○ Fall 2015

Arresting developments

A Biannual Federal Criminal Defense Newsletter

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Message from the Defender

Dear Colleagues,

It has been a busy and productive year. We managed to successfully obtain sentencing reductions for 152 clients who were eligible under Amendment 782 and only had to litigate 5 cases. In 3 of the 5 litigated cases, reductions were granted and we are awaiting decision in the 2 remaining cases. In addition, we are handling several Clemency petitions for clients in our district who meet the criteria under the Clemency 2014 Project. Finally, with the Supreme Court's decision in *Johnson*, our office is being appointed to represent any defendant who may qualify for federal habeas relief under either 28 U.S.C. § 2255 or 28 U.S.C. § 2241.

In *Johnson*, the Supreme Court struck down the residual clause of ACCA as unconstitutional which paved the way for challenges that include the residual clause of the Career Offender Guideline and the statutory definition of "crime of violence." Our Office has received a list of potentially eligible clients from the Sentencing Commission but as we have discovered in the drug amendment cases, the list is not always complete. If you believe you represented a past client who may qualify for some type of relief, please let me know and we will research their possible eligibility.

Another bit of good news relates to the Sentencing Reform Act of 2015 which was passed out of Committee and sent to the full House for consideration. The bill reduces mandatory minimum sentences for a second serious drug offense from 20 to 15 years and reduces mandatory minimum sentences for a third drug trafficking offense or violent felony from life to 25 years. Apparently, there is no date for when the bill will be taken up by the full bodies in the House and Senate but stay tuned because this legislation would be retroactive.

I would also like to make you aware in case you have not already heard, Chief Justice Roberts established a Committee to study CJA representation after 25 years from the last study (Prado Commission). The link to the 1993 Report of Committee to Review CJA is on our website. The Hon. Kathleen Cardone of Texas Western will chair the Committee, which will also include past Chair, Judge Prado. The Prado II Commission is made up of representatives from the Federal Defender Community as well as the CJA National Representative. The Committee will have two years to study the CJA model, both panel and federal defenders to suggest changes and to address increasing calls for our independence or at the very least, recognition relating to the unique role that indigent defense plays within the Judiciary; and the need for a possible role with Congress for funding.

Please do not hesitate to contact me or any member of my staff at the Office of the Federal Public Defender if you have questions or concerns during the course of representing a client in federal court. Remember preparation and persistence is essential to our success in defending our clients and bringing about positive changes in our criminal justice system.

Sincerely yours,

Lisa Peebles
Federal Public Defender

In This Issue:

Dumping the Residual Clause: *Johnson v. United States*

By: James Egan, Esq.

The basic holding of the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct. 2551 (2015), is rather simple: ACCA's residual clause is unconstitutionally vague and is void in all applications. If this were the end of the story, you might be forgiven for wondering what all the Johnson fuss is about. After all, a very small number of ACCA cases are prosecuted in our district. And, *Johnson* left the two remaining ACCA clauses untouched. As it happens, however, the crack opened by *Johnson* has produced a flood of new challenges in a variety of contexts. In the space provided for this article, I would like to highlight the importance of *Johnson* and identify several ways in which it may now be used to challenge the application of statutory and guideline sentencing enhancements.

First, though limited to ACCA, the holding in *Johnson* does and should apply to similar residual clauses found in the United States Code and the Sentencing Guidelines. For example, the same or similar language found in ACCA's residual clause is also used to define the term "crime of violence" in, among other things, 18 U.S.C. § 924(c) and 18 U.S.C. § 16. What is more, the guidelines definition of "crime of violence" includes a residual clause similar to the one struck down in *Johnson* that affects, *inter alia*, the career offender guidelines of U.S.S.G. § 4B1.1 and enhancements under the felon-in-possession guideline of U.S.S.G. § 2K2.1.

Second, the holding of *Johnson* should be applied retroactively to correct sentences imposed under ACCA and under other guideline and statutory provisions. While there appears to be consensus as to the retroactive application of *Johnson* to ACCA sentences, its application to guideline sentences, and especially career offender sentences, has been more contentious. If you believe you have represented a client who may benefit from retroactive application of *Johnson*, please contact our office.

Third, the elimination of the residual clause places greater importance on challenging the remaining clauses of each respective statutory or guideline provision. For example, as a result of *Johnson*, only two clauses of both ACCA and the career offender guideline remain: (1) the force clause and (2) the enumerated offense clause. Prior to *Johnson*, courts often eschewed a rigorous interpretation and application of these two clauses by simply finding that the offense fell within the residual clause. That is no longer possible.

Fourth, and perhaps most importantly, very few offenses should meet the requirements of either the force clause or the enumerated offense clause.

Fifth, when analyzing whether a prior conviction (or an instant one for career offender and § 924(c) purposes) qualifies as a "violent felony" or a "crime of violence," courts must apply the categorical approach, which requires intellectual flexibility. You must forget what you think you know your client actually did. All that matters is how the crime is defined. The Supreme Court's decision in *Descamps v. United States*, 133 S.Ct. 2276 (2013), explains this well and also defines when and how courts may employ the modified categorical approach.

Sixth, when analyzing whether an offense falls within the force clause, take seriously the physical force requirement, which the Supreme Court has interpreted to mean "violent force," *i.e.*, "strong physical force" that is "capable of causing physical injury or pain" to another person. *Johnson v. United States*, 559 U.S. 133 (2010). In addition, the offense only falls within the force clause if the defendant intended to cause violent force. *See Leocal v. Ashcroft*, 125 S.Ct. 377 (2004).

ACCA's residual clause is unconstitutionally vague and is void in all applications

Seventh, an offense only falls within the force clause or enumerated offense clause if "the least of the acts criminalized" by the offense in question meets the requirements of either clause. *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013) (internal citations omitted). To determine the full scope of conduct criminalized, be sure to research case law interpreting the elements of the offense in question. All that is required to take the offense out of the force and enumerated offense clauses is a single example of how the offense lacks the required elements of either clause or captures a broader range of conduct than either clause proscribes. For example, because robbery in any degree in New York State can be committed when a defendant and his accomplices form a "human wall that block[s] the victim's path as the victim attempt[s] to purse someone who had picked his pocket," *People v. Bennett*, 631 N.Y.S.2d 834 (1st Dep't 1995), the offense lacks the required level of force to fall within the force clause and is not a violent felony or a crime of violence.

Eighth, when analyzing whether an offense is a generic enumerated offense, do not be fooled by labels. For example, New York State defines burglary as unlawful entry into a building to commit a crime. On its face, this would seem to constitute a generic burglary for purposes of satisfying the enumerated offense clause. However, "building" is defined to include "any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying

on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer." N.Y. Penal Law § 140.00(2). Therefore, New York State burglary in the third degree, which proscribes burglarizing any type of building, is not a generic burglary

offense and it is no longer a violent felony or a crime of violence. See *United States v. Brown*, 514 F.3d 256, 265 (2d Cir. 2008).

NINTH, be careful of conspiracy and attempt offenses. Conspiracies will never constitute violent felonies under ACCA. Attempt offenses will never qualify under the enumerated offenses clause. Attempt offenses may fall within the force clause only if (1) the object of the attempt satisfies the force clause and (2) the attempt statute requires a "substantial step." *United States v. James*, 550 U.S. 192 (2007).

FINALLY, the list of offenses within the commentary of the career offender guidelines (U.S.S.G. § 4B1.2, application note 1) is no longer operative. As the Supreme Court held in *United States v. Stinson*, 508 U.S. 36 (1993), guideline commentary cannot expand the text of the guideline. This means that enumerated offenses in the commentary now only qualify as "crimes of violence" if they fall within the force clause.

Article Submissions & Letters to the Editor

James P. Egan, *Editor-in-Chief*

If you would like to have an article or letter featured in our next edition of Arresting Developments, please write us at: Office of the Federal Public Defender, 4 Clinton Square, 3rd Floor, Syracuse, NY 13202, or send an email to james_egan@fd.org.

FEDERAL DEFENDER'S OFFICE TO PROVIDE OUTREACH PROGRAM TO SCHOOLS ABOUT FEDERAL CRIMINAL PENALTIES FOR "SEXTING"

The Federal Public Defender's Office is now creating a school educational program to reach Jr. High and High School students about the consequences and dangers of sexting. Our program is intended to make students aware of the very severe consequences of sexting, which could be construed as production of child pornography, exploitation of a child, attempted enticement of a child, possession, receipt and distribution of child pornography. Our office is attempting to educate the students and be proactive before they are actually charged with a crime. We will be putting on short seminars at schools with a power point presentation. Anyone interested in our program should contact our office at 315-701-0080 and ask to speak with Randi Bianco, Esq. or Investigator Wendy Tiffin.

Supreme Court Highlights

By: Molly Corbett, Esq.

The most significant decision from last term was *Johnson v. United States*, addressing the residual clause of the Armed Career Criminal Act spawning much litigation in the lower courts. Some noteworthy cases set for briefing this term include addressing the intent required for a crime to qualify as a misdemeanor crime of domestic violence and an interstate commerce challenge to a *Hobbs* Act violation.

DECIDED:

CONSTITUTIONAL CHALLENGES

Facial Challenge under Fourth Amendment

***City of Los Angeles, Cal. v. Patel*, 135 S. Ct. ___ (2015)**

Decided June 22, 2015

After a Fourth Amendment challenge was brought against a municipal code requiring hotel operators to keep a record of specific information concerning guests was rejected at the lower court levels, the Supreme Court granted certiorari to determine whether facial challenges to statutes can be brought under the Fourth Amendment and, if so, whether this provision of the Los Angeles Municipal Code was facially invalid.

The Court held (5-4) in an opinion by Justice Sotomayor, that facial challenges can be brought under the Fourth Amendment; and that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for pre-compliance review. Justice Scalia (joined by Chief Justice Roberts and Justice Thomas) and Justice Alito (joined by Justice Thomas) dissented.

OFFENSES

Facebook Threats

***Elonis v. United States*, 135 S. Ct. ___ (2015)**

Decided June 1, 2015

The Supreme Court took a leap into the world of social media to address the question of when violent speech on the Internet becomes a crime. Elonis was convicted of transmitting a communication containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c) based on a series of Facebook posts which made his estranged wife feel afraid and as though she was being stalked. One of the posts had included a discussion of the illegality and legality of the statements relating to killing his wife and advised of the best place from which to launch a mortar attack on her. He was tried and convicted on four of the five counts involving his wife.

Elonis challenged the jury instructions given but the Third Circuit affirmed, holding that § 875(c) required only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

The question presented to the Supreme Court asked about the intent required under the Constitution: "Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort.

In granting the petition, the Court added a statutory construction question asking the parties to address: "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten."

In an opinion by Chief Justice Roberts (7-2), the Court, answered its own question and held that the jury instruction, which required only negligence with respect to the communication of a threat, was not sufficient to support a conviction under Section 875(c). Although Section 875(c) does not indicate whether the defendant must intend that the communication contain a threat, under the rules of statutory construction the "wrongdoing must be conscious to be criminal," and a defendant must be "blameworthy in mind" before he can be found guilty.

The Court dismissed the fact that no state of mind language was included in the statute and relied on precedent to find that some level of intent is required before criminal liability arises and the same intent should be presumed to apply to each of the statutory elements.

The Court declined to address whether a mental state of recklessness would also suffice and the First Amendment issues.

Requisite Proof of Controlled Substance Analogue

***McFadden v. United States*, 135 S. Ct. ___ (2015)**

Decided June 18, 2015

In an almost entirely unanimous opinion, the Court provided guidance about what and how the government must prove in relation to defendant's mental state in a federal narcotics prosecution under the Analogue Act. Addressing the propriety of the jury instructions in a case for possession and distribution of analogue drugs, i.e. bath salts, the Court found

that the government must prove that an analogue defendant "knew" that he possessed an "analogue" substance. The Court ruled that the knowledge requirement can be established in two ways: "First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue."

EVIDENCE

Confrontation Clause: Mandatory Reporters and Testimonial Statements

Child Abuse. *Ohio v. Clark*, 135 S. Ct. ___

Decided June 18, 2015

The Supreme Court reversed the Ohio court in an opinion by Justice Alito, with five justices joining, and separate concurrences by Justices Scalia and Thomas. In the face of *Crawford* challenge to the admissibility of hearsay, the Ohio Supreme Court had held that the mandatory-reporting duty turned daycare teachers into "agents of the state for law enforcement purposes" and that a child's out-of-court statements to the teachers qualified as "testimonial" under the Confrontation Clause.

The questions presented to the Supreme Court were:

1. Does an individual's obligation to report suspected child abuse make that individual an agent of law enforcement for purposes of the Confrontation Clause?
2. Do a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause?

The Supreme Court found the statements were not testimonial holding that the introduction at trial of statements made by a three-year-old boy to his teachers identifying his mother's boyfriend as the source of his injuries did not violate the Confrontation Clause, when the child did not testify at trial, because the statements were not made with the primary purpose of creating evidence for prosecution.

CERTIORARI GRANTED:

Montgomery v. Louisiana

No. 14-280, Cert. Granted March 23, 2015

Questions Presented:

1. Whether *Miller v. Alabama* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison.
2. Whether the Supreme Court has jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in *Miller v. Alabama*? (Requested briefing by the Court)

Musacchio v.United States

No. 14-1095, Cert. Granted June 29, 2015

Questions Presented:

1. Whether the law-of-the-case doctrine requires the sufficiency of the evidence in a criminal case to be measured against the elements described in the jury instructions where those instructions, without objection, require the government to prove additional or more stringent elements than do the statute and indictment; and,
2. Whether a statute-of-limitations defense not raised at or before trial is reviewable on appeal.

Puerto Rico v Sanchez-Valle

No. 15-108, Cert. Granted July 17, 2015

Questions Presented:

1. Whether the Commonwealth of Puerto Rico and the federal government are separate sovereigns for purposes of the Double Jeopardy Clause of the United States Constitution.

Molina-Martinez v. United States

No. 14-8913, Cert. Granted October 1, 2015

Questions Presented:

1. Whether where an error in the application of the United States Sentencing Guidelines results in the application of the wrong Guideline range to a criminal defendant, an appellate court should presume, for purposes of plain-error review under Federal Rule of Criminal Procedure 52(b), that the error affected the defendant's substantial rights.

Taylor v. United States

No. 14-6166, Cert. Granted October 1, 2015

Question Presented:

Whether, in a federal criminal prosecution under the Hobbs Act, 18 U.S.C. § 1951, the government is relieved of proving beyond a reasonable doubt the interstate commerce element by relying exclusively on evidence that the robbery or attempted robbery of a drug dealer is an inherent economic enterprise that satisfies, as a matter of law, the interstate commerce element of the offense.

Utah v. Strieff

No. 14-1373, Cert. Granted October 1, 2015

Question Presented:

1. Whether evidence seized incident to a lawful arrest on an outstanding warrant should be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful.

Williams v. Pennsylvania

No. 15-5040, Cert. Granted October 1, 2015

Question Presented:

1. Whether the Eighth and Fourteenth Amendments are violated where a state supreme court justice declines to

recuse himself in a capital case in which he had personally approved the decision to pursue capital punishment against the defendant in his prior capacity as an elected prosecutor and continued to head the prosecutors' office that defended the death verdict on appeal, and where he had publicly expressed strong support for capital punishment during his judicial election campaign by referencing the number of defendants he had "sent" to death row, including the defendant in the case now before the court; and,

2. Whether the Eighth and Fourteenth Amendments are violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive

Voisine v. United States
No. 14-10154, Cert. Granted October 30, 2015
Question Presented:

1. Whether a misdemeanor crime with the *mens rea* of recklessness qualifies as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9); and,
2. Whether 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9) are unconstitutional under the Second, Fifth, and Sixth Amendments and the Ex Post Facto Clause of the United States Constitution.

Nichols v. United States
No. 15-5238, Cert. Granted November 6, 2015
Question Presented:

1. Whether 42 U.S.C. § 16913(a) requires a sex offender who resides in a foreign country to update his registration in the jurisdiction where he formerly resided, a question that divides the courts of appeals.

ARGUED & PENDING DECISION:

Ocasio v. United States
No. 14-361, Argued October 6, 2015
Question Presented:

1. Whether a conspiracy to commit extortion requires that the conspirators agree to obtain property from someone outside the conspiracy.

Kansas v. Carr
No. 14-449, Argued October 7, 2015
Questions Presented:

1. Whether the Eighth Amendment requires that a capital-sentencing jury be affirmatively instructed that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held, or instead whether the Eighth Amendment is satisfied by instructions that make clear that each juror must individually assess and weigh any mitigating circumstances.
2. Whether the trial court's decision not to sever the sentencing phase of the co-defendant's trial – a decision that comports with the traditional approach preferring joinder in circumstances like this – violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless.

Montgomery v. Alabama
No. 14-280, Argued October 13, 2015
Question Presented:

1. Whether *Miller v. Alabama* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison; and,
2. Whether the Supreme Court has jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to this Court's decision in *Miller v. Alabama*.

Hurst v. Florida
No. 14-7505, Argued October 14, 2015
Question Presented:

1. Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*.

Lockhart v. United States
No. 14-8358 Argued November 2, 2015
Question Presented:

1. Whether the mandatory minimum sentence of 18 U.S.C. § 2252(b)(2) is triggered by a prior conviction under a state law relating to "aggravated sexual abuse" or "sexual abuse," even though the conviction did not "involv[e] a minor or ward," an issue that divides the federal courts of appeals.

Foster v. Chatman
No. 14-8349 Argued November 2, 2015
Question Presented:

1. Whether the Georgia courts erred in failing to recognize race discrimination under *Batson v. Kentucky* in the extraordinary circumstances of this death penalty case.

Torres v. Lynch
No. 14-1096 Argued November 2, 2015
Question Presented:

1. Whether a state offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), on the ground that the state offense is "described in" a specified federal statute, where the federal statute includes an interstate commerce element that the state offense lacks.

Luis v. United States
No. 14-419 Argued November 10, 2015
Question Presented:

1. Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments

Second Circuit Highlights

By: Courtenay McKeon, Esq

Below is a summary of some of the most important published decisions involving a successful defense appeal decided after the Spring Newsletter.

Speedy Trial

***United States v. Bert*, 801 F.3d 125 (2d Cir. 2015)**
(Pooler and Hall, JJ.) (dissent by Jacobs, J.) (appeal from EDNY)

Defendant Raheem Bert made his first appearance in federal court on firearms charges on January 30, 2012. On June 25, 2012, he filed a motion to suppress. He supplemented the motion four times over the next six months. The court conducted a one-day suppression hearing on November 20, 2012. The government requested corrections to the transcript, which took two months to complete. On February 1, 2013, the district court took the motion to suppress under advisement. The case remained idle for twelve months. Bert remained in prison. Over a year after taking the motion under advisement, the court denied it. Bert moved to dismiss the indictment with prejudice under the Speedy Trial Act. The government argued that dismissal should be without prejudice. The court dismissed the indictment without prejudice. The government immediately re-indicted Bert. After a jury trial, Bert was sentenced to 120 months in prison. He appealed, arguing that the district court should have dismissed the indictment with prejudice.

The Second Circuit held that dismissal of the indictment without prejudice was an abuse of discretion. Specifically, the Second Circuit found that the district court abused its discretion by failing to give proper weight to several statutory factors in 18 U.S.C. § 3162(a)(2): the seriousness of the Speedy Trial Act violation as measured by length of the delay, the facts and circumstances that led to the need for dismissal, non-trial prejudice suffered by the defendant, and the impact of re-prosecution on the administration of the Act and on the administration of justice. The Second Circuit remanded with instructions to dismiss the indictment with prejudice.

Fourth Amendment Searches and Seizures

***United States v. Bershchansky*, 788 F.3d 102 (2d Cir. 2015)**
(Chin, Winter, and Oetken, JJ.) (appeal from EDNY)

Defendant Yuri Bershchansky was suspected of child pornography offenses. The affidavit filed in support of a search warrant request and the warrant itself referred repeatedly to the subject premises as "Apartment 2" at an address in Brooklyn. The agents who executed the warrant searched Apartment 1 instead. Berschansky, as it happened, actually lived in Apartment 1. The agents seized his computer and charged him. He moved to suppress the computer evidence and statements he made during the search. The district court granted the motion to suppress.

The Second Circuit affirmed, holding that the agents exceeded the scope of the search warrant by searching an apartment not specifically listed in the search warrant. The Second Circuit also held that the good-faith exception to the Fourth Amendment exclusionary rule did not apply to preclude suppression. Of particular note to the Second Circuit was the fact that the warrant did not mention Bershchansky as the subject of the investigation but repeatedly referred to Apartment 2, the fact that the apartments were clearly labeled with their numbers, and the fact that the agent who supplied the affidavit and led the search had previously been admonished in a published Second Circuit opinion for exceeding the scope of a warrant by searching a different floor than the warrant authorized.

***United States v. Watson*, 787 F.3d 101 (2d Cir. 2015)**
(Rakoff, Calabresi, Hall) (appeal from SDNY)

Officers were ordered to locate a robbery suspect who was described as being nineteen years old, black, 5'10" to 6'0" tall, and 155 to 160 pounds. The officers were shown a photograph of the suspect. One of the officers had arrested the suspect a year earlier on a different charge and spent fifteen to thirty minutes with him during processing. Instead of the suspect, the officers found Defendant Severne Watson. The parties' versions of what happened next differed sharply during the suppression hearing. Ultimately, however, the officers searched Watson and discovered drugs and a gun.

The district court granted Watson's motion to suppress. The district court found that Watson and the suspect had materially different facial features, skin tones, heights, ages, and "simply do not look alike."

The Second Court affirmed, holding that the district court's finding that the robbery suspect and defendant did not in fact look alike was not clearly erroneous and that, therefore, the officers could not have reasonably believed that defendant was the robbery suspect for whom they were searching.

Juror Issues

***United States v. Parse,* 789 F.3d 83 (2d Cir. 2015)**
(Kearse and Wesley, JJ.) (concurrence by Straub, J.) (appeal from SDNY)

Catherine M. Conrad, an attorney whose license to practice was suspended following multiple arrests and a conviction, perjured herself repeatedly while being voir dired as Juror Number One in the trial of Defendant David Parse. She did not mention her law degree, her arrests, her convictions, her husband's extensive criminal history, or the fact that she was on probation despite questioning that should have elicited those responses. After the jury on which she served returned a mixed verdict, she wrote a congratulatory letter to the prosecutors. The prosecutors shared it with defense counsel, who investigated the juror, learned the truth about her identity, and moved for a new trial. The district court denied the motion, finding that although the juror was an outrageous liar, defense counsel had not diligently investigated the matter.

The Second Circuit reversed, holding that the district court's finding that defense counsel knew prior to trial that the lying juror was a suspended attorney was clearly erroneous. The Second Circuit further held that defense counsel's alleged lack of due diligence did not amount to a waiver of defendant's right to an impartial jury and that the district court's determination that defendant waived his right to be tried by impartial jury due to juror's lying during voir dire was plain error. The Second Circuit remanded for a new trial.

Sufficiency of Evidence

***United States v. Calderon,* 785 F.3d 847 (2d Cir. 2015)**
(Wesley, Kearse, Chin, JJ.) (appeal from SDNY)

Defendant Eva Cardoza lived with her boyfriend, a member of the Latin Kings gang. She helped with gang business such as collecting money from drug sales, selling drugs, and making drug deliveries. A Latin King member, Overton, was assigned to kill another member in retaliation for a previous event. He was told to look for Cardozo's green SUV after completing the mission. On the day of the murder, Overton hid in the bushes, shot his victim three times, and then ran down the street. Cardoza's car approached Overton, a hand came out the driver's side, and a female voice said "come on, come on." Cardoza drove Overton to his home in a different town. During the drive Cardoza's boyfriend and Overton discussed where Overton's gun, gloves, and jacket were and how they would be disposed of. A jury convicted Cardozo of being an accessory after the fact to homicide. S he appealed.

The Second Circuit reversed. The Second Circuit found that the evidence was not sufficient to show that the defendant knew that the victim of the shooting was dead or dying at the time she drove Overton out of the city. Remanded with instructions to dismiss the accessory after the fact charge of the indictment.

Sentencing

***United States v. Aldeen,* 792 F.3d 247 (2d Cir. 2015)**
(Chin, Cabranes, Pooler, JJ.) (appeal from EDNY)

Defendant Ahmed Aldeen violated the terms of his supervised release by talking to a member of his treatment group, also a convicted felon, on the subway. The guidelines range for the violation was four to ten months. The maximum statutory sentence was twenty-four months. The district court sentenced him to eighteen months plus three additional years of supervised release, explaining its sentence by stating that defendant "ha[dn]'t even tried" and "lie[d] to everybody." The court stated that because it was defendant's second violation of supervised release "I . .. find that in order to deter you and hopefully cause you to really think about this and stop committing these offenses . . . [T]he[e] guidelines are four to ten months. That is far too short a term to afford deterrence in this case." Defendant appealed. The Second Circuit remanded. Regarding procedurally reasonableness, the Second Circuit found that the district court plainly erred in failing to explain its sentence because the court appeared to rely on behavior other than the violation to which defendant pleaded guilty—talking to a group member on one occasion on the subway. Regarding substantive reasonableness, the Second Circuit found that remand was required for a determination.

***United States v. McCrimon,* 788 F.3d 75 (2d Cir. 2015)**
(per curiam) (panel: Pooler, Lohier, and Carney) (appeal from SDNY)

Defendant Joseph McCrimon fled the scene of a bank robbery in a getaway car driven by his co-defendant. The getaway car hit at least one vehicle and endangered other individuals. The district court applied a two-level enhancement under guideline § 3C1.2 for "recklessly creating a substantial risk of death or serious bodily injury to others in the course of fleeing from a law enforcement officer." The district court found that the enhancement was appropriate pursuant to § 1B1.3(a)(1)(B) because it was "reasonably forseeable" that

the co-defendant would drive the getaway car in a manner that would recklessly endanger others.

The Second Circuit remanded for resentencing. As a matter of first impression, the Second Circuit found that the guidelines sentencing increase for reckless endangerment during flight from law enforcement officer was not warranted based on a finding that defendant could have reasonably foreseen that his codefendant would recklessly endanger others while driving the getaway car. The court found that § 1B1.3(a)(1)(B) did not apply because the enhancement guideline itself provides a different definition: "[T]he defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused."

***United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015)**
(Chin, Kearse, and Wesley, JJ.) (appeal from SDNY)

As a matter of first impression, rule of lenity required district court to deem possession of a firearm count rather than discharge of firearm count to be first conviction when imposing mandatory minimum sentences.

NEW STAFF MEMBERS

OFFICE OF THE FEDERAL PUBLIC DEFENDER WELCOMES NEW STAFF MEMBERS

Terrence McGinn

Investigator at Syracuse Office:

Terry spent twenty-five years with the Syracuse Police Department where he held several assignments. Prior to joining the FPD, he was a forensic detective in the criminal investigations division and has worked in some 400 homicide investigations. He received a Bachelor's of Science from Le Moyne College and has vast experience in forensic evidence collection, analysis and has frequently testified as an expert witness in these matters.

Courtenay McKeon

Research & Writing Attorney at Syracuse Office:

Courtenay joined the office in August 2015 after fourteen years clerking in state and federal courts, most recently for United States Magistrate Judges George H. Lowe (2007-2012) and Therese Wiley Dancks (2012-2015) in the Northern District of New York. A 1999 graduate of the University of California, Davis, School of Law, Courtenay spent the early part of her career representing plaintiffs (primarily prisoners) in civil rights lawsuits in state and federal court. Her undergraduate degree, in history, is from the University of Rochester. She lives in Liverpool, New York, with her husband and their two boisterous boys.

Cindy Mezoff

Litigation Paralegal at Albany Office:

Cindy holds a Bachelor's degree in Political Science from the SUNY-Albany and an Associates' degree from Herkimer County Community College in Paralegal Studies. Prior to joining the office, she worked at the U.S. District Court (NDNY) for the past 23 years, serving as a Courtroom Deputy to Magistrate Judge David R. Homer and most recently as Courtroom Deputy to Magistrate Judge Christian F. Hummel. She lives in Clifton Park with her husband and 5 year old daughter. In her spare time, she is actively involved working with horses: riding competitively as well as engaged in matters of equine welfare.

Jeff Roberts

Investigator at Albany Office:

Jeff recently retired from the City of Albany Police Department after 22 years of service with the rank of Commander. He is a graduate of the State University at Albany and is currently completing graduate coursework at Marist College.

Wendy Tiffin

Investigator at Syracuse Office:

Wendy served over 21 years on the Syracuse Police Department in various positions. She was a detective for 8 years and was appointed command officer of the department's training section, managing the Regional Police Academy. Later she served as Detective Division Supervisor of the Family Services Division, which investigated crimes of child abuse, sex offenses, domestic violence, juvenile delinquency, missing persons, and crimes occurring on school grounds. Prior to joining the FPD, Wendy worked for a private insurance company specializing in fraud investigations. She is a member of the Board of Directors at Vera House and serves on the Child Fatality Review Team. She holds a Bachelors degree in Liberal Arts.

Matthew Trainor

Paralegal at Albany Office:

Matt received a Bachelor's of Science degree in Biology from Union College in 1992 and a Juris Doctor *magna cum laude* from Albany Law School in 2000. After being admitted to the New York Bar in January of 2001 he served as an Assistant District Attorney in the Fulton County District Attorney's Office until he left in 2008. Matt worked as a solo practitioner before he joined the Albany Office of the Federal Public Defender's Office in January of 2015.

Judge's Corner

Hon. Glenn T. Suddaby, Chief Judge
United States District Court for the Northern District of New York

INTRODUCTION

The Board of Judges appreciates the opportunity to have an ongoing dialogue with the Federal Defenders and the CJA Panel attorneys. Because this should not be a one-sided conversation, we encourage you to bring areas of concern and/or interest to our attention so we may address them in this forum or by other appropriate means.

HONORING SERVICE

The Hon. Gary L. Sharpe served as Chief Judge of the Northern District from December 16, 2011 through August 31, 2015. While there is always an ongoing stream of administrative duties from the Second Circuit and the Judicial Council that need to be addressed, matters that require the Chief's attention in the District are the most visible to the NYND Bar. Judge Sharpe was tireless in his efforts to represent the Board of Judges and the District as a whole in maintaining the resources we all require to see that justice is appropriately being served. He was a steady hand during tight budgetary times brought on by sequestration and the continuing Congressional call to reduce the costs of the Courts. While the Third Branch of Government staunchly maintains its independence from the other branches of the government by virtue of constitutional separation of powers, we get squeezed by Congressional budget squabbles as Congress controls the purse strings. Chief Judge Sharpe did an outstanding job advocating for necessary funds and managing the budget shortfalls which were experienced throughout the Judiciary during his tenure. Please take a moment to thank Judge Sharpe for his outstanding service to our Court.

MEMORIALIZING THE POLICIES OF THE COURT

Chief Judge Sharpe undertook the monumental task of making sure that the polices of the NYND Board of Judges, both past and present, would be documented in a way to make them accessible to the Judges. While many policies of the Court have been voted on and passed by the Board of Judges, there was no easy way for the Judges to access or refer to that information. By virtue of Judge Sharpe's efforts, with the critical assistance of the Clerk's office, all of these policies -- past, present, and future -- will be captured and catalogued for the Court. Of course, the Court relies on the Bar to comment in this area when it comes to local/general rules of the Court. The Board of Judges relies on the experience of the Federal practitioners to provide their input on local rules so that the rules are fair and balanced while making practice in the NDNY efficient for all. So we encourage you to provide your thoughts and recommendations, during public comment periods, based on your experience as a Federal Court practitioner.

YOUTH AND PUBLIC EDUCATION OPPORTUNITIES

I would request and encourage all members of the Federal Bar to participate in educational programs designed to improve the knowledge and awareness of the critical role of the 3rd Branch of government in our democracy.

Civics education and the role of the Courts appears not to be a high priority for some educational institutions and it is therefore critical that members of the Bench and Bar do whatever they can to provide information and education about the Courts and rule of law when opportunities arise. We need look no further than our recent budget problems to understand how important it is for the general public, youth, and all voters to understand and appreciate the critical role of the Courts to our way of life. The more knowledge and appreciation they have for our judicial system, the more likely they are to speak out and support the Courts' needs with legislative members who make the tough financial decisions which fund our entire system of justice.

So please take every opportunity to get involved with youth, moot court programs, and educational programs of all kinds, either in school or for civic organizations. The more we can educate the youth and general public on the role of Courts and the rule of law, the better for all of us and our communities.

PRACTICE TIPS

One of our active District Judges has observed, and I'm sure all of the Judges would agree, factual disputes that may require a *Fatico* hearing at sentencing need to be brought to the attention of the Court well in advance of a sentencing date. Many of the Judges will schedule a number of proceedings in relatively tight blocks of time and Judges need to have advance warning of such disputes so that the Court's schedule can be adjusted to accommodate the required hearing time. A quick head's up to the Court Room Deputy (CRD) will generally take care of any potential scheduling conflicts.

CONCLUSION

On behalf of the Board of Judges, thank you for your service to the Court along with your professionalism and collegiality.

Hon. Glenn T. Suddaby
Chief United States District Judge
Northern District of New York

Searching Discovery and Creating Brief Banks with dtSearch

By: Nelson Garcia, CSA

Have you ever had the need to search through enormous amount of electronic discovery and don't know where to begin? If your answer is yes, then dtSearch is the program for you. dtSearch is a popular search and retrieval program. It is a search engine utilized in other well-known programs such as CaseMap and Adobe Acrobat Pro.

Federal Public Defender Organizations have used search and retrieval software programs for a number of years. These search programs have been integral in allowing legal teams to search through discovery, create brief banks, and assist in basic organization of their data in a way they can quickly retrieve information. dtSearch's information indexing capabilities provide immense functionality in searching both electronic discovery and materials provided in hard copy that have been scanned and converted to a text searchable format. Its ability to search and retrieve information in many common file types provides great flexibility and functionality. The result is a powerful tool that enables the defense to effectively use both discovery and work product in overall case management as well as trial preparation.

So, when you need to find that "needle in a haystack", dtSearch will wade through terabytes of information in seconds. The program costs $199 and can be purchased at http://www.dtsearch.com/index.html. If you are a CJA panel attorney, you may be able to obtain a license by filling out the following form at: http://nlsblog.org/2014/03/25/dtsearch-desktop/ (license are limited). If you are interested in dtSearch training you can visit www.fd.org. They put together a TECM (Techniques in Electronic Case Management) training twice a year. Happy Searching!

Upcoming CLE: Evidentiary Issues in Federal Criminal Trials

The focus of this program will be on key evidentiary issues in federal criminal trials, with the primary presentation by Steven D. Clymer, the Chief of the Appellate Division of the U.S. Attorney's Office and an adjunct professor at Cornell Law School. Albert J. Millus, Jr., Esq. and First Assistant Federal Public Defender Paul Evangelista will then address evidentiary issues from the defense perspective. The program will include a segment on new developments in federal criminal law by Public Defender Lisa Peebles. The program will conclude with an interactive panel of our local District Judges.

"Evidentiary Issues in Federal Criminal Trials" has been approved for both newly admitted and experienced attorneys, and is in accordance with the requirements of the New York State Continuing Legal Education Board for **3.0** credits toward the **professional practice** requirement.*

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

*** PLEASE REMEMBER TO STOP AT THE REGISTRATION DESK TO SIGN OUT AND TURN IN YOUR EVALUATION FORM.**

Registration begins at 1:00 p.m.

R.S.V.P. for CLE by Thursday, December 3, 2015

December 10, 2015

1:30 PM – 4:30 PM

James M. Hanley Federal Courthouse
100 South Clinton Street
7th Floor, Jury Assembly Room
Syracuse, New York

Schedule

1:30 PM — 1:35 PM
Welcome - *Albert J. Millus, Jr.*

1:35 PM — 2:35 PM
Evidentiary Issues in Federal Criminal Trial - *Steven D. Clymer, AUSA*

2:35 PM — 3:05 PM
Evidentiary Issues from a Defense Perspective - *Paul Evangelista, AFPD & Albert J. Mullis*

3:05 PM — 3:15 PM
Break

3:15 PM — 3:45 PM
New Developments - *Lisa Peebles, FPD*

3:30 PM — 4:30 PM
Judge's Panel Discussion
Hon. Andrew T. Baxter, Moderator
Hon. Glenn T. Suddaby, Chief Judge
Hon. David N. Hurd
Hon. Norman A. Mordue