Fall 2021

Arresting developments

A Biannual Federal Criminal Defense Newsletter
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In This Issue:

- Second Chair program ... 2
- Combing the *Weaver* En Banc Rubble for a Way to Curb Discriminatory Policing 3
- Reconsidering Prior Convictions as Violent .. 7
- *McGirt v. Oklahoma*: a personal connection 8
- The "High Crime Area" Factor 11
- Challenging Whether a "Receiver" is a Firearm .. 12
- Case Law Updates:
  - Supreme Court 13
  - Second Circuit 15
- Positive Outcomes..... 19
- Proposed Amendment to Local Discovery Rules Resources 23
- Pending Legislation: the EQUAL Act 25
- Developing Criminal Issues, Training & Resources..... 26
- Judge's Corner 28

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Message from the Defender

Dear Colleagues:

We recently celebrated our 22-year anniversary, but we're not going to party like it's 1999. The Delta variant looms large so we're not taking any chances. Getting back to a new office normal has been a slow, on-going process. We've all become proficient with technology, or at least are improving., the proverbial silver lining. The downside has been delays and minimal client contact. I've spoken to many of you about the lack of meaningful client access for our in-custody folks. There's been lengthy lockdowns, with no in-person visits, non-contact visits and jailors within earshot, and phone calls with no privacy. There have been technical difficulties with cumbersome, outdated video conferencing systems at a couple of the jails, with no assistance afforded by the jail administration. These conditions are extremely frustrating and obviously unacceptable. We've been working with the marshals to educate the jails about protecting our clients' constitutional rights. The good news is that our district is participating in a pilot program that will use remote video conferencing with state-of-the-art software programs. Broome and Clinton County jails will be the first two facilities to use the new equipment. More information will be coming in the months ahead.

Compounding the lack of meaningful access to our held clients are the blanket protective orders issued for discovery documents in routine drug cases. Even during pre-pandemic times, it was difficult to go through discovery with incarcerated clients, but with the COVID restrictions it's been

(Continued on page 2)

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Message from the Defender...*continued*

next to impossible. Most often the discovery documents in these cases are voluminous. They include long audio, and video recordings, search warrants and associated reports. Keep in mind, the government's protective orders are required to identify and justify specific materials that present a safety concern for confidential sources or informants. It is the government's burden to establish good cause under Rule 16. It is incumbent upon defense attorneys to challenge those orders when there is no articulable good cause, but rather just a routine request. Within this edition, our appellate chief, James Egan, explains proposed changes to our local rules, including procedures for protective orders.

Where are we now? We've acquired several new faces since the start of the pandemic. Our long-time faithful secretary in our Syracuse office, Val Bruni, retired in April. We were fortunate to fill her big shoes with Renata Hohl. Renata, a household name at the James Hanley Federal Building, jumped the court's ship and joined our defense family. We're lucky to have her. Also in Syracuse news, we've acquired the litigation talents of John Gilsenan from the Wayne County Public Defender Office, and IT extraordinaire Matt Clute. In Albany news, Michael Bennett, retired Albany police detective, replaced Tip Kubisch who retired after 12 stellar years of service. The talents our new hires bring to the office is exciting. We're looking forward to many COVID-free years ahead.

- Lisa Peebles

SECOND CHAIR MENTOR PROGRAM

The *Second Chair Mentor Program* is designed for potential CJA panel applicants who require more experience in handling federal criminal matters but are otherwise qualified to practice in federal court. We provide a foundation and additional training in order for the applicant to gain the experience in federal court so they are competent to represent individuals charged with federal crimes. The applicants shadow a defender at initial appearances, detention hearings, a pre-trial hearing, change of pleas, sentencing and, where possible, observe portions of a trial. A number of the essential procedures in federal court are also reviewed such as how to calculate a sentence under United States Sentencing Guidelines, the benefits and detriments of a plea agreement, pre-trial reports as well as presentence reports and how to lodge objections. We give the inexperienced attorney an overview of how to handle a federal criminal case. Certain requirements must be met for our office to recommend the attorney to the CJA Panel Committee and before a candidate is eligible to receive appointments

Becoming a member of the CJA panel in the Northern District of New York takes a number of steps as outlined on the Northern District's website at: www.nynd.uscourts.gov/criminal-justice-act.

Participants who successfully complete the program will be encouraged to file their application for appointment to the Panel. A completed Second Chair form is required and tracks the completion of each requirement with the necessary information. The Panel Review Committee will solicit the views of the Coordinator as to whether the participant qualifies for appointment or whether more training is needed.

For questions about the program please contact the Second Chair Coordinator: Randi Bianco, Assistant Federal Public Defender, 315-701-0080 or at randi_bianco@fd.org.

Combing the *Weaver* En Banc Rubble for a Way to Curb Discriminatory Policing

By: *James P. Egan, AFPD*

Nowhere has the erosion of the Fourth Amendment been more conspicuous than in "stop and frisk" context, where the personal protections of minorities have been trampled with seeming impunity. The seeds of this sad reality can be traced at least as far back as the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court, bowing to pressure (and calls for Chief Justice Warren's impeachment) created the reasonable suspicion standard out of whole cloth. While the Warren Court may have thought it necessary to strike a balance that would give responsible police officers added flexibility when responding to potentially dangerous and fast-moving situations on the street, subsequent Court decisions, most notably *Whren v. United States*, 517 U.S. 806 (1996), have expanded that authority. This expansion has given rise to proactive policing, where entire minority communities are subjected to harassing, aggressive, and violent policing, with, at times, seeming judicial indifference. Despite this unfortunate fact, historical data shows beyond dispute that the over-policing of minorities almost never succeeds in uncovering criminal evidence, but certainly increases community resentment.

At first blush, the Second Circuit's *en banc* decision in *United States v. Weaver*, 9 F.4th 129 (2d Cir. 2021), marks yet another example of the failed bargain the Supreme Court struck in Terry. While there is certainly reason to be pessimistic following Weaver, all sides of the decision acknowledged a possible way to reverse one devastating effect of *Terry*. Criminal defense attorneys may take up the Court's challenge to show how evidence of discriminatory policing might be used to chip away at *Whren* and, perhaps, begin to reverse the harms of racialized policing.

I.

In February 2016, Calvin Weaver, a young black man wearing a hoodie, was walking peacefully along a street in the Near Westside of Syracuse, New York, shortly after 5:00 p.m., when three Syracuse Police Officers were proactively policing the neighborhood as part of a gang task force. As the officers drove past Weaver in their unmarked car with tinted windows, they looked at him and he looked back. Weaver continued walking, pulled up his pants, and got into the passenger side of a sedan, which drove away. The police officers made a couple turns and caught up. As the sedan pulled up to the intersection at Davis Street and Delaware Avenue, where cars are both physically and legally required to turn right, the officers claim the driver activated the right turn signal at the stop sign, instead of 100 feet before it, an act that may (or may not) violate New York Vehicle and Traffic Law. As officers pulled over the sedan, the rear passenger of the sedan opened the door and quickly closed it when ordered to do so by officers. Officer Tom approached Weaver who was seated in the front passenger seat. The officer claimed Weaver was "kind of" pushing down on his pelvis area and "kinda" shifting left to right in his seat, conduct that suggested he was either adjusting in his seat in preparation to respond to police questioning or attempting to push something into his pants. Officer Tom loudly and forcibly ordered Weaver to raise his hands. Weaver complied, saying that he didn't have anything. Officer Tom asked Weaver to produce identification. Weaver told him it was in his pants pocket. Officer Tom saw no outline, bulge, or any indication of a weapon, so he directed Weaver to retrieve his identification from his pocket. After Weaver handed over his identification, Officer Tom put it in his pocket and ordered Weaver to exit and place his hands on the car with his legs spread. Weaver complied. Officer Tom then ordered Weaver to take a step back. Weaver complied. Officer Tom then put his hands on Weaver and, as he began to frisk, Weaver, pushed his pelvis against the car. Eventually officers recovered a gun after reaching through Weaver's underwear.

Weaver was originally charged in state court, where the evidence was suppressed because the officers lacked reasonable suspicion to frisk Weaver. According to the state court, Weaver's actions "were at all times innocuous and readily susceptible of an innocent interpretation" and "there was no evidence adduced to show that the officers reasonably suspected that they were in danger of physical injury." The federal government then charged Weaver based on the same conduct, and the district court (Suddaby, C.J.) denied Weaver's suppression motion. On appeal, the panel majority (Pooler, Calabresi, CJJ.) held that the order to exit the car and spread eagle initiated the search, and, even if officers had reason to suspect Weaver was keeping something private, they lacked reasonable suspicion to believe that that thing was a weapon. The government's petition for en banc rehearing was granted.

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II.

At the surface, the *en banc* case presented two questions. First, does an officer conducting a traffic stop need reasonable suspicion that an occupant is armed and dangerous before ordering him to spread eagle against a car. Second, did the officers have reasonable suspicion given Weaver's full compliance with the officer's orders and the absence of any physical or auditory evidence of a weapon.

A.

Unfortunately, the first question was framed by the original majority opinion solely in terms of whether the order constituted a search, instead of whether it also (or separately) constituted a heightening of the original seizure. For reasons that are not entirely clear, no member of the *en banc* Court realized that Weaver argued in the district court that the order impermissibly expanded the scope of the stop beyond what was necessary to issue a ticket and, therefore, had to be supported by reasonable suspicion.

While the *en banc* majority suggests in a footnote that the order might have been a reasonable heightening of the initial seizure, it does so by ignoring the demeaning nature of having to spread eagle. This is hardly surprising, given that the *en banc* majority mischaracterized a frisk itself as a "minor inconvenience and petty indignity," *Weaver*, 9 F.4th at 139, when *Terry* described such a claim as "simply fantastic." *Terry,* 392 U.S. at 16-17. Just as a frisk is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," *id*., so too is being made to spread eagle in public. Fortunately, any claim to the contrary in *Weaver* is dicta and the issue as to whether an officer must have reasonable suspicion before ordering an occupant to spread eagle is still an issue to be pressed more fully in the next case.

Considered narrowly within the search doctrine, the *en banc* panel held that the order did not constitute a search because, no matter Officer Tom's obvious intent in giving the order, it did not physically intrude on a constitutionally protected area and did not violate Weaver's reasonable expectation of privacy. Instead, the *en banc* majority held that the order "was only a prelude to a frisk." *Weaver*, 9 F.4th at 146. But why a prelude to a frisk – an order unquestionably given for the express purpose of initiating a frisk – is not part of the search is something the majority never explained. (Personally, I would feel ripped off if I paid to see a performance of *Lohengrin* or *Parsifal* and the orchestra skipped the preludes, claiming my opera tickets only covered the works with singing.)

The *en banc* majority attempted to buttress its strained interpretation by suggesting a hypothetical in which Officer Tom ordered each occupant out of the car but never frisked all of them because one ran away. Weaver would claim that all had still been searched (if not fully), but the majority suggests this position would be illogical because the fleeing suspect has not been seized: "Thus, Weaver's position would yield the incoherent conclusion that the runaway was never subjected to a T*erry* stop but was subjected to a *Terry* frisk." *Id.* But Weaver complied with the order to spread eagle. So, the hypothetical proves nothing. Moreover, the fleeing suspect in the majority's hypothetical was originally seized with the stop of the car, so the claim that he was never subjected to a *Terry* stop is utter nonsense.

B.

As to the second issue, Weaver acknowledged that, although susceptible to a perfectly innocent explanation, the police could reasonably conclude that he was attempting to keep something private. The question, therefore, was whether the police had reasonable suspicion to believe that whatever Weaver may have wished to keep private was a weapon that he might use against them.

In the absence of any physical or auditory indication of a weapon, the *en banc* majority was at pains to explain why it would be reasonable to believe Weaver would stuff a weapon into the pelvic area of his pants, not a common sanctuary for weapons. While it was, of course, theoretically possible that one of the things Weaver may have wished to keep private might have been a weapon, that is true of nearly everyone noticeably exercising their Fourth Amendment privacy rights. So why would it be reasonable to suspect that the object may have been a weapon? Here, the majority's explanation is unsatisfying.

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The majority cites three factors: the number and conduct of the occupants in the car; Weaver's efforts at "counter-surveillance"; and the asserted nature of the area in which the stop occurred. The number of passengers in the car and the rear passenger's conduct have no bearing on Weaver's conduct. After all, the rear passenger complied with the officers' orders to shut the door, and though not mentioned by the Court, he was frisked without any suspicion of weapons possession. Moreover, the number of occupants in the car was matched by the number of officers executing the stop.

The majority's reliance on Weaver's asserted "counter-surveillance" efforts is similarly unavailing. To begin with, the majority never explains how looking at a car and later pulling up one's pants counts as "counter-surveillance." And, of course, those actions could only point in that direction if Weaver was aware that police officers (as opposed to other residents of the neighborhood) sat in the unmarked car with tinted windows, which the record did not, and could not, establish. But even if Weaver's ambiguous conduct rose to the lofty label of "counter-surveillance," it does not suggest weapons possession.

Finally, the majority's reliance on the asserted criminal nature of the neighborhood is as stale as it is unpersuasive. That a "neighborhood" may be "dangerous" because there is some historical evidence of gun crimes sheds little light on whether the particular streets where Weaver was first seen and later stopped are generally "dangerous"; whether there had been any recent evidence of violence and, if so, what kind and how much; whether that violence tends to occur at the date and time in question (mid-February at 5:00 p.m., thirty minutes before sunset); and whether anything about Weaver suggested he fit a pattern of prior perpetrators. (Melissa Tuohey offers additional thoughts on challenging the notion of the "*high-crime area*")

III.

Ultimately, the *en banc* majority's decision rests on the uncritical application of the same wooden Fourth Amendment doctrines that have led to the overly aggressive policing of minorities. To make matters worse, the majority, before concluding, pauses to note that its decision takes no account of Weaver's race or the broader problem of racialized policing, as if these were virtues. Nevertheless, there may yet be some room for optimism.

A.

In his concurrence, Judge Lohier acknowledged what now seems beyond dispute, "*Whren* and later cases have unfortunately given police officers a green light to make pretextual stops based on racial profiling." *Id.* at 158-59 (Lohier, J., concurring). *Whren* held that the "actual motivations" and "[s]ubjective intentions" of individual officers have no place in assessing whether a *Terry* stop violates the Fourth Amendment. *Whren,* 517 U.S. at 813. Instead, such evidence could only be used to make out a civil selective enforcement claim in violation of the Equal Protection Clause. Judge Lohier noted that such a limitation "blinks at reality." *Weaver,* 4 F.4th at 159 (Lohier, J., concurring) (quoting 1 W. LaFave, *Search and Seizure* § 1.4(f), at 195 (6th ed. 2020)). Consider the following example:

> Say a police officer pulled over a car for driving one mile-per-hour faster than the speed limit and then explicitly announced that he had stopped the driver because the driver was African American. And say that this particular racially motivated stop happened to lead to evidence of a federal drug crime. If criminal charges were later filed against the driver based on evidence obtained during the stop, Whren would prevent the driver from raising the officer's explicit racial bias in any attempt to suppress the evidence. Whren instructs that the driver has no recourse as far as his liberty is concerned, but that later on he may be able to sue for damages.

Weaver, 9 F.4th at 159 (Lohier, concurring).

Instead of limiting evidence of clear racial bias to civil selective enforcement claims, Judge Lohier advocates for a reconsideration of *Whren*: "Criminal defendants must be able to raise the issue of selective enforcement

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where the presence of racial bias is unmistakable, and they should not have to do so in a separate civil proceeding." *Id.* Not only does limiting selective enforcement claims to civil proceedings disadvantage criminal defendants, but it also "impugns the integrity of our judicial proceedings and 'undermine[s] public confidence in the fairness of our system of justice.'" *Id.* (quoting *Batson v. Kentucky,* 476 U.S. 79, 87 (1986)). To support his proposal, Judge Lohier points to jurisdictions, such as Massachusetts, that have declined to follow *Whren*, noting that the "sky has not fallen" in those states." *Id.*

In response to Judge Lohier, the *en banc* majority states that "the concurrence does not assert that any evidence of racial bias exists in this case . . .." *Weaver*, 9 F.4th at 153. But one need not look very hard to see that "from the moment they first saw him, the police officers were suspicious of Weaver, a Black man wearing a hoodie, even though he did not appear to be doing anything remotely illegal." *Weaver,* 9 F.4th at 184 (Chin, J., dissenting). From there, the officers followed the car he entered, executed a pretextual traffic stop based on traffic observations that may (or may not) be illegal, and then searched everyone in the car. While the biased motivations of the officers appear obvious to anyone taking even a moment to look, the en banc majority was correct that the issue was not expressly pressed by the defense.

It now falls to us to make plain what we all thought was too obvious to mention and to press courts to reconsider *Whren.* Obviously, this will not be easy. And Judge Lohier provides no prescription for how defendants might make out a claim of racial bias. Statistics may be one method. But obtaining relevant statistics, even if collected and publicly available, is "daunting." See *Commonwealth v. Lora*, 451 Mass. 425, 445 (2008). Therefore, Massachusetts has provided the following procedure:

> In order to ensure that drivers who are subjected to racially motivated traffic stops have a viable means by which to vindicate their rights to the equal protection of the laws, as provided by the Massachusetts Declaration of Rights, we today establish a revised test. A defendant seeking to suppress evidence based on a claim that a traffic stop violated principles of equal protection bears the burden of establishing, by motion, a reasonable inference that the officer's decision to initiate the stop was motivated by race or another protected class. To raise this inference, the defendant must point to specific facts from the totality of the circumstances surrounding the stop; the inference need not be based in statistical analysis. If this inference is established, the defendant is entitled to a hearing at which the Commonwealth would have the burden of rebutting the inference. Absent a successful rebuttal, any evidence derived from the stop would be suppressed.

Commonwealth v. Long, 485 Mass. 711, 731 (2020).

B.

Another, less systemic, proposal to limit *Whren*'s harmful effects was offered in dissent by Judge Calabresi. For whatever reasons, courts are inclined to give judicial charity to officer testimony, subtly and not so subtly lending undue weight to the inferences officers attempt to draw from their given observations. Judge Calabresi offers a possible check against this insidious practice in cases involving pretextual stops.

Although *Whren* holds that "a court will not exclude evidence of a crime if a police officer sees such evidence during an objectively reasonable traffic stop, even if the officer's actual, ulterior motivation for performing the traffic stop was not the desire to enforce traffic law," the case does not cloak the testifying officer with absolute reliability concerning reasonable suspicion that an occupant is armed and dangerous. *Weaver,* 9 F.4th at 181 (Calabresi, J., dissenting). This is important because stop and frisk cases are based on "often nebulous, ambiguous things: shifting in one's seat, adjusting one's pants, a protestation of innocence." *Id.* (Calabresi, dissenting). As Judge Calabresi explains, courts must be free to consider whether an officer's improper motivation to initiate the stop has influenced the officer's account of a defendant's dangerousness. *Id.* at 182 (Calabresi, dissenting). After all, "to a man with a hammer, everything will look like a nail." *Id.* at 181 (Calabresi, dissenting). Likewise, to an officer using the traffic laws as a pretext to search a car's occupants, every ambiguous observation will look like evidence of dangerousness. Therefore, Judge Calabresi suggests that in cases of pretextual stops, district courts "should expressly consider the officers' motivation in making the pretextual stop and everything that led up to it" in evaluating whether the officer's reliance on ambiguous observations is reasonably suggestive of dangerousness. *Id.* at 182 (Calabresi, dissenting).

Reconsidering Prior Convictions as Violent:
Disqualifying Federal Sentence Aggravators based on *Mens Rea*

By: *Molly K. Corbett., AFPD*[1]

In *Borden v. United States*, 141 S. Ct. 1817 (2021), the Supreme Court held that a criminal offense that requires only a *mens rea* of recklessness cannot count as a "violent felony" under the Armed Career Criminal Act's (ACCA's) force clause or elements clause. ACCA enhances the sentence of anyone convicted under 18 U.S.C. § 922(g) of being a felon in possession of a firearm if they have three or more prior convictions (whether state or federal) for a "violent felony" or a "serious drug offense," or both. A prior qualifying conviction increases the sentence from a 10-year maximum sentence to a 15-year mandatory minimum.

Borden pleaded guilty as a felon-in-possession of a firearm. The prosecution sought the enhanced sentence under the ACCA, mandating the 15-year minimum sentence for persons found guilty of illegally possessing a firearm who have three or more prior convictions for a "violent felony." An offense qualifies as a violent felony under the ACCA's elements clause if it necessarily involves "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). One of Borden's three predicate convictions was for reckless aggravated assault in violation of Tennessee law. He argued that this offense was not a violent felony under the ACCA's elements clause because a mental state of recklessness could be a basis for conviction. Borden argued that only purposeful or knowing conduct satisfied the requirement of the use of force "against the person of another." The Sixth Circuit affirmed his enhanced sentence.

The Supreme Court reversed and remanded, concluding that a criminal offense with a *mens rea* of recklessness does not qualify as a "violent felony" under the ACCA's elements clause. The Court found that the ACCA's narrow "category of violent, active crimes" as "occurring against the person of another" should be understood to involve a purposeful or knowing mental state. As the opinion emphasized, the "against" clause "is not window dressing: It is the "critical" text for deciding the level of *mens rea* needed. *Borden* 141 S.Ct. 1817, 1833.

The Supreme Court clarified that a specific intent to harm is required to satisfy the elements clause, "use, attempted use, threatened use of physical force against the person of another," and therefore a general intent--a voluntary act--is insufficient.. Applying the categorical approach from *Moncrieffe's* "least culpable act" standard to the elements clause (also sometimes referred to as "full range of conduct" or "minimum conduct") the court reviewed the elements and force clause to determine whether there is a categorical match of elements between the prior conviction and the same federally defined offense. *Borden*, 141 S. Ct. at 1832.

Although the Court did not expressly state that the force must be intentional, it did state the force must be purposeful or knowing, deliberate, directed or targeted at another. And Justice Thomas, in his concurrence, actually interpreted the phrase "use of physical force" to mean "intentional acts designed to cause harm."

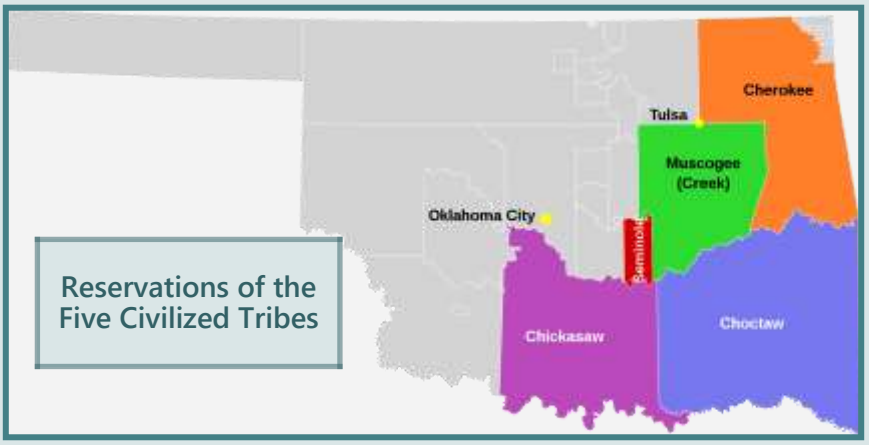
Following these findings even where a statute or case law interpreting a statute does not use the word "reckless," if the offense merely requires a general intent to engage in act that happens to put reasonable person in fear of injury or injures someone, but it does not require any specific intent to frighten or injure someone, then the offense is not a qualifying offense under the force clause. See *United States v. Carter*, __F.4th__, 2021 WL 3354722 (11th Cir. 2021) (finding that Georgia aggravated assault with a dangerous weapon – a general intent crime -- is not a qualifying offense under the force clause); see also *United States v. Benally*, 20-2157 (10th Cir.) (post-*Borden* government concession on 18 U.S.C. 113(a)(6) federal assault resulting in serious physical injury).

Borden is important for at least two reasons. First, the elements clause of the ACCA is very similar to the elements clauses of 18 U.S.C. § 924(c)(3)(A), 18 U.S.C. § 16(a) 18 U.S.C. § 3559(c), and the Career Offender Sentencing Guideline, so *Borden's* holding arguably applies to those provisions. Second, as noted in Justice Kavanaugh's dissent, many offenses, including some federal crimes, can be committed with a *mens rea* of recklessness, including certain types of assault, manslaughter, and even murder.

The *mens rea* required for prior conviction of a violent felony/serious violent felony/crime of violence (ACCA/§4B1.2/3559(c)) must have "as an element, the use, attempted use, or threatened use of physical

(Continued page 10)

McGirt v. Oklahoma:
A personal connection



By: *Gene V. Primomo, AFPD*

In the long struggle for justice by Indigenous peoples, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020), might be one of the most important Supreme Court decisions of all time. In a 5–4 victory in favor of *McGirt* and the Muskogee Creek Nation, the Supreme Court acknowledges Congress never extinguished the reservation lands set aside for that tribe in 1866. Put more plainly, 19 million acres composing 47% of Oklahoma—an area that is home to 1.8 million people—remains Native land.

Background & Decision

Jimcy McGirt, a member of the Seminole Nation of Oklahoma, was convicted in state court of three serious sexual offenses. He persistently argued in postconviction proceedings that Oklahoma lacked jurisdiction to prosecute him as a Seminole and because his crimes took place on the Creek Reservation. McGirt rested his challenges on the federal Major Crimes Act which provided that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). Certain enumerated crimes committed by tribe members were allowed to be tried by the federal government. McGirt argued the State courts generally had no jurisdiction to try Indians for conduct committed in "Indian country." McGirt contended he should be given a new trial for his conduct in federal court. The Oklahoma courts rejected McGirt's arguments, and the Supreme Court overturned their decision.

Justice Gorsuch, writing for the 5-4 majority, found Oklahoma never established personal jurisdiction over any person living on "Indian Lands" whose heritage derived from one of the Five Civilized Tribes. In 1838 Tribal members had been marched from Georgia and Florida on the "Trail of Tears" with the promise that the lands encompassing most of the eastern half of what is now Oklahoma would be Indian Lands governed by the Tribes. Although many actions were taken to eliminate the reservation and its associated rights, Oklahoma's attempts had failed to fully extinguish the sovereignty of the tribal lands.

As early as 1886, the U.S. government and the State of Oklahoma began their attempts to extinguish the reservation. Oklahoma pointed to many acts including Congressional passage of the "Oklahoma Enabling Act" as indicative of the reservation's lack of existence. One component of the Act had sought to divest the tribes' sovereignty by giving Oklahoma jurisdiction over crimes committed on the reservation land. For the next 114 years, Oklahoma, in some cases mistakenly, exercised personal criminal jurisdiction over all Native Americans everywhere within the state. Justice Gorsuch corrected this mistaken assumption in opening the majority opinion,

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty).
>
> Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

McGirt, 140 S.Ct. 2452, 2459 (2020). The landmark decision honored the guarantees holding prosecution of Native Americans for crimes in the expanded Indian

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country must be carried out in federal and tribal courts, rather than by state or local officials.

Need for Assistance and a Return to the Beginning

Although the significance of *McGirt* will be subject to historical debate, the practical impact on Oklahoma state convictions, and the Eastern and Northern District Federal Court is unprecedented. A once sleepy federal district in Muskogee, the Eastern District of Oklahoma (with only one full-time and one roving Article III Judge), has become the epicenter for potentially thousands of retrials. These retrials of thousands of individuals encompass some of the most serious crimes. These retrials will also address crimes alleged to have been committed spanning a geographic area larger than the Northern and Eastern Districts of New York combined. The unintended strain on the federal criminal justice system caused by *McGirt* was immediate. Calls went out nationally for additional assistance from AUSAs and AFPDs to help with the influx of *McGirt* cases. A call from Julia O'Connell, the Federal Public Defender for the Northern and Eastern Districts of Oklahoma to other federal defenders, asked for help representing indigent defendants now facing retrial or new indictments in federal court. Many, including the federal defenders in the Northern District of New York answered the call.

The initial post-*McGirt* proceedings unfolded in the ongoing pandemic. My first court appearances were remote from my home in NY. While in the virtual waiting room, I noticed defenders and panel lawyers entering appearances for defendants from across the country. The Hon. Kimberly West, a federal Magistrate Judge for the district, swiftly moved through an afternoon docket of arraignments, detention hearings and preliminary hearings. The pace and brevity seemed more akin to an evening traffic court than the federal proceedings of which I was accustomed. The charges were major crimes on Indian Land: murder, rape, child exploitation and sexual abuse. Some defendants, serving life terms for state convictions, now faced retrial following *McGirt*. Participating in this magistrate docket provided early perspective of the scope, impact, and significance the *McGirt* decision had on the Oklahoma federal districts, and Native American clients.

Oklahoma through its Attorney General continues to seek reversal of *McGirt* and limits to its retroactive applicability. The Tribes generally see the decision as a victory for their sovereign rights. Those tribes with substantial means are investing in their judicial and criminal justice functions to accommodate the significant increase in the role tribal courts will play. Legal issues of first impression relating to these courts' jurisdiction and other matters abound. State officers that once gathered, retained, and presented evidence of crimes committed on tribal lands for Oklahoma are now beholden to federal and tribal courts. The effect of prior court proceedings and the simple fact that some cases resulted in convictions decades ago, further complicate representation and the proceedings.

Offering assistance was coupled with a certain nostalgia on my part. I am keenly familiar with the area so greatly affected by *McGirt*. I received my law degree from the University of Tulsa in 1985. After law school, I practiced as an Assistant United States Attorney in the Eastern District of Oklahoma for three years. I then entered private practice and served as the CJA panel representative. In 1998, I left Oklahoma, relocated to my boyhood home near Albany and continued my legal career in federal criminal defense serving as the Senior Litigator in the Office of the Federal Public Defender in the Northern District of NY.

As luck would have it, I have the advantage of knowing the area, the courthouse and a number of people in the Eastern District of Oklahoma. Having returned to Muskogee for visits over the past twenty years, entering the courthouse to practice after two decades, was familiar, but also disorienting. Many faces and roles of prior players had changed. Lawyers became judges, judges became lawyers, with some friends and mentors had passed away.

A friend and classmate from law school, Patrick Keeney, who clerked for a district judge after law school was appointed Clerk of the Courts for the Eastern District of Oklahoma in 2013. As we remained friends over the years, he alerted me to the *McGirt* decision, and its pending impact on his relatively quiet federal district. His recent observation portending the impact, "I used to have to deal with two district judges now I have fifteen." He further explained the overwhelming effect of *McGirt:*

> We've gone from the 97 indictments we averaged in the five-year period pre-McGirt to an estimated range of 1023 to 2328 by the year 2023. There will be a gradual progression to this range as the USA ramps up prosecution resources. To date, they have triaged cases and pretty much only the worst of the worst have been brought, i.e., murders, sexual assault, child abuse, etc. At some point the lower-level felonies will be prosecuted and the numbers will

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McGirt vs. Oklahoma...*continued*

increase even at a greater rate. For the 2021 calendar year we are on course for between 450-500 indictments.

Donn Baker, a mentor, and one of the finest trial lawyers I have known, had died in November 2020 after contracting Covid-19. He was a former AUSA with whom I interned in the U.S. Attorney's office, and later partnered with as co-counsel in a multi-defendant federal death penalty case. A regular in federal court, his absence was felt.

Other friends advise of ancillary issue arising from the decision. During a recent trip to Oklahoma, I visited Hon. Judge Robin W. Adair , Special Judge for Muskogee County, an old friend soon to be the longest sitting Special Judge in the state. He shared how victims of less serious state crimes are becoming frustrated by the delay in criminal justice response when the alleged crime involves a Native American suspect or victim. Judge Adair is concerned the delay will cause citizens to lose confidence in law enforcement, potentially resulting in a rise in violent vigilantism.

Another old friend, serving as a part time city court judge, told me some Native Americans see the decision as a "get out of jail free card". They appear and "plead McGirt." while not knowing the specifics of its application.

The stress is not confined to the courts and the defendants, AUSAs are leaving cases and the district. Both prosecutors assigned to my three cases, suddenly quit. Previously an AUSA position in the E.D.O.K. was coveted by local attorneys or those seeking a small-town community, with a low cost of living, With the onslaught of retrials, the case load and commitment has caused AUSAs to leave the office.

For me, entering the fray *McGirt* created has brought my career full circle. My federal criminal defense practice and experiences which began in the federal courthouse in Muskogee, Oklahoma have grown . As a potential last hurrah I am intent on using everything I've learned since to serve my clients.

*Reconsidering Prior Convictions...**continued from page 7*

force against the person of another" must be greater than recklessness and arguably extreme recklessness. If the prior conviction could be obtained with a finding of recklessness or even arguably extreme recklessness, the prior conviction does not qualify as a violent felony/serious violent felony/crime of violence.

We now should be arguing that post-*Borden* nothing less than intentional use of force suffices under the force clause. If an offense can be violated by the unintentional use of force, it should be disqualified under the force clause. Anything less than intentional is overly broad and cannot qualify. The standard for qualifying a prior as a violent aggravator has thus grown to now include a specific intent element.

[1] *Based on Powerpoint presentation by Paresh Patel.*

Examples of Offenses Lacking Intentional Force (can be committed with unintentional force)

- Assault/Battery (inc. aggravated assault & assault with a dangerous weapon)
  - *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (NY assault with a dangerous weapon)
- Arson
- Robbery
- Felony Murder
- Second Degree Murder
- Manslaughter
- Resulting in Death offenses
- Brandishing Firearms
- Reckless Endangerment/Drive-by shooting
- Child Abuse
- Continuing Criminal Enterprise
- VICAR aggravated assault
- VICAR second degree murder

THE "HIGH CRIME AREA" FACTOR:

TOO GENERALLY APPLIED FOR A STANDARD REQUIRING SPECIFICITY

By: *Melissa A. Tuohey, AFPD*

> Police officers and the Government routinely assert that the challenged search was reasonable because it occurred in a high-crime area. But what is a "high-crime area"? It has been more than twenty years since the Supreme Court explained that presence in a "high crime area" is "relevant" when determining whether the defendant was constitutionally stopped. But because basic questions remain unresolved, I doubt that a person's presence in a "high-crime area" should ever meaningfully support reasonable suspicion. For example, how big can the area be? A building, corner, block, neighborhood, or precinct? Should courts train their attention on the overall crime rate in the area, or are only some kinds of crime relevant? Should they consider the crime rate over the last five years? One year? Less?

United States v. Weaver, 9 F.4th 129, 155 (2d Cir. 2021) (Lohier, J., concurring) (citing *Illinois v. Wardlow,* 528 U.S. 119, 124 (2000)).

The label, "high-crime area," routinely flows from the mouths of testifying officers when asked to justify actions they took against one of our clients in the context of a *Terry* stop. Factors officers mention in support of their belief that a person was behaving suspiciously, can receive extra credit if the officer made those observations in an area described as a "high-crime area." The *Terry* exception to the Fourth Amendment's warrant requirement allows "a police officer on the street to perform an act that a judge or magistrate could not authorize, as all warrants must issue from probable cause." David Seawell, *Wardlow's Case: A Call to Broaden the Perspective of American Criminal Law,* 78 Denv. U. L. Rev. 1119, 1121 (2001) (citing *Terry v. Ohio,* 392 U.S. 1, 38 (1968) (Douglas, J., dissenting)). That is why this factor, often spoken of generally, deserves more critical attention, because a citizen's privacy interest receives less constitutional protection under the reduced standard of suspicion set forth in *Terry*. Indeed,

> The legal recognition of a high-crime area for the purpose of Terry stops is significant. If articulable reasonable suspicion can be seen as a group of specific factors that lower one's expectation of privacy and diminish the personal freedom from police intrusion, then the expectation of privacy is automatically a notch lower for residents of high-crime areas.

Id. at 1125; *see also* Andrew Guthrie Ferguson, Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis,* 57 Am. U.L. Rev. 1587, 1589 (2008) (individuals in high crime areas "have different Fourth Amendment protections than they would in other locations in the same town, city or state" causing "a significant shift away from equal constitutional protections for all citizens.").

This consequence negatively impacts relations between law enforcement and the citizens who reside in areas classified as high-crime, because it fosters resentment and distrust. *Id.* at 1132 ("Just as race is beyond a person's control, so too is a person's residence in a high-crime community. Due to the politics of past and present racism, minority members are often forced to live in poverty-stricken, crime-riddled communities, and this segregation continues despite race-neutral policies. Therefore, the high-crime area designation as a basis for increased legal justification of police, and diminished expectations of privacy for residents, only perpetuate this distrust and the politics of identification.").

Equally problematic is that an area can be labeled "high-crime," without much more than an officer's "vague and anecdotal testimony." *Weaver,* 9 F.4th at 156 (Lohier, J., concurring). Because the Supreme Court never defined a "high-crime area" in *Wardlow,* or thereafter, "[a] police officer takes the stand, explains his actions, testifies to his suspicions, adds the magic words- - "high-crime area" - - and reasonable suspicion is found as a matter of constitutional law." Ferguson, *supra,* at 1591. Two decades after *Wardlow* has resulted in a

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"High Crime Area" Factor...*continued*

"hodgepodge" of definitions. *Id.* at 1605-1606 (an area of "expected criminal activity;" "an area known for drug activity or one under surveillance;" one "riddled with narcotics dealings and drug-related shootings;" an area with a "crime wave;" an area that is "notorious" or "plagued by gang-related shootings, drug dealing, assaults, and robberies.") (citations omitted). Shouldn't the record contain objective, verifiable, and empirical data from the police officer to support his conclusion that the area where a person's Fourth Amendment rights were implicated was in fact a high crime area? And what would that look like?

Valuable suggestions for challenging this classification are offered in the above cited law review article, which proposes an objective, quantifiable approach to the high-crime area designation. *Id.* at 1628-1637. The proposal includes a burden on the government to prove that the purported "high-crime area" be "marked by a high incidence of particularized criminal activity in comparison to neighboring areas with objective and verifiable data;" the area "be narrowly tailored to a certain geographic locations" with "recent" criminal activity; and "the nexus between the particularized criminal activity and the officer's observations would have to be demonstrated." *Id.* Although this is not necessarily the law of the land, there is no reason not to ask the testifying witness to provide more specificity when the label is dropped into the record. Why shouldn't the government be required to produce specific crime statistics about an area their witness says is a high-crime area?

For our part, we can seek the data too. For example, the Syracuse City Police Department's webpage has a great deal of crime data for each neighborhood within the city limits. *See* https://www.syracusepolice.org/statistics.asp. The webpage also links to studies concerning racial profiling. *See* https://www.syracusepolice.org/listing.asp?orgId=161. Are minorities being stopped more frequently than white people? What are the results of those stops? If the officer was suspicious that your client was engaged in drug activity, but the alleged "high-crime area" only shows arrests for burglary, was the officer's belief objectively reasonable under the Fourth Amendment? Objective and verifiable evidence can answer those questions, and that is constitutionally appropriate because magic words should never serve as justification for a Fourth Amendment seizure.

Challenging Whether a "Receiver" is a Firearm

By : *Randi Juda Bianco, AFPD*

We all have had clients who are charged with Possession of a Firearm by a Prohibited Person. The prohibition from possessing a firearm can be for a variety of reasons such as being a felon; an unlawful user of drugs; the subject of an order of protection or other reasons.

Whether an object qualifies as a firearm can be important not only for the actual charge, but also for the number of firearms allegedly possessed. An offense that involves three or more firearms increases the client's offense level under U.S.S.G. § 2K2.1(b)(1) so what counts as a firearm can be significant to a person's sentence.

An object the government may allege is a firearm may not in fact fit the definition of firearm in 18 U.S.C. §921(a)(3). One example raising the issue of whether an object qualifies as a firearm is worth exploring. Our client was accused of possessing a "receiver." "A firearm frame or receiver is that part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel." 27 C.F.R. § 478.11. Some receivers *may not actually qualify as a firearm.* See *United States v. Rowold*, et al, 429 F. Supp 3d 469 (N.D. Ohio 2019)(AR-15 lower receiver possessed by defendant did not fall within definition of firearm or receiver because it did not provide housing for all listed components); *United States v. Jimenez*, 191 F. Supp. 3d 1038, 1041 (N.D. Cal. 2016) ("[A] receiver must have the housing for three elements: hammer, bolt or breechblock, and firing mechanism."); *United States v. Joseph Roh*, SACR 14-167-JV, Minute Order p. 6 (C.D. Cal. July 27, 2020) (granting defendant's post-trial motion for acquittal for manufacturing AR-15 lower receivers without a license because "[n]o reasonable person would understand that a part constitutes a receiver where it lacks the components)

So before you readily accept that a "receiver" is a firearm, research its structure and whether it houses all the listed components to determine whether a challenge is warranted.

Supreme Court Update

Recent decisions, petitions granted and potential grants

Decisions

Torres v. Madrid, No. 19-292
(Decided 3.25.2021)
Holding: The application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.

Borden v. U.S., No. 19-5410
(Decided 6.10.2021)
Holding: The decision of the U.S. Court of Appeals for the 6th Circuit — holding that an offense with a mental state of recklessness may qualify as a "violent felony" under the Armed Career Criminal Act's elements clause, 18 U.S.C. § 924(e)(2)(B)(i) — is reversed, and the case is remanded.

Jones v. Mississippi, No. 18-1259
(Decided 4.22.2021)
Holding: The Eighth Amendment does not require a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole.

Lange v. California, No. 20-18
(Decided 6.23.2021)
Holding: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home.

U.S. v. Cooley, No. 19-1414
(Decided 6.1.2021)
Holding: A tribal police officer has authority to detain temporarily and to search a non-Native American traveling on a public right-of-way running through a reservation for potential violations of state or federal law.

Caniglia v. Strom, No. 20-157
(Decided 5.17.2021)
Holding: Neither the holding nor logic of *Cady v. Dombrowski* justifies the removal of Edward Caniglia's firearms from his home by police officers under a "community caretaking exception" to the Fourth Amendment's warrant requirement.

U.S. v. Gary, No. 20-444 &
Greer v. U.S., No. 19-8709 (Decided 6.14.2021)
Holding: In felon-in-possession cases under 18 U.S.C. § 922(g)(1), an error under *Rehaif v. United States* is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.

U.S. v. Palomar-Santiago, No. 20-437 (Decided 5.24.2021)
Holding: Each of 8 U.S.C. § 1326(d)'s statutory requirements for bringing a collateral attack on a prior deportation order is mandatory.

Terry v. U.S., No. 20-5904
(Decided 6.14.2021)
Holding: A sentence reduction under the First Step Act is available only if an offender's prior conviction of a crack cocaine offense triggered a mandatory minimum sentence.

Pending Decision

Wooden v. U.S., No. 20-5279
Argued 10.4.21
Question Presented: Whether offenses that were committed as part of a single criminal spree, but sequentially in time, were "committed on occasions different from one another" for purposes of a sentencing enhancement under the Armed Career Criminal Act.

Hemphill v. New York, No. 20-637
(Argued 10.5.21)
Question Presented: Whether, or under what circumstances, a criminal defendant, whose argumentation or introduction of evidence at trial "opens the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence, also forfeits his right to exclude evidence otherwise barred by the confrontation clause.

U.S. v. Tsarnaev, No. 20-443
(Argued 10.13.21)
Questions Presented: (1) Whether the U.S. Court of Appeals for the 1st Circuit erred in concluding that Dzhokhar Tsarnaev's capital sentences must be vacated on the ground that the district court, during its 21-day voir dire, did not ask each prospective juror for a specific accounting of the pretrial media coverage that he or she had read, heard or seen about Tsarnaev's case.
(2) Whether the district court committed reversible error at the penalty phase of Tsarnaev's trial by excluding evidence that Tsarnaev's older brother was allegedly involved in different crimes two years before the offenses for which Tsarnaev was convicted.

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Certiorari Granted & Pending Argument

U.S. v. Taylor, No. 20-1459
(To be argued 12.7.21)
Question Presented: Whether 18 U.S.C. § 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a).

Houston v. U.S., No. 20-1479
Question Presented: Whether a sentencing court must consider applicable sentencing factors codified in 18 U.S.C. § 3553(a) when deciding whether to impose a reduced sentence under Section 404(b) of the First Step Act.

Concepcion v. U.S., No. 20-1650
Question Presented: Whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal and factual developments.

Denezpi v. U.S., No. 20-7622
Question Presented: Whether the Court of Indian Offenses of Ute Mountain Ute Agency is a federal agency such that Merle Denezpi's conviction in that court barred his subsequent prosecution in a United States district court for a crime arising out of the same incident.

Potential Cert. Grants -Preserve Issues

Ohio v. Deuble, No. 20-1784
Questions Presented: (1) Whether probable cause existed under the Fourth Amendment to detain a person suspected of soliciting sexual activity from a law enforcement officer posing as a minor through a social media application where the person's identity is corroborated through the person's actions. Here the suspect agreed to meet the law enforcement officer posing as a minor for sexual activity, and was the only person observed at the agreed meeting location using his cell phone as the law enforcement officer posing as the minor sent communications to the suspect through the social media application.
(2)Whether a phone is searched for purposes of the Fourth Amendment where the phone's content was not affirmatively accessed by law enforcement officers.

Wyoming v. Mahaffy, No. 21-383
Question Presented: Whether the Supreme Court's rejection in Rodriguez v. United States of de minimis extensions to traffic stops abrogated or limited Arizona v. Johnson, thereby prohibiting officers from posing any unrelated questions even where the inquiry does not measurably extend the duration of the stop.

Jackson v. Hudson, No. 21-347
Question Presented: Whether a federal prisoner is entitled to bring a habeas claim under the saving clause of 28 U.S.C. § 2255(e) to challenge the unlawful application of a mandatory minimum sentence, and imposition of a sentence that exceeded the proper statutory maximum, when his challenge was previously precluded by binding circuit precedent that has since been overruled by the circuit sitting en banc on the basis of an intervening decision of the Supreme Court.

Croft v. U.S., No. 21-297
Question Presented: (1) Whether the U.S. Court of Appeals for the 4th Circuit erred in concluding that a conviction for South Carolina carjacking is categorically a crime of violence under the force clause of the Armed Career Criminal Act, when the state carjacking statute, on its face, criminalizes taking a vehicle by "by force and violence or by intimidation."
(2) Whether the 4th Circuit, departing from the Supreme Court's instructions that the categorical approach focuses on the usual and customary meaning of a statute's plain text, erred in placing improper weight on petitioner Travis Croft's failure to identify "actual cases" demonstrating nonviolent applications of South Carolina's carjacking statute — even though the South Carolina statute, on its face, criminalizes acts of "intimidation" that are not necessarily violent.

Wisconsin v. Jensen, No. 21-210
Question Presented: (1) Whether a person's statement expressing fear about a possible future crime is testimonial under the Sixth Amendment's confrontation clause; and (2) whether, when a person reports ongoing psychological domestic abuse and expresses fear about future physical harm, the person's statement aimed at ending an ongoing emergency is non-testimonial.

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Second Circuit Highlights

By: *Courtenay McKeon, AFPD*

A summary of recent Second Circuit decisions relevant to criminal defense and representation

2021 has been a grim year for criminal defendants at the Second Circuit. Not too long ago, it wasn't unusual for criminal defendants to win in 25% or 30% of published Second Circuit cases. This year, that percentage has been close to zero. New appointments to the bench may eventually turn things around for our clients, but for now the news is bleak. In a separate article, you can learn about the saga of Calvin Weaver, whose momentary victory in the Circuit was snatched away in an en banc decision. In our next newsletter we'll give you the full story of Catherine Melhuish, whose journey through the intersecting dysfunctional worlds of the mental health system and the criminal justice system is still under consideration on remand. Below is a selection of decisions from 2021 on a variety of topics. Here's hoping we'll have better things to report in the next edition!

AGGRAVATED IDENTITY THEFT

United States v. Dumitru, 991 F.3d 427 (2d Cir. 2021) (per curiam: Cabranes, Newman) (appeal from SDNY): In order to support a conviction for aggravated identity theft, the government must prove beyond a reasonable doubt that, *inter alia*, the defendant "use[d], without lawful authority, a means of identification of another person." Here, the Second Circuit held the government met its burden by showing the defendant, an attorney who submitted fraudulent asylum applications on behalf of clients, used a means of identification without lawful authority when she directed her staff to sign clients' names and used the forged signatures to falsely represent to authorities that her clients caused the relevant asylum applications to be signed.

United States v. Gu, 8 F.4th 82 (2d Cir. 2021) (Pooler, Carne, Raggi) (appeal from D. Vt.): The Second Circuit held the defendant "submitted" a passport application for the purposes of the passport fraud statute (18 U.S.C. § 1542), even though she withdrew it and left the passport office without signing it or taking the required oath. She was therefore guilty of both passport fraud and aggravated identity theft.

United States v. Wedd, 993 F.3d 104 (2d Cir. 2021) (Nardini, Carbanes, Park) (appeal from SDNY): The defendant moved to dismiss the indictment, alleging it did not sufficiently allege aggravated identity theft. The Second Circuit found the indictment properly alleged aggravated identity theft even though it did not detail specific facts of the underlying schemes or how the defendants used the information they obtained. In addition, the court found the term "use of a means of identification" within the meaning of the aggravated identity theft statute (18 U.S.C. § 1028A(a)(1)) means "to employ or avail oneself of a means of identification for a particular purpose."

CONTROLLED SUBSTANCES

United States v. McCray, 7 F.4th 40 (2d Cir. 2021) (Nardini, Lohier, Kovner, D.J.) (appeal from WDNY): The Second Circuit held butyryl fentanyl is an analogue of fentanyl for the purposes of enhanced sentencing under 21 U.S.C § 841(b)(1)(B)(vi) despite being itself listed as a separate controlled substance.

COOPERATION AGREEMENTS

United States v. Trimm, 999 F.3d 119 (2d Cir. 2021) (per curiam: Jacobs, Livingston, Menashi) (government appeal from Hurd, J., NDNY): The defendant pled guilty to conspiring to use a minor female to engage in sexually explicit conduct for the purpose of producing visual depictions of such conduct. It is undisputed the defendant provided substantial assistance to the government in its prosecution of her co-conspirator. She testified against the co-conspirator, a "dangerous serial sex offender," at trial. The co-conspirator was convicted and sentenced to ninety-five years in prison. When it came time for the defendant to be sentenced, the government refused to file a motion under 18 U.S.C. § 3553(e) for a sentence below the fifteen-year mandatory minimum and recommended a sentence of 210 months. The district court sentenced the defendant to ninety months in prison. The Second Circuit vacated and remanded, stating the district court had no authority to impose a sentence below the mandatory minimum without finding the government acted unconstitutionally or in bad faith. On remand, the district court found that the government's refusal to file a motion under 18 U.S.C. § 3553 (e) was arbitrary, without reason, and motivated by an unconstitutional motive and bad faith. The district court sentenced the defendant to sixty months in prison. The government appealed again. The Second Circuit reversed, instructing the defendant be resentenced by a different judge. The Second Circuit found the record reflected no unconstitutional motive or bad faith by the government, and they were within their authority to refuse to move under 18 U.S.C. § 3553(e). On remand, the matter was reassigned to Chief Judge Suddaby, who sentenced the defendant to 210 months in prison.

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"CRIME OF VIOLENCE" PREDICATES

United States v. Brown, 2 F.4th 109 (2d Cir. 2021) (per curiam: Cabranes, Stanceu) (government appeal from SDNY): The Second Circuit, reversing the district court, found the defendant's prior conviction for violating New York Penal Law § 120.05(1) (second degree attempted assault) was a "crime of violence" under the career offender Guideline.

United States v. Eldridge, 2 F.4th 27 (2d Cir. 2021) (Nardini, Chin, Sullivan) (appeal from WDNY): Conspiracy to commit Hobbs Act robbery is not a "crime of violence" and thus cannot serve as a predicate for possessing and brandishing a firearm in furtherance of a crime of violence (18 U.S.C § 924(c)). Attempted Hobbs Act robbery, however, is a predicate crime of violence for the same purposes.

United States v. Heyward, 3 F.4th 75 (2d Cir. 2021) (Wesley, Carney, Pooler) (appeal from SDNY): A jury convicted the defendant of RICO conspiracy (18 U.S.C. § 1962(d)), conspiring to distribute narcotics (21 U.S.C. §§ 841(b)(1)(A) and 846), and aiding and abetting the possession of firearms in furtherance of either the RICO conspiracy or the narcotics conspiracy (18 U.S.C. § 924 (c)). The jury was not asked to specify which conspiracy was the basis for the 18 U.S.C. § 924(c) conviction. On appeal, the Second Circuit held the conviction on the third count did not necessarily rest on a proper ground (either a qualifying drug trafficking offense or a categorical crime of violence), vacated the 18 U.S.C. § 924 (c) conviction, and remanded for resentencing.

United States v. McCoy, 995 F.3d 32 (2d Cir. 2021) (Kearse, Parker, Sullivan) (appeal from WDNY): The Second Circuit held attempt to commit Hobbs Act robbery using force is a crime of violence. The court did, however, reverse the defendants' convictions on a different count, reaffirming a Hobbs Act conspiracy is not a crime of violence under 18 U.S.C. § 924(c).

DISOVERY/*BRADY*

United States v. Stillwell, 986 F.3d 196 (2d Cir. 2021) (Cabranes; Raggi; Korman, DJ) (appeal from SDNY): Three defendants were tried and convicted on five counts related to murder-for-hire in a foreign country and sentenced to life in prison. Judgments were entered on different dates due to differences in post-verdict motions. One year after the judgments against the first two defendants were entered, while their cases were on appeal, the Second Circuit panel learned the Narcotic and Dangerous Drug Section---a branch of the Department of Justice---had requested and received a sealed *ex parte* order from the district court barring the U.S. Attorney's office and defense counsel from reviewing certain documents. This order was entered with no notice to either the U.S. Attorney's office or defense counsel. In January 2020, the Second Circuit vacated the order. Over the next year, claims related to the documents were litigated in the Second Circuit. After finally being allowed to see the documents, the defendants raised a claim their convictions should be vacated because the government withheld *Brady* materials. The Second Circuit declined to hear that claim because it had not been litigated in the district court. The Second Circuit remanded, noting only three months remained of the three-year period under which the defendants could file motions for new trial under Federal Rule of Criminal Procedure 33. As of October 1, 2021, those motions are still pending in the Southern District of New York.

DOUBLE JEOPARDY

United States v. Hicks, 5 F.4th 270 (2d Cir. 2021) (Lohier, Menashi, Parker) (appeal from WDNY): In his first trial, the defendant was convicted of participating in a marijuana trafficking conspiracy and acquitted of participating in a cocaine/cocaine base conspiracy and a firearms charge. In his second trial, the defendant was charged with RICO conspiracy. The district court admitted evidence suggesting the defendant had participated in a cocaine conspiracy, despite the fact the defendant had been acquitted of that conduct. The defendant was convicted and appealed, arguing that the admission of the evidence violated his rights under the Double Jeopardy Clause. The Second Circuit held that (1) the charging component of the Double Jeopardy Clause did not bar the government from retrying the defendant for RICO Act conspiracy; and (2) the issue preclusion component of the Double Jeopardy Clause did not bar the government from retrying the defendant for RICO Act conspiracy.

ENTICEMENT OF MINORS

***United States v. Waqar*,** 997 F.3d 481 (2d Cir. 2021) (Lynch, Parker, Pooler) (appeal from SDNY): A jury found the defendant guilty under 18 U.S.C. § 2422(b), which prohibits attempting to persuade, induce, entice, or coerce any minor to engage in any sexual activity for which any person could be charged with a criminal offense. On appeal, the defendant contended the district court should have instructed the jury it could not convict him unless it found he endeavored to transform or

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overcome the will of the minor. The Second Circuit rejected that argument. The Second Circuit found asking a minor to engage in sexual activity may become "persuading" even if the minor never says no or otherwise expresses a determination not to engage in sexual activity. In other words, a defendant may violate the statute even if the minor is already predisposed to or neutral about engaging in the proposed sexual activity.

EVIDENTIARY ISSUES

United States v. Diaz, 986 F.3d 202 (2d Cir. 2021) (Jacobs, Bianco, Pooler) (appeal from SDNY): While on federal supervised release, Robert Diaz robbed and stabbed a man in a Bronx apartment complex. The man lived but was seriously injured. When police arrived, the man said that his attacker had an M-shaped tattoo on his neck, was wearing khaki pants and no shirt, and had been cut during the attack. The next day, the man's girlfriend texted law enforcement a picture from Instagram that she believed depicted the attacker. The officer searched a database of residents of the apartment complex and found a mug shot that appeared to match the man in the Instagram picture. The man had a large neck tattoo. The man was Diaz. This photograph was included in a photo array where none of the other photographs depicted individuals with neck tattoos. The Second Circuit held (1) the photo array presented to victim was unduly suggestive; (2) the victim's identifications of defendant as his assailant were independently reliable; (3) the district court was not required to find good cause before admitting hearsay statements made by witness who testifies at supervised release revocation hearing; (4) the district court did not abuse its discretion in considering hearsay statements made by victim; and (5) any error in admission of victim's girlfriend's out-of-court statements was harmless.

FIREARMS

United States v. Perez**,** 6 F.4th 448 (2d Cir. 2021) (Walker and Carney, concurring opinion by Menashi) (appeal from EDNY): The defendant pled guilty to possessing a firearm and ammunition while unlawfully present in the United States. The Second Circuit held (1) intermediate scrutiny applied in evaluating whether the statute of conviction violated the Second Amendment; and (2) the defendant's conviction did not violate the Second Amendment.

INSIDER TRADING

United States v. Chow, 993 F.3d 125 (2d Cir. 2021) (Kearse, Bianco, Carney) (appeal from SDNY): The Second Circuit held (1) a misappropriation theory of insider trading liability applied to a defendant with an arm's-length relationship with the company at issue; (2) the jury was entitled to infer an investment by the defendant's former business colleague had been based on material, nonpublic information he received from the defendant; (3) the evidence was sufficient to support inferences the defendant received a personal benefit; (4) the evidence supported the jury's verdict that the defendant and his former colleague agreed upon, and intentionally executed a scheme to trade in the stock of the company at issue based on material nonpublic information; and (5) the trial was properly venued in the Southern District of New York because the case involved the trading of securities on a stock exchange located in the district.

JUDICIAL RECUSAL

United States v. Wedd, 993 F.3d 104 (2d Cir. 2021) (Nardini, Cabranes, Park) (appeal from SDNY): 28 U.S.C. § 455(a) states "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." In this case, the district court judge (1) *sua sponte* suggested the parties might want to have the case reassigned; (2) stated while sentencing a co-defendant (who had been convicted) was less culpable than the defendant (whose first trial ended in a mistrial); (3) communicated with the jury; (4) stated there is a high recidivism rate associated with fraud; and (5) made evidentiary rulings that created the appearance of partiality. The Second Circuit held that none of the district court's actions created an appearance of impartiality warranting recusal.

JURORS

United States v. McCoy, 995 F.3d 32 (2d Cir. 2021) (Kearse, Parker, Sullivan) (appeal from WDNY): After they had been found guilty but before they had been sentenced, the defendants learned a juror had failed to disclose he was a convicted felon. The defendants moved for a new trial. Their motion was denied and they raised the issue again on appeal. The Second Circuit held the juror's felony conviction did not automatically warrant granting a new trial absent a showing of bias. The court further held there was no showing of bias.

(Cont'd next page)

JURY INSTRUCTIONS

United States v. Wedd, 993 F.3d 104 (2d Cir. 2021) (Nardini, Cabranes, Park) (appeal from SDNY): The district court gave a conscious avoidance jury instruction. The defendant appealed, arguing it was not warranted by the evidence presented at trial. The Second Circuit noted a district court may only provide a conscious avoidance jury instruction if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction; and (2) the appropriate factual predicate for the charge exists. The appropriate factual predicate exists where the evidence is such that a rational juror could conclude beyond a reasonable doubt that the defendant was (a) aware of a high probability of the fact of the dispute; and (b) consciously avoided confirming that fact. In this case, the Second Circuit found that the jury charge was warranted. *See also United States v. Khalupsky*, 5 F.4th 279 (2d Cir. 2021) (Walker, Carney, Parker) (appeal from EDNY) (conscious avoidance instruction warranted).

SEARCH AND SEIZURE

United States v. Braggs, 5 F.4th 183 (2d Cir. 2021) (Wesley, Menashi, Sack) (government appeal from WDNY): A parole officer may search a parolee so long as the search is reasonably related to the performance of the officer's duties, even though New York law states that reasonable suspicion of wrongdoing is required.

SENTENCING

United States v. Ceasar, 10 F.4th 66 (2d Cir. 2021) (Sack, Menashi, Sullivan) (appeal from EDNY): The defendant pled guilty to conspiracy to provide material support to a foreign terrorist organization and obstruction of justice. Her Guideline sentencing range was 360 months to 600 months. The district court sentenced her to 48 months in prison. The Second Circuit vacated and remanded, finding (1) the district court abused its discretion in weighing the defendant's tragic background and need for rehabilitation nearly to exclusion of countervailing sentencing factors; and (2) the sentence was substantively unreasonable because it was shockingly low.

United States v. Dumitru**,** 991 F.3d 427 (2d Cir. 2021) (per curiam: Cabranes, Newman) (appeal from SDNY): A jury found the defendant, an immigration attorney, guilty of asylum fraud, making false statements, and aggravated identify theft. At sentencing, the district court imposed a nine-level enhancement under Guideline 2L2.1(b)(2)(C) because the fraud involved at least 100 documents. The defendant challenged the enhancement on appeal, arguing an application note to the Guideline prohibits imposition of the enhancement where the basis for imposing the enhancement on an aggravated identify theft count is the exact same conduct that formed the basis of the underlying felony (in this case, asylum fraud). The Second Circuit affirmed the district court, finding that because she signed her own name to the applications under penalty of perjury in addition to forging her clients' signatures, the basis for the enhancement was not the "exact same conduct" that formed the basis for her conviction.

United States v. Rosario, 988 F.3d 630 (2d Cir. 2021) (per curiam: Chin, Sack, Lohier) (appeal from D. Conn.): The district court imposed a two-level sentencing enhancement for obstruction of justice under Guideline § 3C1.1 based on the defendant's trial testimony. The Second Circuit remanded, finding the district court failed to satisfy its obligation to make separate findings on all elements of perjury before imposing the enhancement.

United States v. Waite, 12 F.4th 204 (2d Cir. 2021) (Sullivan, Cabranes, Raggi) (appeal from SDNY): The Second Circuit held the defendant's mandatory minimum 115-year sentence did not violate the Eighth Amendment.

United States v. Williams, 998 F.3d 538 (2d Cir. 2021) (per curiam: Park, Pooler, Sullivan) (appeal from McAvoy, J., NDNY): The defendant pled guilty to distributing, receiving, and possessing child pornography. The court sentenced him to 160 months in prison, to be followed by twenty years of supervised release. On appeal, the defendant argued the district court erred by failing to separately explain its reasons for imposing the term of supervised release. The Second Circuit held the district court, which had set forth its reasons under 18 U.S.C. § 3553(a) for imposing the prison sentence, was not required to set out the factors again to support the supervised release sentence. The Second Circuit also found the period of supervised release was substantively reasonable.

SPECIAL ASSESSMENTS

United States v. Rosario, 7 F.4th 65 (2d Cir. 2021) (Park, Rakoff, Sack) (appeal from SDNY): Under the Justice for Victims of Trafficking Act ("JTVA"), 18 U.S.C. § 3014(a), defendants convicted of certain sex offenses are required to pay a $5000 special assessment

(Cont'd page 20)

Positive Outcomes:

profiles after sentence reduction and release

By: *Molly Corbett, AFPD*

Tyrone Hines

Tyrone Hines celebrated his 54th birthday in his own home. Hines was released from Bureau of Prisons custody on November 8, 2019. He had been in federal custody since April 19, 1994 serving a life sentence.

In May of 1995 Tyrone was sentenced to Life for engaging in a Continuing Criminal Enterprise. Mr. Hines operated as a "drug kingpin" in Syracuse, New York leading an organization that transported cocaine from New York City to Syracuse and sold it as crack cocaine. He went to federal prison with little hope of ever spending another day free.

Even in the face of a hopeless situation such as a life sentence in prison, Tyrone did not despair. Instead, he chose to focus on his own personal development, making positive contribution to his facility, fellow inmates, and the community he left behind. Hines earned his GED. He joined the Alternatives to Violence Project, became certified as a Suicide Watch and Mental Health Companion. He wrote four books and assisted other inmate pursuing legal relief. Some with success.

After his imprisonment he began to reach back out to his community in Syracuse from behind bars to help combat violence. He facilitated marches against violence and began to create a blueprint to assist the community to do so.

Fortunately, when the First Step Act of 2018 passed, Mr. Hines was presented the opportunity to have his prior sentence reconsidered. He qualified for a reduction in his sentence. In part because of his significant efforts toward rehabilitation, contributions to his BOP and home communities, he presented a compelling case for reducing his sentence. The district court judge agreed. His positive mindset and extraordinary efforts were rewarded when his sentence was reduced to what amounted to time served on November 8th.

In speaking with Tyrone, you cannot help but be infected by his energetic personality and ever-present optimism. Since his release Tyrone has fully embraced his commitment to community and insuring others do not follow his initial path.

One month after his release Tyrone was invited to speak to a church congregation on New Year's Eve by a former crack addict. Tyrone rose to the lectern and apologized to the community for his destructive actions. He then went on to stress the importance of continuing to strive to be better. He continues to provide motivational speeches often to youth groups and church organizations. He also tries to lead by example. He is currently working on a movie about his experience to extend his reach.

Tyrone personifies his advice. Since his release he has worked to strengthen his relationship with his family and extended family including his son, Tyron, serving a state prison sentence. Tyrone has also received accolades from his employer of more than a year, Embassy Suites, for his exceptional work performance and positive approach to his responsibilities.

When he is not working or with his family, he is in his community operating his snack stand or overseeing a function produced by his not-for-profit organization, Man Up!. Tyrone is proud of his creation of Man Up! His organization seeks to stop violence through youth and personal development programs and employment

(Cont'd page 20)

Positive Outcomes ...continued

opportunities. They also sponsor social events and family gatherings. They have taken on rehabilitating houses in his neighborhood and last year sponsored a Truck or Treat so children could safely trick or treat during the pandemic. Tyrone believes in promoting positivity and community involvement to combat others from making the same poor decisions he made culminating in a life sentence.

Tyrone continues to work every day to make up for his past, insure a brighter future for others and assist them in doing so. He does not shy away from a project. Recently he was approached by a local developer seeking to build two apartment complexes increasing affordable housing on Syracuse's south side. The developer consults with Hines on numerous issues confronting the neighborhood and appreciates his leadership. Tyrone's actions over the past two years demonstrate the developer's confidence and appreciation are on solid ground.

(Cont'd page 21)

Second Circuit Highlights...*continued from page 18*

if they are "non-indigent." The Second Circuit held a district court may consider both the resources available to the defendant at the time of sentencing and the defendant's future earning potential when determining if the defendant is indigent under the JTVA.

STATEMENTS

United States v. Kourani, 6 F.4th 345 (2d Cir. 2021) (Cabranes, Kearse) (Pooler concurred in part and dissented in part) : The Second Circuit held the defendant's statements to the FBI were voluntary despite false promises of non-prosecution and the defendant's attorney was not ineffective because no constitutional right to counsel attaches during pre-charge interviews with law enforcement.

SUPERVISED RELEASE CONDITIONS

United States v. Carlineo, 998 F.3d 533 (2d Cir. 2021) (Parker, Lohier, Menashi) (appeal from WDNY): The defendant pled guilty to being a felon in possession of firearms and to threatening Congresswoman Ilhan Omar. Congresswoman Omar wrote to the court before sentencing, requesting a restorative justice approach, rather than incarceration or a fine, be considered. An organization called Partners in Restorative Initiatives also reached out to the court, suggesting various restorative justice options. The district court imposed a sentence of one year and one day, to be followed by three years of supervised release. As a condition of supervised release, the district court directed the defendant to "participate in the Partners in Restorative Initiatives program . . . and that's going to involve participating in a program which could include a sentencing circle . . . a listening circle as well . . . and the defendant would need to listen to stories about Muslim refugees or people who suffered violence [for] being Muslim." The Second Circuit found the condition was impermissibly vague and delegated too much authority to the Probation Office and vacated the condition entirely.

Lucien Battiste

Lucien was released from prison early on October 2, 2020 after his sentence was reduced under section 404 of the First Step Act. He had been in custody for over 13 years. Waiting for him was his long-term girlfriend Michele who was there to take him to his new home in Virginia.

In 2008 Lucien was convicted of conspiracy to distribute and possess with intent to distribute both cocaine and crack in violation of 21 U.S.C. §§ 841(a)(1) and 846. After being designated a career offender and an aggravated felony drug offender he was eventually sentenced to 210 months' imprisonment. Section 404 of the First Step Act provided an opportunity for a reduced sentence because his drug sentence had been modified by section 2 of the Fair Sentencing Act of 2010 and those modifications could now be applied retroactively.

Lucien's release was propelled by his consistent dedication to education and serving his fellow inmates. He completed courses in economics, business law, elementary statistics, and small business accounting. Lucien successfully earned an Associates Degree in Business graduating with a 3.9 GPA. Batiste also became a Suicide Watch Companion early in his placement. Id. He completed an apprenticeship program with the U.S. Department of Labor for Commercial, Residential and Industrial Housekeeping before his release.

As Michele and I later waited for Lucien to be officially released, she shared her admiration of his determination and intelligence along with the future plans. He soon emerged with a beaming smile and overflowing gratitude. Their happiness would evidently sustain them for the long drive back to Virginia.

Upon his release and relocation to Virginia, Lucien immediately began to reestablish his life outside prison. He and Michele shared her residence with her son. His drive and determination which resulted in his many accomplishments while in Bureau of Prisons' custody again served him well in settling into his new life. He was quickly hired by Amazon as had been his plan if released. Lucien began working for them in December jumping right in during the holiday rush.

He then applied with the U.S Postal service earlier this year. Some would doubt whether he could be hired with a criminal history but he remained optimistic and hoped for the best. He was eventually contacted and hired after passing a background check and drug-test. He said you can never stop trying. We joked about learning how to drive from the wrong side of the truck. I told him he could always make money in Europe as a driver if he needed a plan to fall back on. He said he learned pretty quickly. He sent me a video from his driver training and it looked pretty tricky.

(Cont'd page 22)

Positive Outcomes ...continued

When asked what he does when not working Lucien admitted he doesn't have a lot of free time. He works a lot. Yet he did find time to marry Michelle in December of 2020 soon after his release. They also recently enjoyed a trip to Las Vegas (with permission from his supervising officer). Lucien laughed when I asked if he gambled. He joked that he actually managed to win a little. In the off-chance that he and Michele get some free time from work, they head to the beach.

Lucien has also visited his daughters and family in New York frequently, and they have visited him in Virginia. He is looking forward to his daughters spending Thanksgiving in Virginia this year.

For now Lucien is happy to have landed a great job and to be able to spend time with Michelle and his family. They are focused on saving for a home of their own. They also have plans for a vacation on the beach this coming summer. Hopefully those plans will come through and they can take time to relax.

Supreme Court Update...*continued from page 14*

Knights v. U.S., No. 21-198
Questions Presented: (1) Whether a court analyzing if a Fourth Amendment seizure has occurred is categorically barred from considering a person's race. Whether a seizure occurred under all the circumstances of this case.

Zupnik v. U.S., No. 21-171
Question Presented: Whether 18 U.S.C. § 2422(b), which prohibits using a facility or means of interstate commerce to "persuade, induce, entice, or coerce" a minor to engage in any sexual activity that is forbidden by state law, sweeps in any conduct that simply attempts to cause commission of unlawful sexual activity (as the court below and some other Circuits have held), or whether the verbs also require something more—an effort by the defendant to transform the minor's will, alter the minor's mental state, or otherwise secure the minor's assent (as several other Circuits have held).

Janis v. U.S., No. 21-68
Questions Presented: (1) Whether Standard Condition 12, U.S.S.G. § 5D1.3(c)(12), unconstitutionally delegates authority to the probation officer. (2) Whether Standard Condition 12 is unconstitutionally vague.

Campbell v. U.S., No. 20-1790
Question Presented: (1) Whether a trial court violates a defendant's rights under the Confrontation clause by prohibiting cross-examination of accomplice witnesses about the sentencing benefits they hope to receive in exchange for their cooperation with the government. (2) Whether appellate courts should review violations of the Confrontation clause de novo or for abuse of discretion.

Proposed Amendment to Local Discovery Rules

By: *James P. Egan*, AFPD

One constant source of frustration in the life of a defense attorney concerns the difficulty in obtaining useful information. As a reactive player in the criminal justice system, we must often rely on the government's disclosure obligations. For example, Brady v. Maryland, 373 U.S. 83 (1963), requires prosecutors to fully disclose all exculpatory evidence – though there is some disagreement as to the scope of that requirement. Rule 16 of the Federal Rules of Criminal Procedure requires the disclosure of certain categories of additional information. While these requirements are helpful, a growing trend within our District has begun to chew away at their promise.

As many of you have noted recently, it has begun to seem that in nearly every case, or at least nearly every multi-defendant drug case, the government obtains some kind of order modifying its Rule 16 disclosure obligations. Often referred to as orders of protection, some orders permit defense counsel to share copies of protected material with the defendant, but prohibit either counsel or the defendant from further disclosure. Others permit counsel to show the defendant protected discovery while in the defendant's presence, but prohibit counsel from leaving copies with the defendant. Still other types of orders prohibit defense counsel from sharing in any way protected discovery with the defendant. Another class of modifying orders completely eliminates the government's obligations by keeping certain information sealed and away from the defense.

The harms created by these restrictions are not hard to imagine.

Take the most restrictive form, where the information is sealed and not revealed to any member of the defense, whatever substantial interest weighs in the government's favor – no doubt, robustly presented – is balanced against a necessarily diminished understanding of its value to the defense. To be sure, there may be clear instances where disclosure would jeopardize a substantial government interest and provide no exculpatory value, but those instances are the rare exception. The more difficult cases arise where there is some exculpatory value but, absent defense input, the task of quantifying how much is left to the government or the court, institutional players with less instincts for approaching cases from a defense perspective, as a general matter, and with less contextual case awareness, in particular.

Harms also arise in less restrictive forms of modifying orders. Take protective orders that prohibit sharing information with the defendant or allow counsel to show the defendant the protected material but not to allow the defendant to retain copies for a more thorough independent review. In the former case, the defendant is placed on the same footing as an incompetent, unable to assist in his defense. In the latter case, defense counsel must spend valuable time sitting in a COVID-rich jail cell while a defendant, who may have information-processing limitations, slowly reviews the protected information. While the defendant in this case is theoretically given access to the protected information, it is unclear whether the restricted manner of that access is fully beneficial. To put it another way, it is hard to know whether the restricted access prejudices the defendant as to the verdict or punishment in a way that full access would not, especially where a defendant provides no context, leads, or new information following this form of restricted review.

Despite these concerns, Rule 16 (d)(1) allows courts to issue protective and modifying orders:

> At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

As explained by the Advisory Committee in 1966, "considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals."

(Cont'd page 24)

Proposed Amendment...*continued*

The same Notes permit a party to seek modification in camera:

> The problem arises in its most extreme form where matters of national security are involved. Hence a procedure is set out where upon motion by the government the court may permit the government to make its showing, in whole or in part, in a written statement to be inspected by the court in camera. If the court grants relief based on such showing, the government's statement is to be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant, Cf. 18 U.S.C. §3500.

The Second Circuit has generally blessed these restrictions. In *United States v. Delia*, 944 F.2d 1010 (2d Cir. 1991), the Court observed that Rule 16(d)(1) "authorizes the district court to limit or otherwise regulate discovery had pursuant to the Rule," and that the decision to regulate lies in the district court's discretion. And in *United States v. Yousef*, 327 F.3d 56, 167 (2d Cir. 2003), a terrorism case implicating national security concerns, the Court held that a district court may seal discoverable material, but "requires a public docketing to indicate that sealed proceedings have occurred," a procedure that places a defendant on notice that material has been sealed and, thus, affords appellate review.

At present, the Local Rules do not contain any additional guidance concerning the modification of protective orders. A proposed amendment would change that:

> In the event the Government believes that a disclosure under his Order would compromise witness safety, victim rights, national security, a sensitive law-enforcement technique, or any other substantial government interest, it may apply to the Court for a modification of its obligations, which may include in camera review or withholding or subjecting to a protective order all or part of the information otherwise subject to disclosure.

https://www.nynd.uscourts.gov/sites/nynd/files/Substantive%20Amendments%20for%202022%20for%20public%20comment.pdf.

This proposed language would increase the government's authority to restrict discovery in three important ways. First, it would remove the good cause standard required by Rule 16(d)(1). While the language requires the filing of an application, it does not expressly provide the defendant an opportunity to challenge the restriction, nor does it provide any standard the government must show before a court modifies the government's Rule 16 disclosure requirements. Second, the rule expands the reasons for which the government may obtain a modifying order. Third, the proposed rule would allow the government to obtain an order allowing it to completely withhold certain discoverable information without providing any notice to the defense or possibility of review.

It is not yet clear whether the proposed amendments will be adopted. It is hoped that before implementing a rule that will likely lead to the increased use of modifying orders, the Court will consider alternatives that permit greater notice and defense input. In either case, it may be worth spending some additional time attempting to chronicle the impact of these orders and educating the courts as to how these orders are prejudicing our clients.

Pending Federal Legislation: the EQUAL Act

By: *Molly K. Corbett, AFPD*

The Eliminating a Quantifiably Unjust Application of the Law ("EQUAL") Act, Senate Bill 79, would eliminate the distinction between cocaine and crack cocaine for sentencing purposes under 21 U.S.C. § 841(b)(1)(A) and (B). The EQUAL Act was voted out of the U.S. House of Representatives on September 29, 2021 by an overwhelmingly bipartisan majority (366-61).

The proposed legislation is now in the Senate Judiciary Committee. The bill has bi-partisan support primarily sponsored by Senators Cory Booker (D-N.J.) and Dick Durbin (D-Ill.), co-sponsored by Rob Portman (R-Ohio), Thom Tillis (R-N.C.), Rand Paul (R-Ky.), Lisa Murkowski (R-AK), Patrick Leahy (D-Vt.), Jon Ossoff (D-GA), Tammy Baldwin (D-WI) and Lindsey Graham (R-S.C.)

The Department of Justice (DOJ) submitted a statement to the House Judiciary Committee on June 22, 2021 prior to the vote in the House. U.S. Department of Justice, "Examining Federal Sentencing for Crack and Powder Cocaine" *available at:* http://cdn.cnn.com/cnn/2021/images/06/22/equal.act.testimony-.final.pdf?eType=EmailBlastContent&eId=2f6d6aaa-bdde-4c06-9fc4-5c0c230f1631. In its written statement the DOJ advised:

> The Department strongly supports the legislation, for we believe it is long past time to end the disparity in sentencing policy between federal offenses involving crack cocaine and those involving powder cocaine. The crack/powder sentencing disparity has unquestionably led to unjustified differences in sentences for trafficking in two forms of the same substance, as well as unwarranted racial disparities in its application. The sentencing disparity was based on misinformation about the pharmacology of cocaine and its effects, and it is unnecessary to address the genuine and critical societal problems associated with trafficking cocaine, including violent crime.
> Id.

Recently AG Garland testified before the Senate Judiciary Committee on October 27th. During that testimony, Senator Booker asked AG Garland if he supports the elimination of the crack-powder disparity. AG Garland replied:

> The Department of Justice supports the equal treatment of crack and powder. The Sentencing Commission has over the last decade—maybe more than that—produced a series of reports which undercut what was supposed to be the scientific basis for the distinction between the two and has made quite clear there is no warrant,…,basis for distinguishing between the two. So once that is undercut there can be no grounds for that [unequal treatment]. On the other side, not only are there no grounds for it, it clearly does have a disparate impact on communities of color also clearly recognized by the sentencing commission statistics. You have that kind of circumstances there's no justification for this and we should end this.

Testimony of Hon. Merrick Garland, available at: https://www.youtube.com/watch?v=jLbgitaiMvg at: 2:2:19:07- 2:21:37

Booker than asked if Garland could respond to concerns that crack is linked to violent crime. At 2:21:41 He replied:

> I think powder cocaine is as dangerous with respect to crime rates as crack cocaine, both of which have now unfortunately been overtaken by fentanyl and opioids. But both of those are bad problems, from respect of crime but equalizing penalties for crack and cocaine should have no difference with our respect to our ability to fight violent crime.

Id. at 2:22:00-2:22:28

For practice purposes:

Pending passage and if the bill does not pass, you should press for non-mandatory minimum pleas because the DOJ agrees that the ratio should be 1:1. There is and was no rational basis for treating crack and powder differently. Pending passage, you should also seek a continuance of sentencing. This continuance may have to extend into early next year as there are only a few weeks left in the legislative calendar due to the two holiday recesses. For sentencing purposes, the testimony of AG Garland also supports the use of the 1:1 ratio or cocaine offense levels for crack offenses. In addition to his testimony, AG Garland also resurrected what came to be known as the "Holder Memo." This May 19, 2010 memo provides further support for arguments related to charging and sentencing. As expressed

(Cont'd page 26)

Pending Federal Legislation...*continued*

in the memo, "Persons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly." Attorney General Eric H. Holder, Jr., Memorandum to all Federal Prosecutors, "Department Policy on Charging and Sentencing," May 19, 2010. AG Garland has stated that cocaine and crack offenses should be treated the same. Thus, charges and resulting sentences should also be similar.

Developing Criminal Issues, Training & Resources

Developing Federal Criminal Law Issues:

- **8 U.S.C. § 1326 violates Equal Protection Clause:**

United States v. Carrillo-Lopez, No. 3:20-CR00026, 2021 WL 3667330, at *1 (D. Nev. Aug. 18, 2021). The district court dismissed the indictment finding the statute violates the Fifth Amendment's equal protection guarantee because of the disparate impact and the discriminatory purpose in enacting the law. This case is on appeal and a number of district court's have found otherwise, but food for thought.

- **Prior New York convictions which include NY "controlled substance" as an element, for example "narcotic" and "cocaine" do not qualify as federal "controlled substance offense[s]":**

New York drug offenses based on the term "controlled substance" may no longer serve as federal predicates, either for statutory purposes, *United States v. Thompson*, 961 F.3d 545(2d Cir. 2020) or guideline purposes, *United States v. Townsend,* 896 F.3d 661 (2d Cir. 2018). Convictions postdating January 23, 2015 and based on the term "narcotic" may no longer serve as federal predicates (ie. NY Third Degree Sale and Possession (NYPL 220.39(1) and 220.16(1)). The New York drug schedule (post 1/15/15) includes "naloxegol" deleted from the federal schedule in 2015. See Letter of the United States 3-4, *United States v. Devane,* 19 Cr. 244 (FB) (E.D.N.Y. Nov. 30, 2020), ECF No. 25. *See also United States v. Swinton,* 495 F.Supp.3d 197 (W.D.N.Y. 2020).

NY Cocaine offenses are also disqualified as federal controlled substance offenses. *United States v. Fernandez-Taveras,* 511 F.Supp.3d 367 (E.D.N.Y. 2021)(disqualifying NY Second Degree Possession, NYPL 220.18), NY's definition of "cocaine" sweeps more broadly than the federal definition because NY criminalizes all isomers of cocaine including positional isomers, whereas federal law criminalizes only geometric and optical isomers of cocaine.
Beware: the timing of convictions and timing of federal sentencings are at issue in two appeals questioning which time controls the categorical assessment of the prior convictions. *United States v. Gibson*, No. 20-3049; *United States v. Johnson*, No. 19-4071

- **Other Priors that are not federal "controlled substance offenses":**

Prior federal marijuana convictions are also being challenged as not "controlled substance offenses" for the purposes of the guidelines. *United States v. Abdul Aziz*, 998 F.3d 519 (1st Cir. 2021); *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Williams*, 2021 WL 1149711 (6th Cir. Mar. 25, 2021 (unpublished))

NY Marijuana convictions expunged by statute, NY CRIM PRO § 160.50

♦ **Procedural Error for Not Addressing Sentence Disparity**

Incorporate sentencing commission data into arguments about sentence length. The commission is keeping up-to date data on sentences allowing for more specific comparisons between offenders, offense conduct and criminal histories. A district court's failing to address the data in relation to the advisory sentence range or sentence imposed is arguably procedural error. *United States v. Perez-Paz*, 3 F.4th 120, 128 (4th Cir. 2021)

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Upcoming Training:

The Defender Services Office, Training Division (DSOTD) has opened registration for a live and recorded webinar, "Greatest Hits in Defense of Our Noncitizen Clients" on Nov. 17, 2021, 1:00-2:15 p.m. You may register at: https://web.cvent.com/event/e78f2664-a44e-4a7d-a491-578d0c992cd7/summary or through "Upcoming Training Events" section of www.fd.org. After registering you will receive a URL from GoToWebinar with instructions on how to join. For questions contact Rolan McClarry at Rolan_McClarry@ao.uscourts.gov. While the CLE is free the DSOTD pays a registration fee for each registrant. Only register if you are committed to attending.

This webinar will provide an overview on dominant issues that defense attorneys seek advice on from the National Immigrant Justice Center, along with practical tips in defending noncitizens, including providing immigrant-safe alternatives to controlled substance, firearm, and fraud related offenses.

RESOURCES:

On-line:

Defender Services: www.fd.org
Second Circuit decisions: https://blog.federaldefendersny.org/
United States Sentencing Commission: www.ussc.gov
-Interactive Data and Sentencing Statistics
https://isb.ussc.gov/index.html.
-Annual, Specific Subject and Congressional Reports
-Sentence and Offender Statistics
-Recent 2020-2021 reports on sentencing in Child Pornography offenses and Recidivism rates.
NDNY FPD : https://nyn.fd.org/

In Person:

Molly K. Corbett, 518-436-1850 x107 or molly_corbett@fd.org

Judge's Corner

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

On behalf of the entire Court family, I want to thank all members of the Federal Public Defenders Office (and indeed all Northern District bar members) for their commitment to excellence and professionalism during these difficult times. Without your dedicated efforts, we as a District would not have been able to fulfill our mission-critical tasks and provide due process to our fellow citizens of the Northern District. While COVID-19 still presents a serious challenge, I feel we have developed strong protocols to ensure both your safety and the safety of all court participants. I would encourage all courthouse visitors to familiarize themselves with General Order #61 which requires individuals, regardless of vaccination status, to wear a mask in common areas. Policies regarding mask coverings and social distancing within a specific courtroom, jury room or chambers area will be determined by the presiding judicial officer. I am confident that, by taking a strong but common-sense approach to our COVID-19 procedures, we can continue to maintain our current operational status until the pandemic finally subsides.

I would also like to take this opportunity to inform you of a new initiative here in the Northern District to enhance the video-conference capabilities within several detention facilities. More specifically, the Court is working with Broome and Clinton County Correctional Facilities to upgrade their technical equipment to allow more robust court proceedings, interviews and attorney-client meetings. Several of the proposed enhancements include providing secure attorney-client communications, creating an online scheduling platform and allowing attorneys to execute documents inside of the videoconference using a product called Adobe Sign. We anticipate installation and testing of these new systems to be completed before the end of the calendar year. Please check the Court's website (www.nynd.uscourts.gov) for updates on this project.

Article Submissions & Letters to the Editor

Molly K. Corbett, *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, 39 North Pearl St, 5th Floor Albany, NY 12207, or send an email to molly_corbett@fd.org