THE MIDDLE GROUND

Federal Bar Association - Middle District of North Carolina Chapter Volume 5, Issue 2 – October 2015

In This Issue:

Chapter Officers:

President's Message

By Brian R. Anderson
Nexsen Pruet, PLLC

It is with great pleasure that I write to you as President of the Middle District of North Carolina Chapter of the Federal Bar Association (FBA). 2015 marks the 95th anniversary of the Federal Bar Association and the 5th anniversary for our Chapter. Our Chapter would not be where it is today without the leadership and vision of Kearns Davis, Adam Charnes, Julie Theall Earp, and Randy Loftis, Jr., among others. As your next President, I pledge to continue to advance the interests of the judiciary, our Chapter and the FBA for the benefit of our Chapter and its members.

The FBA, founded in 1920, is dedicated to the advancement of the science of jurisprudence and to promoting the welfare, interests, education, and professional development of all attorneys involved in federal law. FBA members run the gamut of federal practice: attorneys practicing in small to large legal firms, attorneys in corporations and federal agencies, and members of the judiciary. The FBA is the catalyst for communication between the bar and the bench, as well as the private and public sectors.

Our Chapter was chartered in 2010 to foster and preserve the collegiality and professionalism that have long distinguished our district, and to provide a forum for CLE programs and other services for federal practitioners. For the past five years, our Chapter has continued to strengthen our District's reputation of collegiality and professionalism through events in the spring and fall of each year and continuing legal education programs. On October 26, that tradition continues with the 2015 Fall Banquet and CLE.

However, despite these enriching events, the FBA offers so much more. The FBA has twenty-three sections and six divisions, offering something for every member's area of practice. If you are not a member, then I strongly encourage you to join. If you are already a member, then I urge you to take advantage of the many resources of the FBA at your disposal. Lastly, our Chapter offers a number of leadership opportunities. If you would like to become more involved in our Chapter, please reach out to me or another Chapter officer. ▪

Filing and Litigating a Hague Convention Child Abduction Civil Case in Federal Court

Jennifer B. Lyday & Jamie H. Stone
Womble Carlyle Sandridge & Rice, LLP

I. Background on Child Abduction Cases Under the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") is an international treaty in which the signatory countries agree to cooperate in returning children to their home country, after the children have been abducted by one parent and taken to a foreign country.[1] The goals of the Hague Convention are as follows: (1) to secure the immediate return of a child wrongfully removed or wrongfully retained in any Contracting State; and (2) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States. Hague Convention, Art. 1.[2] The United States is a signatory to the Hague Convention[3] along with eighty-seven other countries.[4]

To begin the process of seeking return of a child pursuant to the Hague Convention, the left-behind parent must first contact the designated Central Authority within his or her home country. The Central Authority will work with the left-behind parent to complete an Application and other supporting materials. The Central Authority sends these documents to the U.S. State Department's Office of Children's Issues ("State Department"), which is the designated Central Authority in the United States. The State Department then initiates the process of locating the child in the United States. Once the State Department locates the child, and if the left-behind parent requests *pro bono* legal representation, the State Department will locate attorneys within its attorney referral program, who may be interested in representing the left-behind parent. Once an attorney expresses an interest in a particular case, the prospective client can choose to contact that attorney. The attorney then has the opportunity to evaluate the case and determine whether to take on the representation.

An attorney who has agreed to represent a left-behind parent ("petitioner"), will file a petition for the child's return in either state or federal district court in the district in which the abducting parent ("respondent") resides.[5] A petitioner establishes a *prima facie* case for the return of a child under the Hague Convention if he or she proves three elements: (1) prior to removal or wrongful retention, the child was habitually resident in a foreign country; (2) the removal or retention was in breach of custody rights under the foreign country's law; and (3) the petitioner actually was exercising custody rights at the time of the removal or wrongful retention. Hague Convention, Arts. 3-4.

If the petitioner establishes a *prima facie* case, then the abducted child must be returned to his or her country of habitual residence unless the respondent can satisfy the requirements of one of the five affirmative defenses. Those defenses are as follows: (1) the child has become well-settled in the new surroundings;[6] (2) petitioner consented or acquiesced in the removal or retention; (3) there is grave risk of danger to the child in the home country; (4) the child is a mature child who objects to removal; and (5) returning the child would violate public policy. Hague Convention, Arts. 12, 13, and 20. However, even if the respondent successfully demonstrates an affirmative defense, the Court may nonetheless order return of the child if doing so would further the Hague Convention's goals.

II. How to Begin Your *Pro Bono* Hague Convention Practice

You do not have to be a family lawyer to develop a *pro bono* Hague Convention practice. As stated above, many Hague Convention petitions are filed in federal district court, where most family lawyers do not practice regularly. Attorneys interested in *pro bono* representation of petitioners in Hague Convention cases should register to be part of the attorney referral program on The State Department's International Parental Child Abduction website.[7] The State Department provides many helpful resources, including a manual entitled, "Litigating International Child Abduction Cases Under the Hague Convention," which contains analysis on relevant case law, guidance on procedural issues and handling the logistics associated with a Hague Convention case, as well as sample pleadings and filings. Interested

attorneys are also encouraged to e-mail any questions to HagueConventionAttorneyNetwork@state.gov or contact Legal Assistance Coordinator Patricia Hoff. Ms. Hoff can be reached at hoffpm@state.gov and 202-485-6124.

Endnotes

1 T.I.A.S. No. 11,670, 1343 U.N.T.S. 22514, reprinted in 51 Fed. Reg. 10493 (1986).

2 The Hague Convention authorizes a federal district court to determine the merits of the abduction claim but does not allow it to consider the merits of any underlying custody dispute. Morris v. Morris, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999) (recognizing that "[p]ursuant to Article 19 of the Convention [this Court has] no power to pass on the merits of custody"); see also Currier v. Currier, 845 F. Supp. 916 (D.N.H. 1994) (citing Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993); Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). The district court's role is not to make traditional custody decisions but to determine in what *jurisdiction* the children should be physically located so that the proper jurisdiction can make those custody decisions. Loos v. Manuel, 651 A.2d 1077, 1079 (N.J. Super. Ct. Ch. Div. 1994).

3 The International Child Abduction Remedies Act ("ICARA") is the United States' implementing legislation for the Hague Convention. 42 U.S.C. § 11601 *et seq.* (1988). ICARA establishes the Hague Convention as the law of the United States and details how the treaty will be enforced.

4 Of these 87, the United States recognizes only 68 countries as "partner countries" for resolving child abductions under the Hague Convention.

5 Many practitioners file these petitions in federal district court as a Hague Convention case is not intended to focus on a "best interests of the child" analysis, and state court judges, who are accustomed to making "best interests of the child" determinations, may be more inclined to apply such a test to a Hague Convention case. Other factors such as the client's needs, docketing speed, and the attorney's familiarity with the court and local rules may also affect a forum decision. NCMEC, Litigating International Child Abduction Cases under the Hague Abduction Convention, p. 69.

6 The well-settled defense is not available to a respondent if the petition is filed within one year of the wrongful removal or retention of the child.

7 The State Department's website is available at http://travel.state.gov/content/childabduction/en/legal/for-attorneys.html. The International Child Abduction Attorney Network's website, www.missingkids.com/ICAAN, also contains helpful information and links to other resources. ▪

Clerk's Corner: An Update from the Clerk of Court for the United States District Court for the Middle District of North Carolina

By John S. Brubaker

Greetings to a terrific Federal Bar Association chapter! Please find the following suggestions and updates from the Clerk's Office for the Middle District of North Carolina.

Filing Documents Under Seal. When filing a document under seal, you will find that most CM/ECF events allow the public to view the docket text of the event. Please be careful to ensure that the docket text does not reveal anything you intend to keep confidential.

Pro Bono Appointment List. Thank you to everyone who has volunteered to participate in the Pilot Pro Bono Representation Program. Several attorneys have accepted appointments and helped pro se filers. Most of the cases have been prisoner cases, and more volunteers would be greatly appreciated. For further information, please refer to the Pro Bono Representation page of the Court's website.

Local Rule Suggestions Wanted. The Local Rules Committee will meet in the next few months and would appreciate your ideas. The Local Rules page of the Court's website gives names of committee members and where to send suggestions.

E-Voucher is Coming. Starting in January, 2016, CJA Panel attorneys will be able to complete vouchers online. Further information will be forthcoming.

Statement of Reasons. The Statement of Reasons will be filed as a sealed document in criminal cases. Attorneys in criminal cases will receive the Statement of Reasons by CM/ECF e-mail notification instead of paper effective immediately.▪

Report on the June 2015 M.D.N.C. Chapter Luncheon

by Katherine Blass Asaro
Law Clerk to the Honorable N. Carlton Tilley, Jr.

The June 2015 Chapter Luncheon and CLE took place on Monday, June 1, 2015 at the Embassy Suites in Greensboro. The event focused on the ever-evolving area of social media and the law. Two presenters gave overviews of different aspects of the impact of social media on our practice and profession.

First, Gary Beaver, of Nexsen Pruet, PLLC, gave a one-hour CLE presentation entitled, "Ethics and Social Media." Gary's presentation covered numerous ethical issues related to social media and addressed ways that social media is changing the legal profession. Gary addressed the obligation that attorneys have to understand and learn about social media and technology in general in the context of legal practice and in advising clients. In addition, Gary gave examples of social media undermining legal work and spoke to specific examples of how and where social media can intersect with the legal profession. Issues included whether lawyers can (1) ask for referrals from clients on your firm's Facebook page, (2) tweet about their work, or (3) seek to connect with a presiding judge on LinkedIn -- all new ethical issues that all lawyers must consider.

Then, Monica R. Guy, of Bell, Davis & Pitt, P.A., presented on the "Use of Social Media at Trial." Monica gave practical advice on how lawyers can and should use social media during the course of litigation. For instance, did you know you can download your entire Facebook history into one PDF (scary, right?). Monica provided an example of the instructions for downloading that history, provided model text for a discovery request for a litigant's history, and discussed how that history might be used. Monica's presentation was an excellent overview for any practitioner on accessing and correctly using social media during discovery and throughout litigation.

Thanks to the organizers and presenters for an informative and entertaining event. ▪

Focus on Federal Practice: An Interview with Stephen Inman

By Kelley L. Gondring
Robinson & Lawing, LLP

Focus on Federal Practice is a column that focuses on a member of the M.D.N.C. Bar in each newsletter. This issue provides insight into the practice of Assistant United States Attorney Stephen Inman.

Q: I understand that you did not begin your legal career at the DOJ. What is your work history and how did it lead you to your work at the MDNC?

A: I started as a litigation associate at what was then Smith Helms Mulliss & Moore in Greensboro in 1999 after working my 1L and 2L summers there. I had the chance to learn at the feet of some incredible lawyers: McNeill Smith, Jim Exum, Larry Sitton, and Alan Duncan, to name a few. After a few years, my wife—who was also in litigation there—decided to leave the law and attend seminary. So we spent about a year and a half in Washington, D.C., which I spent doing contract work, most of it reviewing German documents in a lawsuit seeking to invalidate a patent. My wife was called to her first church, St Paul's Episcopal, in Winston-Salem in 2004. I joined what was then Kilpatrick Stockton, again doing commercial litigation work. Again, I got the chance to work with some great lawyers, Bob Elster, Dan Taylor, Steve Berlin and Adam Charnes. After about four years there, the firm afforded me the opportunity to work at the Forsyth County District Attorney's Office for about three months. They paid my salary while I got the opportunity to prosecute felony drug cases. Having had very limited opportunities in court to that point, I loved the chance I had to try cases in front of juries. After another year at Kilpatrick, I couldn't resist the siren call of criminal law any longer and decided to apply for a position with the United States Attorney's Office for the Southern District of Georgia. They took a chance on me and I started in Augusta in February 2009 as a federal prosecutor. In the summer of 2011, the First Assistant at the US Attorney's Office here, John Stone, called to see if I would be interested in interviewing. They offered me

a job here, and we jumped at the opportunity to return to the Middle District.

Q: *How does your background in civil practice influence your current position as an AUSA?*

A: As a plus, so much of civil practice revolves around written work product. There is a premium placed on researching issues extensively and briefing arguments in the most compelling fashion. And while that attention to detail in written work seems to be slipping away from me, it is helpful in responding to suppression motions and Fourth Circuit appeals. But that focus can also make civil practice a bit myopic. Discovery disputes take on an importance out of proportion to their relevance to the case; objections to requests for admission become hyper-technical and legalistic; taking and defending depositions become less about substance and more about gamesmanship. Having that background gives me a respect for the big-picture focus of prosecutors and criminal defense lawyers on a defendant's liberty.

Q: Was there advice that someone gave you about practicing in the MDNC that has paid off?

A: Before I started as a federal prosecutor, a wonderful lawyer told me, "Whatever you do in this job, do what you think is right, because you want to be able to sleep at night." That's great advice for any lawyer.

Q: What are some qualities that you respect in our MDNC peers?

A: The expectation of professionalism is the biggest. You know in this district that lawyers here are going to strive to understand complexities and nuances of the law, brief issues transparently, and represent their clients with passion. But with that comes the understanding that lawyers are not going to cross the line into unprofessionalism. Lawyers and judges here don't tolerate a lack of candor or a lack of civility. In other districts, guile, duplicity and nastiness are not just tolerated, but sadly, praised as the ideal.

Q: What is your favorite part of your MDNC practice?

A: The opportunity to try a case before a jury. We have such a wonderful cross-section of people in the 24 counties in this district. Seeing them come together from all walks of life to decide with one voice on a contentious, vitally important matter makes you realize how rare that is elsewhere in our society today.

Q: What is unique about practice in the MDNC compared to other districts?

A: The speed of the criminal docket is a stark contrast to other districts. Knowing that a case is going to move from indictment to resolution within two or three months' time—either by plea or trial—sharpens everyone's focus. And I think it is unique to have judges as even-keeled and non-ideological as we do. You hear horror stories about judges in other districts that people dread to appear before or that people feel they have lost in front of before they even open their mouths. Here, people know they are going to get a fair shake, regardless of the issue or the parties.▪

Supreme Court and Fourth Circuit Criminal Law Update

By Milind Dongre
Child Advocacy Research and Clinical Staff Attorney at Wake Forest University School of Law

This article highlights three federal criminal law decisions of note and is intended to dovetail with Kearns Davis' broader federal criminal law update at the Chapter's Fall CLE Program on October 26, 2015.

Supreme Court Reaffirms Principle That Government Conducts Fourth Amendment Search When It Obtains Information through Nonconsensual Physical Intrusion onto Constitutionally Protected Area, Irrespective of both Purpose for which the Information is Gathered and the Expectation of Privacy

In *Grady v. North Carolina*, 135 S.Ct. 1368, (2015), a case involving satellite-based monitoring (SBM) of sex offenders, the Court in a per curiam decision reaffirmed prior decisions regarding what factors are relevant to determining whether the Government's nonconsensual physical intrusion on private property constitutes a "search" under the Fourth Amendment. In particular, the Court 1) rejected the North Carolina Court of Appeals' suggestion that the purpose of such intrusion mattered and 2) noted that the "expectation of privacy" analysis is superfluous under such circumstances.

The facts arose from Grady's convictions in N.C. trial court for second degree sexual offense in 1997 and indecent liberties with a child in 2006. After serving his sentence for the latter, Grady was ordered to appear before the trial court for a hearing on SBM under N.C.G.S. § 14-208.40(a)(1) and § 14-208.40B (2013). Grady did not dispute that his two sex offenses brought him within the category of people who were subject to SBM by statute, but he argued that SBM would violate his Fourth Amendment right to be free of unreasonable searches and seizures because it would force him to continuously wear tracking devices.

The trial court disagreed with Grady and ordered him to enroll in lifetime SBM. On subsequent appeals, the N.C. Court of Appeals also rejected his Fourth Amendment argument and the N.C. Supreme Court summarily dismissed the appeal for lack of a substantial constitutional question and denied discretionary review. (The Court treated this as a decision on the merits subject to its review under 28 U.S.C. § 1257(a).)

In reviewing the decision on Grady's petition for writ of certiorari, the Court explained that the only reason it could discern for the lower courts' rejection of Grady's Fourth Amendment argument was the Court of Appeals' proposition that SBM did not constitute a "search" because it was imposed through a civil proceeding as opposed to a criminal one. The Court swiftly dispatched this theory by citing a prior decision involving building inspectors, *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534 (1967), which stood for the principle that Fourth Amendment protection extended beyond criminal investigations. "[T]he government's purpose in collecting information does not control whether the method of collection constitutes a search," the Court held.

In addition, the Court reaffirmed the principal from *United States v. Jones*, 132 S.Ct. 935 (2012)—popularly known as the GPS case—that "[w]here…the Government obtains information by physically intruding on a constitutionally protected area,…a search has undoubtedly occurred." The court held that "a State conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movement" in the same way that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" The Court also appeared to hold that "under such circumstances, it [i]s not necessary to inquire about the target's expectation of privacy in his…movements in order to determine if a Fourth Amendment search had occurred." This appears to be a nod to the principle set forth by Justice Scalia in his majority opinion in *Jones* that a FourthAmendment search is a form of "trespass." However, it is important to note that the word "trespass" appears nowhere in the *Grady* opinion.

Concluding that SBM was a search, but that it remained to be determined by the North Carolina courts whether it was an *unreasonable* search that violated the Fourth Amendment, the Court vacated the N.C. Supreme Court's judgment, and remanded for further proceedings.

Fourth Circuit Vacates Guilty Plea Due to Trial Court Judge's Repeated Remarks in Favor of Plea Agreement

U.S. v. Braxton, 784 F.3d 240 (4th Cir. 2015), provides another good illustration of the types of remarks by a trial court that violate Fed. R. Crim. P. 11's prohibition against judicial participation in plea agreement discussions. In the trial court, Braxton initially faced a mandatory minimum sentence of ten years' imprisonment upon conviction of the charged offense, possession with intent to distribute at least one kilogram of heroin. Despite his court-appointed attorney's admonition that the failure to plead guilty could result in the government effectively increasing the mandatory minimum to twenty years' imprisonment by filing a prior felony information as provided in 21 U.S.C. § 851, Braxton refused to plead guilty. Even after the government ultimately did file a prior felony information, Braxton opted to proceed to trial in the hopes of testing the validity of the charged weight of heroin. For its part, the government had offered to ask for no more than fifteen years' imprisonment if Braxton pleaded guilty.

On the first day of trial months later, the court, after denying Braxton's motions to be appointed new counsel or to be allowed to represent himself, was drawn into a dispute between Braxton and his court-appointed counsel, and it is in this context that the court made the following offending remarks:

- Stating that "I am not favorably inclined towards having you go to trial and trigger a mandatory minimum of 20 years, as opposed to a plea offer that's down in the 10 to 15 year range in terms of years of your life."

- Stating that Braxton was hurting his own interest by choosing to go to trial.
- Comparing Braxton's decision to go to trial to putting his head in a buzz saw.
- Stating that a "defendant shouldn't put his head in a vice [sic] and face a catastrophic result just over a dispute over drug quantity."
- Describing the decision to go to trial as "almost silly."
- Stating that if Braxton accepted the plea agreement, the court would be "free to sentence [him] to 10 years," but that its "hands [would be] tied" by the twenty-year minimum if he went to trial.

After a forty-five-minute lunch recess, Braxton changed his mind and accepted the plea agreement, indicating that he had not "felt forced or threatened or pushed" to do so. The court accepted the guilty plea and scheduled sentencing, after which Braxton twice moved to withdraw his guilty plea, first on the basis of ineffective assistance of counsel, and later arguing that his plea had been involuntary because the court had pressured him to plead guilty. The court denied both motions and sentenced Braxton to 11 ½ years imprisonment; Braxton appealed to the Fourth Circuit.

Considering these facts in light of the "three principal interests" served by Rule 11's prohibition—diminishment of judicial coercion, protection against judicial unfairness and partiality, and elimination of the appearance that the judge is an advocate for a plea agreement—The Fourth Circuit concluded that the trial court had committed reversible error. Applying the "substantial rights" test drawn from *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004), and taking pains to stress that it believed the trial court had acted in good faith, the Court held that there was "a reasonable probability that the district court's plain error affected Braxton's substantial rights, and that [the] failure to recognize this error would seriously undermine confidence in the fairness of judicial proceedings." Accordingly, the Court vacated Braxton's guilty plea and remanded for further proceedings.

A final notable feature of the case was the Court's rejection of the Government's argument that the trial court's remarks about the plea offer were integral to its determination of whether Braxton's request to represent himself was "knowing and intelligent" within the meaning of *Faretta v. California*, 422 U.S. 806 (1975). To this the Court replied that "the comments…at issue here…relate[d] not to the dangers and disadvantages of proceeding to trial *without counsel*, but rather the dangers and disadvantages of proceeding to trial *at all*, and would have applied with equal force if Braxton had gone to trial with representation as without" (emphasis in original).

Fourth Circuit Holds that Criminal Defendants May Not Avoid a Valid and Applicable Appeal Waiver by Claiming Error Based on a Subsequent Change in Law

The defendant-appellant in *United States v. Archie*, 771 F.3d 217 (4th Cir. 2015) pleaded guilty to using a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c), among other offenses. As part of the plea agreement, Archie had expressly waived his right "to appeal whatever sentence…imposed," along with "all rights to contest the conviction or sentence in any post conviction proceeding." The district court sentenced him to an 84-month minimum sentence based on a judicially-determined statutory enhancement for "brandishing" the firearm during the crime under § 924(c)(1)(A). Four months later, the Supreme Court in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) overruled existing precedent to hold that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury" and found beyond a reasonable doubt." Archie appealed his sentence, contending in part that the district court violated his Sixth Amendment rights by enhancing his sentence through a judicial finding, contrary to *Alleyne*. The threshold question for the Court was whether Archie's appeal waiver prevented him from appealing on this basis.

Relying on what it described as its "indistinguishable" 2005 decision in *United States v. Blick*, 408 F.3d 162, the Court applied contractual principles to the waiver and concluded that because Archie "received a sentence that fully complied with the law applicable at the time, 'precisely in the manner he anticipated,'" he could not "invalidate his appeal waiver to claim the benefit of subsequently issued case law even if it suggest[ed] his sentence now would be different." The Court distinguished the case before it, which involved a claimed error stemming from a subsequent change in law, from those featuring "a failure by the court to apply the established law at the time of sentencing," to which appeal waivers could be held not to apply. "In short," the Court concluded, "defendants cannot knowingly and voluntarily enter an appeal waiver, receive a sentence that fully complies with the law applicable at the time of sentencing, and then, when that law later changes, argue that the issue falls outside the binding scope of the waiver." ▪

SCOTUS Holds that a Kansas Conviction for Possession of a Sock Containing Adderall is Not a Deportable Offense under 8 U.S.C. § 1227(a)(2)(B)(i), Reaffirming its Position on the Categorical Approach

By Ama Frimpong
Elliot Morgan Parsonage, PLLC

Synopsis:
In *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the Supreme Court held that mere possession of a sock, without any link to a drug under the Controlled Substances Act, cannot form the basis of an individual's deportation. Rather, to trigger deportation for a "controlled substance" conviction pursuant to 8 U.S.C. § 1227(a)(2)(B)(i), the government must connect an element of the individual's conviction to a drug in 21 U.S.C. § 802. The Court used the categorical approach in reaching this holding, reaffirming its position on the approach.

Mellouli emphasizes the lesson that criminal defense attorneys must be especially cognizant of deportation consequences when crafting plea agreements for their non-citizen clients. Defense attorneys need to be cognizant of the immigration consequences of specific language that is included (or not included) in the plea agreement. Here, the Supreme Court's decision rested partially on the fact that the controlled substance inside the sock was not identified in the plea agreement. Thus, there was no language linking the sock for which Mellouli was convicted to a § 802 controlled substance.

The Case:
Moones Mellouli was a citizen of Tunisia who entered the United States on a student visa in 2004. He became a Lawful Permanent Resident ("LPR") in 2011. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984-85 (2015). During his time in the United States, Mellouli became an accomplished student, earning a B.A. *magna cum laude*, and a master's degree in applied mathematics and economics. He went on to teach mathematics at the University of Missouri-Columbia. *Id.*

In 2010, Mellouli pled guilty to misdemeanor possession of drug paraphernalia ("PDP") to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." *Id.* at 1983 (quoting Kan. Stat. Ann. § 21-5709(b)(2) (2013 Cum. Supp.)). The paraphernalia in question was a sock in which Mellouli had placed four orange tablets. *Id.* At some point, Mellouli acknowledged that the tablets were Adderall. *Id.* However, it is important to note that neither the charging document nor the plea agreement identified the tablets. *Id.* So, on the surface, Mellouli was convicted of PDP involving some unidentified controlled substance under Kansas law. Mellouli successfully completed his 12-month probation sentence. *Id.* at 1985.

Several months later, in 2012, Immigration and Customs Enforcement ("ICE") placed Mellouli in removal proceedings based on his Kansas conviction. *Id.* According to ICE, Mellouli was deportable under 8 U.S.C. § 1227(a)(2)(B)(i). That statute authorizes the removal of an alien convicted of a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 802 of Title 21)." *See* 8 U.S.C. § 1227(a)(2)(B)(i). Section 802 limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. *See* 21 U.S.C. § 802(6). The Immigration Judge ("IJ") found that Mellouli's conviction did render him removable under 8 U.S.C. § 1227(a)(2)(B)(i), and ordered that he be deported.

The Board of Immigration Appeals ("BIA") affirmed this finding, reasoning that a drug paraphernalia conviction relates to any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. 135 S. Ct. at 1988. Under this approach, the paraphernalia conviction need not involve a controlled substance as defined under § 802. *Id.* Both the IJ and the BIA relied upon *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), which established the paraphernalia-specific approach.

The Eighth Circuit denied Mellouli's petition for review. The Supreme Court granted certiorari.

The issue before the Supreme Court was whether Mellouli's conviction for using drug paraphernalia (a sock) to store or conceal a controlled substance subjected him to deportation under 8 U.S.C. § 1227(a)(2)(B)(i). *Id.* at 1984. The Court found that it did not.

The Court began its analysis with an overview of the categorical approach. The Court explained:

> Because Congress predicated deportation on convictions, not conduct, the [categorical] approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior. The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must presume that the conviction rested upon nothing more than the least of the acts criminalized under the state statute.

Id. at 1986 (internal quotation marks and citations omitted). The Court noted that the BIA employs the categorical approach in drug possession and drug distribution cases.

The Court then rejected the drug paraphernalia-specific approach adopted by the BIA. In doing so, the Court found that applying such conflicting approaches to drug cases leads to consequences that Congress could not have intended. *Id.* at 1989. Specifically, minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses--the latter only trigger removal if they necessarily implicate a federally controlled substance, while the former trigger removal whether or not they necessarily implicate a federally controlled substance. *Id.* The result of this approach is that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance. *Id.*

Upon rejecting the paraphernalia-specific approach, the Court applied the categorical approach, which, as previously noted, the BIA has long used to assess whether a state drug conviction triggers removal under 1227(a)(2)(B)(i). *See, e.g.*, *Matter of Paulas*, 11 I&N Dec. 274 (1965) (finding that an alien's California conviction for selling an unidentified narcotic was not a deportable offense because it was possible that the conviction involved a substance, such as peyote, controlled only under California law, not federal law).

Under the *Paulas* categorical approach analysis, Mellouli was not deportable. The Kansas statute at issue contained at least nine substances on its drug schedules that were not on the federal schedules, *e.g.*, jimson weed. *Mellouli v. Lynch*, 135 S. Ct. at 1988. Thus, the Kansas statute, like the California statute in *Paulas*, was not confined to federally controlled substances. *Id.* The Kansas statute reached substances outside of § 802, and therefore, a conviction under the Kansas statute was not a categorical match to 1227(a)(2)(B)(i).

The government further argued that the "relating to" language in 1227(a)(2)(B)(i) is to be interpreted broadly. Specifically, it urged the Court to find that aliens who commit drug crimes in states whose drug schedules "substantially overlap" the federal schedules are removable. *Id.* at 1989. The Court rejected this argument as well, explaining that the words "relating to" cannot be interpreted so broadly and indeterminately. *Id.* at 1990. The Court opined that Congress and the BIA require a direct link between an alien's crime of conviction and a particular federally controlled drug, not just "some general relation to federally controlled drugs." *Id.*

As such, the Court reversed the judgment of the Eighth Circuit.

A Few Lessons:

Perhaps the biggest lesson in *Mellouli* is the importance of crafting plea agreements for non-citizens. Criminal defense attorneys must be especially cognizant of deportation consequences when selecting the best plea agreement for their non-citizen client, and the best language for the plea agreement. Adderall is a Schedule II controlled substance. Had the plea agreement in Mellouli's case identified the drug as Adderall, it would have been much easier for the government to argue that he was deportable, pursuant to 8 U.S.C. §1227(a)(2)(B)(i). In other words, the sock would have been linked directly to a § 802 controlled substance, as required by SCOTUS. In Mellouli's

case, two great decisions were made: (i) pleading to possession of drug paraphernalia ("PDP"), *not* possession of a drug; and (ii) omitting the identity of the drug from the plea agreement.

Mellouli reaffirms the Supreme Court's embrace of the categorical approach in analyzing immigration consequences of criminal convictions. In recent years, the Supreme Court has put forth a number of decisions pushing in the direction of a uniform approach, much to the delight of immigration practitioners. *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), *Descamps v. United States*, 133 S. Ct. 2276 (2013), and now *Mellouli*, all symbolize a step in the direction toward consistency in an area of law that has caused great confusion, frustration, and distress to many.

To those who may not know much about immigration law, *Mellouli* provides a glimpse into the devastating immigration consequences faced by noncitizens for common, minor convictions. Moones Mellouli worked hard, attaining a master's degree in applied mathematics and economics. He held a steady job. He was engaged to a U.S. Citizen. It does not appear that he had been in any trouble prior to the incident in the instant case. In reality, Mellouli was not a priority for deportation. Yet, the government decided to expend its resources by deporting him because of a sock.

A sock. ▪

Moneyball for Federal Litigators: Making Use of the AOC's Public Data Reports

By Cassie L. Crawford
Nelson Mullins Riley & Scarborough LLP

Most federal practitioners in this District have a sense of the Court's workload and the life of a case here. When a client is sued elsewhere (or plans to sue elsewhere), however, we must rely on local counsel or crowd-sourced inquiries in order to manage client expectations and plan intelligently. Thanks to data published by the Administrative Office of U.S. Courts ("AOC"), one need not rely solely on anecdotal evidence in order to respond to client inquiries about the timing of a decision, or to plan a six- or twelve-month budget while a dispositive motion is pending.

In this scenario, one useful source of information is the so-called "Six-Month Report," or "CJRA [Civil Justice Reform Act] Report," the data that the AOC collects from the federal courts in order to determine court-by-court and judge-by-judge information regarding motions pending longer than six months, civil cases pending more than three years, and Bankruptcy and Social Security appeals pending longer than six months. *See* http://www.uscourts.gov/statistics-reports/analysis-reports/civil-justice-reform-act-report. Pursuant to its statutory directive, the AOC collects this information semiannually, on March 31 and September 30 every year. *See* 28 U.S.C. § 476.

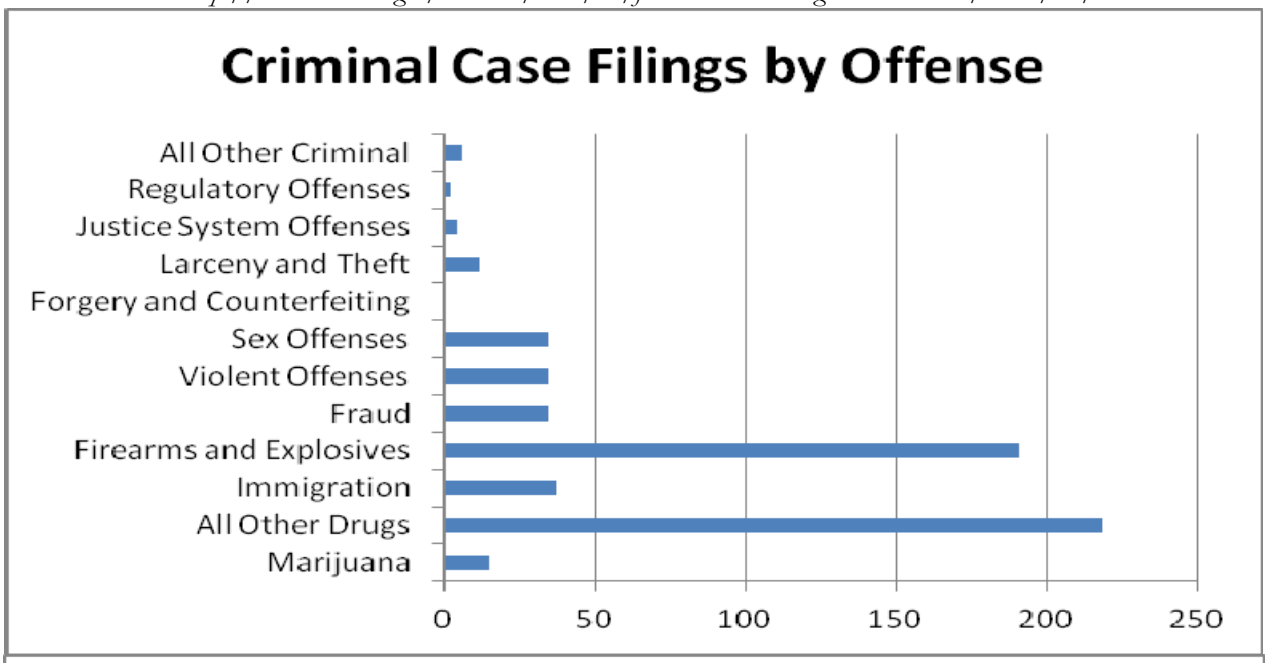
The data of course is not predictive and should <u>not</u> be treated as such– and information about the number of outstanding current civil motions presents an unfinished portrait of a caseload due to the volume of criminal trials, hearings, or motions that occupy so much of federal Judges' time. Still, the data can be valuable in guiding general estimates in two key respects. First, if a six-month report for a particular judge or district is quite full of pending motions, the data allows a practitioner to know that there are several complex matters still pending that will likely need to be addressed before her own. On the other hand, if no matters have appeared on a particular judge's six-month report for the past several reports, it enables the practitioner to expect – without certainty, but with some level of comfort –that a motion that was ripe and fully briefed before March 31 may well be resolved before September 30 of the same year.

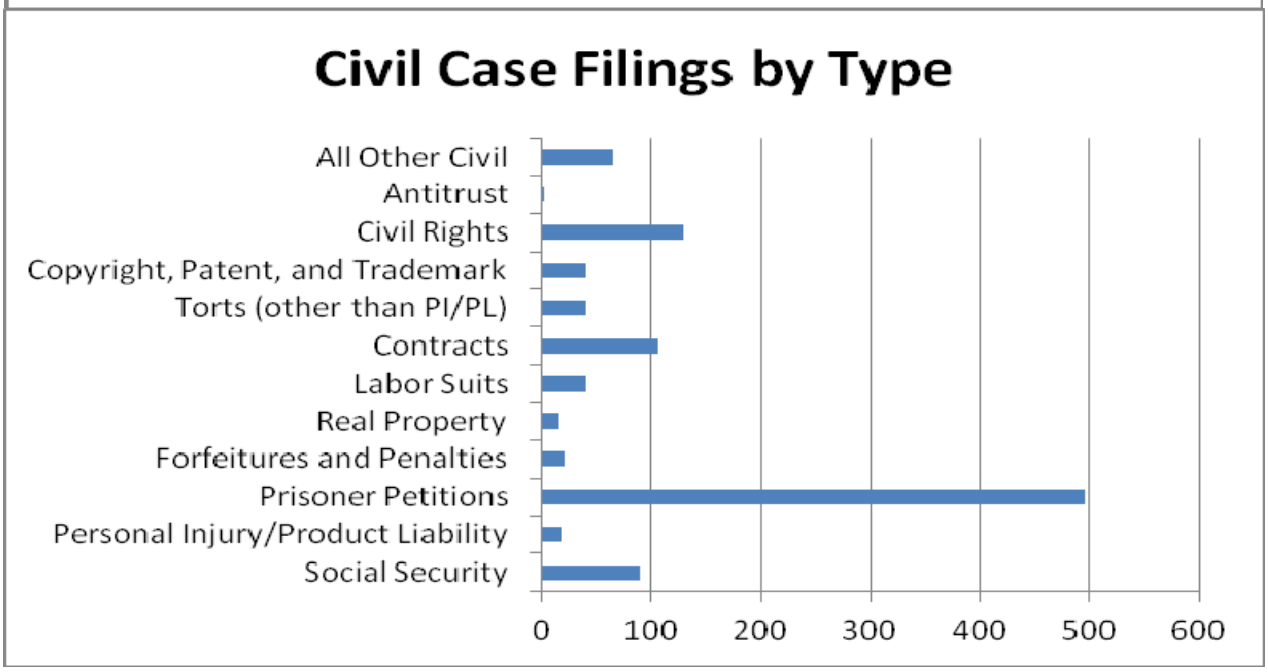
The CJRA Report, however, is just one of many detailed statistical tables available on the U.S. Courts website. *See generally* http://www.uscourts.gov/statistics-reports/analysis-reports Though the most current data is often not available – the most recent information may be six months or twelve months old – the website includes large volumes of data regarding the business of the federal judiciary, including detailed judge-by-judge, district-by-district, and circuit-by-circuit information about filings per judge, number of jury trials in each reporting period, median

time from case filing to disposition, number of *pro se* cases and how those cases are resolved, and a breakdown of types of case and type of federal jurisdiction. The data is also available nationwide – for instance, you can learn that in the twelve months ending on September 30, 2014, only 4770 civil trials took place (only 1922 of which were jury trials), and only 2220 criminal jury trials. *See* http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2014. Some of the information provides more interesting trivia than practical application, but this data too can be useful. For example, the Federal Court Management Statistics include district-by-district breakdowns of the types of cases (civil by type and criminal by offense) initiated within the twelve months immediately preceding the reporting period, most recently June 30, 2015. *See* http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3. These reports are available dating back to 2010. Why does this matter to the civil practitioner? Suppose you have a client that can sue in one of two districts, and the suit involves copyright law, or labor law. You and your client may want to consider whether you prefer to seek, or avoid, a district that handles a large volume of such cases. In sum, the AOC website includes a wealth of illuminating information, and those facing a new district will find it useful to consult not only local rules and local counsel, but also the hard data.▪

M.D.N.C. Civil and Criminal Filings by Type, 12-month Period Ending June 30, 2015

Source: http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30-3





Federal Bar Association
Middle District of North Carolina Chapter

cordially invites you to attend its

FALL 2015 CLE PROGRAM AND BANQUET
Monday, October 26, 2015

CLE Registration: 2:00 p.m.
CLE: 2:30-5:30 p.m.*
Reception: 5:30 p.m.
Banquet & Keynote Remarks: 6:30 p.m.

Brian R. Anderson, FBA MDNC Chapter President, *Nexsen Pruet, PLLC*
Welcome Remarks

Jennifer Lyday, Jamie Stone, &
Francisco Morales, *Womble Carlyle Sandridge & Rice, LLP*
Filing and Litigating a Hague Convention
Child Abduction Civil Case in Federal Court

Patrick Kane, *Smith Moore Leatherwood LLP*
Review of Recent Civil Cases of Interest

Kearns Davis, *Brooks, Pierce, McLendon, Humphrey & Leonard, LLP*
Review of Recent Criminal Cases of Interest

The Honorable Catherine C. Eagles*, United States District Judge*
Keynote Remarks

* 2.5 hours of NC State Bar CLE Credit, pending approval

Embassy Suites Hotel
204 Centreport Drive
Greensboro, NC 27409

To register, complete registration form on next page and return to Brian Anderson at the address provided on the registration form.

Registration Form

Registration Deadline is October 20, 2015

Federal Bar Association, MDNC Chapter
Attention: Brian R. Anderson

701 Green Valley Road, Suite 100
Greensboro, NC 27408
(336) 387-5156

Conference Name: 2015 Fall Banquet and CLE

Conference Date: Monday, October 26, 2015

Conference Time:

Registration	2:00 p.m.
CLE	2:40-5:30 p.m.
Reception	5:30 p.m.
Banquet	6:30 p.m.

Conference Location: Embassy Suites Hotel
204 Centreport Drive
Greensboro, NC 27409

To register, please remit this form and payment by check, payable to "FBA MDNC Chapter," to Brian Anderson at the address above.

Attendee Information	
Name:	
Firm:	
Address:	
City, State, Zip:	
Email:	
Phone:	
State Bar Number:	

Registration

CLE Registration Fee ☐

- ☐ Private Lawyer $60
- ☐ FBA MDNC Member $35
- ☐ CJA Panel Member $35
- ☐ Government Lawyer $0

Check here to reserve a vegetarian option. ☐

Reception and Banquet Fee $80 ☐

TOTAL: ☐