

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2026



The Editors' Message

Despite having weathered recent uncertainty and budget constraints, we are impressed with how attorneys in this district have remained focused on zealous advocacy for clients. Our district's defense attorneys' vigorous representation of indigent defendants demonstrates true dedication to upholding every individual's Constitutional rights.

In this issue of the *Zealous Advocate*, we present several articles covering current issues in federal criminal defense, to include articles on civil liberties such as the First, Fourth, and Fifth Amendments. As sentencing is a major portion of our practice, we also include articles on presentence reports, firearm enhancements, and newly amended supervised release guidelines. We additionally have an article to assist those receiving inquiries on how to exhaust BOP administrative remedies for compassionate release. Finally, we have updates on topics we have previously covered, including the death penalty and restoring voting rights post-conviction. As always, we also include legal updates.

We remain committed to publishing our newsletter, as this is one of several ways we endeavor to keep defense attorneys in our district up to speed on recent legal developments. We hope these articles are helpful in your practice. Our next CLE training programs for attorneys in our district will be held November 19th-20th at N.C. State's McKimmon Center in Raleigh. We look forward to seeing everyone there and hope you know how important your work is for criminal defendants in the EDNC.

Vidalia Patterson & Laura Wasco
ZA Editors

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

Send an e-mail to the
Zealous Advocate Editors:

Laura_wasco@fd.org

or

Vidalia_Patterson@fd.org

Inside the Spring 2026 Issue

PANEL ATTORNEY INFORMATION....2

PRACTICE TIPS

<i>First Amendment.....</i>	<i>2</i>
<i>ICE Surveillance</i>	<i>3</i>
<i>ICE Facial Scanning and Recognition.....</i>	<i>5</i>
<i>Fifth Amendment Coercion and Capacity</i>	<i>7</i>
<i>Fifth Amendment in the Digital Age</i>	<i>8</i>
<i>The PSR is Not the Record</i>	<i>10</i>
<i>Firearm Enhancements.....</i>	<i>11</i>
<i>USSG Supervised Release Amendments.....</i>	<i>12</i>
<i>Compassionate Release Claim Exhaustion</i>	<i>13</i>
<i>Death Penalty Update</i>	<i>15</i>
<i>Voting After Conviction.....</i>	<i>16</i>

LEGAL UPDATES

<i>4th Circuit Update</i>	<i>17</i>
<i>U.S. Supreme Court Update.....</i>	<i>17</i>

LOCAL NEWS..... 17

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

We will host one seminar this year, which will take place Thursday November 19th through Friday November 20th at the North Carolina State University's McKimmon Center in Raleigh. Registration and reservation information will be sent out later

Please be on the lookout for information about our 2027 seminars. Additional details and information will be sent out via email and posted to our website.



PRACTICE TIPS

But First, the First Amendment

Many defense attorneys are comfortable litigating issues related to the Fourth, Fifth, and Sixth Amendments. They know how to spot a bad stop, a *Miranda* problem, or a Confrontation Clause violation almost instinctively. But in focusing on those core protections, it can be easy to overlook another constitutional safeguard that may be just as powerful in the right case: the First Amendment. Failing to raise First Amendment defenses can mean overlooking a dispositive constitutional argument. When the government's theory hinges on what a client said whether in a sermon, a private conversation, or a group meeting, defense counsel should stop and ask whether a First Amendment argument is available. Two Fourth Circuit cases illustrate the point: *United States v. Al-Timimi*¹ and *United States v. Arthur*². Although they arise in different postures, together they demonstrate the two principal ways to raise a First Amendment challenge in a criminal case: (1) an as-applied challenge based on the specific facts, and (2) as a facial overbreadth challenge to the statute itself.

United States v. Al-Timimi illustrates how to effectively argue an as-applied challenge. There, the defendant's convictions were based in significant part on statements he made following the September 11th terror attacks.³ Specifically, he told a group of men that they should "leave the United States," "[j]oin the mujahideen," "fight the Indians or the Russians or the Americans," "defend Afghanistan," and go to Pakistan to "join the LET and get

training from the LET camps."⁴ On appeal, he argued that applying the charged statutes to his speech violated the First Amendment.⁵ The Fourth Circuit vacated Al-Timimi's convictions, recognizing constitutional concerns in the way the government had relied on his speech.⁶ *Al-Timimi* asks a narrow question: even if the statute is valid generally, did the government, on these facts, punish protected speech?

The doctrinal starting points for the First Amendment challenge raised in *Al-Timimi* are *Brandenburg v. Ohio*⁷ and *United States v. Hansen*.⁸ In *Brandenburg*, the U.S. Supreme Court held that advocating the use of force or law violation is protected unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁹ The imminence requirement is critical. The government cannot criminalize abstract advocacy or ideological rhetoric simply because it is offensive or extreme. Just recently in *Hansen*, the Court explained that facilitation, or aiding and abetting, is the "provision of assistance to a wrongdoer with the intent to further an offense's commission."¹⁰

Applying this analysis in *Al-Timimi*, the Fourth Circuit reasoned that both the imminent and the definite prongs of *Brandenburg* were not met because the defendant specified no time frame and also gave no specific instructions for how the actions should be carried out.¹¹ At the same time in *Al-Timimi*, the Court explained that for aiding and abetting under *Hansen* the speech need not encourage imminent lawlessness.¹² However, the government still needs to prove (1) the provision of assistance to the listener, (2) the intent [of the speaker] to bring about a particular unlawful act, and (3) completion of the unlawful act.¹³ In *Al-Timimi*, the prosecution failed to prove both the first and second elements, as the defendant's involvement was nothing more than encouragement.¹⁴

The second path is a facial overbreadth challenge, as seen in *United States v. Arthur*.¹⁵ There, the defendant argued that federal statute 18 U.S.C. § 842(p)(2)(B) criminalized a substantial amount of protected speech and lacked sufficient intent requirements to cabin its reach.¹⁶ The statute "prohibits 'any person' from 'teach[ing] or demonstrat[ing] to any person' how to make or use explosives, while 'knowing that such person intends to use' the information they learned 'for, or in furtherance of,' a federal crime of violence."¹⁷ The defendant argued this would necessarily sweep in all manner of innocent conduct and speech, such as if a physics professor teaches a class on thermodynamics where one of her students is wearing a t-shirt with a violent slogan. The concern this case raises is that *anyone* could be found guilty of criminal conduct simply by relaying information to another person. No criminal intent is required.

Although the *Arthur* panel rejected the First Amendment claim,¹⁸ the case provides a useful blueprint for how to frame an overbreadth

argument. The Supreme Court's overbreadth doctrine, articulated in *Broadrick v. Oklahoma*, allows a statute to be invalidated on its face if it prohibits a substantial amount of protected speech in relation to its legitimate sweep.¹⁹ The concern is systemic: broad laws chill speech because individuals will self-censor rather than risk prosecution. More recently, *United States v. Hansen* clarified that overbreadth must be "substantial" relative to the statute's legitimate applications and that courts should consider whether a narrow construction is available.²⁰

Practically, mounting a facial overbreadth challenge requires three steps which are illustrated in *Arthur*. First, the defendant must define the statute's full textual scope, rather than the government's preferred interpretation.²¹ Second, the defendant must identify realistic situations in which the statute would criminalize protected speech.²² Third, the defendant must show if the unconstitutional portion can be severed from the rest of the statute.²³ As the Fourth Circuit noted in *Arthur* this is a demanding standard,²⁴ but raising the argument can narrow the government's theory and preserve the issue for further review. As the case has been petitioned to be reheard en banc, it will be interesting to see whether this facial overbreadth argument prevails.

When a case centers on speech, the First Amendment should be part of the analysis from the start. An as-applied challenge asks whether this client's speech falls outside constitutional protection on these facts. A facial overbreadth challenge, rooted in cases like *Broadrick v. Oklahoma* and its progeny, asks whether the statute itself sweeps too broadly. Neither argument will carry the day in every case, but both should be considered. Because many defense attorneys may not have experience making First Amendment arguments, one of our appellate attorneys who argued these cases, Andrew DeSimone, has graciously offered to be a resource for our panel attorneys. He can be reached at: Andrew_DeSimone@fd.org.

¹*United States v. Al-Timimi*, 164 F.4th 292 (4th Cir. 2026).

²*United States v. Arthur*, 160 F.4th 597 (4th Cir. 2025).

³164 F.4th at 297.

⁴*Id.* at 306.

⁵*Id.* at 302.

⁶*Id.* at 297.

⁷*Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸*United States v. Hansen*, 599 U.S. 762 (2023).

⁹395 U.S. at 447.

¹⁰599 U.S. at 771.

¹¹*Al-Timimi*, 164 F.4th at 306.

¹²*Id.* at 309.

¹³*Al-Timimi*, 164 F.4th at 309.

¹⁴*Id.* at 310.

¹⁵*Arthur*, 160 F.4th 597.

¹⁶*Id.* at 602.

¹⁷*Id.* at 603.

¹⁸*Id.* at 602.

¹⁹*Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

²⁰*Hansen*, 599 U.S. at 770.

²¹*Arthur*, 160 F.4th at 606.

²²*Id.*

²³*Id.*

²⁴*Id.*

The ZA Editors thank Olivia Romeo for contributing this helpful information. Olivia was a second-year law student at Campbell University School of Law and an extern in the FPD office during the Spring of 2026.



I.C.E. I.C.E. Baby

"Stop, collaborate, and listen. ICE is back with a brand-new invention. Something grabs a hold of me tightly . . . Will it ever stop? Yo I don't know."¹ Although in 1990 Vanilla Ice was talking about his "Flow"—not Immigrations and Customs Enforcement—his words resonate loudly amidst the backdrop of today's federal deportation operations. ICE (not the Vanilla-type) has a plethora of "new-inventions" that leave both lay persons and legal professionals wondering what ICE *can legally* do. Some are arguing there's a problem, and "yo I'll solve it."² (Okay, maybe not completely). At the very least, this article will provide useful legal information to protect the constitutional rights of defendants. First, it will explore some recent behavior by ICE officers, then, it will briefly discuss some arguments for defense counsel that ICE's behavior does not stand up to both statutory and constitutional demands. Finally, it will touch on what remedies defendants can pursue.

ICE has vastly expanded its surveillance toolbox to include "contracts with Israeli spyware company Paragon[,] [] contracts with Palantir, [] deals . . . with [a software] used for analyzing data on cell-phones; and [deals with] a data broker, which collects and sells sensitive digital information on Americans, including geolocation history and addresses."³ ICE Officers use the databases and facial recognition apps on "targets" during investigatory stops to attempt to determine their immigration status.⁴ However, there are reports of the technology being used by ICE officers against non-suspect observers or protestors as well. In turn, individuals' names, addresses, and personally identifying information are either being used to intimidate the individuals or to add them to a "domestic terrorist database."⁵

ICE's mass surveillance software is not the only thing that "grab[s] a hold of [you] tightly."⁶ Their use of force and attempted warrantless seizures and searches have arguably exceeded the scope of regulation and traditionally permissible Fourth Amendment limitations on law enforcement action.

If a defendant is subject to the aforementioned behavior, defense counsel ought to raise the argument that Congress—and the Secretary of Homeland Security—intended for ICE officers to be held to an even higher standard of conduct than normal law enforcement officers (at least regarding warrantless

action and use of force). Title 8 of the United States Code demands that in the absence of a warrant, ICE officers can only make investigatory stops to inquire about someone's immigration status, or make arrests if they have probable cause to believe that both: (1) an immigration crime or other felony has been committed; and (2) the suspect is likely to escape before a warrant can be obtained. 8 U.S.C. § 1357 (a). Furthermore, "[a] designated immigration officer *shall always use the minimum non-deadly force necessary to accomplish the officer's mission* and shall escalate to a higher level of non-deadly force only when such higher level of force is warranted by the actions, apparent intentions, and apparent capabilities of the suspect." 8 C.F.R. § 287.8 (a)(1)(iii) (emphasis added).

Conversely, regular law enforcement officers may effectuate a warrantless seizure or arrest in public (as opposed to the home) if they have probable cause to believe the person they are arresting is guilty of a crime. See *United States v. Watson*, 423 U.S. 411 (1976); *Payton v. New York*, 445 U.S. 573 (1980). Concerning use of force, the constitutional inquiry into normal law enforcement officers is a reasonableness inquiry that turns on the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Regarding ICE's use of mass surveillance and data collection, defense counsel should assert that ICE's recently acquired military-level data collection and surveillance tools are the exact type of "device[s] that [are] not in general public use," which may transform otherwise permissible surveillance into an unreasonable search. See *Kyllo v. United States*, 533 U.S. 27, 40 (2001). Further, that this wide-spread collection of personal data "is the quintessential type of constant, ongoing, mass surveillance that opens 'an intimate window' into our lives such that it implicates the reasonable expectation of privacy protected by the Fourth Amendment." *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 342 (4th Cir. 2021). Finally, "[j]ust because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents." *Carpenter v. United States*, 585 U.S. 296, 400 (2018) (Gorsuch, J., dissenting).

If these arguments are successful, there are still hurdles that arise when crafting a remedy for a defendant. Concerning the discrepancy between ICE's statutory authority and law enforcement's general constitutional bounds, one might think the higher standard imposed by Congress triggers the exclusionary rule—unfortunately not. Multiple circuits, including the Fourth Circuit, have declined to apply the exclusionary rule when ICE officers violate § 1357, unless their conduct

also violated the defendant's rights under the Fourth Amendment. *United States v. Santos-Portillo*, 997 F.3d 159, 165 (4th Cir. 2021) (collecting cases from First and Sixth Circuits). The second problem is the lack of a legally cognizable remedy, even if a defendant proves that ICE violated their Fourth Amendment rights. For example, if ICE pulls over an individual, resorts to excessive force, and then charges them with 18 U.S.C. § 111⁸ there is presumably no suppressible evidence. Thus, there is no remedy under the exclusionary rule, a § 1983 claim is inapplicable to ICE as they are federal officers, and a *Bivens* claim is all but foreclosed. See *Egbert v. Boule*, 596 U.S. 482, 498 (2022).

So, what remedy remains? Considering the unprecedented volume of ICE officer arrests—and their categorical misconduct⁹—attorneys have argued, and some courts have agreed, that the only adequate remedy for these defendants, and the only adequate deterrent for the officers' conduct is a dismissal of the indictment. *United States v. Quintanilla-Chavez*, No. SA-25-CR-388-XR, 2025 WL 2982191, at *18 (W.D. Tex. Oct. 20, 2025).¹⁰ Absent alternate remedies, defense counsel must urge the court to invoke its supervisory authority to dismiss the case before trial. *United States v. Hasting*, 461 U.S. 499, 505 (1983) ("The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct").

"If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *Elkins v. United States*, 364 U.S. 206, 223 (1960). The only way to prevent this deterioration of the criminal justice system is zealous and creative advocacy. After all, "anything less than the best is a felony."¹¹

¹ VANILLA ICE, ICE ICE BABY (SBK Records 1980).

² *Id.*

³ Dana Nickel, Alfred NG, *ICE has expanded its mass surveillance efforts. Online activists are fighting back.*, POLITICO (Feb. 2, 2026, 11:43 AM), <https://www.politico.com/news/2026/01/29/ice-tracking-tools-protesters-00755703> (last visited Apr. 9, 2026).

⁴ *M-J-M-A, et al. v. LAURA HERMOSILLO, et al.*, No. 6:25-CV-02011-MTK, 2026 WL 562063, at *6 (D. Or. Feb. 27, 2026) (explaining officers using the technology attempt to ascertain immigration status of individuals they stop, but that the technology is not only not 100% accurate but also produces a "match" for anyone with an "immigration nexus," so non-illegal immigrants populate a match within the database as well).

⁵ Kat Lonsdorf, Jude Joffe-Block, Meg Anderson, *ICE has spun a massive surveillance web. We talked to people caught in it*, NPR (Mar. 5, 2026, 3:18 PM), <https://www.npr.org/2026/03/04/nx-s1-5717031/ice-dhs-immigrants-surveillance-confrontation-deportation-mobile-fortify> (last visited Apr. 9, 2026).

⁶ VANILLA ICE, *supra* note 1.

⁷ See Class Action Complaint and Demand for A Jury Trial, *Tincher v. Noem*, No. 25CV04469 (D. Minn. Dec. 17, 2025); Complaint for Set-Aside and Declaratory Relief, *Brown, et al. v. Mullin, et al.*, No. 26CV1131 (D.D.C. Apr. 2, 2026).

⁸ 18 U.S.C. § 111 “Assaulting, resisting, or impeding certain officers or employees” is a broad criminal statute which criminalizes any “forcible” opposition or impediment to federal law enforcement officers. It has been used by DOJ to charge protesters and immigration “targets” alike.

⁹ See *M-J-M-A*, *supra* note 4, at *19; *Ramirez Ovando v. Noem*, 810 F. Supp. 3d 1209, 1234 (D. Colo. 2025).

¹⁰ See also *United States v. Escobedo-Molina*, 790 F. Supp. 3d 1283, 1292 (D.N.M. 2025).

¹¹ VANILLA ICE, *supra* note 1.

The ZA Editors thank Ian Russell for contributing this helpful information. Ian was a third-year law student at UNC School of Law and an extern in the FPD office during the Spring of 2026.



Immigration Enforcement and the Unconstitutional Use of Facial Scanning and Recognition Tools

The Fourth Amendment guarantees to all persons the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹ One important throughline is the Amendment’s purpose in protecting *people*, not just property, from “arbitrary government intrusion,” particularly as it relates to “permeating police presence.”² Today, as technology grows and immigration enforcement increases in scale,³ the practices of immigration officers at various federal agencies again test the bounds of the Fourth Amendment.⁴

At the state level, the question of how law enforcement may permissibly use iris scanning and facial recognition technology has already been asked and answered in many places.⁵ At least fifteen states have implemented some form of restrictions with more municipalities doing so.⁶ These restrictions range in scope and purpose,⁷ with some municipalities, including San Francisco and Boston, going so far as banning its use by officers entirely,⁸ though its success has been met with challenges.⁹ Still though, no federal laws exist to constrain federal law enforcement, and state-level statutes do not currently impose these restrictions on federal agents.¹⁰ As a result, the use of facial recognition and scanning of the general population by

federal law enforcement has risen significantly.¹¹

There is a strong argument to suggest that facial recognition and iris scanning used in the absence of any evidentiary showing violates the Fourth Amendment. Principally, individuals retain some expectation of privacy in public, limited by a reasonableness inquiry:¹² where a person has a subjective expectation of privacy and that expectation is objectively reasonable, obtaining such information is a search requiring probable cause.¹³

This standard is limited by the “plain view” doctrine, whereby information made publicly available is afforded no expectation of privacy.¹⁴ The question of recognition and scanning then turns on whether faces and irises are made publicly available. On first glance, *United States v. Dionisio* would suggest yes; there, the Court said that, like a person’s voice, which “is repeatedly produced for others to hear,” a person cannot “reasonably expect that his face will be a mystery to the world.”¹⁵ What this case fails to consider is what information is actually obtained and examined by recognition and scanning and how it is employed.

A person can expect their face to be captured in public by photos and videos. But what they cannot expect is that this information will be used by law enforcement, without any prescribed purpose, to obtain their unique features and cross-reference them to a government database they were not given notice of their presence within. Thus, where “one-to-one” scanning is used,¹⁶ law enforcement should be required to have some reason for using the technology on a particular person—after all, officers would not need the technology if the information obtained was useful to the naked eye.

This conclusion is supported by *Kyllo v. United States*, wherein the technology used was sense-enhancing.¹⁷ There, the thermal scanner employed obtained information that an officer could not perceive with their normal senses of touch and vision without artificial enhancement.¹⁸ With facial recognition and iris scanning, the technology goes even further, effectively *replacing* the officer’s eyes with a different perception device not readily available to, or reasonably expected by, the public. Facial recognition and iris scanning, unlike other tools,¹⁹ is not just sense-enhancing, but *sense-supplanting*, perceiving information a naked-eye never can, even with the best tools. Thus, when law enforcement is looking for a specific suspect, they might be able to use facial recognition technology if they believe the person they stopped matches a predefined description. But scanning without reasonable suspicion or probable cause—for example, scanning random individuals’ faces for any information in an immigration database—²⁰ goes beyond law enforce-

ment's power under the Fourth Amendment, directly into oft-feared Orwellian supervision.²¹

As such, the depth of information obtained by these technologies might independently justify their findings as “searches” under the Fourth Amendment, even if the obtaining of the information is not itself a “search.” *Cupp v. Murphy* suggests that information that is in “public view” may still be a search where the information obtained “went beyond mere ‘physical characteristics . . . constantly exposed to the public,’ and constituted the type of ‘severe, though brief, intrusion upon cherished personal security’ subject to constitutional scrutiny.”²²

In this regard, facial characteristics and irises are more akin to biometric data—like DNA, fingerprinting, and photographs, which generally require probable cause to obtain—rather than one’s voice.²³ While a person might readily expect another who has seen them before to recognize them, they have no expectation of a stranger recognizing them—that is, a person might “expect[] to be seen, [but not] to be recognized.”²⁴ Like DNA and fingerprints, the information obtained goes far beyond what could be accomplished with a mere eye test, even with enhancements.

Further, when using this technology for one-to-one matching without cause, it could be argued that detention is necessary for its effectual use. Facial recognition as a technology is notably unreliable, particularly where images are blurry, dimly lit, or in otherwise poor condition.²⁵ With iris scanning, a person needs to be stationary and only works up to 15 feet away with the best cameras available.²⁶ Federal immigration agents are only using iPhone cameras, where the maximum operating distance is far shorter. Thus, to use this technology, officers would need the consent of the detainee or a showing of cause for detention.²⁷

Ultimately, immigration enforcement’s present use of the technology to scan individuals at random and seemingly without cause clearly veers into Fourth Amendment concerns, though it unclear what constitutional evidentiary standard applies before the technology’s use is permissible. It is likely that this practice will come before appellate courts soon, and those courts need to impose some expectation of cause, even if it is just reasonable suspicion, before law enforcement can use this technology. In the meantime, defense attorneys should be diligent in pressing courts, at all stages of proceedings, from probable cause hearings to appeals, to require the government to justify its use of facial recognition and iris scanning technology against their clients.

¹ U.S. CONST. amend. IV.

² *Carpenter v. United States*, 585 U.S. 296, 303, 305 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967); then quoting *Camara v. Mun. Ct. of City and Cnty. of S.F.*, 387 U.S. 523, 528 (1967); and then

quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

³ See Michelle Hackman et al., *ICE is Using Facial Recognition Technology to Quickly Arrest People*, Wall St. J. (Jan. 4, 2026, at 21:00 EST), <https://www.wsj.com/politics/policy/ice-facial-recognition-app-mobile-fortify-dfdd00bf> (last visited Mar. 5, 2026); Jude Joffe-Block, *Immigration Agents Have New Technology to Identify and Track People*, Week-end Edition Saturday: NPR (Nov. 8, 2025, at 5:00 ET), <https://www.npr.org/2025/11/08/nx-s1-5585691/ice-facial-recognition-immigration-tracking-spyware> (last visited Mar. 5, 2026).

⁴ See Eva Dou et al., *The Powerful Tools in ICE’s Arsenal to Track Suspects—and Protesters*, Wash. Post (Jan. 29, 2026), <https://www.washingtonpost.com/technology/interactive/2026/ice-surveillance-immigrants-protesters/> (last visited Mar. 5, 2026).

⁵ See Bobby Allyn, *With No Federal Facial Recognition Law, States Rush to Fill Void*, Houston Pub. Media: NPR (Aug. 28, 2025, at 13:28 CST), <https://www.houstonpublicmedia.org/npr/2025/08/28/nx-s1-5519756/with-no-federal-facial-recognition-law-states-rush-to-fill-void/> (last visited Mar. 5, 2026).

⁶ See *Facial Recognition Bans in America: The State-by-State Fight Against Biometric Surveillance*, State of Surveillance (Sep. 12, 2025), <https://stateofsurveillance.org/articles/government/facial-recognition-bans-us/> (last visited Mar. 5, 2026).

⁷ See *id.*

⁸ See *id.*

⁹ See Douglas MacMillan, *These Cities Bar Facial Recognition Tech. Police Still Found Ways to Access It.*, Wash. Post (May 18, 2024), <https://www.washingtonpost.com/business/2024/05/18/facial-recognition-law-enforcement-austin-san-francisco/> (last visited Mar. 5, 2026).

¹⁰ See State of Surveillance, *supra* note 8. But see Mark Rivera et al., *Video Shows Immigration Agents Using Facial Recognition on Minors, Possibly Violating Illinois Law*, ABC7 Chi. (Jan. 21, 2026), <https://abc7chicago.com/post/video-shows-immigration-agents-using-facial-recognition-minors-east-aurora-high-school-possibly-violating-illinois-law/18445490/> (last visited Mar. 5, 2026).

¹¹ See Lisa Mascaro, *Trump’s ICE Force is Sweeping America. Billions in His Tax and Spending Cuts Bill Are Paying For It*, PBS News (Jan. 20, 2026, at 14:04 EST), <https://www.pbs.org/newshour/nation/trumps-ice-force-is-sweeping-america-billions-in-his-tax-and-spending-cuts-bill-are-paying-for-it> (last visited Mar. 5, 2026); Paulo Carvão, *What Trump’s AI Action Plan Means For U.S. Tech Leadership*, Forbes (July 23, 2025, at 14:25 EDT), <https://www.forbes.com/sites/paulocarvao/2025/07/23/what-trumps-ai-action-plan-means-for-us-tech-leadership/> (last visited Mar. 5, 2026); See Kat Lonsdorf et al., *ICE Has Spun a Massive Surveillance Web. We Talked to People Caught In It, All Things Considered*: NPR (Mar. 5, 2026, at 15:18 ET), <https://www.npr.org/2026/03/04/nx-s1-5717031/ice-dhs-immigrants-surveillance-confrontation-deportation-mobile-fortify> (last visited Mar. 5, 2026).

¹² See *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

¹³ *Id.* at 361.

¹⁴ See *United States v. Miller*, 425 U.S. 435, 442-43 (1976).

¹⁵ 410 U.S. 1, 14 (1973).

¹⁶ For an explanation of the difference between one-to-one face scanning compared to one-to-many matching, see 1:1 Matching vs 1:Many - What’s the Difference, Austrl. Gov’t (Sep. 15, 2023), <https://www.digitalidsystem.gov.au/news/11-matching-vs->

¹[many-whats-the-difference](#) (last visited Apr. 14, 2026); see also Eifelh Strom, *Facing Challenges in Face Recognition: One-to-One vs. One-to-Many*, ASMag.com (Sep. 19, 2016), <https://www.asmag.com/showpost/21158.aspx>.

¹⁷ 533 U.S. 27, 34-35 (2001).

¹⁸ See *id.*

¹⁹ See, e.g., *California v. Ciarolo*, 476 U.S. 207, 212-14 (1986); *Dow Chemical Co v. United States*, 476 U.S. 227, 234-35 (1986).

²⁰ See Amy Goodman, *ICE Agents Film Minnesota Protesters & Immigrants as Part of Massive Facial Recognition Push*, War & Peace Re.: Democracy Now! (Jan. 29, 2026), https://www.democracynow.org/2026/1/29/ice_cbp_facial_recognition_technology_app (last visited Mar. 5, 2026); CNN, *ICE is Using Face Scanning Technology for Immigration Status Checks*, CNN (Jan. 21, 2026), <https://www.cnn.com/2026/01/21/politics/video/immigration-agents-facial-recognition-invs-digvid-vrtc> (last visited Apr. 2, 2026).

²¹ See Paul St. Lawrence, Note, *Kyllo: As Libertarian Defense Against Orwellian Enforcement*, 2002 Geo. J.L. & Pub. Pol'y 155, 162 n.55 (2002).

²² 412 U.S. 291, 295 (1973) (internal citations omitted).

²³ See *id.*; cf. *Maryland v. King*, 569 U.S. 435, 446, 456-58 (2013) (finding a buccal swab, though far more gentle and less invasive, to be a search akin to drawing blood, scraping an arrestee's fingernails, taking a breathalyzer test, or even photography and fingerprinting).

²⁴ Adam Alba, *In Utah, Canning a Person's Face or Iris to Determine Identity is a Search Justified Only in Limited Circumstances*, UTAH BAR J., Nov.-Dec. 2011, at 16, 18.

²⁵ See, e.g., Joan Friedland, *How the Trump Deportation Machine Relies on Inaccurate Databases and Unregulated Data Collection*, Nat'l Immigr. L. Ctr. (Nov. 1, 2019), <https://www.nilc.org/articles/how-the-trump-deportation-machine-relies-on-inaccurate-databases-and-unregulated-data-collection/> (last visited Apr. 2, 2026) (citing *Gonzalez v. Immigr. & Customs Enf't*, 416 F.Supp.3d 995, 1018-20 (C.D. Cal. 2019), *rev'd*, *Gonzalez v. U.S. Immigr. & Customs Enf't*, 975 F.3d 788, 820 (2020)); Jay Stanley, *Face Recognition and the 'Trump Terror': A Marriage Made in Hell*, ACLU (Nov. 13, 2025), <https://www.aclu.org/news/privacy-technology/ice-face-recognition> (last visited Apr. 2, 2026); Strom, *supra* note 16.

²⁶ NBC NEWS, *How ICE Agents are Using Facial Recognition to Bring Surveillance to the Streets*, at 0:14 (YouTube, Feb. 6, 2026), <https://www.youtube.com/watch?v=kX9LEFVr9GY> ("Armed with facial recognition on their smartphones and professional camera gear, ICE agents are actually photographing the faces of the people they encounter during their daily operations."); Christopher S. Yoo, *Identifying Fourth Amendment Values: An Evidence-Based Approach*, 59 WAKE FOREST L. REV. 1219, 1263 (2024) ("IRT does not perform well over large distances. Typically, the individual must be within a few feet of the Irt sensor. These technical restrictions limit the use in noncooperative settings.")

²⁷ See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) ("The initial detention necessary to procure the evidence may be a seizure of the person if the detention amounts to a meaningful interference with his movement.").

The ZA Editors thank Koen Rodabaugh for contributing this helpful information. Koen was a second-year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2026.



Rethinking Voluntariness: Coercion, Capacity, and the Neurodiverse Defendant

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. To uphold this principle within the context of admissions made during police investigations, the U.S. Supreme Court effectuated *Miranda* rights, which require police officers to advise individuals of their rights to remain silent and to an attorney before proceeding with interrogations after an arrest. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Individuals may waive their *Miranda* rights, but these waivers must be made voluntarily, knowingly, and intelligently. *United States v. Holmes*, 670 F.3d 586, 591 (4th Cir. 2012).

Courts follow a "totality of the circumstances" approach when determining whether *Miranda* rights were involuntarily waived, considering various factors surrounding the interrogation. *United States v. Giddins*, 858 F.3d 870, 885 (4th Cir. 2017). A *Miranda* waiver is considered voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Conversely, in finding that a waiver was made involuntarily, courts have emphasized that "[t]he proper inquiry is whether the defendant's will has been overborne or his capacity for self-determination is critically impaired." *Giddins*, 858 F.3d at 881. Following the totality of the circumstances approach, courts should consider the mental state of the person being interrogated, and whether the individual had the capacity to voluntarily waive his rights. *Id.* Mental competence should be especially relevant in this analysis in cases involving those with intellectual disabilities, neurodiverse individuals, or people from other vulnerable populations, who are more susceptible to pressure from authority figures.¹

However, courts have often suggested that the presence of police coercion during an interrogation is the deciding factor in finding *Miranda* rights were involuntarily waived, even in cases concerning diminished capacity. *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). In *Connelly*, the landmark decision regarding diminished capacity and *Miranda* waivers, the Supreme Court held that diminished capacity alone is not enough to render *Miranda* waivers involuntary. *Id.* This emphasis on police coercion has an adverse impact on neurodiverse individuals and those with diminished capacity. These individuals are typically more impressionable than neurotypical persons and are more likely to be influenced by lower levels of police coercion. *United States v. Preston*, 751 F.3d 1008, 1022 (9th Cir. 2012). Across the country, courts have held that individuals with diminished capacity voluntarily waived their *Miranda* rights because there was an insufficient presence of police coercion to

render the waiver involuntary.² These decisions have been issued despite the individuals experiencing negative physical responses to the interrogations, including anxiety attacks, and expressing fears of potential consequences for disobeying or disappointing authority figures.³

The existing rules create a standard that is difficult for anyone to meet. However, neurodiverse individuals and those with diminished capacity are more likely to have their will “overborne” or their “capacity for self-determination” heavily influenced during interrogations by law enforcement. *Giddins*, 858 F.3d at 881. Individuals with diminished capacity may be more likely to make false confessions,⁴ less likely to understand their rights or ask for an attorney before confessing,⁵ or make confessions due to a desire to please authority figures.⁶ Nonetheless, these clients are often held to the same standard as individuals with typical levels of capacity.

Additionally, there is a risk that police may notice and take advantage of a person’s diminished capacity during an interrogation. It is common practice for police to attempt to build and obtain trust from arrestees so that waivers may be granted and confessions made. People with diminished capacity may be more easily persuaded to divulge information to interrogators. An eagerness to please or provide information that an authority figure wants to hear may lead to a greater likelihood of confessions. Courts, however, are unlikely to find these issues to be indicative of sufficient police coercion or a defendant’s will to be overborne.⁷

It is difficult to establish a sufficient presence of police coercion in most interrogations, let alone those involving people with diminished capacity. However, defense attorneys should not be discouraged by this precedential emphasis on police coercion. It is crucial to continue advocating for clients to receive proper attention and consideration by courts. Advocates should be on the lookout for clients who may be more vulnerable to coercion and carefully assess the interrogation conditions. In some circumstances, it may be appropriate to consult with experts to set up evaluations and obtain additional opinions. After carefully assessing a client’s propensity for vulnerability, it is important to raise concerns before courts to ensure that a client’s constitutional rights are not violated. Given the expectation to follow a totality of the circumstances approach, courts should be held accountable for considering how even slight levels of police coercion can have a substantial impact on clients with diminished capacity. Although police coercion must be found in some form under *Connelly*, various degrees of coercion impact individuals differently. This must be taken into consideration in order to abide by the spirit of the Constitution. While it may create more work for courts to consider individual vulnerabilities, it is essential to the fundamental meaning behind the Fifth Amendment that all individuals are treated fairly and proportionately when interrogated and facing the risk of potentially incriminating themselves.

Mental health is an increasingly relevant issue in this country, and our understanding of its im-

plications is ever-changing. As advocates, it is important to be aware of legal standards that negatively impact clients with unique circumstances and push for these circumstances to be appropriately considered by courts.

¹ Andreas Kuersten, *Tasing the Constitution: Conducted Electrical Weapons, Other Forceful Arrest Means, and the Validity of Subsequent Constitutional Rights Waivers*, 28 Wm. & Mary Bill Rts. J. 919, 932 (2020).

² See *United States v. Young*, 529 F.3d 193, 195 (4th Cir. 1975); *United States v. Pecoraro*, 565 F.Supp.3d 169, 179 (N.D.N.Y. 2021).

³ *Pecoraro*, 565 F.Supp.3d at 179.

⁴ See generally Samson J. Schatz, *Interrogated with Intellectual Disabilities: The Risks of False Confessions*, 70 Stan. L. Rev. 643 (2018).

⁵ See Jade T. Mitchell et al., *Comprehension of Miranda Warnings in Adults with Chronic, Moderate-Severe Traumatic Brain Injury*, J. Comm’n Disorders, Sep.-Oct. 2024, at 1, 2.

⁶ Schatz, *supra* note 3, at 661.

⁷ *Pecoraro*, 565 F.Supp.3d at 180 (“[B]ecause the investigators and his mother were ‘authority figures,’ he felt powerless to resist their questions. Notwithstanding defendant’s limitations, his attempt to suppress his confession absent . . . police coercion cannot warrant suppression.”).

The ZA Editors thank Bailey Willis for contributing this helpful information. Bailey was a second year law student at Campbell University School of Law and an extern in the FPD office during the Fall of 2025.



Unlock at Your Own Risk: The Fifth Amendment in the Digital Age

As digital technology continues to advance in its ability to store our most personal data, courts are now faced with determining whether forcing a suspect to unlock a cell phone violates the Fifth Amendment Right against self-incrimination. The Self-Incrimination clause of the Fifth Amendment protects individuals from “being incriminated by his own testimonial communications.”¹ As the U.S. Supreme Court explained, testimonial communications are “the extortion of information from the accused . . . [and] the attempt to force him to disclose the contents of his mind.”² Becoming more prevalent today are law enforcement’s attempts to compel individuals to unlock their phones using biometric identifiers. A biometric identifier is a measurable biological characteristic, such as a fingerprint or a retina scan, used for automated methods of individual identification.³ Now, the question is whether these compelled acts are testimonial and thus protected by the Fifth Amendment. Determining what the correct answer is has divided the courts and created a split that could lead to significant implications within the criminal procedure process.

The Ninth Circuit is one of two circuit courts that has addressed the issue, and in its view, using a biometric identifier was not testimonial. Instead, the Ninth Circuit compared the act to a physical action.⁴ In *United States v. Payne*, the Ninth Circuit held that compelling a defendant to unlock the contents of his phone using a biometric identifier, such as a thumbprint, did not trigger Fifth Amendment protection.⁵ Rather, the court likened the action to routine practices during the booking process, like a blood draw or fingerprinting.⁶ The court reasoned that using a biometric identifier required no mental effort or disclosure of knowledge, as it did not demand cognitive exertion or divulged the contents of Payne's mind.⁷

The D.C. Circuit, however, reached a different conclusion in addressing the same issue, thus creating a circuit split.⁸ In *United States v. Brown*, the defendant was compelled by law enforcement to unlock his cellphone using his thumb, which revealed incriminating evidence.⁹ The D.C. Circuit held that the compelled action violated the defendants' Fifth Amendment Rights against self-incrimination because it was testimonial.¹⁰ The court reasoned that "the compelled opening of a cellphone itself directly announces the owner's access to and control over the phone, as well as his mental knowledge of how to unlock the device."¹¹ Therefore, "forcing [the defendant] to open the phone was testimonial."¹²

As the issue has only been addressed directly by a few of the federal circuits, it is important to examine how lower courts are addressing it. Until the Fourth Circuit or the Supreme Court directly addresses the issue, any rulings on the matter will help guide federal practitioners. For instance, in *People v. Manganiello*, a defendant was once again compelled to unlock his phone using his fingerprint.¹³ Like the D.C. Circuit, the New York Appellate Division held that the act was testimonial, because it required the defendant to communicate his knowledge of access to the phone and demonstrate his control over it.¹⁴

The Fourth Circuit has had little opportunity to address the issue due to its novelty, and only one district court within the circuit acknowledged it. The Federal District Court of Maryland had the opportunity back in 2020 in *Khaled El Ali v. Barr*, a case in which the plaintiffs challenged the forced use of biometric information to unlock a device.¹⁵ The court recognized that this issue presented an unsettled question of law, but declined to address it.¹⁶ In practical terms, this means that none of our courts within the Fourth Circuit has taken a position on whether compelling a person to unlock a technological device with their biometric data is testimonial.

For federal defense practitioners, the circuit split presents particular challenges to Fifth Amendment rights. Prosecutors and law enforcement in jurisdictions that follow *Payne* will argue that biometric unlocking is akin to a physical act and comparable to a booking procedure, like fingerprinting. In contrast, jurisdictions that are more amenable to *Brown* and *Manganiello* will allow defense practi-

tioners to contend that this kind of compelled action is inherently communicative. Furthermore, it reveals the contents of one's mind, demonstrating both control and knowledge of the device, thereby constituting testimonial evidence. However, the lack of definitive guidance creates a host of implications for federal defense practitioners that will affect aspects such as suppression strategy, plea negotiations, and evidentiary rulings. Depending on the jurisdiction or what a court may find most persuasive, federal defense practitioners may either find themselves hamstrung or arguing that a constitutional violation has occurred.

Until the issue is definitively answered, practitioners will need to navigate a shaky legal landscape where outcomes may be determined simply by geography. Defense practitioners should make it clear to their clients that courts are still wrestling with whether the Fifth Amendment properly applies to the compelled unlocking of a digital device and whether that truly holds the contents of one's mind in an electronic form. In the meantime, practitioners should preserve the issue at every stage and affirmatively advocate for the reasoning in *Brown* and similar cases that recognize compelled biometric unlocking as testimonial, while remaining aware of the existing circuit split between the Ninth and D.C. Circuits. Regardless of how the legal landscape continues to evolve on this matter, it is essential to uphold a high standard of advocacy in the ongoing effort to preserve the right against self-incrimination in the digital era. However, given the technological nature of our society and our reliance on devices to store personal data, this issue is one the courts will likely address more frequently in the near future.

¹ *Doe v. United States*, 487 U.S. 201, 207 (1988).

² *Id.* at 211.

³ David Oberly, *Biometric Data Privacy Compliance and Best Practices* § 1.01[1] (Matthew Bender 2025).

⁴ *United States v. Payne*, 99 F.4th 495, (9th Cir. 2024).

⁵ *Id.* at 512.

⁶ *Id.*

⁷ *Id.* (emphasis added).

⁸ *United States v. Brown*, 125 F.4th 1186, (D.C. Cir. 2025).

⁹ *Id.* at 1203.

¹⁰ *Id.* at 1204.

¹¹ *Id.* at 1203.

¹² *Id.*

¹³ *People v. Manganiello*, 238 N.Y.S.3d 809 (App. Div. 2025).

¹⁴ *Id.* at 815.

¹⁵ *Khaled El Ali v. Barr*, 473 F. Supp. 3d 479, 522 (D. Md. 2020).

¹⁶ *Id.*

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



The PSR Is Not the Record

During a federal sentencing hearing, the Presentence Report (“PSR”) often becomes the central factual narrative of the case. Because the sentencing court may consider information beyond what was admitted at trial or before a plea, the PSR frequently serves as the primary account of both the offense and the defendant’s background. But despite its influence, the PSR is not itself the evidentiary record. Defense counsel should remember that constitutional limits still govern the information a sentencing court may rely upon.

The use of PSRs predates modern sentencing doctrine. Federal probation officers began preparing reports to assist sentencing judges in the early twentieth century, and Congress later formalized this role through the Federal Probation Act of 1925.¹ Since then, PSRs have evolved into comprehensive documents that synthesize investigative materials, criminal history, and personal background information for the court.

The U.S. Supreme Court has long recognized that sentencing courts may consider a wide range of information. In *Williams v. New York*,² a case dating back to the 1940s, the Court held that sentencing judges may “exercise a wide discretion in the sources and types of evidence” used in determining an appropriate sentence.³ The Court reasoned that individualized sentencing would be undermined if judges were strictly limited to the trial record.⁴ As a result, sentencing courts may rely on investigative reports, background information, and other sources that were never tested through the adversarial process.

However, the Court has also emphasized that sentencing discretion has constitutional limits. The Due Process Clause prohibits courts from relying on materially inaccurate or unreliable information when imposing sentences. That principle was clarified a year later in *Townsend v. Burke*.⁵ There, the Court vacated a sentence after determining the district court relied on inaccurate assumptions about the defendant’s prior criminal record.⁶ The Court held that a sentence based on misinformation violates due process, particularly when the defendant lacks a meaningful opportunity to correct the record.

Over two decades later, the Court reaffirmed this rule in *United States v. Tucker*, where a sentencing judge relied on prior convictions that were later vacated as unconstitutional.⁸ Because the sentence in *Tucker* was “founded at least in part upon misinformation of constitutional magnitude” the Court ordered resentencing.⁹

Congress fundamentally reshaped federal sentencing with the Sentencing Reform Act of 1984, which created the United States Sentencing Commission and promulgated it to create the Federal Sentencing Guidelines.¹⁰ The Guidelines were intended to promote uniformity and reduce unwarranted disparities by structuring judicial discretion through standardized calculations and fact-finding.¹¹

But importantly, this shift did not displace articulated constitutional principles. Even under the Guidelines regime, sentencing courts continued to rely heavily on PSRs, and due process still prohibited reliance on materially false or unreliable facts. This baseline principle persists today, even after *Booker* rendered the Guidelines advisory.¹²

This framework matters because assertions in PSRs can take on an air of authority simply because they appear in the PSR. When left unchallenged, courts may treat them as established fact. But Supreme Court precedent makes clear that the PSR is not the record. If a sentencing court relies on inaccurate or unsupported assertions contained in the PSR, due process concerns arise.

For defense attorneys, this means it is essential to carefully scrutinize the PSR. When reviewing a draft PSR, counsel should approach the factual narrative as a set of allegations rather than established facts. Assertions drawn from investigative reports, proffers, or law-enforcement summaries often appear in declarative language, even when the underlying source is uncertain or contested. If the PSR attributes nebulous statements or conduct to the defendant, counsel should consider requesting clarification, timely objecting to the reliability of the information, or asking that unsupported language be removed.

Particular attention should also be paid to descriptions of uncharged or dismissed conduct. Even when such allegations do not directly alter guideline calculations, they can shape the court’s perception of the defendant and influence the ultimate sentence imposed. Likewise, criminal history descriptions should be scrutinized carefully, as errors in prior convictions, offense classifications, or sentencing outcomes can affect the narrative presented to the court and the ultimate guideline calculation.

Defense counsel should treat both draft and final PSRs as documents requiring careful, line-by-line scrutiny. The key question when reviewing a PSR is whether a particular factual assertion would withstand adversarial testing. If the source of the information is unclear, unreliable, or materially disputed, defense counsel should preserve the objection and ensure that the issue can be addressed before or during sentencing. At sentencing, counsel should be prepared to hold the government to its burden of proof for any factual assertions that increase the advisory guideline range. Even when objections do not alter the guideline calculation, they may shape how the court views the defendant and the appropriate sentence under 18 U.S.C. § 3553(a). Unchallenged assertions in the PSR are frequently treated as admitted and, once incorporated into the sentencing record, can influence both guideline determinations and the court’s broader assessment of the case.

¹ 18 U.S.C. §§ 3651-3656

² 337 U.S. 241 (1949).

³ *Id.* at 246.

⁴ *Id.* at 247.

⁵ 334 U.S. 736, 741 (1948).

⁶ *Id.*

⁷ *Id.*

⁸ 404 U.S. 443, 445 (1972).

⁹ *Id.* at 447.

¹⁰ 28 U.S.C. § 991(a).

¹¹ 18 U.S.C. § 3553(a).

¹² 543 U.S. 220, 245 (2005).

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



Reexamining Firearm Enhancements Through a Kimbrough Lens

Federal courts across the country are increasingly revisiting the reasoning of *Kimbrough v. United States* beyond its original drug sentencing context. 552 U.S. 85 (2007). Although Kimbrough addressed disparities associated with the crack-to-powder ratio, its broader holding has become a powerful analytical framework in challenges to certain firearm-related enhancements under the United States Sentencing Guidelines.¹

In *Kimbrough*, the U.S. Supreme Court recognized that the Sentencing Guidelines are advisory and do not bind district courts to policy choices embedded within them.² This principle, while initially applied to drug sentencing, has since provided a broader foundation for empowering courts to engage critically with the underlying policy rationale of certain Guideline enhancements.

The large-capacity magazine enhancement under USSG §2K2.1(a)(4)(B) was originally developed during an era when magazines exceeding ten rounds were considered especially dangerous or unusual; however, the modern firearm market tells a different story. Magazines holding more than ten rounds now come standard with many of the most purchased handguns and rifles, making their possession far less indicative of heightened culpability than the Guidelines assume, and more reflective of ordinary consumer purchasing.³

Several decisions outside the Fourth Circuit reflect a growing judicial awareness that certain Guideline enhancements, especially those involving large-capacity firearm magazines, may overstate the seriousness of an offense. In *United States v. Lucas*, the Ninth Circuit reviewed a downward variance following the application of the large-capacity magazine enhancement under USSG §2K2.1(a)(4)(B).⁴ Although the district court ultimately applied the enhancement, the appellate court entertained policy discussion, signaling potential future space for reasoned policy arguments even within established Guideline frameworks.⁵

The Sixth Circuit has entertained similar challenges. In *United States v. Canada*, the defense challenged the large-capacity magazine enhance-

ment as lacking empirical support and being dangerously arbitrary.⁶ Likewise, in *United States v. Faught*, counsel advanced a policy-based challenge to a very similar argument.⁷ In both cases, the appellate courts upheld the calculation, but acknowledged the legal space for a district court to reject the enhancement on policy grounds. Together, these cases reflect increasing judicial willingness to question enhancements tied to weapon characteristics that may not reliably correlate with increased culpability.⁸

Within the Fourth Circuit, similar issues are poised for review. *United States v. Holman*, scheduled for oral argument in early 2026, raises several critical issues.⁹ *Holman* argues the term “large-capacity magazine” as originally used by the Commission borrowed language from a now expired 1994 federal assault weapons ban.¹⁰ According to Mr. Holman, the statute focused on magazines designed to accept more than ten rounds, not magazines that could theoretically accept more with modification. The Guidelines’ current application expanded the category to include magazines that are “capable of” accepting more than ten rounds, even if sold or configured at ten rounds.¹¹ Mr. Holman contends this expansion constitutes an improper definitional broadening that is inconsistent with the Commission’s directive and unsupported by empirical evidence.¹² The Fourth Circuit’s treatment of the *Holman* case may offer additional critical insight into how *Kimbrough*-style arguments are evolving in firearm-related sentencing contexts.

If the Fourth Circuit directly addresses the policy-disagreement argument or the definitional overreach issue, *Holman* may become one of the most significant firearms sentencing decisions since *Kimbrough*. A ruling acknowledging judicial authority to reject the large-capacity magazine enhancement on policy grounds could align the Fourth Circuit with other circuits which are recognizing the controversial provision and encourage broader reevaluation of firearm enhancements.

For federal practitioners, *Kimbrough* remains a valuable tool when challenging enhancements that exaggerate culpability or rest on outdated assumptions. Additionally, these cases illustrate that while cautious in extending *Kimbrough* beyond its original context, courts are increasingly open to reevaluating the policy foundations of certain enhancements. This emerging dialogue may mark a meaningful shift in how counsel across circuits frame variance arguments, encouraging a more critical examination of the empirical justification—or lack thereof—behind the Sentencing Guidelines. As more courts engage with these arguments, the door may further open for defense counsel to challenge sentencing outcomes that rest on contested or unsupported guideline policy choices. The *Holman* decision may soon clarify the Fourth Circuit’s position and further open the door for refined, evidence-based sentencing arguments rooted in *Kimbrough*. Accordingly, to preserve the issue, defense counsel should continue developing robust records on market data, empirical shortcomings, and the enhancement’s historical origins

in order to argue for a variance from the Guidelines on this basis at sentencing.

¹ *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

² *Id.* at 109.

³ Bureau of Alcohol, Tobacco, Firearms & Explosives, *Firearms Commerce in the United States: Annual Statistical Update 15-18* (2023).

⁴ *United States v. Lucas*, 101 F.4th 1158, 1159 (9th Cir. 2024).

⁵ *Id.* at 1163.

⁶ *United States v. Canada*, No. 23-1434, 2024 WL 991826, at *2 (6th Cir. Mar. 7, 2024).

⁷ *United States v. Faught*, No. 21-6123, 2022 WL 2813240, at *3 (6th Cir. Jul. 19, 2022).

⁸ *Canada* at *2, *Faught* at *3.

⁹ Reply Brief of Appellant at 11, *United States v. Holman*, No. 25-4041 (4th Cir. Jan. 26, 2025).

¹⁰ *Id.* at 13.

¹¹ *Id.* at 15.

The ZA Editors thank Laura Serratos for contributing this helpful information. Laura was a second-year law student at Campbell Law and an extern in the FPD office during the Fall of 2025 and Spring of 2026.



Back to Basics: Analyzing the Sentencing Commission's Amendments to Supervised Release

In 1984, Congress passed the Sentencing Reform Act that, among other things, established supervised release as a tool for courts to “impose post-release supervision on a defendant sentenced to a term of imprisonment.”¹ Supervised release replaced the federal parole system and gave “district courts the freedom to provide postrelease [sic] supervision for those, and only those, who needed it.”² Congress also stated that the purpose of supervised release was to ease a defendant’s transition back into a community and provide further rehabilitation.³

Over time, however, sentencing courts have strayed from the intended use of supervised release. Instead of imposing supervised release on “those, and only those, who need[] it,” courts now tend to impose supervised release on nearly all defendants.⁴ This has created an overburdened probation system and led to a misallocation of resources. For example, as of March 2023, at least 110,000 people were on supervised release.⁵ This is nearly three times the number of people on supervised release in 1995.⁶ The average length of supervised release sentences has also grown in this period.⁷ This bloated system costs taxpayers more than \$500 million annually.⁸ Additionally, probation officers have reported that their “caseloads are packed with lower-risk individuals who may not need intensive supervision, while simultaneously not having time or resources to provide the close supervision and support that higher-risk individuals need to reintegrate into society safely.”⁹

To address these concerns, the United States Sentencing Commission amended the Sentencing

Guidelines.¹⁰ Effective November 1, 2025, these amendments aim to restore the use of supervised release to its original purpose.¹¹ The amendments encourage sentencing courts to conduct an “individualized assessment” of each defendant, and only impose supervised release when warranted by those individualized circumstances.¹² Courts must still consider the factors listed in 18 U.S.C. § 3583(c), however, the emphasis on individualized assessments seeks to ensure that only those who need post-release supervision receive it. This will also prevent resources from being allocated to releasees who do not need them.¹³

Another way the Commission intends to “individualize” supervised release sentences is by removing the requirement to impose supervised release on all defendants whose prison sentences are longer than one year.¹⁴ Instead, supervised release is now only required “when mandated by statute.”¹⁵ In all other cases, courts are directed to impose a term of supervised release only “when warranted by an individualized assessment of the need for supervision.”¹⁶

The amendments also encourage courts “to consider modifying the terms and conditions of supervised release whenever changed individual circumstances so warrants.”¹⁷ This change recognizes “that the terms and conditions of supervised release are imposed at original sentencing, often years before the defendant begins supervision.”¹⁸ As such, an original term of supervised release may not be appropriate once supervision begins, and a modification may be necessary to reflect changed circumstances.

Perhaps the area where the amendments will have their most immediate effect is in the early termination of supervised release. Whereas before the amendments it was unlikely for a court to terminate a sentence of supervised release early,¹⁹ advocates may have more success now. Courts are still directed to determine whether terminating supervised release is “warranted by the conduct of the defendant and in the interest of justice,” however, the amendments make clear that courts must conduct an “individualized assessment of the need for ongoing supervision.”²⁰

When filing motions to terminate supervised release, advocates should emphasize the facts particular to a defendant that make early termination warranted. Motions should cite the factors in § 3583 and then explain how those factors apply favorably to a defendant’s particular set of circumstances. Evidence such as completion of court-mandated treatment and a lack of recidivism by a defendant may be especially relevant to show that an individualized assessment supports terminating supervised release and is “warranted by the conduct of the defendant released and the interest of justice.”²¹

The Sentencing Commission’s amendments to the Guidelines are encouraging changes. The amendments make clear that the use of supervised release should return to its original purpose and be imposed on “those, and only those, who need[] it.”²² Implementation, however, will de-

pend on sentencing courts and defense attorneys who can help guide the process. Advocates should emphasize the need for an individualized assessment of a criminal defendant at all stages of supervised release. Further, attorneys should urge sentencing courts to articulate their reasons for imposing a term of supervised release.

Advocates should also be aware that there is congressional interest in codifying these changes.²³ In August 2023, a group of senators introduced the Safer Supervision Act designed to “ensure that the federal supervised release system is directing its resources to most effectively reduce recidivism and promote public safety, rehabilitation, and reintegration.”²⁴ The bill would require courts to conduct an individualized assessment of a defendant when imposing a term of supervised release; create “positive incentives that will encourage rehabilitation and good conduct”; and provide courts with discretion to deal with minor violations of supervised release terms.²⁵

The amendments to the Sentencing Guidelines mark a welcome change to how courts currently impose supervised release. These changes should reduce the burden on the Probation Office and return the use of supervised release to its original purpose: helping defendants who need it. Defense advocates should continue to monitor the progress of the Safer Supervision Act, and also be on the lookout for clients who are candidates for early termination or modification of their supervised release sentences to ensure that motions are filed on their behalf.

¹ Sentencing Guidelines for United States, 90 Fed. Reg. 19798, 19815 (proposed May 9, 2025).

² *Johnson v. United States*, 529 U.S. 694, 709 (2000).

³ S.Rep. No. 98-225, p. 124 (1983).

⁴ *Number of Offenders on Federal Supervised Release Hits All-Time High*, THE PEW CHARITABLE TRUSTS 1, 2 (2017), https://www.pew.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_all_time_high.pdf (last visited Nov. 14, 2024).

⁵ Letter from Erin D. Haney, Chief Policy Officer, REFORM Alliance, to the Honorable Judge Carlton W. Reeves, Chair, United States Sentencing Commission (March 3, 2025) (<https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2025031213/Haney.pdf>) (last visited Nov. 14, 2024).

⁶ *Number of Offenders on Federal Supervised Release Hits All-Time High*, THE PEW CHARITABLE TRUSTS 1, 2 (2017), https://www.pew.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_all_time_high.pdf (last visited Nov. 14, 2024).

⁷ *Id.*

⁸ Letter from Erin D. Haney, Chief Policy Officer, REFORM Alliance, to the Honorable Judge Carlton W. Reeves, Chair, United States Sentencing Commission (March 3, 2025) (<https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2025031213/Haney.pdf>) (last visited Nov. 14, 2024).

⁹ *Id.*

¹⁰ See generally, 90 Fed. Reg. 19798.

¹¹ *Id.* at 19804.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 19816.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 19816-17.

¹⁸ *Id.* at 19816.

¹⁹ UNITED STATES SENTENCING COMMISSION, QUICKFACTS: SUPERVISED RELEASE (2024) (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Supervised_Release_FY24.pdf) (last visited Nov. 14, 2024).; Laura M. Baber, James L. Johnson, *Early Termination of Supervision: No Compromise to Community Safety*, 77:2 Federal Probation 17, 18 (September 2013), https://www.uscourts.gov/sites/default/files/77_2_2_0.pdf (last visited Nov. 14, 2024).

²⁰ 90 Fed. Reg. at 19809.

²¹ See *id.*

²² See *Johnson*, 529 U.S. at 709.

²³ Press Release, Chris Coons, United States Senator, Senators Coons, Cornyn, colleagues introduce bipartisan, bicameral legislation to improve federal supervised release (Aug. 17, 2023) (<https://www.coons.senate.gov/news/press-releases/senators-coons-cornyn-colleagues-introduce-bipartisan-bicameral-legislation-to-improve-federal-supervised-release>) (last visited Nov. 14, 2024).

²⁴ *Id.*

²⁵ *Id.*

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



Clearing an Exhausting Hurdle: A Guide to Compassionate Release Claim Exhaustion

Compassionate release is a vehicle that allows incarcerated persons to seek early release for certain “extraordinary and compelling” circumstances.¹ It is ultimately up to a court whether to grant compassionate release.² However, the process always begins with the Bureau of Prisons (BOP).

A person seeking compassionate release must first file a written request (**BP-9 form**)³ to their facility’s warden, requesting the BOP to file a motion on their behalf.⁴ Then—after either (1) waiting 30 days from the date the warden receives the request, or (2) exhausting BOP’s administrative remedies to appeal the decision—the applicant may file a motion with the court.⁵ Exhausting BOP’s internal remedies can be, for lack of a better word, *exhausting*. Thus, this article provides step-by-step instructions on how to do so.

First. An applicant must identify who denied their request: the Warden, the General Counsel, or the Director of BOP.⁶

If the request is denied by the Warden, the applicant must appeal the denial through the “Administrative Remedy Procedure.”⁷

If the request is denied by the *General Counsel* or *Director of BOP*, this constitutes “a final administrative decision,” and the decision cannot be internally appealed.⁸ An applicant may then jump to the last step and file a motion to their sentencing court.⁹

Second. To appeal a Warden’s denial, an applicant must file a **BP-10 form**¹⁰ to the appropriate BOP Regional Director within 20 calendar days from the Warden’s signed response.¹¹ To properly complete and submit the form, an applicant must:

- Fill out all information on the form;¹²
- Attach to the form (1) a copy of their request, and (2) a copy of the Warden’s response;¹³
- State the reasons for the appeal in the space provided on the form¹⁴ (but if more space is needed, they may use up to one letter-size continuation page);¹⁵
- Provide two additional copies of any continuation page and exhibits;¹⁶ and
- Date and sign the appeal and mail it to the appropriate Regional Director.¹⁷

Once filed, the Regional Director will respond within 30 calendar days.¹⁸ If the Director needs more time, they must inform the applicant in writing.¹⁹ But if the Director does not respond within the time allotted (including extension), the applicant may consider the lack of response to be a denial.²⁰

If the response is a rejection, the applicant will receive a written explanation.²¹ If the defect on which the rejection is based is correctable, the notice will inform the applicant of a reasonable time extension within which to correct the defect and resubmit the Appeal.²² If a defect is not correctable, the Appeal is denied.²³

Third. If the Regional Director denies the appeal, the applicant must appeal once more to the General Counsel (GC) via a **BP-11 form**.²⁴ This is an appeal to the Central Office in Washington, D.C.²⁵ Alongside the form, applicants should provide copies of the institution and regional filings and their responses.²⁶ The same guidance as above applies, except the applicant must mail their materials to the National Inmate Appeals Administrator, Office of General Counsel.²⁷ The GC shall respond within 40 calendar days.²⁸ If the GC does not respond, the applicant may consider the lack of response to be a denial.²⁹

Fourth. If denied at this point, the applicant has officially exhausted their administrative remedies. The applicant may finally file a motion with the sentencing court.³⁰

It is extremely unlikely that an applicant will prevail in the BOP administrative process.³¹ Still, it is often necessary to go through the process to file a motion with a court.³² Following the rules and processes for each step will help prevent delays and ensure efficiency.

a victim of custodial abuse, can present “extraordinary and compelling” circumstances. U.S.S.G. § 1B1.13(b).

² *United States v. Jenkins*, 22 F.4th 162, 169 (4th Cir. 2021).

³ Request for Administrative Remedy, Form BP-9 (BP-229), is appropriate for filing at the institution. U.S. DEP’T JUST., FED. BUREAU PRISONS, OGC/LIT 1330.18, ADMINISTRATIVE REMEDY PROGRAM (2014) [hereinafter BOP Program Statement 1330.18]; see *Prison Grievance Procedures and Samples*, UNIV. MICH. SCH. L., https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/Prison_and_Jail_Grievance_Policies/US_Bureau_of_Prisons_Blank_Grievance_Forms_BP-9_BP-10_BP-11.pdf (providing sample forms) [hereinafter Sample Forms].

⁴ *United States v. Mohammad*, 16 F.4th 126, 129 (4th Cir. 2021). In making a written request, an applicant should ensure to follow Program Statement 5050.50 procedures. U.S. DEP’T JUST., FED. BUREAU PRISONS, OGC/LCI 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (2019) [hereinafter BOP Program Statement 5050.50].

⁵ *Id.*; 18 U.S.C. § 3582(c)(1)(A).

⁶ BOP Program Statement 5050.50, *supra* note 4.

⁷ 28 C.F.R. § 571.63(a) (2013).

⁸ *Id.* § 571.63(b), (d).

⁹ BOP Program Statement 5050.50, *supra* note 4.

¹⁰ Regional Administrative Remedy Appeal, Form BP-10 (BP-230), is appropriate for submitting an appeal to the regional office. BOP Program Statement 1330.18, *supra* note 3; Sample Forms, *supra* note 3.

¹¹ 28 C.F.R. § 542.15(a) (2005).

¹² *Id.* § 542.15(b)(3).

¹³ *Id.* § 542.15(b)(1).

¹⁴ *Id.* § 542.15(b)(3).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* § 542.18.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* § 542.17.

²² *Id.*

²³ *Id.*

²⁴ Central Office Administrative Remedy Appeal, Form BP-11 (BP-231), is appropriate for submitting an appeal to the Central Office. BOP Program Statement 1330.18, *supra* note 3; Sample Forms, *supra* note 3.

²⁵ *Id.*

²⁶ 28 C.F.R. § 542.15(b)(1).

²⁷ *Id.* § 542.15(b)(3).

²⁸ *Id.* § 542.18.

²⁹ *Id.*

³⁰ *Mohammad*, 16 F.4th at 129.

³¹ In FY 2024, for example, the BOP Director filed or joined motions in fewer than 2% of granted cases. U.S. SENTENCING COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT (2024).

³² *Mohammad*, 16 F.4th at 129.

The ZA Editors thank Abby Murray for contributing this helpful information. Abby was a third-year law student at Duke Law School and an extern in the FPD office during the Spring of 2026.



¹ 18 U.S.C. § 3582(c)(1)(A). For instance, a defendant’s medical condition, age, family circumstance, or status as

A Dance with Death

On February 5, 2025, Attorney General Pam Bondi issued the REVIVING THE FEDERAL DEATH PENALTY AND LIFTING THE MORATORIUM ON FEDERAL EXECUTIONS memo throughout the Department of Justice (DOJ).¹ The memo lifts the moratorium on federal executions and orders the DOJ to start seeking the death penalty when applicable. Additionally, this memo orders the review of non-sentencing decisions since January 20, 2021, and orders the federal government to assist with the implementation of the death penalty in states that carry out the death penalty.² As of September of 2025, the effects of the Federal Government's new stance are largely unknown. However, one thing is certain: no matter what side of the legal landscape federal practitioners lie on, a new dance with death has begun.

Following this order, several notable cases have come to light in which the death penalty has been discussed as a potential punishment. Whether mentioned by prosecutors, the current presidential administration, or the charges within indictments, the death penalty has become a tangible possibility for criminal defendants and has even entered the news cycle. The most notable cases wherein the defendant faces the death penalty include Luigi Mangione (for the killing of UnitedHealthcare CEO Brian Thompson), Tyler Robinson (for the assassination of Charlie Kirk), and Decarlos Brown (for the murder of 23-year-old Iryna Zaruska in Charlotte, N.C.), to name a few.³

In particular, Luigi Mangione's case is the first death penalty case scheduled in the Southern District of New York: prosecutors and White House officials have made it clear that Mangione will face the federal death penalty in his upcoming trial.⁴ This case will be the first instance where the government attempts to obtain a conviction under the federal death penalty. Mangione's counsel filed a motion to dismiss the possibility of the death penalty in part for the attorney general's zealous dedication to ensuring the revival of the federal death penalty.⁵ Regardless of the motion's success, the Mangione trial will undoubtedly give insight into how the current administration plans to conduct capital trials, and if the revival of the death penalty has changed the way in which the government prosecutes capital cases.

Additionally, this revival brings into question the lives of the three remaining federal death row inmates. Dylann Roof, Dzhokhar Tsarnaev, and Robert Bowers are the only three individuals not pardoned from their federal executions during the Biden administration. They must face the reality that their final days may be set by this policy.⁶ Undoubtedly, their dance with death has resumed. If convicted, Mangione may join this short list of federal death row inmates, based on the government's current position.

For Assistant United States Attorneys (AUSA), a multitude of charging instruments have reemerged, and some of them have dire consequences. The memorandum explicitly encourages AUSAs to seek the death penalty in capital cases in-

volving illegal immigrants, the murder of law-enforcement officers, drug trafficking offenses involving the killing of another human being, and in cases involving extremely large quantities of drugs.⁷

For federal criminal defense attorneys, a sense of urgency is deeply warranted. Defense lawyers now face a rapidly expedited deadline to advocate for their clients in avoiding the death penalty. In the last year of the Trump administration's first term, thirteen people were put to death. Notably, no federal executions had been carried out in the previous three years of the term. If the prior pattern holds true, this suggests that towards the end of the current administration's term, executions can be expected to substantially increase. Further expediting this deadline is that an administration's priority can change at any time; therefore, there is truly no way to tell what deadline defense attorneys are working under.

As for states, the revival also changes the landscape of their own capital cases. The memorandum states in part that the "Federal Bureau of Prisons is directed to work with each state that allows capital punishment to ensure the states have sufficient supplies and resources to impose the death penalty."⁸ Likely, states that commit to implementing the death penalty can at the very least expect the current administration to aid in securing materials and resources, although the extent of such aid remains unseen and unpredictable.

One thing is certain: a dance with death has begun anew, and the landscape of Federal Criminal Law has shifted once again, with both prosecutors and defense attorneys joining hands in preparation for upcoming capital cases. Appellate judges should anticipate renewed litigation based on Eighth Amendment challenges, and states are even more empowered to seek the death penalty under their own jurisdiction. Ultimately, and regardless of political ideology, federal attorneys must prepare for this revival of the death penalty, as capital cases deserve the best representation from both sides of the courtroom.

¹ See Memorandum from Att'y Gen. Pam Bondi, *Reviving the Federal Death Penalty*, Office of the Attorney General (February 5, 2025), <https://www.justice.gov/ag/media/1388561/dl> (last visited Nov 7, 2025).

² *Id.*

³ See generally Motion to Preclude the Government from Seeking the Death Penalty, *United States v. Mangione*, No. 25-CR-00176 (MMG), 2025 U.S. Dist. LEXIS 82480 (S.D.N.Y. Apr. 25, 2025); Brad Brooks & Joseph Ax, *Prosecutors to seek death penalty for Charlie Kirk's accused assassin* (September 17, 2025, at 9:52 AM EDT), <https://www.reuters.com/world/us/prosecutors-seek-death-penalty-charlie-kirks-accused-assassin-2025-09-16/> [https://perma.cc/3MY2-KP2V] (last visited Nov. 7, 2025); Tonya Simpson & Aaron Katersky, *Suspect in Charlotte train stabbing indicted on federal charges, death penalty possible* (October 22, 2025, at 5:10 PM), <https://abcnews.go.com/US/suspect-charlotte-train-stabbing-indicted-federal-charges-death/story?id=126774347> [https://perma.cc/R643-9JUL] (last visited Nov. 7, 2025).

⁴ See Motion to Preclude the Government from Seeking the Death Penalty, *United States v. Mangione*, No. 25-CR-00176 (MMG), 2025 U.S. Dist. LEXIS 82480 (S.D.N.Y. Apr. 25, 2025).

⁵ *Id.* (“The Attorney General’s decision is explicitly and unapologetically political. The Attorney General could hardly have been clearer as to the basis for her directive that the prosecutors seek the death penalty in this case: to ‘carry out President Trump’s agenda to stop violent crime and Make America Safe Again.’”) (citation omitted).

⁶ Death Penalty Info. Ctr., List of Federal Death Row Prisoners <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners> [https://perma.cc/CVD8-G9NW] (last visited November 19, 2025, at 12:21 PM).

⁷ Memorandum, *supra* note 1, at 2.

⁸ *Id.* at 4.

The ZA Editors thank Jason C. Thomas II for contributing this helpful information. Jason was a second-year law student at Campbell School of Law and an extern in the FPD office during the Fall of 2025.



Voting After Conviction: Restoring Citizenship Rights in North Carolina

The right to vote is often described as fundamental, yet for individuals with felony convictions, its availability depends not on principle alone, but on a patchwork of state-specific rules that determine when—and whether—that right is restored. While all 50 states have some process for restoring voting rights to individuals with past convictions, the method and timing vary significantly. States adopt widely varying approaches to restoring voting rights to individuals with criminal convictions: some impose permanent disenfranchisement unless individuals seek affirmative restoration, while others restore rights automatically at different stages (after prison, after full sentence, or even while on probation/parole). A small group of states and the District of Columbia never disenfranchises people with felony convictions at all.¹ North Carolina’s approach is unique, and a reflection of its own distinct historical trajectory.

The Reconstruction Acts, which readmitted North Carolina and several other confederate states into the union, provided that “the constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State.”² While this act prohibited states from disenfranchising otherwise eligible voters, it specifically allowed a carve-out in which these states could restrict the right to vote “as a punishment for such crimes as are now felonies at common law.”³

Up until the late 20th century, North Carolina maintained a system that allowed individuals convicted of crimes to petition to restore their rights. This system allowed the restoration of rights like voting “at any time after two years from the date of discharge by filing a petition setting forth the information required by the statute, giving three months’

notice, and having a hearing before a judge of the superior court.”⁴ The court could then restore the individual’s rights if it believed the “character of the applicant for truth and honesty was good.”⁵

In 1971, the General Assembly passed Chapter 13 of the North Carolina General Statutes—streamlining the automatic restoration of rights. Specifically, Chapter 13 required the automatic restoration of voting rights after the person had been pardoned or completed their sentence and did not reoffend for two years following release.⁶ This statute was a major step towards expanding suffrage for felons, but several hurdles—including a two-year waiting period and an appeal to a judge—remained in effect.

In 1973, Chapter 13 was amended to provide the automatic restoration of voting rights upon the completion of a felony sentence, including completion of probation, parole, or post-release supervision.⁷ This amendment removed the separate, often lengthy, application process for restoring rights, so long as the individual was “unconditionally discharged” from supervision.⁸ Although the 1973 amendment simplified the process by tying restoration to an “unconditional discharge” from supervision, the mechanics of determining eligibility, documenting completion of a sentence, and reentering the electorate remained critical.

Once a person is convicted of a felony, they temporarily lose the right to vote in North Carolina.⁹ This means that convicted felons are not permitted to register to vote or cast a ballot while they are serving their sentence.¹⁰ However, a person’s voting rights are automatically restored once one of three conditions are met: (1) the individual receives an unconditional pardon; (2) completes all conditions of a conditional pardon; (3) or is unconditionally discharged by the state agency supervising them as an inmate, probationer, or parolee (or by the court if they were under a suspended sentence). N.C. Gen. Stat. § 13-1.

Importantly, the completion of a felony sentence and the resulting restoration of voting rights are not necessarily contingent on the full payment of all financial obligations associated with the conviction.¹¹ Individuals may still owe fines, fees, or restitution after their period of supervision ends.¹² A court may extend a person’s probation because those obligations remain unpaid, which means the individual is still under supervision and therefore remains ineligible to vote.¹³ However, probation does not always continue until all debts are satisfied.¹⁴ When a person’s term of supervision formally ends, whether or not outstanding financial obligations remain, they are considered “unconditionally discharged” under North Carolina law, and their citizenship rights, including the right to vote, are automatically restored.¹⁵

Once an individual’s voting rights are restored following an unconditional discharge, the relevant authority must formally document that restoration. N.C. Gen. Stat. § 13-2(a). The agency,

department, or court that had jurisdiction over the incarcerated person, probationer, parolee, or defendant at the time their sentence ends must issue a certificate or order of restoration in duplicate. N.C. Gen. Stat. § 13-2(a). This document serves as official evidence that the individual has been unconditionally discharged and that their rights of citizenship, including the right to vote, have been restored. One copy is transmitted to and filed by the clerk of the General Court of Justice in the county where the official record of the conviction is maintained. N.C. Gen. Stat. § 13-2.

North Carolina law also provides procedures for individuals whose convictions occurred in another state or under federal law. In those circumstances, the clerk of court in the county where the individual resides must issue a certificate of restoration once the person demonstrates that the conditions for restoration under N.C. Gen. Stat. § 13-1 have been satisfied, typically by presenting documentation from the relevant out-of-state or federal authority. N.C. Gen. Stat. § 13-2(b). The certificate is then filed along with the other appropriate court records to ensure that the restoration of citizenship rights is formally recorded. N.C. Gen. Stat. § 13-2(b).

Below are links that may be helpful to attorneys as they advise clients on their voting rights. The first link is to our office's website, and a pamphlet published by the American Civil Liberties Union of North Carolina (ACLU) titled, "Know Your Voting Rights: A Misdemeanant & Ex-Felon's Guide to Voting in North Carolina," and the North Carolina General Statutes mentioned within this newsletter. The second link is a webpage published by the North Carolina State Board of Elections titled, "Voter Eligibility for People Serving Felony Sentences," which provides a clear explanation of when individuals with felony convictions lose and regain the right to vote in North Carolina.

- 1) <http://nce.fd.org/content/publications>
- 2) <https://www.ncsbe.gov/registering/who-can-register/registering-person-criminal-justice-system>

The right to vote is a fundamental component of a functioning democracy. As a result, attorneys should be prepared to address questions about voting eligibility and restoration of rights when advising clients with felony convictions. The resources discussed above are intended to assist practitioners in understanding North Carolina's restoration framework and in guiding clients through the process of regaining this important right.

¹ Brennan Ctr. for Just., *Criminal Disenfranchisement Laws Across the United States* (Mar. 7, 2023), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states> (last visited Mar. 5, 2026).

² An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73 (1868).

³ *Id.*

⁴ *State v. Currie*, 202 S.E.2d 153, 154-55 (1974).

⁵ *Id.* at 155.

⁶ Act of July 15, 1971, ch. 902, 1971 N.C. Sess. Laws 1234 (codified as amended at N.C. Gen. Stat. § 13-1).

⁷ Act of July 1, 1973, ch. 251, § 1, 1973 N.C. Sess. Laws 298, 298-99.

⁸ North Carolina State Board of Elections, *State Board Clarifies That Voting While Serving a Felony Sentence Is Unlawful* (Apr. 25, 2024), <https://www.ncsbe.gov/news/press-releases/2024/04/25/state-board-clarifies-voting-while-serving-felony-sentence-unlawful> (last visited Mar. 5, 2026).

⁹ *Id.*

¹⁰ North Carolina State Board of Elections, *Registering as a Person in the Criminal Justice System*, <https://www.ncsbe.gov/registering/who-can-register/registering-person-criminal-justice-system> (last visited Mar. 5, 2026).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

The ZA Editors thank Devin A. Joseph for contributing this helpful information. Devin was a second-year law student at Duke University School of Law and was an extern in the FPD office during the Spring of 2026.



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 "Supreme Court Preview-Review-Overview" before scrolling to the bottom of the page and clicking on "Download United States Supreme Court Preview-Review-Overview."



LOCAL NEWS

Panel News

We are pleased to welcome the following new panel attorneys in Raleigh: Clay Wheeler and Katelynn "Katie" McCoy; in New Bern: Scott Thomas.

EDNC News

We are pleased to announce that G. Alan DuBois began his third term as the Federal Public Defender for the Eastern District of North Carolina on April 16, 2026.