

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2025

The Editors' Message

With a new administration and the ever-changing landscape of federal criminal law, we know how important it is to remain up to date on legal issues that affect our clients. We are therefore pleased to bring you a variety of articles in this edition of the Zealous Advocate. Inside, you will find articles on making second amendment arguments under *Bruen*, issues surrounding Government proffers at detention hearings, mandatory minimum sentences post-*Pulsifer*, reasonable suspicion and racial profiling, considerations in defending machinegun conversion devices cases, and representing defendants with autism spectrum disorder at sentencing. We also have our usual links to updated case law holdings and news around the district, as well as a summary of new federal rules and sentencing guidelines.

As always, we hope you find these articles helpful to your practice. This publication, as you know, is only one of the ways we try to keep the panel up to date on recent legal developments. We also provide CLE training programs for attorneys in our district, with the next one taking place in person this spring at North Carolina State University's McKimmon Center in Raleigh, North Carolina. We look forward to seeing folks at our next seminar and hope you know how important your work is for criminal defendants in the EDNC.

Vidalia Patterson & Laura Wasco
ZA Editors



Inside the Spring 2025 Issue

PANEL ATTORNEY INFORMATION 2

PRACTICE TIPS

<i>Right to Bear Arms after Bruen</i>	2
<i>Providing Insight on Proffering Information</i>	3
<i>Mandatory Minimums: Pulsifer v. US</i>	5
<i>Reasonable Suspicion and Black Men</i>	6
<i>MCDs Under Scrutiny</i>	8
<i>Autism Spectrum Disorder at Sentencing</i>	9

LEGAL UPDATES

<i>4th Circuit Update</i>	10
<i>U.S. Supreme Court Update</i>	10
<i>Amended Rules and Guidelines Update</i>	11

LOCAL NEWS..... 12

THE ZEALOUS ADVOCATE

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

G. Alan DuBois, Federal Public Defender

April Bunn, Panel Administrator

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

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

Gloria Gould & Melanie Fisher, Design & Layout

PANEL ATTORNEY INFORMATION

Reminders

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

Seminar BOLOs

Our Spring 2025 Federal Criminal Practice Seminar will take place Friday, April 25th at North Carolina State University's McKimmon Center.

Please save the dates for our Fall 2025 EDNC Federal Criminal Practice Seminar, which will be a two-day seminar held October 22-23 in Beaufort, NC. Additional details, including registration and reservation information, will be sent out later and will also be posted to our website.



PRACTICE TIPS

A History and Tradition of the Right to Bear Arms After Bruen

The Second Amendment ensures that American citizens have the right to keep and bear arms without government interference. U.S. Const. amend. II. In a landmark decision in 2022, the United States Supreme Court overturned a long-standing firearms public carry licensing law in New York City, setting the stage for a new way to evaluate challenges related to the Second Amendment. *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). This case, *New York Rifle and Pistol Association, Inc. v. Bruen*, fundamentally changed how Second Amendment laws are interpreted. Before *Bruen*, most courts utilized a balancing approach that weighed public safety interests against individual Second Amendment rights, but now, the *Bruen* decision requires courts to evaluate firearms laws and regulations by engaging in a history-based analysis.

The analysis is two-fold. First, the court must assess whether the Second Amendment's plain text applies to the conduct in question. If so, the government must then demonstrate that the statute aligns with the nation's historical practices of firearm regulation. *Bruen*, 597 U.S. at 17. Should the government fail to provide adequate evidence proving that the contested conduct is consistent with "the Nation's historical tradition of firearm regulation," the rule will be deemed unconstitutional under the Second Amendment. *Id.* at 24.

Some historical analogies are clear-cut, whereas cases involving technological advancements or social changes require "a more nuanced approach." *Id.* at 17. Just as the Fourth Amendment safeguards contemporary forms of searches, the Second Amendment applies, at face value, to modern discussions about bearable arms, including those not in existence at the founding. *Id.* at 20. For these nuanced cases, a reviewing court must undertake a historical inquiry that employs reasoning by analogy. *Id.* at 21. This instructs lower courts to assess whether a historical analogy suitably applies to current firearm regulation based on whether the two are "relevantly similar." *Id.*

Under the *Bruen* framework, it is the government's burden to carefully review historical materials and evidence to support a statute. *Id.* at 24. This burden presents opportunities for criminal defense attorneys to challenge the constitutionality of firearms regulations that relate to the right to possess and carry firearms. *Id.* If the government cannot demonstrate that the modern law is "relevantly similar" to its historical counterpart, it must be invalidated. *Id.* at 34.

Defense attorneys are utilizing the *Bruen* decision to challenge the constitutionality of modern gun laws in various ways, leading to a rapidly changing legal landscape. They are making Second Amendment-based arguments against these laws by asserting that current regulations lack a historical foundation in our nation's traditions of firearm restrictions. *Bruen* emphasizes a careful approach when examining whether there is a historical tradition of Second Amendment exceptions that can support current firearm regulations. The *Bruen* decision moved away from relying on a handful of historical analogs to establish broad principles that protect Second Amendment rights. See *United States v. Price* No. 22-4609 (4th Cir. 2024) (challenging the constitutionality of obliterated serial numbers); see also *Bianchi v. Brown*, No. 21-1255 (4th Cir. 2024) (challenging a Maryland "assault" weapons ban.) It highlights that exceptions to the Second Amendment should be treated with the same caution as exceptions to freedom of speech under the First Amendment. *Id.* at 15. Even if there is a "general societal problem" that was present during the founding era, the government must still identify a distinctly similar regulation to justify the challenged modern law. *Id.* at 17. Examples of laws consistent with the nation's historical tradition of firearm regulation are laws regulating firearms trade between colonies, early state laws requiring marking and inspection of gunpowder and prohibiting the alteration of such marks, colonial and early state laws prohibiting the transportation of gunpowder without a license, and early state laws requiring proof marks on gun barrels and prohibiting the alternation of those proof marks. *Id.* at 22-24. With that in mind, defense attorneys can compare these laws with the government's proffered analogies when crafting arguments for why a challenged law is *not* con-

sistent with the Nation's historical tradition of firearms regulations.

Defense attorneys can also argue that the definition of “the people” encompasses everyone in the public rather than just a select few. Modern firearms laws are quite flexible, and defense attorneys can proffer that current restrictions—like those concerning the possession of firearms by drug addicts—do not closely resemble historical trends. Restrictions based on status, such as those affecting users of illegal drugs or simply possessing ammunition, are likely to be ripe for legal challenges following *Bruen*. See *Worth v. Harrington*, 666 F. Supp. 3d 902 (D. Minn. 2023) (holding Minnesota's age permitting restriction to be unconstitutional based on a finding that early laws reflected a tradition of young adults keeping and bearing arms.)

Defense attorneys can and should introduce these challenges via motions to dismiss early and often. Even if this approach might seem futile, it enables current and future clients to keep the issue alive for later review.

The ZA Editors thank Alea Winston for contributing this helpful information. Alea was a 3L at Campbell University School of Law and was an extern in the FPD office during the Fall of 2024.



Providing Insight on Proffering Information

Pretrial detention is intended (1) to ensure that defendants who are flight risks appear for trial and (2) to protect the community from potential further criminal activity by the defendant who is charged.¹ At a pretrial detention hearing, specific rights are given to the defendant, including the ability to present information by proffer rather than through live testimony.² Although not explicitly stated in the statute, other circuit courts have long held that the government may also use proffers.³ The Fourth Circuit recently affirmed the government's ability to proffer information in *United States v. Vane*. 117 F. 4th 244 (4th Cir. 2024). Although this practice benefits law enforcement and the prosecution by saving time and resources, it limits the defense's ability to challenge the government's case early on, potentially impacting trial strategy and leading to more pretrial detentions. However, through proper objections and the court's utilizing its discretion, the practice may not be as detrimental as one might think. Since this ruling has many far-reaching implications that affect numerous facets of a defendant's case, the decision and its implications must be carefully considered.

Release or Detention of a Defendant Pending Trial under 18 U.S. Code § 3142(f)

Under 18 U.S.C. § 3142, which governs the release or detention of a defendant awaiting trial, § 3142(f) can be reasonably understood as allowing a pretrial detention hearing only when there is (1) evidence of a serious risk of flight, (2) a threat of obstructing justice, or (3) in cases involving one of the specific crimes listed in the statute. The statute goes on to enumerate certain rights for the defendant during this proceeding, such as “an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to *present information by proffer or otherwise.*”⁴

Although not enumerated in the statute, other circuit courts have long held that the ability to present information by proffer is a right also afforded to the government and used at the discretion of the judicial officer.⁵ This follows from the logic that a detention hearing is an informal proceeding, not discussing the merits of a case, and thus, “[t]he rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.”⁶ Rather, the government's burden in a detention hearing is to prove by clear and convincing evidence that no conditions of release can reasonably guarantee the safety of the community.⁷

Despite other circuits' acknowledging that the government may proffer information in detention hearings since the 1980s, the Fourth Circuit only recently began discussing this topic. In a recent case that did not squarely address this issue, the Court noted in its dissent that “the government was entitled to make, and the court was entitled to rely upon, evidentiary proffers at the detention hearing.”⁸ Since the issue is often made moot because of plea agreements, the Court finally directly analyzed it as a matter of first impression in *United States v. Vane*.⁹

United States v. Vane

The facts of this case are as follows: Russel Richardson Vane IV was a veteran who previously worked for the government for a decade as a data engineer.¹⁰ Earlier in 2024, the FBI submitted a criminal complaint charging Vane with attempting to produce a biological agent or toxin (specifically, ricin).¹¹ The government then arrested Vane and sought to detain him, entitling him to both a preliminary hearing to determine probable cause and a detention hearing to hold him in custody while awaiting trial.¹²

During the joint preliminary and detention hearing, the Government presented information by proffer, including that Vane was an “an expert in emergency preparedness” and had emergency “go bags” containing 23 firearms, “an apocalypse checklist,” an obituary on Legacy.com that he created for himself, plus a photo that outlined his plan to fake his own suicide to claim life insurance for his wife and children.¹³ Furthermore, the government proffered Vane's prior misdemeanor conviction for bringing a firearm to a federal building as well as a

recent state charge for discharging a weapon in public.¹⁴

Vane objected, arguing *inter alia* that 18 U.S.C. § 3142(f) only allows the use of proffered information in a pretrial detention hearing by the defense, not the government.¹⁵ The magistrate judge disagreed and ordered Vane's detention, a decision that was later upheld by the district court and appealed to the Fourth Circuit Court of Appeals.¹⁶

After the Fourth Circuit issued a quick summary order affirming Vane's detention, Vane pleaded guilty to possession of ricin and moved to voluntarily dismiss his appeal as moot.¹⁷ However, the Court declined to dismiss, explaining it still had jurisdiction and that a full opinion was needed to clarify the earlier ruling on an issue of first impression in the Circuit.¹⁸

The Court upheld Vane's detention and aligned with other courts, reasoning that Congress's decision to explicitly allow defendants to use proffers did not imply that the government was prohibited because preventing the government from using proffered information would leave it with no practical way to meet its burden.¹⁹ Furthermore, although a liberty interest was at stake, allowing both sides to present by proffer is consistent with the purpose of the detention hearing and its fast-paced nature, where "neither the defense nor the prosecution is likely to have marshaled all its proof".²⁰

Practical Implications to be Considered

The Fourth Circuit's decision offers significant advantages for law enforcement and the prosecution. By eliminating the need for officers to testify in person, this practice minimizes disruptions to their duties and conserves time and resources. Additionally, the prosecution can choose to present only the facts they deem most pertinent, limiting the defense to the government's narrative without the opportunity for cross-examination. Although the defense will receive discovery shortly after the hearing, the timing shift may be critical.

This delay in access to information may hinder the defense's ability to confront and scrutinize key facts under oath early in the process, which could have broader implications for suppression hearings, plea negotiations, and trials. Without prior sworn testimony from detention hearings, the defense may lack the inconsistencies or admissions needed to challenge government witnesses later. This procedural change could result in fewer opportunities for the defense to effectively contest the government's narrative from the outset, potentially strengthening the prosecution's case.

Despite the statute's original intention to favor release, this shift in legal practice arguably tilts the scales toward pretrial detention, significantly affecting a defendant's personal, professional, and legal circumstances. Incarceration often leads to job loss, as many employers are re-

luctant to hold positions for an extended and uncertain period. This absence results in financial instability, complicating the defendant's ability to pay for living expenses and legal costs. Furthermore, for those with families, detention disrupts relationships and daily responsibilities, creating emotional and financial strain. Lastly, the harsh conditions of detention and uncertainty about release can pressure individuals to accept plea deals, regardless of their innocence.

However, the government's proffering evidence may not always be detrimental to the defense. For instance, an officer's testimony may introduce more graphic or inflammatory details that could harm the defendant's case, while the Assistant United States Attorney's summary can often be more streamlined. This also allows for the defense to argue that the information presented is not complete or severe enough to warrant pretrial detainment. Regardless, defense attorneys must stay alert and object when the proffered evidence is insufficient to justify detention or when it violates the defendant's Sixth Amendment right to confront witnesses. By challenging weak or improper evidence, the defense can limit the impact of the government's case and avoid unnecessary harm to the defendant's position.

Allowing the prosecution to use proffers raises fairness concerns, especially given the high stakes. This approach lets the prosecution shape the narrative early, likely favoring pretrial detention, which can harm defendants' lives and pressure some to plead guilty. Defense attorneys must guard against the impact of proffers on detention rulings and challenge any information that may infringe on defendants' rights, while reminding judicial officers to scrutinize such evidence and exercise discretion in its admission.

¹Vincent L. Broderick, Pretrial Detention in the Criminal Justice Process, 57 Fed. Prob. 4 (Mar. 1993).

²18 U.S.C. § 3142(f)(2).

³See *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987); *United States v. Winsor*, 785 F.2d 755, 756 (9th Cir. 1986); *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986); *United States v. Acevedo-Ramos*, 755 F.2d 203, 206-07 (1st Cir. 1985).

⁴18 U.S.C. § 3142(f)(2).

⁵See *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987); *United States v. Winsor*, 785 F.2d 755, 756 (9th Cir. 1986); *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986); *United States v. Acevedo-Ramos*, 755 F.2d 203, 206-07 (1st Cir. 1985).

⁶18 U.S.C. § 3142(f)(2).

⁷*Id.*

⁸*United States v. Singh*, 860 F. App'x 283, *286 (4th Cir. June 25, 2021).

⁹117 F. 4th 244 (4th Cir. Sep. 13, 2024).

¹⁰*Id.* at 252, n.2.

¹¹*Id.* at 245.

¹²*Id.* at 247.

¹³*Id.* at 248.

- ¹⁴ *Id.*
¹⁵ *Id.* at 248.
¹⁶ *Id.* at 249.
¹⁷ *Id.*
¹⁸ *Id.*
¹⁹ *Id.* at 250-51.
²⁰ *Id.* at 251.

The ZA Editors thank Brianna Schrimpsheer for contributing this helpful information. Brianna was a 3L at Campbell University School of Law and externed in the FPD office during the Fall of 2024.



The Mechanics of Mandatory Minimums: *Pulsifer v. United States*

Mandatory minimum sentences can be bypassed in certain circumstances that qualify for 18 U.S.C. § 3553(f)(1) relief.¹ This provision, known as the “safety valve,” allows defendants with certain types of drug trafficking offenses to qualify for a reduction in their sentence.² Specifically, 18 U.S.C. § 3553(f)(1) permits a court to sentence a defendant for less than the mandatory minimum for their crime(s) if:

the defendant does 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, as determined under the sentencing guidelines; and
- (C) a prior 2-point violent offense, as determined under the sentencing guidelines

....

There was a circuit split as to the “and” in § 3553(f)(1).³ The Fourth, Ninth, and Eleventh Circuits held the “and” meant a defendant must have a separate conviction falling under each category to be ineligible for a reduction in their sentence.⁴ The Fifth, Sixth, Seventh, and Eighth Circuits, on the contrary, held the “and” functioned akin to an “or,” wherein the defendant would qualify for a reduction in sentencing only if they did not fall under any one of those categories.⁵ To resolve this, the United States Supreme Court heard arguments in *Pulsifer v. United States* in late 2023 and decided the case in early 2024.⁶

In *Pulsifer*, the Government argued that “the phrase ‘does not have A, B, and C’ creat[ed] a checklist with three distinct conditions,” meaning a defendant only qualifies for “safety valve” relief from a mandatory minimum sentence if they do not have A *and* do not have B *and* do not have C. *Id.* at 127 (emphasis added). A defendant is not eligible for relief if they “ha[ve] any one of the three.” *Id.* Conversely, the defendant argued that “the phrase ‘does not have A, B, and C’ [set] out a single, amalgamat-

ed condition for relief.” *Id.* at 127. Reading the statute from the defendant’s view would mean that a defendant is eligible for relief “so long as [they do] not have the *combination* of A, B, and C.” *Id.* at 127-28 (emphasis in original).

The Supreme Court sided with the Government, holding that a defendant qualifies for “safety valve” relief under § 3553(f)(1) only if they do “not have all three of the items listed.” *Id.* at 132. In doing so, the Court set forth the demanding standard that defendants meet each one of the § 3553(f)(1) conditions. *Id.*

The Court based its reasoning on three main points. The first focused on the construction of § 3553(f)(1) itself; the Court reasoned that a single condition requiring the defendant to not satisfy each of the three listed conditions would render Subparagraph A superfluous. *Id.* at 141. The Court’s second point conditioned the “defendants’ eligibility for relief on the seriousness” of their convictions. *Id.* A single condition would allow defendants with more serious criminal histories to receive relief simply because none of their convictions fall under one of those categories; likewise, defendants with less serious criminal histories would potentially not obtain relief because they had one conviction that met each category. *Id.* at 147-48. The third amalgamates the first two considerations, as the Court explained that ambiguous criminal statutes must be read “in favor of liberty.” *Id.* at 152. But the Court found no ambiguity here, as the defendant’s reading would make Subparagraph A superfluous and allow individuals with more serious criminal histories to reduce their sentences. *Id.* at 152-53.

The primary goal of 18 U.S.C. § 3553(f)(1), as the Court understands it, is to give “greater punishment” to “defendants with worse criminal records.” *Id.* at 125. The statute works against allowing a loophole for defendants who have a history of “exhibiting recidivism, lengthy sentences, and violence.” *Id.* The Court’s decision now makes it much more difficult for defendants to avoid mandatory minimum sentences, rendering mandatory minimums even more unavoidable in criminal defense work for individuals facing federal drug offenses.

Since the decision in *Pulsifer* is so recent, it has not been applied to many cases, and it is unclear if new legislation will be passed addressing mandatory minimum sentences in the context of this issue. But it is important to remember that the § 3553 “safety valve” provision and its factors for sentencing below mandatory minimums are only one path of advocacy for your client.⁷ Traditionally, § 3553(f)(1) factors have only been used in cases involving defendants convicted of certain types of drug trafficking or other federal drug charges.⁸ And even if a client is disqualified from §

3553 “safety valve” relief, they can avoid a mandatory minimum by showing substantial assistance in working with the prosecutors or providing the prosecutors with information in the investigation or prosecution of others.⁹ Additionally, it is important for defense attorneys to explore other potential sentencing alternatives or argue for leniency based on other aspects of the defendant’s case, such as their personal background, the nature of their offense, or their potential for rehabilitation.¹⁰ So, while the *Pulsifer* ruling narrows the scope of “safety valve” eligibility, creative legal strategies and advocacy can still yield meaningful reductions in a defendant’s sentence.

¹ Families Against Mandatory Minimums, *How Federal Sentencing Works: Mandatory Minimums, Statutory Maximums, and Sentencing Guidelines*, Families Against Mandatory Minimums (Sept. 15, 2012), <https://famm.org/wp-content/uploads/2018/03/Chart-How-Fed-Sentencing-Works-9.5.pdf> (last visited Nov. 14, 2024).

² United States Sentencing Commission, S, Safety Valve, <https://www.ussc.gov/s#:~:text=Safety%20Valve,five%20criteria%20in%20the%20statute> (last visited Nov. 14, 2024).

³ Supreme Court, 22-340 *Pulsifer v. United States*, Supreme Court of the United States of America (Feb. 27, 2023), <https://www.supremecourt.gov/qp/22-00340qp.pdf> (last visited Nov. 14, 2024).

⁴ Cornell Law School, *Pulsifer v. United States*, LII: Legal Information Institute, <https://www.law.cornell.edu/supremecourt/text/22-340> (last visited Nov. 14, 2024). See, *United States v. Jones*, 60 F.4th 230, 232-33 (4th Cir. 2023); *United States v. Lopez*, 998 F.3d 431, 433 (9th Cir. 2021); and *United States v. Garcon*, 54 F.4th 1274, 1277-78 (11th Cir. 2022).

⁵ Cornell Law School, *Pulsifer v. United States*, LII: Legal Information Institute, <https://www.law.cornell.edu/supremecourt/text/22-340> (last visited Nov. 14, 2024). See also, *United States v. Palomares*, 52 F.4th 640, 641-42 (5th Cir. 2022); *United States v. Haynes*, 55 F.4th 1075, 1079-80 (6th Cir. 2022); *United States v. Pace*, 48 F.4th 741, 751-52 (7th Cir. 2022); and *United States v. Pulsifer*, 39 F.4th 1018, 1022-23 (8th Cir. 2022).

⁶ 601 U.S. 124, 127 (2024).

⁷ Families Against Mandatory Minimums, *How Federal Sentencing Works: Mandatory Minimums, Statutory Maximums, and Sentencing Guidelines*, Families Against Mandatory Minimums (Sept. 15, 2012), <https://famm.org/wp-content/uploads/2018/03/Chart-How-Fed-Sentencing-Works-9.5.pdf> (last visited Nov. 14, 2024).

⁸ Charles Doyle, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, Congressional Research Service (July 5, 2022), <https://sgp.fas.org/crs/misc/R41326.pdf> (last visited Nov. 14, 2024).

⁹ United States Sentencing Commission, S, Safety Valve, <https://www.ussc.gov/s#:~:text=Safety%20Valve,five%20criteria%20in%20the%20statute> (last visited Nov. 14, 2024).

¹⁰ See generally, The University of North Carolina at Chapel Hill School of Government, *Effective Sentencing Advocacy*, Raising Issues of Race in North Carolina Criminal Cases: N.C. Defender Manual (Sep. 2014), https://defendermanuals.sog.unc.edu/sites/default/files/pdf/9.4_1.pdf (last visited Nov. 14, 2024).

The ZA Editors thank Eliana Lavine for contributing this helpful information. Eliana was a third-year law student at the University of North Carolina School of Law and was an extern in the FPD office during the Fall of 2024.



Reasonable Suspicion, Social Media, and Young Black Men

The Fourth Amendment protects “[t]he right of the people to be secure ... against unreasonable searches and seizures.” U.S. Const. amend. IV. Per *Terry v. Ohio* when a police officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot,” the officer may temporarily seize and detain a citizen. 88 S.Ct. 1868, 1885 (1968). Additionally, once that person has been lawfully detained, officers may frisk him if they “reasonably suspect that the person is armed and therefore dangerous.” *United States v. Black*, 525 F.3d 359, 364 (4th Cir. 2008). However, the Fourth Circuit has held that a person’s presence in a high-crime area alone cannot create reasonable suspicion to justify a *Terry* stop. *United States v. Curry*, 965 F.3d 313, 331 (4th Cir. 2020). Recently, in *United States v. Brown*, the Fourth Circuit found that an Instagram video depicting a group of young, Black men carrying guns in a high crime area supplied the reasonable suspicion needed to arrest and frisk two young, Black men. 114 F.4th 253, 255 (4th Cir. 2024).

In July 2021 in Richmond, Virginia, Dequane McCullers and Anthony Brown were subjected to a warrantless seizure and frisk. *Id.* at 256-7. The police acted on a one-to-two old Instagram post of an undated video showing several young Black men holding guns at an apartment complex. *Id.* at 258. The police then viewed live surveillance footage from the apartment complex showing that the group had already left the area. *Id.* at 262. The officers went to the apartment complex and approached two young Black men standing outside the complex. *Id.* at 256. As the officers approached, the two men began walking away. *Id.* The officers approached with guns drawn, even though neither man was holding a gun, and ordered them to “stop reaching.” *Id.* The two men complied within six seconds. *Id.* at 263. One officer approached Mr. McCullers, ordered him to the floor and handcuffed him immediately. *Id.* at 257. A different officer immediately handcuffed Mr. Brown. *Id.* Mr. Brown asked why he was being detained, and the officer replied, “This is what we do all the time, we just jump out, see what’s going on.” See *id.* at 269 (quoting from body camera footage that contains the whole quote; see Petition for Rehearing En Banc, 2, *United States v. Brown*, No. 22-4564(L) & 22-4565 (4th. Cir. 2024). Mr. McCullers and Mr.

Brown were then charged in federal court with unlawfully possessing firearms based on the guns found in their possession after being seized and frisked. *Brown*, 114 F.4th at 257.

The Court recognized the district court's finding that the area where Mr. McCullers and Mr. Brown were detained is a hot spot for gang violence where rival gang members post social media videos to provoke violence. *Id.* at 258. However, the officers who saw the Instagram post that led to the arrests did not testify the video constituted a threat. *Id.* at 265. Instead, they indicated threats are normally direct, naming who they are threatening. *Id.*

Both Mr. McCullers and Mr. Brown filed suppression motions, arguing the officers lacked reasonable suspicion to seize and frisk them. see Petition for Rehearing En Banc, 7, *Brown*, No. 22-4564 (L) & 22-4565. Their argument included that the officers did not (a) know when the Instagram video had had been filmed, not simply posted; (b) know whether the firearms in the video were real or fake; or (c) know anything about Mr. McCullers and Mr. Brown other than what clothes they wore in the Instagram video. *Id.* Further, they noted the officers only knew that (a) the video was at least 75 to 120 minutes old by the time the officers arrived at the apartment complex and located Mr. McCullers and Mr. Brown; (b) the video was posted by a known gang member; and (c) gang members would "post inciting videos on social media to goad each other to violence." *Id.* The district court denied these suppression motions. *Brown*, 114 F.4th at 257.

The Fourth Circuit Court of Appeals upheld the decision to deny these motions. *Brown*, 114 F.4th at 255. First, the Court noted that the officers had reasonable suspicion to stop the defendants. *Id.* at 258. The Court stated that under Virginia law it is illegal to brandish a firearm to induce fear and that the apartment complex the defendants were photographed and arrested at was a known "hotspot for gang violence." *Id.* Therefore, the Court stated, a reasonable officer could suspect that a video posted by a known gang member, was meant to communicate a message to rival gang members. *Id.* Further, they stated officers had reason to believe that the video was taken only an hour before they saw it based on the video's timestamp and video surveillance showing both defendants in the same location wearing the same outfits they wore in the Instagram video. *Id.* Additionally, the Court noted that even if the Instagram and surveillance footage did not provide reasonable suspicion, the videos combined with defendants' "evasive" actions after officers arrived was sufficient to provide reasonable suspicion. *Id.* at 259. Notably, the defendants did not run away from the police and stopped walking away from them soon after the police ordered them to stop. *Id.* at 256. Second, the Court noted the officers had reasonable suspicion to frisk the defendants, since they reasonably believed the individuals were armed based on the Instagram and surveillance footage. *Id.* at 259.

The dissent in *Brown*, written by Judge Wynn, argued that the majority crafted a new exception to the Second Amendment, construing it so that it does not protect the rights of individuals who live in gang violence hot spots. *Id.* at 261. Judge Wynn specifically stated his doubt that law enforcement would have been moved to act on the Instagram video if the defendants were not young, Black men. *Id.* at 265. He cited studies featured in multiple law review articles finding that implicit biases cause police officers to pay more attention to Black people than white people, and to view the behavior of Black people as more suspicious. *Id.*

Judge Wynn's dissent argued that *Brown* hints at a "slow, systematic erosion of the Fourth Amendment protections for a certain demographic." *Id.* at 269 (citing *Black*, 707 F.3d at 542). Attorneys should be aware that officers are more likely to have reasonable suspicion to complete a seizure and frisk when their clients are in high-crime areas. Here, the defendants were not engaging in unlawful activity in the Instagram video, nor was there any testimony that they flashed gang signs or make threats. *Id.* at 264-65. However, that some gangs make threats on social media, coupled with the high-crime area, was enough to supply reasonable suspicion. *Id.* at 258. This may open the door for other legal exercises of the Second Amendment to supply reasonable suspicion for a stop and frisk if the client was in a "hot-spot for gang violence." Judge Wynn stated that behavior like wearing a certain color may supply such suspicion. See *id.* at 265. Additionally, that a client calmly walks away from an officer before being told to stop, may still supply reasonable suspicion. See *id.* at 268. Here, the defendants did not run away and complied within six seconds of being commanded to "stop." *Id.*

Judge Wynn further noted that the majority ignored the standards set by *United States v. Williams* and *Terry v. Ohio*. *Id.* at 263. He stated that to detain a person for a brief investigatory stop, the Fourth Amendment requires that law enforcement possess a reasonable suspicion that criminal activity is afoot. *Id.* (quoting *United States v. Williams*, 808 F.3d 238, 245 (4th Cir. 2015)). To establish reasonable suspicion, officers must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The Instagram video did not depict a crime taking place, and neither did live surveillance footage.

Defense attorneys may benefit from focusing their arguments on whether the conduct taking place in a high-crime area itself warrants a reasonable belief that crime is afoot and consider whether any additional circumstances may negate the reasonability of that belief. To evidence racial bias, they may point to unsupported assumptions officers made about their clients. In *Brown*, the officers assumed the defend-

ants were inciting violence via Instagram, despite the lack of threats or gang signs in the video. *Id.* at 266. They also assumed the defendants were not acting in self-defense in a way that may be protected by *Bruen*, even though there was recently a deadly shooting in the area. *Id.* (citing *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 10 (2022) stating that the Second Amendment protects the right to armed self-defense both in and outside the home).

Although the *Brown* case seems to further erode Fourth Amendment protections by condoning law enforcement's reliance on racially biased, yet otherwise innocuous, conduct to justify investigating young men of color, hope is not lost. Defense attorneys should look to points made in J. Wynn's dissent to attempt to suppress evidence collected in this manner, making sure to remind courts of their duty to safeguard constitutional rights for all defendants, no matter their race, ethnicity, or socioeconomic status.

The ZA Editors thank Olivia Komanduri for contributing this helpful information. Olivia was a third-year law student at Duke Law and was an extern in the FPD office during the Fall of 2025.



MCDs Under Scrutiny: Understanding the Legal Implications

The Second Amendment protects the right to keep and bear arms. U.S. Const. amend. II. *District of Columbia v. Heller* established that, although we have a right to bear arms, this right “was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹ A United States District Court has recently found that accessories for guns, such as Machinegun Conversion Devices (MCDs), do not have Constitutional Protections.²

MCDs are defined by 26 U.S.C. § 5845(b) under machinegun. The term “machinegun” means:

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.³

Common charges that are based on this definition include possession of a MCD (18 U.S.C. § 922(o)), trafficking of MCD-equipped firearms (18 U.S.C. § 933), and use of a MCD-equipped firearm during and

in relation to a crime of violence or drug trafficking crime (18 U.S.C. § 924(c)).

To reduce violent crime, the Department of Justice has been creating and executing initiatives, such as the Comprehensive Strategy for Reducing Violent Crime.⁴ One of the initiative's main focuses has been the regulation of MCDs. As recently as September 10, 2024, the Justice Department created an Anti-MCD Committee, with enforcement components including the ATF, FBI, DEA, the Executive Office for the United States Attorney's Civil and Criminal divisions, and the Office of the Deputy Attorney General.⁵ The Deputy Attorney General, stated in a recent memo, “Given the significant threat to public safety and law enforcement posed by MCDs, such a charge may be warranted where other applicable charges ‘would not sufficiently reflect the seriousness of defendant's criminal conduct, danger to the community,’ harm to victims, or other considerations.”⁶

Although statutes prohibiting MCDs have been available to the Government, the focus on MCDs may increase how often we are seeing these types of charges, as well as higher sentences. Simply possessing an unregistered MCD carries a maximum sentence of 10 years. However, using a machinegun in the commission of a crime of violence or drug trafficking offense carries a 30-year mandatory minimum and up to life in prison.

To minimize the impact of enhancements related to MCDs, practitioners should make sure the Government focuses on the factors that allow for such charges to be imposed. The Department of Justice Manual states certain factors that should be considered when initiating and declining charges in section 9-27.230.⁷ These factors include:

- (1) federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
- (2) the nature and seriousness of the offense;
- (3) the deterrent effect of prosecution;
- (4) the person's culpability in connection with the offense;
- (5) the person's history with respect to criminal activity;
- (6) the person's willingness to cooperate in the investigation or prosecution of others;
- (7) the person's personal circumstances;
- (8) the interests of any victims; and
- (9) the probable sentence or consequences if the person is convicted.⁸

Additionally, practitioners can advocate for downward departures or variances where appropriate.⁹

Approaching MCD charges with these factors in mind allows practitioners to ensure these overarching initiatives are being implemented appropriately. It is important to remember that although there are valid societal concerns for the crack-down on MCDs, every crime is not equal and should not be treated the same.

¹ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

² *United States v. Mitchell*, ---F.Supp.3d---, No. 1:24-CR-9, 2024 WL 2272275 (N.D. Ohio May 20, 2024).

³ 26 U.S.C. § 5845(b).

⁴ U.S. Dep't of Justice, Office of the Attorney Gen. September 6, 2024 Memorandum, (Sept. 6, 2024), <https://www.justice.gov/dag/media/1366606/dl> (last visited Nov. 22, 2024).

⁵ United States Attorney's Office, Western District of Oklahoma, *United States Attorney to Co-Chair Justice Department's New "ANTI-MCD" Committee, Targeting Machinegun Conversion Devices*, <https://www.justice.gov/usao-wdok/pr/united-states-attorney-co-chair-justice-departments-new-anti-mcd-committee-targeting> (last visited Oct. 25, 2024).

⁶ *Id.*

⁷ United States Dep't of Justice, 9-27.00 - *Principles of Federal Prosecution* (Feb. 2024), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#> (last visited Nov. 22, 2024).

⁸ *Id.*

⁹ *Id.*

The ZA Editors thank Taiesha Morgan for contributing this helpful information. Taiesha was a third-year law student at North Carolina Central University School of Law and was an extern in the FPD office during the Fall of 2024.



Autism and Non-Production Child Pornography Sentencings

At sentencing, District Courts look to fit the proposed sentence to the person in front of them—an effort to make sure that sentences are proportional to the unique circumstances of the crime. So, when defendants are not neurotypical, such as people with Autism Spectrum Disorder (ASD), courts must look closely at the sentencing factors to reach just sentences, especially when sentencing crimes that carry significant social stigma and opprobrium, such as child pornography crimes. To do so, courts use the factors set out in 18 U.S.C. § 3553(a), which allow them to determine whether the defendant should receive a sentencing variance. Because of the specific characteristics of people with ASD, defense attorneys may have a good opportunity to advocate for lower sentences for their clients under the § 3553(a) factors for non-production child pornography offenses.

People with autism are a small, but growing, group in the general population and in the justice system. Although the true numbers are hard to come by, one study found the rate of ASD in prison populations to be four times the background rate.¹ While people with ASD are generally less likely to commit crimes, their overrepresentation in the system may be due to their unique vulnerabilities, which make them more likely to falsely confess, plead guilty, and be misunderstood by actors throughout the system, including judges, prosecutors, and their own attorneys.² Therefore, it is crucial to understand how their characteristics aid in their defense.

Sections 3553(a)(1) and (2) strongly suggest that people with autism qualify for downward variances, particularly to non-custodial sentences. In particular, the factors ask courts to examine the “characteristics of the defendant,” and the “need for the sentence to be imposed,” taking into account the seriousness of the offense, deterrent effect of the sentence, prevention of future crimes, and the ability to rehabilitate the defendant with the correct education. 18 U.S.C. § 3553 (a).

These factors indicate that people with ASD should qualify for downward variances. People on the spectrum are often less blameworthy, based on their diminished understanding of the wrongfulness of their conduct. When asked about reasons for offending in the child pornography context, autistic offenders frequently cited that “misunderstanding of the seriousness of the behaviors were key reasons for offending.”³ They may not understand that something “freely accessible” on the internet is illegal, or that the simple viewing of images is a crime.⁴ They may also have experienced social isolation and lack of proper sex education, making them unaware of social taboos that neurotypical people take for granted.⁵

The typical expressions of ASD may also contribute to an incorrect perception that their behavior is more deviant. For example, many with ASD are “completists,” who want to possess all the items within their particular area of interest. In the child pornography context, this leads to accumulating large numbers of images—potentially leading to an enhanced sentence. The mismatch between the perceived behavior and the reality for autistic defendants has been termed “counterfeit deviance,” which nonetheless seems serious if not properly understood by the courts.

Putting autistic offenders in prison is also dangerous and futile. People with ASD are extremely poorly equipped to deal with the social demands of the prison setting, often being bullied, assaulted, or manipulated by inmates, and spending “inordinate periods of time” in solitary confinement as a result.⁶ Furthermore, prison staff may interpret their “direct style,” impaired ability to pick up on social cues, and “unusual pre-occupations or repetitive behaviors” as disruptive or disrespectful, leading to discipline purely as a result of their ASD.⁷

In addition, prisons do not provide the mental health treatment services that autistic offenders need to return to society. People with ASD require different programs than are available to the general prison population, with more focus on sex education and “specific responses to specific situations.”⁸ Placing people with ASD in programs that do not fit them does nothing to reduce the risk of recidivism.⁹

And the risk of recidivism among autistic people, especially in the child pornography context, is already extremely low. Those with ASD often exhibit “rule-following” behavior, where they assiduously follow the rules once they know

that something is prohibited. Hence, once they learn that child pornography is illegal, their risk of reoffending plummets.¹⁰ Individuals with non-production child pornography offenses are already at an extremely low risk of reoffending, and especially of escalating to contact offenses. In general, “prison sentences are not necessary to protect the public from an individual with ASD who has down-loaded child pornography because of the extremely low risk presented by the individual with ASD of harming a child.”¹¹

Moreover, the U.S. Sentencing Commission itself has criticized the child pornography guidelines for not measuring up to the realities of the crime today. For example, the guidelines impose enhancements based on the number of images possessed—something that a person with ASD might fall foul of due to their “completionist” tendencies—but the number of images is not a predictor of the person’s later risk to the community. That courts impose downward variances in most child pornography cases reflects the overly punitive nature of the guidelines, even as applied to neurotypical offenders.¹² Those with ASD have an even stronger claim that the guidelines are not fairly applicable to them.

Finally, some district courts have understood the issues regarding autistic defendants and have sentenced accordingly. In *United States v. Huseth*, No. 18-20027-JAR, 2021 WL 4940915 (D. Kan. Oct. 22, 2021), for example, Chief Judge Julie Robinson’s memo and order laid out how Erik Huseth’s ASD diagnosis and character traits justified a substantial downward variance when sentencing him for possession of child pornography. This opinion provides a useful example for how such an analysis can be applied and shows that the current sentencing factors allow counsel to present substantial mitigation for their autistic clients. In particular, it demonstrates the value of retaining experts who can speak to how ASD presents in the client, and how that should mitigate the final sentence. There, the defense was able to marshal three experts to testify to Huseth’s lack of appreciation of the wrongfulness of his conduct, his unlikelihood to reoffend, and the need for proper treatment outside of prison, resulting in a probationary sentence.

Although sentencing in child pornography cases is often extremely difficult, the above shows that courts are receptive to mitigation. Under the § 3553(a) factors, people with ASD can and should be given substantial downward variances in the pursuit of making their sentences more just. With the right preparation, attorneys can be ready to address these at sentencing, using expert testimony and academic sources for support. tence, and it made very clear that the standard to rebut a presumption of judicial vindictiveness is very relaxed. *Id.* The court expressed little concern that, after *Singletary*, future defendants would be deterred from making meritorious claims on appeal. *Id.* at 427 n.7.

¹ Rachel L. Fazio, Christina A. Pietz, and Robert L. Denney, *An Estimate of the Prevalence of Autism-Spectrum Disorders in an Incarcerated Population*, Open Access J. of Forensic Psych. 69, 69 (2012) <https://www.cdc.gov/>

[autism/data-research/index.html](https://www.cdc.gov/autism/data-research/index.html) (last visited Nov. 19, 2024).

² Mark J. Mahoney, *Defending Men with Autism Accused of Online Sexual Offenses*, in Handbook of Autism Spectrum Disorder and the Law 272 (Fred R. Volkmar, Rachel Loftin, Alexander Westphal, Marc Woodbury-Smith eds., 2021) [hereinafter Handbook].

³ Rachel Loftin, *Sexual Offending and ASD*, in Handbook at 262.

⁴ *Id.*

⁵ Mahoney in Handbook at 285.

⁶ Melanie Clark Mogavero, *Autism, sexual offending, and the criminal justice system*, 7 J. of Intellectual Disabilities & Offending Behaviour No. 3 116, 117 (2016).

⁷ Clare Sarah Allely and Larry Dubin, *The contributory role of autism symptomology in child pornography offending: why there is an urgent need for empirical research in this area*, 9 J. of Intellectual Disabilities & Offending Behaviour No. 4 129, 137 (2018) [hereinafter *Contributory Role*].

⁸ *Id.* at 138.

⁹ *Id.*

¹⁰ Mahoney in Handbook at 289.

¹¹ *Contributory Role* at 138.

¹² U.S. Sent. Comm., *Federal Sentencing of Child Pornography Non-Production Offenses* (2021), available at <https://www.ussc.gov/research/research-reports/federal-sentencing-child-pornography-non-production-offenses> (last visited Nov. 19, 2024).

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



LEGAL UPDATES

4th Circuit Update

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

U.S. Supreme Court Update

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

Amended Rules and Guidelines Update

Rules of Appellate Procedure and Evidence¹

Appellate Procedure Rule 29: Brief of an Amicus Curiae

The amendments to Rule 29 make changes to the procedure for filing amicus briefs, including the disclosure requirements. The amendments seek primarily to provide the courts and the public with more information about an amicus curiae.

Subdivision (a) The amendment to Rule 29 (a)(2) adds a statement of the purpose of an amicus brief: to bring to the court's attention relevant matters not already mentioned by the parties that may help the court. The amendment also eliminates the ability of a nongovernmental amicus to file a brief based solely on the consent of the parties. Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs. Rule 29(a)(3) is amended to require the motion to state why the brief is helpful and serves the purpose of an amicus brief. The amendment calls for broader disclosure to help the court and the public evaluate the likely reliability and helpfulness of an amicus, particularly those with anodyne or potentially misleading names.

Rule 29(a)(5) will be amended to directly impose a word limit on amicus briefs, replacing the provision that establishes length limits for amicus briefs as a fraction of the length limits for parties. This results in removing the option to rely on a page count rather than a word count. This change enables a simplification of the rules and requires a certification of compliance under Rule 32(g)(1) in all amicus briefs.

Subdivision (b) deals with the disclosure of the relationship between the amicus and a party. Subdivision (b)(4) requires disclosure of whether a party, its counsel, or any combination of parties or counsel has either contributed or pledged to contribute 25% or more of the revenue of an amicus. The 25% figure is chosen because the Committee believes that someone who provides that high a percentage of the revenue of an amicus is likely to have substantial power to influence that amicus. Contributions or pledges made within 12 months before the filing of the brief must be disclosed. To minimize the burden of disclosure on the amicus, the 25% calculation is based on the total revenue of the amicus for its prior fiscal year.

Subdivision (d) is new and operates as a backstop to the disclosure requirements of (b) and (c): If the amicus fails to make a required disclosure, and the party or counsel knows it, the party or counsel must make the disclosure.

Subdivision (e) amends the current rule by providing a \$100 threshold for the disclosure requirement. Under the existing rule, a non-member of an amicus who contributes any amount, no matter how small, that is earmarked for a particular brief must be disclosed. This can hamper crowd-

funding of amicus briefs while providing little useful information to the courts or the public.

Rule 32: Form of Briefs, Appendices, and Other Papers

Rule 32(g) is amended to conform to the amendments found in Rule 29.

Evidence Rule 801

The change to Rule 801(d)(1)(A) would allow for substantive admissibility of prior inconsistent statements of a testifying witness. The amendment changes a rule that the Committee found to be unduly narrow. A major advantage of the amendment is that it avoids the need to give a jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

Sentencing Guidelines²

Rule for calculating loss

This proposed amendment is a result of the Commission's continued study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary. The proposed amendment aims to standardize loss calculations under §2B1.1 of the Guidelines Manual in response to recent court decisions.

Youthful individuals

Part A of the proposed amendment sets forth three options to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score. Option 1 would exclude juvenile sentences from receiving two points, limiting this to adult sentences of at least 60 days. Juvenile sentences would get at most one point. Conforming changes would be made to relevant commentary. Option 2 Completely excludes all juvenile sentences from the criminal history calculation, allowing for their consideration for upward departures under §4A1.3. Various references to juvenile offenses would be removed in §4A1.2 and commentary. Option 3 excludes all sentences for offenses committed before age eighteen from the criminal history score, with similar upward departure provisions as in Option 2.

Part B of the proposed amendment would simplify §5H1.1 by removing specific references to "youth" and the conditions under which age may distinguish a case. The revised sentence would state that "[a]ge may be relevant in determining whether a departure is warranted." Additionally, it would explicitly allow for downward departures when the defendant was youthful at the time of the offense, outlining considerations for the court in making such determinations.

Acquitted conduct

The proposed amendment aims to prohibit the use of acquitted conduct in sentencing under the Guidelines Manual. Currently, acquitted conduct is not explicitly addressed, but it can be considered under various guidelines, including §1B1.3,

which defines "relevant conduct," and §6A1.3, which allows courts to resolve disputed factors during sentencing. The amendment would explicitly address the treatment of acquitted conduct in sentencing.

Circuit Conflicts

The proposed amendment aims to resolve circuit conflicts related to §2K2.1 (concerning unlawful firearm transactions) and §2K2.4 (regarding the use of firearms or explosives in certain crimes).

Part A would amend §2K2.1, addressing a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase in §2K2.1(b)(4)(B)(i) for a firearm that "had an altered or obliterated serial number."

Part B would amend the Commentary to §2K2.4 addressing a circuit conflict concerning whether subsection (c) of §3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. § 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. § 924(c) based on the drug trafficking count. An issue for comment is also provided.

Miscellaneous

These proposed amendments respond to recently enacted legislation and miscellaneous guideline issues.

Part A responds to the Safeguard Tribal Objects of Patrimony ("STOP") Act of 2021, Pub. L. 117-258 (2022), by amending Appendix A (Statutory Index) and the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources).

Part B responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232 (Aug. 13, 2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice's National Security Division and the Department of Commerce's Bureau of Industry and Security), by amending Appendix A and §2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism).

Part C responds to concerns raised by the Department of Justice relating to offenses under 31 U.S.C. §§ 5322 and 5336 and §2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts), by amending the specific offense characteristic at §2S1.3(b)(2)(B) to reflect the enhanced penalty applicable to offenses under those statutes.

Part D responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A to §2R1.1 (Bid-Rigging, Price-

Fixing or Market-Allocation Agreements Among Competitors), by amending Appendix A and the Commentary to §2R1.1 to replace the reference to 15 U.S.C. § 3(b) with a reference to 15 U.S.C. § 3(a).

Part E addresses a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)-(a)(4) of §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

Part F responds to concerns raised by the Department of Justice relating to the scope of the definition of "sex offense" in subsection (b)(2) of §4C1.1 (Adjustment for Certain Zero-Point Offenders).

¹ Proposed Amendments to the Federal Rules & Forms (Proposed August 2024), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2024.pdf (last visited November 18, 2024).

² Proposed 2024 Amendments to the Federal Sentencing Guidelines (Proposed December 26, 2023), https://www.uscourts.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf (last visited November 18, 2024).

The ZA Editors thank Wyatt Schline for contributing this helpful information. Wyatt was a second-year law student Campbell and was an intern in the FPD office during the fall of 2024.



LOCAL NEWS

Panel News

We are pleased to welcome the following new panel attorneys in Raleigh: Ryan Willis and Nick Hartigan.

JD Xerri of Raleigh is a welcome addition to the training panel.

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

E-mail the

Zealous Advocate Editors:

Laura_Wasco@fd.org

or

Vidalia_Patterson@fd.org