

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Summer 2021

Message from the ZA Editors

We hope everyone is doing well despite the ongoing challenges posed by the lingering pandemic. We likely echo everyone's sentiments in our surprise that the Covid-19 virus continues to persist, affecting both our personal lives and professional endeavors. That said, it is inspiring that the defense bar continues to diligently provide excellent representation to our clients, who are also feeling the effects of the pandemic during these unprecedented times.

In this edition of the *Zealous Advocate*, we have a number of articles touching on various Fourth Amendment cases that raise issues ranging from race equity arguments to a hemp defense in marijuana cases. Next, we discuss the *Wayda* case and its implications on mental competency and clients confined pursuant to civil commitment statutes. We also feature articles exploring the developing issues surrounding supervised release conditions and objections to consider while conditions are crafted at sentencing. Finally, given the change in administration, we included an update on the status of the federal death penalty. Of course, we also included our usual links to updated case law holdings and news around the district.

As we note in every edition of our newsletter, we hope you find the articles helpful to your practice. We look forward to having you join us during our virtual Federal Criminal Practice Seminar on the afternoons of Thursday, September 16th and Friday September 17th. May these resources continue to inspire your commitment and service to the very important work we do.

Vidalia V. Patterson & Laura S. Wasco,
Editors, *Zealous Advocate*



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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

Please note that no decisions have yet been made about FPD CLE/Seminars for 2022. For information regarding upcoming seminars, please check email and our website.



PRACTICE TIPS

Drakeford's Dialed Down Deference

A successful motion to suppress can completely change the outcome of a criminal case, so it is important for defense attorneys to assert a Fourth Amendment violation anytime a law enforcement officer conducts a stop of a client without reasonable suspicion. Although the U.S. Supreme Court held in *Terry v. Ohio* that law enforcement officers must be able to point to "rational inferences" drawn from "specific and articulable facts" to justify reasonable suspicion,¹ in the decades since, *Terry* courts have been increasingly likely to credit an "experienced police officer's intuitive knowledge" as satisfying the reasonable suspicion standard.² However, a recent Fourth Circuit case, *United States v. Drakeford*, may signal a shift in this circuit's allowing intuition and experience to make up for a lack of specific facts when evaluating reasonable suspicion.³

In *Drakeford*, the Fourth Circuit evaluated whether police had reasonable suspicion to stop Tremayne Drakeford based on general information from a confidential informant, two observations of possible drug deals where no drugs were actually found by officers, and the observation of a handshake that officers claimed was consistent with a hand-to-hand drug exchange.⁴ At the time he was stopped by law enforcement, Drakeford had been the subject of an investigation for several months.⁵ A confidential informant had provided a tip that a "heavysset" "light skinned black male" was selling drugs and gave law enforcement a license plate number that matched Drakeford's car.⁶ In the months that followed, police surveilled Drakeford on multiple occasions and never witnessed any drug sales.⁷ Police also conducted a traffic stop and search of Drakeford's car during this investigation and recovered nothing but empty syringes.⁸

Despite these failures to connect Drakeford with drug dealing, police continued their investigation and asked the confidential informant to contact Drakeford asking to buy heroin.⁹ Drakeford said he did not have any heroin at the time, but later that day contacted the informant saying he now had heroin to sell.¹⁰ In between those calls, police observed a man enter Drakeford's house with several bags.¹¹ A week later, while police were again surveilling Drakeford, they saw him drive to meet with two men in a parking lot.¹² Police did not see any drugs but did see Drakeford shake hands with one of the men twice and claimed the second handshake was longer than the first and consistent with a "hand-to-hand narcotics transaction."¹³ Based on this slightly longer handshake, an officer approached Drakeford, handcuffed him, patted him down, and found narcotics.¹⁴ Drakeford moved to suppress the drug evidence, claiming that the stop was illegal, but the district court denied his motion, saying that after witnessing the hand-to-hand transaction, officers "reasonably believed that criminal activity was afoot."¹⁵

On appeal, the Fourth Circuit found that an officer's "bare suspicion" that a "benign and common gesture" like a handshake was actually a drug transaction was not enough to constitute reasonable suspicion.¹⁶ This was especially so when considering that previous surveillance of Drakeford and a previous stop had not revealed evidence of drug dealing. The Fourth Circuit noted that it was "skeptical of Government attempts to spin largely mundane acts into a web of deception."¹⁷ In his concurrence, Judge Wynn made clear what the majority seems to imply—the facts the Government claimed constituted reasonable suspicion were thin at best and "[s]uch meager testimony would not have received the same degree of deference had it come from someone other than a law-enforcement officer."¹⁸ He suggested that, in light of the growing research suggesting implicit racial bias in policing, that courts should "dial[] down the deference" given to police officer testimony and treat police officers like any other expert witness.¹⁹

Drakeford could be the first step in dialing down that deference, signaling to district court judges in the Fourth Circuit that they need not take officer conclusions at face value if they are not supported by articulable facts. In fact, in the first district court case in the Fourth Circuit to cite *Drakeford*, the court specifically evaluated whether the officer conduct at issue was the type of "impermissible hunch" that *Drakeford* reminded courts could not meet Fourth Amendment muster.²⁰ Although the district court in that case ultimately determined reasonable suspicion existed, it did not take the officers' evaluation of their observations based on their experiences at their word. Instead, that court objectively evaluated what officers would have encountered and thought based on their knowledge, albeit considering crime trends that a

trained officer would know—much like the slightly dialed down deferential standard suggested by Judge Wynn’s concurrence.²¹

In encouraging courts to continue applying a slightly dialed-down deferential standard to law enforcement testimony in motions to suppress, defense attorneys should cite *Drakeford* and remind courts that officers need more than an “impermissible hunch.” Additionally, defense attorneys can use *Drakeford*’s reminder that *Terry* requires rational inferences to inquire into just how rational the inferences made by law enforcement really were. As some scholars have suggested, rather than take at face value that officers would reasonably draw a conclusion based on their experience and training, defense attorneys should question those officers about exactly what experience and training led them to draw that conclusion.²² If an officer can point to specific experiences or training that informed their conclusions, then courts should credit that specific training the way they would when they qualify any other expert. However, if officers can do no more than speak in broad strokes about their intuition after years of experience, that seems far more like the “impermissible hunch” that *Drakeford* reminded is insufficient under the Fourth Amendment.

Time will tell if *Drakeford* signals a significant shift in the deference afforded to law enforcement testimony, but at the very least it reminds defense attorneys that the reasonable suspicion standard still has teeth. By citing *Drakeford* and questioning law enforcement on the training and experience, which led them to draw inferences, defense attorneys will put their clients in the best chance of success on a motion to suppress.

¹ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

² Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2033-34 (2017).

³ *United States v. Drakeford*, 992 F.3d 255, 264 (2021).

⁴ *Id.* at 258.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 258-59.

⁹ *Id.* at 259.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 260.

¹⁴ *Id.* at 260-61.

¹⁵ *Id.* at 263.

¹⁶ *Id.* at 264.

¹⁷ *Id.* at 265 (internal alterations omitted) (quoting *United States v. Foster*, 824 F.3d 84, 89 (4th Cir. 2016)).

¹⁸ *Id.* at 266 (Wynn, J., concurring).

¹⁹ *Id.* at 267.

²⁰ *United States v. Mitchem*, 2021 WL 2621321, at *3 (S.D.W. Va. 2021).

²¹ See *id.* at *4-*5.

²² See Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 214 (2012).

The ZA Editors thank Hannah Caison for contributing this helpful information. Hannah is a third-year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2021.



Wingate v. Fulford: The Future of Police Arrests of People of Color

In February 2021, the Fourth Circuit Court of Appeals spoke out, yet again, regarding police overreach aimed at a young black male - a situation that is all too common in today’s society. We are all familiar with the Fourth Amendment’s protection against unreasonable searches and seizures and that these protections extend to brief investigatory stops which fall short of a traditional arrest.¹ With the standard for these investigatory stops being less than probable cause, law enforcement needs only reasonable, articulable, and particularized suspicion that someone is engaged in criminal activity to justify these brief interactions.² However, as the Fourth Circuit noted in *Wingate*, consider what we do not know. Does a person working on their broken-down car on the side of the road at 2 a.m. suggest criminal activity? Does a person’s racial identity factor into what is deemed reasonable, articulable, and particularized suspicion?

In *Wingate v. Fulford*, George Wingate - a black man - pulled his car off to the side of a Virginia state highway around 2 a.m. because his check engine light came on.³ A former mechanic, he figured he might be able to fix the problem so he left his lights on, popped the hood, retrieved his tools from his trunk, and looked under the hood to investigate.⁴ Unable to identify the problem, Mr. Wingate got back into his car and tried to diagnose the issue using an automotive code reader.⁵ Around this time, Deputy Fulford saw Mr. Wingate’s vehicle and was concerned that the car was “disabled”; he turned around and pulled behind Mr. Wingate, hoping to help.⁶ Upon Deputy Fulford’s arrival, Mr. Wingate got out of his car and walked over to greet the deputy.⁷ Mr. Wingate explained to the deputy about the car issues, and Deputy Fulford immediately requested his identification.⁸ After Mr. Wingate questioned why he had to disclose his identity, Deputy Fulford called for backup. Furthermore, Mr. Wingate asked if he had committed a crime, if he was free to go, and if he was being detained.⁹ Although Deputy Fulford responded “no” to each question, he told Mr. Wingate he was not free to leave until he identified himself.¹⁰ Officers arrested Mr. Wingate pursuant to Stafford County Ordinance § 17-7(c), which provided that it is a crime to refuse an officer’s request for identification “if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification.”¹¹ Mr. Wingate was criminally charged for failing to identify himself, intentionally preventing a law

enforcement officer from lawfully arresting him, knowingly attempting to intimidate or impede a law enforcement official, and possessing an open certificate of title.¹² The prosecuting attorney dropped all of the charges after hearing that the ordinance may be unconstitutional.¹³

Mr. Wingate subsequently filed a lawsuit under 42 U.S.C. § 1983 and Virginia Common Law against both officers alleging that the investigatory stop, arrest, and prosecution violated the Fourth Amendment and state law.¹⁴ The district court entered summary judgement in favor of the officers.¹⁵ Mr. Wingate appealed bringing this case into the purview of the Fourth Circuit Court of Appeals.¹⁶

The Fourth Circuit held that Deputy Fulford's statement that Mr. Wingate was not free to leave until he identified himself converted a previously voluntary encounter into a compelled detention and an investigatory stop, thereby triggering Fourth Amendment protections.¹⁷ Furthermore, it held that Deputy Fulford lacked reasonable and particularized suspicion of possible criminal activity to conduct the investigatory stop.¹⁸ The Court debunked all of the reasons offered by Deputy Fulford that reasonable suspicion did exist. The Court first reasoned that Mr. Wingate's vehicle being parked with its hood up near a closed and empty car dealership around 2 a.m., despite better lit areas down the road, "indicates a very specific, non-criminal enterprise: attempting to identify and remedy car problems," which is not inherently suspicious.¹⁹ Additionally, that the area was known for increased vehicular larcenies at the time was insufficiently particular and minimally probative in the analysis of reasonable suspicion.²⁰ Next, the Court reasoned that Mr. Wingate's exit of his vehicle without first prompting the deputy is not evidence of criminal activity because Mr. Wingate's car was broken down and he was approaching the deputy who had stopped to render him aid.²¹ Moreover, Mr. Wingate's wearing all-black clothing similar to suspects identified during the increase in late-night vehicle larcenies in the area was also insufficient because both criminal suspects and law-abiding people wear all-black clothing.²² Lastly, simply because Mr. Wingate's car appeared to be idling and functional when he said he was having engine trouble does not mean he was lying.²³ The conclusion that Mr. Wingate was being deceitful and unreasonable was the result of the deputy's mistaken pre-judgement that Mr. Wingate's car was disabled. Overall, the Court deemed the stop and identify ordinance unconstitutional when applied outside the context of a valid investigatory stop.²⁴ Therefore, it held Deputy Fulford was not entitled to qualified immunity for the unconstitutional investigatory stop because *Slocumb* (explaining that the government must do more than simply label a behavior as suspicious to make it so) put him on notice that the circumstances present were too innocuous to give rise to reasonable suspicion.²⁵ Additionally, many other pre-*Slocumb* cases put Deputy Fulford on

notice that innocent facts cannot be used as "indicia of suspicious activity."²⁶

In his complaint, Mr. Wingate alleged he was arrested for "contempt of cop," a consequence that exemplifies the risks of "driving while black."²⁷ Fulford's attorney moved to strike these words as a fictional charge, arguing that they were "nothing more than a litigation tactic used to conjure up racial tensions between law enforcement and the African-American community" and to inflame the passions of the Court and public.²⁸ The Court denied this motion.²⁹ Although the Fourth Circuit does not explore the impact of race in its opinion, it is notable the district court did not strike these words from the record.

I urge you to consider the ordinariness and pervasiveness of racism and the impact it has not only on African-Americans but people of color in general, especially in the context of police arrests. Racism is ingrained in the criminal justice system, as it is in many other systems in American society.³⁰ The significance of racism is no mistake. American society was designed to value racism at the expense of people of color. What happened to Mr. Wingate happens all too often to African-American motorists - so much that it known as "driving while black." It also happens to several other non-white populations because ultimately racism is about power, social control, and the consequent subordination on the basis of skin color. There is nothing inherently suspicious about attending to car problems when a car breaks down, regardless of where this might happen or what time it is. What about Mr. Wingate and his situation suggested criminal activity other than Mr. Wingate's racial identity? Unlike some, Mr. Wingate was aware of and asserted his rights. He was aware that he was not required to identify himself to a deputy who had confirmed that he had done nothing wrong and was not suspected of any criminal activity. Thus, Mr. Wingate surmised the deputy's justification for arresting him was simply an arbitrary and boundless pre-judgement due to his race. Although what happened to Mr. Wingate is a modest and fortunately non-lethal example of overarching police behavior that is so often aimed at young black males, not all of these situations end with the African-American or person of color alive.

The Fourth Circuit's opinion in *Wingate* arose out of a § 1983 lawsuit - a civil action for money damages when an individual's Constitutional rights have been violated. However, it has the potential to influence criminal cases with Fourth Amendment issues. Reasonable suspicion is supposed to be based on a reasonable person standard, but who is the reasonable person on whom we are basing this standard? Is it the officer who has been trained to perceive people of color as inherently more violent, suspicious, and therefore criminal? Is it the officer who has been trained to believe that communities of color are more likely

engaging in criminal activity than other communities? Consider what the benchmark for reasonableness is in a society where racism is ingrained in every system that impacts the lives of its citizens. These are the tough questions lawyers must ask themselves not only to heighten efficacy in the legal system, but to seek justice in the zealous representation of a client. If arbitrary and boundless pre-judgements are made solely on the basis of a client's race, criminal defense attorneys should raise these constitutional issues in an attempt to suppress the stop. Furthermore, if a client is exonerated in criminal court due to the illegality of the stop, criminal defense attorneys should advise them to file a § 1983 lawsuit.

¹ *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

² *Id.*

³ *Wingate v. Fulford*, 987 F.3d 299, 302 (4th Cir. 2021).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 303.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Stafford County, Va., Code § 17-7(c) (2020).

¹³ *Fulford*, 987 F.3d at 304.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 306.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 306-07.

²³ *Id.* at 307.

²⁴ *Id.*

²⁵ *Id.* at 309.

²⁶ See e.g., *United States v. Black*, 707 F.3d 531, 539 (4th Cir. 2013) (denouncing the suggestion that “mere presence in a high crime area at night is sufficient justification for detention by law enforcement (quoting *United States v. Powell*, 666 F.3d 180 (4th Cir. 2011) (holding that a person’s possible involvement in prior criminal activity, i.e., “caution data,” can be relevant in establishing reasonable suspicion for suspecting that the lawfully detained person to be frisked is armed and dangerous; however, in most instances, a prior criminal record is not, standing alone, sufficient to create reasonable suspicion); *United States v. Massenburg*, 654 F.3d 480 (4th Cir. 2011) (holding that an officer lacked reasonable suspicion to justify an investigatory stop and frisk of a pedestrian who was found in the vicinity of several gunshots, responded nervously when approached by the police, and was reluctant to consent to a pat down); and *United States v. Foster*, 634 F.3d 243 (4th Cir. 2011) (holding that an officers knowledge of the suspect’s prior criminal involvement in drug activity failed to meet the reasonable suspicion standard necessary for an investigatory stop).

²⁷ Courtland Milloy, *A federal judge shows how to reconcile different perceptions about race. No twitter beef involved.* (Nov. 6, 2018, 2:45 PM),

https://www.washingtonpost.com/local/a-federal-judge-shows-how-to-reconcile-different-perceptions-about-race-no-twitter-beefs-involved/2018/11/06/ceeb5d2c-e1db-11e8-8f5f-a55347f48762_story.html (last visited Mar. 18, 2021).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Race Forward, *What is systemic racism?* [videos], <https://www.raceforward.org/videos/systemic-racism> (last visited Apr. 14, 2021) (explaining that systemic racism can be seen in the wealth gap, employment, housing discrimination, government surveillance, incarceration, drug arrests, immigration arrests, and infant mortality, amongst others).

The ZA Editors thank Jazmine Langley for contributing this helpful information. Jazmine is a second-year law student at North Carolina Central University School of Law and was an extern in the FPD office during the Spring of 2021.



Torres v. Madrid: A New Definition of Seizure

The Fourth Amendment of the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹ The Supreme Court, in *Terry v. Ohio*, held that a “seizure” of a “person” can take the form of “physical force,” or a “show of authority,” that “in some way restrains the liberty of the person.”² In *Torres v. Madrid*, the Supreme Court was tasked with determining whether or not a “seizure” occurs when an officer shoots someone who temporarily evades capture after the shooting.³ The Supreme Court determined that it does, and that the application of any physical force to a person, with the intent to restrain, constitutes a “seizure,” even if the force used is unsuccessful in subduing the person.⁴

On July 15, 2014, two officers with the New Mexico State Police arrived at an apartment complex in Albuquerque to issue an arrest warrant.⁵ The officers saw Roxanne Torres, who was, at the time, standing next to her Toyota FJ Cruiser.⁶ Although the officers concluded that Ms. Torres was not the target of the warrant, the officers approached her anyway.⁷ As the officers approached, Ms. Torres got into the driver’s seat of her car and did not notice the officers until one of them attempted to open the car door.⁸ Although the officers were wearing tactical vests marked with police identification, Ms. Torres only saw their guns and believed them to be carjackers; therefore, she hit the gas to escape them.⁹

Neither officer was in the vehicle’s path, but both of them fired their service pistols to

stop Ms. Torres.¹⁰ The two officers fired thirteen times, striking her twice in the back, which temporarily paralyzed her left arm.¹¹ Despite that, Ms. Torres managed to escape and drove seventy-five miles to a hospital in Grants, New Mexico.¹² The hospital in Grants airlifted her to a hospital in Albuquerque, where she received appropriate care.¹³ But, since the hospital she was taken to was in Albuquerque, police arrested her the next day.¹⁴ Ms. Torres pleaded no contest to her charges.¹⁵

Later, Ms. Torres sought damages from the two officers under 42 U.S.C. § 1983, based on their violating her Constitutional rights.¹⁶ She claimed that the officers used excessive force, rendering the shooting an unreasonable seizure under the Fourth Amendment.¹⁷ The U.S. District Court granted summary judgment for the officers, the U.S. Court of Appeals for the Tenth Circuit affirmed, and the Supreme Court of the United States granted certiorari.¹⁸

In 1991, in *California v. Hodari D.*, the Supreme Court held that the application of force, understood as a physical touch, gives rise to an arrest, even if an officer did not secure or gain control over the arrestee.¹⁹ Of course, *Torres v. Madrid* does not involve a physical touch; instead, it involved a shooting.²⁰ In *Torres*, the Supreme Court noted that not every physical contact between law enforcement and a citizen is a Fourth Amendment seizure under the common law rule.²¹ A seizure, according to the Supreme Court, “requires the use of force *with intent to restrain*.”²² Ultimately, the Supreme Court held that the officers intended to prevent Ms. Torres from driving away by shooting her, and thus used force with intent to restrain—constituting a seizure under the Fourth Amendment the moment that the bullets struck her.²³

Defense attorneys should be able to use *Torres v. Madrid* in any circumstance where law enforcement officers use force with the intent to restrain. Actual restraint, as a result of the use of force, is not required. If a case arises where officers use force, with the requisite intent to restrain, attorneys can argue under *Torres* that a Fourth Amendment seizure has occurred. Additionally, if the facts are similar to *Torres*, where officers use excessive force with the intent to restrain, attorneys should be able to use *Torres* to argue that an unreasonable seizure has taken place under the Fourth Amendment.

Only one case in the Fourth Circuit, *United States v. Cloud*, has cited *Torres v. Madrid* since it was decided.²⁴ But, the facts in *Cloud* are not relevant to using the case to illustrate *Torres* in a helpful way, in the Fourth Circuit. *Cloud* only noted that *Torres* recently affirmed the definition of “seizure,” as outlined in *Terry v. Ohio*, when the Supreme Court quoted *Terry* in *Torres*.²⁵ It remains to be seen how *Torres* will be applied in lower district and appellate courts, but this new definition of

what constitutes a seizure, under the Fourth Amendment, will undoubtedly play a large role moving forward, as the precedent set forth by this decision develops.

¹ U.S. Const. amend. IV.

² *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021).

³ *Id.* at 993-94.

⁴ *Id.* at 994.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 994-95.

¹⁹ *Id.* at 996.

²⁰ *Id.* at 997.

²¹ *Id.* at 998.

²² *Id.*

²³ *Id.* at 999.

²⁴ *United States v. Cloud*, 994 F.3d 233, 242 (4th Cir. 2021).

²⁵ *Id.* at 241-42.

The ZA Editors thank Jericho Cook for contributing this helpful information. Jericho is a third year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2021.



Land of the Free for Some, Home of the Oppressed for People of Color

The majority of Americans prefer to delude themselves with the notion that systemic racism is nearing an end and that racial justice can be achieved with perseverance.¹ However, the liberation we seek is on the business end of a shotgun. We smile at the new Black law professor, new Black judge or justice, or the first Black Commander in Chief of the United States of America. However, nothing pertaining to the social status of Black Americans has meaningfully changed with each new milestone. Institutional racism has not departed, but simply shifted throughout history. Today we continue to see attempts by the government and our judicial leaders to keep racist institutions, including the criminal justice system, intact.

For example, on the night of September 8, 2017, four uniformed officers of the Richmond, Virginia Police Department were on patrol when they heard five to six gunshots coming from the area near Creighton Court.² Creighton Court is largely home to the city's

poorest residents.³ It is located in a densely populated public housing community where the average family makes around \$9,000 in annual income.⁴ After hearing the gunshots, the officers headed toward Walcott Place, the housing community from where they thought the shots originated.⁵ Behind Walcott Place is an open field where the officers stopped every Black male they could see walking through the field.⁶ By this time, the officers had received dispatch calls asserting random gunfire came from Walcott Place.⁷ Despite not receiving a description of the suspect, the officers saw a Black man who “appeared to be maybe favoring one of his arms,” walking behind their car when they decided to get out of their vehicle and approach the Black men in the field.⁸ The officers stopped a few of the men and illuminated their waistbands and hands with a flashlight to check for weapons.⁹ Officer Gaines approached one of the Black men, Billy Curry, as he was walking away from the officers and ordered Mr. Curry to pull his shirt up.¹⁰ Not satisfied with Mr. Curry’s lack of response, Officer Gaines again directed him to pull up his shirt.¹¹ As Officer Gaines could not see a bulge or a weapon on Mr. Curry, he called to Officer O’Brien to assist with a pat down.¹² The officers stated that during the frisk, Mr. Curry remained evasive and attempted to prevent them from looking at his right side.¹³ Officers Gaines and O’Brien then restrained Mr. Curry’s arms in order to pat him down.¹⁴ Officer Gaines stated that he felt a hard object on him, like the butt of a handgun, but was unable to remove the handgun before Mr. Curry was forcefully taken to the ground.¹⁵ Mr. Curry was indicted with one count of possession of a firearm by a convicted felon.¹⁶

Mr. Curry filed a motion to suppress the seizure and the revolver, which was eventually granted by the Fourth Circuit, sitting *en banc*. Instead of attempting to justify the seizure as an investigatory *Terry* stop, the government argued that the seizure was “reasonable” under exigent circumstances created by the nearby gunshots.¹⁷ Therefore, the government asked the Fourth Circuit to apply the test used in *Illinois v. MacArthur*.¹⁸ However, the *MacArthur* opinion specifically applied to property and the destruction of evidence, two factors that were not applicable to Mr. Curry. Thus, the Fourth Circuit rejected this analysis and instead used the *Terry* balancing test. When measuring the totality of the circumstances, the Court held that the officers were not justified in their initial seizure because they lacked reasonable, individualized suspicion as to Mr. Curry.¹⁹ The officers simply relied on the five to six gunshots, two corroborated 911 calls, and a group of Black men walking “separately and calmly” in a public field to support their actions.²⁰

An interesting aspect of this case is the discussion of over policing in minority communities that took place in the concurrences. In this case, officers attempted to solely rely on gunshots in a high-crime area to support their suspicionless

seizure of Mr. Curry. Referencing the use of the term “high-crime area” commonly used in Fourth Amendment analysis, Circuit Judge Wynn recognized how vague depictions of a general location subjects poor communities and poor people of color to a lower degree of Fourth Amendment protections.²¹ Understanding how weak Fourth Amendment protections relegate “individuals in high-crime areas to second-class citizen status[,]” the legal field can begin to use Critical Race Theory (“CRT”) to understand how the law maintains racial hierarchy.²² Pointing out how nuances of the law lead to unequal constitutional protections is one way advocates can use CRT to describe the systemic consequences of police presence in Black and Brown communities.

CRT also allows us to understand that mass incarceration is not the result of individual actors, but the inevitable result of a racialized society deliberately targeting Black people.²³ For example, in terms of traffic stops, research shows that officers are more likely to stop Black drivers for investigatory reasons as opposed to enforcing traffic laws.²⁴ Once pulled over, Black drivers are three times as likely to be searched than whites and twice as likely to be arrested.²⁵ However, officers have a statistically lower chance of finding contraband or evidence of a crime when searching Black people.²⁶

Such evidence of racial profiling is one example of how disproportionate rates of Black people are being incarcerated as opposed to other racial groups. Black communities are often sites of concentrated poverty and have less opportunities for economic advancement than other groups.²⁷ Such “high-crime” areas are inevitably going to be sites of crime. When our legal jurisprudence ignores the impact of policing on Black communities, we are implicit in its maintenance of systemic racism.

As CRT has been on the defensive end for decades, it is far past time to incorporate its underpinnings in the legal field. We must understand that true progress can only be achieved when the allies within the 86% of white legal professionals switch from “Diversity & Inclusion” training, to attempting to understand the central themes of Critical Race Theory. Simply acknowledging lack of diversity, without action, is insufficient. We must truly investigate how the law enables racial discrimination, only then can we achieve true justice and liberation of our clients.

¹ Lee, Cynthia, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society* (2013). 91 North Carolina Law Review, Forthcoming; GWU Legal Studies Research Paper No. 2013-97; GWU Law School Public Law Research Paper No. 2013-97. Available at SSRN: https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2023&context=faculty_publications (last visited August 3, 2021).

² *United States v. Curry*, 965 F.3d 313, 316 (4th Cir. 2020).

³ Mark Robinson, *To Live and Die in Creighton Court* (July 28, 2016), <https://richmondmagazine.com/news/features/creighton-court/> (last visited August 3, 2021).

⁴ *Id.*

⁵ *Curry*, 965 F.3d at 316.

⁶ Def.'s Mot. Suppress at 5, *United States v. Curry*, No. 3:17-CR-130 (E.D. Va. Nov. 21, 2017), ECF No. 14.

⁷ *Curry*, 965 F.3d at 317.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 323.

¹⁸ *Illinois v. McArthur*, 531 U.S. 326, 331 (2001); See generally *Brown v. Texas*, 443 U.S. 47, 51 (1979) (“[T]he constitutionality of such seizures involves weighing the gravity of the public concern served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”).

¹⁹ *Curry*, 965 F.3d at 326.

²⁰ *Id.*

²¹ *Curry*, 965 F.3d at 331.

²² *Id.*

²³ Janel George, *A Lesson on Critical Race Theory* (January 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ (last August 3, 2021).

²⁴ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (April 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (last visited August 3, 2021).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The ZA Editors thank Veronica Edmonds for contributing this helpful information. Veronica is a third-year law student at UNC School of Law and was an intern in the FPD office during Summer 2021.



The Hemp Defense: The Impact of Increased Legalization and Availability on CBD Marijuana Prosecutions

In 2019, a truck driver was arrested and charged with transporting 6,701 lbs. of marijuana in Idaho, where marijuana is still illegal.¹ There, a conviction for that amount of marijuana carries a minimum sentence of five years in prison and a \$15,000 fine.² The driver's defense was that he was legally transporting hemp plants for a Colorado company.³ This is an increasingly common scenario, as persons facing marijuana prosecutions are raising this “hemp product defense.”⁴

Mental culpability is a central theme in criminal law. The term “*mens rea*” comes from a

maxim that translates to “an act does not make one guilty unless one's mind is guilty.”⁵ The explosion in the availability of hemp and Cannabidiol (CBD) products exemplifies how the use of new products and technology can challenge how criminal defense advocates understand and argue mental culpability.

Hemp and CBD products are legal under federal and North Carolina law as long as the dry weight concentration of delta-9 tetrahydrocannabinol (THC) is below 0.3%.^{6,7} Over the past decade, the legalization of CBD products has led to a seemingly exponential increase in their consumption. In North Carolina, the public can purchase CBD products in the form of oils, gummies, gels, and other extracts. Advertisements are common at grocery stores, gas stations, and dedicated CBD stores.

A *mens rea* issue arises in these cases because hemp and marijuana both come from the plant *Cannabis sativa*; they are technically the same biological species.⁸ In fact, there is currently no field test that allows law enforcement to distinguish between marijuana and hemp.⁹ Some would even say that marijuana laws have created a “legal fiction” that a distinction between hemp and marijuana exists in the first place.¹⁰ Indeed, CBD and THC molecules have the exact same chemical composition.¹¹ The only difference is the arrangement of the atoms, and this small variation accounts for the different effects.¹² THC can produce psychoactive effects, whereas the CBD in hemp products do not.¹³

The problem is that hemp plants and CBD products will always test positive for THC¹⁴, but many jurisdictions do not have the technology to test for the specific percentage.¹⁵ This means that hemp or CBD users can easily be accused of possessing marijuana under 21 U.S.C. § 844(a). But, if law enforcement cannot distinguish marijuana from hemp without a lab test, a lay person certainly cannot. Furthermore, a lay person would have no inclination to test a product that they believed in good faith was a legal purchase or acquisition. For example, the average person would be shocked to learn that a product they purchased from the grocery store was actually contraband. In other words, there would be little to suggest that the person knew that they were purchasing something illegal.

Of course, if the substance does not meet the federal definition of marijuana, the client cannot be guilty of violating § 844(a). However, even if the product turns out not to meet the legal definition of “hemp,” the client may still have a viable *mens rea* defense to the prosecution. The government still has to prove that the person “knowingly or intentionally” possessed marijuana, not just that the THC dry weight concentration tested for greater than 0.3%. The average marijuana plant contains a THC concentration of about 12%, which is 40 times greater than the legal threshold of 0.3%.¹⁶ A test that shows a THC concentration only slightly above 0.3% could actually bolster the defendant's

claim that they reasonably believed they were purchasing a legal product. If the defendant in good faith believed that they made a legal acquisition, they would lack the requisite *mens rea* for the government to convict them.

In jurisdictions where hemp products are legal and widely consumed, judges and prosecutors have had difficulty assessing what amounts to proof beyond a reasonable doubt in marijuana prosecutions. For example, in Texas, where hemp legalization occurred in 2019, many prosecutors have stopped prosecuting marijuana altogether because of the difficulties of proving guilt beyond reasonable doubt at trial.¹⁷ Although Texas eventually acquired the technology to test for the percentage of THC, the cost and time involved in testing the plants has made prosecutions less viable.¹⁸

Moreover, some federal courts have given defendants leeway in building the hemp product defense. For example, in *United States v. Runner*, a magistrate judge for the Northern District of West Virginia allowed the defendant to call a CBD business owner to testify at a suppression hearing.¹⁹ The witness testified to the amount of business he received on a regular basis at his CBD store as well as how his customers consume hemp products.²⁰ The defendant in *Runner* argued that the regular consumption of CBD product among the public meant that the odor of marijuana could no longer suffice for probable cause to search.²¹ Although the judge eventually denied the motion to suppress²², that the defendant was able to call this witness suggests that the hemp product defense may be viable in federal court.

When preparing a defense in a case involving marijuana plants, attorneys should first determine whether the government has had the plants tested. If the plants were not tested and are no longer available, then the attorney should consider asserting a *Brady* violation because a lab test could have demonstrated that the plants were not marijuana plants.²³ If the plants test for less than 0.3%, the attorney should move to dismiss or negotiate with the prosecutor for a dismissal. If the plants test above 0.3%, the attorney should determine whether the client believed they had purchased a legal product and had no way to know that it was actually contraband. Lawyers generally are not botanists, but an intricate understanding of the physical characteristics of the plant *Cannabis sativa* can be crucial for client advocacy.

¹ Julia Naftulin, *A man was arrested on charges of transporting 6,701 pounds of marijuana that his company claims was hemp. Here's the difference between them.* INSIDER, (Feb 7, 2019), <https://www.insider.com/how-is-hemp-different-from-weed-marijuana-2019-1> (last visited April 15, 2021).

² Idaho Code Ann. § 37-2732B(a)(1)(C).

³ Naftulin, supra note 1.

⁴ See Major Hudson, *The Hemp Product Defense*, 1998-DEC Army Law. 30, 30 (Dec. 1998).

⁵ Martin R. Gardner, *The Mens Rea Enigma: Observations on The Role of Motive in The Criminal Law Past and Present*, 1993 Utah Law Review 635, 636 (1993).

⁶ 21 U.S.C. § 802(16)(B)

⁷ N.C.G.S. § 90-87(16)

⁸ CBD vs. THC: What's the Difference?, Healthline (July 20, 2020), <https://www.healthline.com/health/cbd-vs-thc#medical-benefits>.

⁹ See State Bureau of Investigations, *Industrial Hemp/CBD Issues* at 2, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf (last visited April 15, 2021).

¹⁰ Aaron Roussel, *The Forensic Identification of Marijuana: Suspicion, Moral Danger, and The Creation of Non-Psychoactive THC*, 22 Alb. L.J. 103, 128 (2012).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Ryan Golden, *Dazed & Confused: The State of Enforcement of Marijuana Offenses After the Texas Hemp Farming Act*, 72 Baylor L. R. 737, 759-760 (Fall 2020).

¹⁶ See Chandra et. al. *Changes in Cannabis Potency over the Last Two Decades (1995-2014) - Analysis of Current Data in the United States*, Biol Psychiatry. 2016 April 1; 79(7): 613-619.

¹⁷ Golden, supra note 15, at 737-738 (Fall 2020).

¹⁸ *Id.*

¹⁹ *United States v. Runner*, No. 5:19CR24, 2020 WL 7093403, at 3-4 (N.D.W.Va. Sept. 28, 2020).

²⁰ *Id.*

²¹ *Id.* at 7.

²² *Id.* at 11.

²³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The ZA Editors thank Christopher Meadows for contributing this helpful information. Christopher is a third year law student at Duke University School of Law and was an extern in the FPD office during the Spring of 2021.



The 2020 Wayda Decision: What It Is and Why It May Matter to You

Too many defendants who have been found to have a “mental disease or deficiency” have been languishing in the custody of the U.S. Attorney General, sometimes for years. A recent Fourth Circuit decision provides promising ways to end these confinements.

Competency of a Criminal Defendant

Chapter 313 of the U.S. Code, comprising 18 U.S.C. §§ 4241-4248, pertains to “Offenders With Mental Disease or Defect.” United States Code Sec. 4241 governs the initial commitment of a defendant suspected of a mental illness; § 4246 allows for further commitment to evaluate whether a defendant is “suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another”; and § 4248 allows for an evaluation to determine whether a defendant is a “sexually

dangerous person” whose release would likewise pose substantial risks.

What Happened in Wayda?

In July of 2020, a unanimous Fourth Circuit panel handed down a watershed opinion¹ affirming a decision by Judge Boyle of the U.S. District Court for the Eastern District of North Carolina.² Judge Boyle had granted a motion filed by Mr. Wayda’s attorney to dismiss as untimely his § 4248 civil commitment certification. Because §§ 4241, 4246, and 4248 allow for a maximum of 45 days for an initial evaluation, 75 days for evaluation under § 4246 or § 4248, and 4 months to determine whether a person can be restored to competency, “the Government ran afoul of that time constraint.”³ In particular, it failed to initiate civil commitment proceedings while Mr. Wayda “was being legitimately held” in custody.⁴

The Attorney General may file a § 4246 or § 4248 certification while a person is in his custody during the statutory period of commitment only if (1) the pending charges have been dismissed, (2) the defendant’s mental condition has “so improved that trial may proceed,” or (3) “there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward.”⁵ Note the words “substantial probability.” If restoration is merely probable (more than 50% likely) but not substantially probable (an undefined but far stricter standard), the defendant does not qualify and must be released from the custody of the Attorney General. Similarly, if there is no articulable timeframe for a defendant to be restored to competency, the Attorney General must release him.

At the time of the § 4248 filing, Mr. Wayda belonged to none of the aforementioned categories: (1) his charges had not yet been dismissed; (2) his mental condition did not enable a trial to proceed; and (3) he had not been found to be substantially likely to be restored to competency in the foreseeable future. The following events led to his protracted commitment:

- 1) March of 2016: Mr. Wayda was indicted, taken into custody, and committed “for a reasonable period not to exceed 30 days”⁶ to determine whether he was mentally competent to stand trial.
- 2) December of 2016 (8 months late): Mr. Wayda received a competency hearing ordering his commitment for up to four months to determine whether he met the “substantially probable” and “foreseeable future” criteria referenced above.
- 3) August of 2017 (4 months late): At a second hearing, Mr. Wayda was committed for another four months after a finding that he did satisfy these criteria. Criminal charges were dismissed.
- 4) July of 2018 (7 months late): Mr. Wayda received a third hearing.
- 5) December of 2018 (following an inexplicable 5-month delay): Mr. Wayda was again committed for

up to four months to determine whether he met the conditions of § 4248.

6) June of 2019 (2 months late): The Attorney General filed a certificate under § 4248 finding Mr. Wayda to be a sexually dangerous person and requesting further commitment.

When the Attorney General filed a § 4248 certificate in June of 2019, more than three years after the client entered the system, Mr. Wayda was no longer in the legitimate custody of the Attorney General. In October of that year, the District Court held a hearing on a motion to dismiss the certificate, at which time it determined that “[a]lthough he had been previously committed under § 4241(d), Wayda was no longer in the Attorney General’s custody pursuant to § 4241(d) when he was certified as sexually dangerous pursuant to § 4248.”⁷ In July of 2020, the Fourth Circuit affirmed, finding that “[a]bsent a creditable explanation of the reasonableness of [Mr. Wayda’s] commitment post-December 2018 – two years after his initial commitment and six full months” after it was determined that he was not restorable, “the § 4248 certification filed against him was untimely.”⁸ The Government did not appeal.

In the wake of *Wayda*, numerous motions have been filed, and many more will be filed, demanding release (to either the Bureau of Prisons or the community) of persons who languish due to statutory violations similar to those experienced by Mr. Wayda.

Why Wayda Is So Important

There is a vast and growing body of literature on the intersection of mental illness with crime.⁹ The National Alliance on Mental Illness estimates that one in 20 U.S. adults experiences a “serious form of mental illness.”¹⁰ As there are more than 250 million adults in the U.S.,¹¹ this amounts to somewhere over 12 million adults who experience a severe mental illness. Of these, roughly two and a half million suffer from schizophrenia.¹²

Almost one in five adults exhibiting a severe mental illness commits an act of violence in a given year. When substance abuse is also present, this figure increases to almost one in three.¹³ Doing the math, each year, somewhere on the order of two million persons with a severe mental illness commit an act of violence. Many of these individuals find their way into the federal criminal justice system.

Where to Turn

Perhaps you have a client for whom the *Wayda* decision provides redress. The Training Division of the Defender Service Office has prepared a PowerPoint overview to jumpstart an attorney’s entry into the world of competency hearings and commitments. Contact Joseph Craven (joseph_craven@fd.org) or Jackie Tarlton

(jackie_tarlton@fd.org) for more hints on how to move forward most effectively.

¹ *United States v. Wayda*, 966 F.3d 294 (4th Cir. 2020).

² *United States v. Wayda*, No. 5:19-HC-2172-BO, 2019 U.S. Dist. LEXIS 191678 (E.D.N.C. Nov. 4, 2019).

³ *Wayda*, 966 F.3d at 296.

⁴ *Id.*

⁵ 18 U.S.C. § 4241(d).

⁶ 18 U.S.C. § 4247(b).

⁷ *Wayda*, 19-HC-2172-BO at *10.

⁸ *Wayda*, 966 F.3d at 309.

⁹ See, e.g., *Mental Disorders Among Criminal Offenders: A Review of the Literature*. J Correct Health Care. 2017 Jul 23(3):336-346.

¹⁰ “Mental Health By the Numbers,” National Alliance on Mental Illness (last updated Mar. 2021), <https://www.nami.org/mhstats> (last visited April 9, 2021).

¹¹ “Total population by child and adult populations in the United States,” The Annie E. Casey Foundation (updated Sept. 2020), <https://datacenter.kidscount.org/data/tables/99-total-population-by-child-and-adult-populations> (last visited April 9, 2021).

¹² “Mental Health Disorder Statistics,” John Hopkins Medicine (copyright 2021), <https://www.hopkinsmedicine.org/health/wellness-and-prevention/mental-health-disorder-statistics> (last visited April 9, 2021).

¹³ “Mental illness and violence,” Harvard Health Publishing (published January 2011), http://www.biblioteca.cij.gob.mx/Archivos/Materiales_de_consulta/Drogas_de_Abuso/Articulos/55984270.pdf (last visited September 13, 2021).

The ZA Editors thank Bruce Ballard for contributing this helpful information. Bruce is a second-year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2021.



Objecting to Discretionary Supervised Release Conditions

When thinking about sentencing, many defense attorneys and clients are understandably focused on the number of months of imprisonment. But, defense attorneys should not overlook the supervised release conditions clients will face upon release. These conditions can have a serious impact on clients as they transition out of custody and may unnecessarily put them in danger of being further punished.¹ Recently, a series of Fourth Circuit cases were decided that demonstrate the significance of being attentive to supervised release conditions. Federal defenders should object to the imposition of discretionary supervised release conditions that are not announced at sentencing, explained, and individually tailored to the client.

The Fourth Circuit held in *United States v. Rogers* that the district court must “orally pronounce” discretionary or non-mandatory supervised release conditions at a client’s sentencing hearing.² In *Rogers*, the district court’s written judgment included some discretionary conditions that were not orally announced at the

sentencing hearing.³ “A defendant has the right to be present when he is sentenced,” the Fourth Circuit explained.⁴ “In order to protect that right, we require a district court to orally pronounce a defendant’s sentence in the defendant’s physical presence.”⁵ The court also found that discretionary conditions must be individually tailored to the client and must be adequately explained in court.⁶ *Rogers* was an important first step in protecting the supervised release interests of defendants sentenced in federal court.

United States v. Singletary took the holding in *Rogers* two steps further.⁷ As in *Rogers*, the district court imposed non-mandatory conditions upon Mr. Singletary in his written judgment that were not announced at his sentencing hearing.⁸ Those conditions were “the defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office” and “the defendant shall provide the probation office with access to any requested financial information.”⁹

Importantly, Mr. Singletary had signed an appeal waiver agreeing not to appeal the sentence imposed on him.¹⁰ The Fourth Circuit held that the discretionary supervised release conditions fell outside the scope of his appeal waiver since the conditions were never announced at Mr. Singletary’s sentencing hearing and therefore never officially became “part of his sentence[.]”¹¹ The court explained, “[w]hat Singletary waived in his plea agreement was the right to appeal ‘the conviction and whatever sentence is imposed.’ . . . [D]iscretionary conditions appearing for the first time in a written judgment in fact have not been ‘imposed’ on the defendant.”¹² Thus, one important accomplishment of *Singletary* was to make clear that an appeal waiver does not bar a client from challenging supervised release conditions that were not pronounced at a sentencing hearing.

The Fourth Circuit also found that this error mandated “vacat[ing] Singletary’s sentence and remand[ing] for the district court to conduct the sentencing anew.”¹³ Thus, the second important accomplishment of *Singletary* was its holding on the proper remedy. When discretionary conditions are imposed upon a defendant without being properly announced, explained, and individually tailored, an entire resentencing must take place rather than just a limited remand for an announcement.¹⁴ In other words, the defendant gets a second bite at the apple—another opportunity to make his or her case as to what sentence is appropriate and why the discretionary conditions should not be imposed.

These cases demonstrate why it is so important for defense attorneys to object to the imposition of discretionary supervised release conditions that are not properly announced, explained, and tailored. The purposes of supervised release conditions are to protect public safety and address the rehabilitative needs of the defendant.¹⁵ However, conditions are not meant to be punitive.¹⁶ When unnecessary conditions are

imposed on clients, they unlawfully punish “and could involve a greater deprivation of liberty than is permissible.”¹⁷ Worse still is that defendants who are unable to comply with such restrictive conditions risk further punishment and incarceration for noncompliance.¹⁸ Thus, objecting to these issues as they arise is of the utmost importance.

Roberts and *Singletary* are likely only the start of progress in the realm of supervised release conditions. One important question was left open in *Singletary*: whether the discretionary condition “barring [Mr. Singletary] from incurring new credit charges without probation-officer approval [] impermissibly delegate[d] the court’s sentencing authority to a probation officer.”¹⁹ The Fourth Circuit elected not to reach that issue in *Singletary*,²⁰ but the question will likely return to the court sometime soon. *United States v. Hamilton* may provide a clue as to how the Fourth Circuit will decide that issue.²¹ There, the Fourth Circuit held that a special supervised release condition that barred the defendant from working in any type of employment without prior approval of his probation officer was overbroad and lacked sufficient nexus to the nature and circumstances of his offense.²² This potential argument is yet another reason it is important for defense attorneys to object to improperly imposed conditions. Doing so will help to ensure the best outcome for clients even beyond their active sentence.

¹ See Michael P. Kenstowicz, *The Imposition of Discretionary Supervised Release Conditions: Nudging Judges to Follow the Law*, 82 U. CHI. L. REV. 1411, 1429 (2015).

² *United States v. Rogers*, 961 F.3d 291, 296 (4th Cir. 2020).

³ *Id.* at 295.

⁴ *Id.* at 296.

⁵ *Id.*

⁶ *Id.* at 297-98.

⁷ See *United States v. Singletary*, 984 F.3d 341, 344-46 (4th Cir. 2021).

⁸ *Id.* at 343.

⁹ *Id.* (internal quotation marks and brackets omitted).

¹⁰ *Id.* at 342.

¹¹ *Id.* at 345 (internal quotation marks omitted).

¹² *Id.* (emphases in original).

¹³ *Id.* at 344.

¹⁴ See *id.* at 346.

¹⁵ Kenstowicz, *supra* note 1, at 1418.

¹⁶ *Id.* at 1429.

¹⁷ See *id.* at 1423-24.

¹⁸ *Id.* at 1429.

¹⁹ *Singletary*, 984 F.3d at 344.

²⁰ See *id.* at 347.

²¹ *United States v. Hamilton*, 986 F.3d 413 (4th Cir. 2021).

²² *Id.* at 419.

The ZA Editors thank Athina Hinson-Boyte for contributing this helpful information. Athina is a third-year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2021.



Total Internet Ban for Sex Offenders on Release

In two recent cases, the Fourth Circuit weighed in on whether a total internet ban is a permissible condition for sex offenders on supervised release. The cases, *United States v. Hamilton*, 986 F.3d 413 (4th Cir. 2021) and *United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2021), have different outcomes but the approaches are reconcilable. The issue was one of first impression in the Fourth Circuit, but it has been discussed in other circuits. See *Ellis*, 984 F.3d at 1104-05, n.10 (collecting cases). Though this is a new and developing area of the law, because of the lasting implications of a complete ban from the Internet, defense attorneys should be cautioned to preserve this issue to protect their clients.

A total internet ban is not a “mere[] inconvenienc[e]” for clients on release. *Ellis*, 984 F.3d at 1105. Such a restriction would prevent clients from exercising their fundamental First Amendment right to engage in discussions of societal issues. *Id.* Additionally, “the [I]nternet is likely to be vital to [a client’s] re-entry to society, including for securing housing and employment.” See *id.* Thus, to justify this broad condition, both the *Ellis* and *Hamilton* courts agree that an internet restriction on supervised release must be “reasonably related” to the underlying offense and “reasonably necessary” to protect the public from further harm under 18 U.S.C. § 3583(d). See *Ellis*, 984 F.3d at 1103-04; see also *Hamilton*, 986 F.3d at 421.

In *Ellis*, the Fourth Circuit held that banning Mr. Ellis from using the Internet could not satisfy the “‘reasonably related’ requirement” of § 3583(d)(1) “absent some evidence linking his offense or criminal history to unlawful use of the internet.” 984 F.3d at 1102. Additionally, the *Ellis* court held that the “‘reasonably necessary’ requirement of § 3583(d)(2)” requires the “least restrictive alternative” when creating probationary terms, and held that a *total* internet ban, “[g]iven the breadth of such a condition, and the vast liberty it deprives, [] will rarely be the ‘least restrictive alternative.’” *Id.* at 1104 (emphasis added). Ultimately, the *Ellis* court found that neither requirement was satisfied in Mr. Ellis’s case. First, the court held that the restriction was not reasonably related to Mr. Ellis’s underlying state offense of possession of child pornography or his federal offense of failing to register as a sex offender, because “even though Mr. Ellis was convicted of crimes that are often carried out online[,]” there was “no evidence in the record linking the internet to the criminal conduct underlying those convictions.” *Id.* at 1103. Moreover, Mr. Ellis’s violative conduct on release, “lying about watching [legal] pornography online on an unauthorized device,” was his “dishonesty, not his internet use[,]” which the court emphasized was not itself illegal. See *id.* Second, the court held that the restriction was overbroad under § 3583(d)(2). *Id.* at 1105. Because Mr. Ellis’s illegal conduct did not involve

the Internet, the court said it was unclear whether “any internet restriction” was reasonably necessary, “let alone a complete ban.” *Id.*

The *Hamilton* court distinguished Mr. Hamilton’s case from Mr. Ellis’s, where the total internet ban was overturned, based on two “key threads”: (1) “in many cases,” like Mr. Ellis’s, “there is simply ‘no evidence of online criminality at all’” and; (2) for cases that *do* involve internet criminality, an outright ban is overbroad where the evidence points to “*non-contact* child pornography activity, or similar conduct, on the internet.” *Hamilton*, 986 F.3d at 421-22 (emphasis added). Ultimately, the court found that both “threads” ran through Mr. Hamilton’s case, justifying the total internet ban. Mr. Hamilton had both (1) criminally solicited child pornography over the Internet, and (2) that solicitation involved directly contacting his victim using the Internet, which eventually led to Mr. Hamilton’s kidnapping and raping her. *Id.* (“[T]he [I]nternet was the mechanism by which the defendant committed this crime. The Internet was how he found the victim in this case and the Internet was how he contacted her after the kidnapping when she was in treatment.”) (internal citation, brackets, and quotations omitted). Therefore, this outcome is consistent with the *Ellis* decision, since the facts here were distinguishable.

The *Hamilton* court also referred to the First Circuit’s test for determining whether an internet restriction is overly broad, which weighs three factors: “(1) the defendant used the internet in the underlying offense; (2) the defendant had a history of improperly using the internet to engage in illegal conduct; or (3) particular and identifiable characteristics of the defendant suggested that such a restriction was warranted.” *Id.* at 422 (quoting *United States v. Perazza-Mercado*, 553 F.3d 65, 70 (1st Cir. 2009)). Though the *Ellis* Court did not explicitly use the First Circuit test, it did cite to *Perazza-Mercado* when holding that there was no evidentiary basis in Mr. Ellis’s case for an outright ban, so this test could present a helpful framework when challenging internet conditions. See *Ellis*, 984 F.3d at 1103.

Ultimately, there are two big takeaways from these new Fourth Circuit developments: (1) defense attorneys need to challenge broad internet restrictions for clients on release, particularly where those restrictions will impede a client’s re-assimilation into society, and (2) a total internet ban likely cannot be justified unless the client’s offenses are either closely tied to criminal internet usage or involve the actual contact of victims using the Internet.

Though the law is still developing, these two cases are certainly reconcilable. Defense attorneys representing clients with sex offenses should remember to preserve this issue by objecting to overbroad internet restrictions. Using the Internet is in many ways a fundamental right and an integral part of adapting to society upon release. The government cannot justify a complete internet ban in this modern age simply because the Internet could be a tool to access child pornography. There

are “le[ss] restrictive alternative[s]” to a complete ban on Internet usage, including banning specific social media sites or “file-sharing services,” and those rules could be enforced with “monitoring software and computer inspections.” *Ellis*, 984 F.3d at 1104. A complete ban should be reserved for more extreme scenarios, such as with Mr. Hamilton, where the Internet was a tool for direct victim contact. But, even then, the argument remains that a previous offender on release should be able to use the Internet to search for jobs, read the news, or watch lawful content, thus demonstrating why this issue is so important to preserve for appeal.

The ZA Editors thank Alessandra Carlton for contributing this helpful information. Alessandra is a third-year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2021.



An Update on the Reappearance of the Federal Death Penalty

Prior to the Trump administration, the last federal death row inmate was executed in 2003 under the Bush administration.¹ During the Trump administration, the execution of federal death row inmates resumed following a seventeen-year hiatus.² In the span of seven months, the Trump Administration executed a total of thirteen federal death row inmates, an unprecedented number of federal executions during a single term.³ Among the thirteen inmates executed, three occurred in the weeks leading up to President Biden’s Inauguration.

- Lisa Montgomery, a white female, was executed on January 12, 2021.⁴ Montgomery was convicted and sentenced to death for murdering a pregnant woman and delivering and kidnapping her child in 2004.⁵
- Corey Johnson, a Black male, was executed on January 14, 2021.⁶ Johnson was convicted and sentenced to death for murdering 7 people in Richmond, Virginia in 1992⁷ as part of a drug trafficking ring.
- Dustin John Higgs, a Black male, was executed on January 16, 2021, merely days before the inauguration of President-elect Joe Biden.⁸ Higgs was convicted and sentenced to death for murdering 3 women at Patuxent Research Refuge in 1996.⁹

The United States remains one of the only western countries to execute prisoners.¹⁰ What remains unknown, however, is how long the

United States will continue to utilize the death penalty, namely at the federal level. During his campaign, President Joe Biden introduced the Biden Plan for Strengthening America's Commitment to Justice, which would abolish the federal death penalty and incentivize states to follow suit.¹¹ President Biden was inaugurated on January 20, 2021, and has yet to take action regarding the federal death penalty.¹² Despite Biden's inaction, Attorney General Merrick Garland vowed to implement a moratorium on the federal death penalty during his confirmation hearing.¹³ Although this would not affect state death penalty cases, because federalism allows states to choose whether to retain the death penalty, it would be extremely significant given the unprecedented number of federal executions in the last seven months by the Trump administration.¹⁴ Merrick Garland was confirmed as Attorney General of the United States on March 10, 2021.¹⁵ As such, there is potential for a moratorium on the federal death penalty in the near future, thereby limiting the application of the death penalty at the federal level until Biden fulfills his promise to abolish the federal death penalty.

How would abolishing the federal death penalty affect North Carolina practice? There are currently three North Carolina offenders on federal death row.

- Aquilia Barnette, a Black male, was convicted and sentenced to death in 1998 for killing his ex-girlfriend and another man in a carjacking.¹⁶
- Allen Jackson, a white male, was convicted and sentenced to death in 2001 for the fatal shooting of a woman while on federal property in North Carolina.¹⁷
- Alejandro Umana, a Latino male, was convicted and sentenced to death in 2010 for the fatal shooting of two brothers in a North Carolina restaurant.¹⁸

If the federal death penalty is halted, either through a moratorium or executive order, these three inmates would be resentenced to life imprisonment.

A moratorium on the federal death penalty begs the question as to what would happen in the absence of death penalty bargaining power.¹⁹ From 1976 to 2008, an estimated 75% of inmates executed could have avoided death by accepting a plea offer.²⁰ Often, criminal defendants have less incentive to plead guilty unless the proposed sentence is significantly less because a criminal defendant relinquishes the possibility of an acquittal through trial and the right to appeal.²¹ A moratorium on the federal death penalty would potentially increase plea bargaining power for defense attorneys because prosecutors can no longer use the threat of the death penalty as a bargaining chip in plea discussions. As a result, prosecutors in the Eastern District of North Carolina may offer lesser sentences during plea negotiations to deter defendants from exercising their

Constitutional right to trial.²² Ultimately, the key to successful plea bargaining lies in threatening to increase the time and cost burdens of the other side by taking more cases to trial.²³

Given the tumultuous events of the last year — a global pandemic, raging wildfires, racial tensions, and a divisive election — the unprecedented number of federal death row inmates is another notch in the belt. After nearly seven months into the Biden Administration, there has been little progress in abolishing the federal death penalty. If Merrick Garland ultimately imposes a moratorium on the federal death penalty, we may see a shift in bargaining power between the defense and the government. Defense attorneys can use this bargaining chip to promote secure more beneficial plea offers for crimes previously eligible for the death penalty.

¹ *Executions under the Federal Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/executions-under-the-federal-death-penalty> (last visited July 14, 2021).

² Michael Tarm & Michael Kunzelman, *Trump Administration Carries Out 13th and Final Execution*, ASSOCIATED PRESS, (Jan. 15, 2021), <https://apnews.com/article/donald-trump-wildlife-coronavirus-pandemic-crime-terre-haute-28e44cc5c026dc16472751bbde0ead50> (last visited July 14, 2021).

³ *Id.*
⁴ Christina Carrega, *Federal Government Executes the First Woman in Nearly 70 Years*, CNN (Jan. 13, 2021), <https://www.cnn.com/2021/01/13/us/lisa-montgomery-federal-execution/index.html> (last visited July 14, 2021).

⁵ *Id.*
⁶ Paul LeBlanc & Christina Carrega, *Federal Government Executes Corey Johnson Following Prolonged Legal Fight*, CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/14/politics/corey-johnson-executed/index.html> (last visited July 14, 2021).

⁷ *Id.*
⁸ Mallika Kallingal & Christina Carrega, *Dustin Higgs Executed Less Than a Week Before Inauguration Day*, CNN (Jan. 16, 2021), <https://www.cnn.com/2021/01/16/us/dustin-higgs-executed/index.html> (last visited July 14, 2021).

⁹ *Id.*
¹⁰ *Death Sentences and Executions*, AMNESTY INT'L GLOBAL REPORT (2020).

¹¹ *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS DEMOCRATS, <https://joebiden.com/justice/> (last visited July 14, 2021).

¹² Christina Carrega, *Biden Vowed to End the Death Penalty. Activists are Demanding Action as He Nears the 100-day Mark*, CNN (Apr. 25, 2021), <https://www.cnn.com/2021/04/25/politics/death-penalty-biden-100-days/index.html> (last visited July 14, 2021).

¹³ Kevin Johnson, *Merrick Garland Expects Return To Death Penalty Moratorium*, USA TODAY (Feb. 22, 2021), <https://www.usatoday.com/story/news/politics/2021/02/22/merrick-garland-us-death-penalty-moratorium-likely-resume/4548167001/> (last visited July 14, 2021).

¹⁴ See Holly Honderick, *In Trump's Final Days, a Rush of Federal Executions*, BBC NEWS (Jan. 16, 2021), <https://www.bbc.com/news/world-us-canada-55236260> (last visited July 14, 2021).

¹⁵ Katie Benner, *Merrick Garland Is Confirmed as*

Attorney General, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2021/03/10/us/politics/merrick-garland-attorney-general-confirmation.html> (last visited July 14, 2021).

¹⁶ List of Federal Death-Row Prisoners, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners> (last visited July 14 2021).

¹⁷ Id.

¹⁸ Id.

¹⁹ Albert Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL LAW REVIEW 671, 674 (2008).

²⁰ Id. at 762.

²¹ Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences* 13 (Crim. Just. Legal Found., Working Paper 09-01, 2009).

²² Id. at 674. (“We live in a nation that kills people for exercising their constitutional rights [to trial]”).

²³ Id. at 677.

The ZA Editors thank Carly Amendola for contributing this helpful information. Carly is a third year law student at Campbell University School of Law and was an extern in the FPD office during the Summer of 2021.



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

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LOCAL NEWS

FPD Office News

In May 2021, we bid a fond farewell to Ormond Harriott, Assistant Federal Public Defender, who retired. Ormond worked in our Raleigh office for 15 years.

In July 2021, we bid a fond farewell to Steve Gordon, Assistant Federal Public Defender, who

retired. Steve worked in our Raleigh office for 24 years.

We are pleased to welcome Snayha Nath, who joined us as an Assistant Federal Public Defender in March 2021, and Susanna Henry and Jean-Paul Jacques-Freese, who joined us in July 2021 as Assistant Federal Public Defenders in the Raleigh office.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Raleigh, NC: Chris Floyd, Michael Frickey, Lauren Fussell, Charlie Gray, and Dana Stott; and in Morehead City, NC: Michael Thomas.

Guy Smith is a new panel attorney in New Bern, NC.



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

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