

ADVOCATE

NEWSLETTER FOR THE DEFENSE
Spring 2018



A MESSAGE FROM THE ZA EDITORS

On April 9, 2018, G. Alan DuBois was sworn in as the Federal Public Defender for the Eastern District of North Carolina. We are excited about the future at our office under Alan's leadership. Please join us in congratulating Alan on his investiture as our Defender.

In our continued efforts to assist our panel, in this edition of the *Zealous Advocate*, you will find practical tips on preserving incarcerated parent's rights, evaluating the viability of potential writs of mandamus, and arguing for a narrowly tailored Fourth Circuit exemption for closed military base searches and seizures. Additionally, we provide legal updates to include a case note on the Supreme Court's decision in *Class v. United States*, advice on how the Fourth Circuit's recent decision in *United States v. McCollum* and the Supreme Court's impending decision in *Sessions v. Dimaya* may shape arguments against Sentencing Guideline increases, proposed synthetic drug amendments to the Guidelines, and our regular case update links and local news.

As always, we hope that you find our newsletter informative and helpful to your practice. We look forward to seeing you all at our upcoming seminar this Friday at Campbell Law School in downtown Raleigh.

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



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PANEL ATTORNEY INFORMATION

Criminal Justice Act (CJA) Panel Payment News

Good news for the CJA Panel! With the signing of the Omnibus Budget, CJA Panel attorneys have received a raise. The new hourly rate, for work performed on or after March 23, 2018, is \$140 for non-capital work and \$188 for capital work. The JNet charts, [Hourly Rates for CJA Panel Attorneys](#), and [Waivable Case Compensation Maximums for Non-Capital Cases](#), indicate the new and previous hourly rates and case compensation maximums.

eVoucher

eVoucher is an automated solution for the paper-based CJA vouchering system to prepare, submit, review, and certify CJA vouchers for payment. We understand that there have been some vouchers that have taken a bit longer to process than normal, and we appreciate your patience during our transition period. Should you have any questions regarding the eVoucher Processing System, please visit: <http://jnet.ao.dcn/court-services/cja-panel-attorneys-and-defenders/evoucher> as JNet's website has some great tools that can help you, as well as the EDNC District Court's website: <http://www.nced.uscourts.gov/attorney/evoucher/evoucher.aspx>. There is also an [Attorney Manual](#) for eVoucher that has very helpful tips for navigating the CJA eVoucher system.

Defender Services Office Training Information

The Defender Services Office Training Division furthers the right to effective assistance of counsel by providing training and other resources to attorneys appointed under the [Criminal Justice Act](#). Please check their [website](#) for upcoming training events: <https://www.fd.org/>.

FPD Fall Seminar BOLO

The dates for the Fall CLE Seminar are October 18th and 19th, 2018 at Atlantic Beach. The seminar information and registration will be posted to the website as soon as it is available. The seminar is intended for CJA Panel Members and selected court personnel only.



PRACTICE TIPS

The Right to Parenthood: Preserving the Parental Rights of Incarcerated Parents

THE ADOPTION AND SAFE FAMILIES ACT OF 1997

Family separation is a damaging collateral consequence of incarceration. For parents with children in foster care, family separation can last long after a term of incarceration because these parents likely face termination of their parental rights. The Adoption and Safe Families Act of 1997 (ASFA), sets out a specific timeline for termination of parental right proceedings (TPR). The act states proceedings should be initiated if: (1) the child has been in foster care for 15 of the most recent 22 months, or (2) the court has determined that the child is "an abandoned infant."¹

The ASFA affects an increasing number of incarcerated parents each year. Researchers estimate that after the ASFA's enactment, TPR proceedings filed based upon parental incarceration saw a 250% increase.² In 2007, over 1.7 million children in the United States had at least one incarcerated parent.³ Approximately 4.5% of children in foster care are placed there because of parental incarceration.⁴ The average sentence that incarcerated parents will serve is 80 to 100 months - far outlasting the 15-month requirement for TPR.⁵ For parents facing TPR proceedings, the most common reason for incarceration is a drug-related charge.⁶ A study of TPR proceedings from 1997 to 2002 found "parental rights were terminated in 92.9% of cases of maternal incarceration, in 91.4% of cases of paternal incarceration, and in 100% of cases when both parents were incarcerated."⁷

Termination proceedings affect female parents particularly harshly. Women are more often the sole caregivers of their children and fill the role of custodial parent. The ASFA can be detrimental to women hoping to resume their role of custodial parent upon release if their parental rights are terminated during incarceration.⁸ Over 10% of incarcerated mothers, compared to over 2% of incarcerated fathers, have a minor child in foster care.⁹ Children of mothers incarcerated at federal correctional facilities are almost three times more likely to reside in foster care than children of fathers incarcerated at federal correctional facilities.¹⁰ Since 1991, the number of children with a mother in prison has increased by 131%.¹¹ In federal prison,

women are limited to a select number of facilities that can house them. Of the 21 United States Penitentiaries for high security inmates, only two are able to house women.¹² Of the 65 Federal Correctional Institutes for medium to low security inmates, only 11 are able to house women.¹³ Therefore, these women are often housed in facilities far away from their children, making visitation near impossible.

Lack of contact with a parent can make the adverse effects of parental incarceration even worse for a child. Further, recent surveys indicate children rarely visit their incarcerated parents. Fewer than half of the incarcerated parents in state prisons ever see their children in person.¹⁴ Of those who do see their children, only about 20% have visits at least once a month.¹⁵ Common reasons for the lack of visitation include distance, lack of transportation, the schedule or wishes of the caretaker, remoteness of prisons, and prison policies.¹⁶

NORTH CAROLINA LAW ON TERMINATION OF PARENTAL RIGHTS

States have enacted their own laws in accordance with the ASFA. Although each state's guidelines for termination of parental rights must fall under the parameters of the ASFA, many states have chosen to expand upon the ASFA requirements. In North Carolina, N.C.G.S. § 7B-1111 defines conditions upon which termination of parental rights proceedings must be initiated.¹⁷ To terminate parental rights, parents must meet at least one of these conditions, and the court must determine termination of parental rights is in the "best interest" of the child.

Two of the N.C.G.S. § 7B-1111 conditions apply to incarcerated parents. The first condition is as follows: "The child has been placed in the custody of a county department of social services, a licensed child placing facility, a child caring institution, or a foster home, and the parent, for a continuous period of six months immediately prior to filing of TPR petition, has willfully failed to pay a reasonable portion of the cost of care for the child although physically and financially able to do so."¹⁸ Regardless of incarceration, a court can still find grounds to terminate parental rights based on failure to pay child support. However, the court must find that the parent has the ability to pay some amount greater than zero, either due to existing resources or money earned while incarcerated.¹⁹

The second condition is as follows: "The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition." To determine if "willful abandonment" has occurred, courts often look to child-parent contact during the six months prior to TPR proceedings. Further, the North Carolina Court of Appeals has held committing a crime that might result in incarceration is insufficient, standing alone, to show a parent's "settled purpose to forego all parental duties."²⁰ However, the commission of a crime may be relevant or determinative on the issue of whether a parent is fit to parent.²¹ Repeated incarcerations, along with other factors, have been held sufficient for termination.²²

RECOMMENDATIONS

If an attorney has a client with children in foster care, the client can be advised of ways to help retain their parental rights. For parents with children in North Carolina, parents should take proactive steps during their incarceration to show a commitment to their children. First, advise clients to make some kind of regular financial contribution to their children. If the client is receiving any outside funds or payment for work while in prison, the court will view these as potential funds for child support. If an inmate can afford to buy hygiene products and snacks while in prison, the North Carolina court has held the inmate can also afford cards and gifts for their child.²³ If an inmate loses their prison job assignment due to misconduct, courts will still find the inmate financially responsible for their children.²⁴

Second, advise clients to schedule visits with children and make calls to their children when possible. Few to no contacts with a child during the six month period will weigh in favor of finding "willful abandonment."²⁵ If a client has their visitation rights or phone privileges taken away due to inmate misconduct, the court will still expect parents to have sufficient contact with their children.²⁶ Therefore, regardless of the reasoning, a lack of visits and phone calls will weigh in favor of finding "willful abandonment."

Lastly, advise clients to avoid misconduct while incarcerated, if at all possible. The court does not look upon misconduct favorably and is likely to use instances of misconduct as evidence the client has not taken proper steps toward rehabilitation. Further, instances of misconduct can lead to circumstances which limit a client's ability to pay child support and maintain contact with their child. Under such circumstances, a client is more likely to have their parental rights terminated regardless of personal efforts or wishes.

Incarcerated parents face a clear uphill battle in retaining parental rights. While behind bars, parents' efforts to show commitment to their children can rest largely on factors beyond a parent's control. Therefore, parents should be advised to do all in their power to retain their parental rights. Clients should be made aware of court expectations as soon as possible because parents are greatly limited in their abilities to fight TPR proceedings. With what limited access parents do have to their children, parents must make a showing of commitment they can present to the court. Knowledge of court expectations can help incarcerated parents prepare for TPR proceedings so they have a better chance at retaining parental rights.

¹ H.R. Res. 10776, 105th Congress (1997) (enacted). Exceptions to this timeline exist if a child is being cared for by a relative, the state agency documents a compelling reason why filing is not in the best interest of the child, or the state agency has not provided the child's family with the services deemed necessary to return the child to a safe home.

² Arlene F. Lee et al., *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Families* 55-56 (2005).

³ *Id.*

⁴ *Id.*

⁵ Sarah Freedman, *Ensuring Effective Counsel for Parents: Extending Padilla to Termination of Parental Rights Proceedings*, 42 Hofstra L. Rev. 303, 305 (2013).

⁶ *Id.*

⁷ Arlene F. Lee et al., *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Families* 55-56 (2005).

⁸ Beck, A., Gilliard, D., Greenfield, L., Harlow, C., Hester, T., Jankowski, L., et al., *Bureau of Justice Statistics: Survey of State Prison Inmates*, 1991, Mar. 1993, <https://www.bjs.gov/content/pub/pdf/SOSP191.PDF> (last visited April 2, 2018).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Glaze, Lauren E., and Maruschak, Laura M., *Bureau of Justice Statistics Special Report: Parents in Prison and Their Minor Children*, Aug. 2008, <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> (last visited April 2, 2018).

¹² Federal Bureau of Prisons, *Custody & Care: Female Offenders*, https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp (last visited April 2, 2018).

¹³ *Id.*

¹⁴ TWELFTH ANNUAL SYMPOSIUM ON CONTEMPORARY URBAN CHALLENGES: DAMAGE TO FAMILY RELATIONSHIPS AS A COLLATERAL CONSEQUENCE OF PARENTAL INCARCERATION, 30 Fordham Urb. L.J. 1671.

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ Whoever brings the proceedings must make a showing of these conditions by clear and convincing evidence. See N.C.G.S. § 7B-1111.

¹⁸ N.C.G.S. § 7B-1111.

¹⁹ *See In re Bradley*, 57 N.C. App. 475 (1982); *In re Garner*, 75 N.C. App. 137 (1985); *In re Becker*, 111 N.C. App. 85 (1993).

²⁰ *In re Harris*, 87 N.C. App. 179, 184 (1987) *superseded by statute on other grounds as stated in In re D.J.D.*

171 N.C. App. 230, 237-38 (2005); *see also In the Matter of the Adoption of Maynor*, 38 N.C. App. 724, 726-27 (1978).

²¹ *In the matter of the Adoption of Maynor*, 38 N.C. App. 724.

²² *In re Blackburn*, 142 N.C. App. 607 (2001).

²³ *In Clark v. Williamson*, 91 N.C. App. 668 (1988), the court was not impressed with an inmate's claim that he lacked money for cards and gifts, because he had money for hygiene items, drinks, and snacks in prison, and occasionally received money from his sister.

²⁴ *In re Bradley*, 57 N.C. App. 475 (1982), the parent could not claim that he could not contribute to his child's care when he lost the opportunity for work release due to his own misconduct.

²⁵ One attempted contact is not enough. *See In re Harris*, 87 N.C. App. at 184.

²⁶ In the case of *In re Blackburn*, 142 N.C. App. 607, 612 (2001), a mother argued that "there was insufficient evidence to show neglect because incarceration alone is not sufficient to demonstrate willful abandonment." The mother claimed that she had overcome her problems and achieved rehabilitation while in prison; that she had frequently written to her daughter and requested visits but those requests were denied; that she had written to the court and petitioner asking them not to terminate her parental rights. The court pointed out that despite her efforts, she had been in trouble repeatedly in prison. *Id.* at 613. The court also stated, in response to the mother's claims, "We note that the child and her best interests are at issue here, not respondent's hopes for the future." *Id.* at 614.

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



So, Your Client Wants a Writ of Mandamus

Many defense attorneys are familiar with the following story: your client is sitting in prison after failing to find relief through usual means, wondering if there is anything else his attorney could possibly do to help his case. Along comes a jailhouse "lawyer" who claims to know how to solve the problem. These solutions are often as far-stretched and implausible as they are plentiful, and one of the questionable solutions these "lawyers" may suggest is the writ of mandamus. What is a writ of mandamus, and when is it appropriate to file one? In short, it is an unusual writ that is useful only in very special circumstances, although some desperate clients likely hope otherwise.

The writ of mandamus is a rarely-useful tool with very limited application, but the jailhouse “lawyer” will probably not describe it as such to your hopeful client. Instead, the client may be told a tale of the writ that paints it as being a broadly applicable tool that can force judges to do what the client wants. The client may even believe that the judge must respond to a writ of mandamus within 30 (or some other arbitrary number of) days, no matter how unfounded the basis for the writ. The client may wish to seize this newfound opportunity (along with the numerous misconceptions about how it works), and ask a lawyer to file a writ of mandamus posthaste. What is a defense attorney to do in this situation? They will almost certainly need to educate the client about what a realistic outcome may be for his case, but before they do so, they need to know what a writ of mandamus is and when it is appropriate.

Title 28 of the United States Code § 1651(a) gives federal courts the power to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” This permits federal courts to use essentially any writ “necessary or appropriate” to their judicial duties as long as “the use of such historic aids is calculated in [the court’s] sound judgment to achieve the ends of justice entrusted to it.”¹

The writ of mandamus is one of these historic writs, and it is used when a party requests a federal court to “confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”² In other words, a federal court has the power to order a lower court judge to act (or not act) in certain ways, and a writ of mandamus is how a party requests the court to issue such an order. Note that this requires filing the writ with the higher court and persuading it to grant the writ; filing the writ of mandamus with the lower court would be ineffective.

The writ of mandamus can only, however, be used in highly unusual situations, because it “is a drastic and extraordinary remedy reserved for really extraordinary causes.”³ The rationale is that writs of mandamus circumvent the more favored appellate process, and therefore cannot be granted lightly.⁴ Courts are permitted to grant a writ of mandamus only where there is “judicial ‘usurpation of power’ or a ‘clear abuse of discretion.’”⁵

Consequently, there are three conditions that must be met before a court can

issue a writ of mandamus: first, there must be no other way of pursuing the relief requested, which means that most petitioners must use the typical appeal process instead; second, petitioners carry the burden of showing that the right they want vindicated by the writ is “clear and indisputable”;⁶ and third, the issuing court must decide that the circumstances warrant the extraordinary remedy of issuing the writ.⁷ Moreover, these conditions do not capture other, extralegal considerations, such as the attorney’s relationship with the district court judge and how that relationship could be affected by filing a writ of mandamus against the judge.

This is no small burden, as is further demonstrated by the types of cases that were found to warrant writs of mandamus: a district court judge who refused to sentence a convicted defendant on the belief that the defendant would “behav[e]” himself;⁸ a district court judge who sought to confiscate a Peruvian ship over Peru’s claim of sovereign immunity;⁹ a district court judge who grew tired of a case and assigned another court official to govern the case, despite court rules that prohibited this behavior and the protests of both parties;¹⁰ and a district court judge who denied a party from receiving a jury trial, even when they were legally entitled to one.¹¹ The one thing these cases have in common is that they are highly unusual examples of exceptionally inappropriate district court behavior; hardly equivalent to, for example, a district court taking somewhat longer than usual to rule on a motion.

Most clients who want their attorneys to file a writ of mandamus in their case likely do not understand this high burden. Although their plights may be sympathetic, only drastic cases of obvious abuse of judicial power are appropriate for a writ of mandamus, and clients who are seeking one for their case should be informed of these difficulties appropriately, jailhouse “lawyers” notwithstanding.

¹ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

² *Will v. United States*, 389 U.S. 90, 95 (1967) (internal quotations omitted).

³ *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004).

⁴ See *id.*

⁵ *Id.* (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)) (internal citations omitted).

⁶ An example of a “clear and indisputable” right is the right to a jury trial. See *In re Lockheed Martin Corp.*, 503 F.3d 351, 353 (4th Cir. 2007) (“In this circuit, a petition for a writ of mandamus is the proper way to challenge the denial of a jury trial.”).

⁷ *Id.* at 380-81.

⁸ *Ex parte United States*, 242 U.S. 27, 45 (1916).

⁹ *Ex parte Republic of Peru*, 318 U.S. 578, 590 (1943). Note that the Court did not actually issue the writ, because it (correctly) thought that the Court's opinion alone would be enough to change the district court's ruling.

¹⁰ *La Buy v. Howes*, 352 U.S. 249, 256 (1957).

¹¹ *In re Lockheed Martin Corp.*, 503 F.3d at 360.

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



A Baseless Search? North Carolina Case Argues Fourth Amendment Exemption for Search and Seizure on Closed Military Bases Should Be Applied Narrowly

The recent unpublished decision, *United States v. Schoonmaker*, No. 5:16-MJ-01913-KS (E.D.N.C. Aug. 25, 2017), provides argument for tighter restrictions on military police when performing searches and seizures on closed military bases. On August 25, 2017, a United States Magistrate Judge sitting in the Eastern District Court of North Carolina rendered a verdict of not guilty and dismissed Driving While Intoxicated (DWI) charges against a defendant in a case from Fort Bragg military base. The case began with the defendant waiting in line at one of the central access control gates to enter the base. While traffic was at a standstill, the defendant was approached by a military police officer (MP) who had ventured away from the gate and down the line of cars. The government explained that the MP ordered the defendant out of his car after forcing him to roll down his car window and smelling alcohol. After a few failed sobriety tests, the MP placed the defendant in custody for DWI. The arresting MP later testified that he was present at the Access Control Point to assist in the same capacity as a gate guard. The Government explained that occasionally the gate guards require assistance from MPs when vehicles are backed up due to increased traffic. However, according to the arresting MP's police incident report, he was at the access point conducting a DWI enforcement checkpoint, and when questioned at trial, he testified that he ventured away from the gate in the interest of general crime prevention.

At trial, the defendant's main defense was that the MP's act of walking away from the access point down the line of traffic, approaching the defendant's vehicle for no apparent reason, and forcing him to roll down his window, constituted an unconstitutional search and seizure under the Fourth Amendment. The defense discussed that the MP's police report stated he was conducting a DWI enforcement checkpoint and acknowledged that would be a valid purpose under the Fourth Amendment. However, the defense also noted that the MP later testified that when the MP came in contact with the defendant, the MP had walked away from the access point and down the line of cars in the interest of general crime control, a per se unconstitutional purpose. After arguing that the MP's primary purpose for inspecting the defendant was for general crime prevention, the defense argued that even if the court determined the MP's checkpoint had a valid purpose, it was still unreasonable under *Brown v. Texas*, given the severity of the MP's interference with the defendant's individual liberty. *Brown v. Texas*, 443 U.S. 47 (1979).

In its opposition, the government did not claim that the MP's checkpoint had a valid purpose or that it was reasonable, but instead argued that the MP's stop and subsequent search of the defendant was exempt from the Fourth Amendment, as it took place on a closed military base. In support, the government offered three cases: *United States v. Jenkins*, 986 F.2d 76 (4th Cir. Md. 1993), *United States v. Guajardo*, No. 1:08-MJ-933, 2009 U.S. Dist. LEXIS 11410 (E.D. Va. Feb. 17, 2009), and *United States v. Cross*, No. 3:14-MJ-245, 2014 U.S. Dist. LEXIS 146617 (E.D. Va. Oct. 14, 2014). For example, in *Cross*, the court stated, "[o]n restricted access military installations that are not completely open to the public, guards briefly stop traffic at entry checkpoints to ascertain the identity of a car's occupants and will often perform a search of the vehicle. . . . These brief seizures and searches have long been exempt from the usual Fourth Amendment requirement of probable cause and particularized suspicion, and are deemed reasonable because of the Government's national security and safety interests in protecting its military installations, personnel, and property." 2014 U.S. Dist. LEXIS at *31.

In response, the defense distinguished Schoonmaker's case, noting that the Fourth Amendment exemption in *Jenkins*, *Guajardo*, and *Cross* were implicitly applied to the authority of the gate guards alone, due to the interest of national security, and did not extend to MPs or an interest in DWI or general

crime prevention. In short, the defense argued that, based on the policy underlying the “closed military base” exemption to the Fourth Amendment, the exception should be applied only when the interest of national security outweighs the interest of the individual’s constitutional protection from unreasonable searches and seizures. Regarding its general application, the exemption should therefore only apply to gate guards operating in their official capacity at an access point. Although there may be circumstances in which military officers, other than the gate guards, must perform a search or seizure in the interest of national security, the defense contended that the MP’s operating in the interest of general crime prevention or any other interest aside from national security should not be afforded the same leeway as the gate guards.

The district court ruled in the defendant’s favor, rendering a verdict of not guilty and dismissing the DWI charge against the defendant. Because the court did not provide its reasoning in a written order, one cannot specifically cite to the case as precedent on the issue. However, given the facts of the case and the arguments presented, practitioners with similar case facts should be prepared for the government to argue that a military officer’s actions are exempt from Fourth Amendment search and seizure requirements. In the case of an impromptu DWI checkpoint positioned at an access point to a military base, an argument that it is conducted in the interest of national security will be a hard sell in any court of law. The closed base exemption may be widely recognized by the Fourth Circuit, but there may be support for limiting it to the official duties of gate guards and/or apprehensions made in the interest of national security.

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



“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

U.S. Const. amend. IV

LEGAL UPDATES

Class v. United States: A Guilty Plea Does Not Inherently Waive the Right to Challenge Statute of Conviction on Appeal

Under the *Menna-Blackledge* doctrine, the U.S. Supreme Court has identified a few appellate challenges, such as vindictive prosecution or double jeopardy, which are not inherently waived by a guilty plea because they implicate the very power of the state to prosecute the defendant. See e.g., *Blackledge v. Perry*, 471 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975). In February 2018, the Court added to that doctrine and held 6-3 that a guilty plea does not waive a defendant’s right to appeal their conviction on the ground that the statute of conviction violates the Constitution. *Class v. United States*, 138 S.Ct. 798, 801-02 (2018).

Rodney Class was indicted for possessing a firearm on the grounds of the United States Capitol, in violation of 40 U.S.C. § 5104(e)(1). *Id.* at 802. Class had left several firearms locked in his jeep in a parking lot on Capitol grounds. *Id.* Class argued in district court that the statute violated the Second Amendment and his due process right to fair notice. *Id.* The district court rejected both arguments, and Class pled guilty under the terms of a written plea agreement. *Id.* That plea agreement expressly waived various types of appeals. *Id.* After pleading guilty, Class appealed to the D.C. Circuit Court of Appeals, which affirmed and held that his claims were waived by his guilty plea. *Id.* at 803.

The Supreme Court presented the issue as “whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal” and held that “it does not.” *Id.* According to the Court, that holding “flows directly from this Court’s prior decisions.” *Id.* In the first of those decisions, *Haynes*, the Court said in a footnote that a “plea of guilty did not, of course, waive his previous claim of the constitutional privilege [against self-incrimination].” *Haynes v. United States*, 390 U.S. 85, 87 n.2 (1968).

The Court then turned to a series of cases it said made up the *Menna-Blackledge* doctrine to provide the justification for that statement. *Class*, 138 S.Ct. at 803-04. In *Blackledge v. Perry*, the defendant appealed

his guilty plea, alleging vindictive prosecution when North Carolina re-indicted him for felony assault after he exercised his right to a trial *de novo* in superior court upon his conviction for misdemeanor assault in district court. 417 U.S. 21, 22-23 (1974). The Court said that while a guilty plea waives some constitutional rights, it does not waive rights which “implicate[] ‘the very power of the State’ to prosecute the defendant. *Class*, 138 S.Ct. at 803 (citing *Blackledge*, 417 U.S. at 30). Later, in *Menna v. New York*, the Court extended this rationale to also include double jeopardy as a right which is not waived by virtue of a guilty plea. *Class*, 138 S.Ct. at 803 (citing *Menna v. New York*, 423 U.S. 61, 63 (1975) (per curiam)). Regarding the nature of a guilty plea, according to the Court, it could not “waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.” *Class*, 138 S.Ct. at 803 (quoting *Menna*, 423 U.S. at 63 n.2).

The Court then addressed *Broce*, where a guilty plea had waived an appeal on double jeopardy grounds because “[the defendants] claims were ‘foreclosed by the admissions inherent in their guilty pleas.’” *Id.* (citing *United States v. Broce*, 488 U.S. 563, 576 (1989)). In *Broce*, the indictment charged the defendants with two separate bid-rigging conspiracies, which was later challenged as actually only being one conspiracy, thus violating double jeopardy. *Broce*, 488 U.S. at 576. The Court ruled that the *Menna-Blackledge* doctrine did not apply because by pleading guilty the defendants had, in effect, admitted to the two distinct conspiracies as alleged in the indictment. *Id.* The Court distinguished *Broce* because *Class*’ claims “do not contradict the terms of the indictment or the written plea agreement” and do not require “any need to venture beyond that record.” *Class*, 138 S.Ct. at 804. Instead, “[t]hey challenge the Government’s power to criminalize *Class*’ (admitted) conduct.” *Id.* at 805. The Court held that a guilty plea “does not bar a direct appeal” where the claims raised “call into question the Government’s power to constitutionally prosecute him”. *Id.* (citations and quotations omitted).

The Court rejected arguments made by the Government and dissenting justices that Rule 11(a)(2) and the Rule 11 plea colloquy by the district court judge caused *Class* to waive his right to appeal. The government and dissenting justices argued that Rule 11(a)(2) foreclosed an appeal because it provided a procedure for “conditional” guilty pleas where a defendant could preserve the right to appeal “an adverse determination of a specified pretrial motion.” *Id.* at 806 (citing Fed. R. Crim. P. 11(a)(2)). The majority for the Court rejected this argument, explaining that Rule 11(a)(2) is not “the exclusive procedure for a defendant to

preserve a constitutional claim following a guilty plea.” *Id.* In fact, the drafters of 11(a)(2) explicitly carved out the “*Menna-Blackledge* doctrine” as exempt from 11(a)(2), and explained that 11(a)(2) “should not be interpreted as either broadening or narrowing [that] doctrine or as establishing procedures for its application.” *Class*, 138 S.Ct. at 806 (quoting Advisory Committee’s Notes, at 912). Accordingly, the Court rejected the application of 11(a)(2) to *Class*’ case. The government also sought to rely on the district court judge’s statement during the Rule 11 plea colloquy that “under the written plea agreement, *Class* was ‘giving up [his] right to appeal [his] conviction.’” *Class*, 138 S.Ct. at 807. The Court rejected this argument because the purpose of a Rule 11 plea colloquy was to “ensure *Class* understood ‘the terms of any plea-agreement provision waiving the right to appeal . . . the sentence.’” *Id.* (citing Fed. R. Crim. P. 11(b)(1)(N)). Thus, it did not waive the appeal brought by *Class* because the appeal challenging the statute of conviction was not waived anywhere in his plea agreement. *Id.* Essentially, if the plea agreement did not waive the appeal then the proceeding explaining that plea agreement did not waive it either.

In the short time since it came out, two Circuit cases have considered *Class* and fleshed out the impact of the decision. The first case, *United States v. St. Hubert*, involved a defendant who challenged his plea of guilty to using, carrying, and brandishing a firearm during, in relation to, and in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). 883 F.3d 1319, 1320 (11th Cir. 2018). The predicate crimes of violence were a Hobbs Act robbery and attempted robbery, which St. Hubert argued did not qualify as crimes of violence. *Id.* The court allowed St. Hubert’s challenge to § 924(c)(3)(B) as unconstitutionally vague to go forward, relying on *Class* because a “guilty plea . . . does not bar his claim that [the] statute of conviction is unconstitutional.” *Id.* at 1324. The court also allowed a statutory appeal based on a jurisdictional indictment defect allowed by 11th Circuit precedent which it held *Class* did not speak to or abrogate. *Id.* at 1326-27. While St. Hubert’s constitutional and statutory claims were not waived, the court ultimately affirmed. *Id.* at 1327.

The second case, *United States v. Bacon*, provides a useful example that while these types of appeals may not be foreclosed, trial counsel must still be mindful of them and ensure that the issues are properly preserved. 884 F.3d 605 (6th Cir. 2018). Bacon pled guilty to selling a firearm to a prohibited per-

son, in violation of 18 U.S.C. § 922(d)(1) and possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). *Bacon*, 884 F.3d 605, 608 (6th Cir. 2018). On appeal Bacon raised, for the first time, a constitutional challenge to § 922(d)(1) and § 922(k) as exceeding Congress's power under the Commerce Clause. *Id.* at 610-11. The court held that the constitutional claim Bacon raised "challenge[d] the Government's power to criminalize [Bacon]'s (admitted) conduct" and thus was not waived by a guilty plea. *Id.* at 610. The court found that "nothing in the [Class] opinion suggests that its holding is limited to cases where the defendant has raised the constitutional challenge before entering a plea." *Id.* However, because the claims were not raised at the district court, the court applied plain error review, rather than de novo review which would have applied had his trial counsel raised and preserved the constitutional claims at the district court level. *Id.* at 610-11. The court rejected Bacon's constitutional claims, and while it almost certainly would have done so under de novo review as well, plain error review ruined whatever small chance Bacon might have had on appeal. *See id.* at 611-12.

Practically speaking, the government may begin to include language in plea agreements which waives the right to appeal based on constitutional challenges to the statute of conviction. One can expect this language to be in boiler plate, generic plea agreements. Trial counsel should be sure to advise clients about the implications of language waiving that right to appeal and be prepared to object to its inclusion if there are concerns about the constitutionality of the statute of conviction. Despite this helpful development, trial counsel must still preserve constitutional claims to protect de novo review and give clients the best chance of victory on appeal.

The ZA Editors thank Kevin Bowie for contributing this helpful information. Kevin is a third year law student at University of Florida Levin College of Law and was an extern in the FPD office during the Spring of 2018.



"[L]awyers in criminal courts are necessities, not luxuries."
Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

How McCollum and Dimaya will Reshape Defense Arguments against Sentencing Increases under the Guidelines

As defendants continue to challenge the use of certain predicate convictions when determining sentencing enhancements, the Fourth Circuit has delivered a crucial victory for defendants facing increased sentences based on prior conspiracy convictions, and the U.S. Supreme Court is expected to rule on a provision of 18 U.S.C. § 16(b) that the government frequently uses to shoehorn crimes in to justify mandatory removal in immigration cases.

The Fourth Circuit's March 2018 decision in *United States v. McCollum* was a huge win for defense attorneys. The court held that a conviction for conspiracy to commit a crime of violence, specifically conspiracy to commit murder in aid of racketeering under 18 U.S.C. § 1959(a)(5), did not constitute a crime of violence under U.S.S.G. §§ 2K2.1 and 4B1.2. By doing so, the Fourth Circuit again narrowed the avenues available to enhance sentences.¹ The court applied the U.S. Supreme Court's ruling in *United States v. Taylor*, which held that an inchoate offense only qualifies as a crime of violence if the conviction for the inchoate offense, when analyzed under the categorical approach, necessarily establishes all elements of the underlying offense.² After *McCollum*, conspiracy to commit an offense that qualifies as a crime of violence does *not*, on its own, qualify as a crime of violence unless conviction for that charge requires an overt violent act in furtherance of committing the offense. In so holding, the court noted that while conviction for conspiracy to commit murder does not require an overt act, the elements of general conspiracy do.³ Therefore, one could be convicted of conspiracy to commit a crime of violence (such as murder) without proving the defendant made an overt act in furtherance of committing the offense. Regardless, the court found that the sentencing enhancement may be imposed only where the predicate conviction establishes that the defendant was found guilty of a crime whose elements include both the generic inchoate crime *and* the generic underlying crime.

The highest court will soon contribute to the catalog of "crime of violence" case law in *Sessions v. Dimaya*.⁴ While *McCollum* dealt with whether inchoate offenses can count as crimes of violence, *Dimaya* will focus on the United States Code's definition of "crime of violence" under the residual clause of 18 U.S.C. § 16(b) in the immigration context. When the Supreme Court releases its long-awaited opinion in *Dimaya*, it will answer sev-

eral pressing immigration issues. However, the Court's ruling is also likely to extend into the realm of federal criminal jurisprudence. The Court granted the government's petition for certiorari in *Dimaya*, which challenged the Ninth Circuit's ruling that the Immigration and Nationality Act's ("INA") definition of "crime of violence," which mirrors the ACCA's definition of "violent felony," is unconstitutionally vague. This may limit which crimes may be used to justify mandatory removal under immigration law. If so, one of the government's essential tools for removal will be seriously crippled. If the Court rules that the definition of "crime of violence" under § 16(b) is unconstitutionally vague, the effects would not be confined to the immigration context, but may have significant ramifications for federal criminal jurisprudence.

The Supreme Court's 2015 decision in *United States v. Johnson* held that the ACCA's residual clause was unconstitutionally vague.⁵ Prior to *Johnson*, the ACCA's residual clause allowed for sentencing increases for crimes involving "conduct that presents a serious potential risk of physical injury to another."⁶ The Court cited the broad nature of that language in striking the clause as unconstitutionally vague and violating the due process clause.⁷ That same language is employed in 18 U.S.C. § 16(b) to define "crime of violence," and includes offenses "involv[ing] a substantial risk that physical force against the person or property of another may be used."⁸ Also mirroring the language of the ACCA is the first clause of § 16(b). Under the ACCA, unless a crime is specifically enumerated, a predicate conviction may not be used unless it falls under the "force clause," which includes prior offenses with "an element the use, attempted use, or threatened use of physical force against the person or property of another."⁹

As was the case with the ACCA's residual clause, § 16(b) greatly expands which offenses qualify as crimes of violence. A ruling in *Dimaya* barring the use of prior convictions that qualify under that statute's residual clause may drastically shrink the number of crimes that could so qualify, including some crimes that might logically seem to qualify as violent. No longer would crimes lacking an element of physical, violent force qualify a defendant for the sentencing enhancement. In *Dimaya*, this would mean that the petitioner's prior burglary conviction could not serve as a violent felony.

The Supreme Court originally heard the case prior to Justice Antonin Scalia's death, and at the time was divided on whether the issue was distinguishable from *Johnson*, given that *Johnson* implicated criminal defendants' rights while *Dimaya* may affect rights in a civil law context. Now that Justice Neil Gorsuch has tak-

en Justice Scalia's seat, clarification of § 16(b)'s language seems imminent, and we will hopefully have an opinion in hand by the summer.

McCollum is clearly a win for defense attorneys, and hopefully *Dimaya* will be as well. The court's analysis in *McCollum* should help reduce the number of conspiracy crimes which previously qualified as "crimes of violence." Depending on how the Supreme Court rules, *Dimaya* may have consequences on the validity of § 16(b) as it is used in the context of other criminal and civil laws, as well as the government's ability to remove some individuals under immigration proceedings. Defense attorneys should note the similarities between the language of § 16(b) and the ACCA that was struck down in *Johnson* when advising clients whose cases may have immigration consequences. Hopefully, they will soon have a ruling from the highest court in their favor as well.

¹ *United States v. McCollum*, 2018 WL 1386159 (4th Cir. 2018).

² *United States v. Taylor*, 495 U.S. 575, 599 (1990).

³ *McCollum*, 2018 WL at *5.

⁴ *Sessions v. Dimaya*, No. 15-1498 (U.S. filed June 10, 2016); see also *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), cert. granted, --- U.S. ---, 137 S.Ct. 31 (2016) (No. 15-1498).

⁵ *United States v. Johnson*, --- U.S. ---, 135 S.Ct. 2551 (2015).

⁶ 18 U.S.C. § 924(e).

⁷ *Johnson*, 135 S.Ct. at 2557.

⁸ 18 U.S.C. § 16.

⁹ 18 U.S.C. § 16(b).

The ZA Editors thank Benjamin Huckill for contributing this helpful information. Ben is a third year law student at UNC School of Law and was an extern in the FPD office during the Spring of 2018.



Proposed Synthetic Drug Amendments to the United States Sentencing Guidelines for the 2018 Amendment Cycle

In December 2017, the United States Sentencing Commission completed a 17 month-long study aimed at "the more prevalent and dangerous synthetic drugs," including synthetic cathinones (also known as bath salts), synthetic cannabinoids, tetrahydrocannabinol (THC), fentanyl, and fentanyl analogues.¹ The Commission expresses concern over these substances, specifically, their availability on the market, strong effects, and danger, to include

death, as a result of their use.² For synthetic cathinones, the Commission notes that “synthetic variants of cathinone can be much stronger than the natural cathinone, and in some cases, very dangerous” and that use of these substances “has become more prevalent over the last decade.”³ As to synthetic cannabinoids, the Commission highlights studies that “some synthetic cannabinoids bind more strongly to cell receptors affected by THC, and may produce stronger effects” and expresses concern over comments that these substances “may cause a more severe toxicity and more serious adverse effects than THC.”⁴ For fentanyl and its analogues, the Commission notes “an increased number of deaths from [fentanyl] overdoses,” the substances’ “high potential for abuse and addiction,” and public health data detailing “that the harms associated with abuse of fentanyl and fentanyl analogues far exceed those associated with other opioid analgesics.”⁵

Based on the Commission’s findings, on January 19, 2018, it issued a press release proposing new classes of synthetic drugs and increases to fentanyl penalties.⁶ The proposed amendments would modify the current Drug Equivalency Tables as well as add fentanyl to the Drug Equivalency Table.⁷

THE PROPOSALS

There are three parts to the Sentencing Commission’s drug guideline proposal. Part A involves synthetic cathinones, Part B involves synthetic cannabinoids, and Part C involves fentanyl and fentanyl analogues.⁸

Part A proposes to amend the Drug Equivalency Table in §2D1.1 for synthetic cathinones by either replacing the only one currently listed, methcathinone (at 380 grams of marijuana equivalency), with “synthetic cathinone (except a Schedule III, IV, or V substance)” or including both.⁹ It also proposes three possible ratios for the marijuana equivalency in that 1 gram of a synthetic cathinone (including methcathinone) would be equivalent to 200, 380, or 500 grams of marijuana.¹⁰ The amendment also proposes establishing a minimum base offense level of 12 for all cases involving synthetic cathinones.¹¹

Part B proposes to amend the Drug Equivalency Table in §2D1.1 for synthetic cannabinoids.¹² Currently, the guidelines list only one synthetic cannabinoid, synthetic THC (at 167 grams of marijuana equivalency); for other synthetic cannabinoids, courts must use Application Note 6 of the § 2D1.1 Commentary which instructs that the most closely related controlled substance referenced be used.¹³ The proposal would add an additional category for synthetic cannabinoids, and proposes three possible ratios for the marijuana equivalency of 1 gram for the synthetic cannabinoid to be equiv-

alent to 167, 334, or 500 grams of marijuana.¹⁴ It also proposes a definition for “synthetic cannabinoid” and establishes a minimum base offense level of 12 for all synthetic cannabinoids.¹⁵

Part C proposes to revise §2D1.1 by changing the established base offense level quantities for fentanyl to increase penalties as are currently provided for fentanyl analogues.¹⁶ In addition to defining “fentanyl analogue,” it would also change the base offense levels in the Drug Quantity Table for fentanyl (at 2,500 grams of marijuana equivalency) to line up with those for fentanyl analogues, currently at a ratio of 1 gram of a fentanyl analogue to be equivalent to 10 kilograms of marijuana.¹⁷ It also provides an enhancement of either 2 or 4 levels in cases where fentanyl or a fentanyl analogue is misrepresented or marketed as another substance, with two alternatives for either such substances being “misrepresented or marketed as another substance” or “knowingly misrepresented or knowingly marketed as another substance.”¹⁸

EFFECTS ON DEFENDANTS

Amendments to Part A could eliminate methcathinone in favor of “synthetic cathinone” in Drug Equivalency Tables, or have both methcathinone and synthetic cathinone categories, so be on the lookout for how the Commission treats this category of synthetics. Also, be aware that whereas currently, if the synthetic cathinone was not listed (or included as a methcathinone) in the drug table, you would use the most closely related controlled substance, which theoretically could provide a base offense level starting at 6, the amendments propose a higher base offense level 12. While methcathinone is currently calculated at 380 grams of marijuana equivalency, it is proposed to bring this equivalency (and that for synthetic cathinones) to 200 grams, 500 grams, or leave it at the current ratio.

Similarly, amendments to Part B of the proposed amendments would add the synthetic cannabinoids to the Drug Equivalency Table. While synthetic cannabinoids not deemed to be synthetic THC also require using the marijuana equivalency of the most closely related controlled substance, which could also theoretically provide a base offense level starting at 6, like synthetic cathinones, the amendments propose a higher base offense level 12. Synthetic THC is currently calculated at 167 grams of marijuana equivalency, and it is proposed that “synthetic cathinones” be calculated at either that same ratio, at 334 grams, or at 500 grams.

The most drastic changes occur in the amendments to Part C where the ratio for

fentanyl (currently at 1:2,500 grams) is proposed to parallel that of fentanyl analogues at a ratio of 1:10,000 grams.¹⁹ Currently, a defendant who possesses 36 kilograms or more of fentanyl will start at a base offense level 38.²⁰ The proposed amendments increase the penalty by reducing that quantity threshold to 9 kilograms or more for a base offense level 38.²¹ Moreover, a defendant may also be eligible to receive a 2 or 4 level enhancement for misrepresenting or marketing fentanyl or a fentanyl analogue (the Commission is also considering the requirement of this to be “knowing”).²²

WHAT’S NEXT?

On April 12, 2018, the Commission will hold a public meeting to discuss its vote on promulgating the 2018 proposed guideline amendments.²³ The Commission is expected to vote on all of the proposed amendments on May 1, 2018,²⁴ before submitting the final amendments to Congress.²⁵

¹ U.S. Sentencing Commission, *New Classes of Synthetic Drugs and Increases to Fentanyl Penalties Among Proposals*, Jan. 19, 2018 <https://www.ussc.gov/about/news/press-releases/january-19-2018> (last visited April 4, 2018)(hereinafter “*New Classes of Synthetic Drugs and Increases to Fentanyl Penalties*”).

² U.S. Sentencing Commission, *Proposed Amendments to Sentencing Guidelines* 17, Jan. 26, 2018, <https://www.ussc.gov/guidelines/amendments/proposed-2018-amendments-federal-sentencing-guidelines> (last visited April 4, 2018)(hereinafter “*Proposed Amendments to Sentencing Guidelines*”).

³ *Id.* at 2.

⁴ *Id.* at 11.

⁵ *Id.* at 16-17.

⁶ *New Classes of Synthetic Drugs and Increases to Fentanyl Penalties and Proposed Amendments to Sentencing Guidelines* at 1.

⁷ *Proposed Amendments to Sentencing Guidelines* at 1.

⁸ *Id.*

⁹ *Id.* at 2. For synthetic cannabinoids not included as synthetic THC, courts must use the most closely related controlled substance referenced be used. U.S.S.G. § 2D1.1, comment. (n.6).

¹⁰ *Id.* at 2, 6.

¹¹ *Id.* at 1.

¹² *Id.* at 1, 11.

¹³ *Id.* at 11.

¹⁴ *Id.* at 12-13.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 16-17.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 18, 20.

¹⁹ *Id.* at 16.

²⁰ U.S.S.G. § 2D1.1(c).

²¹ *Proposed Amendments to Sentencing Guidelines* at 23.

²² *Id.* at 20.

²³ U.S. Sentencing Commission, *Public Meeting*, <https://www.ussc.gov/policymaking/meetings-hearings/public-meeting-april-12-2018> (last visited April 4, 2018).

²⁴ See *New Classes of Synthetic Drugs and Increases to Fentanyl Penalties*.

²⁵ See *Proposed Amendments to Sentencing Guidelines* at ii.

The ZA Editors thank Latrisha “Chantel” Cherry-Lassiter for contributing this helpful information. Chantel is a third year law student at N.C. Central University School of Law and was a pro bono intern in the FPD office during the Spring of 2018.



4th Circuit Update

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

FPD Office News

We are pleased to welcome Arlene Rodriguez, Assistant CSA, who joined our office in January 2018.

We congratulate Sherri Alspaugh, our new First Assistant; Chris Locascio, our new Chief Trial Attorney; and Eric Brignac, our new Chief Appellate Attorney.

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



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