

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Summer 2020



The Defender's Message

Whew, where to start? The world has become a very different place since the last edition of this newsletter. Because of the virus, we live differently and work differently. Because of George Floyd, Breonna Taylor, Ahmaud Arbery and all those who've taken to the streets on their behalf, we've been forced to think differently, to confront, with clear eyes and no excuses, the racial biases and systemic faults that still plague our criminal justice system. But one thing that hasn't changed is the work we do every day, as criminal defense attorneys, to expose and resist these injustices, to fight on behalf of our clients in the face of a system that too often fails to acknowledge their humanity and their worth. No matter how challenging the circumstances, whether arguments now must be conducted by video or behind masks or at personal risk to our own health and safety, we continue to advocate for those who have no voice and fight for those who have no power. What a privilege and honor it is, especially in these trying times, to take up this mantle and accept this awesome responsibility.

We chose to delay our newsletter because we had to cancel our seminar. While we hope to have a seminar soon, we continue as part of our training mission to provide as many tips within this newsletter to continue to educate our panel until we are able to come together again. Given all the difficulties we have been facing, we hope these articles will help your practice and in defending your cases during this challenging time.

To this end, in this edition of the *Zealous Advocate*, we have a jam-packed newsletter with additional information spreading across our practice from pretrial to trial issues. First, we take a look at the U.S. Supreme Court's decision in *Rehaif* and how it changes the landscape of federal firearm law. Next, we delve into N.C.'s recent legislation regarding the legalization of hemp and challenges that can be made to the Fourth Amendment's violations against unreasonable searches and seizures based on the odor of marijuana. We also have articles addressing false confessions, trial and jury trial instructions, and discovery in the immigration context. There are also two articles addressing pretrial detention: one as to facilities in the Eastern District and the challenges it poses for our practice and the other presents tips for detention hearings. Finally, we have articles on probable cause involving the internet in the context of the Fourth Circuit's decision in *United States v. Bosyk* and about conditional discharges in N.C. and whether they qualify as convictions for the federal felon in possession statute.

As always, the Editors and I hope these articles are helpful to you and your practice. We hope that you all are as proud as we are of the work we do to help the arc of history bend, however slowly, toward justice. Until we can see everyone again, we hope everyone is safe and well.

G. Alan DuBois
Federal Public Defender



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PANEL ATTORNEY INFORMATION

Reminders

An implementation of rate increases under the Criminal Justice Act of Panel Attorney Hourly Rates and Case Compensation Maximums went into effect January 1, 2020. This is a result of the "Consolidated Appropriates Act of 2020". Currently, Panel Attorney Hourly Rates for non-capital work is \$148. That has been increased to \$152 hourly. This new rate applies to services performed on or after January 1, 2020. Where the appointment occurred before January 1, 2020, the new hourly compensation rates apply to that portion of services provided on or after the effective date (January 1, 2020). This means that the statutory maximum for non-capital cases have increased as well from \$11,500 to \$11,800. The necessary changes will take place in eVoucher automatically. There will be no action needed on your end. Please make a note of the increases.

From the Court: When assigned a new case, it is very important that you file your Notice of Appearance as soon as possible. This ensures that you receive docketed notices from the Court pertaining to your new client, as well as lets the Court know whom to contact, if needed. This is particularly important at this time when Court agencies and clients are worried about the pandemic. Having your Notice of Appearance filed on the docket will allow all parties concerned, including the U.S. Marshals Service and the Court, to contact the assigned attorney without delay or having to go through third parties to obtain the information.

Thank you all for the hard work you provide to the EDNC CJA Panel.

Seminar BOLOs

Due to the COVID-19 pandemic, the May 2020 Spring Federal Criminal Practice Seminar was cancelled and rescheduled for August 21, 2020. In response to the evolving situation surrounding COVID-19, The North Carolina State Bar eliminated the 6-hour cap for on-demand/online CLE programs. This change means that members of the North Carolina State Bar can meet their entire CLE compliance requirement online. **In order to assist with the CLE fulfillment, our one-day seminar planned for August 21st at McKimmon Center will now be offered via live stream!** This is a one-day seminar that will include 5 hours of CLE credit (including 1 hour of Technology CLE! No Ethics or Substance Abuse is included in this one-day seminar.)

If you signed up for the seminar already, you do not need to register again. If you have not previously registered, there is still time. Please register via this link: <https://www.surveymonkey.com/r/LGXWM8M> When registering, ignore the original "Spring 2020"

date and "April 17th" deadline - this was set up earlier in the year when it was still supposed to be a 'Spring' Seminar. The main thing is to register, so you will receive a live stream link for August 21st.

Please note that, also due to the pandemic, **our Fall 2020 Federal Criminal Practice Seminar originally set for October 29-30th at Wrightsville Beach, North Carolina, has been cancelled. As such, the August 21st webinar will be the ONLY seminar that EDNC FPD will offer this year.** We hope you will take advantage of this free opportunity. For information regarding upcoming seminars, please check email and our website.



PRACTICE TIPS

Knowledge is (Now) Power in *Rehaif v. United States*

One of the most prevalent components of federal firearm law is the prohibition on possession of firearms by persons who fall into various specific categories. Under 18 U.S.C. § 922 (g), convicted felons, aliens unlawfully present in the United States, and certain other persons are prohibited from possessing any firearms or ammunition.¹ Under 18 U.S.C. § 924(a)(2), criminal penalties will be imposed on whoever knowingly violates § 922(g).² While it is settled that the offense requires that the individual with a prohibited status under § 922(g) must know that he was possessing a firearm, a less clear issue was whether that individual also must have knowledge of his prohibited status.

In *Rehaif v. United States*, the Supreme Court in a 7-2 majority opinion provided guidance in resolving this issue, stating that the knowledge requirement applies both to the individual's conduct and to the individual's status.³ In other words, to obtain a conviction for this offense, the government must show that the individual knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.⁴

Hamid Rehaif entered the United States on a nonimmigrant student visa to attend university.⁵ He was academically dismissed, and the university informed him that his immigration status would be terminated unless he transferred to a different university or left the country.⁶ Rehaif did neither; after some time had passed, he went to a firing range, where he purchased ammunition and fired weapons.⁷ The government then prosecuted him for the possession of firearms as an alien unlawfully in the United States in violation of § 922(g) and § 924(a)(2).⁸ The district court instructed the jury that the government was not required to prove knowledge

of status, and the jury returned a guilty verdict for Rehaif.⁹ On appeal, the Eleventh Circuit affirmed.¹⁰ The Supreme Court reversed, stating that the government must prove that Rehaif knew of his status as a person barred from possessing a firearm and extending the knowledge requirement to both components of § 922(g).¹¹

The Court emphasized the longstanding presumption of Congress' intent to require a culpable mental state for each of the statutory elements that criminalize otherwise innocent conduct, a presumption known as scienter.¹² The majority's interpretation of the text of § 922(g) and § 924(a)(2) resulted in a reading of the term "knowingly" as applying to all the subsequently listed elements, and this reading was found consistent with the basic principle underlying the criminal law of separating those who understand the wrongful nature of their act from those who do not.¹³ A "legion" of cases exemplify the importance of scienter in separating wrongful acts from innocent acts; as such, the Court has historically elected to interpret statutes to include a scienter requirement even where the text was silent or unclear on the matter.¹⁴

The importance of scienter permeated here to the Court's interpretation of § 922(g). It was Rehaif's status, not his conduct alone, that made the act criminal.¹⁵ Individuals without knowledge of their status under § 922(g) may lack the intent needed to make the behavior wrongful, and their membership in a prohibited status category may be all that stands between innocent and criminal conduct.¹⁶ The individual's status was the crucial element in separating innocent from wrongful conduct, since possessing a firearm is not necessarily criminal in and of itself.¹⁷ In explicitly extending scienter to the provisions at issue, the Court raised two hypothetical scenarios where the lack of a knowledge of status would prove problematic.¹⁸ The first was in the case of an alien who was brought into the United States unlawfully as a child and was therefore unaware of his unlawful status; the second was in the case of one who was convicted of a prior crime but sentenced only to probation and did not know that the crime is punishable by imprisonment exceeding one year.¹⁹ Therefore, requiring that the government show knowledge in both the possession element and the status element of § 922(g) is the correct and just interpretation in the Court's eyes.²⁰

This decision was a narrow one. The Court clarified that its conclusions were in the contexts of prosecutions under § 922(g) and § 924(a)(2), expressing no view about what the government's burden would be in establishing knowledge of status regarding other statutory provisions.²¹ However, *Rehaif* presents wide-reaching implications, directly affecting the countless individuals currently serving terms for

§ 922(g) convictions and presenting even more impact when considering the future of prosecutions under these provisions.

The dissent in *Rehaif* raised this concern, emphatically arguing that the majority's decision would result in a flood of retroactive challenges by those currently incarcerated under § 922(g), most commonly in the felon-in-possession category. Significant economic burdens would be imposed on the lower courts, and gun owners may begin to intentionally keep themselves in the dark about their potential membership in the § 922(g) status categories.

However, the fallout described by the dissent seemed to pale next to the progress towards meaningful criminal justice reform. The majority briefly addressed the possibility of an increased burden, expressing doubt that the obligation to prove an individual's knowledge of his status would be as burdensome as the government suggested.²² Additionally, the so-called ostrich defense that was articulated by the dissent seems to hold minimal merit if raised, since the Model Penal Code anticipates that intentionally keeping oneself in the dark and then arguing ignorance of incriminating facts as a defense would very rarely succeed.

Rehaif was a significant step forward in criminal justice reform. Defense attorneys should be aware that, although the decision was narrow on its face, § 922(g) by itself encompasses a wide range of current and future cases. Both defense attorneys and prosecutors must now contemplate what kinds of evidence can be used to show the requisite state of mind. The presence of nine distinct status categories in § 922(g) adds another dimension to the analysis, as it is also still unclear what exact level of knowledge is required for each category. Ultimately, although the issue of the economic burden on the judiciary is valid and will likely persist, *Rehaif* will likely represent a significant change in the landscape of federal firearm law.

¹ 18 U.S.C. § 922(g).

² 18 U.S.C. § 924(a)(2).

³ *Rehaif v. United States*, 139 S.Ct. 2191, 2194 (2019).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2195.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2196.

¹⁴ *Id.* at 2196-97.

¹⁵ *Id.* at 2197.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2198.

¹⁹ *Id.*

²⁰ *Id.* at 2200.

²¹ *Id.*

²² *Id.* at 2198.

The ZA Editors thank Jay Kim for contributing this helpful information. Jay was a third year law student at UNC Law School and an extern in the FPD Office during the Fall of 2019.



Hemp and Probable Cause: How Federal Legalization Provides a New Avenue for Challenging Searches and Seizures

“The most basic principle of Fourth Amendment jurisprudence . . . is that warrantless searches and seizures inside a home are presumptively unconstitutional.”¹ However, the Fourth Circuit has found that the odor of marijuana emanating from a home provides probable cause that a crime is occurring and presents an exigency allowing for the warrantless search of a home.² Probable cause for a search requires that “the totality of circumstances is sufficient to warrant a reasonable person to believe that contraband or evidence of a crime will be found in a particular place.”³

The legalization of medical marijuana in states across the country has required courts to re-examine the role of marijuana odor and probable cause.⁴ However, while marijuana remains illegal on the federal level, recent legislation has cleared the way for states to legalize the sale of hemp products.⁵ The Fourth Circuit must decide whether individuals who choose to engage in a legal activity should have their property seized and face potential criminal penalties. Continued searches and seizures based on the odor of marijuana would appear to directly contradict federal and state legislative intent in legalizing hemp products.

As of December 1, 2017, North Carolina criminal law explicitly excludes industrial hemp produced and marketed “in compliance with the rules issued by the North Carolina Industrial Hemp Commission” from its definition of marijuana.⁶ These changes allow North Carolina shops to sell hemp flowers, which are “indistinguishable from marijuana flowers—they look the same, smell the same, and apparently taste the same. Just like dried marijuana flowers, the dried hemp buds can be smoked, vaped, or eaten.”⁷ The products are marketed to help with a variety of conditions, including depression, inflammation, and cancer.⁸ Unlike marijuana, hemp products do not produce psychoactive effects.

New hemp laws may provide defendants with an additional argument for challenging warrantless searches based on officers’ smelling marijuana. As noted above, hemp is virtually indistinguishable from marijuana in smell and appearance.⁹ According to a memo released by the North Carolina State Bureau of Investigation (SBI), no field test currently exists to distinguish

between hemp and illegal products containing THC.⁹ Moreover, K-9 units are unable to distinguish between hemp and marijuana.¹⁰ Thus, the SBI has recommended banning the commercial sale of smokable hemp products.

In North Carolina, efforts to ban smokable hemp has been met with protest by groups representing the interest of farmers, who view hemp as a major potential cash crop.¹¹ While smokable hemp products remain commercially available in North Carolina, current policy is being met with scrutiny and may be on shaky footing. Some legislators view the sale of smokable hemp as “de facto marijuana legalization.”¹² This overstates the impact of hemp legalization, since the commercial sale of marijuana would remain illegal. Not allowing searches based on marijuana odor would more closely resemble decriminalization, but legal hemp remains controversial.

While smokable hemp remains commercially available, defense attorneys should argue that a search and seizure on the basis of the smell or appearance of marijuana violates the Fourth Amendment. Legal use of hemp may lead the Fourth Circuit to update its case law regarding marijuana related searches.

¹ *United States v. Yengel*, 711 F.3d 392, 396 (4th Cir. 2013).

² 254 F.3d 488, 495 (2001).

³ *United States v. Humphries*, 372 F.3d 653, 659 (4th Cir. 2004).

⁴ See *Pacheco v. Maryland*, 465 Md. 311 (2019).

⁵ 7 U.S.C. § 5940 (b)(1)(2) (2018).

⁶ N.C. Gen. Stat. § 90-87(16) (2017).

⁷ See Phil Dixon, *Hemp or Marijuana*, UNC School of Government, May 21, 2019, available at: <https://nccriminallaw.sog.unc.edu/hemp-or-marijuana/>.

⁸ *Id.*

⁹ North Carolina State Bureau of Investigation, *Industrial Hemp/CBD Issues*, available at: https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf

¹⁰ Dawn Baumgartner Vaughan, *NC House votes for ban on smokable hemp, reacting to police concern over pot arrests*, *Charlotte Observer*, Aug. 20, 2019, available at: <https://www.charlotteobserver.com/news/politics-government/article234178387.html>.

¹¹ Will Doran, *NC lawmakers see hemp as the state’s next big cash crop. But police are opposed.*, *News and Observer*, June 11, 2019, available at: <https://www.newsobserver.com/news/politics-government/article231439078.html>.

¹² See fn. 10.

The ZA Editors thank Gordon Saltzberg for contributing this helpful information. Gordon was a third year law student at UNC Law School and extern in the FPD Office during the Fall of 2019.



A Fresh Look at False Confessions

With the Supreme Court's denial to review the confession of Brendan Dassey from Netflix's *Making a Murderer*,¹ the viability of false confession arguments seems bleak. But, even if the likelihood of success may be low on a motion to suppress, filing such a motion may serve a longer-term purpose: convincing the court that even if admissible, the "confession" may not be sufficiently reliable or adequately corroborated. And if the court discounts the confession, it may find the government has failed to meet its burden in a bench trial or grant a Rule 29 motion in a jury trial. If you find an alleged confession at the top of your discovery, particularly if you have a vulnerable client, consider whether a statement that survives suppression might not sustain a conviction.

As the law stands, a confession will be suppressed if it is not "voluntary" to preserve the fundamental fairness guaranteed by the Due Process Clause.² Courts apply a totality of the circumstances test to determine if a defendant's will was overborne, taking into account the characteristics of the individual and the circumstances of the interrogation.³ But voluntariness is a low bar—Dassey's conviction is a testament to that. Despite his youth, his extremely low IQ, and the officers' suggestive and manipulative questioning, the Wisconsin state courts and the Seventh Circuit considered his confession voluntary.⁴

As psychological research and data catch up with the law, confessions are becoming increasingly suspect. About 27% of defendants exonerated of homicide convictions confessed to a crime they did not commit. Of those with a mental illness or intellectual disability, 81% had "confessed."⁵ Though false confessions are strikingly common, the current state of the law still makes a due process voluntariness challenge an uphill battle. But a suppression motion offers the opportunity to showcase these issues to the judge, highlighting a client's vulnerabilities and the potentially unflattering conduct of law enforcement during interrogation. Expert witnesses in the field of psychology can articulate the pressure and mental processes that lead to a false confession, particularly for a client with mental illness or disability.⁶ Even if the judge rules against suppression, the facts of the "confession" may make an impression that lasts through the bench trial or Rule 29 motion.

Critically, a confession alone is not enough for a conviction. In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court explained, "It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused." Often there is ample

evidence that a crime occurred and the government's task is to link the defendant to it. But sometimes it is not obvious that a crime actually occurred at all. For example, if an infant dies from what may be a medical phenomenon or may be intentional harm, the government must first prove that a crime occurred at all—that it was indeed intentional harm that caused the death—before attempting to prove who did it. This corroboration rule is connected to the longstanding concept of the *corpus delicti*, or body/substance of the crime: that an injury occurred and it was criminal agency that caused it. A defendant's confession cannot be the only evidence of this; substantial independent evidence of the *corpus delicti* is required.

This doctrine is rooted in a discomfort with, and perhaps distrust of, confessions wrought under intense questioning by police. It is meant to "prevent confessions to crimes never committed." Thus, corroborating evidence must support the admitted facts. The corroboration alone need not prove every element of the crime or prove them beyond a reasonable doubt—the confession can carry the burden over that line. But the confession must be corroborated by something outside itself. This can require a careful review of the admissibility of other potential evidence—co-defendants' statements or fruits of illegal searches. If no corroborating evidence is admissible, there can be no conviction.

Last year in *United States v. Rodriguez-Soriano*, 931 F.3d 281 (4th Cir. 2019), the Fourth Circuit reinforced the power of the *corpus delicti* corroboration doctrine. In that case, the defendant had legally purchased two firearms and indicated that he was the actual buyer on the necessary paperwork. A year later, one of the firearms was used in a homicide. Officers questioned Rodriguez-Soriano about the purchases and found no connection between him and the homicide but suspected that he had purchased the firearms for someone who was. He initially explained that the firearms had been stolen, but after the officers expressed their disbelief with his story and threatened that lying to federal agents carried a penalty of five years in prison, he confessed to buying the guns for an acquaintance. He repeated the confession at a later interview.

Rodriguez-Soriano was indicted for knowingly making a false statement to a licensed firearms dealer on his purchase paperwork—with not one but two confessions. It was not looking good for him. But, the only evidence that he had made a *false* statement was his confession that it was false. The acquaintance-purchaser did not testify, and the gun was not admitted into evidence. Testimony about the use of the gun in the homicide would have been hearsay and was not admitted for the

truth of the matter asserted. So there was no admissible evidence that the guns were no longer in Rodriguez-Soriano's possession aside from his own words. Still, the jury convicted him.

On appeal, the Fourth Circuit did not find this sufficient to sustain the conviction, citing the corroboration requirement.⁸ The firearms dealer's forms proved only a statement, not the falsity of it, and certainly proved nothing about Rodriguez-Soriano's knowledge at the time. The court did not accept the second confession as independent corroboration of the first. Ultimately the court held that the government could not prove that a straw purchase occurred by any independent evidence and overturned the jury's verdict.⁹

Damning confessions are not always a dead end. Before concluding that a plea deal is the best route for your client, weigh these potential strategies. Consider filing a suppression motion you recognize will likely fail under the voluntariness standard in order to prepare the court to think critically about the weightiness of the confession as an evidentiary matter. Consider hiring experts to bolster reasonable doubt about the veracity of the confession in a compelling case. And finally, evaluate whether the government has sufficient corroborating evidence without the confession.

¹ *Dassey v. Dittmann*, 138 S. Ct. 2677 (2018).

² *Miller v. Fenton*, 474 U.S. 104, 109-10 (1985).

³ *Withrow v. Williams*, 507 U.S. 680, 693 (1993).

⁴ *Dassey v. Dittmann*, 877 F.3d 297, 300-01 (7th Cir. 2017) (en banc).

⁵ *Age and Mental Status of Exonerated Murder and Manslaughter (Homicide) Defendants Who Confessed*, National Registry of Exonerations (Feb. 26, 2019) (<https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf>) (last visited June 23, 2020).

⁶ See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) (<http://scholarship.law.unc.edu/nclr/vol82/iss3/3>) (last visited June 23, 2020).

⁷ *United States v. Rodriguez-Soriano*, 931 F.3d 281, 287-88 (4th Cir. 2019) (quotation omitted).

⁸ *Id.* at 288.

⁹ *Id.* at 290-91.

The ZA Editors thank Chelsea Kapes for contributing this helpful information. Chelsea was a third year law student at Duke Law School and an extern in the FPD Office during the Spring of 2020.



The Realities of Federal Pretrial Detention in the Eastern District

The absence of a centralized federal detention facility is well-known among staff at the Federal Public Defender's Office in the Eastern District of North Carolina (EDNC), who often spend an entire day traveling to meet with a client. A single, centralized detention facility within the EDNC would allow greater access to clients, decrease travel time, and increase the time available to meet with clients, thereby having a direct impact on client representation. More importantly, a centralized detention facility in the EDNC would ensure a criminal defendant's Sixth Amendment right to have the assistance of counsel for his or her defense.

According to the United States Marshals Service (USMS), only 25% of the 55,000 pre-sentence prisoners in its custody are detained in Federal Bureau of Prisons facilities while 75% of prisoners are housed in state, local, and private facilities.¹ The USMS has approximately 1,800 contracts with state and local governments for federal inmate housing.² Two of the three listed federal facilities within the state of North Carolina are located in the same complex, which amounts to two total federal detention complexes serving the entire state.³ Although there are two federal facilities in North Carolina, neither are used for pretrial detention. This explains why federal inmates in the Eastern District are housed in any one of up to 15 different state and private facilities across eastern North Carolina and Virginia.

Clients may be held at various facilities across North Carolina and Virginia, although the detainees in the EDNC are primarily held in approximately 15 different facilities. On average, 59% of federal detainees within the Eastern District are housed in the following 5 detention facilities: Piedmont Regional Jail, Albemarle District Jail, Franklin County Jail, Bladen County Jail, and Pamlico County Jail. [See chart below at p. 8].

Regarding the top 5 detention facilities with the most federal inmates in the Eastern District, the average roundtrip travel spans 222.64 miles and the average roundtrip travel time is 236.6 minutes. Approximately 25% of all EDNC clients require their lawyers spend an average of 3 hours travel time per client visit and 35% of clients require 5 hours and 15 minutes of travel time per client.

Thus, an Assistant Federal Public Defender (AFPD) and Federal Defender staff may spend approximately 3 hours and 56 minutes of strictly driving time for a 2-hour client meeting. Not including time spent stopping for gas and meals, 1 trip for 1 client amounts to approximately 6 hours—essentially, an entire workday can be spent on traveling alone. From the defendant's perspective, a person may be

detained hours away from home, often in another state, and away from the person's entire support system before they are even convicted.

According to one AFPD, she travels approximately 2,000 miles a month. On more than one occasion, she states AFPDs have traveled to meet with a client only to discover upon arrival that the client has been moved to a different facility so quickly that the client's location had not yet been updated in the USMS systems. This seems to be a common complaint among Federal Defender staff; in the last 18-24 months, the USMS is no longer prioritizing placing detainees in a single location such that a client may be moved between 2-3 facilities prior to sentencing.

Other issues to consider in addition to travel include personal safety concerns and out-of-pocket expenses not covered by the office budget, such as meals and roadside assistance programs. One AFPD echoed a common worry among Federal Defender staff that in the event of a family emergency, car trouble, or inclement weather, they are stranded hours away from home. Because she travels alone, the AFPD worries about traveling late in the evening and is on high alert when stopping for food or gas in small, remote areas. Other things Federal Defender staff must invest in to ensure the quality of their representation is the time and money spent helping a client access discovery material, which is less cumbersome in federal detention facilities where a floor is designated specifically for this purpose without the need for assistance from their attorneys. The delay in having access to one's discovery material, in addition to a delay in accessing one's attorney, frustrates a criminal defendant's ability to make informed decisions as well as their Sixth Amendment right to a speedy trial. The bottom line—travel to various facilities multiple times a week has an adverse impact on productivity and the representation of clients.

Another AFPD expressed that the number of hours spent on traveling 3-4 days a week could be put to better use towards actually representing his clients. Rather than being on the road, he says, he could spend more time writing memos or in a meeting with a client. Spending dozens of hours a week on the road also takes its toll and can be both physically and emotionally draining. With regard to client complaints, the AFPD has had positive experiences with the responsiveness of the USMS. When a client has a complaint, Federal Defender staff will initially reach out to the facility to remedy the situation. In one such call, jail staff were not only aware of the situation, but they were also quick to reassure the FPDO that a remedy was already in motion. However, AFPDs have found that other local facilities, which the USMS cannot realistically monitor around the clock, are less than responsive to client complaints.

A common complaint among clients is the lack of access to adequate healthcare, particularly

by those housed in Piedmont Regional Jail. Piedmont Regional has had a fair number of healthcare complaints and inmate death-related lawsuits. The U.S. Department of Justice (DOJ) released a report in 2012 stating that deficiencies in medical and mental health care placed prisoners at Piedmont Regional under an "unreasonable risk of serious harm."⁴ Other issues cited were "inadequate staffing, insufficient procedures to screen and assess medical and mental health problems, and the absence of a chronic care program to treat conditions such as seizures, heart disease and hypertension."⁵

In 2013, Piedmont Regional ultimately entered a settlement agreement with the DOJ in which the substantive provisions were "intended to ensure that prisoners receive proper medical and mental health treatment and do not experience unnecessary suffering or harm while incarcerated."⁶ Piedmont has since had several inmate deaths between June of 2013 and August of 2017; with causes of death range from natural causes, medical emergency, and suicide.⁷ Coupled with client complaints, it seems as though recent physical and mental health related deaths at Piedmont Regional follow the same pattern of "indifference to prisoners' serious medical needs" resulting in preventable deaths which led to the 2013 settlement agreement with the DOJ.⁸ According to the most recent studies by the Bureau of Justice Statistics, 90% of all deaths occurring in state and federal prisons between 2001 and 2016 are attributable to medical issues such as cancer, heart and liver disease, respiratory illness, and AIDS.⁹ Interestingly, Piedmont Regional has also settled medical-negligence related inmate death lawsuits or is currently litigating them.¹⁰

In FY 2019, the USMS spent approximately \$1.83 billion dollars on custody, housing, medical care, and transportation of federal inmates.¹¹ These numbers do not include travel expenses and time spent by defense attorneys and their staff who must travel several hours to meet a single client in a day. Absent a centralized facility, billions in federal taxpayers' dollars are being wasted every day on transportation.

The average cost of constructing a new federal detention facility is estimated to cost between \$98 and \$162 million.¹² Although this is a significant upfront expense, in the long run it would greatly benefit the district to have a centralized facility in the EDNC, where the facility would be accessible to other districts in the Fourth Circuit. Not only is this a central location to the other districts, but a bulk of the Fourth Circuit caseload derives from the North Carolina districts (1,753 out of 5,089).¹³ Thus, the most logical place for a new federal detention facility would be in a centralized

location equally accessible to surrounding districts and where a significant number of cases arise.

Thousands of hours spent on the road each month have a direct impact on a defense attorneys' ability to represent their clients effectively. The construction of a new federal detention facility would revolutionize representation to ensure effective assistance of counsel and ultimately save federal taxpayer money.

¹ See U.S. Marshals Service, Duties and Career Opportunities, page found at <https://www.usmarshals.gov/careers/duties.html> (last visited April 8, 2020).

² *Id.*

³ See Federal Bureau of Prisons, Facility Locations, page found at <https://www.bop.gov/locations/list.jsp> (last visited June 23, 2020).

⁴ U.S. Dep't of Justice, *Justice Department Reaches Settlement with Piedmont Regional Jail to Reform Medical and Mental Health Care at the Facility* (2013), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-piedmont-regional-jail-reform-medical-and-mental-health> (last visited June 23, 2020).

⁵ *Id.*

⁶ Settlement Agreement, at 4, *United States v. Piedmont Regional Jail Authority*, No. 3:13-CV-00646 (E.D. Va. 2013), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/09/22/piedmont_agreement_9-20-13.pdf (last visited June 23, 2020).

⁷ Liz Adetiba et al, *Since Sandra: Here are the 815 people (and counting) who have lost their lives in jail in the year after Sandra Bland died*, Huffington Post (July 20, 2016, 6:05 PM), <https://data.huffingtonpost.com/2016/jail-deaths> (last visited June 23, 2020); Morgan White, *Inmate Dies at Jail*, The Farmville Herald (Nov. 21, 2017, 1:59 PM), <https://www.farmvilleherald.com/2017/11/inmate-dies-at-jail/> (last visited June 23, 2020).

⁸ See fn. 6 at 24.

⁹ U.S. Dep't of Justice, *Mortality in State and Federal Prisons, 2001-2016 - Statistical Table* (2020). See <https://www.bjs.gov/content/pub/pdf/msfp0116st.pdf> (last visited June 23, 2020).

¹⁰ Alexa Massey, *\$103 Million Sought in PJR Death*, The Farmville Herald (Dec. 17, 2019, 9:36 AM), <https://www.farmvilleherald.com/2019/12/103-million-sought-in-prj-death/> (last visited June 23, 2020).

¹¹ U.S. Marshals Service, U.S. Dep't of Justice, Fact Sheet Prisoner Operations 2020 (Feb. 24, 2020). See https://www.usmarshals.gov/duties/factsheets/prisoner_ops.pdf (last visited June 23, 2020).

¹² Office of Inspector General, Audit Division, Federal Bureau of Prisons Management of Construction Contracts (2002). See <https://oig.justice.gov/reports/BOP/a0232/final.pdf> (last visited June 23, 2020).

¹³ Administrative Office of the U.S. Courts, U.S. District Courts—Pretrial Services Release and Detention, Excluding Immigration Cases For the 12-Month Period Ending September 30, 2019 (2020). See https://www.uscourts.gov/sites/default/files/data_tables/jb_h14a_0930.2019.pdf (last visited June 23, 2020).

The ZA Editors thank Guadalupe Howell for contributing this helpful information. Guadalupe was a third year law student at Campbell Law School and a pro bono intern in the FPD Office during the Spring of 2020.

	Facility	Out of 767 Total Detainees on 3/6/2020	Percentage	Total Miles From the FPDO of the EDNC	Total Minutes From the FPDO of the EDNC
1	Piedmont Regional Jail Farmville, VA	150	19.55%	251mi	310 minutes
2	Albemarle District Jail Elizabeth City, NC	115	14.99%	340mi	320 minutes
3	Franklin County Jail Louisburg, NC	67	8.73%	62.2mi	89 minutes
4	Bladen County Jail Elizabethtown, NC	60	7.82%	194mi	196 minutes
5	Pamlico County Jail Bayboro, NC	62	8.08%	266mi	268 minutes



“A Single Click” Equals Probable Cause

Probable cause has long been a shield between citizens and invasive government searches. Before government agents can make arrests and conduct searches for contraband, they need a fair probability that contraband would be found in the searched place.¹ For decades, the concept of a fair probability has been litigated and developed extensively to provide many avenues for courts to find probable cause and fewer avenues for defendants to argue against it. But, one avenue for probable cause that receives the least litigation is the internet, and defense attorneys should aim to change that.

The already slim probable cause shield has shrunk in the face of *United States v. Bosyk*.² The defendant in *Bosyk* was charged with possessing child pornography after his computer's IP address was found to have accessed or clicked a link containing child pornography.³ The government provided a magistrate judge with an affidavit for a search warrant, which the judge granted.⁴ Government officers then executed the warrant by entering the defendant's home and collecting several electronic devices,⁵ including the defendant's personal computer.

On appeal, the defendant challenged the magistrate's warrant, arguing that the affidavit lacked probable cause that he knowingly accessed contraband. The *Bosyk* court reviewed the magistrate judge's order by looking at whether there was a “substantial basis” to find probable cause, and it found a substantial basis primarily because the *timing* of the click led to several inferences that the defendant *knew* he was accessing child pornography.⁶

The question the Fourth Circuit struggled with was whether there was a substantial basis to find that the defendant knew he was accessing child pornography on the internet, based on a single alleged click of an internet link. The affidavit given to the magistrate noted that there was a 64% probability that the link containing child pornography was clicked after it was posted on an internet Bulletin Board (“Board”).⁷ This Board post indicated in text (but not within the URL itself) that the link contained child pornography.⁸ If the link was clicked shortly after it was posted on the Board, then the likelier the defendant clicked on the link from the Board's post and thus the more likely he knew it would lead to child pornography (as opposed to accessing the URL from a different webpage—indicating unawareness that the link would contain child pornography). This string of inferences was what the dissent called “compound probability,”⁹ which was enough for the majority to find probable cause.¹⁰

Judge Wynn's dissent, however, discussed many issues with finding probable cause in “the digital age”¹¹ that defense attorneys should strongly consider in handling internet cases with questionable probable cause supporting a search warrant. Judge Wynn stressed that an understanding of the technology at play should have rendered a

different holding. He noted that (1) the link could have been accessed from any other site without information about the link's contents, (2) the affidavit left out the many ways the defendant could have unknowingly accessed the link (ie: the URL did not disclose what it linked to), (3) compound probability is too weak for probable cause, and (4) the search warrant was too broad.¹² Although defense attorneys should consider the merits of each of those arguments in their relevant cases, this article will address only the highlights.

In *Bosyk*, the dissent found several problems with the search warrant affidavit that was given to the magistrate. The search warrant affidavit did not address whether the defendant ever even visited the Board website, and the government conceded a failure in proving that the defendant was a Board member. The government also failed to show that the defendant's IP address ever applied a password to access the link's contents (clicking the link without entering the password would still show up on the government's monitoring). Further, the affidavit failed to show that the defendant exhibited any of the behaviors associated with child pornography collectors.¹³

The dissent then addressed the “critical”¹⁴ timing issue. Although the government presented the magistrate judge with a case in which a district court judge found probable cause when the download of contraband occurred soon *after* a link to the contraband was posted on a message board, the affidavit in this case lacked the same evidence—and, the magistrate judge in this case was likely misled into believing that the defendant clicked the link only after it was posted on the Board based on the warrant affidavit.¹⁵ Ultimately, the dissent discussed, because the affidavit did not assert that the defendant factually accessed the link after it was posted on the Board, he must have accessed the link elsewhere, and the court should not have found probable cause.¹⁶

In the internet context, less-than-fair probabilities can compound with each other to reach a fair probability and thus probable cause to search electronics in someone's home. Now, a single click of a link on the internet can be sufficient probable cause to search a person's home and devices, which can lead to a conviction. The strongest argument defendants can make against this expansion of law is to show that they lacked the requisite knowledge to commit the alleged crime. The *Bosyk* dissent introduced how a better understanding of the internet's functions mean that more evidence should be required to find probable cause of a crime.

¹ *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

² *United States v. Bosyk*, 933 F.3d 319 (4th Cir. 2019).

³ *Id.* at 323.

⁴ *Id.* at 324.

⁵ *Id.*

⁶ *Id.* at 325.

⁷ *Id.* at 326.

⁸ *Id.*

⁹ *Id.* at 346.

¹⁰ *Id.* at 334.

¹¹ *Id.*

¹² *Id.* at 334-69.

¹³ *Id.* at 335.

¹⁴ *Id.* at 325.

¹⁵ See *id.* at 338.

¹⁶ *Id.* at 341.

The ZA Editors thank Carlos Zapata for contributing this helpful information. Carlos was a third year law student at UNC Law School and was an extern in the FPD office during the Fall of 2019, without a jury's consent.



An Uncertain Standard for Lesser-Included Possession Instructions

Historically, as laid out in *United States v. Baker*, the Fourth Circuit has required lesser-included instructions in drug trafficking cases when the evidence adduced at trial does not all but eliminate the possibility of the lesser possession offense.¹ Thus, the implied burden to eliminate the possibility of the lesser offense was the government's. However, in *United States v. Wright*, the Fourth Circuit added language that has led lower courts to require "affirmative" evidence making the lesser-included offense more plausible.² Thus, the *Wright* decision shifted the implied burden to defendants seeking lesser-included instructions. However, the *Wright* Court likely did so inappropriately. In order to change its own precedent—as such burden shifting likely does—the Fourth Circuit would have had to consider and rule on the issue *en banc*. The *Wright* decision was not *en banc* and even included a district court judge in the decision. At least one subsequent panel has recognized this fact, adding that when a decision like *Wright* comes along, subsequent panels should only consider the previous precedent.³ Defense attorneys should be mindful that, although the Fourth Circuit has not remedied this contradiction in precedent, the burden of eliminating the possibility of a lesser-included possession offense lies with the government.

Generally, "[t]he district court has no discretion to refuse to give a lesser included instruction if the evidence warrants the instruction and the defendant requests it."⁴ A "defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater."⁵ The presumption of innocence at trial requires this rule because "where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction."⁶ "[T]o receive a lesser-included offense instruction, the proof of the element that differentiates the two offenses must be sufficiently in dispute that the jury could rationally find the defendant guilty of the lesser offense but not guilty of the greater offense."⁷ For

an element "[t]o be sufficiently in dispute" either (1) "the testimony on the distinguishing element must be sharply conflicting," or (2) "the conclusion as to the lesser included offense must be fairly inferable from the evidence presented."⁸

Moreover, the test for whether a lesser-included instruction is warranted does not rest on whether there is sufficient evidence to convict on the greater charge.⁹ Rather, where a jury could "rationally [find a defendant guilty] of the lesser offense and acquit him of the greater," the defendant is "entitled" to the instruction.¹⁰ "[W]hen the issue is the propriety of a lesser-included offense instruction, the test is whether a reasonable jury could nonetheless find the appellants guilty only [of possession]."¹¹ When a "substantial basis" exists for a jury to infer that a defendant [committed only the lesser offense], the court must allow the jury to perform its "function of weighing the probabilities[.]"¹² Thus, a lesser-included instruction on [possession] is required unless "as a matter of law, the evidence would rule out the possibility of a finding of [possession]."¹³ This was the clear, straightforward standard until *Wright*.

As stated above, *Wright* changed this analysis. The *Wright* Court held that "in cases in which there is substantial affirmative evidence of [possession], the defendant is entitled to a lesser-included [] instruction"¹⁴ Requiring such "affirmative" evidence—like a defendant's admission of personal drug use in a trafficking case—shifts the government's traditional, implied burden of eliminating the possibility of the lesser offense to the defendant. After *Wright*, courts can place the burden of proving the possibility of the lesser offense on the defendant. However, as the Fourth Circuit has recognized, this burden shifting was not permissible in the first place.¹⁵

The *Wright* court purported to adjust precedent without sitting *en banc*. Accordingly, courts should follow the prior panel precedent. Attorneys should bear this in mind when they seek lesser-included jury instructions and highlight *Wright*'s dubious nature as precedent. Doing so may increase the likelihood that defendants will receive proper lesser-included instructions without the need for appeal and a new trial.

¹ *United States v. Baker*, 985 F.2d 1248, 1259 (4th Cir. 1993).

² *United States v. Wright*, 131 F.3d 1111, 1115-16 (4th Cir. 1997).

³ *United States v. Hall*, 397 F. App'x 860, 863 (4th Cir. 2010) ("Wright seems to depart from the principles set forth in [previous] cases. . . . [A]s to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions.").

⁴ *Baker*, 985 F.2d at 1259.

⁵ *Id.* at 1258.

⁶ *Id.* (emphasis in original).

⁷ *United States v. Walker*, 75 F.3d 178, 180 (4th Cir. 1996) (internal citation omitted).

⁸ *Id.* (internal citation omitted).

⁹ See *United States v. Levy*, 703 F.2d 791, 792 (4th Cir. 1983) (holding that the district court should have given the jury an instruction on the lesser included offense of

simple possession even though this Court was “satisfied that the evidence sufficed to sustain a conviction of the crime of possession with intent to distribute”).

¹⁰ *Keeble v. United States*, 412 U.S. 205, 208 (1973) (emphasis added).

¹¹ *Baker*, 985 F.3d at 1259 (internal quotation omitted).

¹² *United States v. Levy*, 703 F.2d 791, 792 (4th Cir. 1983).

¹³ *Baker*, 985 F.3d at 1259 (internal quotation omitted).

¹⁴ *Wright*, 131 F.3d at 1113 (emphasis added) (citations omitted).

¹⁵ *Hall*, 397 F. App’x at 863.

The ZA Editors thank Brandon Mayes for contributing this helpful information. Brandon was a third year law student at UNC Law School and was a pro bono intern in the FPD office during the Fall of 2019 and Spring of 2020.



Conditional Discharges in NC: Convictions for the Purpose of the Federal Felon in Possession Statute?

In fiscal year 2018, firearms cases made up 20.6% of the total offenses in Eastern District of North Carolina.¹ Our District’s percentage of firearm cases is almost double the national average of 10.8%.² In late September 2019, the Fourth Circuit handed down its decision in *United States v. Smith*, which impacted the analysis that governs the felony conviction predicate on which a § 922(g) requires to stand.³

The *Smith* case originated in North Carolina’s very own Western District.⁴ In 2017, Tyrius Smith pleaded guilty to a violation of North Carolina’s Larceny by Employee statute, an offense punishable by up to twenty-five months’ imprisonment.⁵ However, with the prosecutor’s consent and without entering judgment of guilt, the judge imposed a conditional discharge placing the defendant on supervised probation for twenty-four months.⁶ While serving his probation, Smith was found twice in possession of firearms.⁷ A probation violation was filed in state court, but before the violation was resolved, the federal government obtained an indictment for two counts of felon in possession of a firearm.⁸ Smith filed a motion to dismiss his indictment arguing that his conditional discharge was not a felony conviction under North Carolina law and therefore under 18 U.S.C. § 922(g).⁹ However, the District Court disagreed holding that in North Carolina, “a guilty plea constitutes a conviction regardless of whether there has been an entry of final judgment thereon.”¹⁰ In a subsequent bench trial, a judge found Smith guilty of two counts of being a felon in possession of a firearm.¹¹ Smith appealed, arguing that that his conditional-discharge plea did not constitute a conviction under § 921(a)(20).¹²

Under North Carolina’s conditional discharge statute, judgment is withheld after a defendant enters a plea of guilty on the condition that he or

she will demonstrate good behavior by successfully completing the terms of probation and avoiding any further criminal conduct.¹³ If successful, the plea is vacated and the charge dismissed by the court.¹⁴ With Smith’s only available predicate “conviction” being his conditional discharge, the Court was forced to decide whether a conditional discharge upon which judgment has not been entered constitutes a predicate conviction for felon in possession charges.¹⁵ While the Court noted that what counts as a conviction in some cases is an easy question to answer, it explained that answering the question presented in this particular case is a difficult inquiry.¹⁶ By statute, the question as to whether Smith’s conditional discharge is a conviction is to be determined as a matter of North Carolina state law.¹⁷ Of course, North Carolina has not previously decided the issue, has no single general-use definition for a conviction, and applies the term differently in different contexts.¹⁸

The Fourth Circuit began by looking at North Carolina’s own felon-in-possession statute.¹⁹ While the Court made sure to note that whether Smith’s actions would constitute a violation of North Carolina’s felon in possession statute does not control its inquiry, it stated that the analysis is at least instructive.²⁰ There, the legislature defines “conviction” as “a *final judgment* in any case in which felony punishment or imprisonment for a term exceeding one year . . . is authorized, without regard to the plea entered or to the sentence imposed.”²¹ Because final judgment had not been entered at the time of Smith’s indictment, Smith’s conditional discharge before entry of judgment did not constitute a conviction.²²

The government presented two arguments, both of which the Court rejected. First, the government pointed to the definition of “conviction” from North Carolina’s sentencing scheme, which provides that “[f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest.”²³ The Court easily discounted the argument, pointing to the statutes’ obvious limitation that it applies only “[f]or the purpose of *imposing a sentence*.”²⁴ Further, the Court cited another sentencing provision to show that North Carolina sentencing law does not always treat a conditional discharge as a conviction.²⁵ In the probation context, N.C. Gen. Stat. § 15A-1342(a), distinguishes the maximum time an offender may be placed on probation based on their status as either a “convicted offender” or a person receiving a “conditional discharge.”²⁶ For those receiving a conditional discharge, the maximum time allotted for probation is less than the time for convicted offenders.²⁷ Therefore, the Court concluded that a guilty plea may serve as a conviction for sentencing, but not necessarily for all purposes.²⁸

Second, the government likened Smith’s conditional discharge to a “prayer for judgment continued,” which the North Carolina Court of

Appeals previously held qualified as a conviction barring issuing a firearm permit.²⁹ Interestingly, the Court stated that although it generally treats appellate court decisions as good evidence of state law, it doubted *Friend's* persuasiveness.³⁰ The Court cited an earlier North Carolina Supreme Court decision that held that when a prayer for judgment is continued there is no judgment and referred to the North Carolina statute that specifically states that a prayer for judgment continued upon payment of costs, without more, does not constitute an entry of judgment.³¹ The Court stated that even if it found *Friend's* holding persuasive, it would find conditional discharges distinguishable.³²

With felon in possession cases under § 922(g) making up a large percentage of the cases in the Eastern District of North Carolina, what constitutes a felony predicate conviction is especially important for advocates in our District. Furthermore, the *Smith* decision may reach even further to impact sentencing guidelines calculations. Keep a lookout for conditional discharge language in any discovery and presentence reports, and remember a conditional discharge plea, even after a violation of a condition, does not constitute a predicate felony conviction until a court enters its final judgment.

¹ United States Sentencing Com'n, *Statistical Information Packet Fiscal Year 2018 Eastern District of North Carolina* (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/nce18.pdf>.

² United States Sentencing Com'n, *supra* note 1.

³ *United States v. Smith*, 939 F.3d --612 (4th Cir. 2019).

⁴ *United States v. Smith*, 2018 WL 411338 (W.D.N.C. 2018), *rev'd by United States v. Smith*, 939 F.3d --612 (4th Cir. 2019).

⁵ *United States v. Smith*, 939 F.3d --612, 614 (4th Cir. 2019).

⁶ *Smith*, 2018 WL 411338, at *1.

⁷ *Smith*, 939 F.3d --at 614.

⁸ *Smith*, 2018 WL 411338, at *1.

⁹ *Id.* at *7.

¹⁰ *Id.* at *3.

¹¹ *Smith*, 939 F.3d --at 614.

¹² *Id.* (citing N.C. Gen. Stat. § 15A-1341(a6)).

¹³ *Id.* (citing N.C. Gen. Stat. § 15A-1341(a4)).

¹⁴ *Id.*

¹⁵ *Id.* at 613.

¹⁶ *Id.*

¹⁷ *Id.* at 615 (citing 18 U.S.C. § 921(a)(20)).

¹⁸ *Id.*

¹⁹ *Id.* at 615-616 (citing N.C. Gen. Stat. § 14-415.1).

²⁰ *Id.* at 615.

²¹ *Id.* (quoting N.C. Gen. Stat. § 14-415.1(b)).

²² *Id.* at 616.

²³ *Id.*

²⁴ *Id.* (quoting N.C. Gen. Stat. § 15A-1331(b)) (emphasis added).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (citing *Friend v. North Carolina*, 609 S.E.2d 473 (N.C. Ct. App. 2005)).

³⁰ *Id.* at 617 (citing N.C. Gen. Stat. § 15A-101(4a)).

³¹ *Id.* (first citing *State v. Griffin*, 100 S.E.2d 49, 51 (N.C. 1957); and then citing N.C. Gen. Stat. § 15A-101(4a)).

³² *Id.*

The ZA Editors thank Michelle Nunes for contributing this helpful information. Michelle was a third year law student at Campbell Law School and a pro bono intern in the FPD Office during the Fall of 2019 and Spring of 2020.



Arguing for Pretrial Release: Tips for Detention Hearings

In the Eastern District of North Carolina, there is a culture of pretrial detention. Over the course of a twelve-month period between 2017 and 2018, the district's Pretrial Services Office recommended detention for 78% of defendants,¹ the United States Attorney's Office recommended detention for 87% of defendants,² and the court detained and never released 71.6% of defendants.³ However, just because detention is the "norm" does not mean that this practice complies with the numerous procedural safeguards under the Bail Reform Act of 1984. This article clarifies the law regarding pretrial detention and offers suggestions for defense attorneys.

Initial Appearance

During an initial appearance, defense attorneys should not overlook that Congress has limited the type of cases in which a detention hearing may be held. Under 18 U.S.C. § 3142(f)(1), a detention hearing may be held for the following offenses: (1) a crime of violence; (2) an offense carrying a penalty of life imprisonment or death; (3) a federal drug offense carrying a penalty of ten years or more; or (4) any felony following convictions for two or more of the above three offenses, two or more comparable state or local offenses, or a combination of such offenses.⁴

If none of the above offenses apply, under § 3142(f)(2), a detention hearing is only allowed for either "a serious risk that such person will flee" or "a serious risk that such person will obstruct or attempt to obstruct justice."⁵ Therefore, defense attorneys should argue that a client's danger to the community or general risk of nonappearance, standing alone, does not justify holding a detention hearing. Also, in illegal reentry cases, defense attorneys should argue that the risk of deportation does not constitute a serious flight risk.⁶

Detention Hearing

In non-presumption cases, defense attorneys should remind the judge that § 3142(b) starts with your client's being released on personal recognizance or unsecured bond.⁷ If the judge determines that such release will not "reasonably assure" your client's appearance in court or the safety of the community, § 3142(c) then requires the judge to release your client subject to the "least restrictive" condition or

combination of conditions.⁸ Defense attorneys should note that “reasonably assure” does not mean “guarantee.”⁹ If the judge finds that “no condition or combination of conditions” will reasonably assure your client’s appearance in court or the safety of the community, then your client may be detained.¹⁰

The burden is on the government to prove that there are no conditions of release that will reasonably assure your client’s appearance in court or the safety of the community. For safety of the community, the burden is “clear and convincing evidence.”¹¹ For assuring appearance in court, defense attorneys should argue that the burden is clear and convincing evidence,¹² not by the preponderance of the evidence standard.

In presumption cases, defense attorneys should emphasize that their burden of production to rebut the presumption “is not a heavy one to meet.”¹³ This burden can be met by “[a]ny evidence favorable to a defendant that comes within a category listed in § 3142(g),”¹⁴ including evidence of their marital, family and employment status, ties to and role in the community, and clean criminal record. Once rebutted, the burden of persuasion remains with the government.¹⁵ Defense attorneys should also remind the judge that even if the presumption is not rebutted, your client cannot be detained without a finding that no conditions of release will reasonably assure your client’s appearance in court or the safety of the community.¹⁶

Section 3142(c)(1)(B) includes a list of fourteen possible conditions of release that the judge may impose.¹⁷ In cases where there is no third-party custodian, defense attorneys should argue that requiring a third-party custodian for all defendants is an abuse of discretion.¹⁸ Under § 3142(c)(1)(B)(xiv), the catchall provision, defense attorneys can propose additional conditions of release, such as drug testing, house arrest, submission to warrantless searches, telephone monitoring, residence in a halfway house, electronic bracelet monitoring, freezing of client’s assets, limiting access to the Internet and computers, and submission to random, unannounced visits by pretrial services officers.¹⁹

Finally, defense attorneys should proffer facts or testimony that address specific factors the judge must consider under § 3142(g), including: (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the history and characteristics of the person, and (4) the nature and seriousness of the danger to any person or the community posed by the defendant’s release.²⁰ Of the four factors, the weight of the evidence “is the least important.”²¹ Therefore, defense attorneys should argue that placing too much emphasis on this factor is similar to applying a presumption of guilt, which is forbidden under § 3142(j).

By implementing these suggestions, defense attorneys remind the court that the question is not about whether your client should be detained or released. It is about considering conditions that mitigate flight risk and danger to the community.

Given that we live in an age where tracking a person’s whereabouts and monitoring their habits is ordinary, there should only be a limited number of cases where detention is necessary.

¹ Table H-3. U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release For the 12-Month Period Ending September 30, 2018, https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2018.pdf (last visited June 23, 2020).

² *Id.*

³ Table H-14. U.S. District Courts—Pretrial Services Release and Detention For the 12-Month Period Ending September 30, 2018, https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2018.pdf (last visited June 23, 2020).

⁴ 18 U.S.C. § 3142(f)(1).

⁵ *Id.* at § 3142(f)(2).

⁶ *United States v. Ailon-Ailon*, 875 F.3d 1334, 1337 (10th Cir. 2017) (agreeing that “the risk that he would be removed by ICE does not constitute a risk that he will flee prior to trial”).

⁷ 18 U.S.C. § 3142(b).

⁸ *Id.* at § 3142(c).

⁹ *United States v. Orta*, 760 F.2d 887, 891-92 (8th Cir. 1985) (en banc).

¹⁰ 18 U.S.C. § 3142(e)(1).

¹¹ *Id.* at § 3142(f).

¹² See *United States v. Clark*, 865 F.2d 1433, 1435-36 (4th Cir. 1989) (en banc) (“Pursuant to the Bail Reform Act, a judicial officer shall detain a defendant pending trial if he finds by clear and convincing evidence ‘that no condition or combination of conditions . . . will reasonably assure the appearance of the person as required and the safety of any other person and the community.’”); see also *United States v. Motamedi*, 767 F.2d 1403, 1409-16 (9th Cir. 1985) (Boochever dissenting).

¹³ *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 706-07; see also 18 U.S.C. § 3142(e).

¹⁷ 18 U.S.C. § 3142(c)(1)(B).

¹⁸ See *United States v. Spilotro*, 786 F.2d 808, 816 (8th Cir. 1986) (applying same condition of release to all defendants in district was abuse of discretion).

¹⁹ DAVID N. ADAIR, JR., *THE BAIL REFORM ACT OF 1984* 2 (3d ed. 2006).

²⁰ 18 U.S.C. § 3142(g).

²¹ *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990).

The ZA Editors thank Miles Duncan for contributing this helpful information. Miles was a third year law student at UNC Law School and an extern in the FPD Office during the Fall of 2019.

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

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Deportation Hearing Recordings are Discoverable material Under FRCP 16

Federal defense attorneys in the Eastern District of North Carolina (EDNC) and around the country are subject to the improper procedure of separately requesting deportation hearing recordings in 8 U.S.C. § 1326 cases, instead of the government attorney's providing the recordings pursuant to discovery. This procedure is improper because Federal Rule of Criminal Procedure (FRCP) 16 provides that the government attorney will provide any recorded statement in the possession of *the government*.¹ Such recordings are kept by the Executive Office of Immigration Review (EOIR), within the United States Department of Justice, in each district, an office of the federal government, making such recordings in "possession, custody, or control" of the government.² "The government" was meant to be broad enough to include such government offices, therefore the government attorney is obligated to provide deportation hearing recordings. This is also consistent with the proprietary interests that a defendant has in his or her own statements.³

This impropriety is specifically implicated in criminal cases that are impacted by a defendant's prior deportation case. The delay in obtaining deportation hearing recordings may result in defendants with low guideline ranges serving their entire sentence before their defense attorney could identify possible dismissal grounds under 8 U.S.C. § 1326(d).^{4,5} This leads to further backlogs of deportation cases by calendaring cases that could have been resolved earlier, as well as using already depleted resources appropriated for federal prisons to house additional detainees.

The Federal Rules Advisory Committee has recognized that there are situations where the prosecution is obligated to provide discoverable information that would be "helpful" to defense counsel without a formal request in order to comply with due process requirements.⁶ In order to be consistent with the Supreme Court of the United States' rulings in *Brady v. Maryland*, 372 U.S. 83 (1967), the government must not suppress evidence previously requested by the defendant. Otherwise, this is a due process violation under the Fourteenth Amendment.⁷ In order to avoid violating due process, the government must make reasonable efforts to provide recordings of a criminal defendant's prior deportation hearing.⁸ This is complemented by a change in the language in the 1974 amendment to Rule 16. The language was changed from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit" to make clear that discovery should be accomplished by the parties themselves instead of pursuant to a court order.⁹ Therefore, federal defense attorneys should not be obligated to request a court order to receive discoverable material.

Currently, there are several federal districts where a Freedom of Information Act (FOIA) request to the EOIR is the only way an attorney can obtain

the requisite deportation recordings to challenge their criminal charges. Defense attorneys in the Southern District of California, District of New Jersey, Western District of Virginia, and the EDNC currently must file a FOIA request to the EOIR. In these districts, the average waiting period varies due to having FOIA officers dedicated to making requests of the EOIR,¹⁰ contacts in Immigration Court,¹¹ and different policies or local court rules.

Districts that request these recordings through the prosecuting Assistant United States Attorney (AUSA) receive the recordings quicker than in districts that must use a FOIA request. The average waiting time can be one to two weeks if requested from an AUSA.¹² In other districts the recordings will sometimes be provided at the beginning of a § 1326 case as part of routine discovery request, or not, in which case it is their practice to also complete a FOIA request of the EOIR.¹³

This issue is timely given the current administration's position on detaining illegal aliens and the various interpretations of FRCP 16 in the deportation case context across districts and circuits. Although the language of FRCP 16 compels production of any statement made by a defendant, there is still a misconception in practice as the recordings are maintained by a different government office and government attorneys do not feel compelled to turn over the recordings of deportation hearings. Litigation over the correct interpretation of FRCP 16 provides that the United States Attorney's Office should provide the recordings pursuant to the routine request for discovery by federal defense attorneys.

Where the issue of producing deportation hearing recordings has been litigated successfully, attorneys and courts have relied on Rule 16(a)(1)(B) and 16(a)(1)(E). Specifically, under these provisions, statements by the defendant, pursuant to Rule 16(a)(1)(B), and "documents, data, photographs, [or] tangible objects. . . within the government's possession, custody, or control," pursuant to Rule 16(a)(1)(E), have been used to justify the court's requiring the government produce recordings to the defense attorney.

In *United States v. Diaz-Garcia*, the court held that deportation hearing recordings fall under both 16(a)(1)(B) and 16(a)(1)(E) categories of discoverable material that the government attorney is obligated to produce. 2011 WL 13118879, *4 (E.D. Wash. Sept. 19, 2011). Recently, the Eastern District of Washington also held that one prior removal was not to be considered in *United States v. Bonilla-Garcia*, 2020 WL 533139 (E.D. Wash. Jan. 29, 2020).¹⁴ There are still many districts that are in the same frustrating situation as the EDNC due to the oversight in applying Rule 16 to deportation hearing recordings. The Fourth Circuit could be the first federal appellate circuit to embrace this better practice through adopting arguments utilized in other districts.

Federal defense attorneys are encouraged to argue the broad interpretation of “government” in Rule 16 to include all government offices, agencies, and departments in discovery requests to government attorneys. This argument is supported by the language of the Rule in reference to the statement of defendant under Rule 16(a)(1)(B), and case law specifically out of the Eastern District of Washington, where the district court agreed with defense counsel’s argument to compel the government to produce deportation hearing recordings. Additionally, Rule 16(a)(1)(E) supports this argument because the recordings are in the “possession, custody, or control” of a government office. This argument could further be applied to any “documents, data, photographs, [or] tangible items” that are within a government office’s possession, but which government attorneys refuse to produce as part of their discovery obligations under Rule 16(a)(1)(E). Hopefully, this will lead to government attorneys’ providing deportation hearing recordings that will reduce the wait time in receiving such recordings and proper fulfillment of discovery requests overall.

¹ Fed. R. Crim. P. 16(a)(1)(B)(i); Fed. R. Crim. P. 16(1)(1)(E).

² Fed. R. Crim. P. 16(a)(1)(B)(i).

³ Fed. R. Crim. P. 16 advisory committee note (1991).

⁴ Low guideline ranges such as 0 to 6, 1 to 7, or 2 to 8 months.

⁵ 8 U.S.C. § 1326(d): “In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection(a)(1) or subsection (b) unless the alien demonstrates that - (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.”

⁶ Fed. R. Crim. P. 16 advisory committee note (1974).

⁷ *Brady v. Maryland*, 372 U.S. 83, 87-88 (1967).

⁸ *Id.*

⁹ Fed. R. Crim. P. 16 advisory committee note (1974).

¹⁰ From 2009-2016, the Southern District of California received recordings within 60 days pursuant to EOIR FOIA letters, however, it is not known if that process survived the 2017 government shutdown.

¹¹ In the Eastern District of Virginia, one of the AUSAs has a direct contact with the EOIR for their district that provides recordings in one to two weeks.

¹² In the Northern District of California recordings are received timely when requested from the AUSAs if they have not already provided them with the initial discovery offering.

¹³ In the Southern District of California, it can take months before recordings are provided pursuant to a FOIA request.

¹⁴ District judge ordered the government to produce deportation hearing recordings or suffer sanctions on January 29, 2020. Previously, the recordings had not been produced pursuant to a FOIA request to the EOIR. *United States v. Oseguera-Ferrera*, No: 2:19-CR-0204-TOR (E.D. Wash. Jan. 20, 2020); In *United States v. Landeros-Morales*, No: 1:18-CR-2011-LRS (E.D. Wash. April 26, 2019), the judge denied defendant’s motion to dismiss, but granted defendant’s motion to compel discovery of deportation tapes.

The ZA Editors thank Virginia Mutter for contributing this helpful information. Virginia was

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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

Eastern District News

The FPD welcomes newly seated United States District Judge, Richard E. Myers II, who currently sits in Wilmington, North Carolina. We extend a warm welcome on behalf of our office and the panel attorneys from this district.

We send our congratulations to United States Magistrate Judge James E. Gates. Judge Gates retired on April 1, 2020 and assumed Reserve Status the same day, which has allowed him to continue serving on the bench. Our office extends best wishes in his retirement on behalf of the defender community in our district.

FPD Office News

In May 2020, we bid a fond farewell to Andrew Kukorowski, Assistant Federal Public Defender, who worked in the Raleigh office.

We are pleased to welcome Kyana Givens, who joined us as an Assistant Federal Public Defender in the Raleigh office in January 2020.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh: Brycen Williams.

The following are new panel attorneys in Cary: Helen Smith; in Raleigh: Bill Finn, and Robert Parrott; in Rocky Mount: Moses V. Brown; and in Kitty Hawk: Peter Frost.