

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2017

THE DEFENDER'S MESSAGE

As most of you know, my last day as the Federal Public Defender for the Eastern District of North Carolina will be May 3, 2017. During my 17 year tenure as Defender, one of my primary focuses has been on the training and support of the CJA panel. While I look forward to my retirement, I cannot help but look back and think of how much satisfaction I have gotten from this job. From providing excellent, biannual seminars and the ZA defense newsletter to fostering the relationship among the Court, the FPD Office, and the panel, I feel that my work has made a difference in our district.

I look forward to sharing more of my thoughts with you all at our upcoming seminar on Friday, April 7, 2017. However, I wanted to be sure to say in this final Defender Message that it has been an honor to work with all of the attorneys in this district, including the excellent lawyers that make up the CJA panel.

In this edition, we provide a checklist for challenging wiretaps, the latest *Johnson* update, a brief primer on restitution claims, the latest amendment to the § 2K2.1 cross reference, a case note on last year's U.S. Supreme Court decision in *United States v. Bryant*, and information you can pass along to clients looking to restore their voting rights. This edition also includes our regularly featured case update links and local news.

As always, I join the ZA Editors in hoping that you will find the information contained in the newsletter helpful to your practice. Again, it has been a pleasure to serve as your Defender, and I look forward to seeing you all at our upcoming seminar this Friday at N.C. State University's McKimmon Center.

Tom McNamara
Federal Public Defender



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PRACTICE TIPS

A Six-Step Checklist for Challenging Federal Wiretaps

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 sets forth the federal wiretap provisions. 18 U.S.C. §§ 2510 - 2520. A defendant may move to suppress an electronic interception “or evidence derived therefrom, on the grounds that (i) the communication was unlawfully intercepted; (ii) the order of authorization . . . is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval.” 18 U.S.C. § 2518(10)(a) (emphasis added). If your client is facing charges based on an electronic interception (“wiretap”) authorized pursuant to Title III, this quick, albeit non-exhaustive six-step checklist can help you assess potential challenges to the wiretap application, order, and resulting electronic interceptions. Steps One through Three are technical challenges, while Steps Four through Six are substantive.

Step One: Official Authorization. Check to see if the wiretap application was approved by an authorized official. Section 2516(1) sets forth the exclusive list of officials who may authorize a wiretap application. Check also to see that the authorizing official is reflected on the wiretap order, as § 2518(4)(d) requires that the authorizing official’s identity be reflected on the wiretap order. Application by an unauthorized official requires suppression under § 2518(10)(a)(iii).¹

Step Two: Sealing Requirements. Check to see that the recordings have been sealed.² Section 2518(8)(a) provides that “[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.” Section 2518(8)(a) “has its own independent exclusionary provision,”³ and without a seal “or a satisfactory explanation for the absence thereof,” § 2518(8)(a), the contents of the wiretap cannot be used or disclosed. Most courts are satisfied with the explanations provided by the government, but you should still challenge delays or failures to seal by addressing “the length of any delay before sealing, the care taken in handling the recordings, prejudice to the defendants, any tactical advantage accruing to the government, and whether deliberate or gross dereliction of duty or honest mistake caused the failure to file.”⁴

Step Three: Minimization. Section 2518(5) requires that wiretaps “be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.” Failure to minimize calls is grounds for suppression under § 2518(10)(a). Minimization challenges are analyzed under a reasonableness standard, with courts considering “(1) the nature and scope of the alleged criminal enterprise; (2) the government’s reasonable expectation as to the content of, and parties to, the conversations; and (3) the degree of judicial supervision while the wiretap order is being executed.”⁵ A cautionary word: at least one source notes that “[i]n reality, minimization challenges are often labor-intensive, and low-return, attacks.”⁶

Step Four: Necessity. If you make no other challenge, make a necessity challenge. Wiretaps are (theoretically) the tool of last resort. Check to see that the wiretap application contains *specific* facts relevant to the investigation at issue that demonstrate “whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(1)(c). Kalar and Cohen’s “Wiretap Primer” provides

a helpful list of investigative efforts that should be covered by any application.⁷ The Fourth Circuit has repeatedly stated that the application must be tested “in a practical and commonsense fashion.”⁸ Conclusory language is unacceptable, although boilerplate language will suffice, so long as it is accompanied by specific facts. Necessity determinations are reviewed for abuse of discretion.⁹

Step Five: Probable Cause. Section 2518(3) sets forth three probable cause requirements. You should carefully scrutinize the application to ensure that there is probable cause: 1) that an individual is, has, or is about to commit one of the enumerated offenses in § 2516; 2) that interception will yield communications concerning that offense; and 3) that the facilities from which communications are to be intercepted are or will be used in connection with the offense. 18 U.S.C. § 2518(3). “The probable cause required for issuance of a wiretap order is the same as that which is necessary to obtain the issuance of a search warrant.”¹⁰

Step Six: Franks Challenges. Finally, we come to a familiar area of Fourth Amendment law, wherein “a defendant is entitled to an evidentiary hearing upon ‘substantial preliminary showing’ that the affiant made ‘a false statement knowingly and intentionally, or with reckless disregard for the truth.’”¹¹ “The allegedly false statement must be necessary to the finding of probable cause.”¹² False statements include deliberate or reckless omissions of material information.¹³ As with search warrants, if the defendant satisfies both the intentionality and materiality prongs by a *preponderance of the evidence*, then the wiretap order and the resulting electronic interceptions should be suppressed.¹⁴ And while the *Franks* analysis in the context of wiretaps is similar to warrants, “a *Franks* error [in a wiretap case] may jeopardize not only probable cause, but also *necessity* for the wiretap.”¹⁵

As with any motion to suppress, the devil is in the details and unique facts of each case. While this checklist cannot cover the numerous legal issues pertaining to wiretaps, it can serve as a helpful tool for identifying which facts are worth exploring for potential challenges to the wiretap application, order, and execution of electronic interceptions.

¹ E.g., *United States v. Giordano* 469 F.2d 522 (4th Cir. 1972), *aff’d* 416 U.S. 505 (1974) (affirming suppression of electronic interceptions and resulting evidence where the application was not made by an approved official under the statute, but by the executive assistant to the Attorney General).

² STEVEN KALAR & JOSH COHEN, *UNCLE SAM IS ON THE LINE: A TITLE III (WIRETAP) PRIMER* 1, 11 (2006) (“An early task in wiretap litigation is to visit the facility where the original tapes or data was stored, and examine the sealing orders and logs for the data.”).

³ *United States v. Diana*, 605 F.2d 1307, 1312 (4th Cir. 1979).

⁴ *United States v. Suarez*, 906 F.2d 977, 982 (4th Cir. 1990).

⁵ *United States v. Clerkley*, 556 F.2d 709, 716 (4th Cir. 1977).

⁶ KALAR & COHEN, *supra* note 1, at 12.

⁷ *Id.* at 13.

⁸ *United States v. Smith*, 31 F.3d 1294, 1298 (4th Cir. 1994) (quoting *United States v. Leavis*, 853 F.2d 215, 221 (4th Cir. 1988); *Clerkley*, 556 F.2d at 714).

⁹ See *United States v. Wilson*, 484 F.3d 267, 280 (4th Cir. 2007).

¹⁰ *United States v. Talbert*, 706 F.2d 464, 467 (4th Cir. 1983).

¹¹ *United States v. Muldoon*, 931 F.2d 282, 286 (4th Cir. 1991) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).

¹² *Id.*

¹³ See *United States v. Lull*, 824 F.3d 109, 115 (4th Cir. 2016).

¹⁴ *Id.*

¹⁵ KALAR & COHEN, *supra* note 1, at 22 (citing *United States v. Ippolito*, 774 F.2d 1482, 1486-7 n. 1 (9th Cir. 1985)).

The ZA Editors thank Jessica Waddle for contributing this helpful information. Jessica is a third year law student at Duke University Law School and was an extern in the FPD office during the Spring of 2017.



Updates to Johnson and Cases that may Impact the Meaning of “Crime of Violence”

As most lawyers practicing federal criminal law are aware, in *Johnson v. United States*, 135 S.Ct. 939 (2015), the U.S. Supreme Court decided that AC-CA’s residual clause (18 U.S.C. § 924(e)(2)(B)(ii)) was unconstitutionally vague. Specifically, Justice Scalia reasoned that the phrase of the statute: “. . . or otherwise involved conduct that presents a serious risk of physical injury to another” cannot be used to categorically sentence a defendant because it inherently enables a judge to imagine what the “potential risk” of the crime’s ordinary conduct could be dependent on an individual judge’s perception. Even though the Court attempted multiple times to articulate a standard for sentencing crimes of violence under the residual clause, Justice Scalia explained that the clause is unworkable because of how the statute allows for uneven and arbitrary enforcement. After this decision, the Court also determined that *Johnson* set out a new substantive rule that has retroactive effect on collateral review cases. *Welch v. United States*, 135 S.Ct. 1257 (2016). During the October 2016 term of court, the U.S. Supreme Court granted cert in two cases to resolve some of the issues still in play after *Johnson*. Moreover, several cases at the Fourth Circuit are pending to resolve issues related to *Johnson*.

Supreme Court Cases

Beckles v. United States 580 U.S. ___, 197 L. Ed. 2d 145 (2017). When granting cert, the Court planned to address three issues:

- (1) whether *Johnson* has retroactive effect to collateral cases challenging sentences which applied the residual clause under U.S.S.G § 4B1.2(a)(2);
- (2) whether the residual clause in U.S.S.G § 4B1.2(a)(2) is void for vagueness after *Johnson*, which would make Mr. Johnson’s case recognizable under § 2255(a); and,
- (3) whether possession of a sawed off shotgun, an offense listed as a crime of violence only in the commentary of U.S.S.G § 4B1.2(a)(2), still qualifies as a crime of violence after *Johnson*. Section

4B1.2(a) is at issue in *Beckles* but its decision could also impact §§ 4B1.1, 2K2.1, 2L1.2, 5K, and 7B1.1.

On March 6, 2017, the Supreme Court narrowly held that, because the Sentencing Guidelines are not mandatory but merely advisory, they are not subject to constitutional vagueness challenges. *Beckles*, 580 U.S. at ___, 197 L.Ed. 2d at 156. While the high court ruled against the defense in this case, this holding is not as far reaching as one would think. The U.S. Sentencing Commission amended the guidelines to remove § 4B1.2(a)(2)’s residual clause. Thus, the holding only affects those sentenced before November 1, 2016. Moreover, the Court limited its ruling to vagueness challenges but left open the possibility for other due process challenges to the guidelines.

Lynch v. Dimaya (9th Cir.) Docket No. 15-1498, was argued January 17, 2017 with the decision pending. The issue in this case is whether 18 U.S.C. §16(b), which defines a crime of violence as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,” is unconstitutionally vague. This language has been incorporated into the definition of an “aggravated felony” in the Immigration and Nationality Act (INA). See 8 U.S.C. § 1101(a)(43)(f). Although this case focuses on the INA’s interpretation, the Court’s analysis will derive from §16(b) which could impact all federal “violent crimes.” While the INA uses this provision in its definition of aggravated felony, § 16(b) is cross-referenced across the Federal Code. For example, this definition of crime of violence is also used to supplement the definitions of domestic violence, stalking, and child abuse as described in 8 U.S.C. § 1227(a)(2)(E)(i). Similarly, the language of 42 U.S.C. § 13981(d), which defines terms for the purpose of civil rights for women after they have experienced gender-motivated violence, references the § 16(b) definition. The impact of *Dimaya* may therefore have far reaching implications.

Fourth Circuit Cases

Sentencing Guidelines (primarily § 4B1.2(a)(2))-

Despite the importance of *Beckles* at the Supreme Court, there are other related Fourth Circuit cases that will provide both guidance and insight into *Johnson*’s application in sentencing guideline cases:

- *United States v. Shawntanna Thompson*, No. 15-4685- North Carolina assault inflicting serious injury. (Pending post-*Beckles*; supplemental briefing ordered)

- *United States v. Geoffrey Gattis*, No. 16-4663- North Carolina common law robbery.

18 U.S.C. § 924(c)(3)-

These cases specifically deal with challenges to the sentencing enhancement for when a firearm is involved in committing a federal crime of violence or a federal drug trafficking offense. The following cases, which are challenging the scope of crimes of violence, are currently being heard in the Fourth Circuit (the specific crime is listed after the case name):

- *United States v. Hassan Ali*, No. 15-4433- Hobbs Act robbery under the residual clause arguing that it can be committed without use or threat of direct, imminent, physical violence.

- *United States v. Joseph Simms*, No. 15 15-4640- The challenge is the same as *Hassan Ali*, arguing that a Hobbs Act Robbery is not a crime of violence.

- *United States v. Joseph Simms*, No. 15-4640- The challenge is the same as *Hassan Ali*, arguing that a Hobbs Act Robbery is not a crime of violence.
 - *United States v. Donald Walker*, No. 15-4301- Kidnapping as a crime of violence under 18 U.S.C. § 1201(a)(1).
 - *United States v. James Irby, III*, No. 16-0601- Federal murder when committed indirectly.
 - *United States v. Bradley Campbell*, No. 15-4281- Kidnapping; this case was first placed in abeyance because of *McNeal*, 818 F.3d 141(4th Cir. 2016), and has now been placed in abeyance pending *Walker*.

These Supreme Court and Fourth Circuit cases may impact and possibly redefine what a “crime of violence” means. Despite the recent holding in *Beckles*, the hope is that *Johnson* was not only the beginning of the Supreme Court’s reshaping the use of predicate offenses in sentencing but also the end of applying arbitrary sentencing enhancements based on “crimes of violence” across the Code. Hopefully, this broad overview of the issues surrounding post-*Johnson* will enable practitioners to continue to find ways to use *Johnson* to better serve clients.

More information about *Johnson*, *Beckles*, and recently decided Fourth Circuit cases will be presented at our April 7th seminar.

¹ See generally *Descamps v. United States*, 133 S.Ct. 2276 (2013) (for more information on the requirement to use the categorical approach over the modified categorical approach).

The ZA Editors thank Sarah Vega for contributing this helpful information. Sarah is a third year law student at UNC Law School and was an extern in the FPD office during the Fall of 2016.



Restitution: A Primer

While asset forfeiture and fines are the most common monetary compensation, restitution orders are increasingly becoming more common in the federal system. Crimes that involve fraud or property damage can easily lead to restitution orders for compensation of a victim’s harm. In 2010 alone, state and federal officials collected over \$55 billion in restitution from criminal defendants.¹ Therefore, it is critical for practitioners to be familiar with the crimes that may trigger restitution and how it would affect your client.

Who is subject to receive restitution and which crimes trigger restitution?

In the federal system, there are two types of restitution: mandatory and discretionary.

If your client has been charged with certain crimes, he or she is subject to mandatory restitution under the Mandatory Victims Restitution Act (“MVRA”) 18 U.S.C. § 3663A (2016). There are three elements under which mandatory restitution applies: (1) the defendant is convicted of an offense specified under 18 U.S.C. § 3663A(c)(1)(A),² (2) there is an identifiable victim (or victims), (3) the victim (or victims) suffered a physical injury or pecuniary loss.³

Though a judge *must* order restitution under the MVRA, a judge *may* order restitution for a defendant convicted of any offense enumerated in 18 U.S.C. § 3663(a)(1)(A).⁴ There are two factors that the court considers when deciding whether to order restitution: (1) the amount of loss sustained by each victim, and

(2) the financial resources of the defendant.⁵ The financial resources of the defendant include financial needs, earning ability, dependents, and any other factors that the court deems appropriate.⁶ However, if the court decides that the sentencing process will be overly complicated by the order (and outweigh the need for restitution), the court has the discretion not to order restitution.⁷ Further, a court cannot order restitution as a part of a sentence unless there is a statutory basis for the restitution.⁸

Third parties may not be liable for, but can be subject to, restitution judgments. For example, the marital home of a defendant and their spouse may be subject to a forced judicial sale to cover the defendant’s restitution, even if the spouse is not liable for any criminal activity. Restitution is considered a tax lien for purposes of collection and enforcement, and it does not abate even after the defendant’s death.⁹

A judge has the discretion to force a sale of property to satisfy a tax lien, even if there is a third party who also has an interest in the property.¹⁰ It is proper so long as the third party is adequately compensated based on his or her interest in the property.¹¹ However, fairness (i.e. dislocation of a non-liable third party and under-compensation) is one consideration that the *Rodgers* court puts forth in the determination of if a forced judicial sale is proper. 461 U.S. 677 (1983).

What is the process for determining restitution and how can a defendant pay it?

The Presentence Report (“PSR”) is how the court determines the victim’s losses and the defendant’s financial situation. The court also uses the PSR to determine the specific amount restitution owed pursuant to a plea agreement.¹² Therefore, in order to challenge the amount of restitution, it is crucial to object to the relevant portions of the PSR if any information concerning restitution is inaccurate. Another opportunity to object to the amount is if the court requires additional documentation or decides to hear testimony.¹³ However, this is discretionary and may not be ordered.

If the victim’s losses cannot be calculated by ten days prior to sentencing, the government’s attorney must notify the court. The court will then set a date for the final determination of a victim’s losses, not more than 90 days after sentencing.¹⁴ However, if a court indicates during sentencing that it will order restitution, the amount determination can occur past the 90-day deadline.¹⁵ The standard for proving the amount of restitution is the preponderance of the evidence.¹⁶

Once ordered, restitution will be paid to the victim or to the victim’s estate, if the victim is deceased or a minor. A court can order the restitution to be paid in a number of ways: a single, lump sum payment; partial payments; in-kind payments; or a combination of partial and in-kind payments.¹⁷ In-kind payments are the return/replacement of property or services to the victim or an organization (e.g. a non-profit) so long as the victim agrees.¹⁸

What are a defendant’s responsibilities to multiple victims or multiple co-defendants?

When co-defendants have been convicted, the court can make a choice on which defendant pays what amount. Each defendant can be held liable for the full restitution amount regardless of the defendant’s share of liability, or the court can allo-

cate liability based on each defendant's contribution to the victim's harm. Both of these methods consider the individual defendant's financial situation and their level of contribution to the victim's loss.¹⁹

If a defendant has harmed more than one victim, there is no specific order for which victims receive restitution first. Each victim might have a different payment schedule depending on the type of harm, amount of harm, and economic circumstances.²⁰ The only exception to this rule is where the United States is a victim. In such cases, all other victims will receive restitution before the Government.²¹

When does a defendant start (and stop) paying restitution?

A defendant's restitution liability extends for at least 20 years. Liability ends 20 years from the entry of judgment or release from imprisonment, whichever date is later.²² Further, while a fine terminates at the defendant's death, restitution does not.²³ A defendant's estate will be liable for any unpaid balance.²⁴ The rationale behind this is that a fine is punishment for a defendant's bad act. Therefore, a fine is no longer effective after the defendant's death. However, restitution compensates the victim's harm that will still be present with unpaid restitution after the defendant's death.

This is intended to help practitioners better understand how restitution works and the practical effects of a restitution order. Though these orders are not common, it is much easier to prepare a client for the realities of restitution at the outset rather than at the end of your representation.

¹ Offices of the U.S. Attorneys, *Federal and Non-Federal Restitution Collected by Fiscal Year*, U.S. DEP'T OF JUSTICE (Mar. 21, 2017).

² Applies to an offense "that is—(i) a crime of violence, as defined in section 16; (ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; (iii) an offense described in section 1365 (relating to tampering with consumer products); or (iv) an offense under section 670 (relating to theft of medical products);"

³ 18 U.S.C. § 3663A(c)(1)(B) (2016).

⁴ Note that § 3663 and § 3663A are two different statutes and govern different restitution procedures.

⁵ 18 U.S.C. § 3663(a)(1)(B)(i) (2016).

⁶ *Id.*

⁷ 18 U.S.C. § 3663(a)(1)(B)(ii) (2016).

⁸ *United States v. Webber*, 536 F.3d 584, 601 (7th Cir. 2007).

⁹ 18 U.S.C. § 3613(c) (2016); *United States v. Dudley*, 739 F.2d 175, 178 (4th Cir. 1984).

¹⁰ *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

¹¹ *Id.* at 697.

¹² 18 U.S.C. § 3664(a) (2016).

¹³ 18 U.S.C. § 3664(d)(4) (2016).

¹⁴ 18 U.S.C. § 3664(d)(5) (2016).

¹⁵ *Dolan v. United States*, 560 U.S. 605, 608 (2010).

¹⁶ 18 U.S.C. § 3664(e) (2016).

¹⁷ 18 U.S.C. § 3664(f)(3)(A) (2016).

¹⁸ 18 U.S.C. § 3664(f)(4)(A-C) (2016).

¹⁹ 18 U.S.C. § 3664(h) (2016).

²⁰ 18 U.S.C. § 3664(i) (2016).

²¹ *Id.*

²² 18 U.S.C. § 3613(b) (2016).

²³ *Id.*; *Dudley*, 739 F.2d at 178.

²⁴ 18 U.S.C. § 3613(b) (2016).

The ZA Editors thank Ariel Smallwood for contributing this helpful information. Ariel is a third year law student at UNC Law School and was an extern in the FPD office during the Spring of 2017.



How Amendment 784 Narrowed § 2K2.1's Cross Reference Section

Prior to the enactment of Amendment 784 ("the Amendment") to the United States Sentencing Guidelines, the Circuit Courts of Appeals were split on how to apply § 2K2.1 (b)(6)(B) and the cross reference found at § 2K2.1 (c)(1). The Amendment resolves the circuit split and changes the applicability of subsections (b)(6)(B) and (c)(1). This article focuses primarily on how the cross reference provision found at subsection (c)(1) was applied prior to the Amendment and how it should be applied today.

Previously, subsection (c)(1) stated: "If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense apply [the cross references]." USSG § 2K2.1 (c)(1) (Nov. 2013). Many circuit courts, including the Fourth Circuit, took the view that the subsection only applied if the other offense was a "groupable" offense under § 3D1.2 (d). See *United States v. Horton*, 693 F.3d 463, 478-79 (4th Cir. 2012) (holding that the cross reference did not apply where a felon in possession used a firearm in connection with a murder because murder is not "groupable"); *United States v. Williams*, 431 F.3d 767, 772-73 (11th Cir. 2005) (holding that the cross reference did not apply where a felon in possession used a firearm in connection with an aggravated assault); *United States v. Settle*, 414 F.3d 629, 632-33 (6th Cir. 2005) (holding that the cross reference did not apply where a felon in possession used a firearm in connection with an attempted murder). However, a few circuits followed the view that the subsection may apply even if the other offense was neither "groupable" nor relevant conduct. See *United States v. Kulick*, 629 F.3d 165, 170 (3d Cir. 2010) (holding that the cross reference may apply even though extortion is not "groupable"); *United States v. Outley*, 348 F.3d 476 (5th Cir. 2003) (holding that relevant conduct principles do not restrict the cross reference's application).

Also, circuit courts, when applying the cross reference, have interpreted the phrase "in connection with" broadly. Although the possession could not be "merely coincidental," the cross reference could apply, where a defendant's possession of a firearm aided or facilitated the commission of another offense. See *United States v. Wyatt*, 102 F.3d 241, 247 (7th Cir. 1994), *United States v. Nale*, 101 F.3d 1000, 1003 (4th Cir. 1996); *United States v. Thompson*, 32 F.3d 1, 7 (1st Cir. 1994); *United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994); *United States v. Gomez-Arrellano*, 5 F.3d 464, 466-67 (10th Cir. 1993). Thus, as previously interpreted, the cross reference could apply to any firearm that was determined to be used by a defendant to commit another offense. For example, Defendant was convicted of unlawful possession of a handgun by a felon

in June 2016. It was later determined that Defendant used a shotgun in connection with a kidnapping. Under the former application of subsection (c)(1), the cross reference would apply as Defendant used a firearm (i.e., the shotgun) in connection with another offense (i.e., kidnapping).

The Amendment was therefore enacted to narrow the application of the cross reference. Because the Amendment is fairly new, having gone into effect November 1, 2014, there is no case law illustrating its application. However, the Amendment's legislative history may be helpful. The Sentencing Commission created the Amendment to "clarif[y] how relevant conduct principles operate in determining how [§ 2K2.1] (b)(6)(B) and (c)(1) apply." USSG, App. C, Amend. 784 (Nov. 2016). Unfortunately, the legislative history of the Amendment does not specifically indicate that the purpose for enacting the Amendment was to require that the firearm be listed in the indictment. However, the argument should be made based on the plain meaning of subsection (c)(1) and the commentary that follows § 2K2.1 that the firearm must be specifically charged as the amended guideline now includes the phrase, "cited in the offense of conviction." When this phrase is given its plain meaning, it arguably implies that the indictment must state the specific firearm or firearms connected to the cross referenced offense, or that the same firearm must have been used in both offenses. When making this argument, be sure to focus on the meaning of "offense of conviction." Section 1B1.2 (a), which provides guidance and definitions of Chapter 2 language, offers the most guidance on what that phrase may mean. This section states: "[d]etermine the offense guideline section . . . applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." USSG § 1B1.2 (a). Thus, if "offense of conviction" means the offense charged in the indictment, then the phrase "firearm cited in the offense of conviction" necessarily means that the firearm must be cited in the indictment.

Furthermore, in the commentary that follows § 2K2.1(c)(1), the Commission offers an example of what constitutes a "firearm cited in the offense of conviction." For instance, a "firearm is cited in the offense of conviction" if Defendant is charged for unlawfully possessing a shotgun and it is later determined that Defendant used that same shotgun in an earlier robbery. But, a "firearm is not cited in the offense of conviction," if Defendant is charged for unlawfully possessing a shotgun and it is later determined that Defendant used a handgun in an earlier robbery. See USSG, § 2K2.1, comment. (n. 14 (E)).

Based on the Commission's examples of the cross reference's application and the plain meaning of the amended guideline, practitioners should argue that a firearm used in connection with the other offense must be the same firearm charged in the indictment for the cross reference to apply. Practitioners are encouraged to preserve this issue in their PSR objections and sentencing arguments.

The ZA Editors thank Antwoine Coleman for contributing this helpful information. Antwoine is a second year law student at North Carolina Central University School of Law and was an extern in the FPD office during the Spring of 2017.



Tribal Court Convictions and Federal Crimes: What You Need to Know About United States v. Bryant

"If you cannot afford an attorney, one will be appointed for you."¹ Since *Miranda v. Arizona*, this popularized phrase has widely been regarded as true in the United States. However, because the Bill of Rights does not apply to Native American tribes,² defendants in tribal courts are regularly sentenced to imprisonment without the aid of counsel.³ One of those defendants was Michael Bryant, who was convicted and imprisoned several times for domestic assault even though he was indigent and unrepresented.⁴

Domestic assault is a terrible problem in Native American communities. Native American women suffer from domestic violence at higher rates than any other racial group.⁵ In an effort to reduce domestic violence in the tribes, Congress criminalized domestic assault by a habitual offender.⁶ That crime requires two prior convictions, which can be obtained in tribal courts.⁷

The problem is that because the Indian Civil Rights Act (ICRA) does not guarantee the same rights as the U.S. Constitution, a conviction may be valid in tribal court even though it would have been unconstitutional had it been obtained in state or federal court. For example, the ICRA only requires appointed counsel if the defendant is imprisoned for more than one year,⁸ but the Sixth Amendment has been interpreted to require appointed counsel when the defendant is imprisoned for any length of time.⁹ Because Michael Bryant was repeatedly sentenced to less than one year of imprisonment,¹⁰ his tribal court convictions comported with the ICRA, but not the Sixth Amendment.

In federal court and with appointed counsel, Michael Bryant was convicted of two counts of domestic assault by a habitual offender.¹¹ The government used his uncounseled tribal court convictions as predicate offenses.¹² In *United States v. Bryant*, the Supreme Court unanimously upheld the convictions.¹³ It is now permissible for the government to use convictions that do not comport with the Sixth Amendment to prove an element of a federal crime.

What does that mean for a federal practitioner in the Eastern District of North Carolina? While tribal court convictions are not as commonly seen here as they may be in other states, it is entirely possible that someone who once lived in tribal territory ends up in this district. If you see tribal court convictions on a person's criminal history, it may be tempting to argue that they should not be used in federal court for any number of purposes, including sentencing.¹⁴ However, *United States v. Bryant* forecloses the argument that because convictions do not align with the U.S. Constitution, they cannot be used in federal court. Defense attorneys now have to be more creative and find additional arguments for why those convictions should not be used; categorically, tribal court convictions are not invalid simply because they are tribal court convictions. It is important to be informed of the Court's holding in *United States v. Bryant* so that you can prepare to make other, sound arguments against counting individual tribal convictions against your client.

For an analysis of the Court's opinion in *United States v. Bryant* and three proposed alternative solutions, see Monique A. Kreisman, *United States v.*

Bryant, *Federal Habitual Offender Laws, and the Rights of Defendants in Tribal Courts: A Better Solution to Domestic Violence Exits*, 39 Campbell L. Rev. 205 (2017).

¹ 384 U.S. 436 (1966).

² See *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that the Fifth Amendment does not apply to the Cherokee tribe because its power to prosecute crimes was not created by the Constitution). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.”).

³ In place of the Bill of Rights, Congress enacted the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (2012). Although the ICRA has many familiar protections for defendants, such as prohibitions against double jeopardy and self-incrimination, as well as the right to a speedy and public trial, it only requires counsel when a defendant is sentenced to more than one year of imprisonment. *Id.*

⁴ Brief for Petitioner at 7, *United States v. Bryant*, No. 15-420, slip op. at 10 (U.S. June 13, 2016) (citing Presentence Investigation Report ¶¶ 26, 81).

⁵ See MICHELE C. BLACK ET AL., CTR. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR INJURY PREVENTION & CONTROL, DIVISION OF VIOLENCE PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT 40 (2011).

⁶ 18 U.S.C. § 117(a) (Supp. II 2014).

⁷ *Id.*

⁸ 25 U.S.C. § 1302(c) (2012).

⁹ *Argersinger v. Hamlin*, 407 U.S. 25, 26-27 (1972); *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (clarifying that the holding in *Argersinger* only applies to cases that result in actual imprisonment, not merely the possibility).

¹⁰ Brief for Petitioner at 7, *United States v. Bryant*, No. 15-420, slip op. at 10 (U.S. June 13, 2016) (citing Presentence Investigation Report ¶¶ 26, 81).

¹¹ *United States v. Bryant*, No. 15-420, slip op. at 13-14.

¹² *Id.* at 2.

¹³ *Id.* at 16.

¹⁴ Although *Bryant* did not specifically allow using uncounseled tribal court convictions for federal sentencing or other purposes, the central holding of *Bryant* is that there is no Constitutional violation in using tribal court convictions in federal court, so long as they comport with the ICRA. Therefore, this holding likely applies to using convictions for any number of purposes, particularly because the Court in *Bryant* cites *Nichols v. United States*, 511 U.S. 738 (1994) extensively, which was a case regarding sentencing enhancement.

The ZA Editors thank Monique Kreisman for contributing this helpful information. Monique is a second year law student at Campbell University School of Law and was an extern in the FPD office during the Spring of 2017.



Restoring Citizenship Voting Rights

As an election year, 2016 was reported to be one of the most significant in recent memory, especially for those who voted in the “battleground state” of

North Carolina. In the wake of this recent election year, clients in North Carolina may express concerns about losing their voting rights due to their felony convictions. However, if a person is convicted of a felony in North Carolina, in federal court, or in another state, such person usually only temporarily loses their voting rights.

Restoration of voting rights is governed by state law and therefore varies from state to state. In North Carolina, a person’s citizenship rights are automatically restored upon the occurrence of an unconditional pardon, satisfaction of all conditions of a conditional pardon, or the unconditional discharge of the person as an inmate, probationer, or parolee by the agency of the State having jurisdiction of the person or of a defendant under a suspended sentence by the court. N.C. Gen. Stat. § 13-1.

If a person has been convicted of a felony in federal court, and the person has completed all the terms of their criminal sentence, that individual, or their representative, must show the clerk of court in the county where the person resides that the conditions of N.C. Gen. Stat. § 13-1 have been met. N.C. Gen. Stat. § 13-2(b)(1). Under § 13-1, any person convicted of a crime against the United States will have their citizenship rights, including their voting rights, automatically restored upon the occurrence of an unconditional discharge by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person, or the satisfaction by such person of a conditional pardon. N.C. Gen. Stat. § 13-1. To show those conditions have been met, the convicted felon, or his representative, must produce “any paper writing” from the United States demonstrating that the § 13-1 conditions have in fact been met. N.C. Gen. Stat. § 13-2(b)(1). For example, “any paper writing” may include a document certifying a person’s discharge from supervised release. Once the required documentation has been submitted, the clerk of court must issue a certificate specifying the restoration of citizenship rights. *Id.* The certificate is then filed by the clerk of the General Court of Justice in the county in which the person resides. N.C. Gen. Stat. § 13-2(a)(2).

Furthermore, if the individual was convicted of a crime in another state, the person will have their citizenship rights, including their voting rights, automatically restored upon the occurrence of an unconditional discharge of such person by the agency of the state having jurisdiction of such person, the unconditional pardon of such person, or the satisfaction by such person of a conditional pardon. N.C. Gen. Stat. § 13-1. Note that while this process restores the individual’s voting rights, it does not automatically restore other citizenship rights lost as a result of a criminal, felony conviction.

Below are links that may be helpful to attorneys as they advise clients on their voting rights. The first link is to our office’s website, where you’ll find a pamphlet published by the American Civil Liberties Union of North Carolina (ACLU) titled, “Know Your Voting Rights: A Misdemeanant & Ex-Felon’s Guide to Voting in North Carolina”, and the North Carolina General Statutes mentioned within this newsletter. The second link is to an informal article published by The University of North Carolina at Chapel Hill School of Government titled, “Relief From a Criminal Conviction: Citizenship Rights.” All of the materials provided through these links are available to be printed.

- 1) <http://nce.fd.org/content/publications>
- 2) <https://www.sog.unc.edu/resources/microsites/relief-criminal-conviction/citizenship-rights>

The right to vote is essential to a democracy. Therefore, it is important for attorneys to be able to address these concerns with their clients as they arise. Hopefully, these resources will be helpful in advising clients on how to have this important right restored.

The ZA Editors thank Sara Locklear for contributing this helpful information. Sara is a second year law student at Campbell University Law School and was an extern in the FPD office during the Fall of 2016.



LEGAL UPDATES

4th Circuit Update

For the latest Fourth Circuit update, please visit our website at <http://nce.fd.org/> and go to "Publications." For up-to-date summaries and commentary on Fourth Circuit cases and federal law, check <http://circuit4.blogspot.com>. For daily published Fourth Circuit opinions, visit <http://www.ca4.uscourts.gov/opinions/daily-opinions>.

Supreme Court Update

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



LOCAL NEWS

Eastern District News

We send our best wishes to Senior United States District Judge James C. Fox. Judge Fox retired on March 31, 2017 after 35 years on the bench. Our office extends a fond farewell on behalf of the defender community in our district.

The FPD welcomes newly appointed Clerk of Court, Peter (Statt) Moore. We extend a warm welcome on behalf of our office and the panel attorneys from this district.



Thanks for the Memories

A MESSAGE FROM THE ZA EDITORS

The ZA Editors have been privileged to work alongside Thomas P. McNamara for nearly 11 years of his 17 years with the Federal Public Defender's Office. Tom has served the legal community for approximately 52 years. In addition to his time as our Defender, he has 24 years of combined federal service, which includes his serving as the U.S. Attorney for our district.

During his tenure with the FPDO, Tom has expanded our office both in terms of office space and employees. He has spearheaded the office's efforts in obtaining relief for retroactive drug and *Simmons* clients as well as expanding our civil commitment practice. Tom has seen at least two cases from our office go to the U.S. Supreme Court and has overseen lawyers defending complex cases ranging from terrorism and torture to interstate kidnapping and human trafficking. Our clients have benefited from his supportive managerial style and vast knowledge of all aspects of criminal prosecution and defense.

Tom has also fostered a collegial work environment wherein his employees serve as adjunct professors at law schools and train lawyers at seminars nationally and internationally. Less known is Tom's love of lunch-time potlucks and family-friendly office events. Both professionally and personally, Tom has been a devoted leader. We wish him all the best in his retirement and thank him for the many ways he has served our office and the CJA panel.