

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Fall 2017

Message from the ZA Editors

We often write about change in our newsletter, whether in statutes, case law, rules, or procedures. After 16 years, our office is in the midst of its most significant change in many years - a new Federal Public Defender. We are delighted that our current First Assistant, G. Alan DuBois, has been named as the Federal Public Defender for the Eastern District of North Carolina. We look forward to working under Alan's leadership and continuing to provide our panel with practical tips through our newsletter.

In this edition, you will find articles regarding the federal implications of North Carolina's failure to raise the age for adult convictions, the latest *Johnson* update, a case note on this year's U.S. Supreme Court decision in *Maslenjak v. United States*, and the latest amendments to local and federal rules as well as proposed changes to the U.S. Sentencing Guidelines. This edition also includes our regularly featured case update links and local news.

As always, we hope that you will find our newsletter informative and helpful to your practice. We look forward to seeing you all at our upcoming seminar this Thursday and Friday at the Holiday Inn, Wrightsville Beach.

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



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PRACTICE TIPS

The Only Career You Can Earn at 16-Years Old:

North Carolina's Failure to Raise the Age and the Armed Career Criminal Act

In 1919, the Juvenile Court Statute was passed, providing North Carolina juvenile courts with jurisdiction over children under the age of 16 years old, as opposed to children under the age of 18 years old.¹ North Carolina has been in the minority on this issue for decades: in 1946, North Carolina was one of only four states who refused to prosecute children older than 16 years old in their juvenile courts.² On April 10, 2017, Governor Cuomo signed “raise the age” into law in New York,³ at that time leaving North Carolina as the only state in the nation that then prosecuted all 16 and 17-year olds as adults, regardless of the severity of the crime.⁴ Until recently, North Carolina guaranteed that all 16 and 17-year olds will be prosecuted in adult court by denying them the ability to appeal for return to the juvenile system.⁵

In 2015, Chief Justice Mark Martin convened the North Carolina Commission on the Administration of Law and Justice (“NCCAL”) to discuss, among other things, juvenile reinvestment.⁶ Ultimately, the NCCAL determined that raising the age will make North Carolina safer; will yield economic benefit to the state and its citizens; has been successfully implemented in other states; strengthens families; is supported by scientific research; is consistent with Supreme Court decisions recognizing juvenile’s lesser culpability; and would remove a competitive disadvantage that North Carolina places on its citizens.⁷ The NCCAL’s recommendation to raise the age received momentous law enforcement, bi-partisan, and public support.⁸ In response to the overwhelming support, North Carolina included the Juvenile Justice Reinvestment Act in its 2017 state budget.⁹ The bill provides juvenile courts with jurisdiction over crimes committed by a person when they were under the age of 18.¹⁰ However, until the bill becomes effective on December 1, 2019,¹¹ tens of thousands of 16 and 17-year olds will continue to be convicted in North Carolina’s adult courts.¹²

Typically, the phrase “competitive disadvantage” is used to describe the detrimental impact a person’s criminal history has on their ability to obtain employment, higher education, and housing.¹³ However, North Carolina’s delay in raising the age has placed its youth at a disadvantage during future criminal proceedings. Specifically, it has disproportionately subjected its residents to harsh mandatory mini-

mum sentencing guidelines such as the Armed Career Criminal Act (“ACCA”). Under the ACCA, any person who has three predicate convictions and violates 18 U.S.C. § 922 (g) - The Gun Control Act - shall be imprisoned not less than fifteen years.¹⁴ Predicate convictions are those for a “violent felony,” “serious drug offense,” or both, which were committed on occasions different from one another.¹⁵ The ACCA defines a “violent felony” as:

“any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

- (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives. . . .”¹⁶

On its face, the ACCA applies a more stringent test for determining when an act of juvenile delinquency, as opposed to an adult conviction, may qualify as a violent felony.¹⁷ For example, where an adult conviction for North Carolina Breaking or Entering in violation of N.C.G.S. § 14-54 counts as a predicate offense, an act of juvenile delinquency in violation of § 14-54 would only count as a predicate offense if the juvenile carried a firearm, knife, or destructive device during the offense.¹⁸ However, because North Carolina prosecutes all 16 and 17-year olds as adults (at least until 2019), these teenagers are not saved by the more stringent test imposed for acts of juvenile delinquency. The end result is that North Carolina’s youth disproportionately earns ACCA predicates because their crimes were committed in the last state to indiscriminately prosecute all 16 and 17-year olds as adults.

The problem is significant: juveniles account for as much as 50% of arrests for arson and 37% of arrests for burglary.¹⁹ Simply put, some kids break into houses, some kids start fires, and most of them age out of that behavior. It defies reason that a 16-year old can earn the label of “career offender” for engaging in behavior they will likely outgrow. It is fundamentally unfair that a 16-year old in North Carolina is disproportionately likely

to be labeled a “career offender” because of the delay in raising the age.

While the Juvenile Justice Reinvestment Act offers a step in the right direction, it is not perfect. In particular, the bill provides that “[p]rosecutions or delinquency proceedings initiated for offenses committed before . . . this section becomes effective are not abated or affected by this act. . . .”²⁰ Because the bill does not apply retroactively, it would not benefit people who have already been prosecuted in adult court for crimes they committed when they were 16 or 17-years old and, thus, their convictions would likely count as ACCA predicates.

As a result, North Carolina’s 16 and 17-year olds will continue to earn ACCA predicates until December 1, 2019, and these predicates can be used for ACCA sentence enhancement well beyond December 1, 2019. So, what are we to do? Perhaps, one could argue that counting an offense committed by a 16 or 17-year old in North Carolina as an ACCA predicate is so unfair as to violate that person’s Due Process rights. A further stretch, one could argue that no rational basis exists for North Carolina’s disparate treatment of 16 and 17-year olds and, thus, it violates the Equal Protection Clause. Certainly, an attorney presented with a client in this situation should request a downward departure due to mitigating circumstances.

¹ BETTY GENE ALLEY & JOHN THOMAS WILSON, NORTH CAROLINA JUVENILE JUSTICE SYSTEM: A HISTORY, 1868-1993, at 4 (NC AOC 1994).

² Tamar R. Birkhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C.L. Rev. 1443, 1446 (2008).

³ RAISE THE AGE NY CAMPAIGN, *Get the Facts*, <http://raisetheageny.com/get-the-facts> (last visited July 24, 2017).

⁴ YOUTH JUSTICE PROJECT, *Raise the Age NC*, <http://youthjusticenc.org/raise-the-age-nc/> (last visited July 24, 2017). See generally N.C.G.S. § 7B-1501.

⁵ Birkhead, *supra* note 2, at 1445.

⁶ N.C. COMM’N ON THE ADMIN. OF LAW AND JUSTICE, RECOMMENDATIONS FOR STRENGTHENING THE UNIFIED COURT SYSTEM OF NORTH CAROLINA vii (2017).

⁷ *Id.* at 114-24.

⁸ *Id.* at 125.

⁹ LATOYA POWELL, UNC School of Gov’t, “Raise the Age” Is Now the Law in North Carolina (2017), <https://nccriminallaw.sog.unc.edu/raise-age-now-law-north-carolina/>.

¹⁰ 2017 Bill Text NC S.B. 257.

¹¹ *Id.*

¹² Birkhead, *supra* note 2, at 1449.

¹³ *Id.* at 1445.

¹⁴ U.S.C. § 924(e)(1).

¹⁵ *Id.*

¹⁶ 18. U.S.C. § 924(e)(2)(B) (emphasis added).

¹⁷ *United States v. Wright*, 594 F.3d 259, 263 (4th Cir. 2010).

¹⁸ See *id.*

¹⁹ HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NAT’L REPORT, 116 (1999). Cf. MELISSA SICKMUND & CHARLES PUZZANCHERA, NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NAT’L REPORT 119 (2014).

²⁰ 2017 Bill Text NC S.B. 257.

The ZA Editors thank Floyd “Trey” Cooke for contributing this helpful information. Trey is a third year law student at Campbell University School of Law and has been an intern in the FPD office since the Summer of 2017.

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North Carolina Crimes of Violence/ Violent Felony Update

North Carolina Breaking and Entering Under ACCA

The issue is whether North Carolina breaking and entering constitutes a violent felony under ACCA. After initially scheduling this issue for oral argument in September in the case of *United States v. Lazurus Beatty*, No. 16-4439, the Fourth Circuit unexpectedly pulled *Beatty* from the calendar and on August 31, 2017, issued a 6-page unpublished opinion authored by Judge Duncan. Judge Duncan, joined by Judges Wilkinson and Thacker, held that North Carolina breaking and entering constitutes generic burglary and therefore qualifies as a violent felony. The FPD believes the opinion was incorrectly decided. And because *Beatty* is unpublished, the decision is not binding precedent. For that reason, the issue remains viable, and we encourage folks to preserve the issue in the hopes of obtaining further review.

North Carolina Common Law Robbery Under the Guidelines

At issue is whether North Carolina common law robbery constitutes generic robbery under the Guidelines. Oral argument on this issue took place before the Fourth Circuit on October 26, 2017 in the case of *United States v. Geoffrey Gattis*, No. 16-4663. On the panel were Judges Niemeyer, King and Floyd. At oral

argument, Judge Niemeyer indicated that he believes that North Carolina common law robbery qualifies as generic robbery. Judges King and Floyd were less vocal, so it is unclear how they will rule on the issue. Preserve the argument and stay tuned!

North Carolina Assault Under the Guidelines

On October 26, 2017, the Fourth Circuit issued its long-awaited decision in *United States v. Shawntanna Thompson*, No. 15-4685. *Thompson* was procedurally unusual, in that the case was argued twice. At the first oral argument in October 2016, the government conceded that the residual clause of the Guidelines was void for vagueness. The government nonetheless argued that North Carolina assault inflicting serious bodily injury (“AISBI”) qualified under the force clause and as the enumerated offense of aggravated assault. After the first oral argument, the Fourth Circuit placed *Thompson* in abeyance to await the Supreme Court’s decision in *Beckles*. After *Beckles* held that the residual clause of the advisory Guidelines is not void for vagueness, the Fourth Circuit ordered supplemental briefing and a second oral argument on the issue of whether AISBI qualifies as a crime of violence under the residual clause. The second oral argument was held on September 12, 2017.

In a 10-page published opinion authored by Judge Motz (Judges Wilkinson and Diaz concurred), the Fourth Circuit narrowly held that AISBI does qualify under the residual clause because the offense “typically” involves “purposeful, violent, and aggressive” conduct under the “ordinary case” approach. What is most notable in *Thompson* is what the Court does *not* discuss: whether AISBI qualifies under the force clause or as the enumerated offense of aggravated assault. Indeed, if the Court had agreed with the government on either of these issues, there would have been no need to hold the case for *Beckles*—the case could have been decided under either of those clauses, with no need to reach the residual clause. Now that the residual clause has been removed from the Guidelines, *Thompson*’s pregnant absence of any discussion regarding the force clause or aggravated assault indicates that the Court may well have come out differently, but for the residual clause (in fact, during the second oral argument, Judge Motz implied as much). In addition, *Thompson* expressly disagrees with the government’s argument that AISBI is a divisible offense, stating that AISBI “includes no divisible categories.”

The take-away from *Thompson* is that whether North Carolina assault qualifies as a crime of violence under the current Guidelines (which no longer contain the residual clause) remains very much in dispute. Keep fighting the good fight!

The ZA Editors thank Jenny Leisten, Research & Writing Attorney, for contributing this helpful update.



Maslenjak v. United States: Clients Who Provide False Statements in Naturalization Proceedings under 18 U.S.C. § 1425(a)

In 2015, nearly 70,000 refugees sought and were granted admission into the United States seeking refuge from their home countries for a variety of reasons.¹ Refugees are of special humanitarian concern to the United States government. To qualify as refugees, they must demonstrate persecution or fear of persecution due to religion, nationality, political opinion or membership in a particular social group.² Refugees are admitted into the United States under a special status, at which they must remain for a minimum of twelve months.³ After the twelve month period, refugees may apply to adjust their status to Legal Permanent Resident and, after five years, they may apply for United States citizenship.⁴ However, when applying for citizenship, refugees are asked to swear that they have never given false information to a government official while applying for an immigration benefit or in order to gain entry into the United States.⁵ But what happens when a client (now a U.S. citizen) who was a former refugee lied in order to gain entrance to the United States and then swears they never gave a false statement during their subsequent citizenship interview? The Supreme Court recently addressed this issue in *Maslenjak v. United States*.

In *Maslenjak*, the defendant was an ethnic Serb who resided in Bosnia during the Bosnian Civil War.⁶ In 1998, she and her family sought refugee status in the United

States where she stated under oath that her husband had evaded service in the Bosnian-Serb Army and because of his evasion, she believed her family would be mistreated by both the Muslim and Serb populations.⁷ The Maslenjak family was granted refugee status, and six years later, the defendant applied for citizenship, where she was asked to swear that she had never given false information for an immigration benefit or lied to an official to gain entry into the United States.⁸ The defendant swore “no” to both questions.⁹ However, not long after she became a naturalized citizen, it was discovered that the defendant’s husband had actually spent the greater portion of the civil war as an officer in the Bosnian-Serb Army, where he participated in at least one gruesome massacre.¹⁰

Inflamed by the deception, the government charged the defendant with knowingly “procuring contrary to law, her naturalization,” in violation of 18 U.S.C. § 1425(a) by breaking another law - 18 U.S.C. § 1015(a) —which prohibits knowingly making a false statement under oath in a naturalization proceeding.¹¹ The defendant was convicted, and as a result, was stripped of her citizenship pursuant to § 1451(e).¹² At issue on appeal was whether, in order to secure a conviction under § 1425(a), the government was required to prove the defendant’s false statements were material to the decision to approve her citizenship application -i.e. a causal connection - or whether there need only be a chronological link.¹³

A unanimous Supreme Court concluded that in order for the government to prove an individual obtained citizenship illegally by a false statement to government officials, the government must establish that the false statement actually influenced - or “sufficiently altered” the citizenship process as to have influenced an award of citizenship.¹⁴ The Court reasoned that by looking at the plain text of the naturalization fraud statute as well as the statutory context, there was a required causal connection between an illegal action and obtaining citizenship.¹⁵ Indeed, anything less than a causal connection would mean that committing a driving offense while driving to a citizenship interview would be a “violation of law in the course of procuring naturalization,” which is not what the statute intended to prevent.¹⁶

Further, in order to determine whether such a false statement “sufficiently altered” the process, an objective analysis is employed to determine whether the state-

ment would have prompted a reasonable official, seeking only evidence concerning citizenship qualifications, to investigate further and whether such an investigation would uncover disqualifying information.¹⁷ This two-part analysis provides an obvious answer when an individual misrepresents facts that are obviously disqualifying.¹⁸ However, in order to strike a balance between the defendant’s rights and the government’s interests in protecting the integrity of the citizenship process, the Court held that the government need not establish that further investigation into the applicant would have unearthed disqualifying information, only that such an investigation “would predictably have disclosed some legal disqualification.”¹⁹ Finally, the defendant may rebut the government’s claim by a showing of a preponderance of the evidence that they would have qualified for citizenship despite the false statement.²⁰ Thus, as long as a client’s misrepresentation could not objectively affect the citizenship process, the client should be able to successfully combat a § 1425(a) charge and thus keep their citizenship.

As with any immigration issue, the stakes involved with § 1425(a) cases are undoubtedly high. It is imperative that attorneys be aware of *Maslenjak* for clients who are facing the possibility of losing their citizenship status after a § 1425(a) conviction. So long as a client’s misrepresentation is immaterial to their retaining citizen status, all hope is not lost. Therefore, it is important for attorneys to keep in mind the materiality requirement in § 1425(a).

¹ See Bureau of Population, Refugees and Migration, *FY15 Refugee Admissions Statistics* (2015).

² See Bureau of Population, Refugees and Migration, *U.S. Refugees Admissions Program FAQs* (2017).

³ *Id.*

⁴ *Id.*

⁵ *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1923-1924.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1923.

¹⁴ *Id.* at 1928.

¹⁵ *Id.* at 1924-1928.

¹⁶ *Id.* at 1925 (internal brackets omitted).

¹⁷ *Id.* at 1929 (internal citations omitted).

¹⁸ *Id.* at 1928.

¹⁹ *Id.* at 1929 (internal citations omitted).

²⁰ *Id.* at 1930.

The ZA Editors thank Melissa Botiglione for contributing this helpful information. Melissa is a third year law student at Campbell University School of Law and was an intern in the FPD office during the Summer of 2017.



LEGAL UPDATES

4th Circuit Update

For the latest Fourth Circuit update, please visit our website at <http://nce.fd.org/> and go to “Publications.” 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 <http://www.ca4.uscourts.gov/opinions/daily-opinions>.

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.

New Rules and Guideline Amendments

FEDERAL CRIMINAL CODE AND RULES

The following amendments take effect December 1, 2017. Links to the information listed below can be found at:

http://www.uscourts.gov/sites/default/files/2017-04-27-congressional_package_rev_4-25_final_final_with_signed_letters_and_orders_0.pdf

Appellate Procedure and Forms - Modification to Appellate Rules 4, 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4

**Please note that the changes to appellate practice rules are significant. More detailed information on the changes can be found at <http://www.ca4.uscourts.gov/docs/pdfs/december2016amendments-federalrulesofappellateprocedure.pdf?sfvrsn=4>*

-Rule 4 Appeal as of Right—When Taken
This Amendment provides no additional fee to be required when filing an amended notice. This amendment restores subsection (a)(4)(B), which had been inadvertently deleted in 2009.

-Rule 8, 11, 39
The provisions to these Amendments revise clauses that use the term “supersedeas bonds” to conform to the proposed revision of Civil Rule 62(b). This alters subdivisions 8(a)(1)(b), 8(b), 11(g), and 39(e)(3).

-Rule 25 Filing and Services
This Amendment addresses the rules regarding the filing date by an inmate using an institution’s internal mail system. The amendment conforms Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service.

-Rule 28.1 Cross-Appeals
This Amendment requires that the appellee’s reply brief be served within 21 days after the appellant’s response.

-Rule 29 Brief of an Amicus Curiae
This Amendment authorizes orders or local rules that prohibit the filing of an amicus brief by party consent if the brief would result in a judge’s disqualification.

-Rule 31 Serving and Filing Briefs
This Amendment revises subdivision (a)(1) to extend the period for filing a reply brief from 14 days to 21 days.

-Rule 39 Costs
This Amendment conforms the costs on appeal to the amendment of Federal Rule of Civil Procedure 62.

-Rule 41 Mandate: Contents; Issuance and Effective Date; Stay
This Amendment revises subdivision (b) to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

-Form 4 Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis
This Amendment removes the question asking petitioners seeking to proceed in forma Pauperis to provide the last four digits of their social security numbers.

Criminal Procedure - Modification to Criminal Rules 12.4, 45, 49**-Rule 12.4 Disclosure Statement**

This Amendment requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. In addition, this amendment specifies that the time for making the disclosures is within 28 days after the defendant's initial appearance.

-Rule 45 Computing and Extending Time

This Amendment specifies that when service is made under Federal Rule of Civil Procedure 5 (b)(2)(C) (mailing), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added to the period in which the party must or may act. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49.

-Rule 49 Serving and Filing Papers

This Amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. In addition, this amendment eliminates the provision permitting the electronic filing only when authorized by local rules, moving to a national rule that mandates electronic filing by represented parties.

Evidence – Modification to Evidence Rules 803, 902**-Rule 803(16) Exceptions to the Rule Against Hearsay**

This Amendment provides a hearsay exception for “ancient documents”; that is, if a document is more than 20 years old and appears authentic, it is admissible for the truth of its contents.

-Rule 902 Evidence that is Self-Authenticating

This Amendment adds two new subdivisions that would allow certain electronic evidence to be authenticated by the certification of a qualified person (in lieu of that person's testimony at trial).

EDNC Local Criminal Rules Amendments - Modification to Local Criminal Rules 47.3, 49.1, 55.2, 57.1

**The information listed below can be found at <http://www.nced.uscourts.gov/rules/Default.aspx>.*

-Rule 47.3 Form of Pleadings, Motions and Documents

This Amendment adds subsection (k) to provide that absent an order of the court, all materials filed with the court shall be in the English language unless translations are furnished.

-Rule 49.1 Filing and Service of Papers

This Amendment provides exceptions for the requirement of electronic filing for documents listed in Section V.A. of the CM/ECF Policy Manual.

-Rule 55.2 Sealed Documents

This Amendment edits Rules 55.2(a), 55.2(b), and 55.2(d) to update references to the revised CM/ECF Policy Manual.

-Rule 57.1 Attorneys

This Amendment edits Rule 57.1(1) to require an attorney to take the required oath or affirmation of admission prior to being allowed to file as a member of the court. In addition, this amendment updates the language in the oath of admission and requires a special appearance attorney to certify in writing that he or she will submit any documents to local counsel for review prior to filing.

U.S. SENTENCING GUIDELINE AMENDMENTS

New amendments were not promulgated during the last amendment cycle due to a temporary lack of a quorum. Accordingly, the *Guidelines Manual* effective on November 1, 2016 will remain in effect, and the Sentencing Commission will not reissue a manual on November 1, 2017.

For those interested, the outstanding proposed Guideline amendments are found below, and additional information may be found at: <https://www.ussc.gov/guidelines/amendments/proposed-2017-amendments-federal-sentencing-guidelines>

-First Offenders/Alternatives to Incarceration***First Offenders §4C1.1***

This Amendment contains two parts, Part A and Part B. Part A sets forth a new Chapter Four Guideline that would provide lower guideline ranges for “first offenders” generally if [(1) the defendant did not receive any criminal history points under the rules con-

tained in Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind.

Alternatives to Incarceration §5B1.1, §5C1.1, and §5F1.2

Part B of this Amendment expands Zone B by consolidating Zones B and C. The expanded Zone B would include sentence ranges from one to 18 months and provide probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. While this amendment would delete Zone C by its consolidation with Zone B, Zone D would not be redesignated.

-Tribal Issues - Tribal Court Convictions and Court Protection Orders

Tribal Court Convictions §4A1.3

This Amendment provides a list of relevant factors that courts may consider, in addition to the factors set forth in §4A1.3(a), in determining whether an upward departure based on a tribal court conviction may be warranted.

Court Protection Orders §1B1.1

This Amendment would include in the Commentary to §1B1.1 (Application Instructions) a definition of court protection order derived from 18 U.S.C. § 2266(5), that is consistent with 18 U.S.C. § 2265(b).

-Youthful Offenders §4A1.1, §4A1.2, and §4A1.3

This Amendment states that a departure may be warranted in cases in which the defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen as “adults.”

-Criminal History- Treatment of Revocation Sentences and Departure Based on Substantial Difference Between Time-Served and Sentence Imposed

Treatment of Revocation Sentences §4A1.2, and §4A1.1

This Amendment would amend §4A1.2(k) to provide that revocation of probation, parole, supervised release, special parole, or mandatory release are not to be counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Departure Based on Substantial Difference Between Time-Served and Sentence Imposed §4A1.3

This Amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a downward departure from the defendant’s criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

-Bipartisan Budget Act - §2B1.1

This Amendment references the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). In addition, this would amend §2B1.1 to provide an enhancement and a minimum offense level for cases in which the defendant was convicted under 42 U.S.C. § 408 (a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a).

-Acceptance of Responsibility - §3E1.1

This amends the Commentary to §3E1.1 to revise how the defendant’s challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. Specifically, this Amendment would edit Application Note 1(A) to delete the sentence that states “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.”

-Miscellaneous- Criminal Infringement of Copyright or Trademark, Sex Offenders, Chemical Safety

Criminal Infringement of Copyright or Trademark §2B5.3

This Amendment would revise §2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” In addition, this Amendment would also amend the Commentary to §2B5.3 to delete the “counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

Sex Offenders §2A3.5, §2A3.6

This Amendment revises Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2250 (b) are referenced to §2A3.5. This Amendment also brackets the possibility of adding a new application note to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b). Lastly, this Amendment makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the redesignation of 18 U.S.C. § 2250(c) by the International Megan’s Law.

Chemical Safety

Part C of the proposed amendment amends Appendix A (Statutory Index) so that the new provision, 15 U.S.C. § 2615(b)(2) is referenced to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. § 2615(b)(1).

Computer Enhancement 2G1.3

This Amendment revises the Commentary to §2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b) (3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

-Marihuana Equivalency - §2D1.1

This Amendment revises §2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables for determining penalties for controlled substances. It replaces that term throughout the guideline with the term “converted drug weight.” In addition, it changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” The Amendment is not intended as a substantive change in policy. Lastly, this Amendment makes certain clerical and conforming changes to reflect the changes to the Drug Equivalency Tables.

-Technical- Clarifying Changes, Title References to §4A1.3, Clerical Changes***Clarifying Changes §2B1.1***

This Amendment makes certain clarifying changes to two guidelines. First, this Amendment revises Chapter One, Part A, Subpart 1(4) (b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-

Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. Second, the proposed amendment makes minor clarifying changes to Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Title References to §4A1.3 §2Q1.3, §2R1.1, §4A1.2, §4B1.4

This Amendment makes technical changes in §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Clerical Changes §1B1.13, §2D1.11, §2M2.1, §2Q1.1, §2Q1.2, §2Q1.3, §5D1.3

This Amendment makes clerical changes to--the Commentary to §1B1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582 (c)(1)(A) (Policy Statement)) to correct a typographical error by inserting a missing word in Application Note 4; subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to correct a typographical error in the line referencing Pseudoephedrine; subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to correct a punctuation mark under the heading relating to List I Chemicals; the Commentary to §2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions” to add a missing section symbol and a reference to Appendix A (Statutory Index); the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions” to add a missing reference to 42 U.S.C. § 7413 (c)(5) and a reference to Appendix A (Statutory Index); the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) captioned “Statutory Provisions” to add a specific reference to 42 U.S.C. § 7413(c)(1)-(4); the Com-

mentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions” to add a specific reference to 42 U.S.C. § 7413(c)(1)-(4); subsection (a)(4) to §5D1.3. (Conditions of Supervised Release) to change an inaccurate reference to “probation” to “supervised release”; and the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index) to rearrange the order of certain Chapter Two guidelines references to place them in proper numerical order.

The ZA Editors thank Christina Makarova for contributing this helpful information. Christina is a senior at Duke University and was an intern in the FPD office during the Summer of 2017.



LOCAL NEWS

Eastern District News

The FPD welcomes newly sworn United States Attorney, Robert J. Higdon, Jr. We extend a warm welcome on behalf of our office and the panel attorneys from this district.

CJA Panel News

After 19½ years of federal service, our Panel Administrator, Donna Stiles is retiring. Her last day in the office is November 30, 2017. April Bunn will succeed her on December 1, 2017. We wish Donna a fond farewell and congratulate April on her new position. Until Donna's last day, please be sure to copy both April and Donna on communications regarding the panel.

The following are new regular panel attorneys: in Raleigh: Hill Allen, Tharrington Smith; Jim Melo, Melo Law; Kimberly Moore, Jessie Jeffers Law Firm; Caitlin Poe, Ward and Smith; Ripley Rand, Womble Carlyle; Kyle Smalling, Capital City Law Firm; David Smyth, Brooks Pierce; Patrick Weede, Weede Law; Kelly Dagger, Ellis & Winters; Colon Willoughby, McGuireWoods.

FPD Office News

We are pleased to announce the naming of G. Alan DuBois, currently First Assistant, as the future Federal Public Defender for the Eastern District of North Carolina. Louis C. Allen, Federal Public Defender for the Middle District of North Carolina, will serve as Acting Federal Public Defender for our district until Alan is sworn in.

We are pleased to welcome to the Raleigh office Senior Legal Assistant, Mandy Reilly, who joined us in October.



Is there a topic you would like to see covered in the ZA?

Do you have a suggestion for a news article or a featured section in the ZA?

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

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