

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Winter 2024

The Defender's Message

As always, we are excited to bring you a variety of articles in this edition of the Zealous Advocate. Inside, you will find a brief primer on diminished capacity, new Fourth Circuit insight into standards for reasonable suspicion for stops, a historical perspective on police surveillance, and a cautionary tale for lawyers whose fees may derive from their client's unlawful activities. In appellate and post-conviction news, you will find articles regarding the possibility of harsher sentences upon successful remands, restoration of firearm rights, the implications of appellate courts' raising harmless error *sua sponte*, and the limitations of federal challenges to capital and habeas sentence claims. We also have our usual links to updated case law holdings and news around the district, as well as a summary of new local rules, federal rules and sentencing guidelines.

As always, the Editors and I hope you find these articles helpful to your practice. As you know, this publication is only one of the ways we try to keep the panel up to date on recent legal developments. We also provide CLE training programs for attorneys in our district, with the next one taking place in person this spring at North Carolina State University's McKimmon Center in Raleigh, North Carolina. I look forward to seeing everyone at our next seminar and thank you for your continued dedication and the tireless work you do for criminal defendants in the EDNC.

G. Alan DuBois
Federal Public Defender



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PANEL ATTORNEY INFORMATION

Reminders

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

Seminar BOLOs

Please save the dates for our 2024 EDNC Federal Criminal Practice Seminars. Our Spring 2024 Seminar is set for Friday, May 17th at North Carolina State University's McKimmon Center in Raleigh, NC. Our Fall 2024 Seminar will be a two-day seminar held November 7-8th at the Holiday Inn in Wrightsville Beach, NC.

Additional details, including registration and reservation information, will be sent out later and will also be posted to our website.



PRACTICE TIPS

Diminished Capacity: A Narrow Doctrine

In criminal cases, psychiatric evidence is sometimes insufficient to prove insanity yet still probative of a defendant's intent. A narrow doctrine permits this evidence at trial, but it is flanked on each side by the prohibitions of the Insanity Defense Reform Act ("IDRA") and the Federal Rules of Evidence. To argue diminished capacity, defense attorneys must familiarize themselves with this doctrine and avoid several common pitfalls.

Before 1984, federal law on insanity and psychiatric evidence was relatively permissive.¹ Then, John Hinckley Jr. shot the president, believing it would impress the actress Jodie Foster.² His acquittal by reason of insanity prompted Congress to pass IDRA, which severely limited the scope of the insanity defense.³ Federal law now permits the defense only if the defendant "was unable to appreciate the nature and quality or the wrongfulness of his acts."⁴ It explicitly provides that "[m]ental disease or defect does not otherwise constitute a defense."⁵

Nevertheless, in *United States v. Worrell*, the Fourth Circuit joined other federal Courts of Appeals in maintaining a limited role for psychiatric evidence in non-insanity criminal defenses.⁶ It held that "IDRA does not prohibit psychiatric evidence of a mental condition short of insanity when such evidence is offered purely to rebut the government's evidence of specific intent," though it warned that "such cases will be rare."⁷

Indeed, such cases *have been* rare. In the majority of cases later brought before the Fourth Circuit, the court has affirmed decisions to *exclude* diminished capacity evidence from trial.⁸ These cases suggest a need for defendants to be careful in articulating their basis for admitting the psychiatric evidence. Improper arguments might not only run afoul of IDRA; they could also contravene the Federal Rules of Evidence.

First, diminished capacity evidence is admissible only to "to disprove *specific intent* for *specific intent* crimes."⁹ Unlike the insanity defense, it is not a blanket justification or excuse for wrongful conduct.¹⁰ Rather, the evidence is permitted because it "negates an essential element of the government's *prima facie* case."¹¹ In *United States v. Taoufik*, for instance, the Fourth Circuit rejected a defendant's attempt to use this evidence to dispute that he acted "willfully," where that term merely meant "deliberately, voluntarily, and intentionally."¹²

Relatedly, diminished capacity evidence cannot be used to argue a defendant lacked behavioral control. Courts have interpreted IDRA to prohibit this kind of "volitional" excuse across the board.¹³ For instance, evidence of a "supposed psychiatric compulsion or inability or failure to engage in normal reflection" would be inadmissible.¹⁴ In other words, the evidence must "show the defendant 'did not do it, not that he could not help it.'"¹⁵

Additionally, even beyond IDRA, psychiatric evidence must overcome common relevance objections. The evidence must be, at minimum, "*relevant* to the issue of specific intent."¹⁶ In *United States v. Hayez*, for instance, the Fourth Circuit rejected evidence that the defendant "was a pathological gambler" because it was not probative of whether he "possessed the specific intent willfully to file a false tax return."¹⁷ But defendants must also avoid violating Federal Rule of Evidence 704(b). That rule prohibits an expert witness from explicitly concluding that "the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."¹⁸ Notably, "Rule 704(b) . . . was an attempt to constrain psychiatric testimony on behalf of defendants asserting the insanity defense."¹⁹

Finally, psychiatric evidence must "focus on the defendant's state of mind *at the time of the alleged offense*."²⁰ For example, the Fourth Circuit affirmed a district court's decision to partially exclude testimony where the expert "limited his opinion to a short temporal window" that covered only one of the defendant's charges.²¹ But the district court admitted the testimony as to that charge.²²

In summary, diminished capacity arguments should avoid any justification or excuse for a defendant's conduct. Defendants should not suggest that they were unable to control themselves or appreciate the wrongfulness of their acts. Expert witnesses should not state directly

that defendants did not possess the specific intent required for a given crime. But experts may be able to testify *generally* as to a defendant's mental condition *at the time of the alleged offense* if it is *relevant* to the question of whether the defendant formed the required intent. If psychiatric evidence threads this needle, it may yet be admissible to dispute a specific intent crime.

¹ See Judge Eugene M. Fahey et al., "The Angels That Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense, 68 Buff. L. Rev. 805, 817-19 (2020) (describing how most states and federal courts adopted the American Law Institute's insanity test, which incorporated a defense based on defendants' inability to conform their conduct to the law).

² *Id.* at 822.

³ See *id.* at 823-24 (describing how a bipartisan Congress passed IDRA "with virtually no opposition"). 48 U.S.C. § 17(a).

⁴ *Id.*

⁵ 313 F.3d 867, 874 (4th Cir. 2002).

⁶ *Id.*

⁷ See, e.g., *United States v. Johnson*, 110 F. App'x 319 (4th Cir. 2004); *United States v. Hayez*, 260 F. App'x 615 (4th Cir. 2008); *United States v. Dietz*, 443 F. App'x 781 (4th Cir. 2011); *United States v. Ging-Hwang Tsoa*, 592 F. App'x 153 (4th Cir. 2014); *United States v. Taoufik*, 811 F. App'x 835 (4th Cir. 2020). Even in *Worrell* itself, the district court excluded this evidence, and the Fourth Circuit affirmed. See *Worrell*, 313 F.3d at 874.

⁸ See *Worrell*, 313 F.3d at 873 (emphasis added).

⁹ See *id.*

¹⁰ *Id.* (quoting *United States v. Cameron*, 907 F.2d 1051, 1065 (11th Cir. 1990)).

¹¹ See *Taoufik*, 811 F. App'x at 840.

¹² See *Worrell*, 313 F.3d at 872.

¹³ *Id.* at 873 (quoting *United States v. Pohlot*, 827 F.2d 889, 890 (3d Cir. 1987)).

¹⁴ *Dietz*, 443 F. App'x at 788 (quoting *Worrell*, 313 F.3d at 874).

¹⁵ See *Johnson*, 110 F. App'x at 323.

¹⁶ See *Hayez*, 260 F. App'x at 618-19.

¹⁷ Fed. R. Evid. 704(b).

¹⁸ *United States v. Gastiburo*, 16 F.3d 582, 588 (4th Cir. 1994).

¹⁹ *Ging-Hwang Tsoa*, 592 F. App'x at 155 (citing *Cameron*, 907 F.2d at 1067).

²⁰ See *Dietz*, 443 F. App'x at 788.

²¹ See *id.* at 787.

The ZA Editors thank Will Petro for contributing this helpful information. Will is a third year law student at Duke University School of Law and was an extern in the FPD office during the Fall of 2023.



United States v. Critchfield: Fourth Circuit Requires More for Reasonable Suspicion

In *United States v. Critchfield*,¹ the Fourth Circuit found that observations made by a tipster and relayed to police over the phone

was not enough to support a finding of reasonable suspicion.² The reasonable suspicion standard stems from *Terry v. Ohio*,³ where the U.S. Supreme Court held that police may conduct a brief, investigatory stop as long as there is "reasonable cause to believe" that a person is involved in a crime.⁴ In *Alabama v. White*,⁵ the Supreme Court found that anonymous tips, corroborated by independent police work, are reliable enough to provide reasonable suspicion for an investigatory stop.⁶

Recently, the Supreme Court clarified its holding in *White*. In *Navarette v. California*,⁷ the Court held that police officers need not personally observe criminal activity and anonymous tips alone may be reliable enough to provide the basis for reasonable suspicion.⁸ The Fourth Circuit has adhered to this broad interpretation of reasonable suspicion, and it has even applied it to "face-to-face" tips—those that are not anonymous—finding them to be even more reliable than anonymous tips.⁹ In *United States v. Kehoe*,¹⁰ the Fourth Circuit found that information from an identifiable bar patron, knowledge that the bar was in a "known problem area," and minimal observations from a police officer was enough to provide reasonable suspicion.¹¹ The holding in *Critchfield* suggests a departure from this broad interpretation of what is required for reasonable suspicion.

In *Critchfield*, a United States Postal Inspector observed Mr. Critchfield walk out of an alley and onto the street.¹² The Inspector believed the alley was right next to an unoccupied house.¹³ The Inspector made eye contact with Mr. Critchfield, and after determining he looked suspicious, got in his car and began following Mr. Critchfield.¹⁴ Moreover, the Inspector believed Mr. Critchfield had "something very heavy" in the front pocket of his sweatshirt.¹⁵ Thus, he called local law enforcement, with whom he had previously worked, and relayed this information to the officers.¹⁶ The officers located Mr. Critchfield, stopped and frisked him, and found a firearm and drugs.¹⁷ After analyzing the totality of the circumstances, the Fourth Circuit determined that the officers lacked reasonable suspicion to stop Mr. Critchfield.¹⁸

This holding narrows the Fourth Circuit's interpretation of reasonable suspicion and is a small victory for defendants stopped based on a tip to police officers. First, compared to *Kehoe*, *Critchfield* seems to require more from police officers acting on tips. In both cases, the officers knew who the tipster was, thus increasing the information's "indicia of reliability."¹⁹ In fact, the tipster in *Critchfield* was someone who had a working relationship with the officers. But this was not enough for the Fourth Circuit. The court required some observations or "firsthand knowledge" from police officers that could contribute to their suspicion.²⁰ *Critchfield* can be beneficial to defendants when officers are acting solely based on second-hand information, even if that information comes from a credible and reliable source.

Defense attorneys can use *Critchfield* to argue for evidence suppression when information

comes solely from a tipster. During suppression hearings, it will be important to focus on what the police officers knew at the time of the stop. For example, in *Critchfield*, the officers testified that “a hooded sweatshirt with a bulge in these circumstances ‘could be any number of things,’” and officers could not know what was in Mr. Critchfield’s pockets until they were “able to locate him.”²¹ Further, *Critchfield* demonstrates that even if the evidence does not come solely from a tipster, the Fourth Circuit will scrutinize the officer’s knowledge when determining if the information gives rise to reasonable suspicion.²² Thus, defense attorneys can still use *Critchfield* when arguing that an officer lacked reasonable suspicion.

Moreover, the Fourth Circuit noted the officers failed to testify to any “specialized basis” for interpreting the Inspector’s information.²³ Defense attorneys will need to question officers on the distinction between information they heard from a third-party and what they themselves observed. If the court finds that officers were acting solely on the third-party information, rather than applying their expertise to the information and corroborating it with first-hand knowledge, a court may suppress any evidence against the defendant.

Critchfield serves to clarify the reasonable suspicion standard. The holding requires police to make their own observations before a stop, even if the tip comes from a trusted source. This can help defense lawyers argue against evidence from tip-based stops and may lead to that evidence being suppressed.

¹ *United States v. Critchfield*, 81 F.4th 390 (4th Cir. 2023).

² *Id.* at 394.

³ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴ *Id.* at 8.

⁵ *Alabama v. White*, 496 U.S. 325 (1990).

⁶ *Id.* at 332-33.

⁷ *Navarette v. California*, 572 U.S. 393 (2014).

⁸ *Id.* at 397.

⁹ *United States v. Lawing*, 703 F.3d 229, 237 (4th Cir. 2012).

¹⁰ *United States v. Kehoe*, 893 F.3d 232 (4th Cir. 2018).

¹¹ *Id.* at 239.

¹² *Critchfield*, 81 F.4th at 392.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 394.

¹⁹ *Kehoe*, 893 F.3d at 238.

²⁰ *Critchfield*, 81 F.4th at 394.

²¹ *Id.* at 395.

²² *Id.* at 394 (“To summarize, when the officers stopped Critchfield, they knew he was a man with a weighed-down sweatshirt pocket who had walked through a residential neighborhood past an occasionally unoccupied home next to a commercial area in broad daylight and who had behaved evasively when a neighborhood resident watched and followed him. These circumstances, without more, do not give rise to reasonable suspicion of theft.”). See generally Lauryn P. Gouldin, *Crimes of*

Suspicion, 72 EMORY L.J. 1429 (2023) (arguing for officers to have suspicion of a specific crime before conducting a *Terry* stop).

²³ *Critchfield*, 81 F.4th at 395.

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



Surveilling Our Freedom: Slave Patrols and the Origins of Police Surveillance

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,” providing that “no warrants shall issue but upon probable cause.”¹ In *Katz v. United States*, the U.S. Supreme Court expanded the protection guaranteed by the Fourth Amendment by holding that the Fourth Amendment protects people, not simply places against unreasonable searches and seizures.² Since *Katz*, the Supreme Court has expanded the circumstances in which a person has a reasonable expectation of privacy. In *Carpenter v. United States*, the court held that a person has a reasonable expectation of privacy in the whole of their physical movements.³ However, for African-American communities and allies, the reasonable expectation of privacy to the whole of our physical movement is constantly threatened. African-American communities and allies are continuously subjected to technology surveillance.

Leaders of a Beautiful Struggle v. Balt. Police Department illustrates an example of how technology has been used to surveil Black communities and their allies. Leaders of a Beautiful Struggle is a grassroots think-tank and advocacy group located in Baltimore, Maryland.⁴ The group is dedicated to creating transformative policies to improve the conditions of Baltimore’s Black communities.⁵ In 2020, Leaders of a Beautiful Struggle brought suit against the Baltimore Police Department to enjoin the implementation of its aerial surveillance program and prevent access to any data collected by the program.⁶ The aerial surveillance program used aerial photography to track movements related to serious crimes.⁷ Using multiple planes equipped with high-tech cameras, the police department could capture approximately 32 square miles per image per second.⁸ The planes would fly a minimum of 40 hours a week, obtaining an estimated twelve hours of coverage of around 90% of the city each day.⁹ Data from this surveillance would then be sent to ground stations where contractors would use

the data to track individuals and vehicles from a crime scene to assist the Baltimore Police Department's investigation.¹⁰ However, the United States Court of Appeals for the Fourth Circuit held that the aerial surveillance program violated the Fourth Amendment.¹¹ The Court reasoned that the aerial surveillance program opened an intimate window into a person's associations and activities, thus violating the reasonable expectation of privacy individuals have in the whole of their movement.¹²

For the African-American community, the surveillance of the whole of our individual movements is rooted in tactics used to suppress our liberation during colonial slavery. During colonial slavery, African-Americans were committed to fighting for their human right to freedom. To stop African-Americans from organizing around matters of liberation, slave patrols were used to prevent African-Americans from fighting for freedom.¹³ The origins of an organized slave patrol system can be traced backed to Spanish and English colonists in the Caribbean.¹⁴ Almost every colony in the Caribbean faced difficulties in controlling their slaves.¹⁵ In Barbados, for an example, controlling the movement of slaves became a growing priority.¹⁶ In 1661, Barbados passed the "Act for the Better ordering and governing of Negroes" which partially stated slaves were a "heathenish, brutish, and dangerous kind of people who had to be controlled."¹⁷ Thus, Barbados slave patrols were called upon whenever the government suspected slaves were organizing to pursue freedom.¹⁸ Consequently, when Barbadians settled South Carolina after 1670, they implemented slave laws and enforcement groups in South Carolina.¹⁹ In 1671, the colony created a night watch charged with being vigilant of slave gatherings.²⁰ In 1696, the South Carolina assembly passed a comprehensive slave code directing night watchers to take a more active role in policing slaves.²¹ Finally, in 1704, South Carolina created their first official slave patrols.²² Not limited to South Carolina, county courts in North Carolina appointed patrols in the 1750s whose primary purpose was to restrict the movement of slaves.²³

The systematic surveillance of African-Americans and our communities by slave patrolers has influenced modern-day police department practices. In 2016, the ACLU of California discovered that Facebook, Instagram, and Twitter were providing user data to Geofeedia.²⁴ Geofeedia developed a social media monitoring product marketed to police departments as a tool to monitor activists and protestors.²⁵ In fact, following the Freddie Gray killing in Baltimore, the Baltimore Police Department used social media data from Geofeedia to thwart groups from exercising their right to protest the unjust killing of Freddie Gray.²⁷ Geofeedia allowed the police to geographically locate people as they communicated, view their pictures and videos, and track with whom they interacted.²⁸ Online surveillance by police departments deters people

from organizing online to voice their opposition to unjust government conduct. This surveillance is a manifestation of the night watchers and slave patrols of the 1600s and 1700s who sought to prevent the slaves from organizing to end the inhumane system of slavery.

Furthermore, the historical and modern-day surveillance of the African-American community is a form of social control used to prevent rebellion against unjust government practices and systems. During colonial slavery, this surveillance was used to prevent rebellion against the institution of slavery. Today, surveillance is used to suppress the movement and voice of oppressed communities and allies. Thus, when considering the application of the Fourth Amendment to government intrusion on the whole of an individual's movement, it is vitally important to understand how government surveillance was historically rooted in suppressing liberation movements. As a legal profession, we must strive to ensure the oppressed have a right to a reasonable expectation of privacy in the whole of their movements towards freedom and power.

¹ *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 2 F.4th 330, 339 (4th Cir. 2021) (quoting U.S. Const. Amend IV).

² *Katz v. United States*, 389 U.S. 347, 353 (1967).

³ *Carpenter v. United States*, 138 S.Ct. 2206, 2217 (2018).

⁴ *Leaders of a Beautiful Struggle*, <http://www.lbsbaltimore.com> (last visited January 22, 2024).

⁵ *See Id.*

⁶ *Leaders of a Beautiful Struggle*, 2 F.4th at 330.

⁷ *Id.* at 2 F.4th 330, 333.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2 F.4th 330, 330.

¹¹ *Id.* at 2 F.4th 330, 342.

¹² *Id.*

¹³ *See Sally E. Hadden, Slave Patrols Law and Violence in Virginia and the Carolinas* 11 (2001).

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 11.

¹⁸ *Id.*

¹⁹ *Id.* at 14.

²⁰ *Id.* at 15.

²¹ *Id.* at 18.

²² *Id.* at 19.

²³ *Id.* at 36.

²⁴ Matt Cagle, Facebook, Instagram, and Twitter Provide Data Access for a Surveillance Product Marketed to Target Activist of Color, News & Commentary (October 11, 2016), <http://www.aclu.org/news/privacy-technology/facebook-instagram-and-twitter-provided-data-access> (last visited January 22, 2024).

²⁵ *Id.*

²⁶ *See Rebecca R. Ruiz, Baltimore Officers Will Face No Federal Charges in Death of Freddie Gray*, The New York Times (September 12, 2017), <https://>

www.nytimes.com/2017/09/12/us/freddie-gray-baltimore-police-federal-charges.html (last visited January 22, 2024). (In April of 2015, Mr. Freddie Gray was arrested by the Baltimore City Police Department and placed in a police van shackled but unsecured by a seatbelt. During the ride, Mr. Gray suffered a spinal cord injury and was found unresponsive).

²⁷ See [Baltimore County Police Department and Geofeedia Partner to Protect the Public During Freddie Gray Riots, Case Study: Baltimore County PD, https://www.aclunc.org/docs/20161011_geofeedia_baltimore_case_study.pdf](https://www.aclunc.org/docs/20161011_geofeedia_baltimore_case_study.pdf) (last visited January 22, 2024).

²⁸ *Id.*

The ZA editors thank James Whitaker for contributing this helpful information. James was a third year law student at North Carolina Central University School of Law and an extern in the FPD office during the Fall of 2023.



Ravenhall Decision Raises Possible Money Laundering Charges for Attorneys

When a criminal defendant has money, he or she can pay an attorney to represent them in court. But how important is it for an attorney to know where the money from a defendant comes from? A new decision in the Fourth Circuit heightens the importance of an attorney knowing the money's origin and the consequences for turning a blind eye.

Under 18 U.S.C. § 1956, it is illegal for someone who knows "property involved in a financial transaction represents the proceeds of some form of unlawful activity" and "conducts or attempts to conduct such a financial transaction" involving the proceeds of the unlawful activity. In conducting or attempting to conduct the transaction, the person must have the "intent to promote the carrying on of specified unlawful activity" or "know[] that the transaction is designed in whole or in part - to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; and to avoid a transaction reporting requirement under State or Federal law."¹ Further, § 1956(h) "states '[a]ny person who conspires to commit' money laundering 'shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.'"²

In a new decision from the Fourth Circuit, an attorney was charged and convicted of conspiracy to commit money laundering when he "received more than \$350,000 in drug proceeds via an associate of [the defendant]"³ The client testified that the money given to her

attorney was from drug proceeds and "she explained to [the attorney] exactly where the money was coming from and the method by which she was collecting it."⁴ However, the attorney testified, "he had no knowledge about either drug organization."⁵ According to *Ravenell*, an attorney may be charged with conspiracy to commit money laundering under § 1956(h) if he or she knowingly accepts money derived from illegal conduct or "by evidence that [the attorney] made himself deliberately ignorant to that fact."⁶ Someone is "deliberately ignorant" when "(1) the defendant subjectively believes that there is a high probability that a fact exists; and (2) the defendant took deliberate actions to avoid learning of that fact."⁷ When it comes to accepting money from a client, attorneys often have the "don't ask, don't tell mindset." However, after *Ravenell*, "[t]he classic trope of avoiding accountability by saying 'I don't want to know where the money comes from' does not form the basis of a legally tenable defense."⁸

The *Ravenell* decision also raises concerns regarding attorney-client privilege. Conversations between a client and attorney regarding payment are protected by the attorney-client privilege. However, "the client, '... is the holder of the attorney-client privilege...'"⁹ This means "[a]ny voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter."¹⁰ With the client's having the power to waive the privilege, what will stop him or her from disclosing privileged conversations to the government in an attempt to receive a better plea agreement or sentence? What will stop an angry client from "getting back" at an attorney that "did them wrong?"

If an attorney discovers that he or she is being paid in drug proceeds, he or she may withdraw from representing the client. Under the Model Rules of Professional Conduct, an attorney may withdraw if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" or "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."¹¹ While an attorney does not have to withdraw from representing the client if those scenarios are present, if an attorney wishes to avoid possible criminal prosecution for money laundering, he or she should withdraw from the case. Ultimately, the *Ravenell* decision is a warning to attorneys to "dot their I's and cross their T's" when it comes to where defendant-paid funds originated. This decision puts the burden on the attorney to ensure he or she is only receiving "clean money," and prevents attorneys from turning a blind eye.

¹ 18 U.S.C. § 1956(a)(1).

² *United States v. Ravenell*, 66 F.4th 472, 486 (4th Cir. 2023) (citing 18 U.S.C. § 1956(h)).

³ *Ravenell*, 66 F.4th at 478.

⁴ *Id.*⁵ *Id.*⁶ *Ravenell*, 66 F.4th at 490 (citing *United States v. Farrell*, 921 F.3d 116, 145 (4th Cir. 2019)).⁷ *Ravenell*, 66 F.4th at 491 (citing *United States v. Miller*, 41 F.4th 302, 314 (4th Cir. 2022)).⁸ *Ravenell*, 66 F.4th at 491.⁹ *United States v. Sharp*, 2009 U.S. Dist. LEXIS 59223, 3 (N.D.W. Va. 2009) (quoting *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998)).¹⁰ *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (citing *In re Sealed Case*, 676 F.2d 793, 808-09 (D.C. Cir. 1982)).¹¹ *Model Rules of Prof'l Conduct* R. 4.1(b) (2020).

The ZA Editors thank Sydney Kraft for contributing this helpful information. Sydney is a third year law student at Campbell University Norman Adrian Wiggins School of Law and was an extern in the FPD office during the Summer of 2023.



The Singletary Chill

Many criminal defendants waive their rights to appeal their sentences or convictions as part of their plea agreements.¹ The Fourth Circuit routinely upholds appellate waivers in valid plea agreement cases² when the issue on appeal falls within the scope of that waiver.³ However, an appeal waiver does not prevent defendants from appealing their sentences on certain grounds, including sentences based on constitutionally impermissible factors.⁴ A problem arises then, when a defendant successfully appeals their sentence, but appears before the same sentencing judge on remand. What prevents judges from imposing a higher sentence?

In *North Carolina v. Pearce*, the U.S. Supreme Court addressed defendants' due process right to be protected from judicial vindictiveness. 395 U.S. 711, 725 (1969). While trial judges are not constitutionally precluded from imposing a greater sentence based on events after the first trial that paint the defendant in a new light, due process requires that any vindictiveness against defendants who successfully attacked their first conviction must not play a part in the new sentence. *Id.* at 723, 725.

When the defendant receives a harsher sentence after appeal, there is a rebuttable presumption that the judge acted vindictively. *Id.* at 726. To rebut that presumption, the reasons for the more severe sentence must be based on objective information about the defendant's conduct after the original sentence was imposed, and that information "must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.* Without the presumption, defendants need to show ac-

tual vindictiveness by objectively demonstrating that the court sought to punish them for something the law plainly allows them to do.⁵

The Fourth Circuit has previously expressed that appellate courts will prioritize the defendant's perception of vindictiveness: "Regardless of the sentencing judge's expressed intent, the increased severity of the later sentence would create a reasonable apprehension of vindictiveness *in defendants* . . . that might well deter them from taking meritorious appeals. Due process protects against this."⁶ As in *Pearce*, the presumption is aimed at ensuring the fear of retribution does not discourage defendants from exercising their rights. *Pearce*, 395 U.S. at 725 ("[S]ince the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." (emphasis added)).

The case of *United States v. Singletary*, 75 F.4th 416 (4th Cir. 2023), deviates from that precedent. In that case, Mr. Singletary successfully appealed his sentence and appeared before the same sentencing judge on remand. *Id.* at 420-21. Singletary's new sentence effectively added at least a decade to his original. *Id.* at 422. The primary reasons for the new sentence were disciplinary infractions in prison, and since his last sentencing hearing, Singletary had been convicted in North Carolina State Court to approximately ten-and-a-half to fourteen-and-a-half years' imprisonment for an unrelated, but similar, crime. *Id.* at 421. The conduct underlying the state convictions had occurred two years before Singletary's original federal sentencing hearing, and the District Court was aware of the pending charges at the time. *Id.* at 426. However, the state sentence was set to run concurrent with Singletary's original federal sentence, and the District Court expressed concerns that the sentences running together would allow Singletary to evade punishment for his federal crimes. *Id.* at 421. Determining there was a strong need to protect society from Singletary, the District Court added six months to its original sentence and ordered it would run consecutively to Singletary's state sentence. *Id.*

On the second appeal, the Circuit Court decided that because the trial judge had fully articulated his reasons for Singletary's new sentence, the government had sufficiently rebutted any presumption of vindictiveness, and so it affirmed the new sentence. *Id.* at 427. The court acknowledged Singletary's perspective: "before his appeal, he faced 13 years in prison for both his state and federal offenses; after vindicating his claim on appeal, he will serve more than an additional decade." *Id.* at 427. But the court placed greater value in a district court's ability to point to objective facts that occur after the initial sentence, and it made very clear that the standard to rebut a presumption of judicial vin-

dictiveness is very relaxed. *Id.* The court expressed little concern that, after *Singletary*, future defendants would be deterred from making meritorious claims on appeal. *Id.* at 427 n.7.

Following *Singletary*, there are increased risks that defendants and their attorneys must carefully consider before bringing appeals. The Fourth Circuit has communicated that judges only need to provide articulable, objective reasons for a greater sentence to rebut the presumption and force a defendant to prove actual vindictiveness. It will be much harder to prove judicial vindictiveness moving forward, and defense attorneys will need to inform their clients of this reality before deciding to challenge a sentence on appeal or collateral review in the first place.

¹ Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. Mich. J.L. Reform 347, 348 (2015).

² *United States v. Soloff*, 993 F.3d 240, 243 (4th Cir. 2021).

³ *United States v. Boutcher*, 998 F.3d 603, 608 (4th Cir. 2021).

⁴ *United States v. Cornette*, 932 F.3d 204, 209 (4th Cir. 2019).

⁵ *Balsavage v. Wetzel*, 936 F. Supp. 2d 505, 517 (E.D. Pa. 2013).

⁶ *United States v. Bello*, 767 F.2d 1065, 1068 (4th Cir. 1985) (emphasis added).

The ZA Editors thank Sarah Varela for contributing this helpful information. Sarah is a third year student at Campbell Law and was an extern in the FPD office during the Fall of 2023.



Navigating Federal Firearm Rights Restoration in North Carolina

Firearm ownership is deeply ingrained in the culture and family traditions of many Americans; it serves as a means of personal security; and it is an enduring source of recreation and enjoyment. But defense attorneys face an uphill battle when clients, who are subject to federal firearm disablement, wish to continue to enjoy those benefits following a federal felony conviction. This article will outline the challenges federal and state laws pose to lawyers and their clients in this position, explore the complications behind restoring federal firearm rights in North Carolina, and discuss alternative relief strategies, including jurisdictional transfers and constitutional arguments.

Title 18 of the United States Code § 922(g)(1) bars felons from possessing firearms. But there are two ways felons can regain this right: they can either (1) seek relief from § 922(g)(1) under § 925(c) or (2) seek to exclude their conviction from § 922(g)(1) via § 921(a)(20).

Under § 925(c), Congress gave convicted felons the chance to petition the Attorney General of

the United States to relieve § 922(g)(1) disablement. But Congress has repeatedly left the agency responsible for processing these petitions (the Bureau of Alcohol, Tobacco, Firearms and Explosives) without funds to hear those petitions.¹ So, relief from § 922(g)(1) via § 925(c) is not available.²

Alternatively, a felon might avoid § 922(g)(1) disablement altogether by excluding their convictions via § 921(a)(20). Section 921(a)(20) excludes convictions if: (1) that conviction has been expunged or set aside; (2) that person has been pardoned of the conviction; or (3) that person has had their civil rights restored.³ This article will focus on the restoration of civil rights, as pardons and federal expungements are exceedingly rare.⁴

State law determines the restoration of civil rights.⁵ In North Carolina, a federal felony conviction results in the suspension of a person's civil rights, but those rights are "automatically restore[d]" after that person's "unconditional discharge" from the Bureau of Prisons.⁶ So, after a person completes their federal conviction (including probation and parole), North Carolina will automatically restore their civil rights.⁷

But people subject to § 922(g)(1) are still in an uncertain situation. Section 921(a)(20) will not exclude a conviction if any state firearm ban continues after the restoration of that person's civil rights.⁸ Such a continuation would trigger the "unless" clause of § 921(a)(20), making the convictions count for § 922(g)(1) purposes.⁹ The "unless" clause states that a person can exclude their convictions "unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."¹⁰ So, an exclusion depends on the nature of a state's firearm restrictions.

North Carolina bars those with federal felony convictions from possessing firearms,¹¹ and the firearm rights of violent offenders in North Carolina are permanently disabled.¹² For non-violent offenders, relief can be sought 20 years after they restore their civil rights.¹³ But because North Carolina disables the firearm rights of all felons for at least 20 years after their civil rights are restored, their felony convictions will likely never be excluded under § 921(a)(20) because of its "unless" clause.¹⁴

Setting aside the adverse effects of the "unless" clause, North Carolina requires that a person convicted of a felony in federal court seek relief from that same federal court to restore their state firearm rights.¹⁵ And as discussed above, there is no federal statutory relief available. Thus, state statutory relief is not possible for federal felons in North Carolina. Indeed, the North Carolina Court of Appeals said as much: "[T]here is no current procedure under federal law to enable a convicted individual to restore his firearm rights," so a person cannot have his firearm rights restored in North Carolina based on the requirements of N.C. GEN. STAT. § 14-415.4(c).¹⁶ Thus, a

person with a federal felony conviction from a federal court will likely never restore their federal or state firearm rights in North Carolina.

Defense attorneys facing such a dilemma have (at least) two alternative strategic paths forward: (1) exploring the possibility of transferring the case to a jurisdiction with more favorable firearm restrictions before the case resolves, or (2) launching an as-applied constitutional challenge against North Carolina's firearm ban.

Defense attorneys may seek to transfer their client to an alternative jurisdiction before conviction to avoid unfavorable restrictions. In Alabama, for example, there are no firearm restrictions for non-violent felons.¹⁷ Thus, if a person has certain non-violent federal felony convictions from an Alabama federal court, the federal "unless" clause would not be triggered, paving the way for an exclusion. So long as that person restores at least two of their civil rights in Alabama, they have a chance of being excluded from any federal firearm restrictions.¹⁸

Transfers pose their own unique challenges. For example, transferring under FED. R. CRIM. P. 20 requires that the defendant agree to plead guilty and the Assistant United States Attorneys in both districts approve. And transferring under FED. R. CRIM. P. 21(a) requires proving that "so great a prejudice against the defendant exists."

Defense attorneys may also seek to launch an as applied constitutional challenge to North Carolina's firearm ban based on the state constitution.¹⁹ The North Carolina Court of Appeals considers these five factors in determining whether the state firearm ban is unconstitutional as applied to a particular felon: (1) whether the convictions involve violence or the threat of violence; (2) the remoteness of the convictions; (3) the felon's history of law-abiding conduct since the crime; (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited; and (5) the felon's assiduous and proactive compliance with N.C. GEN. STAT. § 14-415.1.²⁰ The court also considers whether the constitutional challenge was proactively brought or if the felony waited to bring the challenge after being charged with possession of a firearm by a felon.²¹

A successful state constitutional challenge could pave the way for a § 921(a)(20) exclusion for two reasons: state relief would become unnecessary, and the "unless" clause might not be triggered because no state-law firearm ban would affect the felon. Case law is unclear as to how the "unless" clause would operate in such a scenario. Nevertheless, it remains an option for those with the right set of facts.

In the end, a client with federal firearm disqualification in North Carolina will likely never have that ban relieved. But defense attorneys may consider potential alternative strategies to avoid disqualification, including jurisdictional transfers and constitutional challenges. Attorneys and clients can find value in exploring these options together and should

carefully and thoroughly evaluate their potential effectiveness.

¹ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (2022).

² *United States v. Bean*, 537 U.S. 71, 74-75 (2002) (noting the Attorney General cannot be petitioned under § 925(c) because Congress specifically excludes sending money to the ATF to process those applications; so, courts cannot review applications because they are never processed to begin with).

³ 18 U.S.C. § 921(a)(20).

⁴ *Record Scratch: Expunging Federal Criminal Records and Congressional Considerations*, Congressional Research Service (Feb. 27, 2020), <https://crsreports.congress.gov/product/pdf/lrb/lrb10413> (last visited Nov. 17, 2023).

⁵ *Caron v. United States*, 524 U.S. 308, 309 (2007).

⁶ See N.C. GEN. STAT. § 13-1.

⁷ *United States v. Thomas*, 52 F.3d 82, 84 (4th Cir. 1995). After the conviction is complete, the person will notify their district clerk that the conditions of N.C. GEN. STAT. § 13-1 have been met. Then the clerk issues a certificate evidencing the person's discharge and specifies the restoration of civil rights.

⁸ § 921(a)(20).

⁹ See *Caron*, 524 U.S. at 308.

¹⁰ § 921(a)(20).

¹¹ N.C. GEN. STAT. § 14-415.1.

¹² *Id.* §§ 14-415.4(b), (c).

¹³ *Id.*

¹⁴ See *Caron*, 524 U.S. at 308.

¹⁵ N.C. GEN. STAT. § 14-415.4(b).

¹⁶ *Matter of Jones*, 881 S.E.2d 639, at *1 (N.C. Ct. App. 2022).

¹⁷ ALA. CODE § 13A-11-72(a)(1).

¹⁸ *United States v. Nix*, 438 F.3d 1284, 1287 (11th Cir. 2006); ALA. CODE § 15-22-36.1(a).

¹⁹ See *Britt v. State*, 681 S.E.2d 320, 323 (N.C. 2009) (successful challenge); *State v. Fernandez*, 808 S.E.2d 362, 368 (N.C. Ct. App. 2017) (unsuccessful challenge); *State v. Bonetsky*, 784 S.E.2d 637, 640 (N.C. Ct. App. 2016) (unsuccessful challenge).

²⁰ *State v. Bonetsky*, 784 S.E.2d 637, 640 (N.C. Ct. App. 2016).

²¹ *Id.*

The ZA Editors thank Jacob Showers for contributing this article. Jacob was a third-year law student at UNC School of Law and was an extern in the FPD office during the Fall of 2023.



Sua Sponte Harmless Error: *United States v. Dix*

In *United States v. Dix*, a Fourth Circuit panel raised the harmless error standard *sua sponte* in a written response to a procedural error made during sentencing proceedings,¹ endorsing a judicial practice that threatens both defendants'

rights and separation of powers. On May 24, 2023, the Fourth Circuit denied appellant's petition for rehearing en banc, solidifying its previous position.² This article analyzes *Dix* and discusses the implications for practitioners in the Fourth Circuit.

In *Dix*, Jason Dix sped away from a police car that was pursuing him, leading to a high-speed chase and an eventual crash.³ After searching his car, officers recovered firearms and ammunition.⁴ Mr. Dix ultimately plead guilty to possession of a firearm by a convicted felon.⁵ He had also been charged with two other offenses not included in his ultimate plea agreement: grand larceny, alleging theft of the car he was driving, and a blue-light offense, for failing to pull over for law enforcement.⁶

At sentencing, the presentence report recommended a sentencing enhancement “on the ground that Dix ‘used and possessed a firearm and ammunition in connection with another felony offense.’”⁷ Though the presentence report included all of the initial charges—including the blue-light offense—it specifically recommended the enhancement based on the grand larceny offense.⁸ At sentencing, Mr. Dix argued there was insufficient evidence to support the grand larceny charge as the underlying offense.⁹ In response, the government raised, for the first time, the theory that the enhancement could instead be based on the blue-light charge.¹⁰ While Mr. Dix’s counsel objected that this basis had not been previously disclosed, he proceeded to argue against the blue-light theory on the merits.¹¹ The district court found the grand larceny charge “could kind of go either way,” but “then announced that it ‘agree[d] with [the government’s] alternative argument’ for applying the enhancement, based on the blue-light offense.”¹²

On appeal, Mr. Dix argued he was denied due process because he was not given proper notice for the basis of the enhancement.¹³ The government did not argue harmless error, nor did the panel explicitly raise the question at oral argument.¹⁴ However, in its opinion denying Mr. Dix relief, a Fourth Circuit panel held that while the lack of notice constituted procedural error under Rule 32(d) and U.S.S.G. § 6A1.2, the error was ultimately harmless.¹⁵ This was the first time the harmless error standard was raised in the case.

As the dissent points out, *Dix* raises important concerns about judicial restraint and separation of powers.¹⁶ By permitting Courts of Appeals to raise harmless error *sua sponte*, the judicial branch blends into the executive by raising new arguments it is then permitted to decide. This decision also holds the prosecution to a lower standard, allowing the court to raise issues for the government despite the system’s insistence on prosecutorial burdens. Both developments pose a significant threat to defendants’ rights and the integrity of the judicial system.

Other Courts of Appeals have taken note of this difficulty. *Dix* situates itself within a circuit split on the question of *sua sponte* harmless error. The Seventh Circuit held that an appellate court will only consider harmless error after considering “the

length and complexity of the record, whether the harmlessness of the error or errors found is certain or debatable, and whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court.”¹⁷ The majority of other Circuits adopt the same or a similar test.¹⁸ *Dix* joins only the Second Circuit in permitting essentially full discretion to consider harmless error unprompted.¹⁹ The Fourth Circuit has therefore adopted a minority position, increasing the possibility that the Supreme Court will weigh in soon.

However, in the meantime, *Dix* raises important implications for trial attorneys practicing in the Fourth Circuit. In terms of obtaining the best immediate result for clients, defense attorneys should move to continue hearings if a prosecutor raises a theory not initially raised in the presentence report. In *Dix*, the Fourth Circuit found that, because the attorney argued the merits of the blue-light offense at trial and “made every argument in the district court before sentencing that he now makes on appeal to oppose basing the enhancement on the blue-light offense,” there was no prejudice from the untimeliness of the notice.²⁰ Therefore, by continuing to argue the merits of the predicate offense, under *Dix*, the defense attorney surrenders those arguments to the District Court—and ultimately, the Fourth Circuit. Alternatively, if the judge denies the motion to continue, the attorney should object to the new theory offered by the government and make a proffer of prejudice before making any arguments, in order to give the judge an opportunity to address the procedural failure.

While there are steps defendants can take to mitigate its impact, by “relieving the government of its burden, the panel majority has also provided the prosecution — which is always held to the highest of standards — preferential treatment over other litigants.”²¹ This decision takes us one step further away from a system that truly insists on prosecutorial burdens.

¹ *United States v. Dix*, 60 F.4th 61, 67 (4th Cir. 2023).

² *United States v. Dix*, 69 F.4th 149 (4th Cir. 2023) (denying rehearing en banc).

³ *Dix*, 60 F.4th at 62.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 64.

⁸ *Id.*

⁹ *Id.* at 65.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 66.

¹³ *Id.* at 67.

¹⁴ Appellant’s Petition for Rehearing En Banc at 4, *United States v. Dix*, No. 19-4725 (4th Cir. Feb. 28, 2023).

¹⁵ *Dix*, 60 F.4th at 66.

¹⁶ *Id.* at 69.

¹⁷ Order Denying Rehearing En Banc at 6-7, *United States v. Dix*, No. 19-4725 (4th Cir. Feb. 24, 2023) (King, J., dissenting).

¹⁸ *United States v. Giovanetti*, 928 F.2d 225, 227 (7th Cir. 1991).

¹⁹ *Gover v. Perry*, 698 F.3d 295, 301 (6th Cir. 2012); *United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir.

1997); *Lufkins v. Leapley*, 965 F.2d 1477, 1481 (8th Cir. 1992); *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005).

¹⁹ *United States v. Dolah*, 245 F.3d 30 98, 107 (2d Cir. 2001).

²⁰ *Dix*, 50 F.3d at 67.

²¹ Order Denying Rehearing En Banc at 7, *United States v. Dix*, No. 19-4725 (4th Cir. Feb. 24, 2023) (King, J., dissenting).

The ZA Editors thank Kate Bock for contributing this helpful information. Kate is a rising third year law student at UNC School of Law and was an intern in the FPD office during the summer of 2023.



Recent Federal Challenges to Capital and Habeas Sentence Claims

Ranging from accommodating to plainly injurious, recent U.S. Supreme Court opinions help clarify the extent of relief capital defendants are entitled to in federal court, including habeas petitions and 42 U.S.C. § 1983 claims. First, in a radical shift, the Supreme Court in *Shinn v. Ramirez* held that in federal habeas corpus proceedings, federal courts are limited to examination of the state court record when deciding if the defendant received ineffective assistance of counsel (“IAC”).¹ Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a federal court may not conduct an evidentiary hearing or otherwise consider or develop any new evidence unless the defendant satisfies a narrow exception by showing that “the new evidence will establish his innocence ‘by clear and convincing evidence.’”² This means that a capital defendant must raise any IAC claims at the state level or else abandon them upon federal habeas review.³ By not preserving issues on appeal, including those generated by post-conviction counsel, a defendant is deemed “‘at fault’ even when state postconviction counsel is negligent.”⁴ The Court reiterated that federal habeas review is circumscribed, so even when the capital defendant is arguing IAC at the state level, federal courts may not grant relief based on evidence outside the established record.⁵

Next, in *Shoop v. Twyford*, the Court held that a transportation order, in which an inmate sought to develop new evidence on appeal, is not “necessary or appropriate in aid of” the adjudication of a federal habeas claim under 28 U.S.C. § 1651(a) when the defendant has failed to show that the evidence “would be admissible in connection with a particular claim of relief.”⁶ Twyford filed a motion to be transported from prison for “medical testing necessary for the investigation, presentation, and development of claims,” which he argued could produce evidence to counter the prosecution’s arguments.⁷ Relying on *Shinn*, the Court reiterated that defendants are largely prohibited from introducing new evidence in a federal habeas action.⁸ Even if the evidence is admitted under one of the AEDPA’s exceptions, the defendant would need

to demonstrate by clear and convincing evidence that, given this new evidence, no reasonable factfinder would have convicted him of the offense.⁹ Because Twyford could not demonstrate how the transportation order would lead to the development of admissible evidence, the order was not “necessary or appropriate,” considerably limiting the ability for capital defendants to build their post-conviction cases.¹⁰

Then, in *Nance v. Ward*, the Court re-examined how to handle a capital defendant’s proposal for an alternate method of execution.¹¹ The Court previously held that when a capital defendant challenges the state’s proposed method of execution, he may proceed under a 42 U.S.C. § 1983 claim when the alternative method is also authorized under state law.¹² In *Nance*, the defendant argued that lethal injection—the only method currently available to Georgia death row inmates—is likely to cause him severe pain and suffering due to his longtime use of intravenous drugs.¹³ Instead, he requested “death by firing squad.”¹⁴ The Court held that even when proposing an alternative method not permitted in the state, capital defendants should proceed under § 1983, not a habeas petition, which is reserved for challenging the validity of the death sentence itself.¹⁵ “Nance’s requested relief still places his execution in Georgia’s control” because the state can pass legislation approving his proposed alternate method.¹⁶ Thus, a § 1983 claim is the proper means of challenging a state’s proposed method of execution.¹⁷

Most recently, in *Reed v. Goertz*, after the defendant’s motion to request post-conviction DNA testing of evidence by the state failed, he filed a 42 U.S.C. § 1983 claim arguing that the relevant post-conviction DNA testing statute “failed to provide procedural due process.”¹⁸ The Court held the statute of limitations for such claims begins to run at the end of state court proceedings, not when the state trial court denies DNA testing.¹⁹ Generally, statutes of limitations begin to run when “the plaintiff has a ‘complete and present cause of action.’”²⁰ Here, the claim for a procedural due process violation is “‘complete’ only when ‘the State fails to provide due process.’”²¹ Thus, the clock to file a timely § 1983 claim only starts “when the state litigation ends.”²²

What does this all mean for practitioners handling federal challenges to capital or habeas sentences?

First, federal attorneys’ ability to develop new evidence for their capital clients has been significantly circumscribed. Unfortunately, by the time attorneys are assisting clients raising federal habeas or § 1983 claims, *Shinn* tells us that the window to raise IAC issues may have already closed.²³ Because the exception in the AEDPA focuses on evidence that establishes by “clear and convincing evidence” that the defendant is innocent, IAC claims, by and large, would not qualify.²⁴ However, if you have a client who you believe is factually innocent and whose state-level attorneys failed to raise the issue, you can argue

that *Shinn* does not apply to your case and an evidentiary hearing is not only permitted, but necessary. Likewise, in *Shoop*, the Court significantly cabined what is considered “necessary and appropriate in aid of” the adjudication of a federal habeas case.²⁵ Simply asking for the development of evidence that could counter a prosecutorial argument is insufficient. The best shot for the client would be to argue that the new evidence would have been material to the jury and would have resulted in a different verdict. Also, be sure to argue exactly how the evidence would be admissible in the case because eventual admissibility is key for the Court here. Additionally, the ruling in *Shoop* focuses on a transportation order which would develop new evidence that does not yet exist; therefore, if you discover evidence that already exists but just may be difficult to access, you can argue that *Shoop* should not apply.

Second, once it becomes clear that your client’s execution will proceed, federal practitioners may make a last-ditch effort to, at a minimum, select the least objectionable means of execution. In North Carolina, lethal injection is the only statutorily permitted method of execution.²⁶ For clients with significant history of intravenous drug use, lethal injection may be exceedingly difficult, drawn-out, and painful, but *Nance* opens the door to requesting a less “cruel and unusual” method.²⁷ However, be sure to file this claim under § 1983, not as a habeas petition, because the Court makes clear that this is not a challenge to the execution itself.

Third, and perhaps most encouraging, we now have confirmation that the statute of limitations only starts for § 1983 claims requesting post-conviction DNA testing “when the state litigation ends,” not when the trial judge denies the motion.²⁸ While defendants in states with relevant statutes of limitations still do not have unlimited time to file a post-conviction DNA testing motion, *Goertz* at least extends the available period. Fortunately, however, compared with the Texas statute at issue in *Goertz*, North Carolina has a relatively permissive post-conviction DNA testing statute,²⁹ which does not include a statute of limitations.³⁰ To qualify for testing, biological evidence must be “material to the defendant’s defense,” “related to the investigation or prosecution that resulted in the judgment,” and “was not DNA tested previously” or “was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.”³¹ No time limit is given.³¹ Thus, practitioners and capital defendants in North Carolina may not be privy to the full benefits of *Goertz*; here, time limits are not a concern, and we can file motions for post-conviction DNA testing so long as they arguably meet the statutory criteria.

¹ *Shinn v. Ramirez*, 142 S. Ct. 1718, 1727-28 (2022).

² *Id.* at 1728 (quoting 28 U.S.C. § 2254(e)(2)(B)).

³ *Id.* at 1735.

⁴ *Id.*

⁵ *Id.* at 1732-34.

⁶ *Shoop v. Twyford*, 142 S. Ct. 2037, 2046 (2022).

⁷ *Id.* at 2042.

⁸ *Id.* at 2043--44.

⁹ *Id.* at 2044.

¹⁰ *Id.* at 2046.

¹¹ *Nance v. Ward*, 142 S. Ct. 2214 (2022).

¹² *Nelson v. Campbell*, 541 U.S. 637, 644-47 (2004).

¹³ *Nance*, 142 S. Ct. at 2220.

¹⁴ *Id.*

¹⁵ *Id.* at 2219-21.

¹⁶ *Id.* at 2223.

¹⁷ *Id.* at 2224.

¹⁸ *Reed v. Goertz*, 143 S. Ct. 955, 959-60 (2023).

¹⁹ *Id.* at 959.

²⁰ *Id.* at 961 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)).

²¹ *Id.* (quoting *Zinerman v. Burch*, 494 U.S. 113, 125 (1990)).

²² *Id.* at 962.

²³ *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022).

²⁴ 28 U.S.C. § 2254(e)(2)(B).

²⁵ 28 U.S.C. § 1651(a).

²⁶ N.C. Gen. Stat. § 15-188 (2022).

²⁷ *Nance v. Ward*, 142 S. Ct. 2214, 2220 (2022).

²⁸ *Reed v. Goertz*, 143 S. Ct. 955, 962 (2023).

²⁹ N.C. Gen. Stat. § 15A-269 (2022).

³⁰ *Id.*

³¹ *Id.*

The ZA Editors thank Kendall Carter for contributing this helpful information. Kendall was a rising third year law student at Wake Forest University School of Law and an intern in the FPD office during the Summer of 2023.



LEGAL UPDATES

4th Circuit Update

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U.S. Supreme Court Update

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Amended Rules and Guidelines Update

EDNC Local Criminal Rules¹

New Rule 1.2 provides definitions of terms used throughout the rules. The new rule includes definitions for person, party, nonparty, attorney,

unrepresented person, incarcerated unrepresented person, and movant.

Amends 5.2(a) to clarify misdemeanor cases not assigned to a district judge will be assigned to a magistrate judge per Fed. R. Crim. P. 58.

Amends 5.3 to include “district judge” as opposed to referencing magistrate judges. The amendment clarifies a magistrate judge’s ability to accept pleas and exercise contempt authority.

Amends 12.1 to conform to current local practice allowing for judicial discretion in setting deadlines for the filing of pretrial motions and responses.

Amends 12.3 to reflect Fed. R. Crim. P. 12.4 in reference to required disclosures of corporate affiliations and other entities with a direct financial interest in litigation to file a disclosure statement with the court within 28 days after the defendant makes an initial appearance. The parties are required to amend their disclosure statements when necessary to maintain their current accuracy.

Amends 16.1(b) to conform to current local practice allowing for judicial discretion in setting deadlines for criminal pretrial conferences.

Moves 24.1(c) to new rule 57.6, referencing courtroom technology and clarifies the requirement of technology training by any party or nonparty in any hearing, not just trials. A party or nonparty must file the technology certification with the clerk no later than 7 days prior to the scheduled proceeding.

Amends 47.1(h)(1) to require consultation with a non-incarcerated party or nonparty whose interests may be affected by a motion for extension of time. Prior to this amendment, the rule required consultation with opposing counsel only. Now unrepresented parties and nonparties whose interests may be affected by a motion must be consulted.

Amends 49.1 to reflect the 2018 amendments to the Fed. R. Crim. P. 49 and E.D.N.C Standing Order 18-SO-5 concerning electronic service of documents filed by unrepresented litigants. If service of a paper is sent to a registered user by filing with the court’s electronic-filing system, no certificate of service is required. Unrepresented litigants are not permitted to file documents electronically, unless otherwise ordered by the presiding judge. Unrepresented litigants will submit all filings to the clerk’s office by delivering the original documents to the clerk’s office during regular business hours or by mail.

Combines the redundant provisions of Rule 50.2 and Rule 50.5 into a single rule, making it mandatory for the government to file a notice identifying prior related cases but discretionary for defendants.

Rules of Appellate Procedure and Evidence²

Appellate Procedure 32, 35, 40, Appendix

Amends and combines Rule 35 and Rule 40, as litigants frequently request both a panel rehearing under Rule 40 and a rehearing en banc under

Rule 35. To provide clearer guidance, the rules will be reconciled so that petitions for panel rehearing and rehearing en banc are combined under the new Rule 40. In addition, the proposal amends Rule 32(g) and the Appendix of Length Limits to conform with the above changes to Rule 35 and Rule 40.

Evidence 611, 613, 801, 804, and 1006

Amends Rule 611(d) to clarify the distinction between illustrative aids (not admitted into evidence but used solely to assist the jury in understanding other evidence) and demonstrative evidence (admitted into evidence and used substantively to prove disputed issues at trial). The amendment will require that the court balance the utility of the illustrative aid against the risk of unfair prejudice, confusion, and delay. Parties will be required to provide advance notice so that the court can rule on whether the aid has sufficient utility before it is displayed to the jury. Finally, the aids should not be allowed into the jury room during deliberations, unless the court orders otherwise, but may still not be used in jury deliberations as evidence. The proposed rule is not intended to regulate aids that a party uses to guide the jury through an opening or closing argument.

Amends Rule 613(b) to better align the Rules of Evidence with current trial practice. The common law provided that before a witness could be impeached with extrinsic evidence of a prior inconsistent statement, the adverse party was required to give the witness an opportunity to explain or deny the statement. Previous Rule 613(b) rejected that “prior presentation” requirement and allowed the witness to explain or deny the statement at some point in the trial. The amended Rule 613(b) requires a witness receive a prior opportunity to explain or deny a statement, with the court having discretion to allow a later opportunity.

Amends Rule 801(d)(2) to allow a hearsay exemption of the statements by a party opponent to be used against the declarant’s successor-in-interest. When a declarant makes a statement that would be admissible against them as a party-opponent, but he is not the party opponent because his claim or defense has been transferred to another, the statement may be used against the transferee as the new party-opponent. The Committee Notes to amended Rule 801(d)(2) will emphasize that to be admissible against the successor, the declarant must have made the statement before the transfer of the claim or defense.

Amends Rule 804(b)(3) to clarify the consideration of independent corroborating evidence of the hearsay exception for declarations against interest in criminal cases. The amended Rule 804(b)(3) will allow consideration of both the inherent guarantees of trustworthiness underlying a particular declaration against interest, as well as independent evidence corroborating or refuting the accuracy of the statement.

Amends Rule 1006 to provide guidance to the admission of summaries of voluminous evi-

dence. Courts have not properly distinguished between summaries of evidence under Rule 1006, admitted as evidence and summaries that are illustrative aids, which are not evidence. Some courts have incorrectly stated that summaries admissible under Rule 1006 are “not evidence,” or all the underlying evidence must be admitted before the summary can be admitted, or the summary is inadmissible if any of the underlying evidence has been admitted. The amended Rule 1006 will distinguish between a voluminous summary, as opposed to an illustrative aid as governed by Rule 611(d). The new Rule 1006 clarifies that a summary is admissible independent of the underlying evidence being admitted.

Sentencing Guidelines³

Sentence Reduction (Compassionate Release)

The proposed amendments updated the text of the policy statement allow for sentencing modification procedures so that under certain circumstances a defendant may file a motion seeking a reduction in the term of imprisonment. The amendments also moved the descriptions of extraordinary and compelling reasons previously in the commentary to the text. The amendments expand the medical circumstances that may qualify, such as insufficient treatment by the Bureau of Prisons and public health emergencies or an ongoing outbreak of infectious diseases. In addition, the amendments expand the family circumstances considered for release. The amendments also allow for motions by victims of sexual abuse or physical abuse committed by, or at the direction of prison authorities. The category of “other reasons” will allow for circumstances that are similar in gravity to those described in the policy statement. Changes in the law may be considered in motions for release, but only if a person is serving an unusually long sentence and has served at least ten years or where a change in law would produce a gross disparity between the sentence being served and the sentence likely to be imposed today. Besides unusually long sentences, changes in the law cannot be considered when determining whether release circumstances exist, but can be considered in the §3553(a) analysis about the extent of a reduction. Finally, while not dispositive, rehabilitation may be considered in combination with other factors.

Sex Abuse

The amendments increase the base offense level in §2A3.3 (criminal sexual abuse of ward) from 14 to 18. They also add a cross-reference stating §2A3.1 should apply for the offense or attempted offense.

Safety Valve

The amendments will broaden the provision for the two-point reduction for persons who are safety valve eligible but is contingent on a person meeting the §3553(f) criteria.

Fake Pills

The amendments add a narrow, alternate two-level enhancement where a person represented pills as a legitimately manufactured substance con-

taining fentanyl and acted with willful blindness or conscious avoidance of knowledge that the substance was not the legitimately manufactured drug.

Firearms

The amendments create a tiered enhancement for persons convicted of certain straw purchasing and trafficking offenses. The amendments create a two-level enhancement for people who qualify for the tiered enhancement and committed the offense in connection with a criminal organization. However, the amendments create a two-level reduction for persons who qualify for the tiered enhancement, who have one or less criminal history points, but were motivated by specific factors and were otherwise unlikely to commit the offense or were unusually vulnerable to being persuaded to commit the offense. The conduct that qualifies for the upward departure for offenses involving substantially more than twenty-five firearms was expanded to include conduct like transporting, selling, transferring, and disposing. Finally, the amendments will add a four-level enhancement for non-serialized firearms (ghost guns) but require a high mens rea of conscious avoidance of knowledge or willful blindness.

Acceptance of Responsibility

The amendments clarify that the government should not withhold the motion for the acceptance of responsibility for reasons other than having to prepare for trial. The definition for what constitutes preparing for trial is narrow, but includes things like preparing witnesses, motions in limine, voir dire, jury instructions, and witness and exhibit lists. The amendments clarify that pretrial proceedings, like discovery and suppression motions, are not considered trial preparations.

Criminal History

The amendments eliminate status points in most cases, such as the two-point addition if a person committed the instant offense under a criminal justice sentence. An additional status point applies only in cases where a person already accrued seven or more criminal history points. The amendments create a new guideline in §4C1.1 that provides a two-offense level reduction for some zero criminal history point offenders. An amendment to §5C1.1 application note 4 advises that a sentence other than imprisonment is generally appropriate if a person is in Zone A or B of the sentencing table and gets the §4C1.1 reduction. The amendments advise that a departure, including a sentence of non-imprisonment, may be appropriate for a person in any sentencing zone if they qualify for §4C1.1 and the guideline range overstates the gravity of the offense. Additionally, the amendments provide examples of instances where a §4A1.3 downward departure for overrepresentation of criminal history may be appropriate to include persons who receive criminal history points from a conviction for the simple possession of marijuana.

Career Offender

The amendments will continue to utilize the categorical approach. However, the amendments will expand the definitions to include Hobbs Act Robbery as a “crime of violence” and move the definitions for robbery, forcible sex offense, and extortion from the commentary to the text. The provision that includes inchoate offenses as a “crime of violence” or “controlled substance offense” is moved from the commentary to the text.

¹ Notice of Amendments to the Local Rules, <https://www.nced.uscourts.gov/rules/Default.aspx> (last visited July 18, 2023).

² Proposed Amendments to the Federal Rules & Forms, <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment> (last visited July 18, 2023).

³ Proposed 2023 Amendments to the Federal Sentencing Guidelines, <https://www.ussc.gov/guidelines/amendments/proposed-2023-amendments-federal-sentencing-guidelines> (last visited July 18, 2023).

The ZA Editors thank Ryan Mitiguy for contributing this helpful information. Ryan was a rising third year law student at Campbell Law and an extern in the FPD office during the summer of 2023.



LOCAL NEWS

EDNC News

We extend our congratulations to Van R. Freeman, Jr. on his appointment as Chief United States Probation Officer for the Eastern District of North Carolina following the retirement of James L. Corpening, Jr. on September 30, 2023.

Panel News

We are pleased to welcome the following new panel attorneys in Raleigh: Erin Wilson and Melissa Hill.

The following are new panel attorneys, in Raleigh: Meaghan O'Connor; in Greenville: Willis Brantley and Darren Day; in Jacksonville: Paul Castle; in Edenton: Patrick Sellers; and in Wilmington: Christian Jones.



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

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