

ADVOCATE

NEWSLETTER FOR THE DEFENSE

Winter 2021

The Defender's Message

Happy New Year! And good riddance to 2020! Hard to believe we've been in lockdown for almost a full year now. Yet we all fight on, doing our best to continue to represent our clients, doing all we can to protect their rights and, increasingly, their basic safety and health under just about the most difficult conditions imaginable.

Things are still rough, the pandemic continues to rage, but with the turn of the year, there are clear reasons to believe that 2021 will be better than 2020. We have the prospect of a new administration with a new Attorney General, new United States Attorneys, and a new set of criminal justice priorities. We have the possibility of bipartisan sentencing and criminal justice reform in Congress. And I hope we will all come out of this bizarre and trying post-election period with a new found respect for the rule of law and the role we all must play in preserving it.

Finally, almost miraculously, we have the prospect of a vaccine and, with it, the promise that before long we will be able to return to our offices, our courtrooms, our colleagues, and our clients and resume the life and work we knew before the pandemic.

We have changed our timeline in releasing newsletters this year because the last one was published in the summer and we are fortunate to have so many articles to share in this edition. Although we do not yet have our next seminar date, this newsletter remains a key tool in fulfilling our training mission, particularly during this pandemic. As such, we hope these articles will assist your practice and provide information that will help in defending your cases during these uncertain times.

Accordingly, this edition of the Zealous Advocate has articles addressing everything from Compassionate Release during this unprecedented pandemic to the reemergence of federal executions. In this edition of the *Zealous Advocate*, we have a newsletter filled with useful information spanning across our practice from Fourth Amendment to post-conviction issues. First, we take a look at cases that implicate Fourth Amendment rights, including ways to challenge traffic stops based on license revocations, as well as cases in which the Fourth Circuit has spoken out against excessive use of police force. Next, we explore the importance of sealing court documents in cases involving client cooperation as well as providing tips on guiding clients through the time-served crediting process. We also have articles concerning sentencing issues such as preserving a reasonableness standard of review and raising trauma as mitigating circumstances. Given the impact of the pandemic on incarcerated individuals, one article discusses COVID-19, compassionate release, and federal prisons. The last two articles address post-conviction issues such as how to argue Section 2255 as a fundamental right as well as a piece discussing a renewed use of the death penalty in federal cases. Finally, we have updates about proposed rules and guidelines.

As always, the Editors and I hope you find these articles helpful to your practice. We also hope that you are doing well during these trying times. Here's to a better 2021 for us all and hoping we can be together before the year is out!

G. Alan DuBois
Federal Public Defender



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PANEL ATTORNEY INFORMATION

Reminders

On January 7, 2021, Director Jim Duff issued an updated memorandum (updating the December 31, 2020 memo) that documents the increases to the CJA non-capital hourly rate and case compensation maximums in non-capital cases (memo attached). The new non-capital hourly rates and case compensation maximums apply to services performed on or after January 1, 2021. The rates and case compensation maximums have also been updated on the JNet and in eVoucher. Any services input on or after January 1, 2021 will reflect the new rate. The new hourly rate increased from \$152 to \$155 for non-capital work. Because of the increase in the non-capital hourly rate, the waivable case compensation maximum amounts for non-capital representations increase to: \$12,100 (previously \$11,800).

Thanks all for the hard work you provide to the EDNC CJA Panel.

Seminar BOLOs

Please note that no decisions have yet been made about FPD CLE/Seminars for 2021. For information regarding upcoming seminars, please check email and our website.



PRACTICE TIPS

Kansas v. Glover: Challenging Traffic Stops

A traffic stop is a seizure under the Fourth Amendment. Because police officers so often use “routine” traffic stops to justify a more detailed search, practitioners should pay special attention to the initial justification for that stop. To conduct a traffic stop, the officer must have a reasonable, articulable suspicion that “something criminal is afoot.”¹ Many of our clients have had their licenses revoked or suspended for reasons not related to traffic violations. Some know their licenses have been suspended and continue to drive. Some know their licenses have been suspended and stop driving. Some don’t know their licenses have been suspended. When an officer runs a car’s license plate and discovers that the car’s registered owner has a suspended driver’s license, the officer does not know for sure that the owner is the one driving, or that something criminal is going on. So does the officer have reasonable suspicion to justify pulling over the car?

The U.S. Supreme Court has only partially answered this question. In *Kansas v. Glover*,² the Court held that “when the officer lacks information negating an inference that the owner is the driver

of the vehicle, the stop is reasonable.”³ In *Glover*, an officer pulled over a truck based on the license plates’ belonging to the truck’s registered owner’s having a revoked driver’s license, and that *someone* was driving the truck. From those facts, the Court reasoned that the officer could draw a common-sense inference that the truck’s registered owner was driving with an invalid license. The Court supported its holding two ways. First, there is statistical evidence showing that improperly licensed drivers continue to drive.⁴ Second, the truck driver’s license was revoked, not merely suspended, and Kansas only *revokes* driver’s licenses for gross and repeated traffic violations. To the Court, “[t]he concerns motivating the State’s various grounds for revocation lend further credence to the inference that a registered owner with a revoked Kansas driver’s license might be the one driving the vehicle.”⁵

As Justice Kagan notes in her concurrence, “[t]he license revocation signal is always subject to a defendant’s challenge.”⁶ There are several individualized facts that can negate an officer’s inference that the registered owner is driving the car: if the driver does not match the description of the owner, if there is an indication that the car is part of a car-sharing service, if the car has two registered owners or looks like a shared family vehicle, to name a few.⁷ But there are also two general challenges, based on state law, that an attorney can make: (1) if the owner’s license is suspended—not revoked—and the state suspends licenses for non-traffic related violations, and (2) if the driver does not know that their license is suspended and the state’s driving without a license law has a knowledge requirement. Both objections apply in North Carolina.

North Carolina invalidates licenses for reasons unrelated to traffic violations, and it does not differentiate between suspended and revoked licenses.⁸ North Carolina invalidates driver’s licenses for failure to appear or pay fines,⁹ failure to pay child support,¹⁰ perpetrating a hoax concerning a destructive device in a public building,¹¹ and theft of motor fuel,¹² in addition to gross and repeated traffic violations. This means that when an officer sees that a car owner has an invalid license, he does not know whether it was invalidated because the owner has exhibited a gross and repeated disregard for the traffic laws or for one of the many other reasons. As the Court in *Glover* pointed out, the fact that the officer knew that Kansas only revokes licenses for gross and repeated traffic violations supported the conclusion that the owner has a general disregard for traffic laws and would therefore continue to drive even if his license was invalid.¹³ North Carolina’s laws do not support such a conclusion.

In North Carolina, a person driving with an invalid license is only committing a crime if that person knows their license is invalid.¹⁴ That a North Carolinian knows of their license status is

by no means an obvious conclusion. One recent study found strong evidence that a significant portion of people in North Carolina whose licenses have been invalidated does not know of their license status. That study, *Undeliverable: Suspended Driver's Licenses and the Problem of Notice*¹⁵, set out to survey invalid license-holders to understand the effect that their license status has on their lives. To that end, authors mailed surveys to 300 North Carolinians with invalid driver's licenses. They sent their surveys to the same addresses to which the state sends notice that a person's license has been invalidated. Of those 300 mailings, 107 could not be delivered because the address provided by the state was incorrect. Of the eight surveys that were completed and returned, only one respondent had been properly notified of his license status.¹⁴ The reasonable inference is that many North Carolinians do not actually know that their driver's license has been invalidated—and therefore are not committing a crime if they continue to drive.

The Supreme Court's decision in *Glover* lowered the evidentiary threshold an officer must meet before initiating a traffic stop for an invalid license signal. But it did not remove it. When reviewing a case for suppression issues, practitioners should be aware of the Fourth Amendment issues implicated by a license revocation signal. The challenges outlined above are not necessarily limited to North Carolina. Practitioners are encouraged to research the suspension/revocation laws and notice processes in their states.

¹ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

² 140 S. Ct. 1183 (2020).

³ *Id.* at 1186.

⁴ T. Neuman et al., *A Guide for Addressing Collisions Involving Unlicensed Drivers and Drivers With Suspended or Revoked Licenses* III-1 (2003) ("It is estimated that as many as three-fourths of [suspended/revoked] drivers continue to drive, although they apparently drive less often and more carefully"); National Hwy. and Traffic Safety Admin., *Research Note: Driver License Compliance Status in Fatal Crashes 2* (2014) (Table 1 shows that an average of 18% of fatal crashes between 2008 and 2012 involved invalidly licensed drivers).

⁵ *Glover*, 140 S. Ct. at 1189.

⁶ *Id.* at 1193 (Kagan, J., concurring).

⁷ *Id.*

⁸ Jon A. Carnegie, *Driver's License Suspensions, Impacts and Fairness Study* 88 (2007).

⁹ N.C. Gen. Stat. § 20-24.1.

¹⁰ N.C. Gen. Stat. § 20-17(b).

¹¹ N.C. Gen. Stat. § 20-17(a)(15).

¹² N.C. Gen. Stat. § 20-17(a)(16).

¹³ *Glover*, 140 S. Ct. at 1189.

¹⁴ *State v. Green*, 811 S.E. 2d 666, 669-70 (N.C. Ct. App. 2018).

¹⁵ Karima Modjadid, et al., *Undeliverable: Suspended Driver's Licenses and the Problem of Notice*, 4 Crim. Just. L. Rev. 185 (2020).

¹⁶ *Id.* at 190-91. The remaining 185 surveys were not returned at all, but the study reached no conclusion about the reason.

The ZA Editors thank Maureen Gleason for contributing this helpful information. Maureen is a third-year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2020.



Fourth Circuit Questions Truthfulness of Police Officers

As with many other public figures in June 2020, the Fourth Circuit spoke out against police officers using excessive force on Black Americans in *Jones v. Martinsburg. Estate of Jones by Jones v. City of Martinsburg, W. Virginia*, 961 F.3d 661, 664 (4th Cir. 2020). Notably, the court commented on the tendency of officers to lie about and cover up each other's mistreatment of the public. The court has recognized this issue before and has even provided relief to criminal defendants when their trials were influenced by clearly corrupt officers. See *Quintana v. United States*, No. 7:10-CV-53-BO, 2010 WL 3743769, at 1 (E.D.N.C. Sept. 21, 2010) (in which the defendant received a reduced sentence after a testifying officer was convicted of embezzlement). In *Martinsburg*, however, the court's strong condemnation of police brutality indicates an increased willingness by the court to question the truthfulness of officers who use force against Black people.

Wayne Jones was a Black man "experiencing homelessness" in Martinsburg, West Virginia. *Martinsburg* at 663. After being approached and briefly questioned by a police officer for "walking alongside, rather than on, the sidewalk," Mr. Jones was hit, kicked, and tased by five officers for possessing a knife. Later, those officers claimed he refused to let go of the knife throughout the beating. *Id.* at 663-64. The officers ultimately killed Mr. Jones by shooting him 22 times. *Id.* at 664. His estate filed a 42 U.S.C. § 1983 suit against the City of Martinsburg as well as the officers involved in the killing. *Id.* The ensuing case reached the Fourth Circuit Court of Appeals after the district court granted the officers qualified immunity. *Id.*

Throughout its opinion, the court put in doubt the accuracy of statements made by the officers who killed Mr. Jones. It repeatedly questioned the decision to escalate an initially nonviolent encounter into a deadly shooting, showing doubt for the officers' judgment. *Id.* at 670-1. Likewise, the court deemed the officers' attempts to deescalate the situation as "at best, farcical." *Id.* at 670. Crucially, the court called into question the officers' stated justification for killing Mr. Jones, arguing that a number of factors

undermined the supposed necessity of shooting the man. *Id.* at 667. The court discussed the reasons why Mr. Jones would not likely have been able to hold his knife by the time officers decided to shoot him, demonstrating clear doubt towards the officers' claims that Mr. Jones maintained a hold on his knife throughout the incident. *Id.*

The court could not make an ultimate determination on the truthfulness of the officers who killed Mr. Jones or on whether the amount of force they used against Mr. Jones was proportional to the threat he supposedly posed. It did, however, reverse the district court's decision to award the officers qualified immunity, arguing that any other decision "would signal absolute immunity for fear-based use of deadly force." *Id.* at 673. Additionally, while reflecting on recent protests against police brutality, *Id.* (referencing protests against the deaths of Michael Brown and George Floyd), the court called for an end to police officers' killing Black Americans and encouraged them to instead act "with respect for the dignity and worth of black lives." *Id.* The strength of the court's call-to-action may reveal an increased willingness in the Fourth Circuit to look at police testimony with more scrutiny.

Martinsburg indicates a potential shift in how courts weigh police officer testimony. Although *Martinsburg* involved a civil case, this shift may extend to how police testimony is treated in criminal cases. As the court has stated previously, district courts are at times required to weigh the credibility of witnesses in criminal cases. *United States v. Lighty*, 616 F.3d 321, 374 (4th Cir. 2010). Criminal defendants face a heavy burden when trying to question the truthfulness of officers. Stephen E. Arthur & Robert S. Hunter, *Federal Trial Handbook: Criminal* § 34:4 (4th ed. 2019). Officers often receive the benefit of the doubt from courts under doctrines like qualified immunity. See *Martinsburg* at 667 (citing *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)) (stating that officers "are not liable for bad guesses in gray areas; they are liable for transgressing bright lines"). A change in how courts weigh the testimony of officers could have enormous benefit to defendants who want to dispute police officers' accounts.

Martinsburg is a key source to cite to when referencing the need to question the truthfulness of officers who have interacted with defendants. Defense attorneys interested in challenging the truth of officers' statements should highlight parallels between *Martinsburg* and their own cases. For example, attorneys can compare their cases to *Martinsburg* when officers present their assumptions as facts in official statements, see *id.* at 664 (arguing that an officer's report was misleading because he "could not have known that Jones's hands were 'about' to be raised"), or make claims that conflict with those of other officers. See *id.* at 666 (criticizing the district court for "ignor[ing] 'discrepancies among the officers' accounts'"). Attorneys who can make such parallels should argue in favor of questioning

officers' statements as the court did in *Martinsburg*.

Furthermore, defenders should look at future district court decisions to see how they cite to *Martinsburg*. Some courts have already referenced the case to define legal terms, such as municipal liability, *Booker v. City of Lynchburg*, No. 6:20-CV-00011, 2020 WL 4209057, at 9 (W.D. Va. July 22, 2020), or qualified immunity. *Torres v. Davis*, No. 1:18-CV-00314-MR, 2020 WL 4194204, at 2 (W.D.N.C. July 21, 2020). As district courts continue citing to *Martinsburg*, it will be worthwhile to see whether they begin reassessing how much credibility they give to officers. If courts respond to the criticisms of officers' credibility in *Martinsburg*, defense attorneys may see more opportunities to argue against police officer testimony.

The Fourth Circuit's opinion in *Martinsburg* arose out of a § 1983 suit, but it has the potential to influence criminal cases. Criminal defense attorneys interested in challenging police officers' reports or testimony should review the decision and determine whether it can be cited to in their own cases.

The ZA Editors thank Anastasia McKettrick for contributing this helpful information. Anastasia is a third-year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2020.



United States v. Doe: The Importance of Sealing a Court Document Referencing Client Cooperation

A situation where a client is willing to provide credible information to the government authorities can lead to positive results. The government is more inclined to offer the client a plea and move for a downward departure under U.S. Sentencing Guidelines § 5K1.1 in light of the client's substantial assistance. Later, in weighing the sentencing factors, the district court judge may significantly depart downward from the Sentencing Guidelines or grant a downward variance to provide additional credit for the client's work. However, client cooperation with government authorities can just as easily lead to negative results for the client. Those who cooperate with the government face retribution for the information they provide. As such, the client's decision to cooperate with the government and provide crucial information incriminating other individuals may result in threats to their lives and safety while also jeopardizing the safety of their loved ones.

In *United States v. Doe*, a defendant was faced with the positive and negative results from cooperating with the government. 962 F.3d 139 (4th Cir. 2020). The defendant plead guilty to conspiracy to distribute and possession with intent to distribute. *Id.* at 142. The government moved for a downward departure and explained that the defendant willingly provided important information to state authorities well before the defendant was federally indicted. *Id.* The defendant informed the government of in-state drug dealers, home invasion robberies, and multistate drug-trafficking networks. *Id.* The district court sentenced the defendant to 252 months' imprisonment departing down from the Sentencing Guidelines range of 292 to 365 months. *Id.* The defendant did not appeal their sentence, however, in 2016 the defendant moved for a sentence reduction under 18 U.S.C § 3582(c)(2) and Sentencing Guidelines Amendment 782, which lowered base offense levels in federal drug crimes. *Id.* The district court's order denied the defendant's motion and in doing so referred to the government's § 5K1.1 motion. *Id.* Due to defendant's concern about the reference, the defendant moved to seal the district court's order. *Id.* The district court denied the defendant's motion to seal the court order in late December of 2018, and after the defendant appealed, again in February 2019. *Id.*

The Fourth Circuit first considered whether the public's right to access the district court's order denying the defendant's § 3582 motion stemmed from the First Amendment or common law. *Id.* at 145. Precedent supported applying the public's First Amendment right of access to the district court's order. *Id.* at 146. The Fourth Circuit's previous holdings applied the First Amendment right of access to sentencings, plea hearings, and documents filed in connection with those proceedings.¹ Accordingly, the court order denying a sentence reduction is encompassed by the First Amendment right of access. *Id.*

Second, the Fourth Circuit analyzed whether the public's First Amendment right to access the order outweighs defendant's interests in sealing it. *Id.* at 145. Under the First Amendment, the district court's order denying a defendant's motion should be sealed only if (1) closure serves a compelling interest; (2) there is a substantial probability in absence of closure, that a compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest. *Id.* at 146.

The defendant argued sealing the district court's order would serve the compelling interest of protecting their safety. *Id.* at 147. Courts have long recognized that protecting the physical and psychological well-being of individuals related to the case can justify restricting public access. *Id.* Further, the threat

of harm to cooperators not only affects those individuals, but also public safety and the criminal justice system as a whole.² The Court held protecting cooperators from harm is a compelling interest that justifies sealing the court order. *Id.* at 148.

Regarding the substantial probability of harming a compelling interest, the defendant asserted the district court's order referring to their cooperation established an ongoing, significant risk to their safety. *Id.* The court analyzed how the defendant's substantial cooperation with the government and the information provided by the defendant put them at risk of harm. *Id.* The court also looked to the court order which included that the defendant cooperated, provided useful information, and was rewarded for that cooperation with a reduced sentence. *Id.* at 149. The probability of that harm is stressed by the Eastern District of North Carolina (EDNC) Standing Order No. 09-SO-02 requiring the automatic sealing of documents related to a defendant's substantial assistance.³ The EDNC has received reports of assaults and torture of cooperating defendants by fellow inmates, especially because inmates can readily search fellow inmates' dockets using PACER or other online research tools. *Id.* Although the government noted the defendant's sentencing transcript discussing defendant's cooperation had been publicly available since September 2014, the court ultimately held that protecting cooperating defendants in federal custody is a compelling interest with a substantial probability of being harmed. *Id.* at 152.

Lastly, the defendant argued there were no adequate alternatives to sealing the court's order. The court held common sense and precedent confirms that merely redacting information could not protect the defendant in this case. *Id.* Sealing the order at issue was the narrowest means of shielding the compelling interest of protecting the defendant's safety. *Id.* Ultimately, the Fourth Circuit reversed the order denying defendant's motion to seal the district court's sentencing reduction order referring to the defendant's cooperation with the government. *Id.*

Overall, sealing an order referring to a client's substantial assistance is necessary to protect the client from harm, even well after the case has effectively been resolved. After a client has agreed to cooperate with the government, it is only just to protect that client from conceivable injury. Risks facing cooperators has led to the EDNC Standing Order and therefore, courts within this district should act consistently with the concerns underlying that policy. While pleadings are frequently sealed before and up to sentencing, lawyers should request documents be sealed in a post-sentencing context as well. Defense attorneys

should emphasize the importance of sealing documents in court to avoid potential harm to clients and their loved ones after cooperation with the government.

¹ *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986).

² Memorandum from the Comm. on Court Admin. & Case Mgmt. of the Judicial Conference of the U.S. (June 30, 2016), in Meeting Agenda Book for the Advisory Comm. on Criminal Rules 243-51 (Sept. 19, 2016), http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf (last visited Nov. 17, 2020).

³ United States District Court, Eastern District of North Carolina, Standing Order No. 09-SO-02 (Feb. 12, 2010), <http://www.nced.uscourts.gov/data/StandingOrders/09-SO-2.pdf> (last visited Nov. 17, 2020).

The ZA Editors thank Brianne Van Apeldoorn for contributing this helpful information. Brian is a third-year law student at Campbell Law School and was an extern in the FPD office during the Fall of 2020.



Guiding Clients Through the Time-Served Crediting Process

Oftentimes, federal criminal cases originate with an arrest by a state-level law enforcement agency. If federal charges follow, clients can be confused and overwhelmed by the separate adjudication processes playing out, especially if they are in custody. Where a federal prison sentence ultimately results, clients will naturally want credit for the time in custody. Whether that is possible can be a complicated answer. “A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . . that has not been credited against another sentence.” 18 U.S.C. § 3585(b). The U.S. Supreme Court has interpreted 18 U.S.C. § 3585(b) to grant the Attorney General, through the Bureau of Prisons (“BOP”), the authority to credit federal prisoners with time served. See *United States v. Wilson*, 503 U.S. 329, 333-34 (1992). Thus, the sentencing court does not have the authority to compute or award any time served credit. See *id.*

Under 18 U.S.C. § 3585(b), the definition of “official detention” is crucial. The U.S. Supreme Court interpreted “official detention” to “refer[] to a court order detaining a defendant and committing him to the custody of the Attorney General for confinement.” *Reno*

v. Koray, 515 U.S. 50, 56 (1995). Therefore, when a case involves both state and federal authorities, the question becomes when does federal custody begin?

Generally, the first sovereign to arrest an individual has primary jurisdiction. *Thomas v. Brewer*, 923 F.2d 1361, 1365 (9th Cir. 1991). If this is a state, the state retains primary jurisdiction, even if the individual has been temporarily transferred to appear for federal proceedings pursuant to a writ of habeas corpus *ad prosequendum*. *United States v. Evans*, 159 F.3d 908, 912 (4th Cir. 1998). The writ is effectively a “loan” to federal authorities. *Id.* Unless relinquished, federal custody begins only when all state proceedings are completed. *Id.* Typically, states relinquish authority by dropping charges or releasing the individual on bail. Thus, if a client is arrested by state authorities and continuously remains detained until being transferred for federal proceedings, the time in custody will usually not count as official detention for federal purposes. Instead, it could only apply as time served for a forthcoming state sentence.

Clients may challenge BOP sentence calculations, including their amount of time-served credit, through the administrative remedies outlined at 28 C.F.R. §§ 542.10-542.16. After this administrative sentence review is exhausted, the last option is to file for a writ of habeas corpus under 28 U.S.C. § 2241 in the district court of the jurisdiction in which the client is in custody. See *United States v. Miller*, 871 F.2d 488, 490 (4th Cir. 1989); *United States v. Brown*, 753 F.2d 455, 456 (5th Cir. 1985).

Though sentencing judges cannot award time served credit, they can still greatly affect the total length of incarceration for a defendant facing both federal and state incarceration through their power to order a federal sentence to run consecutively to a pending or anticipated state sentence. See *Setser v. United States*, 566 U.S. 231, 236-38 (2012). Sentencing courts must consider the 18 U.S.C. § 3553(a) factors when choosing to impose a consecutive sentence. See, e.g., *United States v. Lynn*, 912 F.3d 212, 217 (4th Cir. 2019).

If a client is being sentenced federally while a state case based on relevant conduct is ongoing, it is important to make sure the sentencing court considers U.S.S.G. §5G1.3(c). Although only advisory, this section calls for federal sentencing courts to order sentences to run concurrently when “a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction.” U.S.S.G. §5G1.3(c). While the sentencing court can still order the federal sentence to be served consecutively to the future state sentence, it must consider the guideline and “explain[] its rationale for declining to exercise its discretion.” *Lynn*, 912 F.3d at 219. Failure to consider U.S.S.G. §5G1.3(c) can serve as the basis for a successful appeal

of a sentence. See *United States v. Anderson*, 770 Fed. App'x. 106, 107-08 (4th Cir. 2019).

While seeking time served credit can be confusing for both client and attorney, familiarity with these procedures will ensure that all potential avenues to a shorter period of incarceration are explored. Thus, at federal sentencing for a client with a relevant state case pending, the attorney must be prepared to argue that consecutive sentences would not be appropriate based on the 18 U.S.C. § 3553(a) factors. If the judge orders consecutive sentences without considering the factors on the record, the attorney should use this as the basis for an appeal.

The ZA Editors thank Brian Griffin for contributing this helpful information. Brian is a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2020.



Holguin-Hernandez: Preserving a “Reasonableness” Standard of Review

The ordinary rule in our legal system is that “[i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue.” *Puckett v. United States*, 556 U.S. 129, 134 (2009). Rule 51 of the Federal Rules of Criminal Procedure instructs parties on how to preserve claims of error for appeal. A party preserves the claim when it informs the court of (1) “the action the party wishes the court to take,” or (2) “the party’s objection to the court’s action and the grounds for that objection.” Fed. R. Crim. P. (FRCP) 51(b). If an error is properly preserved, it is subject to review under a reasonableness standard. An error not brought to the court’s attention under the requirements of Rule 51 is subject to review under a plain error standard. FRCP 52.

The U.S. Supreme Court recently addressed whether requesting a specific sentence qualifies as a “claimed error [] brought to the court’s attention.” *Holguin Hernandez v. United States*, 589 U.S. ___, 140 S.Ct. 762, 766 (2020). In a unanimous decision, the Court held that a criminal defendant does not need to make a formal objection to an issued sentence in order to preserve the right on appeal to be reviewed under a reasonableness standard, rather than plain error. *Id.* Instead, “advocat[ing] for a shorter sentence than the one ultimately imposed” is sufficient to properly preserve a “reasonableness” standard review. *Id.* “Nothing more is needed to preserve the claim that a longer sentence is unreasonable.” *Id.*

In *Holguin-Hernandez*, defense counsel argued that imposing an additional consecutive sentence would not serve any beneficial purpose and urged the district court to impose a sentence below the applicable range. *Id.* at 765. Counsel did not make an explicit argument as to the reasonableness of the sentence besides requesting a shorter sentence. *Id.* On appeal, petitioner argued that the 12-month sentence was “unreasonably long and ‘greater than necessary’ to accomplish the goals of the sentencing.” *Id.* The Fifth Circuit Court of Appeals, in affirming the district court’s decision under a “plain error” standard, held that petitioner “forfeited [the] argument by failing to object in the district court to the reasonableness of the sentence imposed.” *Id.* The Supreme Court reversed the Fifth Circuit concluding that a defendant who requests a specific sentence during a sentencing hearing does not have to object to the “reasonableness of a sentence to preserve such claims for appeal.” *Id.* at 766.

In its decision, the Court left unresolved two issues that impact practicing attorneys. First, the Court declined to address whether its reasoning applied to procedural reasonableness, i.e. what is sufficient for “preserv[ing] a claim that a trial court used improper procedures in arriving at the chosen sentence.” *Id.* at 767. As the law currently stands, “failing to object at all to a procedural error (e.g. a district court’s miscalculation of the Guidelines range) will subject a procedural challenge to plain-error review.” *Id.* As such, a party must still make a specific objection to preserve procedural errors on appeal. Courts across the nation are particularly attentive to the Supreme Court’s refusal to address challenges to procedural reasonableness in assessing claims. See *United States v. Merritt*, 809 F. App'x. 243 (5th Cir. 2020); *United States v. Sanders*, 820 F. App'x. 932 (11th Cir. 2020); *United States v. Finnesy*, 953 F.3d 675 (10th Cir. 2020).

Second, the Court did not decide what is sufficient to preserve any particular substantive-reasonableness argument. *Holguin-Hernandez*, 589 U.S. ___, 140 S.Ct. at 767. In other words, the Court did not address the circumstances where a party properly preserves the right to make particular arguments supporting the claim that a sentence is unreasonably long. *Id.* It simply resolved the question of whether asking for a shorter sentence constituted a claimed error brought to the court’s attention. *Id.* Thus, practicing attorneys must be aware that “a generalized argument in favor of less imprisonment will [not] insulate all arguments regarding the length of a sentence from plain-error review.” *Id.* (Alito, J., concurring) (emphasis in original). Attorneys should therefore note their objection to the substantive reasonableness of a sentence to preserve the issue on appeal.

Despite the Court's holding and dicta, it is important to err on the side of caution and alert the court of errors related to a defendant's sentence to preserve these issues for appeal, including those that arise to substantive and/or procedural error. Although advocating for a shorter sentence fulfills the requirement under Rule 51 for substantial error, a party must object to a procedural error in order to preserve review under a reasonableness standard. *United States v. Rios*, 823 Fed.Appx. 398, (6th Cir. 2020) ("simply raising objections to the length of the sentence does not preserve an alleged procedural error for appellate review").

The ZA Editors thank Laida Alarcon for contributing this helpful information. Laida is a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2020.



The Importance of Consistently Raising Trauma as a Mitigating Factor at Sentencing

Defense counsel should consistently raise trauma as a mitigating factor during the sentencing phase of criminal cases, regardless of the crime charged. Currently, trauma is typically only raised in a narrow set of offenses. In capital cases, for instance, the U.S. Supreme Court has recognized a Constitutional obligation to investigate a defendant's background because citizens who commit criminal acts due to hardship, or emotional and mental problems, are less culpable than those without that background.¹ Additionally, the Supreme Court has found that childhood trauma's effect on brain development is relevant in juvenile sentencing.² But trauma does not stop affecting a person once they reach the age of majority. Rather, trauma continues to play a significant role in why adults commit crimes—and these crimes are not limited to just capital offenses. Consistent efforts by defense counsel to raise trauma as a mitigating factor at sentencing cannot only help defendants receive lower sentences, but also help obtain proper trauma treatment while incarcerated. Receiving proper treatment for trauma will lower defendant's risk of recidivism and decrease the likelihood of worsening trauma incurred while incarcerated.³

Trauma occurs when a person experiences an intense event that overwhelms their body's capacity to react, causing lasting damage to their neurological system.⁴ Typically, trauma can be traced back to a specific event or series of events in an individual's life.⁵ Trauma symptoms vary greatly among individuals, "includ[ing] intrusive memories, flashbacks, hyper-vigilance, sleep disturbance, avoidance of traumatic stimuli, numbing of emotions, social dysfunction, and physiological hyperresponsivity."⁶ Although, in most circumstances, courts have not generally embraced trauma as a mitigating factor, they have shown

greater sympathy for people with Post Traumatic Stress Disorder (PTSD), as a result of military service, and victims of domestic violence with Battered Women Syndrome (BWS).⁷ Both of these conditions are forms of trauma.

Courts likely find these forms of trauma more convincing because of their increased acceptance by society. Advances in neuroscience and public awareness have reduced doubts, in general, about PTSD from military service and BWS.⁸ In addition, our society's respect for veterans and sympathy for victims of domestic violence have further contributed to the change.⁹ Thus, as other forms of trauma become increasingly recognized and accepted among society and health professionals, there is potential for courts to also begin accepting it as a factor at sentencing.

One positive step in this direction is the Supreme Court's recognition of childhood trauma as a mitigating factor in juvenile cases.¹⁰ When a child has been deprived of care, concern, and parental attention, they can suffer mental and emotional developmental delays.¹¹ These developmental delays do not suddenly disappear the moment a child reaches the age of majority. Instead, the mental and emotional developmental delays and traumatic responses often persist into adulthood and continue to impact the victim's decision-making process.¹² Unsurprisingly, then, an estimated seventy-five percent of incarcerated men and women have experienced some form of abuse, violence, or childhood neglect.¹³

Raising a defendant's history of trauma at sentencing is frequently not enough to be mitigating on its own.¹⁴ Instead, attorneys must connect the dots and describe to the court how trauma contributed to the offending conduct, by showing the way it impaired the defendant's decision-making and judgment.¹⁵ While the Supreme Court has only looked at trauma as a persuasive mitigating factor in juvenile and capital offenses, it also made clear that punishments should fit the offender, not merely the crime.¹⁶ To do this, courts need as much information as possible about a defendant's life, circumstances, and characteristics.¹⁷

Common mitigation claims for trauma in sentencing are dissociative reactions, sensation-seeking syndrome, and depression-suicide syndrome.¹⁸ A dissociative reaction makes one believe that they are in another setting, or may cause them to misunderstand what is happening around them.¹⁹ Sensation-seeking syndrome occurs when a person is trying to reenact their trauma, which causes them to seek out dangerous situations and may lead to crime.²⁰ Finally, depression-suicide syndrome causes traumatized people to feel hopelessness, guilt, or depression that leads to criminal behavior.²¹ Each of these three conditions affect a traumatized person's capacity to conform their behavior to the law.²²

Defense advocates should begin consistently raising trauma as a mitigating factor

at sentencing in cases where it clearly played a substantial role in the offense. While the court is only required to look at trauma factors in capital and juvenile cases, it is still relevant in other offenses as well. In particular, trauma needs to be raised as a mitigating factor in cases where it is evident that the defendant's trauma could be worsened, if unaddressed, while incarcerated. Consistent efforts by defense counsel to argue trauma as a mitigating factor at sentencing will slowly increase courts' acceptance of trauma for this purpose. It will also assist defendants in receiving the care they need, while also reducing the likelihood they will reenter the criminal justice system upon release.

¹ *California v. Brown*, 479 U.S. 538, 538 (1987).

² *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

³ Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 Am. J. Crim. L. 1, 45 (2018).

⁴ Gene Griffin, Sarah Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 Child. Legal Rts. J. 1, 6 (2014); Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 Cardozo L. Rev. 53, 55 (2012).

⁵ Grey, n.4 at 55.

⁶ *Id.* at 58.

⁷ *Id.* at 55.

⁸ *See id.* at 62.

⁹ *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009); U.S.S.G. §5H1.11 (recognizing that military service is relevant in determining whether a departure is warranted).

¹⁰ *Eddings v. Oklahoma*, 102 S. Ct. 869, 877 (1982).

¹¹ *Id.*

¹² Emad H. Atiq & Erin L. Miller (FN1), *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 Am. J. Crim. L. 167, 176 (2018).

¹³ Gohara, n.4 at 6.

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011).

¹⁷ *Id.* at 1235.

¹⁸ Grey, n.4 at 62.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

The ZA Editors thank Samantha Jackson for contributing this helpful information. Samantha is a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2020.



COVID-19, Compassionate Release, and the Federal Prison System

The coronavirus has had a global impact, and as states try to contain the spread with calls for masks and socially distancing, those within custody of the Federal Bureau of Prisons (BOP) are confined in tight spaces. Unsurprisingly, there have been numerous reports of COVID-19 outbreaks within the BOP. Because of this, federal courthouses across the country have received numerous requests from inmates asking for Compassionate Release as a result of the disease.¹ Many individuals who are requesting compassionate release are those who have underlying medical conditions which make them more susceptible to the disease.

As of January 12, 2021, there are 5,530 federal inmates and 2,013 BOP staff who have tested positive for COVID-19.² Butner Medium II has the fourth largest number of confirmed cases in the federal system, with 174 inmates testing positive, while Fort Dix FCI ranks first with 797 positive cases.³ COVID-19 in prisons should be of concern to everyone: research shows that prisons contribute to infectious disease deaths outside of the facility.⁴ Significantly fewer people in custody limits the spread of COVID-19 infection among those incarcerated, as well as those who work in jails.

COVID-19 in U.S. prisons is unlikely to be contained without implementing more effective infection control.⁵ For criminal defense attorneys, this virus presents an immediate risk to colleagues, clients, and to justice. However, criminal defense attorneys must take care to overcome all of the necessary procedural hurdles and articulate something more than just the existence of the pandemic to obtain relief for their clients.⁶ Reports demonstrate that jails and prisons are among the nation's COVID-19 hot spots.⁷ Fighting for compassionate release for clients who are eligible is of top importance, as one immediate way to protect people in prison and prevent the spread is to substantially reduce the prison population.

Once a person has been convicted and sentenced to prison, under 18 U.S.C. § 3582(c)(1) (A), the court can reduce the sentence if it finds that "extraordinary and compelling reasons warrant such a reduction."⁸ Such "extraordinary and compelling reasons" can include the following: the prisoner is suffering from a terminal illness; the individual is suffering from a serious physical or medical condition, and if the prisoner is at least 65 years old, is experiencing a serious deterioration of their physical or mental health, and has served at least 10 years or 75% of their sentence.⁹ Judges have also been using their discretion to grant relief for other reasons, such as family issues amidst the pandemic. There is also a catchall provision that allows judges to identify other extraordinary circumstances that are not set out in the guidelines.

In 2018, § 603 of the First Step Act amended 18 U.S.C. § 3582(c)(1)(A) to provide that a defendant may request compassionate release from the sentencing court after exhausting all of their administrative remedies.¹¹ In the context of compassionate release, this requires that the defendant either exhaust all administrative rights to appeal a failure of the BOP to bring a motion of compassionate release on their behalf or the lapse of thirty days from the receipt of a request by the warden of the defendant's facility.¹²

The process for compassionate release was slightly amended with the passage of the First Step Act. Before the First Step Act, inmates would submit a written request to the Warden of their facility, and the Warden would conduct the review to determine whether the court should consider compassionate release for that individual.¹³ The First Step Act now provides inmates the power to file a motion if they can demonstrate that they tried and failed to convince the BOP to do so. If the Warden fails to address the petition within 30 days, the inmate is now able to file directly with the district court.¹⁴ The change in compassionate release also broadens the scope of "extraordinary or compelling reasons" for an individual's release. Along with terminal medical conditions, debilitating conditions, and old age, inmates may now be granted compassionate release for family circumstances, such as the death or incapacitation of the family member or caregiver of the inmate's children, or the incapacitation of their spouse or registered partner.

Moreover, when deciding whether to grant compassionate relief for an individual, the court must consult the sentencing factors in 18 U.S.C. § 3553(a) and must ensure that the reduction is "consistent with applicable policy statements."¹⁰ Recently, the Fourth Circuit explained that U.S.S.G. § 1B1.13 is not such an "applicable policy statement" when a compassionate release motion is filed by a defendant, rather than the Director of the Bureau of Prisons. "When a defendant exercises his new right to move for compassionate release on his own behalf . . . § 1B1.13 does not apply, and thus § 3582(c)(1)(A)'s consistency requirement does not constrain the discretion of district courts." *United States v. McCoy, et al.*, 981 F.3d 271, 281(4th Cir. 2020).

Compassionate release is especially important in light of this pandemic. COVID-19 spreads quickly, and the facilities in which inmates are housed are extremely susceptible to quick, uncontrollable outbreaks of this disease. Those who are most at risk should be removed from those facilities if at all possible. For those appointed to cases with compassionate release issues, be sure to evaluate your client's situation to see if there are any conditions that might put them at higher risk for the virus is vital. Courts have also acknowledged situations where environmental factors pose an unreasonable risk to an inmate's health¹⁵, and this reasoning can apply with greater force given COVID-19. It is imperative that if you believe a client of yours would be granted compassionate release due to their own health concerns or the health of their

family you support them by properly evaluating their medical record and situation to determine if they qualify for relief.

¹ Walter Pavlo, *Federal Judges Are Relying on Bureau of Prisons COVID-19 Numbers to Make Rulings*, FORBES (May 20, 2020), <https://www.forbes.com/sites/walterpavlo/2020/05/20/federal-judges-are-relying-on-bureau-of-prisons-covid-19-numbers-to-make-rulings/#664fc1c412c7>.

² COVID-19 Cases, <https://www.bop.gov/coronavirus/> (last visited Jan 12, 2021).

³ *Id.*

⁴ Sandhya Kajeepeta & Seth J. Prins, *Why Coronavirus in Jails Should Concern All of Us*, The Appeal, (Mar. 24, 2020) <https://theappeal.org/coronavirus-jails-public-health/#XnpLyfLt5Zs.twitter>.

⁵ Alexandra Sternlicht, *Prisoners 550% More Likely to Get Covid-19, 300% More Likely to Die*, New Study Shows, FORBES, (Jul. 8, 2020) <https://www.forbes.com/sites/alexandrasternlicht/2020/07/08/prisoners-550-more-likely-to-get-covid-19-300-more-likely-to-die-new-study-shows/#1139bb463a72>.

⁶ Eric W. Moran and Elena M. Quattrone, *Federal Courts Set Out Preconditions for Prisoner Release Because of COVID-19 Risk*, NEW YORK LAW JOURNAL, (Apr. 15, 2020) <https://www.law.com/newyorklawjournal/2020/04/15/federal-courts-set-out-preconditions-for-prisoner-release-because-of-covid-19-risk/>.

⁷ "Correctional Facilities Are Covid-19 Hot Spots. Why Don't They Get Vaccine Priority?" (Dec. 24, 2020) found at [https://www.npr.org/2020/12/24/948873835/correctional-facilities-are-covid-19-hot-spots-why-dont-they-get-vaccine-priorit#:~:text=Live%20Sessions-,Correctional%20Facilities%20Are%20COVID%20Hot%20Spots%2C%20Don't%20Get%20Vaccine,get%20vaccinated%20before%20they%20do; see also, The Editorial Board, The Coronavirus Crisis Inside Prisons Won't Stay Behind Bars, NY TIMES, \(Jun. 25, 2020\) https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html](https://www.npr.org/2020/12/24/948873835/correctional-facilities-are-covid-19-hot-spots-why-dont-they-get-vaccine-priorit#:~:text=Live%20Sessions-,Correctional%20Facilities%20Are%20COVID%20Hot%20Spots%2C%20Don't%20Get%20Vaccine,get%20vaccinated%20before%20they%20do; see also, The Editorial Board, The Coronavirus Crisis Inside Prisons Won't Stay Behind Bars, NY TIMES, (Jun. 25, 2020) https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html).

⁸ *Federal Prisoners and COVID-19: Background and Authorities to Grant Release*, Congressional Research Service, <https://crsreports.congress.gov/product/pdf/R/R46297> (last visited July 27, 2020).

⁹ *Id.* at 9.

¹⁰ 18 U.S.C. § 3582(c)(1)(A).

¹¹ Pub. L. 115-391, 132 Stat. 5194.

¹² See n. 10.

¹³ *Compassionate Release, The First Step Act, and COVID-19: Everything You Need to Know*, <https://niemanlaw.com/compassionate-release/> (last visited July 27, 2020).

¹⁴ *How the First Step Act Changed Federal Compassionate Release*, <https://compassionaterelapse.com/first-step-act-compassionate-release/> (last visited July 27, 2020).

¹⁵ Some Courts have supported 8th amendment claims where environmental factors posed an

unreasonable risk to an inmate's health, including exposure to 'infectious maladies such as hepatitis and venereal disease' caused by overcrowding, unsafe drinking water, and 'toxic or other substances.' See e.g., *Allen v. Kramer*, 2016 U.S. Dist. LEXIS 115024, 2016 WL 4613360, at *7 (E.D. Cal. Aug. 17, 2016)

The ZA Editors thank Laurena Grissett for contributing this helpful information. Laurena is a third-year law student at UNC School of Law and was an intern in the FPD office during the Summer of 2020.



Section 2255 as a Fundamental Constitutional Right

After a defendant files or succeeds under 28 U.S.C. § 2255¹ in overturning a conviction, prosecutors are generally free to reindict that individual for offenses not charged in the original indictment, or for those formally dismissed during plea bargaining.² To bar re-prosecution for such offenses, defense counsel could plausibly argue that the U.S. Constitution vests a fundamental right in federal defendants to file a § 2255 motion for judicial review of their sentencing or conviction. Accordingly, the Due Process Clause of the 5th Amendment would then require strict scrutiny review of any state action infringing upon that right (here, actual or threatened subsequent reindictment), effectively dooming such action to dismissal.³ This argument appears to be an issue of first impression (upon which there is widespread academic and judicial disagreement), and is likely to fail initially at the district court level. Its validity would likely require testing and certification by an appellate court.

Combined with the plain language of § 2255 itself (which empowers federal prisoners to file an initial petition as a matter of right),⁴ the Suspension and Due Process Clauses in Article I and the 5th Amendment to the U.S. Constitution plausibly vest a fundamental Constitutional right in federal criminal defendants to *habeas* review under petitions like § 2255.⁵ Should a trial or appellate court agree, then it must review any state action infringing upon that right under strict scrutiny and almost certainly bar it. This would surely include actual or threatened harsher prosecution following a § 2255 motion, or perhaps even the chilling effect that reasonable apprehension of retaliatory prosecution would have on the decision to file such motions.

Considerable disagreement exists over whether the Suspension Clause grants federal prisoners a positive right to *habeas* review, or merely prohibits Congress from suspending the power of federal courts to grant writs of *habeas corpus* (absent the exigent circumstances outlined in the Clause).⁶ Despite academic controversy that extends to this day,⁷ the U.S. Supreme Court

appears to have suggested in 1807 that the Suspension Clause does in fact vest, *in federal prisoners themselves*, an affirmative right to *habeas* review.⁸ Since traditional *habeas* petitions and § 2255's are (by intention)⁹ nearly identical in scope,¹⁰ this would imply a right to review under § 2255.

Assuming that the Suspension Clause does create a fundamental right to *habeas* review, it would follow that the act of filing a § 2255 motion is—in and of itself—a fundamental Constitutional liberty protected by the 5th Amendment doctrine of substantive due process: a right to review necessarily implies a right to file, or else would prove a nullity. Therefore, impingement upon that fundamental right by the government—prosecutors being the archetypal class of state actors engaged in the business of infringing upon fundamental rights, viz. life and liberty—would constitute just the sort of action that § 2255(a) empowers a defendant to claim “was imposed in violation of the Constitution.”¹¹ If the Suspension Clause vests such a fundamental right in a defendant to file and receive review under *habeas* petitions like § 2255, then actual or threatened prosecutorial retaliation—or any chilling effect caused by reasonable apprehension of it—could constitute as-applied or facially unconstitutional infringements upon that right.

There is little case law suggesting that a federal prosecutor is barred in any way from charging a criminal defendant with uncharged crimes after that defendant successfully overturns his conviction via § 2255 for the original crimes charged. This is largely due to the vast breadth of prosecutorial discretion, and its general unreviewability. However, should courts agree that § 2255 vests a Constitutionally-protected right in the movant, defense counsel could potentially vitiate an indictment filed subsequent to the motion by arguing that it infringes upon a fundamental liberty.

As noted, this argument appears to be an issue of first impression that would likely require, and succeed only upon, appeal. It should therefore be deployed sparingly—and with great circumspection—in a narrow class of appropriate test cases. For instance, counsel should probably only pursue this line on behalf of a client with a highly sympathetic personal history; who is reindicted in a visibly vindictive fashion by the prosecution; after *succeeding* upon a § 2255 motion to overturn a conviction (i.e. not merely after filing and awaiting review); for which the overturned conviction was for a non-violent, victimless offense; the superseding indictment of whom charges previously uncharged offenses that were similarly victimless and non-violent; and which were committed in the distant (though not statutorily-barred) past.

Like the decision to file a § 2255 motion itself, the decision to bring this argument is ultimately a tactical one bound up in counsel's broader litigation strategy—and, given its novelty, an especially delicate one. It must be made on an

individualized basis according to the underlying facts and procedural history of the case; the character and personality of the opposing prosecutor, the presiding judge, and the client; the makeup and judicial philosophy of the appellate courts that would have to certify it; and above all, the wishes of the client and sound judgement of defense counsel.

If successful, this argument could generate new precedent safeguarding defendants' due process rights and recalibrate the balance of power between prosecutor and defendant during plea bargaining. Given the fundamentality of due process rights, perhaps it is a fight worth having, even against the odds: "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If government is always to be accountable to the judiciary for a man's imprisonment, access to the courts on *habeas* must not be thus impeded."¹²

¹See, generally, 28 U.S.C. § 2255 (2018) (Like traditional habeas petitions, § 2255 is a form of collateral attack that allows federal prisoners to challenge their convictions and sentences. As with all forms of collateral review, it is not a direct substitute for appeal.).

²The government is generally empowered to do so by the broad scope of prosecutorial discretion, and by statute. See 18 U.S.C. § 3296 (2018) ("Counts dismissed pursuant to a plea agreement...shall be reinstated by the District Court if..."). There are limits to this discretion (e.g. prosecutorial vindictiveness, statutes of limitation, etc.), but they are omitted from this analysis.

³The basic logic of the argument is as follows: (1) that § 2255 is analogous to a traditional petition for a Writ of *Habeas Corpus*; (2) that the Writ is so fundamentally important it was enshrined in the main Articles of the U.S. Constitution, before the Bill of Rights was even written or passed; (3) that the right to file a § 2255 petition ought therefore be considered a fundamental Constitutional right protected by the doctrine of substantive due process under the Due Process Clause of the 5th Amendment; (4) that actually-executed or threatened retaliatory prosecution, or reasonable apprehension of retaliatory prosecutorial action following a § 2255 motion, would necessarily infringe upon that fundamental right; (5) that any state action which infringes upon a fundamental right (criminal prosecutions being the quintessential example of government infringement upon Constitutionally protected rights) is subject to strict scrutiny; and (6) that any state action subject to strict scrutiny is, statistically, almost certainly doomed to dismissal by the trial court or reversal upon appeal.

⁴See, generally, 28 U.S.C. § 2255 (2018) ("[A] prisoner in custody...may move the court"; "unless the [prisoner is] conclusively...entitled to no relief...the could *shall vacate*..." etc; "[a] second or successive motion *must be certified* [if]...[newly discovered, exculpatory evidence is identified and pled, or] a new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court [is promulgated]."). Legal

scholarship also supports this interpretation: see, e.g., Jennifer L. Case, *Kaleidoscopic Chaos: Understanding the Circuit Courts' Various Interpretations of § 2255's Savings Clause*, 45 U. MEM. L. REV. 1, 9 (2014). Finally, courts usually treat the plain meaning of unambiguous statutes as conclusive, except in rare cases where literal interpretation would produce results demonstrably at odds with the drafters' intent. See, e.g. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

⁵Other, analogous, forms of collateral attack include *habeas corpus* and *coram nobis* petitions.

⁶See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

⁷Compare William F. Duker, *A Constitutional History of Habeas Corpus*, 126-56 (1980) (concluding that the Suspension Clause only applies to prevent Congress from impeding a state court's ability to grant the writ), with, Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 871-74 (1994) (concluding there is a constitutional right to federal oversight of state convictions). See also, e.g., Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071, 2079 (2014) ("The controversy begins with the constitutional standing of habeas corpus. The Constitution, by its plain terms in the "Suspension Clause," does not provide an affirmative right to habeas corpus, but rather creates a general prohibition on the writ's suspension. This has given rise to an ongoing debate over whether the Constitution provides an affirmative right to habeas review, and if so, whether that right applies to prevent Congress from depriving federal prisoners, state prisoners, or both of the right to federal court oversight of their convictions. And this disagreement about what the Suspension Clause means spills over into debates about what the Judiciary Act of 1789 (the Act) means. The conventional reading of the Act is that it provided federal courts the authority to grant habeas corpus to federal prisoners. But one of the most distinguished habeas scholars and historians, Eric Freedman, concluded based on archival research that ever since the government began to function, the federal courts have had the power, both by federal statute and independently of it, to issue writs of habeas corpus in order to free state prisoners held in violation of federal law."). For a more detailed explanation of this history, see Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF L. REV. 451 (1996).

⁸See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (concluding that the Clause provides federal prisoners with an affirmative right to federal habeas review), *id.* at 95 (noting that if the Constitution did not require congressional enactment of a right to habeas corpus, then "the privilege itself would be lost, although no law for its suspension should be enacted"); see also, *Sanders v. United States*, 373 U.S. 1, 12-13 (1963)

("[I]f construed to derogate from the traditional liberality of the writ of habeas corpus, § 2244 [and similar provisions like § 2255(e) which limit successive motions] might raise serious constitutional questions," under the Suspension Clause.).

⁹ *Davis v. United States*, 417 U.S. 333, 343 (1974) ("[§ 2255's] sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum."); *see also, ibid.* "[The legislative] history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.... Nowhere in the history of § 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."); *and, United States v. Hayman*, 342 U.S. 205, 216-17 (1952) (citing the 'Statement' of the Judicial Conference Committee clarifying the necessity and purpose of § 2255: "[I]t...is in the nature of, but much broader than, *coram nobis*...[It] broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus.").

¹⁰ It is true that § 2255 is no longer exactly coterminous with traditional habeas petitions, as it once was. *See*, 28 U.S.C. § 2255(f) (one-year statute of limitation to file added in 1996). In addition, trial courts do have authority not to entertain second or successive motions, which contain no new information. *See* § 2255(h). Besides these limitations, however, § 2255 serves generally to provide federal prisoners with the same means as the Writ to collaterally attack the legality or Constitutionality of their detention. In fact, based on the jurisdictional flexibility it sought to introduce, one could argue that it is even broader and more generous.

¹¹ 28 U.S.C. § 2255(a) (2018).

¹² *Sanders*, 373 U.S. at 8.

The ZA Editors thank Peter Spring for contributing this helpful information. Peter was a third year law student at Duke Law School and extern in the FPD Office during the Spring of 2020.



The Reappearance of the Federal Death Penalty

On July 14, 2020, the United States Bureau of Prisons executed Daniel Lewis Lee at the Terre Haute federal penitentiary in Indiana.¹ Lee was the first federal inmate to be executed since Louis Jones in March of 2003. Five more federal inmates were put to death in the next two and a half months. The executions are moving at an unprecedented pace. Put into perspective, before the most recent seven executions, there have been a total of 37 federal executions in the previous 93 years; there had never been more than four in a single year.²

The resumption of federal executions further complicates the arduous process of representing capital defendants. Attorney General William Barr stated, "The American people . . . have long instructed that defendants convicted of the most heinous crimes should be subject to a sentence of death . . . We owe it to the victims of these horrific crimes, and to the families left behind, to carry forward the sentence imposed by our justice system."³ Based on the comments from Attorney General William Barr and the rapid pace of executions under the current administration, executions appear to be a fixture of the federal criminal justice system. Further, with 60 death row inmates in the federal system, the choice of which inmate to prioritize for execution can offer insight as to which cases the government might pursue the death penalty.⁴

The federal death penalty has had a unique existence. In *Furman v. Georgia*⁵, the Supreme Court found Georgia's capital punishment scheme to be cruel and unusual punishment. In the per curiam opinion, Justices Marshall and Brennan argued that the death penalty was *per se* unconstitutional. The other three concurring justices struck down the Georgia statute in question but refused to condemn the death penalty generally. In 1976, the Court reconsidered the question in *Gregg v. Georgia*⁶ and came to the opposite conclusion, stating, "the death penalty is not a form of punishment that may never be imposed."⁷ Still, the cases made a tremendous impact on the popular opinion of the death penalty at both the state and federal levels. In spite of *Gregg's* holding, no federal executions were carried out until Timothy McVeigh's in 2001.

Federal executions were resumed during the summer of 2020 at Attorney General Barr's direction. The Department of Justice website explains that Barr scheduled the executions of "five death-row inmates convicted of murdering, and in some cases torturing and raping, the most vulnerable in our society—children and the elderly."⁸ This is reflected in the choice of inmates scheduled for execution. A brief summary of the conduct for which the seven inmates were executed follows to illustrate follows to illustrate which cases have been prioritized by the current administration.

- The BOP executed Wesley Ira Purkey on July 16, 2020. Purkey was convicted in 2003 for raping and murdering a 16-year-old girl and murdering an 80-year-old woman with polio.⁹
- The BOP executed Dustin Lee Honken on July 17, 2020. Honken and a friend, Timothy Cutkomp, manufactured and distributed methamphetamine to two dealers. One dealer, Greg Nicholson, began cooperating with law enforcement, which led to Honken's arrest and indictment. Honken was convicted of murdering Nicholson, his girlfriend, and her two young daughters, as well as another potential witness against him while on pretrial release.¹⁰

- The BOP executed Lezmond Mitchell on August 26, 2020. Mitchell was convicted in 2003 of first-degree murder, felony murder, and carjacking resulting in murder, as well as other offenses, for the murder of a 63-year-old grandmother and her nine-year-old granddaughter. Mitchell stabbed the grandmother to death and slit the granddaughter's throat twice.¹¹
- The BOP executed Keith Dwayne Nelson on August 28, 2020. Nelson was convicted in 2001 of kidnapping, raping, and strangling a 10-year-old girl in Kansas. Nelson abducted his victim while she was roller blading in front of her home.¹²
- The BOP executed William Emmett LeCroy, Jr. on September 22, 2020. LeCroy was convicted of robbery, rape, and murder in 2001. LeCroy had served 10 years in prison for aggravated assault, burglary, child molestation, and statutory rape. In an effort to flee the country, LeCroy broke into the home of Joann Tiesler. When she returned home, LeCroy attacked, bound, raped and killed her. LeCroy then stole her car and attempted to flee to Canada.¹³
- The BOP executed Christopher Andre Vialva on September 24, 2020. Vialva was found guilty in 2000 of two counts of murder after abducting Todd and Stacie Bagley, two youth ministers, forcing them into the trunk of his car, using their debit cards to make withdrawals from ATM machines, shooting both victims, and setting the car on fire with both victims inside.¹⁴
- The BOP executed Brandon Bernard on December 11, 2020.¹⁵ Bernard was convicted, along with Christopher Vialva, for the same conduct.

On October 16, 2020, the Department of Justice scheduled the execution of federal inmate Lisa Montgomery to be conducted in December 2020. The pattern of the DOJ's scheduling executions for those convicted of harming children and the elderly tends to hold true. Lisa Montgomery was convicted of strangling a pregnant woman to death and taking her child. Montgomery's execution was eventually scheduled for January 12, 2021. However, late on January 11, 2021, a federal judge "blocked the execution to allow a hearing on whether Montgomery, 52, is too mentally ill to be executed," while another appellate court voted to stay the execution to determine if adequate notice was provided about the execution date.¹⁶ If Montgomery is executed, she will be the first woman to be put to death in the United States since 1953.¹⁷ As of January 13, 2021, this makes 11 federal executions since the BOP resumed carrying out executions in the summer of 2020.¹⁸

While a new administration may signal a shift, the recent resumption of federal executions could change the landscape of federal defense. These executions may affect the entire criminal process from effective plea bargaining and client counseling to trial strategy. Defense attorneys should be aware of renewed and increased federal executions, their rapid pace, and those cases that

have been prioritized for execution in order to provide more effective counsel to clients who may be charged with capital offenses.

¹ "Executions Scheduled for Four Federal Inmates Convicted of Murdering Children", The United States Department of Justice (2020), <https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children>. (last visited Oct 27, 2020).

² Capital Punishment, Federal Bureau of Prisons, BOP, https://www.bop.gov/about/history/federal_executions.jsp (last visited Oct 27, 2020).

³ "Executions Scheduled for Four Federal Inmates Convicted of Murdering Children", *supra* note 1

⁴ "Federal Death Penalty", Death Penalty Information Center (2020), <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty> (last visited Oct

⁵ 408 U.S. 238 (1972).

⁶ 428 U.S. 153, 187 (1976) (citing *Lloyd v. Hough*, 42 U.S. 153, (1843)).

⁷ *Id.*

⁸ "Executions Scheduled for Four Federal Inmates Convicted of Murdering Children", *supra* note 1

⁹ *Id.*
¹⁰ Lauren Gill & Ruth Hopkins, "U.S. Executes Dustin Lee Honken, The Third Federal Execution In A Week" The Appeal, <https://theappeal.org/u-s-executes-dustin-lee-honken-the-third-federal-execution-in-a-week/> (last visited Oct 27, 2020).

¹¹ Hailey Fuchs, "Justice Dept. Executes Native American Man Convicted of Murder" The New York Times (2020), <https://www.nytimes.com/2020/08/26/us/politics/lezmond-mitchell-executed.html> (last visited Oct 27, 2020).

¹² Jessica Schneider, "US government executes killer of 10-year-old girl" CNN (2020), <https://www.cnn.com/2020/08/28/politics/keith-dwayne-nelson-executed/index.html> (last visited Oct 27, 2020).

¹³ Vic Ryckaert, "U.S. executes 6th inmate since July in Terre Haute prison" The Indianapolis Star (2020), <https://www.indystar.com/story/news/crime/2020/09/23/u-s-executes-william-emmett-lecroy-jr-terre-haute-prison/3501262001/> (last visited Oct 27, 2020).

¹⁴ Department of Justice, Office of Public Affairs No. 20-999, Statement by Department of Justice Spokesperson Kerri Kupec on the Execution of Christopher Andre Vialva (2020).

¹⁵ "Brandon Bernard executed in Trump's final days," <https://www.bbc.com/news/world-us-canada-55261224> (last visited Jan. 12, 2021).

¹⁶ "Government Appeals Stay Of Execution For Only Female On Federal Death Row," <https://www.npr.org/2021/01/12/955984890/judge-blocks-execution-of-only-woman-on-federal-death-row> (last visited Jan. 12, 2021).

¹⁷ Jay Croft, "US government to execute first woman since 1953" CNN (2020), <https://www.cnn.com/2020/10/17/us/lisa-montgomery-brandon-bernard-executions-trnd/index.html> (last visited Oct 27, 2020).

¹⁸ See DeathPenaltyInfo.org, "Execution List 2020," <https://deathpenaltyinfo.org/executions/2020> (last visited Jan. 13, 2021).

The ZA Editors thank Robert Simmons for contributing this helpful information. Robert is a third-year law student at Campbell Law School and was an extern in the FPD office during the Fall of 2020.



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.

New Rules and Guideline Amendments

Federal Rules of Appellate Procedure

Changes to the Federal Rules of Appellate Procedure will take effect on December 1, 2020.

Rule 35(e) is amended to apply the fifteen-page limit of Rule 35(b)(2) to responses to petitions for en banc consideration.

Rule 40 (a)(3) is amended to change the word "Answer" to "Response" and apply the requirements of Rule 40(b) to any requested response.

Federal Rules of Criminal Procedure

There will be no changes to the Federal Rules of Criminal Procedure in 2020. The most recent changes were included in the Fall 2019 edition of the *Zealous Advocate* and took effect on December 1, 2019.

Federal Rules of Evidence

Changes to the Federal Rules of Evidence will take effect on December 1, 2020.

Rule 404 is amended to impose additional notice requirements on the Government in a criminal case. The Government must now provide notice, in writing, identifying what evidence it intends to offer under 404 and articulating a relevant, non-propensity purpose for which it offers

the evidence. This change corrects jurisdictions which have allowed the prosecution to admit evidence under 404 without explaining what specifically the evidence proves or its relevance for a non-propensity purpose.

Additionally, notice must now be provided far enough in advance of trial to give the defendant a fair opportunity to meet the evidence. However, the court may excuse this requirement upon a showing of good cause. The good cause exception applies both to the general notice requirement and to the prosecution's obligation to articulate a relevant non-propensity purpose. But if the court finds good cause, it must still consider measures to protect the defendant from undue prejudice.

Rule 404 is further amended to eliminate the requirement that a defendant make a request before notice is provided. As such, the prosecution must now provide notice of Rule 404 (b) evidence regardless of whether it has been requested. Finally, some words in the headings and text of the act have been rearranged for additional clarity, but do not carry any substantive impact.

Proposed Amendments to the E.D.N.C. Local Rules of Criminal Procedure

There will be no changes to the E.D.N.C. Local Rules of Criminal Procedure in 2020. The most recent changes were included in the Fall 2019 edition of the *Zealous Advocate* and took effect on December 1, 2019.

Amendments to the United States Sentencing Guidelines

There are no new proposed changes to the United States Sentencing Guidelines in 2020. The most recent proposed changes were included in the Fall 2019 edition of the *Zealous Advocate*, but they have not yet been approved by Congress.

The ZA Editors thank Nathan Wilson for contributing this helpful information. Nathan is a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2020.



LOCAL NEWS

Eastern District News

The FPD welcomes newly seated United States Magistrate Judge Brian S. Meyers, who sits in Raleigh, North Carolina. We extend a warm welcome on behalf of our office and the panel attorneys from this district.

The ZA editors note that effective January 6, 2021, Richard E. Myers II assumed the position of Chief Judge for the Eastern for the Eastern District of North Carolina.

FPD Office News

In September 2020, we bid a fond a farewell to Marshal Ellis, Assistant Federal Public Defender, who worked in the Raleigh office.

We also bid a fond farewell to Susan Umstead, Assistant Federal Public Defender, who retired in December 2020. Susan worked in our Raleigh office for almost 18 years and had over 24 years of combined federal service.

We are pleased to welcome David Venable, who joined us as an Assistant Federal Public Defender in the Raleigh office in October 2020 and Kimberly Moore, who joined as an Assistant Federal Public Defender in the Raleigh office in January 2021.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys in Cary NC: Shawna Vasilko; in Wilmington, NC: Cecilia Reyna; and in New Bern, NC: Guy Smith.

Robert J. McAfee is a new panel attorney in New Bern, NC.



“Warm in the Snow” by Anna Patterson

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

Send an e-mail to
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“Penny Lane” by Mary Kate Wasco