

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Summer 2023

The Defender's Message

As many of you know we lost long-time Federal Defender Tom McNamara last month. Tom was the Federal Defender (and my boss) for 17 years. Before that he had a thriving private criminal defense practice and was a pillar of our CJA panel. And, BEFORE THAT, he was the United States Attorney in this district. Tom's impact on the criminal practice in the EDNC is incalculable. But beyond his many professional accomplishments, his greatest legacy might be as a role model for all those who knew him. Tom was unfailingly kind, decent, and compassionate. He treated everyone from the highest judge to the lowliest client with the same courtesy and respect. He was also one heckuva a good lawyer who represented every client with skill and passion. He will be greatly missed by all who know him.

This Summer Edition of the Zealous Advocate is filled with a wide variety of articles, thanks to the many student staff writers we have worked with this year. Inside, you will find articles discussing new types of drugs affecting our clients both before sentencing and in prison; tips on correcting sentences for clerical error; reasons to lookout for possible computer animations at trials; developments in the law concerning the 5th Amendment, retroactive First Step Act crack resentencing, crimes of violence, and *Bruen*; some insight into federal cyberstalking law; how to help clients in BOP navigate new transgender resources; and what to know about civil asset forfeiture in our district. There are also our usual links to updated case law holdings and news around the district.

As always, the Editors and I hope you find these articles helpful to your practice. As you know, this publication is only one of the ways we try to keep the panel up to date on recent legal developments. Most notable are the CLE training programs our office presents, with the next one taking place in person this October in Beaufort, North Carolina. I look forward to seeing everyone at our next seminar and thank you for your continued dedication and the amazing work you do for criminal defendants in the EDNC.

G. Alan DuBois
Federal Public Defender



Inside the Summer 2023 Issue

PANEL ATTORNEY INFORMATION 2

PRACTICE TIPS

<i>Poppers: What You Should Know</i>	<i>2</i>
<i>Synthetic Cannabinoids: Practical Concerns</i>	<i>3</i>
<i>BOP Transgender Inmate Resources.....</i>	<i>5</i>
<i>US v. Leggette and the Fifth Amendment</i>	<i>7</i>
<i>US v. Taylor and Crime of Violence</i>	<i>8</i>
<i>What's Brewing Under Bruen?</i>	<i>10</i>
<i>First Step Act Motions Post-Conception</i>	<i>11</i>
<i>Correcting Sentence Based on Clerical Error..</i>	<i>13</i>
<i>Computer-Generated Animations in Trial</i>	<i>14</i>
<i>Cyberstalking and the First Amendment</i>	<i>16</i>
<i>NC's Civil Forfeiture after McClellan.....</i>	<i>17</i>

LEGAL UPDATES

<i>4th Circuit Update</i>	<i>18</i>
<i>Supreme Court Update</i>	<i>18</i>

LOCAL NEWS..... 18

THE ZEALOUS ADVOCATE

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

G. Alan DuBois, Federal Public Defender

April Bunn, Panel Administrator

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

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

Gloria Gould & Melanie Fisher, Design & Layout

PANEL ATTORNEY INFORMATION

Reminders

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

Seminar BOLOs

Our Fall 2023 EDNC Seminar, set for October 26th-27th, will be held at the Beaufort Hotel, 2440 Lennoxville Rd, Beaufort, NC. Be sure to register and book your hotel room. We look forward to seeing you there!

Please note that no decisions have yet been made about FPD CLE/Seminars for 2024. For information regarding upcoming seminars, please check email and our website.



PRACTICE TIPS

If Poppers Pop up, Here's What You Should Know

Jungle juice, liquid gold, rush, purple haze, and buzz are all common names for the popular inhalant: poppers.¹ They are a club drug generally used to enhance social experiences by giving users sensations of warmth and euphoria, a heightened state of sexual arousal, and muscle relaxation.² This article will briefly cover the uses, side effects, and recent research regarding poppers before discussing their potential relevance in criminal cases.

Poppers have many historical uses and are currently most associated with the gay community³ and young, college-age adults⁴ seeking a rushing high. Importantly, using poppers is not illegal.⁵ Instead, because poppers have several medicinal and non-medicinal uses, they are only partially regulated.⁶ Poppers can be legally sold for any purpose other than for the inhalation or introduction into the human body for euphoric or physical effects.⁷ This makes them easily accessible for purchase online or in adult stores, where they are most commonly found,⁸ as air fresheners, liquid incense, deodorizers, leather cleaners, cosmetics, solvents, and nail polish removers.⁹ Even still, poppers use does not come without risks. For example, inhaling poppers may lead to temporary reductions in blood pressure,¹⁰ high heart rates, lightheadedness, and fainting.¹⁰ Frequent use may lead to skin lesions on the face, nose, and mouth areas, and low blood-oxygen levels that can compound the aforementioned side effects.¹¹ Consequently, using poppers can have potentially life-threatening effects.¹² Pop-

pers have demonstrated toxic effects on the central nervous systems of mice,¹³ and clinicians are concerned that inhaling poppers can be carcinogenic.¹⁴ Finally, ingesting poppers may also cause these symptoms and cause complications leading to death if untreated.¹⁵

An under-researched side effect of poppers is the psychological addictiveness and the ability to contribute to a sex addiction. One study suggests that, given the dopaminergic effects of poppers—the effects that enhance sensations of pleasure—they may at least be psychologically addictive.¹⁶ The study conducted a conditioned place preference (CPP) test, which evaluates the rewarding effects of substances, on mice.¹⁷ CPP tests in relationship to dopamine are accepted as a well-known manner of evaluating abuse potential based on rewarding effects.¹⁸ The changes in CPP observed during the test led researchers to conclude that alkyl nitrites—the compound of which poppers are a subset—have the potential for psychological dependence.¹⁹

Similarly, another study suggested that individuals with a sex addiction—or hypersexual individuals—often engage in substance use in a sexual context, called “chemsex.”²⁰ Chemsex illustrates the relationship between hypersexual behavior and addictive substance abuse.²¹ Some of the most common drugs used by those engaging in chemsex are methamphetamines, cocaine, ketamine, and poppers.²² Thus, although there is no indication that poppers contribute to a sex addiction or vice versa, at the very least, there is some connection. Additionally, poppers heighten libido and reduce sexual inhibitions,²³ which may further contribute to this relationship. Consequently, while poppers are likely not physically addictive, there is evidence to suggest that they may be psychologically addictive and have a connection to sex addictions.²⁴ This conclusion is further illustrated by the ways that individuals use poppers in relation to sex. For example, users have described poppers as enhancing pleasure and improving their capacity to “let go and enjoy sex.”²⁵ More specifically, people report using poppers just before a sexual orgasm because the rush is perceived to augment and intensify the sensation and experience.²⁶

Given this association, poppers may pop up in relation to sex crimes. While there is little case law related to poppers in the criminal context, it is not unheard of. At least one court, in *United States v. Antone*, mentioned “rush”—another name for poppers—in determining that the defendant was not a sexually dangerous person under the Adam Walsh Child Protection of Safety Act of 2006.²⁷ However, the brief mention was only to describe the defendant's drug history and did not weigh for or against the determination.²⁸ Nevertheless, one could conceive of a judge or law enforcement officer considering a defendant's use of poppers against them at sentencing, in a pre-sentencing report, or during a criminal investigation. To that end, it is wise to make a client aware of the risks that come with

discussing their use of poppers with law enforcement.

In the event a defendant's use of poppers is being considered, there may still be a way to spin the facts in a light more favorable to the client. Specifically, at the sentencing stage for a sex crime, a sex addiction may be considered and can support a downward variance. For example, a sex addiction may be considered in evaluating a defendant's mental health issues.²⁹ In *Harden v. United States*, the petitioner challenged his sentence, arguing that his mental health issues were not before the court as a mitigating factor during sentencing.³⁰ In reviewing the petitioner's sentence, the court acknowledged that the defendant's therapy for "sexual deviant behavior and sex addiction" was included in the pre-sentencing report and weighed by the court as a mitigating factor, among other health issues.³¹ Similarly, in *United States v. Bollinger*, the Fourth Circuit acknowledged that a person's pursuing rehabilitative treatment for a sex addiction can be considered a mitigating factor at sentencing.³² According to the Fourth Circuit, the district court granted the petitioner a thirty-five-year downward variance from the advisory term because, among other things, the petitioner self-reported his crimes during a therapy session, pursued treatment and rehabilitation, and was an active leader in Sex Addicts Anonymous meetings.³³ Consequently, if a defendant can draw a connection between their use of poppers and a sex addiction and take positive steps to address it, their conduct may be considered a mitigating factor at sentencing.

Case law regarding poppers is limited. Accordingly, poppers may rarely appear in case-work with clients. Nevertheless, these considerations are important for when they do pop up.

¹ *Amyl Nitrite*, ALCOHOL & DRUG FOUND. (Jan. 10, 2023), <https://adf.org.au/drug-facts/amyl-nitrite>.

² Frank Romanelli et al., *Poppers: Epidemiology and Clinical Management of Inhaled Nitrite Abuse*, 24 PHARMACOTHERAPY 69, 69, 74-75 (2004) (hereinafter "Romanelli et al.").

³ Austin Le et al., *Use of "Poppers" Among Adults in the United States, 2015-2017*, 52 J. PSYCHOACTIVE DRUGS 433, 433 (2020) (hereinafter "Le et al.").

⁴ Romanelli et al., *supra* note 2, at 70.

⁵ Cf. 15 U.S.C. § 2057b(b).

⁶ *Id.* at (b) & (c); see also Romanelli et al., *supra* note 2, at 70.

⁷ 15 U.S.C. § 2057b(b).

⁸ *Ingesting or Inhaling Nitrite "Poppers" Can Cause Severe Injury or Death*, U.S. FOOD & DRUG ADMIN. (Jul. 15, 2021), <https://www.fda.gov/consumers/consumer-updates/nitrite-poppers> (last visited Apr. 11, 2023). Poppers also have a low cost of use, averaging between \$10 and \$20 per 10 ml to 30 ml vial. Romanelli, et al., *supra* note 2, at 70.

⁹ *Ingesting or Inhaling Nitrite "Poppers" Can Cause Severe Injury or Death*, U.S. FOOD & DRUG ADMIN. (Jul. 15, 2021), <https://www.fda.gov/consumers/consumer-updates/nitrite-poppers> (last visited Apr. 11, 2023).

¹⁰ Romanelli, et al., *supra* note 2, at 75-77.

¹¹ See *id.* ("A serious adverse effect of large nitrite exposure is methemoglobinemia.").

¹² See *id.* (describing the medical case of a healthy twenty-nine year old man who faced a life-threatening experience as a result of methemoglobinemia caused by using poppers).

¹³ Hye Jin Cha et al., *Neurotoxicity Induced by Alkyl Nitrites: Impairment in Learning/Memory and Motor Coordination*, 619 NEUROSCIENCE LETTERS 79, 80, 84 (2016).

¹⁴ Romanelli, et al., *supra* note 2, at 75-77.

¹⁵ Romanelli, et al., *supra* note 2, at 76-77.

¹⁶ See generally, Seo Young Jeon et al., *Abuse Potential and Dopaminergic Effect of Alkyl Nitrites*, 629 NEUROSCIENCE LETTERS 68, 68 (2016).

¹⁷ *Id.* at 69.

¹⁸ *Id.* at 71.

¹⁹ *Id.* at 72.

²⁰ Leo Malandain et al., *Pharmacotherapy of Sexual Addiction*, 22 CURRENT PSYCHIATRY REPORTS 29, 29-30 (2020) (hereinafter "Malandain et al.").

²¹ *Id.* at 30.

²² *Id.*

²³ Le et al., *supra* note 3, at 437.

²⁴ See Malandain et al., *supra* note 20.

²⁵ Cameron Schwartz et al., *Queering Poppers Literature: A Critical Interpretive Synthesis of Health Sciences Research on Alkyl Nitrite Use and Canadian Policy*, 101 INT'L J. DRUG POL'Y (2022), at 2 (internal quotation marks omitted).

²⁶ Romanelli et al., *supra* note 2, at 75.

²⁷ No. 5:07-HC-2042-FL, 2012 WL 4450849, at *10, *40 (E.D.N.C. Apr. 30, 2012).

²⁸ *Id.*

²⁹ *Harden v. United States*, No. 19-CR-00031-KDB-DCK-1, 2021 WL 2295588, at *5 (W.D.N.C. Jun 4, 2021).

³⁰ *Id.* at *3. The petitioner challenged his sentence by filing a motion to vacate under 28 U.S.C. § 2255. *Id.*

³¹ *Id.*

³² *United States v. Bollinger*, 798 F.3d 201, 204, 206 (4th Cir. 2015).

³³ *Id.* at 206-07. The district court, at sentencing, also considered the defendant's crime-free record, advanced age, and past ministerial work as mitigating factors. *Id.*

The ZA Editors thank George Khoury for contributing this helpful information. George is a second-year law student at Duke University School of Law and was an extern in the FPD office during the Spring of 2023.



Synthetic Cannabinoids: Practical Concerns for Clients Using "Spice" in Custody

Synthetic Cannabinoids, often called K2, "Spice", or "fake weed", is a class of designer drugs that is infiltrating prisons because of its potency, undetectability, and availability.¹ When ingested, Spice can mimic the effects of natural marijuana like euphoric feelings, altered perception, and feelings of relaxation.² However, Spice is not natural and can have a number of dangerous side effects including psychotic symptoms such as extreme paranoia and hallucinations.³ Defense attorneys should be aware of the appeal this drug has to their clients, the effects it has on their mental health, and the

prevalence of the drug both within prisons and in the communities they work in.

What is Spice?

Initially developed by academic chemists and pharmaceutical scientists to study the health benefits of cannabinoids, synthetic cannabinoids mimic but do not share structural commonality with Δ^9 -tetrahydrocannabinol (Δ^9 -THC), the psychoactive chemical in cannabis.⁴ The lab-produced chemical is dissolved in solvent and then either applied to dry plant matter or even infused into paper.⁵ To bypass regulation, street manufacturers synthesize and market new compounds with minor changes to the chemical composition but with the same pharmacologic activity.⁶ Because of this everchanging chemistry of Spice, identifying the substance is challenging for toxicology reporting, forensic testing, and public health laboratories, making them almost impossible to find in drug screenings.⁷ Synthetic Cannabinoids can induce stronger physiologic and psychoactive effects than Δ^9 -THC, such as psychosis, seizures, collapses, cardiac toxicity, and acute kidney failure.⁸ Spice blends can produce psychoactive effects up to 100 times more potent than natural cannabinoids.⁹

Spice is cheap. Estimations of street price vary, but enough Spice blend to craft a single joint usually goes for only a dollar or two.¹⁰ This has made the drug incredibly popular among poor and homeless populations, like in East Harlem, New York.¹¹

Alongside the low cost of Spice, the ability to move and use the drug has made it the drug of choice for many incarcerated persons. Spice in its liquid form, after manufacturing, is usually sprayed onto dry plant matter to smoke like traditional marijuana. But to transport the drug into secured prisons, the liquid is sprayed onto paper to create a laced K2 product.¹² The paper is then sent through the mail to inmates, who can light and smoke the paper to achieve a high.¹³ Using Spice in this manner can be extremely dangerous; apart from the inconsistency of a drug chemically manufactured by different makers, how much is sprayed in particular areas of the paper can be the difference between a light high and a high that spurs psychosis.

Considerations for Defense Attorneys

Clients could be attracted to Spice for many reasons, including the low cost, ease of access, and difficulty for authorities to test for both in and out of prison. Most clients will be using the substance as an alternative to traditional marijuana. However, attorneys should be clear with clients they suspect of using Spice, **it is not a safe alternative.**

To be clear, Spice is not the same as other natural cannabinoids and hemp products that have become popular in the recent years. For example, substances like Delta-8 (Delta-8 tetrahydrocannabinol) and HHC (hexahydrocannabinol) are derived from legal hemp plants and can also be used to

substitute for traditional marijuana.¹³ While these products are still being studied, these substances are much more likely to be of high quality and do not tend to induce the side effects associated with Spice.¹⁴ Clients who are using these substances as substitutes for traditional marijuana are highly unlikely to experience any of the negative side effects associated with Spice.

If attorneys believe that their client is using Spice, especially while in prison, they should be careful in developing a strategy to protect the client's interests. If a client is already imprisoned within the Federal Bureau of Prisons, access to the drug may be easy. Acute Spice psychosis is treated as a correctional matter, with inmates suspected of using Spice and suffering from side effects generally monitored in segregated housing. Attorneys may wish to communicate to the BOP the need for psychiatric intervention if they feel Spice use has increased to the level of long-term addiction and psychosis and should implore family members to do so as well. However, attorneys should weigh this consideration with the increased chance of the BOP's questioning their client's competency.

For clients that are on pre-trial release, parole, and probation, attorneys should warn their clients of the dangers of synthetic cannabinoids. Spice is not a safe alternative for clients who may wish to continue using cannabinoids while passing drug screenings.

Overall, Spice is an unnatural chemical drug that has dangerous and even deadly side-effects. Attorneys should be aware of its prevalence in the community and prisons and look to intervene when possible to ensure their client's health and safety.

¹ Johnson, Timothy, *Suboxone and "Spice" are Ubiquitous in American Prisons*, PRISON JOURNALISM PROJECT (Oct. 18, 2022), <https://prisonjournalismproject.org/2022/10/18/american-prisons-k2-suboxone-surg-ing-overdose-rates/>, (last visited Apr. 16, 2023).

² Ayer, Uma & Lautieri, Amanda, *The Effects of Spice Use*, AM. ADDICTION CENS. (JAN. 19, 2023), <https://drugabuse.com/drugs/spice/effects-use/>, (last visited Apr. 16, 2023).

³ *Id.*

⁴ Adams, A.J. et. al, "Zombie" Outbreak Caused by the Synthetic Cannabinoid AMB-FUBINACA in New York, 376 (3) NEW ENGLAND J. OF MED., 235-42 (Jan. 19, 2017). Note, Synthetic Cannabinoids are different from Δ^9 -THC, known as "Delta 8." Delta-8 is a naturally occurring cannabinoid in marijuana and hemp plants that is extracted naturally using acid conversion for human consumption. Delta-8 is a legal substance and naturally does not have the stronger effects of K2 or harmful additives used in the production process. Julia, Nina, *Is Delta-8 THC Synthetic and Why Does it Matter?*, CENTER FOR ADVANCING HEALTH (Jan. 21, 2022), <https://cfah.org/is-delta-8-thc-synthetic/>, (last visited Apr. 16, 2023) (hereinafter, "Julia").

⁵ *Id.* See also ‘Inmates are very creative in here’: Paper laced with K2 being mailed to inmates at Sedgwick County Jail, KSN NEWS (Dec. 7, 2020, <https://www.ksn.com/news/crime/sheriff-papers-laced-with-k2-being-mailed-to-inmates-at-sedgwick-county-jail/>), (last visited Apr. 16, 2023) (hereinafter “KSN News”).

⁶ Fattore, Liana, *Synthetic Cannabinoids - Further Evidence Supporting the Relationship between Cannabinoids and Psychosis*, 79 (7) BIOLOGICAL PSYCHIATRY, 539-48 [2016].

⁷ *Id.*

⁸ *Id.* For a more in-depth discussion of the history and effects of K2, YouTube channel “Into the Shadows” provides a 15-minute crash course in the drug, “Spice: the Synthetic Drug Destroying Lives”, https://www.youtube.com/watch?v=reVRmrjccA&ab_channel=IntotheShadows, (last visited Apr. 16, 2023).

⁹ Julia, *supra* note 4.

¹⁰ Casey, Nicholas, *K2, A Potent Drug, Casts a Shadow over an East Harlem Block*, N.Y. TIMES (Sep. 2, 2015), <https://www.nytimes.com/2015/09/03/nyregion/k2-a-potent-drug-casts-a-shadow-over-an-east-harlem-block.html>, (last visited Apr. 16, 2023).

¹¹ See *id.*

¹² KSN NEWS, *supra* note 5.

¹³ See Food and Drug Admin., *5 Things to Know About Delta-8 Tetrahydrocannabinol: Delta-8 THC*, 119(1) MO. MED. 21-22 (Jan-Feb, 2022), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9312454/#:~:text=Delta%2D8%20THC%20is%20one,%2Dderived%20cannabinoid%20\(CBD\)](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9312454/#:~:text=Delta%2D8%20THC%20is%20one,%2Dderived%20cannabinoid%20(CBD),), (last visited Apr. 16, 2023).

¹⁴ See *id.*

The ZA Editors thank Jack Monroe for contributing this helpful information. Jack is a third-year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2023.



BOP Transgender Inmate Resources: A More Transparent View

On January 13, 2022, the Department of Justice issued an updated Transgender Offender Manual that directs federal prisons to provide certain services, accommodations, and resources to transgender individuals in the federal prison system.¹ For transgender inmates and their representation, the passive language of the manual as well as the intricate structure of the Bureau of Prisons (BOP) complicate an incarcerated individual’s access to services and resources. This article summarizes BOP’s available programs for transgender inmates, the administrative hierarchy for transgender issues, the inmate designation and transfer process, medical and mental health resources, and accommodations available to transgender inmates.

Available Programs

The First Step Act (FSA), signed into law in 2018, requires the Attorney General to develop a system to assess the needs of inmates in federal prison and provide programming to ad-

dress those needs.² Although no programs specifically address transgender and intersex topics, the FSA Approved Programs Guide describes the programs BOP offers.³ BOP assessment under the FSA system identifies needs in one or more of the following: Anger/Hostility; Antisocial Peers; Cognitions; Dyslexia; Education; Family/Parenting; Finance/Poverty; Medical; Mental Health; Recreation/Leisure/Fitness; Substance Use; Trauma; and Work.⁴ Based on these needs, unit management staff will assign the inmate to programming to address them.⁵

Administrative Hierarchy

According to the manual, the Women and Special Populations Branch (WASPB) is the BOP’s primary source and contact on “accommodation/transition, classification, management, and intervention/treatment programs and practices” regarding transgender individuals in BOP custody.⁶ For questions at this level, contact Jenna Epplin, National Policy and Programs Coordinator for the Women and Special Populations Branch.⁷ For questions specifically regarding the transgender population, contact Dr. Ashley Noble.⁸

At individual institutions, the Warden is the BOP’s primary contact for issues affecting transgender inmates.⁹ The Warden is responsible for referring transgender individuals to the Transgender Executive Council (TEC), the BOP’s “official decision-making body on all issues affecting the transgender population.”¹⁰

Some facilities¹¹ have a Special Populations Coordinator who is responsible for “delivering First Step Act and other programs . . . developed for inmates who identify as transgender.”¹² If a facility does not have a Special Populations Coordinator, the Warden “will seek consultation from WASPB regarding the delivery of group interventions and services.”¹³

Inmate Designations

Upon entry into BOP custody, inmates should receive a Transgender Resource Guide the Reentry Services Division and WASPB have compiled that provides an overview of BOP policies, the transgender screening process, treatment and services, and the rights transgender inmates possess.¹⁴

Initially, when BOP receives information that a person entering BOP custody is transgender or intersex, designations staff will refer the matter to the TEC, and unit management staff must give “serious consideration” to the inmate’s views on their safety and preferences in housing assignments.¹⁵ The same applies to pretrial or holdover detainees.¹⁶ Should an inmate wish to be redesignated as a part of their transition after entering BOP custody, the inmate or staff must make a request to the Warden.¹⁷ The Warden will communicate with WASPB and the Designation and Sentence Computation Center (DSCC), and the Office of Medi-

cal Designations will consult with WASPB in the redesignation.¹⁸

Staff must refer to individuals with transgender designations with gender neutral language such as a last name or the pronouns associated with the individual's identified gender, and "[d]eliberately and repeatedly misgendering an inmate is not permitted."¹⁹

Transfer Process

Should an inmate wish to be transferred to a facility that houses persons of a different sex, the transgender individual or a staff member on their behalf must submit a request to the Warden.²⁰ The Warden should then submit documentation to the TEC showing the inmate's minimum compliance with programs, medications and psychological treatment, and meeting hormone goal levels.²¹ However, the Warden will not submit the inmate's request to the TEC until the inmate has "maintained one year clear conduct for 100 and 200 series incident report sanctions," but the Warden may consider the requests on a case-by-case basis.²²

Medical Resources

Transgender inmates may receive hormone therapy after a consultation and assessment with medical staff.²³ Medical staff will contact Psychology Services to assess the mental health benefits of the treatment to the inmate.²⁴ WASPB or Health Services respond to questions regarding treatment.²⁵ If the individual's appearance changes significantly during the course of treatment, the institution will provide a new I.D. without cost to the individual.²⁶

Gender-confirming surgery is "generally considered only after one year of clear conduct and compliance with mental health, medical, and programming services at the gender affirming facility."²⁷ An individual can submit this request to the Warden after this period has passed, and the Warden will refer the matter to the TEC.²⁸ The TEC then will determine whether the individual has met all "milestones and individual goals" to be considered for surgery.²⁹ The TEC will refer the case to the BOP's Medical Director, who may "review existing records and/or interview the inmate, institution staff, and members of the TEC."³⁰ The Director then will recommend whether the individual should receive the surgery, and if so, the Medical Director will refer the individual to a gender-affirming surgeon.³¹

Mental Health Resources

Mental health resources are available to individuals who identify as transgender.³² The psychologist at the institution will give the inmate treatment options and can refer the individual to the Clinical Director and/or Chief Psychiatrist.³³ An initial interview must be scheduled within 14 days of the inmate's request.³⁴ Inmates also may receive individual psychotherapy or group treatment.³⁵

While this article is a small window into the resources available within BOP, various sources contain more detailed information regarding the following: reporting abuse;³⁶ transgender rights under federal law;³⁷ documentation, identification, and case management;³⁸ accommodations in facilities;³⁹ and other forms of relief.⁴⁰ Given their vulnerable status within our community, attorneys must be aware of and advocate for the resources available to transgender inmates designated to the BOP.

¹ FEDERAL BUREAU OF PRISONS, *Transgender Offender Manual*, at 1 (January 13, 2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf> (last visited Nov. 11, 2022) [hereinafter *Transgender Manual*].

² FEDERAL BUREAU OF PRISONS, *An Overview of the First Step Act*, <https://www.bop.gov/inmates/fsa/overview.jsp> (last visited Nov. 11, 2022).

³ FEDERAL BUREAU OF PRISONS, *First Step Act Approved Programs Guide* (January 2022), https://www.bop.gov/inmates/fsa/docs/fsa_program_guide_2201.pdf (last visited Nov. 11, 2022) [hereinafter *Programs Guide*].

⁴ *Id.*

⁵ *Transgender Manual*, *supra* note 1, at 6. Note that although some programs list they are available at all institutions, that this means only that the program "can be offered anywhere," but "[p]rograms will vary based on the needs of the sentenced population of those locations." *Programs Guide*, *supra* note 3.

⁶ *Transgender Manual*, *supra* note 1, at 3.

⁷ Ms. Epplin's email is jepplin@bop.gov.

⁸ Dr. Noble's email is axnoble@bop.gov.

⁹ *Id.* at 4.

¹⁰ *Id.* at 3-5.

¹¹ According to Ms. Epplin, facilities with a Special Populations Coordinator are as follows: FPC Alderson, FCI Aliceville, FDC Brooklyn, FPC Bryan, FMC Carswell, FCC Coleman, FCI Danbury, FCI Dublin, FCI Englewood, FCC Florence, FCI Greenville, FCC Hazelton, FCI Lexington, FCI Pekin, FCI Phoenix, FCI Tallahassee, FCC Terre Haute, FCC Victorville, and FCI Waseca.

¹² *Transgender Manual*, *supra* note 1, at 10.

¹³ *Id.*

¹⁴ This Guide is available to BOP employees through its intranet; and Ms. Epplin, provided the Guide upon request.

¹⁵ *Transgender Manual*, *supra* note 1, at 5-6.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 7-8.

¹⁸ *Id.*

¹⁹ *Id.* at 10.

²⁰ *Id.* at 6-7.

²¹ *Id.* at 7.

²² *Id.*

²³ *Id.* at 8.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 9.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ FEDERAL BUREAU OF PRISONS, *Sexual Abuse Prevention*, https://www.bop.gov/inmates/custody_and_care/sexual_abuse_prevention.jsp (last visited Nov. 11, 2022).

³⁷ 28 C.F.R. §§ 115.15, 115.41, 115.42.

³⁸ *Transgender Manual*, *supra* note 1, at 7-8, 10.

³⁹ *Id.* at 10-12; see also 28 C.F.R. §§ 115.42(f)-(g).

⁴⁰ Unless otherwise described, transgender inmates should submit all other concerns or requests through the Administrative Remedy Program. *Transgender Offender Manual* at 17; FEDERAL BUREAU OF PRISONS, *Administrative Remedy Program* (January 6, 2014), https://www.bop.gov/policy/progstat/1330_018.pdf (last visited Nov. 11, 2022).

The ZA Editors thank Rachel Allore for contributing this helpful information. Rachel is a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2022.



U.S. v. Leggette: One Step Closer to the 5th Amendment's Being "But a 'Form of Words'"

*United States v. Leggette*¹ is a recent Fourth Circuit decision further eroding *Miranda*'s protection. This article will briefly summarize the custody test for *Miranda*, analyze the Fourth Circuit's reasoning in *Leggette*, and conclude with practice tips for attorneys moving forward.

The Fifth Amendment protects against self-incrimination.² *Miranda v. Arizona* requires "proper safeguards," the now-familiar *Miranda* warnings, for "in-custody interrogation of persons suspected or accused of crime."³ Custodial interrogation includes any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁴

Custody for *Miranda* purposes includes both formal arrest and any treatment that can be considered its functional equivalent.⁵ Custody is determined by looking at the circumstances objectively⁶ and using a totality of the circumstances approach.⁷ In taking this approach, courts engage in a two-part test.⁸ First, the court asks if a reasonable person would have felt free to leave and end the interrogation.⁹ If the answer is no, then the court considers if the environment was coercive like stationhouse questioning.¹⁰ Relevant factors for determining custody include questioning length, location, temporariness, perceived power imbalance, physical restraint,¹¹ and an interviewee's release after questioning.¹² Because *Miranda* custody requires more than a person's feeling unfree to leave, factual circumstances surrounding the questioning environment regularly determine if someone is in custody.

Miranda was meant to "[e]nsure that what was proclaimed in the Constitution[']s Fifth Amendment] had not become but a 'form of words[.]'"¹²

However, over time this intent has been narrowed almost to the point of non-existence due to the many exceptions, limits, and the fact-specific inquiry required to show the safeguards are needed.¹³ The Fourth Circuit's decision in *United States v. Leggette* highlights just how fact-specific the *Miranda* analysis is and how pliant court decisions surrounding *Miranda* violations can be.

Dwayne Leggette was with Deborah Marshall in a park one hour after it closed to the public.¹⁴ Officer Matthew Rochelle¹⁵ saw a vehicle in the parking lot, called for backup, and began investigating for trespass in "the dark area [.]"¹⁶ He soon found Leggette and Marshall walking near the park's picnic area.¹⁷ They told him they were hanging out, and he informed them the park was closed.¹⁸ However, the interaction did not end there. Once backup arrived, Officer Rochelle walked with the two back to the parking lot and gathered their biographical information, while the other officer searched the picnic area.¹⁹ The other officer "soon" found a gun in a trash can.²⁰ Once Officer Rochelle received this information, he frisked Mr. Leggette.²¹ Mr. Leggette was unarmed.²² Then, Officer Rochelle began to question him about the gun.²³ At first, he denied the gun was his, but said he had just been in prison for 15 years.²⁴ Then, after being asked about the gun three times and told honesty would "go a long way", he admitted the gun was his and that he was "not supposed to have it."²⁵ The officers did not search or question Ms. Marshall.²⁶ The officers arrested Mr. Leggette.²⁷ At the station, he was *Mirandized* for the first time, agreed to speak, and confessed again.²⁸

Ultimately, the Fourth Circuit agreed with the district court's finding that Mr. Leggette was not in custody.²⁹ While the court found that a reasonable person would not have felt free to leave, meaning the first part of the custody test was met, the court did not consider the environment to be coercive like stationhouse questioning.³⁰ This is despite Mr. Leggette's being: (1) approached by a uniformed, armed officer and stopped for trespassing, an arrestable offense; (2) subjected to a *Terry* frisk; (3) held after this frisk found no weapons and his express denial of owning the gun; (4) asked multiple questions by the officer; (5) encouraged by the officer to cooperate; and (6) in a closed park late at night.³¹

In supporting this decision, the court pointed to many facts. First, there was only one officer questioning Mr. Leggette.³² Second, Officer Rochelle only asked a handful of questions, in a polite tone, that were meant to determine ownership of the discovered gun.³³ Further, the officer did not draw his firearm, did not physically restrain Leggette prior to or during the questioning, and only touched Mr. Leggette to perform the protective frisk.³⁴ The court also noted the questioning's short time period and that Ms. Marshall was by Mr. Leggette's side.³⁵

Interestingly, the court considered the park a public space, despite the park's closing to the public one hour before Mr. Leggette's interactions with the police.³⁶

The court compared this to *United States v. Gardner*, where, as here, two officers interacted with the defendant, performed a protective frisk, and asked the defendant a couple of questions before he confessed to the suspected illegal firearm possession.³⁷ In *Gardner*, the court found that the interrogation was not custodial.³⁸

Mr. Leggette differentiated his case from *Gardner* in three ways. First, he argued the questioning here was more coercive because he was asked more questions, which continued in the face of express denials rather than mere avoidance.³⁹ Additionally, the officer here encouraged honesty.⁴⁰ However, the court found this unpersuasive.⁴¹ Second, Mr. Leggette argued that, as the park was closed to the public, the opportunity for a passerby to witness the events was limited.⁴² This is critical because in custodial analysis a public place lessens the coercive atmosphere of an interrogation because of the likelihood of public witnesses.⁴³ However, the court found that even though the park was closed it was still public.⁴⁴ Finally, Mr. Leggette argued that his interrogation was more coercive because the confrontation with police began in reference to trespassing, an arrestable offense.⁴⁵ While the court conceded that being detained for an arrestable offense could lead a reasonable person to believe he is in custody, not every trespass investigation ends in arrest. Because the officer here did not express any intent to arrest Mr. Leggette this was not enough to satisfy the custodial environment test.⁴⁶

Leggette is important for practitioners to keep in mind. Here, there were many factors that could point to custodial interrogation.⁴⁷ However, the questioning brevity, Ms. Marshall's presence, and the court's considering the closed park public overcame those factors. In practice, this means that defense attorneys will need to pick apart every fact and present every argument where *Miranda* custody issues arise. Further, it is critical to remember that the court will likely not be persuaded to find a public place coercive, even when it is not open to the public and the late hour and darkness add to the environment's coercive nature. Overall, *Leggette* shines a light on how narrow the road to a successful *Miranda* challenge has become.

¹² *Miranda*, 384 U.S. at 444 (quoting *Silverthorn Lum-ber Co. v. United States*, 251 U.S. 385, 392 (1920)).

¹³ Claudia Barbieri, Comment, *Oregon v. Elstad Revisited: Urging State Court Judges to Depart from the U.S. Supreme Court's Narrowing of Miranda*, 4 U. D.C. L. REV. 63, 67 (1998) (citing Paul Marcus, *A Return to the "Bright Line Rule" of Miranda*, 35 WM. & MARY L. REV. 93, 111-12 (1993)); see, e.g., *New York v. Quarles*, 467 U.S. 649 (1984); *Oregon v. Elstad*, 470 U.S. 298, 305-09 (1985); *Berkemer*, 468 U.S. at 437-38; *Howes*, 565 U.S. at 509-10.

¹⁴ *Leggette*, 57 F.4th at 408-09.

¹⁵ Brief of Appellant at 4, *Leggette*, 57 F.4th 406 (No. 21-4175), 2021 WL 3574016.

¹⁶ *Leggette*, 57 F.4th at 408-09.

¹⁷ *Id.* at 409.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* (internal quotation marks omitted).

²⁶ See *id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 410.

³⁰ *Id.* at 411.

³¹ *Id.* at 411-13.

³² *Id.* at 411.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 411-12.

³⁶ *Id.* at 412-13.

³⁷ *Id.* at 412.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² *Id.* at 412-13.

⁴³ *Id.*

⁴⁴ *Id.* (pointing to the park's still being a public area and Leggette's not being isolated or separated from Ms. Marshall).

⁴⁵ *Id.* at 413.

⁴⁶ *Id.*

⁴⁷ These factors include: Mr. Leggette was not free to leave, this happened late at night, the setting was dark, the park was closed to the public, the officers were visibly armed and uniformed, the questioning and detainment continued after the completed *Terry* frisk and express denial of gun ownership, and the officer's encouragement. All these factors were included in Mr. Leggette's Appellate Brief. See Brief of Appellant, *supra* note 15, at 14-19.

The ZA Editors thank Meagan Watson for contributing this helpful information. Meagan is a third year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2023.



Crime of Violence Definition Tailored by Taylor

A recent U.S. Supreme Court case provides a new opportunity for resentencing under 28 U.S.C. § 2255 and holds potential for retroactive

¹ 57 F.4th 406 (4th Cir. 2023).

² U.S. CONST. amend. V.

³ 384 U.S. 436, 467 (1966).

⁴ *Id.* at 444 (emphasis added).

⁵ *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

⁶ *J.D.B. v. North Carolina*, 564 U.S. 261, 270-71 (2011).

⁷ *United States v. Parker*, 262 F.3d 415, 419 (4th Cir.

2001); see also *Berkemer*, 468 U.S. at 437-38.

⁸ *United States v. Pressley*, 990 F.3d 383, 388 (4th Cir.

2021); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

⁹ *Pressley*, 990 F.3d at 388; *Thompson*, 516 U.S. at 112.

¹⁰ *Howes v. Fields*, 565 U.S. 499, 509 (2012).

¹¹ *Berkemer*, 468 U.S. at 437-438; *Howes*, 565 U.S. at 509-10.

collateral attack of previous convictions.¹ Title 18 of the United States Code, Section 924(A) defines a “crime of violence” as a felony that “has as an element of the use, attempted use, or threatened use of physical force against the person or property of another.”² In June 2022, the Supreme Court held that *attempted* Hobbs Act robbery no longer qualifies as a crime of violence. *United States v. Taylor*, 142 S. Ct. 2015 (2022). Accordingly, attempted Hobbs Act robbery does not trigger the enhanced sentencing for using a firearm in “furtherance of a crime of violence” nor qualifies for the “stacking” of multiple § 924(c) convictions.³

In *Taylor*, the Court determined the elements of attempted Hobbs Act robbery did not require the government to prove the “use, attempted use, or threatened use of physical force,” and therefore did not qualify as a “crime of violence” under § 924(c).⁴ Based on the “crime of violence” charge, the defendant received an extra ten years on his initial sentencing from the district court.⁵ For relief, the Court vacated the defendant’s § 924(c) conviction and remanded the case for resentencing concerning his one remaining Hobbs Act conviction.⁶

Since June 2022, *Taylor* has primarily been used under 28 U.S.C. § 2255 to collaterally attack a sentence.⁷ Accordingly, the Fourth Circuit has remanded lower courts’ decisions denying resentencing under *Taylor*.⁸ Furthermore, the Fourth Circuit has also ordered lower courts to refund “any portion of the special assessment that [a defendant] paid for that conviction.”⁹ Although unpublished, the *Edwards* case provides insight on how these cases will be handled by the Fourth Circuit.

While *Taylor* is already being used to attack current sentences, *Taylor* could be used retroactively to attack predicate convictions that qualified individuals for sentence enhancements. If successful in attacking the prior conviction, a defendant may qualify for resentencing on their current sentence. Although no court has yet decided on the retroactive nature of *Taylor*, precedent suggests there may be hope. There is a possibility that *Taylor* will be deemed a “substantive change in law” and could be used to attack the “stacking” of prior convictions and therefore correct that harsher sentencing.

In an unpublished case, affirmed by the Fourth Circuit, a Western District of Virginia district court stated a “change in substantial law” is required to apply a change in law retroactively.¹⁰ In that case, a petitioner challenged his second § 924(c) conviction as defective pursuant to *Dean v. United States*, 581 U.S. 62 (2017), but “because [his] petition [did] not identify any change in substantive law relative to his conviction, let alone one that render[ed] the conduct for which he was convicted no longer criminal, as required by *In re Jones*, 226 F.3d 328, 332 (4th Cir. 2000), he [could not] use § 2241 to challenge his conviction.”¹¹ Accordingly, if *Taylor* does represent a “change in substantive law,” it may be deemed retroactive.

In *Johnson v. United States*, the Supreme Court struck down the Armed Career Criminal Act’s (ACCA) residual clause as unconstitutionally vague.¹² The Act defined a “violent felony” in part as any

crime punishable by more than a year’s imprisonment that “otherwise involve[d] conduct that present[ed] a serious potential risk of physical injury to another.”¹³ In *Welch v. United States*, the Supreme Court held that *Johnson* applied retroactively on collateral review because of its substantive nature.¹⁴ The *Welch* Court used the *Teague* standard to determine the retroactive applicability of *Johnson*.¹⁵ Under *Teague*, “new constitutional rules of criminal procedure” will not be retroactive.¹⁶ However, “[n]ew substantive rules generally apply retroactively.”¹⁷

In applying that standard, the Court held the *Johnson* decision “struck down part of a criminal statute that regulate[d] conduct and prescribe[d] punishment” and “thereby altered ‘the range of conduct or the class of persons that the law punishes.’”¹⁸ Therefore, substantive change included “decisions that narrow the scope of a criminal statute by interpreting its terms” and “constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.”¹⁹

Taylor parallels *Johnson* and could be deemed retroactive based on similar reasoning. Like in *Johnson*, the *Taylor* Court altered the definition of “crime of violence” and struck down a part of the criminal statute that “regulate[d] conduct and prescribe[d] punishment.”²⁰ It also narrowed the scope of the criminal statute by removing attempted armed robbery from the crime of violence definition. Therefore, *Taylor* arguably altered the range of conduct and the people the law punishes by ruling attempted robbery was no longer a crime of violence.

Since *Taylor* narrows § 924(c)’s scope, it could be deemed retroactive. This would allow advocates to challenge a “stacking” of multiple § 924(c) convictions, attack a current § 924(c) conviction based on attempted robbery, and argue for resentencing that reflects the current sentencing structure as demanded by *Taylor*. However, regardless of its retroactive nature, with a § 2255 motion, advocates can currently use *Taylor* to argue for resentencing of a current attempted robbery conviction.

¹ *United States v. Taylor*, 142 S. Ct. 2015 (2022).

² 18 U.S.C. § 924.

³ *Taylor*, 142 S. Ct. at 2025-26.

⁴ *Id.*

⁵ *Id.* at 2019.

⁶ *Id.* at 2025-26.

⁷ *Bullis v. United States*, No. 5:16-CV-628-FL, 2022 WL 4291332, at *2 (E.D.N.C. Sept. 16, 2022) (vacating § 924(c) conviction and ordering plenary resentencing).

⁸ *United States v. Edwards*, No. 20-6566, 2022 WL 5241270, at *1 (4th Cir. Sept. 1, 2022).

⁹ *Id.*

¹⁰ *Rodriguez v. Streeval*, No. 7:21-CV-00029, 2021 WL 1168703, at *3 (W.D. Va. Mar. 26, 2021), *aff’d*, No. 21-6533, 2021 WL 4843571 (4th Cir. Oct. 18, 2021).

¹¹ *Id.*

¹² *Johnson v. United States*, 76 U.S. 591 (2015).

¹³ *Id.* at 594.

¹⁴ *Welch v. United States*, 578 U.S. 120 (2016).

¹⁵ *Id.* at 128 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

¹⁶ *Id.* (quoting *Teague v. Lane*, 489 U.S. 288, 310 (1989)).

¹⁷ *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)).

¹⁸ *Id.* at 135.

¹⁹ *Welch*, 578 U.S. at 129 (quoting *Schriro*, 542 U.S. at 353).

²⁰ *Id.* at 128.

The ZA Editors thank Lillian House for contributing this helpful information. Lillian is a third year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2022.



What's Brewing Under Bruen?

The Second Amendment to the United States Constitution is guarded and protected in the eyes of both American Society and the Supreme Court. However, recent changes have broadened the extent to which gun ownership is safeguarded. In 2008, the Supreme Court, in *District of Columbia v. Heller*, held that an individual has a right to carry a handgun for self-defense inside the home. 554 U.S. 570, 595 (2008). After *Heller*, the circuit courts developed a two-part framework to determine when a law violated the Second Amendment.¹ The circuit courts often analyzed how close the law came to the core of the Second Amendment right and the severity of the law's burden on that right.² If the law burdened a core Second Amendment right, courts would apply strict scrutiny and consider whether the government could show that the regulation was narrowly tailored to achieve a compelling government interest.³ Otherwise, under this framework, courts could apply intermediate scrutiny.⁴ Therefore, under this framework, the government could justify its regulation by establishing that the challenged law regulated activity that fell outside the scope of the right as originally understood at the founding.⁵ However, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* changed the framework by removing this scrutiny. 142 S.Ct. 2111, 2127 (2022). In doing so, *Bruen* altered the legal landscape as we know it and opened the door for defendants to mount constitutional challenges against a host of firearm statutes.

Writing for the majority, Justice Thomas la-beled the multi-step analysis in *Heller* as having a step too many.⁶ Instead, Justice Thomas stated the government must affirmatively prove its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.⁷ The majority's new standard established that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.⁸ The government must then justify its regulation by demonstrating the regulation is consistent with the nation's historical tradition of firearm regulation.⁹ Only then may a court conclude the individual's conduct falls outside

the Second Amendment's "unqualified command."¹⁰ Thus, the two main questions under the new *Bruen* framework are: (1) what conduct is being regulated, and (2) is that conduct covered by the Second Amendment's plain text? If the conduct is covered by the Second Amendment, then the burden is on the government to justify the regulation by providing a historical analysis and justification.

The historical justification is the most complex part of the analysis. Under *Bruen*, the government's historical inquiry must show that the regulation is consistent with the historical understanding of the Second Amendment.¹¹ There are two tracks for historical analysis, distinctly similar regulations and relevantly similar regulations.¹² The proper track depends on what kind of problem the statute is meant to address. When a challenged regulation addresses a "general societal problem" that has persisted since the eighteenth century, the lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.¹³ Under this track, the government must provide regulations that are "distinctly similar" to the one being challenged.¹⁴ However, in other cases where a statute implicates unprecedented societal concerns or addresses a problem that was unimaginable at the founding, the government may use analogical reasoning.¹⁵ Under this track, the court evaluates whether the two regulations are "relevantly similar."¹⁶ These two inquiries are treated differently, each with its own standard. Furthermore, the Court still cautioned courts from upholding every modern law that remotely resembles a historical analogue because doing so "endorses outliers that our ancestors would have never accepted."¹⁷ Justice Thomas explicitly stated, "analogical reasoning under the Second Amendment is neither a regulatory straitjacket nor a regulatory blank check."¹⁸

Catching wind of what the Supreme Court did in *Bruen*, litigants began challenging criminal firearm regulations. In *United States v. Quiroz*, a District Court in Texas dismissed a charge under 18 U.S.C. § 922(n).¹⁹ Section 922(n) makes it unlawful for "any person who is under felony indictment for a crime punishable by imprisonment for a term exceeding one year . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."²⁰ The conduct in § 922(n) is the receipt of a firearm.²¹ Is receipt covered by the Second Amendment? The Second Amendment says, "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."²² Thus, the question becomes whether "keep and bear arms" covers "receipt."²³ Receipt means the action of receiving something or the fact that it was received.²⁴ However, to keep something, a person must first receive it. As noted by the District Court, "even if § 922(n) doesn't prevent possession, by preventing receipt it effectively prevents Defendant's constitutional possession."²⁵ Thus,

the *Quiroz* court concluded that § 922(n)'s constitutionality turns on whether prohibiting persons under indictment from receiving a firearm is consistent with the nation's historical tradition of firearm regulation.²⁶

Turning to the historical analysis, the District Court found § 922(n) to be unsupported and unconstitutional.²⁷ Section 922(n)'s history began in 1938, when Congress passed the Federal Firearms Act (FFA).²⁸ The FFA prohibited "individuals under indictment for, or convicted of, a crime of violence from shipping or transporting any firearms or ammunition in interstate commerce."²⁹ When conducting its own historical analysis, the District Court in *Quiroz* noted not what laws the colonies retained from their English roots, but what laws they excluded.³⁰ Specifically, even traitors unwilling to swear their allegiance to the Crown retained their weapons in colonial America.³¹ From 1607 to 1815, one historian could not find a single instance in which the jurisdiction exercised a police power to prohibit gun ownership by members of the body politic.³² By the 1920s, only six states had laws banning concealed carry by someone convicted of a crime involving a concealed weapon.³³ Zero states banned possession of long guns based on prior convictions.³⁴ Based on this analysis, the District Court dismissed *Quiroz*'s charges.³⁵

This presents the first of what hopefully will be many successful challenges to criminal firearm regulations under *Bruen*. Two important considerations can be gleaned from this Supreme Court decision. First, *Bruen*'s first step mentions only conduct. Who may keep and bear arms is relegated to step two and, if relegated to step two, the government must prove that restricting rights for a specific group adheres to this Nation's historical tradition. Second, it is imperative for an attorney relying on *Bruen* to be the better historian. Defeating the regulation relies on showing that our nation's history does not support the prohibition. This will require the attorney to first determine the appropriate historical track, distinctly similar versus relatively similar. The attorney must next conduct a lengthy and in-depth analysis of all conduct-related regulations dating back to the country's inception. Litigation under *Bruen* will be a historical dog fight. After all, "history is a pack of lies about events that never happened told by people who weren't there."³⁶

¹ *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct 2111, 2126 (2022) (citing *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)).

² *Id.* at 2126.

³ *Id.* at 2126-27 (citing *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017)).

⁴ *Id.* at 2126-27 (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012)).

⁵ *Id.* (quoting *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012)).

⁶ *Id.* at 2127.

⁷ *Id.*

⁸ *Id.* at 2129-30.

⁹ *Id.* at 2130.

¹⁰ *Id.* at 2130 (quoting *Konigsberg*, 366 U.S. at 50, n. 10 (1961)).

¹¹ *Id.* at 2131.

¹² *Id.* at 2131-32.

¹³ *Id.*

¹⁴ *Id.* at 2131.

¹⁵ *Id.* at 2132.

¹⁶ *Id.*

¹⁷ *Id.* at 2133 (quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021)).

¹⁸ *Id.* at 2133.

¹⁹ *United States v. Quiroz*, 4:22-cr-00104 DC, ECF #82, *25 (W.D. Tex. September 19, 2022).

²⁰ *Id.* at *6.

²¹ *Id.*

²² U.S. Const. amend. II.

²³ *Quiroz*, at *6.

²⁴ *Quiroz*, at *7 (quoting Oxford English Dictionary (3d ed. 2015)).

²⁵ *Quiroz*, at *7.

²⁶ *Id.*

²⁷ *Id.* at *25.

²⁸ *Id.* at *8.

²⁹ 5 Cong. Ch. 850, § 2(E), 52 Stat. 1250, 1251 (repealed).

³⁰ *Quiroz*, at *11.

³¹ *Id.* at *11-12.

³² Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 157 (2007).

³³ C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y, 695, 711 (2009).

³⁴ *Id.*

³⁵ *Quiroz*, at *25.

³⁶ George Santayana; Ashwin Sanghi, *History: The truth often lies*, Times of India Blog (March 17, 2019, 5:27 PM), <https://timesofindia.indiatimes.com/blogs/chanakyas-chant/history-the-truth-often-lies/?source=app&frmapp=yes> (last visited November 17, 2022).

The ZA Editors thank Rebecca Pierce for contributing this helpful information. Rebecca is a third-year law student at Campbell University Norman Adrian Wiggins School of Law and was an extern in the FPD office during the Fall of 2022.



First Step Act Motions for Reduced Sentence Post-Conception

In 2010, Congress passed the Fair Sentencing Act to reduce the 100-to-1 sentencing disparity that had previously existed between crack and powder cocaine offenses.¹ However, because these reforms did not apply retroactively,² people sentenced before its passage were not eligible for relief. This changed in 2018 when Congress passed the First Step Act, which authorized district courts to impose a reduced sentence "as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed."³ As a result, many of those sentenced under the old scheme became eligible to move for a reduced sentence under § 404(b) of the First Step Act.

Until recently, *United States v. Collington*⁴ had provided part of the governing framework for adjudication of § 404(b) motions in this circuit. There, the court held that a district court "abuses

its discretion when it ‘impose[s] a reduced sentence’ that exceeds the maximum established by the Fair Sentencing Act.”⁵ In other words, *Collington* required district courts to reduce the sentence for covered offenses to *at most* the revised statutory maximum, and courts retained the discretion to reduce these sentences by even more if in their judgment such a reduction was warranted.

The Supreme Court’s subsequent decision in *Concepcion v. United States*⁶ seemed to conflict with *Collington* in part. There, a defendant serving a crack-cocaine-related sentence moved for a reduced sentence under § 404(b), arguing that his prior convictions had either been vacated or were no longer considered crimes of violence that triggered the career offender sentencing enhancement.⁷ The *Concepcion* Court held that “a district court adjudicating a motion under the First Step Act may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison).”⁸ However, the court “is not required to modify a sentence for any reason.”⁹

The Fourth Circuit recently confirmed that *Concepcion* did in fact partially abrogate *Collington*. In *United States v. Reed*, the Fourth Circuit held that under *Concepcion*, district courts adjudicating § 404(b) motions are not required to reduce a sentence for *any* reason, *even if* that means leaving in place a sentence longer than the statutory maximum established by the Fair Sentencing Act.¹⁰ Thus, the court rejected *Reed*’s argument that the district court abused its discretion by retaining a sentence above that set forth in the Fair Sentencing Act.¹¹

In late March, the Fourth Circuit further elaborated on *Concepcion*’s effect on resentencing proceedings in *United States v. Troy*.¹² There, the Court held that district courts exercising their authority under the First Step Act must not recalculate the movant’s guidelines range to account for *any* changes other than those brought about by the First Step Act.¹³ In so holding, the Court abrogated another Fourth Circuit case providing the governing framework for § 404(b) adjudication, *United States v. Chambers*,¹⁴ which had held that retroactive Guidelines errors must be corrected when recalculating a defendant’s benchmark Guidelines range.¹⁵

Perhaps the most obvious effect of *Collington* being partially overruled is that it will impede the ability of people sentenced before 2010 for certain crack cocaine offenses to obtain relief under the First Step Act in this circuit. While offenders who met the Act’s eligibility requirements could previously be assured that their sentences would be reduced to at most the revised statutory maximum, the resentencing court may now decline to adjust the sentence at all. Likewise, *Troy*’s abrogation of *Chambers* means that district courts are not required to correct Guidelines errors when considering § 404(b) motions, though they may consider those errors when deciding whether to impose a reduced sentence.

One compelling criticism of these outcomes is they undercut Congress’s intent in passing the

First Step Act. As the *Collington* court observed, the goal of the Fair Sentencing Act, which was made retroactive by the First Step Act, was to eliminate racially disparate sentencing outcomes for crack and powder cocaine-related offenses.¹⁶ Giving judges the discretion to leave in place sentences that would be illegal if imposed today directly conflicts with Congress’s goal of ensuring that similar crimes receive similar punishment regardless of who commits them.

Since district courts are no longer required to reduce any sentence in the context of § 404(b) motions, defense attorneys’ ability to articulate compelling reasons why the court should exercise its discretion to reduce these sentences will be crucial. Fortunately, there are very few limitations on what a district court may consider. As the Supreme Court recently stated, “The only limitations on a court’s discretion to consider any relevant materials . . . in modifying [a] sentence are those set forth by Congress in a statute or by the Constitution.”¹⁷

As a result, attorneys arguing for reduced sentences under § 404(b) should thoroughly explain positive intervening changes of fact, such as the movant’s good disciplinary record, lowered risk of recidivism, educational and professional achievements, and any other relevant efforts at rehabilitation while incarcerated. Additionally, attorneys should consider pointing to intervening changes of law—even if they are not directly applicable to § 404 motions—as persuasive authorities.¹⁸ Such changes, including changes in sentencing Guidelines, may prove persuasive to judges insofar as they reflect changes in “society’s judgment of the seriousness of [the movant’s] offense.”¹⁹ By highlighting these changes, attorneys representing clients moving for First Step Act relief may be able to overcome the barrier to securing a reduced sentence that the Fourth Circuit’s interpretation of *Concepcion* has created.

¹ Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

² In 2012, the Supreme Court held that the more lenient crack-cocaine penalties applied to offenders whose crimes were committed before the effective date of the First Step Act, but whose sentences were imposed after that date. *Dorsey v. United States*, 567 U.S. 260, 283 (2012).

³ First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222.

⁴ 995 F.3d 347 (4th Cir. 2021).

⁵ *Id.* at 356 (quoting § 404(b), 132 Stat. at 5222).

⁶ 142 S. Ct. 2389 (2022).

⁷ *Id.* at 2397.

⁸ *Id.* at 2396.

⁹ *Id.* at 2402. *Concepcion* did, however, leave in place *Collington*’s requirement that the district court’s decision be both substantively and procedurally reasonable.

¹⁰ 58 F.4th 816, 822 (4th Cir. 2023).

¹¹ *Id.*

¹² 64 F.4th 177 (4th Cir. Mar. 2023).

¹³ *Id.*

¹⁴ 956 F.3d 667 (4th Cir. 2020).

¹⁵ *Id.* at 668.

¹⁶ *Collington*, 995 F.3d at 355.

¹⁷ *Concepcion*, 142 S. Ct. at 2400.

¹⁸ “Where district courts must calculate new Guidelines ranges as part of resentencing proceedings, courts have also considered unrelated Guidelines changes in their discretion.” *Id.*

¹⁹ *Id.* (quoting *United States v. Gilmore*, 599 F.3d 160, 166-67 (2d Cir. 2010)).

The ZA Editors thank Emily Strombom for contributing this helpful information. Emily graduated from UNC School of Law in 2023 and was an extern in the FPD office during the Spring of her 3L year.



Sentences Based on a Clerical Error Can—And Should—Be Modified Any Time After Sentencing

Imagine that your client was sentenced to twenty years in prison after pleading guilty to conspiracy to sell and deliver cocaine. Years later, you realize the client’s sentence was based on a recording error in the client’s presentence report, which inaccurately states the client pled guilty to conspiracy to traffic cocaine by transportation. But for the error, the client’s sentence would have been shorter. Can the client successfully move the court to correct the error, and thus, reduce the sentence? Yes, if your client was sentenced within the Fourth Circuit.

In *United States v. Vanderhorst*,¹ the Fourth Circuit held that Federal Rule of Criminal Procedure 36 (“Rule 36”), which states, “the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission,”² “may serve as an appropriate vehicle for a defendant to obtain resentencing when a clerical error likely resulted in the imposition of a longer sentence than would have been imposed absent the error.”³

But other circuits disagree. In fact, some have held the direct opposite—Rule 36 is *not* a vehicle for a court to modify a sentence.⁴ Judge Diaz, who concurred in the judgment in *Vanderhorst* but dissented in part, persuasively explained why these sister circuits may be correct. Perhaps he and the other circuits are right, but the Fourth Circuit’s rule is arguably the better one: it allows a court to modify a defendant’s sentence based on a clerical error at *any time*, rather than solely within the strict fourteen-day period after sentencing that the other circuits require.

First, we should examine some background on this circuit split. Federal courts are prohibited by statute from modifying someone’s “term of imprisonment once it has been imposed,” barring some exceptions.⁵ Under one of these exceptions, “the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.”⁶ Rule 35 states, “[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear

error.”⁷ And as previously mentioned, Rule 36 allows a court to correct a clerical error in a judgment, order, or other part of the record at any time.⁸

The *Vanderhorst* court relied on *United States v. Powell*,⁹ an unpublished decision, in holding that Rule 36 allows a court to modify a defendant’s sentence based on a clerical error.¹⁰ In *Powell*, the Fourth Circuit explained, “when an error is purely a ‘clerical error in a judgment, order, or other part of the record,’ the policy of finality [in judicial proceedings] is trumped and a court is authorized to correct the error *at any time*.”¹¹ The *Vanderhorst* court agreed with *Powell* and added that “[f]orcing a defendant . . . to spend years longer in prison solely due to a data entry error for which he had no responsibility serves no legal, judicial, or public interest, is manifestly unjust, and is why Rule 36 exists.”¹²

Judge Diaz disagreed that Rule 36 allows defendants to obtain resentencing for several reasons. His primary argument focused on the text of 18 U.S.C. § 3582(c), which he explained allows courts to modify a sentence in three specific instances, none of which involve Rule 36.¹³ He emphasized that the statute’s mention of Rule 35, and not Rule 36, “is even more telling given that § 3582 expressly cites another Federal Rule of Criminal Procedure.”¹⁴ Judge Diaz also accounted for the legislative intent behind § 3582 when he wrote that the majority “subvert[ed] the sentencing scheme created by Congress” and “render[ed] meaningless Rule 35 and the time limits within it.”¹⁵

To back his argument, Judge Diaz cited other circuit courts that interpret the statute the same way.¹⁶ The Tenth Circuit has held Rule 36 “does not fall within § 3582’s exclusive statutory ambit of authority to ‘modify a term of imprisonment.’”¹⁷ The Fifth Circuit has held Rule 36 “does not encompass sentence modifications in the sense contemplated by § 3582.”¹⁸

Judge Diaz’s second main argument was that, in addition to relying on an unpublished decision in *Powell*, the majority failed to follow Fourth Circuit precedent.¹⁹ In *United States v. Goodwyn*,²⁰ the defendant petitioned the district court to reduce his sentence based on the U.S. Sentencing Commission’s lowering the sentencing range for his offense conduct, and the district court granted his motion in part, reducing his sentence from 264 months’ imprisonment to 240 months.²¹ Eight months later, Goodwyn moved the court to lower his sentence again so that he could care for his family, and the district court granted the motion, further reducing his sentence to 216 months’ imprisonment.²² While the Fourth Circuit held the lower court “acted within its authority” in granting the first motion, the court held it had no such authority to grant the second motion.²³ The Fourth Circuit explained that “the clear intent of § 3582 is to *constrain* postjudgment sentence modifications,” and “[t]o hold otherwise would subvert the statute’s overriding purpose.”²⁴

Judge Diaz interpreted *Goodwyn* to control the Fourth Circuit's interpretation of § 3582.²⁵ "[T]hat is, a district court may not modify a sentence except when specifically authorized by § 3582. And because § 3582 [does not] mention Rule 36, a district court [cannot] rely on that rule to modify a sentence."²⁶

But the *Vanderhorst* court disagreed that *Goodwyn* controlled the case for several reasons.²⁷ The majority explained *Goodwyn* "dealt with a materially distinguishable legal issue—whether and in what circumstances a defendant can obtain a second sentence reduction on grounds not set forth in any statute or rule."²⁸ Second, the majority pointed out that *Goodwyn* did not mention Rule 36, "let alone state whether or in what circumstances a defendant can rely on Rule 36 to obtain resentencing."²⁹ And third, *Goodwyn* did not "purport to provide an exhaustive list of circumstances in which a defendant can obtain resentencing."³⁰

While Judge Diaz's opinion might be grounded in sound legal arguments compared to the majority, *Vanderhorst*'s rule is much more desirable from a public policy standpoint. Justice is not served when an individual's term of incarceration is based on a clerical error that they did not cause. If justice is to be served, courts should be able to modify such sentences any time beyond the arbitrary fourteen-day period after sentencing. The Fourth Circuit got it right, and lawyers can avoid this preventable situation by checking the client's presentence report against the specific offense to which the client pled guilty as soon as the presentence report draft and the final is released. Although this is may be cumbersome to do in each case, taking a few minutes to ensure accuracy can prevent the client from serving years longer than necessary in prison.

¹ 927 F.3d 824 (4th Cir. 2019).

² Fed. R. Crim. P. 36.

³ *Vanderhorst*, 927 F.3d at 827.

⁴ See, e.g., *United States v. Blackwell*, 81 F.3d 945, 948 n.3 (10th Cir. 1996).

⁵ 18 U.S.C. § 3582(c).

⁶ § 3582(c)(1)(B).

⁷ Fed. R. Crim. P. 35(a).

⁸ Fed. R. Crim. P. 36.

⁹ 266 F. App'x 263 (4th Cir. 2008).

¹⁰ *Vanderhorst*, 927 F.3d at 827.

¹¹ *Powell*, 266 F. App'x at 266 (emphasis in original) (quoting Fed. R. Crim. P. 36).

¹² *Vanderhorst*, 927 F.3d at 827.

¹³ *Id.* at 829 (Diaz, J., dissenting in part and concurring in the judgment).

¹⁴ *Id.* at 830.

¹⁵ *Id.*

¹⁶ *Id.* at 829.

¹⁷ *Blackwell*, 81 F.3d at 948 n.3.

¹⁸ *United States v. Lopez*, 26 F.3d 512, 515 n.5 (5th Cir. 1994).

¹⁹ *Vanderhorst*, 927 F.3d at 829-30.

²⁰ 596 F.3d 233 (4th Cir. 2010).

²¹ *Id.* at 234.

²² *Id.* at 234-35.

²³ *Id.* at 235.

²⁴ *Id.* at 235-36.

²⁵ *Vanderhorst*, 927 F.3d at 830.

²⁶ *Id.*

²⁷ *Id.* at 827 n.1 (majority).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

The ZA Editors thank David Katahira for contributing this helpful information. David is a third year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2023.



The Risk of Seeing is Believing: Rising Concern of Computer-Generated Animations

The prosecution's increased use of Computer-Generated Animations ("CGAs") in jury trials presents a growing cause for concern. CGAs are highly effective at persuading juries of both fact and fiction. When the prosecution presents an animation in trial, the defense has limited alternatives to counteract the strong psychological impact on the jury other than presenting an animation of its own. Meanwhile, the cost of CGAs remains exorbitantly high. Combatting the prosecution's use of CGAs may drain department resources and be fiscally impracticable. Although animations have been primarily utilized at the state-level, federal defenders should be wary of what may appear just around the corner.

CGAs are persuasive. While there are several factors that contribute to effective advocacy, supplementing oral presentation with visual exhibits offers a nearly universal way to appeal to a diverse group of jurors. This theory has strong scientific support. For instance, the Weiss-McGrath study compared information retained by juries in both oral and visual formats to analyze the impact of visual demonstrative evidence.¹ After 72 hours, jurors retained 10% of oral information and 65% of a combination of oral and visual information.² Jurors were also more likely to find lawyers' arguments more compelling and credible when coupled with visual exhibits.³

The Weiss-McGrath study only evaluated still frame images.⁴ If a picture is worth a thousand words, then an animation is worth "a thousand words, sings a thousand songs, and paints with a thousand colors all at once."⁵ While neither a still-frame picture nor an animation is entirely objective, CGAs involve significantly more human inputs than photographs. This includes creation of the computer program, human entry of data, scriptwriting, storyboarding, human review of the animation, and human editing of the animation.⁶ At each of these junctures, an individual can color and alter the CGA through their biases and inaccuracies. Whether done knowingly or unknowingly, "if garbage goes into the production, garbage will come out."⁷

The problem is juries are often unable to recognize the difference between manipulated and repre-

sentative CGAs. In theory, animations are supposed to provide a graphic representation of an expert witness's facts or opinions. However, in one study, when mock jurors were shown an animation that conflicted with an expert's oral testimony, jurors largely disregarded the oral testimony and relied on the visual evidence to make their determination of guilt or innocence.⁸ This danger may be significantly enhanced when only one side presents an animation. A study conducted in 1996 found that 15 out of a possible 858 cases went to trial when only one side presented an animation.⁹ In all 15 cases, the jury found for the side using the CGA.¹⁰

Furthermore, CGAs are expensive. In *Commonwealth v. Serge*, the prosecution spent between \$10,000-\$20,000 for a 15 second animation, while the indigent defendant in the case was afforded \$10,000 for his entire defense.¹¹ In general, parties can "expect to spend at least \$15,000 on a high-quality forensic animation video" for trial.¹² This cost can increase or decrease depending on the project's complexity or specific features the party needs. Although adding details to the animation will be more expensive, studies of mock jurors demonstrate that visual testimony containing vivid and colorful details is more likely to be remembered and accepted as true.¹³ Therefore, the tradeoff is likely justified. As this currently remains an untouched issue at the federal level, it is unclear whether, and to what extent, defense counsel can obtain funding through the Criminal Justice Act to hire its own CGA expert or create its own animation.

Defenders can reconcile the prosecution's use of CGAs against defendants in two different ways. Primarily, defenders can advocate for CGAs to meet the Daubert standard under Federal Rules of Evidence 702. Because demonstrative evidence is supposed to be purely illustrative, it has a significantly lower threshold for being admitted into evidence than other scientific testimony. In theory, CGAs should add no probative value to the factual record. Thus, courts classify CGAs as demonstrative evidence. However, studies prove that jurors assign independent weight to animations.¹⁴ When oral and visual testimony contradict one another, juries tend to believe what they see rather than hear. Due to the high likelihood of animations holding independent weight, defense counsel should argue that CGAs are substantive pieces of evidence. And because these substantive pieces of evidence are offered through expert testimony, defense counsel can advocate for exclusion of the CGA via a Daubert hearing or Rule 702. Unfortunately, if the judge is left unpersuaded by this argument, there is little defense counsel can do to remedy the situation. Defense counsel may request the judge to provide a limiting instruction. For instance, the judge could instruct the jury to use the animation solely for demonstrative purposes rather than as substantive evidence. Yet, in the words of Judge Learned Hand, expecting juries to distinguish evidence for one purpose and not for another is a "mental gymnastic which is beyond, not only their powers, but anybody's else."¹⁵

Furthermore, defenders can rely on Rule 403. If sufficient funding is unavailable to the de-

fense, the "wisest course" may be to exclude the prosecution's animation "to level the playing field."¹⁶ While this is hopeful thinking, courts are largely split on this issue. Fifteen federal judges were asked in a survey "whether a disparity in resources should be considered when deciding the admissibility or use of computer-generated presentations."¹⁷ Seven judges responded that they would take economic disparities into account, while eight judges indicated they would not.¹⁸ Until higher level courts decree how to analyze animations under Rule 403, defenders should continue arguing that disparity in resources poses the risk of creating an unfair jury trial.

¹ Trey Cox, *The Weiss-McGrath Study*, The Jury Rules (2012), <http://www.thejuryrules.com/2012/12/21/the-weiss-mcgrath-study/> (last visited Apr. 12, 2023).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J. L. & TECH. 161, 190 (2000).

⁶ Marc A. Ellenbogen, *Lights, Camera, Action: Computer-Animated Evidence Gets its Day in Court*, 34 B.C.L. REV. 1087, 1099-1100 (1993).

⁷ *Commonwealth v. Serge*, 896 A.2d 1170, 1189 (Pa. 2006) (Castille, J., concurring).

⁸ See Saul M. Kassin & Meghan A. Dunn, *Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects*, 21 LAW & HUM. BEHAV. 269, 277 (1997) (conducting empirical research to analyze the impact of factual and fictional animations have on jury behavior).

⁹ Ajit Narayanan & Sharon Hibbin, *Can animations be safely used in court?*, 9 A.I. & L. 271 (2001).

¹⁰ *Id.*

¹¹ *Serge*, 896 A.2d at 1189 (2006).

¹² *The Cost To Make A Forensic Animation Video*, Austin Visuals (2007), <https://austinvisuals.com/the-cost-to-make-a-forensic-animation-video/> (last visited Apr. 9, 2023).

¹³ Elizabeth Loftus, *Trivial Persuasion in the Courtroom: The Power of (a Few) Minor Details*, 56 J. PERSONALITY & SOC. PSYCH. 669, 669-670 (1989).

¹⁴ See generally Saul M. Kassin & Meghan A. Dunn, *Computer-Animated Displays and the Jury: Facilitative and Prejudicial Effects*, 21 LAW & HUM. BEHAV. 269 (1997) (noting that juries made decisions based on the animations despite being told to only use it as demonstrative evidence).

¹⁵ David Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 411 (Mar. 28, 2013).

¹⁶ *Serge*, 896 A.2d at 1190 (Castille, J. concurring).

¹⁷ Victor G. Savikas & David L. Silverman, *Making the Poverty Objection: Parties Without Fancy Exhibits Could Claim Unfair Prejudice, But Not All Judges Would Agree*, NAT'L L.J., July 26, 1999, at C1.

¹⁸ *Id.*

The ZA Editors thank Dev Madeka for contributing this helpful information. Dev is a third-year law student at Duke School of Law and was an extern in the FPD office during the Spring of 2023.



Cyberstalking and the First Amendment: Narrowing the Scope

Under the federal cyberstalking statute, speech can be punished for its content if expressed with the requisite intent and if a certain result follows.¹ Under 18 U.S.C. § 2261A(2), the Government must prove that the defendant (1) with the intent to harass or intimidate (2) used an electronic communication system of interstate commerce (3) to engage in a course of conduct that (4) placed a person in reasonable fear of death or serious bodily injury or (5) caused, attempted to cause, or would be reasonably expected to cause substantial emotional distress to that person. For cyberstalking charges to comport with the First Amendment, the speech alleged to constitute part of the course of conduct must fall into a class of unprotected speech.²

Until 2013, the cyberstalking provision of § 2261A covered only courses of conduct that caused emotional distress or placed a person in reasonable fear of death or bodily injury.³ In 2013, the statute was broadened to include intimidation as well as harassment, and situations where conduct caused, attempted to cause, or would be “reasonably expected to cause” substantial emotional distress.⁴ This change was met with renewed attempts by defendants to challenge the statute as overbroad.⁵

The Fourth Circuit has not ruled on the constitutionality of the changes to the cyberstalking statute, but a handful of cases are instructive as to how these charges are generally handled in the Fourth. One instructive case challenged the interstate stalking portion of § 2261A (2006) as vague.⁶ In *Shrader*, the appellant argued the statute’s failure to define the terms “harass” and “intimidate” did not put defendants on notice as to what conduct it prohibited.⁷ Further, the appellant argued the statute was void for vagueness because it failed to specify whether all acts in the course of conduct had to be committed with the specific intent of instilling fear.⁸ The court ruled “harass” and “intimidate” did not need to be specifically defined, as their common sense reading adequately defined the prohibited conduct.⁹ Additionally, the court found that the statute’s specific intent requirement modified the “cumulative course of conduct as a whole,” as the government was required to show the defendant’s conduct evidenced a “continuity of purpose.”¹⁰

Other Fourth Circuit cases discussing cyberstalking are unpublished and not binding on any court, however their rulings could still be useful in rounding out an argument against a cyberstalking charge. One unpublished case, *Bartley*, ruled a defendant’s conduct toward third parties could constitute harassment of the alleged victim when the defendant “specifically intended for such words, conduct, or actions to annoy, alarm, or cause substantial emotional distress to [the victim].”¹¹ Another case, *Davis*, ruled explicit threats of violence sent directly to the alleged victim via the internet would be reasonably expected to cause substantial emotional distress, and therefore could constitute a course of conduct of cyberstalking.¹²

The Fourth Circuit has not heard any cases challenging the 2013 cyberstalking statute as overbroad. Statutes can be challenged under the “overbreadth doctrine” by a showing that the law punishes a “substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep.”¹³ Looking to other circuits for guidance is useful in finding arguments for narrowing the scope of the law.

United States v. Yung, a recent Third Circuit decision tracking the language of the 2013 cyberstalking statute, ruled § 2261A(2) as a whole was not overbroad (and was thus constitutional) so long as it was narrowly construed.¹⁴ The court ruled the act element covered both speech and conduct and thus did not do enough on its own to narrow the statute.¹⁵ Additionally, the court determined the result element, taken alone, did little to “confine the law to unprotected speech” in part because it did not require the resulting emotional distress be objectively reasonable.¹⁶ It was the intent element, narrowly construed, that saved the statute, according to the Third Circuit.¹⁷

The intent element of the cyberstalking statute reads in part that the defendant must act with the intent to harass or intimidate.¹⁸ The Third Circuit determined reading the intent element broadly allowed the statute to reach constitutionally protected speech that was “nonviolent” and “nonthreatening.”¹⁹ The court looked to the definitions of “harass” and “intimidate” and determined the words covered both unprotected and punishable speech as well as speech that “annoy[ed],” “vex[ed],” or “inspire[d] with fear.”²⁰ Though the court recognized general principles of statutory interpretation would support the broad reading, it determined the narrow reading was not precluded.²¹

The Third Circuit narrowed both the intent and the result portions of the statute, effectively ruling certain speech would necessarily fall outside of its scope.²² Ultimately, the court ruled conspiracy to commit Hobbs Act robbery¹⁹ and conspiracy to violate RICO²⁰ are *not* crimes of violence.

One recent battle over the elements clause concerns whether *attempted* Hobbs Act robbery constitutes a crime of violence. In *United States v. Taylor*, the Fourth Circuit concluded that it is not.²¹ Attempted Hobbs Act robbery has two elements: “intent to commit Hobbs Act robbery” and “a substantial step toward the completion of Hobbs Act robbery that strongly corroborates the intent to commit the offense.”²² But “unlike substantive Hobbs Act robbery, attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force” because “[t]he substantial step need not be violent.”²³ It explained that “merely *attempt[ing]* to *threaten* to use physical force” does not meet the definition of a crime of violence.²⁴ The court noted, however, that three different courts of appeals had held the opposite.²⁵ The Supreme Court granted certiorari in *Taylor* but has not issued a decision as of this writing.²⁶

that to “intimidate,” a defendant must “put the victim in fear of death or bodily injury.”²³ It also limited “harass” to “criminal harassment” because it constituted “true threats or speech that is integral to proscribable criminal conduct.”²⁴

Litigators in the Fourth Circuit can look to *Yung* for arguments against cyberstalking charges predicated on constitutionally protected speech. As the Fourth Circuit has not defined the terms “harass” and “intimidate” in a way that limits their meaning, it is possible to challenge indictments that cover language not intended to “put the victim in fear of death or bodily injury” and speech that is not a true threat or integral to other criminal conduct.²⁵

¹ 18 U.S.C. § 2261A(2).

² See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

³ 18 U.S.C. § 2261A(2) (2006).

⁴ *United States v. Yung*, 37 F. 4th 70, 76 (3d Cir. 2022) (citing 18 U.S.C. § 2261A(2) (2006) and 18 U.S.C. § 2261A(2) (2013)).

⁵ *Id.* at 76.

⁶ See *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012).

⁷ *Id.* at 310.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (internal quotation marks omitted).

¹¹ *United States v. Bartley*, 711 F. App'x 127, 129 (4th Cir. 2017) (citing *United States v. Osinger*, 753 F.3d 939, 941 (9th Cir. 2014)) (internal quotation marks omitted).

¹² *United States v. Davis*, 801 F. App'x 80, 87-88 (4th Cir. 2020).

¹³ *Hicks*, 539 U.S. at 118-19 (citation and internal quotation marks omitted).

¹⁴ *United States v. Yung*, 37 F. 4th 70, 77 (3d Cir. 2022).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 18 U.S.C. § 2261A(2).

¹⁹ *Yung*, 37 F. 4th at 77-78.

²⁰ *Id.*

²¹ *Id.* at 80.

²² *Id.* at 81.

²³ *Id.* at 80.

²⁴ *Id.* (citing *United States v. Ackell*, 907 F.3d 67, 76 (1st Cir. 2018)) (internal quotation marks omitted).

²⁵ *Id.*

The ZA Editors thank Sawyer Davis for contributing this helpful information. Sawyer is a third year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2022.



Policing the Cops: North Carolina's Civil Forfeiture after McClellan

Civil asset forfeiture enters the wider cultural conversation every few years when an especially egregious seizure is committed against an especially sympathetic individual. But, while the momentum of these stories has led to some strides in recent years it is still quite common for state and federal agents to take property from their suspects. Unlike most states, though, North Carolina requires a crim-

inal conviction and proof of guilt before police can seize property.¹ The state also funnels all profits or proceeds from asset forfeiture to its public schools.² Overall, North Carolina's forfeiture laws are some of the most stringent in the country.³

Unfortunately, federal rules undermine North Carolina's laws. The principle of “equitable sharing” allows distribution of up to eighty percent of federally seized property to state law enforcement.⁴ Generally, suspicion of guilt is enough to allow civil property seizure at the federal level.⁵ This creates a perverse incentive for state agencies to involve the federal government in their cases to gain access to mere suspects' property. From 2000 to 2019, North Carolina proceeds from equitable sharing in civil asset forfeiture totaled \$293,770,162.⁶

A major contributor to civil forfeiture proceeds is supposed “drug money.” Under federal law, federal agents can civilly seize property if the property either “facilitated the transportation, sale, receipt, possession, or concealment of a controlled substance, or was intended to do so, or constitutes proceeds of drug-trafficking activities.”⁷ Pursuing either of those theories, the government bears the burden to show a “substantial connection between the property and the offense.”⁸

In *United States v. McClellan*, the Fourth Circuit whittled down law enforcement's civil forfeiture power by strengthening the “substantial connection” standard. Further, it left this determination to juries even when the defendant's acquisition story is inconsistent and traces of drugs are found on the acquired cash.⁹ State police found an empty liquor bottle, a blunt, two medical marijuana ID cards, and nearly \$70,000 in Mr. McClellan's vehicle following a car accident.¹⁰ Although the charges were related to the liquor in the vehicle and Mr. McClellan's alleged intoxication, the police questioned both him and his girlfriend about the money.¹¹ Mr. McClellan and his girlfriend claimed the money was profit from the girlfriend's business, but this explanation was inconsistent with the girlfriend's tax returns.¹² The state police brought in the Department of Homeland Security (DHS), thus triggering equitable sharing. As part of the investigation, the DHS used a narcotics detection ion scanner, finding trace amounts of cocaine on the bills.¹³ Mr. McClellan also had an extensive criminal history, including several drug trafficking convictions.¹⁴ The government moved for summary judgment before the District Court of South Carolina, arguing there was no dispute of material fact that the money was substantially connected to drugs.¹⁵ The District Court granted the government's motion and approved the seizure.¹⁶

On appeal, the Fourth Circuit reversed.¹⁷ In doing so, the appellate court upheld a strong presumption of innocence when the government attempts to seize assets in apparent connection with an alleged drug crime.¹⁸ The court easily disposed of the prior criminal history claim for clearly violating the bar on character evidence in Fed-

eral Rule of Evidence 404(b)(1).¹⁹ The Fourth Circuit also determined the ion scans were inconclusive because, according to multiple studies, cocaine can be found on most American paper currency.²⁰ The court further explained that the government did no work to demonstrate how the scans could differentiate typical trace amounts from an amount that would implicate Mr. McClellan.²¹ Additionally, the mere existence of medical marijuana ID cards was not enough to remove any doubt that Mr. McClellan was drug trafficking.²² Most notably, the court concluded that a contradictory story regarding the source of the money should not result in an automatic default to the government's version of events.²³ Finally, the Fourth Circuit stated even if the government could prove the claimant's story was false, it would not be enough for a court to grant summary judgment.²⁴ Put simply, "[n]ot using a bank does not necessarily make one a criminal."²⁵

Even in North Carolina, where civil asset forfeiture is severely limited at the state level, the *McClellan* decision could have major consequences. Equitable sharing has largely undermined legislative efforts to curtail the perverse incentives inherent to a system where police get to keep the money they take. The Fourth Circuit's holding erects a barrier to police recovery by discouraging courts from granting motions for summary judgment when there is tenuous evidence of any connection between drugs and money. In resource-balancing, the Government will have to decide in similar cases whether trial is worth the time and expense, especially given that up to eighty percent of these funds are potentially returned to the state police.

¹ See, e.g., N.C. Gen. Stat. § 90-112(a) (2022) (authorizing forfeiture only when in connection with drug conviction); N.C. Gen. Stat. § 90-95.1(b) (2022) (authorizing forfeiture only for those convicted of engaging in a "continuing criminal enterprise").

² N.C. Gen. Stat. § 90-112(d) (2022).

³ Lisa Knepper et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 126 (3d ed. 2020), <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf> (last visited Nov. 9, 2022).

⁴ *Federal Equitable Sharing*, Institute for Justice, <https://ij.org/report/policing-for-profit-2/federal-equitable-sharing/> (last visited Nov. 9, 2022).

⁵ Dick M. Carpenter et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 8 (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> (last visited Nov. 9, 2022). See also Knepper et al., *supra* note 4, at 9.

⁶ Knepper et al., *supra* note 4, at 126.

⁷ *United States v. McClellan*, 44 F.4th 200, 205 (4th Cir. 2022) (citing 21 U.S.C. § 881(a)(6)).

⁸ 18 U.S.C. § 983(c)(3).

⁹ *McClellan*, 44 F.4th at 203.

¹⁰ *Id.* at 203-04.

¹¹ *Id.* at 204.

¹² *Id.* at 204-05.

¹³ *Id.* at 204.

¹⁴ *Id.*

¹⁵ *Id.* at 205.

¹⁶ *Id.*

¹⁷ *Id.* at 212.

¹⁸ *Id.*

¹⁹ *Id.* at 206.

²⁰ *Id.* at 207 (citing *Jones v. U.S. Drug Enf't Agency*, 819 F. Supp. 698, 720 (M.D. Tenn. 1993)).

²¹ *Id.*

²² *Id.* at 208.

²³ *Id.* at 208-09.

²⁴ *Id.* at 210.

²⁵ *Id.* at 211.

The ZA Editors thank Sasha Kahn for contributing this helpful information. Sasha is a third-year law student at Duke University School of Law and was an extern in the FPD office during the Fall of 2022.



LEGAL UPDATES

4th Circuit Update

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

U.S. Supreme Court Update

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



LOCAL NEWS

EDNC News

We extend our congratulations to the Honorable Albert Diaz, who on July 9, 2023 became Chief Judge of the United States Court of Appeals for the Fourth Circuit.

Panel News

We are pleased to welcome the following new panel attorneys, in Raleigh: Ania DeJoy, Brad Polk, and Jackie Willingham; in Greenville: Tayloe Hill; in Manteo: Richard Colgan; and in Wilmington: Monique Kreisman.

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

Laura_Wasco@fd.org or

Vidalia_Patterson@fd.org

FPD Office News

We are saddened by the news of Tom McNamara's passing on July 23, 2023. Tom served as the Federal Public Defender in the EDNC for 17 years. He retired in the spring of 2017 and previously served in the district as United States Attorney. Tom will be remembered for his leadership, compassion, and commitment to indigent defense. The editors are grateful for his many contributions to our office and practice.

