No. 5:19-046-DCR, 2019 WL 727794 (E.D. Ky. Feb. 20, 2019) (holding that the amended provision allowing 54 days of good time credit does not take effect until the Attorney General completes the risk assessment system); *Kornfeld v. Puentes*, No. 1:19-cv-00263-JLT (HC), 2019 WL 1004578 (E.D. Cal. March 1, 2019); *Sennett v. Quintana*, No. 5:19-085-JMH, 2019 WL 1085173 (E.D. Ky. March 7, 2019); *Sheppard v. Quintana*, No. 5:19-084-DCR, 2019 WL 1103391 (E.D. Ky. March 8, 2019); *Rizzolo v. Puentes*, No. 1:19-cv-00290-SKO (HC), 2019 WL 1229772 (E.D. Cal. March 15, 2019).

The ZA Editors thank Courtney Bain for contributing this helpful information. Courtney is a third year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2019.



The Forgotten Factor: How Incarcerating Mothers Affects Children

Between 1980 and 2016, the number of women incarcerated in the United States rose by more than 700%.¹ The majority of women are incarcerated for nonviolent offenses—namely drug and property offenses. Many have dependent children.² In fact, it is estimated that 2.6 million children have a parent who is currently incarcerated, and many more have experienced the incarceration of a parent at some point during their life.³ Despite these figures, little attention is given to the consequences which incarceration has on children.

While it is perhaps common sense that incarcerating a child’s mother would have a negative impact, criminologists focus on four theories to explain why: strain, attachment, social control, and stigma.⁴ Strain theory proposes that the incarceration of a parent removes key financial and social opportunities which negatively impact a child’s development.⁵ The emotional and financial strain is also likely to radiate to surrogate caregivers, compounding the impact and straining

communities. Attachment theory focuses on the healthy emotional development of the child, which strongly depends upon the parent-child relationship.⁶ In fact, the critical and most important task of the first year of human life is “the creation of a secure attachment bond of emotional communication between the infant and the primary caregiver.”⁷ Research suggests that attachment bonds are even formed prenatally and not necessarily dependent upon a cultivated relationship after birth.⁸ Therefore, maternal incarceration has damaging and lasting effects on children, even when there has been no opportunity to nurture and develop a personal relationship prior to incarceration.

Social control theory posits that violating rules is a natural component of human behavior.⁹ This innate behavior is mitigated by the presence of social norms, rules, laws, etc., though the relationship between a parent and child is particularly important.¹⁰ The attachment between parent and child operates to prevent delinquency while parental control and supervision help to keep children away from criminal activity and other negative behaviors.¹¹ Often, when a parent is incarcerated, the remaining social network is inadequate to provide the level of supervision, discipline, and guidance a child requires in order to ensure proper development.¹² Finally, stigmatization theorizes that the shame and guilt associated with having a parent incarcerated is borne by the individual’s family members, and is most acutely felt by children.¹³ Stigmatization results in rejection from social groups, and feelings of disconnect or dissociation from peers.¹⁴ This social exclusion persists into adulthood. Hence, the effects of maternal incarceration are not felt solely during the child’s youth, but may dictate their opportunities and feelings of social inclusion throughout life. No one theory accounts for all of the effects on children, but these mechanisms coalesce and drive the effects we see throughout development.

The separation of a child from a mother is “explicitly linked to insecure/disorganized attachment and subsequent mental health problems.”¹⁵ Studies indicate that extended separations from a parent are linked to increased instances of borderline personality disorder,¹⁶ depression,¹⁷ anxiety,¹⁸ diminished cognitive functioning,¹⁹ and post-traumatic stress disorder among others.²⁰ Furthermore, evidence has shown that separating an infant from her mother during the first year of the infant’s life “drastically impairs [the infant’s] ability to sympathize or show concern for others.”²¹ Maternal attachment is integral to the development of an infant’s stress system, and the attachment experiences of the first two years of life directly influence development of these systems.²² Without proper development, children are susceptible to post-traumatic stress, underdeveloped coping mechanisms, poor emotional response processes, and an overall alteration of the child’s developmental trajectory.²³

Behaviorally, children of incarcerated mothers are more likely to exhibit maladaptive coping patterns, such as lying, stealing, gang activity, and violence, than are other children from similar environments.²⁴ These children also tend to exhibit higher levels of hostility generally, sexual promiscuity, and substance abuse.²⁵ As a result of these trends towards heightened engagement in illegal or risky behavior, children of incarcerated mothers are more likely to be arrested than other children.²⁶

Furthermore, children who have an incarcerated family member have significantly worse academic outcomes than those who do not.²⁷ For instance, maternal incarceration results in increased rates of school dropout among adolescents,²⁸ while the chance that a child of an incarcerated parent will fail to graduate is nearly double that of the national average.²⁹ While it is true that children of incarcerated mothers tend to have greater economic and social adversity irrespective of the mother’s incarceration, the negative school outcomes of these children are “above and beyond” those documented within similarly situated populations.³⁰

The reality is that incarceration can be just as punitive for the family of the incarcerated as it is for the incarcerated. While simply granting get out of jail free cards to every individual who has familial obligations is probably not the best solution, the impact upon those reliant on or affected by an individual’s incarceration should be considered. Under current sentencing practices, family responsibilities alone typically do not warrant a downward departure unless the case exhibits “extraordinary circumstances.” The question this raises is does this approach truly represent the utilitarian goals of incarceration? In other words, by failing to consider familial obligations, are we ultimately punishing innocent swathes of society, predisposing them to increased hardship and increasing their own risks of incarceration later in life? If the ultimate goal of incarceration is to be directed at the individual guilty of the crime, then we perform a great disservice to society by ignoring the impact incarceration has on others, and particularly children. Additionally, the existence of a close mother-child relationship has been demonstrated to greatly reduce recidivism, therefore serving societal interests better than incarceration.

Practitioners should be aware that children of an incarcerated parent typically suffer greater negative life outcomes relative to their peers. While courts may be reluctant to consider familial obligations, practitioners nonetheless should be aware of the consequences and underlying mechanisms, and work to incorporate them into arguments and requests for downward variances. The most

effective arguments will highlight parental responsibilities, and use them in a way to argue that they contribute to extraordinary circumstances warranting a variance. In this way, some of the negative effects on children may be mitigated.

¹ The Sentencing Project, *Incarcerated Women and Girls, 1980-2016*, <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls-1980-2016.pdf>.

² *Id.* More than 60% of women in state institutions.

³ Kristin Turney & Rebecca Goodsell, *Parental Incarceration and Children's Wellbeing*, 28 THE FUTURE OF CHILDREN 1 (2018).

⁴ Emily Bever Nichols, Ann Booker Loper, *Incarceration in the Household: Academic Outcomes of Adolescents with an Incarcerated Household Member*, 41 J. YOUTH ADOLESCENCE 1455, 1456 (2012).

⁵ *Id.*

⁶ *Id.*

⁷ Allan N. Schore, *Dysregulation of the right brain: a fundamental mechanism of traumatic attachment and the psychopathogenesis of posttraumatic stress disorder*, 36 AUSTRALIAN AND NEW ZEALAND J. OF PSYCHIATRY 9, 13 (2002).

⁸ Myron A Hofer, *Psychobiological Roots of Early Attachment*, 15 CURRENT DIRECTION IN PSYCHOLOGICAL SCIENCE 84, 84-85 (2006).

⁹ Elizabeth I. Johnson, Beth Easterling, *Understanding Unique Effects of Parental Incarceration on Children: Challenges, Progress, and Recommendations*, 74 J. MARRIAGE AND FAMILY 342, 349-50 (2012).

¹⁰ *Id.*

¹¹ *Id.*

¹² Nichols, *supra* note 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Kimberly Howard, et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACH. HUM. DEV. 1, 2 (2011).

¹⁶ *Id.*

¹⁷ Turney, *supra* note 3, at 151.

¹⁸ Barbara J. Myers, et al., *Children of Incarcerated Mothers*, 8 J. OF CHILD AND FAMILY STUDIES 1, 18 (1999).

¹⁹ Johnson, *supra* note 10, at 344

²⁰ Schore, *supra* note 7, at 11.

²¹ Michael Gilad, Tal Gat, *U.S. v. Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 381 (2013).

²² Schore, *supra* note 7, at 10-11.

²³ *Id.* at 11-13.

²⁴ Myers, *supra* note 18, at 18.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Nichols, *supra* note 4, at 1461.

²⁸ Rosa M. Cho, *Understanding the Mechanism Behind Maternal Imprisonment and Adolescent School Dropout*, 60 FAMILY RELATIONS 272, 281 (2011).

²⁹ Nichols, *supra* note 4, at 1468.

³⁰ *Id.*

The ZA Editors thank Garrett Steadman for contributing this helpful information. Garrett is a third year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2019.

Fourth Circuit: Expired and Revoked Card Numbers Count in Access Device Fraud Loss

The Fourth Circuit recently held that credit card numbers, even if they are expired or revoked, can be counted in the total loss without any proof that the numbers are usable. The case is *United States v. Carver*, 916 F.3d 398 (4th Cir. 2019). Defense attorneys should take note of this decision since it could significantly increase loss amounts under U.S.S.G. §2B1.1.

In *Carver*, the defendant was charged with, among other crimes, access device fraud under 18 U.S.C. § 1029(a)(3).¹ Under that provision, it is illegal to “knowingly and with intent to defraud [possess] fifteen or more devices which are counterfeit or unauthorized access devices.”² An “access device” is one of any swath of items, including “account numbers,” that “can be used alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value”³ An “unauthorized access device” is “any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.”⁴

For sentencing purposes, violations of § 1029 fall under §2B1.1 of the U.S.S.G.⁵ When calculating loss under §2B1.1(b)(1), each access device counts for a minimum of \$500 of loss, regardless of whether the device is actually used.⁶

Hoping to exploit a circuit split, the defendant in *Carver* objected to the counting of any access devices without proof they could actually be used to gain something of value.⁷ The Fourth Circuit rejected Carver’s arguments, siding with the majority of circuits.

The defendant in *Carver* relied on a Ninth Circuit case, *United States v. Onyesoh*,⁸ in which the court held that “an unauthorized access device must be usable.”¹⁰ Implicitly conceding that “expired” access devices are included in the statutory definition of “unauthorized access devices,” the *Onyesoh* court explicitly pointed out that access devices are those devices that are “capable of obtaining something of value.”¹¹ The court then went on to discuss § 1029’s legislative genesis, noting that the law was written to account for “future technological changes” in access devices; however, this broad scope, the court reasoned, applies to the “kind” of access devices that might one day be covered by the definition, not their usability.¹² For this reason, the Ninth Circuit found that expired or revoked access devices can be counted in the loss amount, but only if either the defendant concedes that they

are useable or the government shows, by a preponderance of the evidence, that such devices are usable in some way.¹³

The *Onyesoh* usability test was expressly rejected by the Sixth¹⁴ and Seventh Circuits,¹⁵ and the Eighth Circuit implicitly rejected it.¹⁶ In *Carver*, the Fourth Circuit joined the Sixth and Seventh in rejecting a usability analysis for calculating loss amounts in unauthorized access device cases.¹⁷

The *Carver* court started by focusing on the statutory language defining an “unauthorized access device”; the court pointed out that the definition includes devices that are “expired, revoked, [or] canceled.”¹⁸ Since expired and revoked card numbers cannot immediately be used to obtain money, the court concluded that the usability logic of *Onyesoh* would require that those three words be read out of the statute.¹⁹ Finding this statutory reading unacceptable, the court proposed and adopted another.

It began by also quoting the legislative history behind § 1029, noting that Congress was “mindful of the need to ‘encompass future technological changes.’”²⁰ Section 1029’s phrase “can be used” is, the court reasoned, better understood to expand the definition to include any “device of the general sort that people use to get money.”²¹ Analogizing to a universal TV remote control that “can be used on any model of television” but still needs batteries before it can be used, the court concluded that an expired or revoked card number is likewise imminently usable.²² “Even if [an expired card] could not complete a transaction now, it is the type of thing that could do so, and was altered for precisely that purpose.”²³ Congress wrote a “capacious” definition of “access device” and made the loss calculation “straightforward” by setting the minimum loss amount at \$500 per device.²⁴ Both of these facts, the court concluded, make it clear that Congress intended to cast a wide net.²⁵ For that reason, the *Carver* court held that:

To meet the definition of unauthorized access device under 18 U.S.C. § 1029(e) (3) . . . the government did not need to show that each device was currently functional, but only that it was in principle the sort of thing that people use to obtain money (like a credit card or bank number).²⁶

With that holding, the *Carver* court definitively put the Fourth Circuit in the “non-usability” column for access device fraud.

Still, at least the Seventh Circuit has suggested there may still be some usability limit in extreme cases, though it declined to read a usability requirement into the statute and

suggested this limit with a healthy dose of sarcasm.²⁷ There may be cases where cards, account numbers, or other access devices are so outrageously expired or otherwise unusable that defense attorneys should argue to omit them from the loss calculation. Absent these “extreme” situations, however, attorneys should advise their clients that the expiration or revocation of an account number does not offer an effective argument to lower loss totals under §2B1.1(b)(1).

¹ *Carver*, 916 F.3d at 400.

² 18 U.S.C. § 1029(a)(3) (2012).

³ *Id.* § 1029(e)(1).

⁴ *Id.* § 1029(e)(3).

⁵ U.S.S.G. App. A (2018).

⁶ *Id.* §2B1.1 comment. (n.3(F)(i)). As an example, if a defendant used one device to charge \$100 worth of goods or services, the loss amount for that device would be rounded up to \$500. See *id.* If the amount charged to the device was \$550, the loss amount for that device would be \$550. See *id.*

⁷ *Carver*, 916 F.3d at 402.

⁸ *Id.* at 402-03.

⁹ 674 F.3d 1157 (9th Cir. 2012).

¹⁰ *Id.* at 1159.

¹¹ *Id.* (paraphrasing the “can be used” language of § 1029(e)(1)).

¹² *Id.* (emphasis in original) (quoting H.R. Rep. No. 98-894, at 19-20 (1984)).

¹³ *Id.* at 1159-60.

¹⁴ *United States v. Moon*, 808 F.3d 1085, 1092 (6th Cir. 2015). In addition to discussing the language of § 1029(e)(3), the *Moon* court also based its decision on what it considered an “expansive” definition of intended loss in §2B1.1 comment. (n.3). *Id.*

¹⁵ *United States v. Popovski*, 872 F.3d 552, 553 (7th Cir. 2017), cert. denied, 138 S. Ct. 1017 (2018).

¹⁶ *United States v. Thomas*, 841 F.3d 760, 764-65 (8th Cir. 2016). Under plain error review, the Eighth Circuit upheld a district court’s loss calculation that did not include a usability analysis. *Id.* at 765. The court did not expressly adopt either position for the Eighth Circuit. See *id.*

¹⁷ *Carver*, 916 F.3d at 402.

¹⁸ *Id.* at 403 (emphasis in original) (quoting 18 U.S.C. § 1029(e)(3)).

¹⁹ *Id.*

²⁰ *Id.* (quoting H.R. Rep. No. 98-894, at 19 (1984)).

²¹ *Id.*

²² *Id.* Language from the Seventh Circuit’s decision in *United States v. Popovski* is helpful in understanding this analogy. As that court put it, the definition of an “access device” that “can be used” to access goods only works with a definition of “unauthorized access devices” that includes expired or revoked cards, if an “access device” is defined “according to its nature—the sort of thing that could in principle be used to get goods or funds, whether or not it would work in practice.” *Popovski*, 872 F.3d at 553.

²³ *Carver*, 916 F.3d at 403.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Popovski*, 872 F.3d at 553.

The ZA Editors thank William Walker for contributing this helpful information. Will is a third year law student at UNC Law School and was an extern in the FPD office during the Spring of 2019.

ACCA Under the Microscope: Recent Developments in post-Johnson ACCA Interpretation by the Fourth Circuit

When the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), it sparked a raft of lower court decisions interpreting the Armed Career Criminal Act's ("ACCA") constitutionality and application. *Johnson* only expressly invalidated ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii); *Johnson*, 135 S. Ct. at 2557, but that was more than enough to open numerous challenges to previously imposed sentences. ACCA carries a 15-year mandatory minimum for qualifying defendants. 18 U.S.C. § 924(e)(1) (2016). Such a heavy consequence makes the now-shifting landscape of ACCA application an area of keen interest to federal criminal practitioners.

In the Fourth Circuit, two recent cases have addressed ACCA's meaning and application. *United States v. Townsend*, 886 F.3d 441 (4th Cir. 2018), determined the status of certain state statutes as "violent felonies" and *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018), concerned the government's timing in invoking ACCA's sentencing enhancements.

ACCA creates a fifteen-year mandatory minimum sentence for any conviction under 18 U.S.C. § 922(g) (criminalizing possession of a firearm by a felon and, ordinarily, carrying a statutory sentence of zero to ten years). To qualify for ACCA's enhancements, a defendant must have been convicted of three prior separate "violent felonies" or "serious drug offenses." See 18 U.S.C. § 924(e)(1) (2016). The statute defines "violent felonies" as felonies that "[have] as an element the use, attempted use, or threatened use of physical force against the person of another . . . [or] burglary, arson, . . . extortion, [or acts] involv[ing] use of explosives." *Id.* at § 924(e)(2)(B). ACCA also contains a "residual clause" covering any conduct which "otherwise . . . presents a serious potential risk of physical injury to another[.]" but the Supreme Court held that clause unconstitutional. *Id.* at § 924(e)(2)(B)(ii) (2016); *Johnson*, 135 S. Ct. at 2557.

In *Townsend*, the defendant was sentenced under ACCA's enhancements. 886 F.3d at 442. One of his predicate offenses was a state court conviction under North Carolina's assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) statute. *Id.* During habeas litigation concerning the sentence, the Supreme Court handed down *Johnson*. For *Townsend*'s enhanced sentence to remain valid, the predicate offenses would need to qualify under the "use of force" clause described above. That AWDWIKISI involves "force" was not contested. At issue was the use of force, meaning the offense has to

include a mens rea greater than recklessness. See *id.* at 444-45; see also *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). The court looked to the North Carolina Supreme Court interpretations of the AWDWIKISI statute and found the "intent to kill" element required specific intent. *Townsend*, 886 F.3d at 445 (citing *State v. Grigsby*, 526 S.E.2d 460 (N.C. 2000) and *State v. Irwin*, 285 S.E.2d 345 (N.C. Ct. App. 1982)). *Townsend* asserted other state court decisions held this element is satisfied by as little as "culpable negligence." *Townsend*, 886 F.3d at 446. The court rejected this argument, noting the cases *Townsend* relied on were interpretations of other felonies—namely, assault with a deadly weapon inflicting serious injury (AWDWISI). *Id.* at 447 (citing *State v. Jones*, 538 S.E.2d 917 (N.C. 2000)). The court denied *Townsend*'s petition, concluding North Carolina's AWDWIKISI offense qualifies as a violent felony for purposes of ACCA's enhancements. *Townsend*, 886 F.3d at 448.

In *Hodge*, the Fourth Circuit agreed with the defendant that one of his predicate crimes was no longer sufficient under ACCA post-*Johnson*. *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018). *Hodge*'s presentence report ("PSR") (filed in 2011) contained ten prior convictions, three of which were explicitly designated as predicates for an enhancement. *Id.* at 424. After *Johnson*, *Hodge* filed a habeas petition and the Government conceded one of those predicate offenses, a Maryland conviction for reckless endangerment, was no longer proper under ACCA. *Id.* at 426. However, the Government attempted to re-designate one of the other prior convictions in the PSR, a Maryland drug conviction, as a "serious drug offense" that satisfies ACCA's requirements. *Id.* The court held the Government could not reach back to re-designate this conviction as an ACCA predicate. See *id.* at 427. Allowing the re-designation would deprive the defendant of adequate notice to contest the designation at the time the PSR was filed. *Id.* Furthermore, the court reasoned it was appropriate to hold the Government to the same standard as the defendant: once the PSR has been accepted without objection, the parties forfeit the right to petition for changes. See *id.* at 429.

These two cases present a few interesting takeaways. First, the Fourth Circuit remains deferential to state courts when applying ACCA to state crimes. Second, the Fourth Circuit will likely continue deciding narrowly on state crime questions presented. For example, in *Townsend*, state court decisions concerning the very similar AWDWISI and assault with intent to kill statutes did not affect the Fourth Circuit's analysis of the North Carolina AWDWIKISI statute. See *Townsend*, 886 F.3d at 446-47. However, *Townsend* keeps hope alive for convictions under statutes that arguably lack the

element of specific intent to cause harm as required by ACCA's "use of force" clause. See *id.* at 444-45.

Hodge presents a more concrete practice note going forward. The Government must designate all ACCA predicate convictions it wishes to apply in the final PSR. Any undesignated conviction cannot be re-designated after the sentence is entered. This is important both during initial sentencing and during any later collateral review. This will likely lead the Government to designate as many ACCA predicate convictions as it can to avoid losing the enhancement if a predicate conviction is found insufficient on collateral review. Any defendant with only the minimum three designations stands a much better chance of getting a corrected sentence if any one predicate is questionable. As such, counsel should vigorously object to designations above the minimum during sentencing, so they can increase the chance of success during future collateral attacks on an ACCA enhancement.

Johnson left many ACCA sentencing enhancements ripe for challenge. The cloud over ACCA continues to gather, especially in the wake of other successful void-for-vagueness challenges to federal criminal statutes. See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding the general "crime of violence" definition in 18 U.S.C. § 16(b) unconstitutionally void). These latest developments in the Fourth Circuit add their own new contours, particularly to the importance of predicate offense designations in final PSRs.

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



To Flee or Not to Flee: Unprovoked Flight and the Reasonable Suspicion Analysis

Criminal defense attorneys should feel justified in their reasonable suspicion about reasonable suspicion's legitimacy. Both sides of the ideological spectrum can cite flaws on which they hang their hats, such as reasonable suspicion's absence from the text of the Fourth Amendment or its supplanting the probable cause standard, permitting more opportunity for intrusion on less justification. Yet reasonable suspicion's entrance into criminal procedure (and constitutional) framework has long come and passed. And its purported legitimacy carries on with its principal partner in genesis: stop and frisk. *Terry v. Ohio*, 392 U.S. 1, 27, 30 (1968). Indeed, stop and frisk is the main area under which reasonable suspicion's expansions prove most damaging to defendants.

For over fifty years, defendants have been obliged to work within reasonable suspicion's stop and frisk framework—no matter the expansion of

the doctrine. See e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (nervous, evasive behavior and unprovoked flight); *United States v. Robinson*, 846 F.3d 694 (4th Cir. 2017). This article highlights one expansion impacting defendants in the Eastern District: nervous, evasive behavior in investigatory stops. Rather than educate and conform—the *modus operandi* for defense attorneys when a controlling court issues new precedent—the purpose of the article is to educate and foster challenges.

The justification for stop and frisk and reasonable suspicion is officer safety. *Terry* 392 U.S. at 22-24 (concluding that forming the reasonable suspicion standard is necessary, in light of the real-world consequences of police work, "for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause"). For the stop portion, as we know, the officer must present a reasonable, articulable suspicion that criminal activity is afoot. One factor that goes toward reasonable suspicion is nervous, evasive behavior. Seemingly, both the Supreme Court and the Fourth Circuit have held that nervous, evasive behavior (although a pertinent factor) cannot establish reasonable suspicion on its own. See *Wardlow*, 528 U.S. at 124; *id.* at 126-27 (Stevens, J., concurring in part and dissenting in part); *United States v. Smith*, 396 F.3d 579, 584-85 (4th Cir. 2005); *United States v. Sprinkle*, 106 F.3d 613, 618 (4th Cir. 1997). On its face, optimistic defendants can find solace in this notion because of the totality of circumstances analysis, which requires a holistic view of relevant factors. But a careful read of *Wardlow* suggests that unprovoked flight—a specific type of evasive, nervous behavior—effectively, if not expressly, might be sufficient on its own.

In an apparent paradox, the Supreme Court deemed using flight as a pertinent factor consistent with an individual's "right to ignore the police and go about his business." *Wardlow*, 528 U.S. at 125. In an attempt to explain the apparent contradiction, the Court confusingly stated that "[f]light, by its very nature, is not going about one's business; in fact, it is just the opposite." *Id.* There are two flaws with the purported justification. First, the Court willingly failed to explain how flight is the opposite of "going about your business." Second, the Court has referred to "going about your business" a couple of ways, including "refusal to cooperate" and "right to ignore." No matter how it is said, the end result is the same: it "does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Moreover, one could contend that flight is simply a quicker way to show refusal to cooperate or go about your business. To assume that flight is not a means of refusing to cooperate attaches suspicion to the nuance that dictates the behavior of unique individuals. See e.g., *California v. Hodari D.*, 499 U.S. 621, 630 n.4 (1991) (Stevens,

J., dissenting) (explaining that the majority's assumption that "innocent residents have no reason to fear the sudden approach of strangers" is an "ivory-towered analysis of the real world" and does not illustrate people of colors' lived experience); cf. *United States v. Black*, 707 F.3d 531, 541 (4th Cir. 2013) (recognizing the perverseness of treating cooperation as justification for reasonable suspicion when it has been held that an individual may refuse to cooperate). Dismissing that notion, the *Wardlow* Court asserted that innocent explanations for flight do not create a Fourth Amendment violation and are necessary evils accepted by the reasonable suspicion standard. Regardless, the defendant could not offer an innocent explanation; no harm, no foul.

The Court rested its decision that there was reasonable suspicion to stop the defendant on his unprovoked flight *and* his presence in a high crime area. But this pairing effectively makes flight sufficient on its own. Making high crime areas a pertinent factor punishes entire communities for something they might not play a part in creating. And "those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances." *Black*, 707 F.3d at 542. Mere presence in a high crime area, without any other action, results in a predetermined check in the box on law enforcements' and judges' justification for reasonable suspicion. In the end, high crime areas fly in the face of the requirement that police present an articulable suspicion that criminal activity is afoot as to that specific individual. Without high crime area actually pulling any weight, flight is effectively sufficient to conduct a stop.

So, what can you do? Any attorney faced with the use of nervous, evasive behavior or unprovoked flight as a factor should be ready and willing to argue that the client was merely exercising their right to ignore, refuse to cooperate, or go about their business. The facts of the particular case might lend merit to the argument—there are cases that affirmatively state that nervous, evasive behavior (at least alone) cannot be the basis for reasonable suspicion. This might be more of a stretch for cases involving unprovoked flight, but it at least frames unprovoked flight in a light more favorable to your client—with the force of legal precedent. *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Additionally, understanding the disproportionate racial makeup of criminal defendants, attorneys should not shy away from pointing out what is obvious—criminalizing flight and high crime areas criminalizes certain people and places associated with those people. No doubt flight and high crime area are not the sole reasons a person requires the services of a criminal defense attorney; the police likely obtained probable cause to arrest or search after the initial stop. *Wardlow*, 528 U.S. at 126. But they have the availability of the exclusionary rule remedy. People who are stopped for flight or being in a high crime area, but have not committed a crime are subject to the embarrassment that results, sometimes without vindication—the exclusionary rule "does nothing to

protect innocent persons." *Irvine v. California*, 347 U.S. 128, 136 (1954). Particularly in cases where nervousness and flight are factors justifying a stop, Defense attorneys are encouraged to continue challenging the basis for these stops and advocate for standards that better protect the rights of their clients.

The ZA Editors thank Aaron Davison for contributing this helpful information. Aaron is a third year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2019.



Potential *Payton* Preservation

Even when law enforcement has procured evidence pursuant to a search warrant, defense attorneys must pay attention to the circumstances leading to that warrant. *Payton v. New York* established the warrant requirement for arrests in the target's residence, but it also produced controversial dicta regarding the validity of the original entry to execute such warrants. 445 U.S. 573, 603 (1980). In the last three sentences of the opinion, the Court states that police, armed with an arrest warrant and probable cause, may enter the home of a suspect if they have "reason to believe" (1) the suspect lives at the address, and (2) that the suspect is at home at the time of entry. *Id.* Entry without "reason to believe" either prong violates a defendant's Fourth Amendment rights. However, the circuits are split as to exactly what this reasonable belief standard requires.¹ Some hold that the standard is probable cause; others hold that the standard is lower than probable cause; and some hold that the standard is indefinite and hard to pin down.² The Supreme Court has not granted certiorari to elaborate on this vague language, and the Fourth Circuit has "declined to reach a conclusion" as to the exact standard.³ For the purposes of evaluating the validity of an entry, the Fourth Circuit merely uses the "totality-of-the-circumstances" approach.⁴

When defendants move to suppress evidence found pursuant to an invalid entry, they usually do so on the second *Payton* prong. Most people enjoy the benefit of, at least somewhat, stable residence. However, as criminal defense attorneys deal with indigent clients who may face housing insecurity or bounce from place to place, the first *Payton* prong can play a more substantial role. It is here where the defender can challenge law enforcement's belief as to the defendant's actual residence. In such cases, law enforcement may rely on confidential informant information to establish their belief of defendant's residence. Here, informant reliability and independent corroboration are crucial factors.⁵ More importantly, when faced with a defendant who does not have a registered address, police armed with little more than unsubstantiated hearsay may take a shot in the dark as to the defendant's

address in their warrant affidavit. This can lead to a knock-and-see approach to finding suspects, potentially subjecting innocent individuals to unconstitutional invasions of their property and privacy.

However, in order to establish that your client has a reasonable expectation of privacy in the residence searched, and standing to challenge the search, you will likely have to admit in the alternative that the home was in fact your client's. Thus, although there is room for challenging the belief that a defendant lives at a certain address, defense attorneys will likely focus suppression arguments on the belief that the defendant was actually present at the time of entry. Under this prong, the quantum of proof for a lower "reasonable belief" standard can be so low, that some courts have held that anything beyond a mere "hunch" satisfies the standard. *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005). For the *Thomas* court, the fact that police stated that they conducted an "investigation" connoted some sort of "systematic official inquiry." *Id.* However, most other courts require more than such a thread-bare statement of investigation. Courts holding that the standard is lower than probable cause have accepted contact with the suspect at the residence,⁶ seeing a car allegedly connected to the suspect parked in front of the residence,⁷ and seeing lights and noises emanating from the residence⁸ as sufficient evidence of a suspect's presence.

Circuits that have adopted the probable cause standard have accepted similar evidence of presence as described above. Although this seemingly blurs the line between the lower reasonable belief standard and a more exacting probable cause standard, such evidence was only accepted after police showed probable cause that the suspect lived at the residence.⁹ Additionally, although the Fourth Circuit has not yet adopted a "probable cause" standard for *Payton* entry analyses, there is no risk that the quantum of proof is so low (perhaps non-existent) as to mirror the minimal evidence in the *Thomas* decision.¹⁰ Thus, even in its totality-of-the-circumstances analysis, the Fourth Circuit has rejected less probative evidence of presence that would satisfy the lower standard. As such, defense attorneys should argue that, although the Fourth Circuit has not set an explicit standard, it has required more than the lower "reason to believe" standard and that the trial court should require a probable cause showing.

If courts were to allow police to justify entries (especially into the homes of innocent citizens) on minimal evidence, the Fourth Amendment would no longer protect against unreasonable invasions of the home, the "chief evil"¹¹ against which the amendment was designed to protect. *Payton*, 445 U.S. at 585. Accordingly, defense attorneys should argue that *Payton* requires a higher quantum of proof for "reason to believe" because it is in the interest of public policy and because the Fourth Amendment warrant

requirement demands "probable cause." Without an express probable cause standard, or a totality-of-the-circumstances standard that closely mirrors probable cause, police will have little incentive to respect the area where citizens have the greatest expectation of privacy, the home.

¹ *United States v. Hill*, 649 F.3d 258, 262-63 (4th Cir. 2011).

² *Id.* at 263.

³ *Id.*

⁴ *United States v. Exum*, 657 F. App'x 153, 155 (4th Cir. 2016) (per curiam) (quoting *Illinois v. Gates*, 462 U.S. 213, 230 (1983)).

⁵ *Draper v. United States*, 358 U.S. 307, 313 (1959).

⁶ *United States v. Smith*, 131 F.3d 1392, 1396 (10th Cir. 1997) (police entered the residence fifteen minutes after spotting the suspect at the door of the garage).

⁷ *United States v. Magluta*, 44 F.3d 1530, 1537-38 (11th Cir. 1995).

⁸ See *United States v. Route*, 104 F.3d 59, 63 (5th Cir. 1997) (television heard on the premises); see also *United States v. Morehead*, 959 F.2d 1489, 1496 (10th Cir. 1992) (lights illuminating a building on the premises).

⁹ *United States v. Vasquez-Algarin*, 821 F.3d 467, 481 (3rd Cir. 2016).

¹⁰ *Hill*, 649 F.3d at 264-65 (holding that "an unidentified noise coming from within the home" was not enough to establish that someone was present and that it was indeed the defendant).

¹¹ James J. Franklin, *Payton's Probable Cause: Why "Probable Cause" and "Reason to Believe" Represent and Should Represent the Same Reasonableness Standard*, 70 U. Pitt. L. Rev. 487 (2009).

The ZA Editors thank Brandon Mayes for contributing this helpful information. Brandon is a second year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2019.



Mourning the Fourth: How the Protective Sweep Gutted Fourth Amendment Protections in Private Dwellings

Courts have long held that the home is the most protected area under the Fourth Amendment; therefore, all searches and seizures conducted within a private dwelling must be reasonable. Reasonable searches are typically conducted with a warrant supported by probable cause; however, the U.S. Supreme Court significantly reduced the high level of protection presumed for the home in *Maryland v. Buie*, 110 S. Ct. 1093 (1990). In *Buie*, law enforcement officers executed an arrest warrant at the home of a man, suspected as one of two culprits in an armed robbery. The suspect willingly submitted to officers and after detaining the suspect, an officer proceeded to search the basement, allegedly to check for dangerous individuals. In doing so, the officer found a red running suit that one witness stated was worn by one of the robbers. The Court

held that that during a search incident to an arrest, an officer may perform a limited protective sweep in conjunction with an in-home arrest if the officer reasonably believes, based on specific and articulable facts, that the area to be swept harbors a dangerous individual. A protective sweep is “a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others.” *Id.* at 1094. “It is narrowly confined to a cursory visual inspection of those places in which a person may be hiding.” *Id.* Despite the limiting language in the definition, a protective sweep is far from narrow and widely discretionary.

The *Buie* decision proved troubling for criminal defense practitioners, specifically in pursuing motions to suppress. When conducting a protective sweep anything found in plain sight will likely be admissible under the plain view doctrine. Under *Buie*, however, anything found within the scope of the protective sweep will also likely be admissible, even if the items are not in plain view. *United States v. Williamson*, 250 Fed.Appx. 532 *WL 2963944 (4th Cir. 2007) (holding that police officer’s search under mattress of bed in upstairs bedroom did not exceed scope of lawful protective sweep of home); *United States v. Green*, 599 F.3d 360 (4th Cir. 2010) (holding protective sweep of defendant’s home, which encompassed a look under defendant’s bed, was appropriate). The primary issue with the *Buie* decision is that the Court stretched *Terry v. Ohio* beyond its intended purpose by applying *Terry*’s low reasonable suspicion standard during police-citizen encounters to the most protected area under the Fourth Amendment, the home. 392 U.S. 1 (1968). This allows almost anything found by officers in the home to be admissible despite the absence of probable cause supported by a warrant.

When dealing with cases regarding Fourth Amendment violations resulting from protective sweeps, defense practitioners are fighting an uphill battle. While victory is not impossible, it is certainly almost impracticable unless law enforcement acts with apparent bad faith. It is time for a zealous advocate to challenge the depth of Fourth Amendment protections uprooted by *Terry*’s expansion under *Buie*. Recently, the First Circuit Court of Appeals provided a sword and shield for defense practitioners battling the badges and effects of *Buie*. In *United States v. Serrano-Acevedo*, 892 F.3d 454, 459 (1st Cir. 2018),¹ the court held that police officers violated the Fourth Amendment rights of a suspected bank robber after conducting a protective sweep of his home while he and his accomplice were detained. The court reasoned that the two suspects were both detained at the time of the search and officers provided no articulable facts to support why they believed a third robber was in the home. *Id.* at 459. Finally, the officers provided no explanation for failing to seek a warrant in the 30-minute window that passed while they awaited the SWAT team’s arrival. *Id.* Thus, the court reversed the lower court’s denial of the defendants’ motion to suppress and remanded the case. *Id.* at 460-62.

In sum, the reasonable suspicion standard in *Terry* was never meant to extend to the home. To restore protections of private dwellings, courts must be reminded that the law favors protecting individuals in their homes and there are rare circumstances in which those protections may be disturbed. While *Serrano-Acevedo* is only binding in the First Circuit, it certainly can be applied as a bandage in healing this wound to the Fourth Amendment.

¹ Two defendants were charged with armed bank robbery. Similar to *Buie*, law enforcement officers received information from an informant that helped officers locate one of the alleged robbers at his home. While watching the home, officers saw the second robber drive through the area. The officers stopped and arrested the second robber. The SWAT team arrived about thirty minutes later. After the first robber was arrested outside of the home, the SWAT team conducted a sweep of the home and found large amounts of cash throughout the home, including inside the toilet.

The ZA Editors thank Destiney Parker-Thompson for contributing this helpful information. Destiney is a third year law student at Campbell Law School and was an extern in the FPD office during the Spring of 2019.



LEGAL UPDATES

Supreme Court Update

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

4th Circuit Update

For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check <http://circuit4.blogspot.com>. For daily published Fourth Circuit opinions, visit <http://www.ca4.uscourts.gov/opinions/daily-opinions>.



LOCAL NEWS

Eastern District News

We are saddened by the passing of Senior United States District Judge James Carroll Fox who passed away on March 23, 2019. Judge Fox will be greatly missed by everyone in the district.



Judge James C. Fox served 35 years
on the federal bench in
the Eastern District of North Carolina

FPD Office News

We bid a fond farewell to Suzanne Little, Assistant Federal Public Defender, who retired at the end of December. Suzanne worked in our office for over 9 years and had over 23 years of combined federal service.

We are pleased to welcome Edward D. Gray, who will be joining us as an Assistant Federal Public Defender in the Raleigh office.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh: Madelaine Wane; and in Rocky Mount: Moses V. Brown.

The following are new panel attorneys in Raleigh: Lawrence Cameron; and in Clayton: Neil Morrison.



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



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