



THE MIDDLE GROUND

Federal Bar Association - Middle District of North Carolina Chapter

Volume 3, Issue 2 – October 2013

In This Issue:

President's Message	1
Spring Banquet Recap	2
Introducing Chris Clifton	3
S. Ct. Civil Update	3
Clerk's Corner	4
Preparing for Civil Trial	5
Sequestration and Shutdown	6
Preparing for Criminal Trial	8
S. Ct. Criminal Update	9
U.S. Bankruptcy Judges	13

Chapter Officers:

President

Christopher R. Clifton
Grace Tisdale & Clifton P.A.

President-Elect

W.R. "Randy" Loftis
Constangy Brooks & Smith, LLP

Secretary/Treasurer

Brian R. Anderson
Nexsen Pruet, PLLC

Membership Chair/National Delegate

Open

Immediate Past President

Julie Theall Earp
Smith Moore Leatherwood LLP

Younger Lawyers Chair

Laura J. Dildine
Smith Moore Leatherwood LLP

President's Message

*By Christopher R. Clifton
Grace Tisdale & Clifton P.A.*

The collegiality and professionalism exhibited in the Middle District have consistently distinguished it from other districts throughout the years. This organization was established to foster these critical, but sometimes overlooked, aspects of legal practice. Now, more than ever, our association's mission is essential to preserve these ideals and to set a good example for the younger attorneys joining our ranks.

Recently, I was talking with a good friend who has been in a civil practice for many decades and our conversation landed on this very subject. He was bemoaning the state of collegiality and professionalism within our ranks compared to when he began his practice. He saw the ability, through technology, to conduct an entire legal practice from behind a desk as the biggest culprit in diminishing these characteristics of our profession.

Most of the technology we use was invented to keep us connected no matter where we are—to make the world a smaller place. As my friend pointed out, while the world may be smaller, it is also less friendly. For it is far easier to snipe at and belittle someone you have never met in person and will never see face to face. I assured my friend that the federal bar in the Middle District had not fallen into the disrepair he had observed overall, but it is up to all of us to ensure that does not happen.

I challenge each of you to take time during your week to get out of the office. Try to have face to face meetings with other attorneys. Get to know the lawyers you are working with—even the ones you may never have to deal with again. Go to lunch together. Come to Federal Bar Association meetings. They are a great way to meet other attorneys within our association on a professional and social level. Get to know your colleagues, thereby becoming a more effective advocate for your client and maybe even a little nicer to be around in your own office.

I look forward to having face to face conversations with many of you during this year and finding new ways to foster the spirit of respect and cooperation that have long been hallmarks of this distinguished bar.

Thank you for having the confidence in me to lead this group. I am honored and will do my best to maintain the high level of service we have enjoyed for the last three years.

This newsletter was produced by the Younger Lawyers Committee for the MDNC Chapter of the Federal Bar Association and edited by Laura J. Dildine. Interested in being published in the next issue of *The Middle Ground*? The editorial staff is currently accepting articles for upcoming issues. Please direct all inquiries to Laura J. Dildine at: laura.dildine@smithmoorelaw.com.

Judge Duncan Headlined Spring Event

By Julie Theall Earp
Smith Moore Leatherwood LLP

The 2013 Spring meeting of the Middle District chapter was held at the Koury Convention Center on May 22, 2013, with more than 90 attorneys, law students, members of the judiciary and guests in attendance. Following an introduction by former law clerks Kathleen Gleason and Matt Leerberg, the Honorable Allyson K. Duncan, United States Circuit Court Judge for the Fourth Circuit Court of Appeals, delivered the keynote address. Judge Duncan shared her thought-provoking “Observations on Judicial Independence from 10 Years on the Bench.”

Also on the agenda, and back by popular demand, was the Honorable John Brubaker, Clerk of the Middle District, to deliver the “Brubaker Report.” As always, Mr. Brubaker provided timely and practical information to an appreciative audience.

Elected by the membership as officers of the Chapter for the 2013-14 fiscal year were: President: Chris Clifton; President Elect: Randy Loftis; and Secretary Treasurer: Brian Anderson. In addition, Laura Dildine agreed to take on the Newsletter this year and will chair the Younger Lawyer’s committee. Kearns Davis, Adam Charnes and Julie Theall Earp will continue to serve on the Board as past presidents.

Members of the chapter who are interested in writing for the newsletter, presenting at a meeting, or becoming an officer are welcome and should make their interests known to any officer.



Keynote Speaker Judge Allyson Duncan



U.S. Magistrate Judge Peake, Clerk of Court Brubaker, Kathleen Gleason, Matt Leerberg, and other guests



Introducing Our New President, Chris Clifton

By Whit Pierce

Smith Moore Leatherwood LLP

One of our founding officers, Chris Clifton, has taken the helm of the FBA's MDNC Chapter. After having served as Membership Chair and then as Secretary and Treasurer, Mr. Clifton intends to use his new position as a means to "foster the collegiality that has always existed in the Middle District." In addition, Mr. Clifton hopes to carry on the outstanding work of our outgoing President, Julie Theall Earp.

After graduating from the Wake Forest University School of Law, Mr. Clifton served as an Assistant District Attorney in the state's 19th Prosecutorial District. In 1997, he joined Michael A. Grace's Winston-Salem law practice, where Mr. Clifton remains today. There, he has built a thriving practice focused on appellate and post-conviction representation. In 2010, for example, he brought the case of Sandako Meshawn Brandon before the Supreme Court of the United States. Mr. Clifton obtained a favorable ruling, a new sentencing, and Mr. Brandon's eventual release.

In addition to the Supreme Court of the United States, Mr. Clifton is admitted to practice in all of the North Carolina appellate courts, and the Fourth, Eighth, and Eleventh Circuit Courts of Appeals. Among his numerous other professional and community activities, Mr. Clifton sits on the North Carolina Sentencing and Advisory Commission, where he advises the North Carolina General Assembly regarding sentencing guidelines.

Mr. Clifton takes over the presidency while our Chapter is still young, so he will have a significant say in charting our course. As President, Mr. Clifton hopes to add law students to our roster. According to Mr. Clifton, law students represent our best bet for increasing our membership, and including them in our ranks will help "keep us focused on what's important." Welcome, Mr. Clifton.

Whit Pierce is an associate at Smith Moore Leatherwood, LLP in Greensboro, NC, and a former law clerk to the Honorable Samuel G. Wilson, U.S. District Judge for the Western District of Virginia.

Notable Civil Decisions from the Supreme Court

By Thurston H. Webb

Kilpatrick Townsend & Stockton LLP

United States v. Windsor, 133 S. Ct. 1521 (2013)

In a closely watched and highly anticipated opinion, the Supreme Court struck down § 3 of the federal Defense of Marriage Act ("DOMA"), which amended the Dictionary Act to define "marriage" and "spouse" as excluding same-sex partners. In an opinion written by Justice Kennedy, who was joined by the Court's four more liberal Justices, the Court held § 3 unconstitutional based on a rationale that combined federalism and equal protection principles. Justice Kennedy reasoned that states, not the federal government, have historically been responsible for defining and regulating marriage, and many states have decided to allow same-sex couples to marry. But despite the historical role states play in regulating marriage, DOMA intended to and did injure legally married same-sex couples, the very class state law was meant to protect. Therefore, the Court found that it must use heightened scrutiny to evaluate the rationale of § 3's definition of marriage. The Court then found that § 3's definition of marriage was improperly motivated by animus, and thus violated the Fifth Amendment.

The Court also held that despite the Obama administration's decision not to defend § 3's constitutionality, the Court had jurisdiction to consider the merits of the case. The Court found that Windsor's ongoing claim for a refund from the United States, which the United States refused to pay, established a controversy sufficient for Article III jurisdiction. Further, the substantial arguments supporting § 3's constitutionality by the Bipartisan Legal Advisory Group, a group established by the House of Representatives to defend § 3 of DOMA, were

sufficient to satisfy the prudential considerations that demand adversarial presentation of the issues.

However, Justice Kennedy's opinion left open numerous questions. Most notable, it is unclear what effect the opinion will have on state laws that prohibit same-sex marriage. Further, the Court did not address whether the opinion is retroactive, or whether it will affect ERISA and other benefits statutes. These, and many other unanswered questions, will likely be vigorously litigated over the next few years.

***Ass'n for Molecular Pathology v. Myriad*, 133 S. Ct. 2107 (2013) and *Bowman v. Monsanto Co.*, 133 S. Ct. 1761 (2013)**

The Court decided two important patent cases this term. First, in *Ass'n for Molecular Pathology v. Myriad*, the Court unanimously ruled that naturally occurring genes are not patent eligible. Myriad Genetics, Inc. had patented the isolation of two human genes that show a high risk of breast and ovarian cancer. The Court found that because these genes are naturally occurring DNA sequences and were not created by the company, they were not eligible to be patented. However, the Court made it clear that a synthetic form of the genes were eligible for a patent, as it was created and not naturally occurring, as was any method to isolate the genes.

Second, in *Bowman v. Monsanto, Co.*, the Court unanimously held that the patent exhaustion doctrine did not forbid Monsanto from prohibiting farmers who buy its patented "Roundup Ready" soybean seeds to use newly grown seeds for subsequent plantings. A farmer who had done just this was sued by Monsanto for patent infringement. The farmer based his defense on the argument that the patent exhaustion doctrine, which holds that the initial sale of an item terminates all patent rights in that item, prohibited Monsanto from preventing him from using the second generation seeds. The Court unanimously rejected this argument, which it called the "blame-the-bean defense," holding that a purchaser of an item does not have the right to make and sell copies of a patented item.

Thurston H. Webb is an associate at Kilpatrick Townsend & Stockton LLP in Winston-Salem, NC and a former law clerk for the Honorable Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit and the Honorable Thomas D. Schroeder of the U.S. District Court for the Middle District of North Carolina.

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

Proposed Local Rules Posted. Proposed amendments to the local rules have been posted on the Court's website at www.ncmd.uscourts.gov. The Court welcomes your comments, which should be submitted by November 1, 2013.

New Bankruptcy Judges Appointed. Benjamin A. Kahn and Lena M. James have been appointed to the position of U.S. Bankruptcy Judge for the Middle District of North Carolina. Mr. Kahn will succeed Judge William L. Stocks and will be stationed in Greensboro, North Carolina. Ms. James will succeed Thomas Waldrep and will be stationed in Winston-Salem, North Carolina.

Mr. Kahn and Ms. James will be sworn in after completing the required background check investigation.

Helpful Hints.

- **Proposed Orders.** Proposed orders shall be submitted with motions not requiring briefs and motions for temporary restraining orders. A PDF version of the proposed order should be filed in CM/ECF as an attachment to the related motion. A version that is compatible with WordPerfect should also be e-mailed to the appropriate address listed in section L of the Electronic Case Filing Administrative Policies and Procedures Manual. If your office uses Word, please save the document in **rich text format** before sending it.
- **Viewing Sealed Documents.** If you are viewing a sealed document in CM/ECF in which you have been granted viewing access, you will be required to enter your CM/ECF filing login ID and password as a security measure. If you are being served a copy of the document via CM/ECF and entitled to a free look, you will not be charged for accessing the document.

- **State Court Removals.** If you are filing a notice of removal in CM/ECF, file the notice of removal using the CM/ECF Petition for Removal event and add each state court document as a separate attachment. Please do not combine all of the documents filed in the state court action as one attachment.
- **Briefs.** In CM/ECF, file briefs using the “Brief” or “SEALED Brief” events. Do not file briefs as an attachment to a motion.
- **Certificates of Service.** Certificates of service should be filed for all documents requiring service, even if service is effectuated through CM/ECF. For signature authenticity, the certificate of service should be signed by the attorney who is filing the certificate in CM/ECF.
- **Bill of Costs.** Please review the Bill of Costs Guide on the Court’s website before submitting a Bill of Costs. Allowable costs are not always easily understood, and costs have been denied where the filer did not provide adequate supporting documentation.

Preparing for a Civil Trial in the Middle District

By Daniel M. Vandergriff
 Kilpatrick Townsend & Stockton LLP

Although the federal courts are very busy, there were less than 5,500 “civil trials” before the 677 Article III judges in the 94 federal district courts during the year ending September 30, 2012.¹ That number includes both trials to a judgment and contested evidentiary hearings regarding temporary restraining orders, preliminary injunctions, and other matters that were not seeking a final judgment or verdict. Of those “civil trials,” only 8 occurred in the Middle District, and only 3 of those were full trials. During the year ending September 30, 2011, there were 6 trials to judgment.

It is hard to predict exactly *which* cases will result in a trial. Thus, *preparing* for a civil trial is a part of every case. To start with, the choice of a case-management track under Local Rule 26.1 can significantly impact the duration and breadth of discovery. Likewise, failure to develop the facts needed for trial during discovery leads to obvious difficulties at trial.

Once discovery has closed, and the parties have filed motions for summary judgment, it is time to focus on organizing the case for trial. First, attorneys must keep in mind the many deadlines triggered by the impending trial date. Under Rule 26(a)(3), witness and exhibit lists are due 30 days before trial, and objections may be filed to the opposing party’s designations within 14 days thereafter. Except for evidentiary objections under Rules 402 and 403, all other objections not made are waived.

In between those deadlines, under Local Rule 40.1, the trial brief and either proposed jury instructions or (for non-jury trials) proposed

findings of fact and conclusions of law are due 21 days before trial. This is also the time to file proposed jury verdict sheets, proposed voir dire, and motions in limine. These filings are a crucial part of developing the boundaries for trial. Additionally, during this process, attorneys should continue conferring with opposing counsel in order to narrow the issues for trial by agreeing on stipulated facts, joint exhibits, and exhibit lists. Notwithstanding all of those efforts, trial strategy has to remain flexible because, under Local Rule 56.1(f), parties may still be awaiting a ruling on summary judgment until the outset of trial.

Finally, as the trial date draws near, attorneys need to simultaneously prepare for the pre-trial settlement conference while still assuming they are proceeding to trial. Although Local Rule 83.2 offers some guidance on courtroom practices, attorneys should do as much as possible to learn about how their assigned trial judge prefers to handle jury selection, objections, asking to approach the witness, and time limitations. Also, attorneys should make sure to learn how the logistics of the trial will work, including the use of electronic presentation devices. Those are not things to be worried about the day before trial.

For more guidance on preparing for a civil trial in the Middle District, be sure to attend the October 21, 2013, CLE presentation by Manning A. Connors of Smith Moore Leatherwood, LLP, who will share what he has learned about trial preparation through practicing in the Middle District since 1995.

¹ The United States Courts website produces a report and tables every December detailing what has occurred in each judicial district. All of the statistics used in this article were gathered from the trial statistics included in the “T” tables. The most current statistics are available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2012.aspx>.

Daniel M. Vandergriff is an associate at Kilpatrick Townsend & Stockton LLP in Winston-Salem, NC.

The Courts Remain Open for Business in Trying Times – Lessons from Sequestration and Shutdown

Co-authored by Sophia Harvey of Liao Harvey PC and Chris Jackson of Ellis & Winters LLP

With special thanks to the U.S. Bankruptcy Court, U.S. Attorney's Office, U.S. Marshals Service, U.S. Probation & Pre-Trial Services, and CJA Panel

On March 1, 2013, following the expiration of a temporary budget and a protracted congressional standoff, President Obama issued a sequestration order, canceling around \$85 billion in federal funding for the 2013 fiscal year. According to the official website of the United States courts, the sequestration called for a five-percent reduction in judiciary funding during FY 2013, as compared to FY 2012.¹

For a judicial system with already-strained resources, further reductions raised genuine concerns about the continued operation of our federal courts. On August 13, 2013, eighty-seven federal district chief judges, including Judge Osteen from the Middle District of North Carolina, wrote to Vice President Biden, as President of the United States Senate, “to express [their] grave concern over the impact the flat funding of the last few years, followed by sequestration, is having on the Judiciary’s ability to carry out its constitutional and statutory responsibilities.”² Seven weeks later, the federal government shut down.

This article’s initial purpose was to highlight the effects of sequestration on various agencies and departments within the Middle District of North Carolina. However, on October 1, 2013, sequestration became part of a bigger story. Believing that the lessons learned from sequestration would prove valuable during *and after* the government shutdown, we forged ahead. What follows is an overview of the plans of the federal courts – and more specifically the Middle District of North Carolina – for operation during the shutdown, as well as the sequestration experiences of the U.S. Bankruptcy Court, U.S. Attorney’s Office, U.S. Marshals Service, U.S. Probation & Pre-Trial Services, and CJA Panel of the Middle District that we hope will prove educational even after the government reopens for business.

On September 24, 2013, the Honorable Judge John D. Bates, Director of the Administrative Office (AO) of the United States Courts, sent a memorandum to all federal judges, federal defender offices (FDOs), and others, titled, “Status of Judiciary Funding and Guidance for Judiciary Operations During a Lapse in Appropriations.”³ Judge Bates noted that, in the event of a shutdown, the judiciary would use fees and no-year appropriations to continue operations for an estimated ten business days. (As of publication, this funding extended to October 17, 2013.) During this time, “[c]ourts and FDOs [would] continue to operate,” but Judge Bates warned that “funding should be conserved as much as possible by delaying or deferring expenses not critical to the performance of . . . Constitutional responsibilities.”

Following this interim period, the Judiciary would operate under the Anti-Deficiency Act, 31 U.S.C. §§ 1341–1342, which allows work deemed “essential” to the exercise of Article III power to continue during a lapse in appropriations. Employees deemed necessary to perform such tasks would continue working on non-pay status, with the expectation of being paid upon the passage of appropriations. All other employees would be furloughed. The AO left to each court and FDO the task of implementing a “shutdown plan” and defining “essential work.”

On October 11, 2013, the U.S. District Court for the Middle District of North Carolina issued its shutdown plan.⁴ The Court concluded that sequestration cuts had already caused staffing levels to fall below those allowed by AO metrics, such that all employees not already furloughed were deemed “essential.” This plan suggests that court offices will continue to operate at sequestration capacity during the shutdown, with the salaries of non-furloughed employees being deferred. The remainder of this article attempts to summarize the

¹ <http://news.uscourts.gov/issues/sequestration>

² <http://news.uscourts.gov/sites/default/files/Chief-Judges-Letter-to-Joseph-Biden.pdf>

³ Available at <http://online.wsj.com/public/resources/documents/shutdowncourts.pdf>

⁴ Available at http://www.ncmd.uscourts.gov/sites/default/files/fy2014_plan.pdf

specific impact of sequestration and shutdown on various departments within the Middle District, based on publicly available information from both government publications and key individuals within these departments. Although the situation remains fluid, the goal is to provide objective information and maintain a well-informed local federal bar.

U.S. Bankruptcy Court

According to Reid Wilcox, Clerk of Court for the U.S. Bankruptcy Court of the Middle District of North Carolina, the sequester has combined with a broader trend of funding cuts to result in a 24% reduction in staff over the past two years. Thanks to advances in technology, Mr. Wilcox says that the Court was previously able to mitigate the effect of these staffing cuts. However, when the sequester began, the Court lost three additional employees, putting the Court below the already reduced work-unit metrics that had been instituted by the AO. There is concern in the Court that when appropriations are eventually passed, sequester-level funding will be established as the “new normal,” which could result in further staff reductions.

Following the shutdown, the U.S. Bankruptcy Court has thus far continued to operate as normal. Because sequester cuts had already reduced staff to a level below the AO’s work-measurement formulas, the Court declared all remaining employees to be essential to the exercise of Article III judicial power. The Middle District’s shutdown plan made clear that the Constitution mandates that judges be paid, regardless of any lapse in appropriations. Other Court employees will work on non-pay status until the shutdown ends, with the expectation that back pay will be awarded upon passage of appropriations.

U.S. Attorney’s Office

The U.S. Attorney’s Office of the Middle District of North Carolina continues to prosecute criminal and civil cases on behalf of the federal government, but is doing so on a reduced staffing level. The civil division is operating on a skeleton staff, while the criminal division remains largely fully operational as a result of being exempted from furlough. Court schedules have not to this point been impacted by the shutdown and no stays have at this time been requested in criminal cases.

The U.S. Attorney’s Office had been operating with fewer staff as a result of budget cuts. Prior to the shutdown, a hiring freeze had reduced the number of Assistant United States Attorneys by 15% and resulted in five or six support staff positions remaining vacant and unfilled. As a result of the shutdown, the DOJ has no funding to pay salaries going forward, and as it currently stands employees of the U.S. Attorney's Office will work without a salary until the shutdown ends.

U.S. Marshals Service

As an agency within the Department of Justice, the U.S. Marshals Service was not required to furlough employees during FY 2013. As first announced by Attorney General Eric Holder in an April 24, 2013 memorandum to DOJ employees, additional funding from the final FY 2013 funding bill, combined with a hiring freeze and other cost-cutting measures, avoided the need for any furlough days during FY 2013. According to Bill Stafford, the U.S. Marshal in the Middle District, the local office has been fully operational since the sequester. However, the current hiring freeze has left the office understaffed. Two deputy positions and one staff position are currently vacant, with a third deputy position set to be vacant via retirement later this year.

Since the shutdown began, the twenty-three remaining employees within the Marshals office have continued to work as normal, but none have been paid. This includes U.S. Marshal Stafford, seventeen sworn deputies, and five administrative staff members. The office also retains forty-four court-security-officer contractors and one asset-forfeiture contractor. These contractors were being paid at the beginning of the shutdown, but funding for these contracts is set to expire in the middle of October. According to U.S. Marshal Stafford, it is currently unclear what cuts, including furlough days, will be imposed during FY 2014.

U.S. Probation & Pre-Trial Services

The U.S. Probation Office in the Middle District of North Carolina had a 10% reduction in funding in the FY 2013 budget due to sequestration. The office has avoided employee furloughs through flexibility in funding other items and departures of employees who were not replaced. It has lost five people over the past year, including two U.S. Probation Officers and one Supervisory U.S. Probation Officer. The inability to replace employees has resulted in staffing at 77% of the office's ordinary needs, based on AO metrics. Despite this understaffing and one of the highest-risk populations in the nation, however, the office has continued to meet Court deadlines for reports, maintaining one of the country's best rates for offenders successfully completing supervision. Since the shutdown, the office has utilized non-appropriated funds to continue the Court's work, but after October 17, it will further curtail its duties and maintain essential staff on non-pay status. According to the office, the dedicated staff continues to address the risks of the local population, but the continued lack of adequate resources makes this a progressively difficult task.

Criminal Justice Act Panel

The members of the CJA Panel continue to receive appointments in federal criminal cases during the shutdown. Payment of CJA vouchers had been suspended for the last two weeks of FY 2013, and had been set to resume October 1, 2013. However, since the shutdown went into place, it does not appear that CJA vouchers will be paid until the shutdown ends. Nevertheless, members of the CJA Panel continue to provide representation to the indigent and work with the U.S. Attorney's Office to ensure the criminal justice system continues to operate.

Sophia Harvey is principal at Liao Harvey PC in Winston-Salem, NC and former law clerk to the Honorable Thomas D. Schroeder of the U.S. District Court for the Middle District of North Carolina.

Chris Jackson is an associate at Ellis & Winters LLP in Greensboro, NC.

Preparing for a Criminal Trial in the Middle District

By Laura J. Dildine

Smith Moore Leatherwood LLP

Special thanks to Eric Placke of the Federal Public Defender's Office of the M.D.N.C.

Preparing for a criminal trial in the Middle District requires diligence, a keen eye for detail, diplomacy, and stamina. As experienced trial attorneys know, a meaningful investment of time *before* trial pays dividends *during* trial.

Scheduling Order. Attorneys must pay attention to the Court's Scheduling Order provided at arraignment. In addition to setting deadlines for plea agreements and dates for changes of plea and trial, this Order specifies key deadlines by which motions must be filed and information concerning requests for preliminary instructions. It is important to read the Scheduling Order carefully, because the Orders contain different substantive information, depending on the assigned trial judge. For instance, some Scheduling Orders may require and provide deadlines for trial briefs. On the other hand, other

judges add details relevant to the Scheduling Orders as minute entries on PACER. If attorneys have any scheduling questions, they should not hesitate to call or e-mail the assigned trial judge's Case Manager for the judge's preferences.

Federal Rules of Criminal Procedure. In addition to deadlines and directives in the Scheduling Order and on PACER, the Federal Rules of Criminal Procedure mandate particular actions. For example, if the U.S. Attorney requests notice of an alibi defense pursuant to Rule 12.1(a), the defense attorney has 14 days, unless otherwise set by the court, to serve written notice of such a defense. In addition, according to Rule 12.2(a), if a defendant intends to assert an insanity defense, his attorney must notify the U.S. Attorney within the deadline set in the Scheduling Order for pre-trial motions. The Rules also require the government, upon the defendant's request, and the defendant, upon the government's request, to provide the other side with a written summary of any expert testimony that is intended to be used at trial. Fed. R. Crim. P. 16(a)(1)(G), 16(b)(1)(C). Codifying the Jencks Act, Rule 26.2

requires an attorney, on motion by opposing counsel, to disclose particular witness statements. In short, attorneys should be well-versed in the Rules of Criminal Procedure early in a case.

Open Dialogue with U.S. Attorney. It is also important to maintain an open dialogue with the U.S. Attorney prior to trial. The finer points of scheduling can be ironed out. The attorneys may be able to determine what issues they can resolve and what issues are for the court to decide. For instance, in a felon-in-possession case, the attorneys may agree to stipulate to the fact of the prior felony conviction. On the other hand, issues on which the attorneys cannot agree should be presented to the court in a trial brief, if appropriate, or in a motion in limine.

Meaningful Dialogue with Client. If a federal criminal defendant has trial experience, it is likely in the state court system, which can be a very different experience. Therefore, it is important for the defense attorney to explain the trial process, admissibility or inadmissibility of evidence, and the attorney's ethical obligations during trial. The attorney should thoroughly cover the defendant's right to testify at trial, examining both the benefits and consequences of testifying. A defendant should also understand the significance of his or her behavior and demeanor in the courtroom.

Technology. If attorneys are going to use the Court's technology during trial, they should contact the Systems staff at least one week before trial to reserve a Digital Evidence Presentation System (DEPS) and must receive training by the Systems Department. If attorneys plan to use their own technology system, they must contact opposing counsel and the trial judge's Case Manager at least one week prior to trial. In addition, attorneys can request authorization to bring cell phones, laptops, tablets, or other electronic devices inside the M.D.N.C. courthouses. It is also recommended that attorneys and/or their staff visit their assigned trial courtroom beforehand to assess courtroom logistics.

Access to Client. Up to the date of trial, the U.S. Marshals Service typically keeps a criminal defendant at the facility where he or she has been held. On the Thursday or Friday before trial begins on Monday, the defendant is often moved to the Guilford County jail if the trial is to be held in the Greensboro courthouse or the Forsyth County jail if the trial is to be held in Winston-Salem. Prior to the first day of trial, a family member should take the defendant's trial clothing to the jail so the defendant can dress for court before

transport to the courthouse. During the trial, as a result of transportation from the county jail to the federal courthouse, a defense attorney should not expect to have a great amount of time with the client prior to court in the mornings.

Assistant Federal Public Defender Eric Placke will present "Preparing for a Criminal Trial in the MDNC" at the MDNC Chapter's October 21, 2013 CLE.

Laura J. Dildine is an associate at Smith Moore Leatherwood LLP in Greensboro, NC and a former law clerk to the Honorable N. Carlton Tilley, Jr. of the U.S. District Court for the Middle District of North Carolina.

Supreme Court Criminal Law Update

By Tanisha Palvia

Brooks, Pierce, McLendon, Humphrey & Leonard LLP

The United States Supreme Court has issued numerous substantive opinions in the past year on topics ranging from withdrawal from a conspiracy to searches and seizures to what constitutes a Fifth Amendment violation. This article sheds light on some of these decisions, while Kearns Davis' federal criminal law update at the October 21, 2013 CLE will provide criminal law practitioners with a more in-depth look at recent decisions from both the United States Supreme Court and the Fourth Circuit Court of Appeals.

Burden of proof is on the defendant for withdrawal from a conspiracy. Before the Court's opinion in *Smith v. United States*, 133 S. Ct. 714 (2013), the circuits were divided as to whether withdrawing from a conspiracy before the statute of limitations period shifts the burden of proof to the government to prove beyond a reasonable doubt that the accused was a member of the conspiracy during the relevant period. *Id.* at 718. In *Smith*, the Supreme Court unanimously resolved this split, holding that establishing withdrawal from a conspiracy is an affirmative defense in which the burden of proof rests on the defendant, regardless of when the purported withdrawal took place. *Id.* at 720.

Petitioner Smith was convicted, *inter alia*, of various conspiracy charges. *Id.* at 717-18. Petitioner argued these conspiracy convictions were barred by the applicable 5-year statute of limitations, since

Petitioner presented evidence that he withdrew from the conspiracies more than five years before he was charged, as he had spent the last six years of the charged conspiracies in prison for a felony conviction. *Id.* at 718. As a result, Petitioner contended that the burden of proof shifted to the Government to prove Petitioner's membership in the conspiracy persisted within the applicable five year window—which the Government did not do. *Id.* at 718-19.

In addressing Petitioner's argument, the Court first reaffirmed that the relevant date for statute of limitation purposes with conspiracy crimes is the date when the conspiracy concludes or the date when a defendant withdraws from the conspiracy. *Id.* at 718. The Court further emphasized that withdrawal is an affirmative defense that requires affirmative acts inconsistent with the goals of conspiracy that are communicated to the defendant's co-conspirators. *Id.*

Justice Ginsberg, who authored the opinion, noted that with affirmative defenses, the burden of proof lies usually with the defendant unless the affirmative defense negates an element of the crime. *Id.* at 719. However, as the affirmative defense of withdrawal does not negate an element of the conspiracy crimes charged and instead presupposes the defendant committed the offense (in order to be able to withdraw from it), the Supreme Court held that the burden of proof for withdrawal likewise does not shift to the Government. *Id.* The Court further noted that with regard to withdrawal, Petitioner, as the one claiming he withdrew from the conspiracy, would be in the best position to provide proof of that withdrawal since the Petitioner would know what steps, if any, he took to dissociate from his co-conspirators. *Id.* at 720.

Moreover, since the commission of a conspiracy within the applicable statute of limitations period is also not an element of the conspiracy offense, the Court held that the burden is on the defendant to prove the statute of limitations has expired. *Id.* As a result, the Supreme Court affirmed Petitioner's convictions for conspiracy because he did not meet his burden of proof in presenting the affirmative defense of withdrawal or the expiration of the statute of limitations. *Id.* at 721.

Only occupants in the immediate vicinity of the area to be searched pursuant to a search warrant may be detained. In *Bailey v. United States*, 133 S. Ct. 1031 (2013), the defendant was detained by officers after leaving the premises in his car just before officers began executing a search warrant for the premises. *Id.* at 1336. Officers in an unmarked car

followed defendant for .7 miles before detaining and bringing him back to the apartment being searched. *Id.* at 1045. By the time they returned, the search team had found a gun and drugs in plain view inside the apartment. *Id.* at 1036. Defendant was arrested, and his keys were seized incident to the arrest. *Id.* Officers later learned one of the keys opened the door of the apartment being searched. *Id.*

At trial, the defendant moved to suppress the apartment key and statements he made when detained by the officers .7 miles from where the search was occurring, contending the evidence was obtained from an unreasonable seizure in violation of the Fourth Amendment. *Id.* While the district court and the Second Circuit disagreed, the Supreme Court sided with the defendant. *Id.* at 1037, 1041.

Justice Kennedy, authoring the majority opinion, first noted the general rule that Fourth Amendment seizures are reasonable only if based on probable cause to believe an individual has committed a crime. *Id.* at 1037. The Court recognized the narrow exception laid out in *Michigan v. Summers*, 132 S. Ct. 2710 (2012), by which officers executing a search warrant may detain occupants of the premises being searched without the necessity of probable cause, due to law enforcement interests of officer safety, facilitating the completion of the search, and preventing flight. *Id.* at 1037-38. The Court reasoned that none of these rationales, however, apply with similar force to the scenario where the defendant is detained outside the "immediate vicinity" of the premises being searched. *Id.* at 1041. Justice Kennedy also noted the additional intrusiveness on the defendant's personal liberty of being detained while on the premises versus being detained after having left its immediate vicinity. *Id.* In the former scenario, the public stigma associated with the search itself would only be minimally added to and the defendant would avoid the inconvenience and indignity of being detained somewhere besides his home. *Id.* However, detention after the defendant has left the premises will resemble a full-fledged arrest and therefore be more intrusive on the defendant's personal liberty. *Id.*

The Court finally emphasized the need for a spatial constraint to the *Summers* exception because the exception grants officers the substantial authority to detain individuals outside the traditional

rules of the Fourth Amendment. *Id.* at 1042. Justice Kennedy wrote that limiting the *Summers* rule to the area where an occupant poses a “real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification.” *Id.* Once the occupant is beyond the “immediate vicinity” of the premises being searched, officers may no longer detain the occupant pursuant to *Summers* and will have to have another lawful rationale for the stop (such as an arrest based on probable cause or a brief stop pursuant to *Terry v. Ohio*). *Id.* Otherwise, the occupant may not be detained.

Of note is that the Court did not define what “immediate vicinity” means because there was no doubt the defendant in this case was outside the immediate vicinity. *Id.* The Court did, however, indicate lower courts could consider a number of factors to determine if an individual was detained in the immediate vicinity of the searched premises, including but not limited to the lawful limits of the premises, whether occupant was in the line of sight of the premises, and the ease of reentry from the occupant’s location. *Id.*

Justice Scalia wrote the concurrence and noted that the majority’s balancing test was inconsistent with the bright line, categorical rule provided in *Summers* and would make it harder for officers to know whether a seizure was constitutionally permissible before carrying it out. *Id.* 1043-45. Justice Bryer authored the dissent and contended that the majority applied an arbitrary geographical rule instead of weighing out Fourth Amendment concerns. *Id.* at 1045-50.

Failure to use Sentencing Guidelines in effect at time of offense violates the *Ex Post Facto* Clause. In *Peugh v. United States*, 133 S. Ct. 2072 (2013), Petitioner Peugh was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. *Id.* at 2075. At his sentencing hearing, Petitioner was sentenced under the 2009 Sentencing Guidelines in effect at that time instead of the 1998 Sentencing Guidelines that were in effect at the time of his offenses. *Id.* at 2078. Petitioner’s sentencing range under the 1998 Guidelines would have been 30 to 37 months, while his range under the 2009 Guidelines increased significantly to 70 to 87 months. *Id.* at 2078-79. The district court rejected Petitioner’s argument that sentencing him under the 2009 Guidelines was an *ex post facto* violation and sentenced Petitioner to 70 months in prison pursuant to the lower end of the 2009 Guidelines (which was still 33 months higher than the high end of the 1998 Guidelines range). *Id.* at 2079. The Seventh Circuit affirmed the district court on appeal. *Id.*

Because there existed a split amongst the Circuit Courts as to whether the *Ex Post Facto* Clause could be violated when a defendant is sentenced under Guidelines promulgated after he committed his crimes when such Guidelines provide a higher applicable sentencing range than the version in place at the time of the offense, the Supreme Court granted *certiorari*. *Id.* Writing for the majority, Justice Sotomayor provided that under 18 U.S.C. § 3553(a)(4)(A)(ii), district courts must apply the Sentencing Guidelines “in effect on the date the defendant is sentenced.” *Id.* at 2081. However, the Sentencing Guidelines include the provision that “[i]f the Court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the [E]x [P]ost [F]acto [C]lause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.” *Id.* (alteration in original) (citing USSG §§ 1B1.11(a), (b)(1) (Nov. 2012)).

At issue here was the category of *ex post facto* laws that inflict a greater punishment than the law annexed to the crime when committed. *Id.* Because the 2009 Guidelines call for a greater punishment than the 1998 Guidelines, Petitioner argued the *Ex Post Facto* Clause was violated, while the Government contended that because the Guidelines were merely advisory, they are not “law” and there can thus be no *ex post facto* problem. *Id.* As each party could point to precedent in support of its position, the Court focused on the touchstone of the Court’s inquiry concerning *ex post facto* violations, which is whether a particular change in a law presents a “sufficient risk of increasing the measure of punishment attached to the covered crime.” *Id.* at 2082.

Relying on the prior Supreme Court holding in *Miller v. Florida*, 107 S. Ct. 2446 (198), the Court noted that “applying amended sentencing guidelines that increase a defendant’s recommended sentence can violate the *Ex Post Facto* Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range.” *Id.* As the federal sentencing scheme aims to achieve uniformity amongst sentences, the Guidelines are to anchor sentencing decisions and remain a meaningful benchmark through the process of appellate review. *Id.* at 2083. District courts must

begin their analysis for sentencing with the Guidelines and failure to calculate the correct Guidelines range constitutes procedural error. *Id.* at 2083. Thus, the Court held the Guidelines have the “intended effect of influencing the sentences imposed by judges.” *Id.* at 2084. Based on these findings, the Court held the *Ex Post Facto* Clause forbids the government from altering the substantive formula used to calculate the applicable sentencing range to enhance a defendant’s measure of punishment. *Id.* at 2088.

Accordingly, the Court held that the district court’s refusal to apply the previous Guidelines in effect at the time of defendant’s offenses created a type of *ex post facto* law that changed the nature of the crime by inflicting a greater punishment than would be applied when the crime was committed. *Id.* Going forward, the Court held that district courts must begin their sentencing analysis with the guidelines in effect at the time the defendant committed his crimes. *Id.* at 2087. However, the Guidelines in effect at the time of sentencing are not necessarily deemed pointless, as they may serve as a reason for deviating from the older Guidelines. *Id.*

Silence is not enough to invoke the privilege against self-incrimination. In a plurality decision concerning the Fifth Amendment right against self-incrimination, the Supreme Court held in *Salinas v. Texas*, 133 S. Ct. 2174 (2013) that one who desires the protection of the Fifth Amendment must expressly invoke it. In 1992, Petitioner agreed to accompany police to the station for questioning concerning a murder. *Id.* at 2178. Petitioner answered the officer’s questions over an hour but fell silent when asked questions about whether his shotgun would match shells recovered at the murder scene. *Id.* Instead of responding, he “[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up.” *Id.* After the interview, he was released due to a lack of evidence to charge him with the murders. *Id.* By the time police found a witness who heard Petitioner confess to the crimes, Petitioner had absconded. *Id.* In 2007, he was found living under an assumed name. *Id.*

At his trial, Petitioner did not testify. However, over his objection, the prosecution used his silence in response to the officer’s question regarding his shotgun during the 1992 interview as evidence of his guilt. *Id.* Petitioner was found guilty and sentenced to 20 years in prison. The Court of Appeals of Texas affirmed his convictions, rejecting Petitioner’s argument that prosecutors’ use of his silence to evidence his guilt

violated the Fifth Amendment. *Id.* The Court reasoned that Petitioner’s pre-arrest, pre-*Miranda* silence was not “compelled” within the meaning of the Fifth Amendment. *Id.* The Texas Court of Criminal Appeals affirmed on the same grounds. *Id.* at 2179.

Justice Alito authored the opinion, in which the Chief Justice and Justice Kennedy joined, beginning with the general principle that the Government has the right to everyone’s testimony. *Id.* at 2179. The exception to that general rule is the Fifth Amendment, and the Court emphasized that it has long held this exception must be claimed by the one who desires its protection. *Id.* Although Justice Alito recognized that scenarios exist where one need not expressly invoke the Fifth Amendment to gain its protection, those exceptions are united by the common principle that a witness need not do so where “some form of official compulsion denies him a free choice to admit, deny, or refuse to answer.” *Id.* at 2180. Petitioner, however, could not benefit from any of these exceptions because his interview with the police was voluntary. *Id.* Accordingly, Petitioner had to expressly invoke the privilege of the Fifth Amendment to prevent the prosecution from using his noncustodial silence as evidence of his guilt. *Id.* As he did not, the prosecution was free to use his silence against him. *Id.*

Justices Thomas and Scalia agreed with Justice Alito, but concurred to write that even had Petitioner expressly invoked his privilege, his silence could nevertheless be used as evidence of his guilt because the prosecutors’ comments about his silence did not compel him to give self-incriminating testimony. *Id.* at 2184. The remaining four justices dissented, emphasizing that using the Petitioner’s silence against him compels the Petitioner to take the stand to explain his silence, and the prosecution may then introduce a prior conviction for impeachment purposes that the law would otherwise make inadmissible. *Id.* at 2186. The dissent also commented on the impracticality of the Court’s holding and questioned how the common man would know to expressly assert legalese invoking the Fifth Amendment, instead advocating for an approach analyzing the individual’s silence and the surrounding circumstances to determine if the Fifth Amendment had been invoked. *Id.* at 2190-91.

Tanisha Palvia is an associate at Brooks, Pierce, McLendon, Humphrey & Leonard LLP in Greensboro, NC.

New United States Bankruptcy Judges Appointed

By *Brian R. Anderson*
Nexsen Pruet, PLLC

The Middle District of North Carolina Chapter of the Federal Bar Association welcomes two new United States Bankruptcy Judges to our district. The United States Court of Appeals for the Fourth Circuit has appointed Benjamin A. Kahn and Lena M. James to the position of U.S. Bankruptcy Judge for the Middle District of North Carolina.

Mr. Kahn graduated from the University of North Carolina at Chapel Hill with a Bachelor of Arts degree in Political Science and History in 1990. He received his Juris Doctorate with Honors from the University of North Carolina School of Law at Chapel Hill in 1993. Mr. Kahn is a member of Nexsen Pruet, PLLC, and previously served as law clerk to the Honorable Jerry G. Tart. He is a Conferee of the National Bankruptcy Conference, a non-profit organization comprised of bankruptcy judges, practitioners, and law professors who assist the United States Congress with bankruptcy legislation. Mr. Kahn will succeed the Honorable William L. Stocks and will be stationed in Greensboro, North Carolina.

Ms. James attended Swarthmore College and graduated with a Bachelor of Arts degree in English Literature in 1992. She received her Juris Doctorate with Honors from the University of North Carolina School of Law at Chapel Hill in 1998. Ms. James serves as the Chief Deputy for the U.S. Bankruptcy Court for the Middle District of North Carolina. She previously worked as career law clerk to Chief Bankruptcy Judge Catharine R. Aron and as an attorney at Womble, Carlyle, Sandridge & Rice. Ms. James will succeed the Honorable Thomas W. Waldrep, Jr. and will be stationed in Winston-Salem, North Carolina.

The officers and members of the Chapter congratulate Mr. Kahn and Ms. James.

Brian R. Anderson is an associate at Nexsen Pruet, PLLC in Greensboro, NC and a former law clerk to the Honorable Thomas W. Waldrep, Jr. of the United States Bankruptcy Court of the Middle District of North Carolina.

Federal Bar Association

Middle District of North Carolina Chapter

cordially invites you to attend its

**FALL 2013 CLE PROGRAM
AND BANQUET**

featuring:

Christopher R. Clifton, *Grace Tisdale & Clifton P.A.*
Welcome, FBA MDNC Chapter President

Richard D. Dietz, *Kilpatrick Townsend & Stockton, LLP*
“Review of Recent Supreme Court Civil Cases of Interest”

Kearns Davis, *Brooks, Pierce, McLendon, Humphrey & Leonard, LLP*
“Federal Criminal Case Law Update”

Manning Connors, *Smith Moore Leatherwood LLP*
Eric Placke, *Assistant Federal Public Defender, MDNC*
“Preparing for Trial in the MDNC – Civil and Criminal”

The Honorable Thomas D. Schroeder, United States District Judge
Keynote Remarks, Banquet

Monday, October 21, 2013

2:00 CLE Registration

2:30 CLE

5:30 Reception

6:15 Banquet

**Embassy Suites
204 Centreport Drive
Greensboro, NC**

To register, please go to:

<http://events.kilpatrickstockton.com/images/FBA2013FallBanquetandCLE.pdf>

For more information about the FBA, or to join, please visit www.fedbar.org.
FBA MDNC programs and events are for all lawyers, regardless of FBA membership.