



# THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Winter Edition 2010  
Volume IV, Issue 1

## THE PRESIDENT’S MESSAGE

NAFD NEWSLETTER

National  
Association of  
Federal Defenders

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### CRISIS AND OPPORTUNITY

Early in 2009, I was obsessed, captive, like many of you, with news of our imploding financial system. I read all I could and struggled to understand unfamiliar financial concepts such as “derivatives,” “ARMs,” etc. I wanted to understand how and why this happened. Coming, as it was, on the heels of Barack Obama’s election, I thought, at first, that this could derail his attempt at a progressive agenda. In the end, I saw in the crisis an opportunity for fundamental change. Yes, I know, what does any of this have to do with criminal defense?

In my article in the Spring of 2008, I touched on the mass incarceration of Americans and the exploding human and financial costs of that of policy. Even before the financial crisis, many states scrambling with budget shortfalls rolled back mandatory minimums and other harsh sentencing practices. The financial crisis has added to that burden and could potentially spur additional reforms. In March of last year, New York State, facing its own financial problems, repealed most of its draconian sentencing laws which began the trend toward mandatory minimums. That event symbolically suggests that the pendulum is swinging our way. The states can no longer afford the financial

costs, and the human costs are becoming more evident. Drug courts, pretrial diversion, lower pretrial detention rates, reentry and early release programs are now debated and encouraged by legislators on both sides of the aisle. This climate presents defenders with an opportunity to push for pretrial and reentry reforms in our respective districts.

In October of last year, I invited Doug Burris, the Chief United States Probation Officer from St. Louis, Missouri, to speak at our CJA seminar. I had heard Mr. Burris speak on two prior occasions. I was impressed with the extraordinary changes that office accomplished, well before the current financial crisis. In describing the dramatic changes in his district, he noted that the Eastern District of Missouri is the 18th largest in the system. It was one of the worse districts in terms of its rates of detention and recidivism. Today it is one of the best in the country on both scores. At the core of the Missouri program’s success is the recognition of the humanity of its clients. In Burris’ words, “The vast majority of people processed through the federal criminal system are not evil. Instead, they are people who lack two of the greatest attributes of humanity – hope, and opportunity. With these two attributes, miracles can occur.”

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The changes in St. Louis, Missouri, were not accidental. They required a shift in the culture of the probation office, including the development of closer communication among probation officers, the prosecution and defense counsel. Their sentencing process is fully transparent; sentencing recommendations are shared with both sides. Probation officers are expected to consult with defense counsel regarding possible reasons for a downward variance. Their recommendations for downward variances and departures in the year 2008 dwarfed recommendations for upward variances and departures. Greater understanding of the social history and family circumstances of defendants is encouraged. More drug treatment programs were added. The Missouri probation office recognizes a clear connection between a lower recidivism rate and clients who are gainfully employed. They assist with employment and vocational training. Annual job fairs are organized to link clients with employers. Burris' presentation at the seminar included a slide marking the 56<sup>th</sup> continuous month of having a caseload

unemployment rate lower than the community at large. Similar goals, standards and programs could bring similar successes to every district.

I find it interesting that the fuel driving the Missouri success is the recognition of the human potential in their clients. We do the same when our mitigation investigators “peel the onion” to uncover the social histories of our clients and tell their story. There is common ground on which we can build cooperation and trust in the interest of our clients. Our clients certainly have an interest in lower pretrial detention rates, lower recidivism rates and in effective reentry programs. Indeed, the prosecution should have the same interest. The financial crisis brought to the foreground the financial and human costs we share, and the potential for redemption in our clients. “Miracles can occur,” and the pendulum may be swinging our way, but we must work to get there.

*All the best,  
Carlos A. Williams, President*

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# AMICUS COMMITTEE REPORT

*By Fran Pratt, Co-Chair of Amicus Committee, Assistant Federal Defender  
Eastern District of Virginia, Alexandria*

The Amicus Committee has been quite busy since the last report in the *Liberty Legend*. Before addressing the cases in which we've been involved, though, Paul Rashkind and I would like to express our deep thanks and appreciation, both personally and on behalf of the Amicus Committee, to Henry Bemporad, the Federal Defender for the Western District of Texas, for his strong leadership of the Committee over the past six years. Although Henry has stepped down as a co-chair of the committee, we are fortunate to have Brett Sweitzer, an appellate assistant defender in the Philadelphia office who has been a Committee member for a number of years, step in to fill Henry's large shoes. Welcome, Brett!

Since May of 2008, the National Association of Federal Defenders filed or joined in amicus briefs on the merits in numerous cases in the Supreme Court. Many Committee members have been involved in helping to edit them, which has resulted in the filing of strong briefs that we believe have been helpful to the Court. Briefs at the merits stage include the following:

! *Melendez-Diaz v. Massachusetts*, No. 07-591, in support of petitioner. Written by Jeff Green and his team at Sidley Austin in Washington, DC, it was filed on behalf of NAFD, NACDL, and the National College for DUI Defense. The brief is available at 2008 WL 2550612.

! *Arizona v. Gant*, No. 07-542, in support of respondent. The brief was written by Ketanji Brown (a former AFPD in the Washington, DC office) and her team at Morrison & Foerster in Washington. It is available at 2008 WL 2958118.

! *Bell v. Kelly*, No. 07-1223, in support of the petitioner. The brief was written by Justin Marceau, a former AFPD in the Phoenix office now teaching at

the University of Denver, on behalf of NAFD and NACDL. It is available at 2008 WL 3459585.

! *Dean v. United States*, No. 08-5274, in support of the petitioner. The brief was prepared on behalf of NAFD, NACDL, and FAMM by David Salmons and his team at Bingham McCutcheon in Washington, DC. It is available at 2009 WL 97753.

! *Montejo v. Louisiana*, No. 07-1529, in support of the petitioner. This supplemental amicus brief was prepared by attorneys at the Public Defender Service in Washington, DC, and is available at 2009 WL 1028740.

! *Florida v. Powell*, No. 08-1175, in support of the respondent. The brief was prepared on NAFD's and NACDL's behalf by Linda Coberly and her team at Winson & Strawn in Chicago. The brief is available at 2009 WL 3615003.

! *United States v. Comstock*, No. 08-1224, in support of the respondents (ably represented by the FPD office in the Eastern District of North Carolina). The brief was prepared on NAFD's and NACDL's behalf by Jeff Green and his team at Sidley Austin in Washington, DC. The brief is available at 2009 WL 3727683.

The NAFD also filed or joined in three briefs at the cert. stage: (1) *Carachuri-Rosendo v. Holder*, No. 09-60, in which NAFD joined with several groups in support of cert. (the Supreme Court has granted cert. and NAFD will likely file or join in a brief at the merits stage); (2) *Tablada v. Thomas*, No. 08-11034, in which we joined with NACDL (the Supreme Court has taken the issue presented in *Tablada* in another case, *Barber v. Thomas*, No. 09-5201, in which a comparable amicus brief was filed at the cert. stage; NAFD will likely file or join in a brief

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at the merits stage); and (3) *Dunphy v. United States*, No. 08-1185 (although the Court denied cert. in *Dunphy*, it has taken the issue presented in another case, *Dillon v. United States*, No. 09-6338, to address the applicability of *Booker* to § 3582(c) cases; NAFD will likely join in a brief at the merits stage in this case as well).

If you know of a case that might benefit from NAFD amicus support, please contact an Amicus Committee co-chair (listed below) as early in the

process as possible so that we can look at the issue, send the issue to the full committee for input and a vote, and if it is decided that the NAFD should participate, to find a writer or another organization with which to join, etc. As well, if you are interested in being involved in the work of the Amicus Committee, please contact the three co-chairs: Paul Rashkind in Miami, Florida, Brett Sweitzer in Philadelphia, Pennsylvania, or me, Fran Pratt, in Alexandria, Virginia.

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# KUDOSKORNER

Tim Henry, AFD, District of Kansas, received a sweet victory in the Tenth Circuit Court of Appeals in *United States v. Lovern and Barron*, 2009 WL 2871538 (10<sup>th</sup>

Cir. Sept. 9, 2009), which found that there was insufficient evidence to support his client's conviction. The client was the computer technician in an on-line pharmacy operation. The client had virtually no background in pharmaceutical work and his duties were primarily clerical in nature. He, along with the owner (who pled guilty), and another employee were convicted of conspiracy to dispense drugs and distribution of controlled substances under an aiding and abetting theory, based on the pharmacy's practice of filling prescriptions based on on-line questionnaires completed by patients. The Court of Appeals held that there was insufficient evidence to prove that the client knew that the prescriptions he helped to fill were written by physicians acting outside the usual course of professional medical practice, and remanded with instructions to enter a judgment of acquittal. The conviction of the co-defendant, the pharmacist in the enterprise, was upheld.



Congratulations to Stephen McCue, FPD, and Terry Storch, RWS, District of New Mexico, for convincing the Tenth Circuit to reverse the district court's denial of the suppression motion in *United States v. Pena-Montes*, 2009 WL 4547058 (10<sup>th</sup> Cir. Dec. 7, 2009). The defendant was the passenger in a vehicle that an officer stopped at night because it did not have a license plate. The defendant was ultimately arrested and

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charged with illegal reentry. As the officer approached the SUV, he saw it had a dealer tag in the rear window. The Court held that the officer made a mistake of law in assuming that the lawful use of dealer plates was limited to demonstrating vehicles and thus investigating his suspicion that the vehicle may have been stolen. Under New Mexico law, dealer plates may be used on highways for any purpose. Reasonable suspicion was dispelled as soon as the officer discovered a license plate permitting general-purpose use and the stop should have been terminated without questioning the vehicle's occupants at that point. The Tenth concluded that the officer lacked reasonable suspicion to expand the scope of the stop, but remanded for a hearing on whether the evidence of Mr. Pena's identity -- his fingerprints -- were fruit of the poisonous tree that should be suppressed.

Phillip Medrano, AFD, District of New Mexico, recently obtained a judgment of acquittal, though unfortunately the decision did not come until seven months after the jury verdict of guilty, which resulted in the client sitting in jail for that time. The client was co-driver of a truck coming from California who was stopped at the Gallup, New Mexico, port of entry. The co-driver, who was also convicted, was the owner of the truck and had supervised the loading of the truck. Cocaine and ecstasy were found in the trailer of the truck. The judge wrote a great memorandum opinion establishing insufficient evidence to support the conviction as to the client. The co-defendant's motion for judgment of acquittal and new trial were both denied.



Applause is due to Marc Robert, AFD, District of New Mexico, for his win in *United States v. Montes-Ramos*, 2009 WL 3138866 (10<sup>th</sup> Cir. 2009). The district court had denied the defense's suppression motion in a marijuana case. Although the Court agreed that the initial highway stop of the defendant's car did not violate the Fourth Amendment, the deputy sheriff searched the car when he intentionally stuck his head into the window and smelled marijuana only after his nose crossed the threshold. Furthermore, the search was unreasonable because the government failed to show it was supported by probable cause.



In the Keystone state, Keith Donoghue, RWS - Appeals Unit, who wrote the brief, and Robert Epstein, AFD, Federal Community Defender Office, Eastern District of Pennsylvania, who argued the case, for a Sixth Amendment speedy trial victory in the Third Circuit, a rare speedy trial reversal. For what appears to

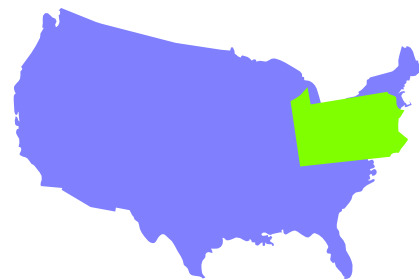
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be the first time in more than 30 years, the Third Circuit in *United States v. Germaine Battis*, Case No. 08-2949 has thrown out a conviction and dismissed an indictment after holding that the delay violated the Sixth Amendment's speedy trial guarantee. The Court's December 14 decision has implications for "adoptive" prosecutions that federal authorities take over from their state counterparts, such as felon-in-possession cases under 18 U.S.C. § 922(g) that start as aggravated assault or robbery cases in the Court of Common Pleas. The United States filed a § 922(g) indictment but then put its case on hold for more than two and a half years. The government argued that the delay was justified to permit a parallel state prosecution to go first because local authorities had a "compelling interest in this case, which involved an allegation that the defendant attempted to shoot a police officer." The Third Circuit held that, whatever the propriety of such deference at the outset, it had continued for too long here. Federal prosecutors' duty to bring the defendant to trial expeditiously "persists even when state authorities have a strong interest in bringing their own case against the same defendant," the Court explained.

Congratulations to Renee Pietropaolo, AFD, and Lisa Freeland, FPD, Western District of Pennsylvania and the rest of the team for winning Supreme Court review! The Court granted certiorari in a crack retroactivity case out of the Third Circuit (WDPA), *Dillon v. United States*, cert. granted (U.S. Dec. 7, 2009), decision below, 572 F.3d 146 (3d Cir. 2009). The issues are: (1) whether the Guidelines are binding in a Section 3582 sentencing (i.e., can the client get "a Booker")?; and (2) whether, in a Section 3582 proceeding, the court must impose sentence based on an admittedly incorrect Guideline calculation? The case involves a then-23 year old defendant, who had only two prior misdemeanor convictions, but received an almost 27-year sentence, even though the court at the time felt 5 years would have been enough. Worse, the sentence was assessed based on an incorrectly calculated criminal history, so was higher than it should have been. In the 15 years that he's been incarcerated, the defendant started an African-American studies program for prisoners, became a published author, took a leadership role in a youth development agency, and not only obtained his GED, but obtained a business degree. He was eligible for a sentence reduction under the retroactive amendment, and received the two-level reduction. His lawyer also asked the court to fix the criminal history error and for a further reduction under Booker. The district court found that it lacked jurisdiction to do either. The Third Circuit affirmed. Now, the Supreme Court is taking the case. This is a

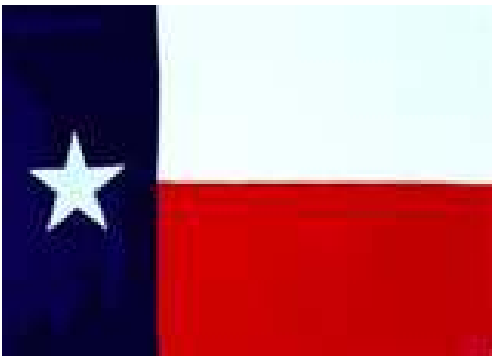


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great sign, since every Circuit except the Ninth has ruled the same way as the Third, and the Ninth seemed poised to reverse itself in a pending en banc case.



The Lone Star state had an impressive victory. Matthew Belcher, AFPD, Northern District of Texas, Fort Worth Division should be congratulated for an important appellate victory in the Fifth Circuit in *United States v. Curtis Rhine*, 583 F.3d 878 (5<sup>th</sup> Cir. 2009). Rhine was indicted and convicted of one count of possession with intent to distribute 1.89 grams of cocaine base and one count of felon in possession of a firearm. The district court, relying on the recommendation of the probation officer in the pre-sentence report, calculated Rhine's base offense level using a quantity of 4.5 kilograms of crack cocaine from Rhine's alleged previous drug trafficking conduct, conduct that had not been charged in the indictment. This drug quantity ultimately resulted in an aggregate sentence of 360 months, whereas Rhine's advisory guideline range would have been approximately 30-37 months for 1.89 grams of crack. The probation officer came up with the 4.5 kilogram quantity applying relevant conduct and using statements of other informants who had been involved in a widespread crack cocaine conspiracy that had culminated in a 30-defendant prosecution some 17 months before Rhine's arrest for the 1.89 grams of crack cocaine. The Fifth Circuit held that the earlier drug trafficking activity was not relevant conduct as it was not a part of the same common scheme or plan or the same course of conduct as the offense of conviction. See *Rhine*, 583 F.3d at 885-890. The sentence was reversed and remanded for re-sentencing. On remand, Rhine was recently re-sentenced to an aggregate sentence of 180 months, which is now on appeal.

This case was truly a critical decision in the Fifth Circuit, being a published opinion that applies some of the limits set forth in the guidelines regarding the application of relevant conduct.

If you read *The Liberty Legend* regularly, you may have wondered why your much deserved Kudo was conspicuously missing. The editors solicit Kudos before every edition. If we are not told of successes and achievements, we have no way of sharing them with the Association. Brag on yourself or someone else.

What are you waiting for? The editors are accepting Kudos 24/7 at [Shari\\_Allison@fd.org](mailto:Shari_Allison@fd.org) and [Tony\\_Lacy@fd.org](mailto:Tony_Lacy@fd.org).

# PRESENTING A DEFENSE AT TRIAL: THE USE OF REVERSE F.R.E. 404(B) EVIDENCE<sup>1</sup>

By Mark D. Hosken, Assistant Federal Public Defender  
Western District of New York

Rule 404(b) of the FEDERAL RULES OF EVIDENCE is most commonly utilized by criminal defense attorneys as a shield against “other crimes” evidence offered by the government. Although much less common, F.R.E. 404(b) may be successfully used as a sword to pierce the very foundation of the government’s case.

F.R.E. 404(b) generally prohibits the prosecution from offering evidence at trial relating to the defendant’s prior crimes, wrongs or acts if the intent of such evidence is merely to suggest that in the instant case, the defendant was acting in conformity with his criminal character. Notwithstanding this general restriction, the government may still offer such evidence if the purpose is to demonstrate motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of a mistake or accident. Indeed, the Second Circuit evaluates the use of F.R.E. 404(b) evidence under an inclusionary approach and routinely allows character type evidence for any purpose other than to demonstrate the defendant’s criminal propensity. *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002).

Reverse F.R.E. 404(b) evidence is defense counsel’s opportunity to turn the table. Such evidence may be offered by the defendant to exonerate rather than implicate. This permits the defendant to prove another person, such as a government witness, a co-defendant, or a third party, committed the charged crime. Such evidence is relevant, probative and admissible.

Many jurisdictions, including the Second Circuit, have adopted a relaxed standard of admissibility when considering the defensive use of “other crimes” evidence. Reverse F.R.E. 404(b) material may be used alone or with other evidence to negate the defendant’s guilt of the crime charged. *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir. 1984), *United States v. Stevens*, 935 F.2d 1380 (3<sup>rd</sup> Cir. 1991), *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), *United States v. Cohen*, 888 F.2d 770 (11<sup>th</sup> Cir. 1989), and *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978).

For example, in *United States v. Aboumoussallem*, the defendant argued he was an innocent pawn, duped into transporting drugs by his cousins. The district court, however, prohibited the introduction of any evidence supporting this theory, finding that it was irrelevant, confusing and prejudicial under F.R.E. 403. The district court also refused the defendant’s attempt to offer the evidence under F.R.E. 404(b). The Second Circuit rejected the district court’s finding that the proposed testimony was irrelevant or inadmissible per F.R.E. 404(b). According to the Circuit, the proffered evidence satisfied the liberal relevancy standard of the FEDERAL RULES OF EVIDENCE as it was intended to make the existence of a consequential fact less probable. The defendant’s knowledge was the central issue at trial and the evidence should have been admitted to show the defendant’s lack of knowledge. (Though the evidence was not permitted, the Circuit affirmed the conviction, finding no abuse of discretion.)

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<sup>1</sup> This article was completed with the excellent assistance of Jeffrey L. Ciccone, Assistant Federal Public Defender, Western District of New York.

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Of particular importance to defense counsel is the Second Circuit's acknowledgment that the standard of admissibility is less restrictive when the defendant seeks to use F.R.E. 404(b) evidence. The Circuit specifically identified the "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense. . . . [i]n such cases the only issue arising under F.R.E. 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense." 726 F.2d at 911-912.

In *United States v. Stevens*, the Third Circuit examined many of the state and federal cases discussing the use of reverse F.R.E. 404(b) evidence. Unlike "ordinary other crimes evidence, which is used to incriminate criminal defendants, reverse F.R.E. 404(b) evidence is utilized to exonerate defendants." 935 F.2d at 1402. "We agree with the reasoning . . . that the admissibility of reverse F.R.E. 404(b) evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues. Recasting this standard in terms of the FEDERAL RULES OF EVIDENCE, we therefore conclude that a defendant may introduce reverse F.R.E. 404(b) evidence so long as its probative value under F.R.E. 401 is not substantially outweighed by F.R.E. 403 considerations." *Id.* at 1404-1405.

The Third Circuit specifically rejected the government's argument that the defendant must satisfy the same preconditions applicable to the prosecution.

"More specifically, the defendant, in order to introduce other crimes evidence, **need not show** that there has been more than one similar crime, that he has been misidentified as the assailant in a similar crime, or that the other crime was sufficiently similar to be a signature crime. These criteria, although relevant to measuring the probative value of the defendant's

proffer, should not be erected as absolute barriers to its admission. Rather, a defendant must demonstrate that the reverse F.R.E. 404(b) evidence has a tendency to negate his guilt, and that it passes the F.R.E. 403 balancing test" (emphasis added).

*Id.* at 1405.

Similarly, in *United States v. Robinson*, the Second Circuit permitted the introduction of evidence consistent with the defendant's theory that another individual committed the crime. The Court reversed the conviction, holding that "[i]t was entirely proper for Robinson to disprove the government's contention by proving that the [guilty party] was someone else. If it was, then obviously Robinson was innocent. Evidence . . . was clearly probative of the issue that Robinson sought to prove, namely, that the [guilty party] was someone else." 544 F.2d at 112-113. The defendant may properly defend the charges against him by proving that another individual committed the crime.

In *United States v. Cohen*, the defendants attempted to discredit an essential government witness through the introduction of evidence relating to that witness's prior criminal conduct. Such evidence included the witness's ability to concoct and conduct a fraudulent scheme without the defendants' aid or participation. The Eleventh Circuit reversed and granted a new trial, finding the trial court's failure to admit the evidence proffered deprived the defendants from presenting an adequate defense. The panel identified the rationale for permitting the excluded evidence.

"When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent . . . . In the present case, introduction of the proffered evidence would not have clashed with the policy of keeping scandalous or prejudicial evidence

from the jury.”

888 F.2d at 777.

In *United States v. Morgan*, the defendant was charged with possessing drugs with the intent to distribute. The majority of the drugs and a substantial amount of cash were found in the basement. The defendant sought to offer evidence that another individual lived in the house and was selling drugs. That evidence was offered through the cross examination of the owner of the house. The defendant had information that the owner’s son lived in the house and was selling drugs out of that location. The D.C. Circuit reversed the conviction and ordered a new trial, finding that the district court abused its discretion when it excluded the defendant’s evidence:

“[t]he government’s evidence that appellant possessed (drugs) with intent to distribute was entirely circumstantial. There was no evidence that appellant had actually sold (drugs) at any time. No fingerprints of his were found on any of the items concealed in the basement. And there was evidence that at least one other person. . . was not afraid to enter the basement. Hence, the jury necessarily engaged in speculative inferences to convict. We cannot say with the necessary fair assurance that the jury would have drawn these inferences if it had been informed of sales by a third person living in that house.”

581 F.2d at 939.

It should also be noted that the Second Circuit extended the application of F.R.E. 404(b) to include the introduction at trial of evidence of several acts occurring subsequent to the crime in question. Although not favorable to the defendant, in *United States v. Ramirez*, 894 F.2d 565 (2d Cir. 1990), the Circuit permitted similar act evidence if it occurred after the crime at issue: “[r]elevancy cannot be

reduced to mere chronology; whether the similar act evidence occurred prior or subsequent to the crime in question is not necessarily determinative to its admissibility.” *Id.* at 569. This reasoning should be equally applicable to reverse F.R.E. 404(b) evidence.

I recently had the pleasure of trying a case with AFPD Tracy Hayes. Our client was found in a house where police recovered cocaine base and a firearm. As the police entered the house, another individual jumped out of a window. Our investigation revealed that person had a history of trafficking in narcotics. Specifically, that individual was arrested a month later at another location by the same officers. Police reports completed in connection with the later incident contained oral and written admissions by the individual (the window jumper). Most relevant was his admission that he was cutting up the crack, weighing it, and bagging it into \$10, \$20, and \$40 bags, which he sold to local friends. Tracy and I were successful in convincing the trial court judge to permit the defense to elicit testimony about the window jumper’s drug-trafficking activities as reverse F.R.E. 404(b) evidence. We were permitted to elicit testimony on cross-examination from those same officers as to the items seized and the identity of the person present on the subsequent occasion.

Although the threshold for admission of reverse F.R.E. 404(b) evidence is more relaxed than that required for direct F.R.E. 404(b) evidence, defense counsel is well-advised to prepare an explanation in case the court should inquire. A simple statement may suffice. Such as:

Your Honor, the evidence will show the government’s witness, Mr. Smith, was in the apartment before the search warrant was executed. The government contends the defendant solely possessed the contraband seized from the apartment where he was present. The defendant offers evidence of Mr. Smith’s drug activities one month later when he was arrested by the police. The defendant

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was not present when Mr. Smith was in possession of similar contraband on that occasion. Such reverse F.R.E. 404(b) evidence will show Mr. Smith had a motive and an opportunity to possess the contraband at issue in this case.

Frequently, defense counsel objects to the government's introduction of "other crimes" evidence. Notwithstanding such arguments, the trial judge generally permits the prosecutor to offer

evidence relating to the defendant's prior activities, or "other crimes." Many trial defenses have been compromised and destroyed by the government's successful use of F.R.E. 404(b) evidence. There is no reason that the government should be the sole proponent of "other crimes" evidence. Counsel should consider the availability and use of reverse F.R.E. 404(b) evidence when constructing the theory of the defense. Evidence that will exonerate the defendant or negate his guilt is relevant and probative. It is also admissible evidence pursuant to F.R.E. 404(b).

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## IN LOVING MEMORY OF MELISSA KUPFERBERG

*By James W. Smith III and Mary Mills, Assistant Federal Public Defenders  
Middle District of Florida*

*This article originally ran in the "Eagle's Eye," Volume 19, December 2009, the magazine published by the National Defender Investigator Association.*

On November 7, 2009, our office lost a dear friend: Melissa Kupferberg. Melissa, an investigator assigned to the Tampa Division of the Federal Public Defender's Office for the Middle District of Florida, tragically died as a result of a freak firearms accident. Melissa was 32 years old at the time of her death and was just entering the prime of what was already an accomplished career as an investigator and mitigation specialist. She had a national reputation as a scholar, creative thinker, and effective problem solver. Melissa was a frequent lecturer and speaker at national conferences. Investigators and attorneys across the nation sought her out for advice and guidance.

As the news of her death spread across the nation, the response was uniform. Grief, combined with disbelief, shock, and sadness. Why did Melissa, so vibrant, so full of life, so filled with a

desire to serve others, have to die so young?

All of us knew about Melissa's body of work. Talk to any attorney or investigator who worked with her and you'll hear some common themes: extremely intelligent, creative, very well-read, a tireless worker, an effective advocate for her clients, and a prolific scholar. In short, she set the standard for what it means to be a complete investigator.



Melissa began her career as an investigator with the Office of the Public Defender for Maricopa County, Arizona. Melissa had a master's degree in psychology from Arizona State University and, during her first few years in the field, quickly established a reputation as an effective advocate for the accused, particularly for those who suffered from mental illness. Her ability to bond with clients of all backgrounds was uncanny. Attorneys who worked on cases with Melissa say she had an amazing ability to bond with clients and was extremely effective in coming up with ways to

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present every client's unique story to the court.

Jan Kullberg, a paralegal who worked with Melissa in Phoenix, Arizona, states that she "feels honored to have gotten to know Melissa as well as I did. She was absolutely brilliant, an incredible speaker, a comic, an outdoorsy type, an animal lover, a fun all-around bright and light-hearted spirit." Ms. Kullberg remembers that "you never saw Melissa without a smile. If you were down or frustrated, she'd make you laugh. Always, and I mean, ALWAYS upbeat. Her compassion for our clients, their mental health and social dysfunctions and needs, as well as her all-around caring nature were inspiring. We all need to take from her example and keep her memory alive by choosing to embrace that spirit in our own daily work with clients."

In 2006 Melissa joined the Tampa Federal Defender's office and quickly became a superstar. Most federal criminal work takes place in the area of sentencing. Many of the clients have several prior offenses and often face the likelihood of severe punishment as a result of statutory mandatory minimums and the federal sentencing guidelines. Despite these long odds, Melissa helped attorneys tell each client's story in a unique and effective way that often moved judges to grant variances and departures from the federal sentencing guidelines.

Melissa believed that every client, regardless of his or her background, record, and circumstance had a story that was worth telling. Melissa believed that the first duty of an investigator was to help gather the facts of that story. She did this through diligent and comprehensive records searches and effective client interviewing. Once the basic facts had been collected, Melissa would focus on the two or three facts that best told the client's story. Perhaps it was the foul-smelling carpet in the childhood home of a client that would let the judge feel the poverty the client experienced during his formative years. Maybe it was the jailhouse sketch produced by a client that demonstrated her artistic side. Or perhaps it was the tender jailhouse letter from a client to his daughter that showed the love and dedication of a father. Every

client has a story, every case has a winning theme, and Melissa entered each case with the heartfelt determination to find both.

Alec Hall, a supervising assistant federal public defender in the Tampa office, remembers fondly several of the cases he worked on with Melissa. According to Alec, "She was incredible. She helped me with everything, from the basics of investigation to jury selection, to the development of a case theory, to effective mitigation practice during sentencing. She was a great asset to this office and helped me obtain favorable results for many clients."

John Badalamenti, an assistant federal defender in the Tampa Office, recalls that "Melissa was selfless, caring, and never too busy to make time for a friend. She gave from her heart, mind, as well as her soul. She was self-driven, extremely bright, and carried herself with humility. I am a better person for having had the opportunity to know Melissa."

Andy Kelleher, an investigator in the Tampa office, remembers Melissa as person dedicated to the cause of defending the clients. "I consider it an honor and a pleasure to have known and worked with Melissa. She was certainly a person who brightened a room by entering it. I had the privilege of working closely with her for over two years on a very difficult, involved case and her determination, perseverance and total dedication contributed, I am sure, to a favorable outcome for the client. She never wavered from the certainty that hard work and attention to detail would result in a victory and she was right! There was no facet of this case that was too big or too small to deserve her full effort. But this was just one case. She exhibited the same work ethic on all her cases and she viewed her position in the Federal Defender's Office not as just a job but as a calling, and a calling of the highest order. She gave her all to being the voice for those who can't speak for themselves for whatever reason. She was a friend to all, not just to those with whom she associated but also to those often called the least among us. Many of our clients are in a better position for Melissa's efforts and I am proud to have known her as a coworker and

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friend. She will be sorely missed.”

Sharon Mercer, an investigator in the Orlando Federal Defender’s Office, recalls that “Melissa made me feel important, needed and respected on more than one occasion. She was the best of the best, but she always made you feel like YOU were the important one. Her selflessness and goodness is what I will remember and miss most about Melissa.”

Deborah Flanigan, a senior secretary in the Tampa office, recalls Melissa’s optimism and dedication to her clients: “I have worked with Melissa on numerous cases and her knowledge and assistance was unmatched by any other. Her dedication to her job was such an inspiration and her witty personality would bring a smile to my face even on the worst day. What a joy she was to work with and I am so glad that I was given the opportunity to know and work with Melissa. What a beautiful soul, she is sorely missed and will never be forgotten.”

Jana Hamilton, also a secretary in the Tampa Office, remembers that “Melissa was such a happy spirit. We will miss her laughter, her smiles, her giving heart and her love for life.”

Melissa was the kind of person who made a positive, lasting impression on everyone she met. Assistant Federal Defender Jenny Devine of the Tampa Office recalls that “Melissa was special - she could make you feel, from the first day she met you, as though you had always known her and she was excited to get to know you even better. I know the clients she worked with must have felt that palpable quality and for them to see Melissa on their team fighting for them must have been a great comfort to countless people.”

In addition to the dedication to her clients and the support she showered upon her co-workers, Melissa was quick to offer assistance to those asking for it from other defender offices. Sally Perez, an investigator with the Federal Defender’s Office in Southern District of Florida, recalls that Melissa assisted her on a number of her cases. Kimberly

Collins, an investigator and mitigation specialist with the Federal Community Defenders Office in Philadelphia, Pennsylvania, remembers that “Melissa has been a tremendous resource” and “mitigation friend.”

Patricia Gallo, an investigator with the Federal Defender’s Office in Gainesville, Florida, states that Melissa was a “rising star. Her gentle spirit and dedication to her work will be greatly missed by myself and the many other members of NDIA that were fortunate to know her.”

Wendy Kunkel, an investigator with the Federal Defender’s Office in Portland, Oregon, remembers Melissa from a training seminar in which she was assigned to Melissa’s group. Wendy states, “I enjoyed her immensely due to her no nonsense attitude, her crafty sense of humor and her compassion for others.”

Richard Wolff, Chief of the Training Branch of the Office of Defender Services in Washington, D.C., states that he was “impressed by the depth of Melissa’s knowledge, her openness to others, and her pleasure in teaching. She had a special radiance about her - a truly gifted person whose presence will be missed by so many.”

Andrea Taylor, Deputy Chief of the Training Branch of the Office of Defender Services in Washington, D.C., states that “Melissa was near and dear to me as both a friend and colleague. She was just absolutely amazing and I can not believe that she is no longer with us. My Training Branch colleagues and I would often remark on Melissa’s talent, dedication and accomplishments. Melissa was that person we could always rely on to go beyond the call of duty, think outside the box and do it all with enthusiasm and passion. She truly had a heart of gold.”

Lisa Pocari, Attorney Advisor with the Training Branch of the Office of Defender Services in Washington D.C., states that the Paralegal and Investigator Skills Workshop “would not be what it

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was without Melissa's input. Seldom have I come across a more hard-working, thoughtful, dedicated, warm, caring person."

Sean Broderick, with the Administrative Court Operations in Oakland, California, notes that Melissa was "the kind of person who remembered little details about you." He fondly recalled how Melissa would remember cute things his son had said, and his favorite shows. He added that Melissa was smart, funny, competent and positive, even in the most trying of circumstances.

Lori James-Townes, chair of the National Alliance of Sentencing Advocates and Mitigation Specialists, remembers that "Melissa was a shining star amongst us all."

This article could go on at length talking about the professional accomplishments of Melissa. Those who knew Melissa knew she was dedicated to and loved her work, but she was not defined by it. She lived a balanced life and combined her hard work with a zest for life that was infectious. Her smile could light up a room and her sense of humor was always there at the right time with the right joke.

Her amazing ability to bond with people was present in every interaction with the attorneys, investigators, and support staff assigned to the office. Melissa was a true friend because she took the time to invest in relationships. She remembered birthdays, she took the time to listen to your stories about your children, and she always asked about your spouse. Secretaries and support staff loved her because she actually took the time to relate to them, to listen to them, and consistently thanked them for their work.

Melissa could engage in an intellectual conversation about the latest scholarship in the area of mitigation and sentencing and also talk at length and with authority about the latest personnel moves of the Tampa Bay Buccaneers. Melissa loved Def Leppard and Public Enemy. When she had the rare quiet

minute to herself you could find her enjoying her lunch with a copy of the New Yorker. Over the past year she became a devoted fan of the HBO series *The Wire*. When a member of the office was going through a tough spell, Melissa was there with a kind word and a helping hand. Hers was the calming voice that provided comfort to the soul.

She also loved the outdoors. Many of us remember getting text messages from her during her vacations. "Hey, I'm kayaking!" "Arizona is so beautiful this time of the year." "We have to go snowboarding soon." "I'm scalloping. Never knew this could be so fun."

When someone as special and dynamic as Melissa leaves this world in such a sad and untimely fashion, it's only natural for our hearts to ache. Upon the news of her death our office received hundreds of e-mails and phone calls expressing condolences from defense attorneys, prosecutors, investigators, and former clients.

Melissa was a valued member of our family and now she is gone. However, we know that Melissa would not want us to be sad. She would want us to remember not how she died but rather how she lived. She would want us to remember how she came to the office each day with one primary goal, to be an advocate for those without a voice. She would want us to remember her zest for life. She would want us to remember the countless e-mails, text messages, and phone calls that she sent to family, friends, and coworkers that were daily expressions of her love. Most of all she would want us to remember the ultimate lesson of her life: everyone has a story that deserves to be heard. Her story was one of professionalism, dedication, love, and compassion. We were blessed that we had the chance to witness it. We miss you dearly, Missy. You left the world a better place.

## BEGAY, JOHNSON, AND BEYOND:

### THE SUPREME COURT CONTINUES CLARIFYING THE CATEGORICAL ANALYSIS

By Tim Henry, Assistant Federal Public Defender  
District of Kansas

By the time this article is published, it is likely we will have received, or be close to receiving the decision in *Johnson v. United States*, cert. granted, 129 S.Ct. 1315 (2009), decision below, 528 F.3d 1318 (11<sup>th</sup> Cir. 2008), on the issue of whether Florida's battery statute can qualify as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (ACCA).

Johnson had been convicted of simple battery, enhanced to a felony due to a prior conviction, which was later used as an ACCA predicate conviction. The record did not establish this battery was anything more than simply an "unwanted touching," and the Florida Supreme Court had previously held physical force or violence was not a necessary element of the Florida battery statute. In other words, Florida has taken the position that a simple "Newtonian" touching qualifies as battery. Can such a conviction qualify as a predicate "violent felony" for purposes of the ACCA? The federal circuit courts of appeal are split over this issue. Compare *United States v. Griffith*, 455 F.3d 1339 (11<sup>th</sup> Cir. 2006); *United States v. Nason*, 269 F.3d 10 (1<sup>st</sup> Cir. 2001); *United States v. Smith*, 171 F.3d 617 (8<sup>th</sup> Cir. 1999) ("Newtonian" touching sufficient); with *United States v. Hays*, 526 F.3d 674 (10<sup>th</sup> Cir. 2008); *Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> Cir. 2003); *United States v. Belless*, 338 F.3d 1063 (9<sup>th</sup> Cir. 2003) (true physical force or violence required).

Under both the Armed Career Criminal and Career Offender enhancements,<sup>2</sup> there are two (some,

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<sup>2</sup> For purposes of simplifying this article, the focus has remained upon the career offender (§ 4B1.2(a)) and armed career criminal (18 U.S.C. § 924(e)(2)(B)) enhancements, although its analysis applies as well to

including this author, would argue three)<sup>3</sup> avenues for a prior conviction to qualify. Either the prior conviction's statute "has as an element the use, attempted use, or threatened use of physical force against the person of another;" or "is burglary []<sup>4</sup>, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Under the categorical approach established in *Taylor v. United States*, 495 U.S. 575 (1990), we are to examine only the statutory elements of the underlying offense of conviction. An exception called the "modified" categorical approach arises where the statute 1) is overly broad in that it contains multiple definitions that encompass both violent and nonviolent crimes; and 2) is divisible into multiple element sets or subparts. See discussion regarding *Zuniga-Soto*, *infra*.

If the "modified" categorical approach were to apply, sentencing courts can view what are called *Shepard* materials. See *Shepard v. United States*, 544 U.S. 13 (2005). They include the charging document pleaded to, the written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge **to which the defendant has assented**. *Shepard*, 544 U.S. at 16 (emphasis supplied). Yet,

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U.S.S.G. § 2K2.1 (firearms' guideline), and §2L1.2 (illegal reentry guideline).

<sup>3</sup> These avenues are called "element of force," "enumerated offense," and residual "otherwise" clause.

<sup>4</sup> "[O]f a dwelling" in the context of the Guidelines' career offender enhancement of U.S.S.G. § 4B1.2(a)(2).

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even with this exception, the underlying facts of the predicate conviction are never to be considered. The “conduct” to be examined is not the defendant’s underlying conduct, but the conduct that is described in the statutory elements being examined. The *Shepard* materials are only to be used to determine under which part of a divisible statute the defendant was convicted.

The two initial Supreme Court decisions to apply the categorical approach (*i.e.*, *Taylor* in 1990 and *Shepard* in 2005) dealt with the “enumerated offense” analysis, and not the “element of force” or residual “otherwise” clause analyses. The “enumerated offense” analysis permits the use of *Shepard* materials from one’s prior conviction under the “modified” categorical approach to determine whether the prior offense met the generic and contemporary meaning of the enumerated offense in question. Thus, for fifteen years, sentencing courts were given the impression *Shepard* materials could always be considered in determining whether the aforementioned enhancements were to apply. It is only within the past year or so that this misunderstanding and misuse of the modified categorical approach has come to light, and its application becoming more limited. It is anticipated future Supreme Court’s decisions, including the pending decision in *Johnson*, will bring this issue more into focus for sentencing courts and those practicing before them.

Application of the categorical approach should, by now, be ingrained into our daily sentencing practice. Since the *Shepard* decision in 2005, the Supreme Court has continued to address its application. *See e.g.*, *James v. United States*, 550 U.S. 192 (2007); *Begay v. United States*, 128 S.Ct. 1581 (2008); *Chambers v. United States*, 129 S.Ct. 687 (2009); and now *Johnson v. United States*, *cert. granted*, 129 S.Ct. 1315 (2009). *Begay*, of course, was the watershed decision that severely limited the sentencing courts’ application of the career offender and armed career enhancements in the context of the residual “otherwise” clause analysis. Yet, like many bad habits that are developed over time, sentencing

courts have been slow to differentiate between the aforementioned three analyses, or to embrace the true scope decisions such as *Begay*, *Chambers*, and hopefully *Johnson* have on the federal sentencing landscape.

For example, the Tenth Circuit recently broke with its sometimes inconsistent precedent when it decided *United States v. Zuniga-Soto*, 527 F.3d 1110 (10<sup>th</sup> Cir. 2008). There, the Tenth Circuit held the modified categorical approach (and the use of *Shepard* materials) can never apply under the “element of force” analysis. Although the other analyses (*i.e.*, “enumerated offense” and residual “otherwise” clause) permit the modified categorical approach, that approach can only be invoked when the overly broad statute in question is divisible into multiple element sets or subparts. The focus is never on a subjective inquiry into the facts of the case, but to determine under which part of the statute the defendant was convicted. *See e.g.*, *United States v. Hays*, 526 F.3d 674, 676 (10<sup>th</sup> Cir. 2008). If the statute is not so divisible, the court is not permitted to go behind the statute to use *Shepard* materials. As the Eighth Circuit held, “When a statute is broadly inclusive, but contains no alternatives in its elements, we must apply the traditional categorical approach, and application of the modified categorical approach is inappropriate.” *United States v. Boaz*, 558 F.3d 800, 808 (8<sup>th</sup> Cir. 2009); *accord United States v. Gamez*, 577 F.3d 394 (2<sup>nd</sup> Cir. 2009).

Beginning in 2007, the Supreme Court decided in rapid succession *James*, *Begay*, and *Chambers*. All three decisions were under the residual “otherwise” clause analysis. Even though the Supreme Court in *Begay* found the offense of DUI did “present a serious potential risk of physical injury to another,” that was not enough for the ACCA’s “violent felony” enhancement to apply. The Supreme Court found the residual clause’s examples of burglary, arson, extortion, or crimes involving the use of explosives “should [be] read [] as limiting the crimes that clause (ii) covers to crimes that are roughly similar **in kind, as well as in degree of risk posed**, to the examples themselves.” *Begay*, 128 S.Ct. at 1585 (emphasis

supplied). The Court in *Begay* found the felony DUI conviction differed from the example crimes “in **at least** one pertinent, and important, respect. The listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.” *Id.* at 1586, quoting *United States v. Begay*, 470 F.3d 964, 980 (2006) (J. McConnell, dissenting) (emphasis supplied). By using the term “at least,” the Supreme Court left open the possibility other qualifying factors could further narrow the application of the residual “otherwise” clause.

Such further narrowing occurred in *United States v. Polk*, 577 F.3d 515 (3<sup>rd</sup> Cir. 2009). There, the Third Circuit specifically disagreed with the Tenth Circuit’s position in *United States v. Zuniga*, 553 F.3d 1330 (10<sup>th</sup> Cir. 2009), that possession of a shank in prison is a violent felony for ACCA purposes. The Third Circuit found mere possession, whether it be a concealed firearm in public or a shank in prison, was not a “crime of violence” for career offender purposes because the *Begay* criteria require the crime to be active, rather than passive, if it is to be “roughly similar in kind, as well as in degree of risk posed.” Thus, not only must offenses under the residual “otherwise” clause be “purposeful, violent and aggressive,” they must also be “active” crimes in the Third Circuit. Not only did the Third Circuit create a circuit split in *Polk*, similar splits presently exist for “flee and elude” offenses,<sup>5</sup> with more splits likely to arise in the future.

Having addressed the “enumerated offense” analysis in *Taylor* and *Shepard*, and the residual “otherwise” clause in *James*, *Begay* and *Chambers*, the Supreme Court is now set to rule on the “element of force” analysis with its pending decision in *Johnson*.

One issue in *Johnson* is whether federal courts are bound by a state’s highest court’s interpretation of

its statute in interpreting the ACCA’s violent felony definition. Under the residual clause analysis in *James*, *supra*, the Supreme Court found the Florida Supreme Court’s narrow interpretation of its attempted burglary statute was critical in permitting it to find such a conviction qualified as an ACCA predicate after initially finding Florida’s attempted burglary statute was overly broad.

Yet, in analyzing the Florida battery statute under the “element of force” analysis, it seems unlikely the Supreme Court will abandon its desired principle of uniformity from its *Taylor* decision in the application of the ACCA enhancement. To this author, the “element of force” analysis, whose sole focus is upon the statutory elements, requires a more uniform definition than even the “enumerated offense” analysis that established the uniform practice of looking to the generic and contemporary meaning of a particular offense. On the other hand, the residual “otherwise” clause’s focus on the conduct described in the statute’s elements appears more receptive (as was the case in *James*) to the individual state’s interpretation of their respective laws in determining whether that conduct “presents a serious potential risk of physical injury to another.”

Ultimately, the holding in *Johnson* will most likely be remembered for the other issue the Supreme Court must decide, *i.e.*, whether the ACCA’s “element of force” definition extends to circumstances of simple “Newtonian” touching under Florida’s battery statute, especially where the Florida Supreme Court has interpreted the statute as not requiring a finding of physical force or violence. If the Court holds the term “physical force” means something more than simple touching (which this author suspects will happen), it is uncertain whether further explanation will be given as to what constitutes a violent felony under the “element of force” analysis. The Court may simply find mere “Newtonian” touching to be insufficient to qualify, and leave for another day future cases to flesh out a more complete meaning.

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<sup>5</sup> Compare, *e.g.*, *United States v. West*, 550 F.3d 952 (10<sup>th</sup> Cir. 2008), with *United States v. Harrison*, 558 F.3d 1280 (11<sup>th</sup> Cir. 2009).

Finally, if Florida's battery statute fails to qualify under the "element of force" analysis, it is unclear whether the Supreme Court will then proceed to analyze *Johnson* under the residual "otherwise" clause. If it does, as in *Chambers*' failure-to-report

escape scenario, it is likely mere "Newtonian" touching will also fail to meet the "purposeful, violent, and aggressive" conduct standard established in *Begay*.

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## **MAY THE (PHYSICAL) FORCE BE WITH YOU: CHALLENGING AN ACCA "VIOLENT FELONY"**

*By Lisa Call, Assistant Federal Defender  
Middle District of Florida*

Editor's Note: The Supreme Court in *Johnson v United States*, 129 S.Ct. 1315 (2009), has another opportunity to limit the scope of the Armed Career Criminal Act. This article by Lisa Call, who argued the case before the Supreme Court, is an in-depth look at the facts, issues, and arguments raised in the case.

The Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), provides for a draconian sentencing enhancement in certain firearms cases. Absent a finding that a defendant qualifies as an armed career criminal, the maximum sentence for possession of a firearm by a convicted felon is 10 years' imprisonment and a term of supervised release of up to three years. If the Court finds that the defendant has the necessary prior convictions, the sentence instead becomes a mandatory minimum 15 years' imprisonment, with a maximum potential term of life imprisonment, and a term of 5 years' supervised release.

The ACCA sentence is triggered if a defendant "has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. §924(e). A 'violent felony' means "any crime punishable by imprisonment for a term exceeding one year, . . . that— (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

Over the last 10 years, the number of gun cases filed and the number of ACCA sentencing imposed have both increased greatly. In Fiscal Year 1998, there were 2,480 defendants sentenced under U.S.S.G. § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and 194 ACCA sentences imposed. In Fiscal Year 2008, there were 6,797 defendants sentenced under U.S.S.G. § 2K2.1 and 653 ACCA sentences imposed.

Given the increase in gun cases filed, creative defense counsel have brought more challenges to the ACCA statute. In the last few terms, the Supreme Court has addressed the ACCA statute on four separate occasions. *Shepard v. United States*, 544 U.S. 13, 15 (2005), *James v United States*, 550 U.S. 192 (2007), *Begay v United States*, 128 S.Ct. 1581 (2008), *Chambers v United States*, 129 S.Ct. 687 (2009). However, each of these cases addressed only the second subprong of the violent felony definition.

In *Johnson v United States*, 129 S.Ct. 1315 (2009), the Supreme Court granted certiorari to address the first subprong of the violent felony definition to determine when a prior conviction satisfies the requirement of "having as an element the use ... of physical force." Congress does not define the phrase "physical force" in ACCA and the lower courts have split on defining what is necessary for to satisfy this requirement.

### Background of *Johnson*

Mr. Johnson pleaded guilty to possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the government introduced three prior convictions to enhance Mr. Johnson's sentence pursuant to the ACCA. Mr. Johnson only challenged one prior conviction - his 2002 Florida battery conviction - on the basis that it was not a violent felony within the meaning of the ACCA.

Simple battery is ordinarily a misdemeanor in Florida, but Mr. Johnson's 2002 simple battery charge was enhanced to a third-degree felony because he had sustained a prior conviction for simple battery in 1989. In Florida, simple battery occurs when a person "[a]ctually and intentionally touches or strikes another person against the will of the other; or [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). "[A]ny intentional touching, no matter how slight, is sufficient to constitute a simple battery." *State v. Hearn*, 961 So. 2d 211, 218-19 (Fla. 2007). Just touching an object that has an "intimate connection" with another person can constitute battery under Florida's statute. *Nash v. State*, 766 So. 2d 310 (Fla. App. 2000) (victim's closely-held purse); *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001) (victim's vehicle). The Florida Supreme Court has held that the underlying conduct required for simple battery and felony battery "is identical," and that when felony battery is based on the commission of simple battery by touching, it does not have as an element "the use or threat of physical force or violence against any individual." *Hearn*, 961 So. 2d at 214, 218-19.

The information (charging document) filed in Mr. Johnson's 2002 battery case charged that he "did actually and intentionally touch or strike [the victim] against the will of said person." When he pleaded guilty, he merely stipulated that there was "a factual basis" for the charge. During the change-of-plea and sentencing hearing in state court, there was no mention of how the offense was committed, and Mr. Johnson made no admissions in that regard. The written judgment reflected a conviction for "Felony

Battery (one prior)."

The state court records introduced by the government at Mr. Johnson's federal sentencing hearing did not prove that Mr. Johnson had been convicted of anything other than battery by unwanted touching. Mr. Johnson argued that a mere unwanted touching did not constitute "physical force" as that term was intended by Congress to be used in § 924(e)(2)(B)(i) and that it did not involve a serious potential risk of physical injury. Mr. Johnson also argued that any holding purporting to equate touching with physical force would be directly contrary to the Florida statute, which prohibits touching or striking.

When determining whether a prior conviction qualifies as a "violent felony," the sentencing court is limited to looking only at "the fact of conviction and the statutory definition of the prior offense." *United States v. Taylor*, 495 U.S. 575, 602 (1990). If a prior conviction was under a statute that could include both conduct that would qualify as a predicate and conduct that would not qualify, the later court determining the character of the prior conviction "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit findings of fact by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 15 (2005). This analysis does not allow the sentencing court to consider the arrest and booking sheet from the prior conviction.

In Mr. Johnson's case, the original Pre-Sentence Investigation Report contained a statement, from the arrest report, which purported to provide the "circumstances" of the prior conviction. Upon Mr. Johnson's objection, the government agreed that it could not prove any other facts, apart from the fact of conviction. The "circumstances" of the underlying case were therefore removed from the PSR. Under Eleventh Circuit precedent, "a sentencing court's findings of fact may be based on undisputed statements in the PSI. Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact. However, challenges to the facts contained in the PSI must be

asserted with specificity and clarity. Otherwise, the objection is waived.” *United States v. Bennett*, 472 F.3d 825, 832 (11<sup>th</sup> Cir. 2006). Absent Mr. Johnson’s objection to the statements taken from the arrest report, these “circumstances” would have been deemed admitted and it is likely that the government would argue that the sentencing court could rely on those to find that the offense qualified as a violent felony.

The government argued that under Eleventh Circuit precedent, the Florida crime of battery always constitutes a crime of violence. In support of this argument, the government cited *United States v. Glover*, 431 F.3d 744, 749 (11<sup>th</sup> Cir. 2005), which holds that battery on a law enforcement officer is a crime of violence under the career offender guideline, U.S.S.G. § 4B1.1. As with the violent felony definition in § 924(e)(2)(B)(i), a prior conviction is a “crime of violence” under U.S.S.G. § 4B1.1 if it is a felony that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” U.S.S.G. § 4B1.2(a)(1).

The district court overruled Mr. Johnson’s objection to the ACCA enhancement based on the government’s arguments and the probation officer’s position that “[o]ne cannot physically touch or be physically touched without the use of force” and that “touching someone against their will does in fact present a serious potential risk of physical injury.” The district court sentenced Mr. Johnson to 185 months’ imprisonment, five months more than the fifteen-year mandatory minimum required by the ACCA

### **Eleventh Circuit appeal**

Mr. Johnson appealed, again contesting the finding that a battery by touching had as an element the use of physical force and arguing that the intervening Florida Supreme Court decision in *Hearns* was binding on federal courts, thereby abrogating Eleventh Circuit precedent holding that simple battery under Florida law necessarily involves the use of physical force. Mr. Johnson also argued that the

Florida crime of battery by mere non-consensual touching did not involve conduct that presents a serious potential risk of physical injury to another.

In affirming Mr. Johnson’s sentence, the Eleventh Circuit ruled that its precedent, holding the Florida offense of battery by touching *or* striking is a crime of violence, was not undermined by the Florida Supreme Court’s ruling in *Hearns*. “The issue of whether the federal Armed Career Criminal Act applies to the state law defined crime of battery is a federal question, not a state one. For that reason, nothing that the Florida Supreme Court said in *Hearns* about that state’s violent career criminal statute binds us[.]” the Court stated.

### **Questions Presented to Supreme Court**

The Supreme Court granted review on two of the questions presented. In the first question, it is considering how to resolve the circuit split on whether the physical force required in the definition of a violent felony is a *de minimis* touching in the sense of “Newtonian mechanics,” as found by the Eleventh Circuit, or whether the physical force required must be in some way violent in nature. Second, the Court is addressing Mr. Johnson’s argument that when a state’s highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a “violent felony” under the federal Armed Career Criminal Act.

Mr. Johnson argued that the phrase “physical force against the person of another,” as used in the definition of “violent felony” in the ACCA, requires violence and aggression likely to cause a serious potential risk of physical injury, a standard that is not satisfied by the *de minimis* contact which could support a conviction for simple battery under Florida law. Since the statute does not define “physical force,” Mr. Johnson argued that the Court should apply the plain meaning of the words and give the phrase its ordinary and common usage to require that something more than mere unwanted contact. Mr.

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Johnson offered numerous dictionary definitions to support the interpretation of the physical force clause to only include violent, aggressive conduct likely to create a serious potential risk of physical injury. The edition of Black's Law Dictionary ("Black's") in effect when the ACCA was enacted defined "physical force" as: "Force applied to the body; actual violence." Black's Law Dictionary 1032 (5<sup>th</sup> ed. 1979). The current edition defines physical or actual force as: "Force consisting in a physical act, esp. a violent act directed against a robbery victim" and force as: "Power, violence, or pressure directed against a person or thing." Black's Law Dictionary 673 (8th ed. 2004).

Further, Mr. Johnson argued that state courts, being the ultimate expositors of state law, define the elements of their criminal offenses. Federal courts are bound by the construction placed on a state's statutes by the courts of that state. Therefore, when the Florida Supreme Court categorically held that the Florida battery statute does not have as an element the use or threat of physical force or violence when charged under the touching prong, that construction of that statute became binding on Federal courts.

As we await the final decision from the Supreme Court, the *Johnson* issues continue to arise, not only within the ACCA but also within the "crime of violence" definitions in U.S.S.G. § 4B1.1, the career offender guideline, and U.S.S.G. § 2L1.2, the illegal reentry guideline. The determination of whether a defendant has a prior crime of violence or violent felony impacts the sentencing determinations greatly. In the ACCA context, the determination strips the sentencing judge of any real consideration of the 18 U.S.C. § 3553 factors since the statute forbids any sentence below the minimum mandatory of 180 months (absent substantial assistance). It is necessary to review the prior statute, making sure to consider the version in effect at the time of the defendant's conviction, and the state case law interpreting its elements. The challenge requires us to hold the government to its strict burden by requiring production of only those documents approved in *Shepard*, and not looking to the 'facts' alleged in arrest reports. The characterization of a prior conviction is an important challenge to be made during the sentencing but gives us the opportunity to be a true advocate, looking to both legal and factual issues.

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## A TRIBUTE TO NANCY BERGESON

*Editor's note: The following tribute is based on news reports and Nancy's obituary, which appeared in the Portland Oregonian newspaper, and on the memories of her colleagues and friends. The photograph is by Mitzi Miller of the Oregon FPD office.*

The Federal Defender community tragically lost a dedicated colleague last November 24, when Nancy Bergeson was found slain in her Portland, Oregon home. She had been an assistant federal public defender in Oregon since 1991. Her colleagues remember her as a champion and a hero. Honoring her at a dinner of the Oregon



Criminal Defense Lawyers, Federal Defender Steven Wax described how Nancy's zest for life gave her the unique ability to fight as hard as anyone for her clients yet gain not only respect from her adversaries but also their affection. Her death was "a devastating loss," said Steve Sady, the chief deputy federal public defender in Portland.

Nancy was born November 30, 1951, in Logan, Utah, to Garth and Marian Bergeson. The family settled in Newport Beach, California.

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In 1969, Nancy returned to Utah, where she obtained degrees in special education and law from the University of Utah. She then set out to champion the causes of her clients. “Nancy was unique and wonderful in her commitment to defending her clients and the Constitution,” Sady said.

Nancy compiled many great achievements for her clients, some making important law, some barely noticed beyond her clients’ family and friends. One case that reflected her dedication and determination is a Ninth Circuit opinion titled – truly – *United States v. Bergeson*. In that case, the government subpoenaed Nancy to testify against her client after he allegedly skipped off pretrial release. She refused to testify because she wanted to continue representing the client when he was re-arrested; the government did not really need her testimony. The district judge agreed that the governmental interests did not warrant interference with continuity of counsel. The government appealed. In a decision that is now often cited in cases involving the need to protect the attorney-client relationship from government interference, the Ninth Circuit issued a strong opinion defending the decision to keep the government out of indigents’ attorney-client relationships, including: “Though an indigent is not entitled to counsel of his choice, the government is not entitled to force an indigent’s assigned lawyer out of the case;” “A client’s confidence in his lawyer, and continuity of the attorney-client relationship, are critical to our system of justice;” and “Issuing subpoenas to lawyers to compel them to testify against their clients invites all sorts of abuse.”

Nancy’s colleague Steve Sady says, “The postscript on the *Bergeson* case is classic Nancy. When we received the opinion, I was surprised to see she was listed as the defendant in the title. Properly, I thought the case should have been *In re Bergeson* since the litigation occurred in the context of *United States v. her client*. When I told her I would contact the Circuit and the publishers to fix it, she refused. I told her, but people might misunderstand and think

you were a criminal defendant. She looked at me with mischief in her eyes and said, ‘Don’t you believe in the presumption of innocence ... we won!’”

Throughout her life, Nancy was always willing to charge head-on into the toughest of situations. She was bold and passionate in everything she did; arguing challenging issues with equal fervor both in the courtroom and at the dinner table. Well-renowned as an incredible trial attorney, Nancy believed that the true test of a justice system was how it treated the most vulnerable. Nancy selflessly and tirelessly fought on behalf of the powerless and less fortunate. She excelled with a keen sense of humor, never afraid to laugh at herself, infectiously bringing out laughter in all of us. Later in life, Nancy discovered a passion for athletics through the sport of dragon boat racing. She traveled the world to Germany, Australia, Malaysia and Prague, winning multiple awards in international competitions.

Nancy is survived by her daughter, Jamie, who was her pride and joy. Nancy embodied the very best aspects of motherhood, raising Jamie with unconditional love, sound judgment and advice, and a raw enthusiasm for life.

Her family said that, in reality, Aunt Nance was mother to many, as she acted as a confidant to and supporter of her nieces and nephews, neighbors and many of Jamie’s friends. She is also survived by her parents, Marian and Garth; siblings Garth, James and Julie; nephews, Alex, Max, Tim and Hayden; and nieces, Katie, Shannon, Allison, Kimberly, Andrea and Daniella. Her family and friends will miss her biting wit, irreverent sense of humor and irrepressible spirit. Life will not be the same without her—a hand filled with a Starbucks mocha, a toothpick in the corner of her mouth and her arms dancing to whatever music she could find. In lieu of flowers, her family suggested that remembrances could be made in Nancy’s name to The Forest Park Conservancy. ([www.forestparkconservancy.org](http://www.forestparkconservancy.org)).

# DEFENDING ILLEGAL REENTRY CASES

By Miguel Noguera, Assistant Federal Public Defender  
Southern District of Texas

It recently has been widely reported in the press that the Southern District of Texas has become the most active federal district prosecuting illegal reentry cases in the country. Southern Texas is not alone, however. Reentry cases are increasingly common throughout the United States. So, it should come as no surprise that your next court appointment might be one of these cases.

The purpose of this short article is to guide you through the very basic issues our Federal Defender's Office often encounters during the defense of reentry cases and hopefully assist you in obtaining a favorable result for your client. The article is limited to defenses, and not to sentencing, which in itself is another hot topic.

## I. Elements of Illegal Reentry Cases Under 8 U.S.C. § 1326

In order for an individual to be found guilty of illegal reentry, the Government must prove beyond a reasonable doubt the following four elements established by the Fifth Circuit Pattern Jury Instructions:

1. That the defendant was an alien at the time alleged in the indictment;
2. That the defendant had previously been denied admission [excluded] [removed] [deported] from the United States;
3. That thereafter the defendant knowingly entered [was found in] the United States; and
4. That the defendant had not received the consent of the Attorney General of the United States to apply for readmission to the United States since the time of the defendant's

previous deportation.

The Supreme Court held in *Almendarez-Torres v. United States*, 118 S. Ct. 1219 (1998), that proof of the defendant's commission of a felony or an "aggravated" felony prior to deportation is not an element of the offense but is a punishment provision in addressing recidivism. So, although there might be an allegation related to criminal history in the indictment, it is not an element of the offense. It is only a matter for sentencing.

According to the Fifth Circuit, specific intent is not an element of this crime; it is a general intent crime. *United States v. Berrios-Centeno*, 250 F.3d 294, 297-98 (5th Cir. 2001); *United States v. Guzman-Ocampo*, 236 F.3d 233 (5th Cir. 2000). This means that the defendant does not have to intend to break the law; he must only intend to do the acts that constitute the law violation, *i.e.*, enter or be found in the United States.

## II. The Penalties

The penalties for this offense could be up to two (2) years under § 1326(a), up to ten (10) years under § 1326(b)(1) if subsequent to a conviction of three or more misdemeanors involving drugs, crimes against a person, or both, or a non-aggravated felony; and up to 20 years if the defendant was removed subsequent to conviction of an aggravated felony under 1326(b)(2).

Whether a prior offense is an "aggravated felony" is determined under 8 U.S.C. § 1101(a)(43). There are many crimes on this list that surprise both attorneys and defendants. So, it is always advisable to check this section. Even though the defendant's prior criminal history may only be used at sentencing, the attorney should file a motion to strike the allegation of a prior crime if research shows that the defendant's

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prior crime does not qualify as a felony or “aggravated felony” under these provisions. It makes a difference in terms of the statutory maximum about which the defendant would be admonished at a arraignment.

### III. Defenses and Trial or Pre-Trial Considerations

#### A. No Valid Proof of Deportation

In *United States v. Wong Kim Bo*, 466 F.2d 1298 (5th Cir. 1972), the Fifth Circuit held that in order for the Government to prove a charge under § 1326, at the very least, the Government must present actual proof of deportation in the form of an executed warrant of deportation. An executed warrant of deportation is a warrant ordering any officer of the United States Immigration and Naturalization Service to deport or remove an individual from the United States, based upon a final order from (1) an immigration judge, (2) a district director, (3) the Board of Immigration Appeals, or (4) a United States Article III Judge or Magistrate Judge. The warrant contains a second page that should have the picture of your client, his/her right thumb fingerprint, the client’s signature as well as the departure witness’ signature, and a notation by the removing officer stating the date and manner of removal (*i.e.*, by foot at port of entry, or by plane). Under *Wong Kim Bo*, without the executed warrant of deportation, the Government cannot prove its case.

#### B. Failure to Charge Attempted Entry Into The United States

If a defendant was trying to enter the United States, but was never able to cross the boundary out of the sight and control of officials, he did not commit the crime of illegal reentry. Rather, he committed the separate offense of *attempted* illegal reentry. For example, in *United States v. Pacheco-Medina*, 212 F.3d 1162 (9th Cir. 2000), the defendant climbed the international boundary fence that separates the United States and Mexico. Responding to surveillance, a border patrol agent arrived within seconds at the fence just as Mr. Pacheco-Medina was landing in the parking lot of the United States Customs compound.

He ran and the agent gave chase, never losing sight and eventually apprehending him. He confessed and was charged with illegal reentry. He was convicted at trial. On appeal, the Ninth Circuit entered a judgment of acquittal because Mr. Pacheco-Medina had never been free from official restraint and therefore had only committed the uncharged crime of attempted reentry.

As noted, attempted illegal reentry is a separate offense. See *United States v. Martinez-Espinoza*, 299 F.3d 414, 417-18 (5th Cir. 2002). An attempt receives the same punishment, but the charge must be stated as an attempted reentry. Otherwise, the defendant should be acquitted.

On the other hand, not every effort to enter the United States is an attempted illegal reentry. In *United State v. Morales-Tovar*, 37 Fed. Supp. 2d 846 (W. D. Texas), the defendant was charged with attempting to enter the United States after having been deported. He had approached the Del Rio Port of Entry with the intention to find out how to replace his alien resident card. At trial, the evidence showed that Mr. Morales-Tovar never gave a false name, did not present false document, did not lie about his immigration status, nor did he attempt to elude inspection by immigration officials. Moreover, the senior inspector in charge of the case was aware that there were waivers that would allow someone who has been previously deported to return the United States legally. The bottom line was that Mr. Morales-Tovar was not deceptive and just wanted to come back legally. The district court entered a judgment of acquittal. The teaching of this case is that an attempted illegal reentry involves an effort to evade the immigration law requirements, not an honest effort to inquire.

#### C. Citizenship by Birth

Article 14, Section I of the United States Constitution states in part that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

As incredible as it may sound, we have encountered many individuals who are United States citizens by birth, born in one of the fifty states, commonwealths, or possessions. Sometimes, the defendants honestly were unaware that they had been born on this side of the border (because they simply assumed that they were from Mexico, where they had been raised). Others falsely claimed to be in the country illegally when they had an encounter with immigration authorities. Typically such defendants lied about his/her citizenship in order to avoid apprehension by other law enforcement agencies for what that individual perceives to be a more serious problem (*e.g.*, criminal charges pending). Our experience has been that providing the Assistant U.S. Attorney with a copy of the client's birth certificate and access to the parents or guardians, plus school records, will be sufficient evidence to support dismissal of all charges. Occasionally, we have been forced to go to trial on this issue; we repeatedly have had success in convincing juries that there is at least a "reasonable doubt" about whether our clients were born in the United States. A dismissal or acquittal will not necessarily solve the client's predicament with the civil immigration authorities but will avoid the greater harm of being branded a convicted felon.

A related defense is that a defendant, while born abroad, has a valid claim to "derivative" citizenship – through his U.S. citizen parent(s). That issue is discussed below.

#### D. Rio Rico Defense

In the history of Texas during the early twentieth century, an anomaly occurred in the distribution of land between Mexico and the United States. By way of diverting the flow of the Rio Grande river, a portion of Texas land ended on the other side of the Rio Grande. Decades passed and people born on what used to be U.S. soil thought that they were born in Mexico and received their birth certificates accordingly (the birth certificates usually state that he/she was born in "Rancho El Horcon, Tamaulipas, Mexico"). In 1978, the Board of Immigration Appeals recognized that a person born in

Rio Rico was in fact a United States citizen. *See Matter Of Cantu*, 1978 WL 36395 (BIA). Although this type of situation is not common, be alert to the possibility of this defense. *See Andy Noguera, Lessons Learned From Rio Rico, Mexico. Or Is It Texas?*, VOICE FOR THE DEFENSE, Vol. 29, No. 10 (2001).

#### E. Derivative Citizenship

Pursuant to 8 U.S.C. § 1401(c)-(h), an individual born outside the United States may derive citizenship from his parents or grandparents who were either born or naturalized in the United States.

It is very common for our clients not to realize that they may derive their citizenship from their parents or grandparents. In order to establish this defense, it is imperative to interview the parents or grandparents and establish the time that they lived in the United States before and after the birth of your client. This is important because 8 U.S.C. § 1401 establishes time periods of residence that may allow your client to raise the defense. These requirements have also changed several times during the past seventy years. These requirements will be determined by the date of birth of the defendant or, in the case of naturalized parents, by the date of naturalization. All of these requirements can be found in helpful charts located in the appendices to Ira J. Kurzban, *Immigration Law Sourcebook* (published by American Immigration Law Foundation).

In your investigation of a derivative citizenship claim, you will need to obtain school records, baptismal certificates, social security and census records, payment stubs, electric and water bills, mortgage payments, and similar documents to establish the residency of your client's parents and/or grandparents in the United States.

Some of the key factors you should investigate to establish your client's defense include the following:

1. How your client's parents and/or grandparents

obtained U.S. citizenship;

2. The length of time your client's parents and/or grandparents resided in the United States prior to your client's birth;

3. Whether your client was born out of wedlock, was legitimated, or was adopted;

4. Whether only one or both of your client's parents became United States citizens; and

5. Whether your client's parents separated or divorced before a naturalized United States parent obtained citizenship.

If you are able to document enough information to establish the time frames of residence required by § 1401, the Government will often dismiss the indictment. Again, the dismissal of the charges will not necessarily solve your client's civil immigration troubles, but it will avoid a felony conviction.

### F. Motion To Dismiss Indictment

#### 1. United States v. Mendoza-Lopez

In 1987, the Supreme Court held in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), that a prior administrative decision such as a deportation must comply with due process in order for that decision to be used as the basis for a later criminal prosecution. This decision gives the attorney in a criminal immigration prosecution a means to "collaterally attack" the prior order of removal used for the § 1326 prosecution. The Supreme Court set out various requirements for collateral attack which were later codified at 8 U.S.C. § 1326(d).

There are several bases to argue that a prior removal violated due process. One basis would be that your client was removed when the law did not permit his removal. This situation occurs, for example, in cases where the defendant, a legal permanent resident, was removed as an "aggravated

felon" under 8 U.S.C. § 1227 for a crime that the courts have subsequently clarified is *not* an aggravated felony, such as felony DWI. Another basis would be that your client was not permitted to apply for discretionary relief from removal that would have been available to him, such as cancellation of removal (8 U.S.C. § 1229(c)) or a "212(h) waiver" under 8 U.S.C. § 1182(h). There are a number of bases to avoid removal, and you will need to consult an immigration treatise or civil immigration attorney on this issue. One final due process argument relates to removals *in absentia*. If your client was removed *in absentia*, you must check to make sure that he was given notice of the hearing. In order to explore these issues, request the opportunity to review your client's complete A-file and a copy of the recording of the deportation hearing to determine whether he/she received a fair administrative hearing. You may be surprised at the way things are handled in the immigration courts.

If you determine that there is a basis to challenge your client's removal, you may file a motion to dismiss the indictment and request a hearing. At the hearing, offer into evidence the audio-tape of the deportation proceeding (if it exists) and all of the relevant paperwork from the deportation proceeding to prove that a defect occurred. If the motion is denied, with your client's permission, proceed to a bench trial. Stipulate the facts and preserve the issue on appeal unless the Government is willing to offer your client a plea agreement which permits your client to preserve the issue on appeal.

On some occasions, the Government will agree with your analysis and dismiss the prosecution.

#### 2. INS v. St. Cyr

One very specific variation of the *Mendoza-Lopez* motions discussed in the previous paragraphs involves former § 1182(c) of Title 8, often referred to as "212(c) relief." Between 1996 and 2001, thousands of legal immigrants lost their legal status in the United States because they were convicted of a crime. Many had a right to request a second chance to

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keep their legal status through discretionary relief under 8 U.S.C. § 1182(c). However, in 1996, Congress first severely restricted then repealed § 212(c) effective in April 1997.

Between 1997 and 2001, numerous courts held that the restrictions and ultimate repeal of § 212(c) relief applied retroactively in that the repeal prohibited relief for legal permanent residents convicted of crimes before the repeal if immigration proceedings commenced after the repeal. *See, e.g., Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 307-09 (5th Cir. 1999). This changed in 2001 when the Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that the 1996 and 1997 amendments to § 212(c) did not apply retroactively to aliens convicted of crimes before the amendments when such aliens relied on the availability of § 212(c) relief in reaching a plea. This Supreme Court decision means that aliens deported for criminal convictions who would have been eligible for § 212(c) relief prior to that section's repeal remain eligible even after the repeal. A number of conditions apply to eligibility, including whether, for example, your client pled guilty to his prior charge or proceeded to trial. These issues require extensive research. The bottom line is that a *Mendoza-Lopez*/§ 1326(d) motion may be appropriate where your client should have had the opportunity to apply for § 212(c) relief but was denied that opportunity prior to *St. Cyr*.

You must be aware that all of these issues related to discretionary relief as described in this and the previous section have been foreclosed by the Fifth Circuit's decisions in *United States v. Lopez-Ortiz*, 313 F.3d 225 (5th Cir. 2002) and *United States v. Calderon-Peña*, 339 F.3d 320 (5th Cir. 2003). These cases hold that an immigration judge's failure to inform an eligible alien of his/her rights to apply for discretionary relief or to appeal does not render the deportation proceeding fundamentally unfair for due process purposes. In spite of *Lopez-Ortiz* and *Calderon-Peña*, there is still hope because there is a clear split in the circuits. *See, e.g., United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004); *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-50

(9th Cir. 2004). We hope that the Supreme Court takes up this issue once again in the near future.

Unless the Government is willing to allow your client to reserve the right to appeal these issues in a plea agreement, we suggest that you file a motion to dismiss (and admit that it is foreclosed in the Fifth Circuit) and then stipulate the facts at a bench trial in order to preserve this issue on appeal. You should submit the tape of deportation proceedings and argue that, had your client been given an opportunity to file for § 212(c) discretionary relief or some other form of discretionary relief, then he/she had a reasonable possibility of relief being granted, rendering that prior proceeding a violation of due process.

On the other hand, in cases where your client simply should not have been deported because the law did not permit deportation, or where there is a due process defect such as lack of notice, your *Mendoza-Lopez* motion is not foreclosed, and you may be successful in obtaining a dismissal.

### G. Statute of Limitations

Under 18 U.S.C. § 3282, a prosecution under § 1326 must be commenced within five years. When that five year period begins has been analyzed in a number of cases. A recent summary of those cases can be found in *United States v. Gunera*, 479 F.3d 373 (5th Cir. 2007). In that case and in prior decisions, the essential rule is that the statute of limitations "clock" begins running when immigration authorities discovered the illegality of your client's presence or, through the exercise of due diligence, should have discovered his illegal presence. In terms of your § 1326 case, this means that you will need to determine if Immigration authorities had prior notice of your client's presence. For example, did Immigration and Customs Enforcement file a detainer with a sheriff's office more than five years before the indictment was returned? Did your client essentially turn himself in by filing paperwork to try to obtain immigration benefits, disclosing his illegal return? These issues can be explored effectively by reviewing your client's full A-file.

### H. Venue

As the number of indictments under 8 U.S.C. § 1326 has increased in the past several months so have the number of dismissals for improper venue. What appears to be happening, at least in Texas, is that an alien is prosecuted by the state and sentenced to a term of imprisonment in the Texas Department of Criminal Justice (“TDCJ”). The Bureau of Immigration and Customs Enforcement (“ICE”) becomes aware of the alien when he is initially taken into state custody and files a detainer with the local county jail. The government does not commence its prosecution at that time. The alien serves his sentence and is eventually transported for release processing to a TDCJ unit located in a federal district other than the one in which the county jail is located. ICE then finds the alien again in the district where he is released and he is indicted in that district. Under these circumstances venue is improper in the district of release. The case should have been brought where the alien was first “found,” *i.e.*, where the county jail is located.

The offense of illegal reentry under 8 U.S.C. § 1326, which prohibits among other things a previously deported alien from being “found in” the United States without permission, is completed when the alien-defendant is first “found” in the United States by immigration authorities and identified as an illegal alien. *United States v. Alvarado-Santilano*, 434 F.3d 794, 798 (5th Cir. 2005). Venue, therefore, lies in the district in which the alien was initially found. *See United States v. Asibor*, 109 F.3d 1023, 1037 (5th Cir. 1997); *see also United States v. Pazzi-De Hoyos*, 2007 WL 2121994, at \*1 (5th Cir. July 25, 2007) (unpublished). The filing of an immigration detainer with a county jail in which the alien was being held on unrelated state charges is sufficient to constitute a “finding” of the alien by immigration authorities. *See United States v. Ramirez-Rodriguez*, 11 Fed. Appx. 894, 896 (9th Cir. 2001) (unpublished). If more than five years has passed between the time the alien was originally “found” and the return of the indictment based on the second, purported “finding,” the case will have statute-of-limitation problems.

It is not always easy, however, to discover this type of venue problem. The first detainer does not usually make its way to the A-File maintained by ICE, and provided to the defense in discovery. Thus the case agent may be unaware of the fact that the alien has already been found. Defense counsel needs to carefully scrutinize the client’s criminal history at the beginning of the case. If the client was last convicted in another district and has not been released since, defense counsel should contact the facility where the client was housed during the state prosecution to see if they have record of an ICE detainer being placed on the client. Moreover, an interview of the client focusing on when and where he has been interviewed by ICE may uncover a venue issue. Often, when confronted with the detainer, the government will dismiss the indictment.

This does not end the analysis, however. Dismissing the case on the basis of venue may mean that the client is simply deported – particularly if there is a statute-of-limitations defense. It may mean, on the other hand, that the client is transported to the proper district and prosecuted there. Counsel should consult with the client and decide based on the expected sentence, the current and potential forums, and the likelihood of deportation versus renewed prosecution whether it is in the client’s best interest to move to dismiss the case. Note that a guilty plea waives the non-jurisdictional venue issue. Also, note that raising the venue issue for the first time at trial – when defense counsel was on notice of the issue before trial – is improper and will constitute a waiver of the venue defense. *See United States v. Delgado-Nunez*, 295 F.3d 494 (5th Cir. 2002).

### I. Plea Bargaining

There are many offers that you can make to help your client’s situation, but very few “bargains” are actually struck in the absence of significant problems of proof in the Government’s case. Certain personal characteristics of your client may offer a basis for a negotiated dismissal, such as your client’s advanced age or health problems. One alternative you might consider proposing is a misdemeanor plea

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under 18 U.S.C. § 1325. The maximum penalty for this offense is six months and a fine not to exceed five thousand dollars.

The basic elements are: (1) defendant was an alien at the time of the alleged offense, and (2) the defendant (a) entered or attempted to enter the United States at a time or place other than as designated by immigration officers; or (b) eluded examination or inspection by immigration officers; or (c) attempted to enter or obtain entry into the United States by a willfully false or misleading representation or the

willful concealment of a material fact. This type of plea might be acceptable to the prosecutor when there are possible challenges to the Government's proof which do not rise to the level serious enough to obtain dismissal. As can be expected, you will have more success in negotiating when your client has few or no prior criminal convictions.

Best of all, a misdemeanor conviction for illegal entry should not be an impediment for your client's future attempts to return legally. Good luck!

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# NAFD MEMBERSHIP DUES

The dues year for the National Association of Federal Defenders runs from January 1 until December 31. Therefore, it's time to renew membership. These dues are used to give a voice to the federal defender community through activities such as participating as amici in important cases and to recognize the achievements of our colleagues. The dues are \$52 per year. If you paid dues in November or December 2009, those dues are credited towards 2010.

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