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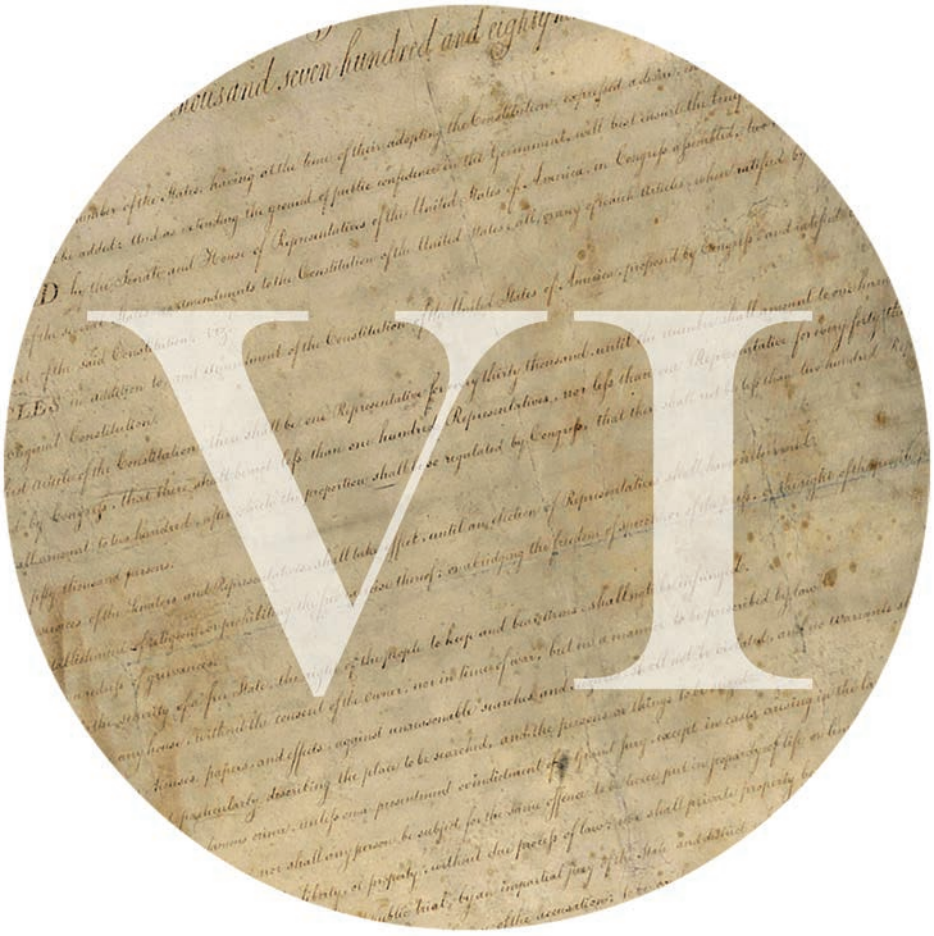

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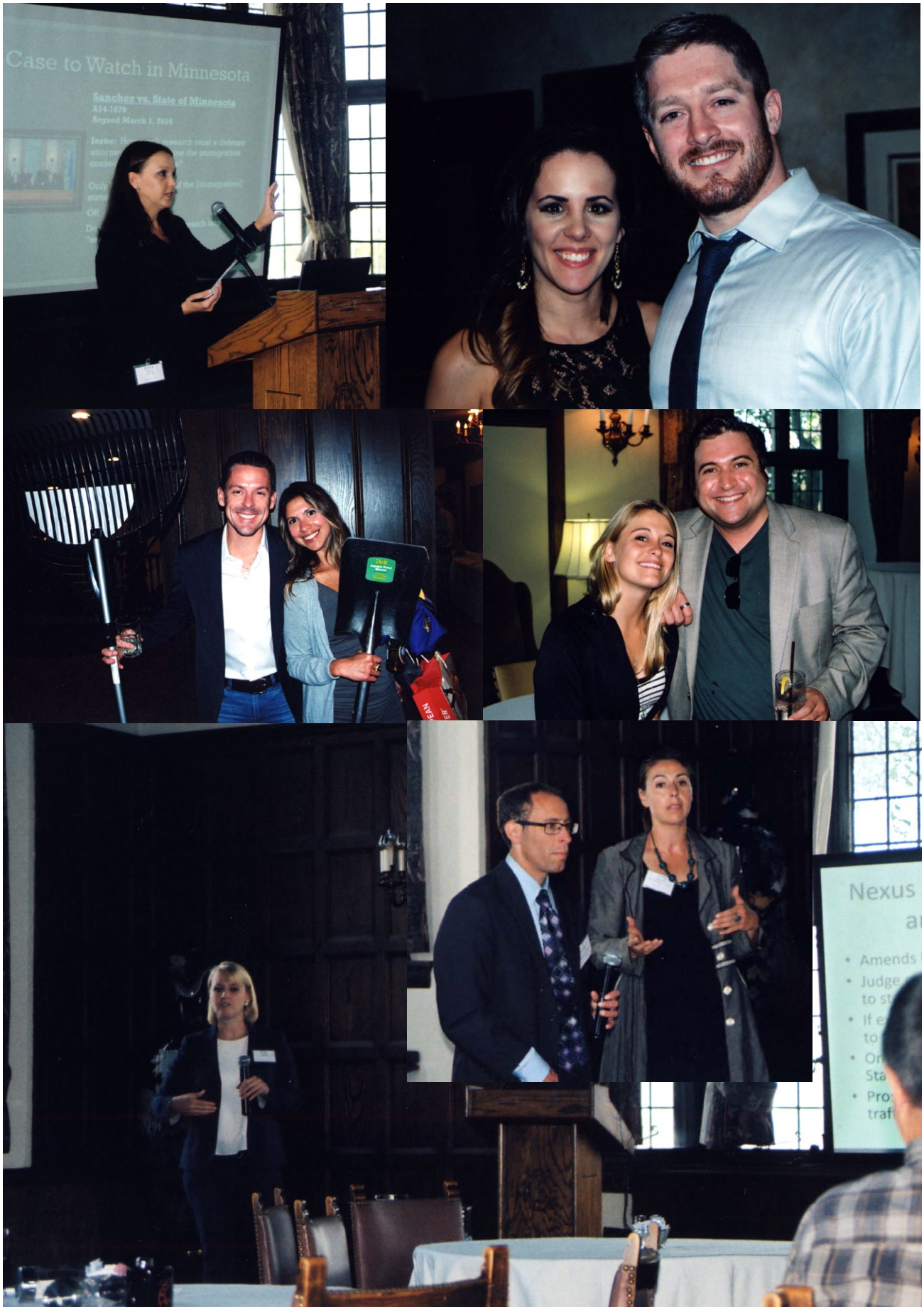
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It's a New Year: Did You Catch All of the 2016 Minnesota Appellate Rules Changes?

By Lisa Lodin Peralta

Depending on how often one handles appeals in the Minnesota state courts, the attorney filing an appeal may not be up to date on the current rules. Some amendments to the procedural rules are more material than others. During 2016, the Minnesota Rules of Civil Appellate Procedure were subject to some major changes about which you should know.

(And yes, even though there are criminal rules that cover criminal appeals,[1] the civil appellate rules also apply for various procedural aspects.[2])

Mandatory E-Filing

The most significant change in 2016 in practical terms is that e-filing in the appellate courts became mandatory.[3] The appellate courts use E-MACS,[4] however, which is a different platform than that used by the Minnesota district courts for e-filing. So if one hasn't handled an appeal in an e-filed manner, one needs to be prepared to learn a new system (at least enough to get a login and password so an assistant can file the documents).

Although e-service is accomplished as part of the e-filing process, one aspect of "conventional" filing and service still applies to appeals: parties must still file and serve some paper copies of briefs.

As to filing of paper briefs, the "number, time, and manner of filing" is not specified in the appellate rules[5] but rather by court orders – subject to change – made available on the clerk's webpage.[6] Effective July 1, 2016, the supreme court's order provided that a party before the supreme court needed to file only one unbound copy of the brief; in matters before the court of appeals, a party needs to file four bound briefs and one unbound brief.[7]

1 Minn. R. Crim. P. 28 & 29.

2 *See* Minn. R. Crim. P. 28.01, subd. 2 ("To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern appellate procedure unless these rules direct otherwise."); 29.01, subd. 2 (same); *see, e.g.,* 28.02, subd. 10 ("[T]he Minnesota Rules of Civil Appellate Procedure govern, to the extent applicable, the form and filing of briefs, but the appellant's brief must contain a procedural history.")

3 Minn. S. Ct. Order No. ADM09-8006 (Jan. 27, 2016) ("In all appeals … pending on or filed after July 1, 2016, use of the appellate courts' electronic file and service system is required in all case types in which all parties to the appeal or matter are represented by an attorney…").

4 Access to E-MACS and information about it, including training, is available at: http://www.mncourts.gov/Clerk-of-Appellate-Courts.aspx#tab05AppellateeFiling.

5 Minn. R. Civ. App. P. 131.03, subd. 1.

6 A summary of the supreme court and court of appeals requirements for number of paper copies to be filed, and links to the orders so providing, available at: http://www.mncourts.gov/Clerk-of-Appellate-Courts.aspx#tab05AppellateeFiling (last viewed on 12/7/2016).

7 *Id.*

Similarly, there is still a requirement to serve two paper briefs on the opposing party or parties despite e-service. Further, because this is conventional service, there must be an actual proof of service (whether by mail, express delivery, or personal service) completed and e-filed through E-MACS.[8]

References to the Record

Another notable change concerns references to the record in appellate briefs. Rule 128.03 clarifies how parties should refer to the record: by using the document index number from the trial court Register of Actions, and the page numbers of that particular document.[9] The comment provides an example that a citation to page three of a Register of Actions entry might be "Doc. 50 at 3." There is always a caveat, though. Where that portion of the record is included in the addendum, the reference should be to the addendum page, such as "Add. 38." The comment provides further guidance on abbreviations the parties might use in references, such as to the transcript or the other party's brief.[10]

Addendum (Not Appendix)

The old rules required the filing of an appendix, with no limit on length and not much direction on content. The amended Rule 130 prohibits the filing of an appendix and instead requires an "addendum." The addendum must include "(1) a table of contents identifying each document included in the Addendum, including the Document Index Number from the Register of Actions, if available; (2) a copy of any order, judgment, findings, or trial court memorandum in the action directly relating to or affecting the issues on appeal; (3) any agreed statement of the record; and (4) if the constitutionality of a statute is challenged, proof of compliance with Rule 144."[11] The addendum may also include up to 50 pages of other materials, with certain items excluded from the page count – such as the trial court judgment or order.[12]

Just a reminder: Effective July 2014 the appellate rules were amended to eliminate the appendix in favor of an addendum for briefs,[13] petitions for discretionary review[14] and petitions for further review (PFRs).[15] These rules do apply to criminal appellate matters.[16] As to PFRs, the amendment amounted basically to merely a name change from "Appendix" to "Addendum" on the cover sheet of the attached documents.

While there was a grace period until May 2015, the failure to use the word "Addendum" on the cover sheet of PFR attachments can now be fatal to an appeal. The Clerk of Appellate Courts notes on its webpage that "petitions for review submitted to the Clerk of Appellate Courts for filing with the supreme court that include an appendix rather than an addendum will no longer be accepted for filing, and will be returned to the filer."[17]

The premature death to a PFR comes if the filing appellant waits until the last days to file. A PFR which has the improperly named "Appendix" that is e-filed on the last (i.e., 30th[18]) day, which is then reviewed by the clerk's office and returned to the lawyer (usually days later by mail), there is not enough time to correct the error by refiling (i.e., using a cover page with the word "Addendum"). Supreme court orders rejecting PFRs verify the court is enforcing this rule, at least in civil cases.[19]

8 Minn. R. Civ. App. P. 131.03, subd. 2.
9 Minn. R. Civ. App. P. 128.03(c).
10 *Id.*, cmt.
11 Minn. R. Civ. App. P. 130.02(a).
12 Minn. R. Civ. App. P. 130.02(b).
13 Minn. R. Civ. App. P. 130.02, cmt. (2014 amend.).
14 Minn. R. Civ. App. P. 105.02; *see also* Minn. R. Civ. App. P. 130.02(d).
15 Minn. R. Civ. App. P. 117, subd. 3; *see also* Minn. R. Civ. App. P. 130.02(d).
16 *See* Minn. R. Crim. P. 29.04, subd. 8 (referring to addendum in contents of brief), 29.04, subd. 3 (referring to addendum in contents of PFR) & 29.04, subds. 4-6 (referring to addenda in contents of petitions, responses to petitions and cross-petitions for review and discretionary review).
17 *See* http://www.mncourts.gov/Clerk-of-Appellate-Courts.aspx (last viewed 12/7/2016).
18 Minn. R. Crim. P. 29.04, subd. 2.

Whether the supreme court will enforce the rule as to criminal cases is unknown, but in this author's opinion, it is unlikely. First, criminal rule 29.04, subd. 2 allows for the time to file the PFR to be extended by 30 days,[20] whereas the court has no such authority under the civil rules.[21] Therefore, upon the filing of and granting of a motion for extension of time to file a PFR in a criminal case under the criminal rule, the filing of a corrected PFR that uses the word "Addendum" instead of "Appendix" would still be timely. Second, the supreme court is generally more reluctant to enforce the same harsh consequences on criminal defendants that it is willing to apply to civil litigants – such as refusing to look at a PFR. Technically Rule 29.04, subd. 2 actually requires "good cause" for the 30-day extension to the filing deadline for a PFR in a criminal appeal, but the supreme court never addressed that requirement in at least one previous extension it granted where the defendant mistakenly labeled an addendum an "Appendix."[22] However, at some point (that being years after the addendum rule became effective?), a prosecutor might reasonably argue – and the supreme court might agree – that there is no "good cause" to allow for an extension when the appendix/addendum mistake has been made.

Unpublished Cases

The rule amending the addenda in briefs now eliminates the need to provide unpublished decisions as part of the addendum, unless those decisions are not generally available in online databases or from Minnesota law libraries.[23] The appellate courts neither need nor want to be provided in the brief with the cases it can easily find on their own, as they are "unhelpful."[24] There are a couple of important provisos to pay attention to with this change.

The first relates to the Supreme Court's "request" in the comment that one cite to the unpublished cases using the Westlaw citation because the appellate courts use Westlaw.[25] Obviously it is easier for the clerk or judge to figure out the correct page of the unpublished case that the brief author is citing to when it is looking up the case if the brief author has used the same database with the same page numbers. The problem is that Westlaw is a paid service to which not all attorneys have ready access. One may instead pay for Lexis, or pay to be a member of MSBA and use Casemaker, or have access to Fastcase, or, for example, find discussion of a case in CLE materials and obtain the slip opinion by accessing it directly from the court's website.

The second important piece one needs to know is that this is a rule amendment that does not affect the statutory requirement to provide copies of unpublished opinions to opposing parties or counsel.[26] Therefore, if unpublished cases are cited in the brief, the cases need to be copied and sent along with the briefs when the briefs are served on the

19 *See, e.g., In re the Estate of Leonard J. Marihart*, No. A14-1799, order (Minn. Sept. 2, 2015) (petitioner filed appendix with PFR; filing was rejected by clerk; petitioner filed motion asking court to accept late PFR with addendum but court denied motion); *Quinn v. Johnson*, No. A15-0322, order (Minn. Oct. 29, 2015) (petitioners timely filed PFR with properly prepared addendum incorrectly titled "Appendix;" clerk rejected petitioners' filing after time had expired to seek further review so petitioners couldn't timely file corrected petition; petitioners asked court for permission to file corrected petition after the filing deadline but court denied motion).

20 Minn. R. Crim. R. 29.04, subd. 2.

21 *See* Minn. R. Civ. App. P. 126.02 & cmt.

22 *State v. Treadwell*, No. A14-0512, order (Minn. July 15, 2015).

23 Minn. R. Civ. App. P. 130.02(a).

24 Minn. R. Civ. App. P. 130.02, cmt.

25 *See id.* ("Parties should be aware that the appellate courts have access to online databases through Westlaw and, therefore, should include the appropriate citation for unpublished decisions available on that service.")

26 *See id.* ("The committee acknowledges that current statutory authority requires parties to provide each other with copies of unpublished opinions that are cited in the briefs. … The rule does not affect the obligation under Minn. Stat. § 480A.08, subd. 3, to provide copies of unpublished opinions to opposing parties or attorneys, but specifies that they should not be filed as part of the addendum.").

opposing party.

Word Limits

The petition for further review is no longer limited in length by number of pages. A criminal petition is now limited to 4,000 words,[27] and a civil petition is limited to 2,000 words.[28] The change from page numbers (10) to word count (4,000) also applies to petitions for discretionary review[29] and petitions for accelerated review by the supreme court prior to a decision by the court of appeals.[30] Along with the word-count limitations comes a requirement to file a Certificate of Document Length,[31] of which there is a sample form in the appendix to the civil appellate rules.[32]

Conclusion: Read the Rules

The point here is that, especially if one does not regularly handle appeals, it is so necessary to read the rules – and that doesn't mean just some rules that one believes one is unfamiliar with. While the appellate courts will at times excuse ignorance, particularly in representation of a criminal defendant, one's reputation is on the line for failure to know and follow the current rules. An additional option is to seek out advice of a regular appellate practitioner who can provide direction on new or confusing rules. But one shouldn't skimp on spending time on appellate procedure. Failing to follow the appellate rules can not only prejudice the client, but also can result in attorney discipline.[33]

27 Minn. R. Crim. P. 29.04, subd. 3.
28 Minn. R. Civ. App. P. 117, subd. 3.
29 Minn. R. Civ. App. P. 105.02 (made specifically applicable to criminal appeals through Minn. R. Crim. P. 28.02, subd. 3).
30 Minn. R. Civ. App. P. 118, subd. 2.
31 Minn. R. Civ. App. P. 117, subd. 3; 118, subd. 2. While Rule 105 was also amended in 2016 from a page limit to a word limit, it does not contain a specific requirement to file a Certificate of Document Length. This author presumes that was oversight on the part of the rules committee and recommends that along with any petition for discretionary review, the filing attorney include a Certificate of Document Length.
32 Form 132 is available in Microsoft Word or PDF format on the Forms Appendix for the Rules of Civil Appellate Procedure, which you can access via link at: http://www.mncourts.gov/SupremeCourt/CourtRules/Forms-Appendix-for-the-Rules-of-Civil-Appellate-Pr.aspx (last viewed on 12/7/2016).
33 *See In re Gilmore*, 871 N.W.2d 212, 212 (Minn. 2015) (disciplining lawyer for failing to provide competent appellate representation when he appealed from non-appealable orders and failed to file an appeal after entry of final judgment).

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The Armed Career Criminal Act: "Prior Convictions are not What they Seem"

By RJ Zayed and Katherine Arnold

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. 924, mandates a 15-year minimum sentence for defendants convicted of unlawful possession of a firearm if that defendant has three or more prior convictions for certain violent felonies or serious drug offenses. Without this enhancement, defendants convicted of the same crime are subject to a maximum sentence of 10 years. Determining whether defendants qualify as armed career criminals has proven a difficult task for the courts. The ACCA has spawned extensive litigation at all levels of the federal judiciary, including numerous cases brought before the Supreme Court. The result is that words and phrases often mean something far different from their everyday meaning when used in an ACCA case. Defense attorneys whose clients are facing an enhancement under the ACCA need to be aware that many crimes that would intuitively seem to be violent felonies under a plain and ordinary meaning of the language used to describe the convictions cannot constitutionally be used as predicate offenses.

Under the ACCA, a "violent felony" is any crime punishable by imprisonment for a term exceeding one year that (1) "has as an element of the use, attempted use, or threatened use of physical force against the person of another," (2) "is burglary, arson, or extortion, [or] involves the use of explosives," or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another." The Supreme Court addressed constitutional challenges to the third clause, known as the "residual clause," four times before deciding that the clause was unconstitutionally vague in *Samuel Johnson v. United States*.[1]

After *Samuel Johnson*, prosecutors were forced to rely more heavily on the first clause—the "force clause"—to get enhancements under the ACCA. The ACCA does not define the term "physical force." The Court, in another case titled *Curtis Johnson v. United States*, held that the term's "ordinary meaning," would therefore apply.[2] After considering alternative definitions, the Court found "the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. If a statute's force element is satisfied by "the merest touch," it cannot qualify as physical force under the ACCA. *Id.* at 143.

To determine whether a prior conviction includes the required force element, a court generally uses the "categorical approach,"

1 135 S. Ct. 2551 (2015); *Sykes v. United States*, 131 S. Ct. 2267 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007).

2 *Curtis Johnson v. United States*, 559 U.S. 133, 138-140 (2010). This case is unrelated to the Supreme Court's 2015 *Samuel Johnson v. United States*.

under which it considers "only … the fact of conviction and the statutory definition of the prior offense."[3] A court may stray from the categorical approach only if it is interpreting a divisible statute.[4] Divisible statutes use "an explicitly finite list of possible means of commission," while indivisible statutes "create[ ] an implied list of every means of commission that otherwise fits the definition of a given crime."[5] If one of the alternatives is a predicate offense, but another alternative is not, the courts may "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction."[6] The court then considers whether the text of that alternative, and not the facts underlying the conviction, fits the definition of a violent felony.[7]

The restrictions put in place by the categorical approach allow courts to avoid having mini-trials to determine whether previous offenses were violent. The evidence from these prior convictions is often stale and incomplete. Often, the finder of fact did not have to specify which element among alternatives served as the basis for the conviction. The effect of this process is that many crimes that the ordinary person would categorize as a "violent crime" are not violent crimes under the ACCA. It does not matter that the crime is typically committed in a violent manner, or that the specific conduct for which the defendant was convicted was in fact violent. As long as it is possible for the offense to have been committed without the use, attempted use, or threatened use of violent, physical force, the offense cannot be a predicate offense regardless of the level of violence actually used.

The law in this area has been changing rapidly. In December 2015, as part of the Federal Defender CJA Panel, we were assigned to represent a defendant charged with being a felon in possession of a firearm, with the indictment seeking an ACCA enhancement. The prior criminal history in our case included three prior convictions for simple robbery, two convictions for first-degree aggravated robbery and a conviction for second-degree burglary of a dwelling. At the time of our assignment, several cases before the District of Minnesota and the Eighth Circuit had noted that convictions under Minnesota's simple robbery and burglary statutes were violent offenses.[8] The assumption that these offenses were violent felonies under the ACCA was so strong that sometimes defendants did not challenge this presumption for their prior simple robbery and burglary convictions even when arguing they did not qualify as an armed career criminal.[9] Nonetheless, we objected to the ACCA enhancement in our case on the basis that the three simple robberies and the two first-degree aggravated robberies were not predicate offenses under the ACCA because, as interpreted by Minnesota courts, the convictions did not satisfy the force requirement of the ACCA as interpreted by the Supreme Court in in *Curtis Johnson* and the Eighth Circuit had not addressed the Minnesota robbery statutes in light of *Curtis Johnson.*

Before sentencing in our case, the Eighth Circuit decided *United States v. Eason*.[10] *Eason* held that Arkansas's simple robbery did not meet the force requirement articulated in *Curtis Johnson* (2010) because the statute could be satisfied with unwanted touching, citing an Arkansas Supreme Court decision

3 *Taylor v. United States*, 495 U.S. 575, 602 (1990).
4 *See Mathis v. United States*, Slip Op. No. 15-6092, at 3-4 (S. Ct. June 23, 2016).
5 *Descamps v. United States*, 570 U.S. —, 133 S. Ct. 2276, 2289 (2013)
6 *Id.* at 2281.
7 *Descamps*, 133 S. Ct. at 2284-85

8 *See, for example, United States v. Schultz*, No. CR 13-214 (DWF/JSM), 2015 WL 5853117, at *1 (D. Minn. Oct. 7, 2015); *United States v. Raymond,* 778 F.3d 716, 717 (8th Cir. 2015); *United States v. Johnson*, 526 F.App'x 708, 709 (8th Cir. 2013) rev'd and remanded, 135 S. Ct. 2551 (2015); *United States v. Armstrong*, 554 F.3d 1159, 1164 (8th Cir. 2009).
9 *Raymond*, 778 F. 3d at 717; *Armstrong*, 554 F.3d at 1164.
10 829 F.3d 633 (8th Cir. 2016).

finding that "grabb[ing]" an individual's clothing "lightly" satisfied the statute's physical force element.[11] The court found that its previous holding to the contrary in *United States v. Sawyer*[12] must be overruled in light of the Supreme Court's intervening decision in *Curtis Johnson*. We believed that *Eason* would be dispositive in our case because Minnesota's simple robbery and first-degree robbery statutes, as interpreted by Minnesota courts, were identical to the Arkansas simple robbery statute.

Shortly thereafter, the Eighth Circuit decided another significant ACCA case, in *United States v. Morris*.[13] There the court vacated the district court's finding that Morris's conviction for third-degree burglary was a violent felony under the ACCA. The district court had found that this conviction was a predicate offense under the ACCA's 'enumerated offense' clause, which states that convictions for burglary, among others, are violent felonies. Under this clause, the offense of conviction must meet all of the requirements of the "generic" offense of burglary.[14] The court found that Minnesota's third-degree burglary statute was a divisible offense. In the first alternative, the requisite intent to commit a crime is formed at or before the time the offender enters the building without consent; in the second alternative, the offender develops the intent to commit a crime within the building only after the entry without consent has occurred. Turning to *Taylor*, the court found that "a generic burglary requires intent to commit a crime at the time of the unlawful or unprivileged entry or the initial 'remaining in' without consent."[15] Since only one of the divisible alternative means of satisfying Minnesota's third-degree burglary statute meets this requirement, the court of appeals vacated the district court's decision and remanded with instructions for the court to resentence the defendant under the modified categorical approach.[16]

The district court permitted us to submit supplemental briefings after both *Eason* and *Morris* were decided. We argued that *Eason* was dispositive as to the simple robbery and aggravated robbery convictions and *Morris*, coupled with the jury instructions that were actually given in the trial of the prior burglary conviction, established that our client was not an Armed Career Criminal under the ACCA. The court agreed, finding that among our client's prior convictions, the only offense to qualify as a violent felony under the ACCA was one of the first-degree aggravated robbery convictions.[17] The fifteen-year minimum sentence that would have applied to our client as an armed career criminal instead became a maximum sentence of ten years.

Given the enormity of the stakes for a defendant facing an ACCA enhancement and the swift changes occurring in the case law,[18] defense attorneys cannot afford to make any assumptions when it comes to the application of an enhancement under the ACCA. Each prior conviction of what may seemingly appear to be a violent felony under a common understanding of the language needs to be scrutinized to ensure that it is a predicate ACCA offense as defined by *Curtis Johnson*, *Taylor*, *Mathis*, *Eason*, *Morris*, or other applicable precedent.

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11 *Id.* at 641, citing *Fairchild v. State*, 600 S.W.2d 16, 17 (Ark. 1980).
12 588 F.3d 548 (8th Cir. 2009)
13 836 F.3d 931 (8th Cir. 2016)
14 *Taylor*, 495 U.S. at 598-99.
15 *Id.* at 944.
16 *Id.*
17 *United States v. Pettis*, Case No. 15-CR-0233 (PJS/FLN) (D. Minn. Sep. 19, 2016)
18 For example, as this article goes to press, the government has sought *en banc* review of the Eighth Circuit's decision in *Morris* and its appeal of the court's decision in *Pettis* pending.

The Cloistered Exclusivity of the Federal Court and its Harms

By Paul Engh

After every presidential election, foremost on the agenda, at least for lawyers, is the next nominee for the Supreme Court. Of far greater interest, though, is not the name. It's the criteria. The selection process suggests why the federal courts remain so insular and as a result unfair to the criminal defendant. The selection process of exclusivity and cloister has resulted in the rote acceptance of sentences that are too high, and the disappearance of the jury trial.

To see the adverse linkage between the criteria and its attendant harms, a good place to start is with the most recent Justice confirmed, Elena Kagan. In "What It Takes," New York Times, May 10, 2010, David Brooks took a hard look at her qualifications.

Ms. Kagan is described as being a part of a group called "organizational kids." She belonged to that group of students with "great grades, perfect teacher recommendations, broad extracurricular interests, admirable self-confidence and winning personalities." Individuals like her, observed Brooks, tend to regard "professors as bosses to be pleased rather than authorities to be challenged." Recalled one of her professors, "She is very effective at playing her cards in every setting I've seen." A graduate of Princeton and Harvard Law School, Ms. Kagan is described by Mr. Brooks as "smart, deft and friendly." She "bec[a]me a legal scholar without the interest scholars normally have in the contest of ideas. She's shown relatively little interest in coming up with new theories or influencing public debates." That "her publication record is scant and carefully nonideological," focused "mostly on technical and procedural issues." "[O]ne scans her public speeches for a strong opinion, and one comes up empty."

In Mr. Brooks' view, "what we have is a person whose career has dovetailed with the incentives presented by the confirmation system, a system that punishes creativity and rewards caginess." And thus he reached this rather dark conclusion: "I have to confess my first impression of Kagan is a lot like my first impression of many Organizational Kids. She seems to be smart, impressive and honest – and in her willingness to suppress so much of her mind for the sake of her career, kind of disturbing."

Kagan has voted with the liberal block since taking the bench, a preference pleasing to the criminal defense bar. Still, Mr. Brooks' hesitation resonates.

Last summer, Adam Liptak, the New York Times reporter assigned to the Supreme Court, summarized a continued trend toward exclusivity in his piece, "Criminal Defendants Sometimes 'Left Behind' at Supreme Court, Study Shows," New York Times, August 8, 2016. Mr. Liptak begins with Justice Elena Kagan's observation that "Case in and case out, the category of litigant who is not getting great representation at the Supreme Court are criminal defendants."

Mr. Liptak cites a study published in the University of Minnesota Law Review, by Harvard Law Professor Andrew Manuel Crespo, "Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court," 100 Minn.L.R. 1985 (2016) noting for the last ten years ending in 2015, "as many

as two-thirds of the arguments on behalf of criminal defendants were presented by lawyers making their first Supreme Court appearances." Id. at 2008.

Why is it, poses Mr. Liptak, that there are "so few expert lawyers arguing on behalf of criminal defendants?" Justice Sotomayor is quoted as providing an answer: that "many criminal defense lawyers are too reluctant to cede the glamour of Supreme Court arguments to specialists." She adds,"I think it's malpractice of any lawyer who thinks, 'This is my one shot before the Supreme Court, and I have to take it.'"

Taking her advice to heart, no lawyer from Minnesota should ever argue a case before the Court for the first time. But many have secured victories doing so, never to return; the lack of subsequent appearances do not diminish their achievement. Mark Nyvold won Crosby v. United States, 506 U.S. 255 (1992), with a 9-0 vote. Katherian Roe prevailed in United States v. RLC, 503 U.S. 291 (1992), with 6-3. Kate Menendez and Doug Olson triumphed with Johnson v. United States, 135 S.Ct. 2551 (2015), the vote 7-2.

None of these lawyers traded away the experience to more seasoned, out-of-state counsel. All were the better for it, as was the Court for listening to new voices from individuals who could compete with the best and brightest from the Solicitor General's office.

For balance, it should be added that local lawyers have also lost in the Supreme Court. See, e.g., Minnesota v. Murphy, 465 U.S. 420 (1984) (the vote 6-3);United States v. Knotts, 460 U.S. 276 (1983)(7-2); United States v. Jacobson, 466 U.S. 109 (1984)(7-2); and, Minnesota v. Carter, 525 U.S. 83 (1998)(6-3).

Solace at least awaits those who do not prevail. Whatever the brief says or how stellar the argument might not matter. Justice Thomas believes oral arguments are not necessary. A case may even be decided by the political persuasion alone. See Bush v. Gore, 531 U.S. 98 (2000) (5-4, awarding a presidential election along party lines of the Justices).

There may be a more telling reason for Justice Sotomoyer's thought that criminal defense lawyers should not be arguing their own cases: a lack of shared professional experience with that segment of the bar. "The Supreme Court itself is dominated by former prosecutors," notes Liptak. Six of the eight current members have worked in a prosecution capacity. Chief Judge Merrick B. Garland would have been the seventh. Justice Sotomayor herself is a part of club whose members' experience skews in a singular direction.

Thus observes Professor Crespo, "the court is strikingly lopsided as there are no criminal defense lawyer on the court." Id. at 1992. The last Justice to serve who practiced defense law was Thurgood Marshall, who retired in 1991. Id. And it's not just criminal defense lawyers who are missing.

In Obergefell v. Hodges, 135 S.Ct. 2584 (2015), the opinion affirming the right to gay marriage, Justice Scalia filed one of his last dissents, describing the narrow Supreme Court bench.

> Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are native to New York City. Eight of them grew up in east-and west-coast states. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a

Protestant of any denomination . . .

Id. at 2629.

While Justice Scalia believed that federal judges are selected because of their "skills as lawyers," he may have been a bit too self-congratulatory. He was picked because of a political/judicial philosophy shared with President Reagan.

Once on the bench, the Justices perpetuate themselves. When requesting lawyers to argue as a friend of the Court, 25 out of the last 26 cases have gone to former law clerks; the 26th went to Justice Alito's law clerk from the Court of Appeals. Adam Liptak, "When Appointing Friends Court, Justices are Friendliest Toward White Men," New York Times (May 16, 2016).

Exemplary members of the criminal defense bar, a bar in need of experience according to Justices Kagan and Sotomayor, were not considered but should have been. Crespo, at p. 1989. Professor Katherine Shaw, who summarized the trends of these amicus appointments in "Friends of the Court: Evaluating the Supreme Court's Amicus Invitations," 101 Cornell L.R. 1533 (2016) discerned a downside to the exclusivity. The Amicus appointments, she suggests, confirm the High Court's reputation as the "least transparent institution in American public life." Id.

Familiarity breeds a certain acceptance, so the saying goes. However, those who stand on the outside and never get in are reminded of Mark Twain's phrase, "familiarity breeds contempt." This isn't an ethereal concern voiced just by those who are excluded. The preference for prosecutors threatens the "institutional legitimacy" of the Court. Crespo at p. 1996.

The criteria for a Supreme Court Justice isn't that different from the Circuit Court Judge, or the District Court, and down to federal prosecutors, many of whom clerked for federal judges and were hired for that reason. The unstated and required predicates – a prosecutorial bent and a preference for the "organizational" adult – make for a perspective that has led to results that have been harmful to criminal defendants.

The majority of defendants face a federal justice system that remains pernicious for two reasons: sentences are beyond what is necessary for society's need to both punish and rehabilitate, and just as important, the jury trial is disappearing.

Forty-years ago, the District Court had abundant discretion to impose a just punishment. That changed with the advent of the Guidelines, then accelerated by the mandatory minimums passed during and with approval of the Clinton administration. The only way to secure a sentence below the statute's floor quantum was for the defendant to cooperate with the government. 18 U.S.C. 3553(e).

The defense challenged the prosecutorial control of the mandatory minimums. The High Court held an Assistant United States Attorney's decision not to file such a motion for downward departure may only be challenged for an "unconstitutional motive," i.e., for reasons of race or religion. Wade v. United States, 504 U.S. 181 (1992). Good luck with showing that.

Once the prosecution gained control of the mandatory minimums, acceptance of the higher than necessary sentence became the norm. The renowned Ashcroft Memorandum (July 28, 2003), named after the then Attorney General, "strongly encouraged" the United States Attorneys to charge, as a matter of "duty" the highest-time crime available, with all statutory enhancements (e.g. Sec. 851). That policy ignored the individual's circumstance, and increased the danger of having AUSAs, most younger in age and with far less experience than the judges they appear in front of, control the unfamiliar life of the criminal defendant. One of the attributes of an insular, risk-adverse resume is the avoidance of untouchables. That rigid insularity makes easy the charging decisions

affecting entire classes of people with whom prosecutors have never associated.

Not only did the Ashcroft Memorandum place abject faith in the ideal of high time. Local United States Attorneys offices kept track of those judges who departed, and reported them in turn to main DOJ. This practice caused then Judge Rosenbaum to undergo congressional scrutiny for his sentences below recommended guidelines. See Mosi Secret, "Wide Sentencing Disparity Found Among U.S. Judges," New York times (March 3, 2012 (summarizing the conflict).

Some would say federal sentences have improved over time. The Ashcroft Memorandum is no longer. The safety valve helps on occasion, for two point discount if the defendant has an uncounted criminal history. The Guidelines are now advisory though still followed. United States v. Booker, 543 U.S. 220 (2005). Attorney General Holder sought to limit marijuana prosecutions save against the higher end defendants. President Obama encouraged an aggressive clemency program. The crack/cocaine ratios changed from 100-1 to 18-1, better but still without scientific predicate.

These incremental changes were welcomed, of course, but the power of imposing incarceration will likely remain where it has been for the last thirty-years. The unfair federal sentencing, caused in large part by prosecutorial control, has been at least now recognized by those who matter the most. Justices Kennedy and Breyer testified before Congress on March 24, 2015. Referring to systemic over-incarceration, the high costs of keeping inmates, and the detrimental impact prison exposure has long term, Justice Kennedy said this about federal sentencing practice: "In many respects, I think it's broken."

Justice Breyer criticized mandatory minimum sentences as a "terrible idea," which "set back the cause of justice."The minimums, he argued, didn't allow for legitimate exceptions, and still don't. See "Justice Kennedy's Pleas to Congress," Editorial page, New York Times, April 4, 2015 (summarizing the testimony and criticizing the "unjustly harsh and ineffective sentencing laws" that Congress has passed).

Yet underneath that testimony is a lurking contradiction. All nine justices upheld the mandatory minimums. Wade was a unanimous opinion. No effort has been made to overrule.

The role of the District Court in this tragedy of over-sentencing has also been acknowledged. Judge Jed Rakoff, of the Southern District of New York, begins "Mass Incarceration: The Silence of the Judges," May 21, 2015, New York Review of Books, at pp. 14-17, with this sentence: "For too long, too many judges have been too quiet about an evil of which we are a part: the mass incarceration of people in the United States today. It is time that more of us spoke out." Id. at 14. He says "[t]he basic facts are not in dispute. More than 2.2 million people are currently incarcerated in U.S. jails and prison, a 500 percent increase over the past forty years." The central reason for the increase is that "the sentences are longer" today. Id. "The supposition on which our mass incarceration is premised – namely, that it materially reduces crime – is, at best, a hunch." Id. at 15.

Judge Rakoff concludes:

> In many respects, the people of the United States can be proud of the progress we have made over the past half-century in promoting racial equality. More haltingly, we have also made some progress in our treatment of the poor and disadvantaged. But the big, glaring exception to both of these improvements is how we treat those guilty of crimes. Basically, we treat them like dirt. And while this treatment is mandated by the legislature, it is we judges who mete it out. Unless we judges make more effort to speak out against this inhumanity, how can we call ourselves instruments of justice.

Id. at 16.

Judge Rakoff's invitation to speak out is not often accepted. By and large, the federal court sentencing reflects a certain hostility toward most criminal defendants, particular those the government dislikes.

And it's hostile, the federal court, for a reason that goes beyond the perverse incarcerations. A defendant cannot face a jury without taking an unfair risk. Asking for a jury has become an ill-advised decision, the client testifying just about impossible. The five point differential – three for loss of acceptance of responsibility points, and two more for testimony rejected (referred to as obstruction) – doubles the defendant's Guideline sentence. See Lucian E. Dervan, "The Injustice of the Plea-Bargain System," Wall Street Journal, December 7, 2015; Rakoff, "Why Innocent People Plead Guilty," New York Review of Books, November 20, 2014.

Hence the Guidelines systemically discourage a defendant from airing a contrary point of view. In 1997, there were 3,200 jury trials in the federal courts, and 63,000 defendants; in 2015, 1,650 jury convictions and 81,000 defendants. Benjamin Weiser, "Trial by Jury, a Hallowed American Rights, is Vanishing," New York Times (August 7, 2016). In Minnesota, there were about 40 criminal CJA trials from January 1, 2014 through the end of 2016, less than two per year per active judge.

The Minnesota federal courts no longer buzz with the excitement of a criminal trial. The supposed star of the show, the defendant, is difficult to find. He or she is de facto hiding, fearful of saying an iota that runs contrary to not only what the prosecution believes, but what the probation officer finds as fact by reading slanted FBI reports. The same probation officer who more than not endorses the DOJ proposed and enacted sentencing guidelines that are too high and often above the mandatory minimum.

All of this means the federal court is no longer exposed to significant public scrutiny. Judges do not often have the chance to listen to an individual with a different perspective from the Government's. The citizen sitting in the back row doesn't have much to watch. And the jurors, even if selected once, won't be picked again if the trends continue.

What to do, is the remaining question. It does no good to merely whine; silence cannot be a preference.

Repetition is the great teacher, and it needs to be said, over and over again, the Guidelines and statutes suggest sentences that are too high and should be changed. The unique characteristics of a defendant ought to matter far more than the arbitrary penalty. That the jury trial is the only way for the citizens to reject the government's overreach and should be lauded as a remedy without enhanced penalty for a loss.

That there are far better ways to achieve an overarching fairness than what the federal court has to offer today.

Interview with U.S. Magistrate Judge Kate Menendez

Conducted by Ryan Garry and Daniel Guerrero

February 1, 2017

RG: Its Dan Guerrero and Ryan Garry in the opulent chambers of Magistrate Judge Kate Menendez. Thank you for taking the time to meet with us today for an interview of VI Magazine.

KM: Of course.

RG: We're just going to go through some questions. Judge, where did you grow up?

KM: Kansas.

RG: And how about law school and college?

KM: Undergraduate at the University of Chicago, and law school at NYU.

RG: What brought you to Minnesota?

KM: My husband, though then he was a boyfriend, and, frankly, a really good opportunity to work in the Office of the Federal Defender.

RG: Did you get that job right out of law school?

KM: I clerked for a year on the Fourth Circuit for the late Sam Ervin, III, and then I applied for a fellowship funded by George Soros of the Open Society Institute to do innovative criminal justice work. It's funny to think that they fund brand new lawyers to be innovative in any area, but they did. And I reached out to then Federal Defender Dan Scott to see if he would sponsor my application. The fellowship was designed to work on the cases that arose from Indian country, so mostly Red Lake Reservation cases in the Federal Defender's Office. I had that fellowship for two years, from 1997 to 1999, and then I became an Assistant Federal Defender in 1999.

DG: During this fellowship with the Defender's Office, was it your intent to try to stay on as a lawyer, or did that just come naturally as you ended your fellowship?

KM: I really loved the office from the very beginning and had focused in on federal public defense as something I wanted to do during the second half of law school. It's a great opportunity to practice public defense, really represent people in their darkest day, and also to have the luxury of writing and thinking about pretty complicated issues of Constitutional significance and criminal procedure. So once I saw what it was like in person, I knew that office was where I would love to end up. So I was really lucky. At the end of my fellowship, they were hiring for a permanent position, and I had an opportunity to apply.

RG: What made you get into criminal defense, if that's what you wanted to do initially?

KM: Well, I went to law school to do indigent representation, and I didn't know what that would look like. I was doing a lot of work with people who were homeless in Chicago during college. I wanted to work for people in poverty, and law school seemed like a way to make that happen. Then the pivot to criminal public defense as opposed to civil indigent work was just because it's the best. It's the most interesting, it's the most challenging, and it's helping people who are in enormous peril. So once I learned about public defense and how that worked, that's what I wanted to do.

DG: What were your ambitions as a law student?

KM: Well, I feel like when I was a law student, I was much less sophisticated and less intentional about my career path than many very impressive law students that I meet today. In many ways I was lucky that opportunities kind of presented themselves to me and helped me see what I wanted to do. I wasn't very good at strategically planning my career from the very first day of law school. My first summer, I did Indian legal services on the civil side in Southern California. Then my second summer, I again wanted to continue with the Indian law focus, but in the criminal defense arena, so I ended up with the Federal Defenders in Eastern Washington. And pretty much once I learned about the Federal Defender system, I knew that's what I wanted to do.

RG: How long were you there at the Federal Defender's Office?

KM: Well, in one way or another, from 1997 until last spring, so more than 18 years.

DG: That's typically a small office in terms of numbers of attorneys who work there. Did you all work together in collaboration on cases, or were you more individual?

KM: It's a very collaborative office. It's not uncommon for two attorneys to be assigned to a complicated case, and that's how much of my best and most satisfying work happened. Andrew Mohring and I, together with two outside learned counsel, worked on a death penalty case for five years. I worked on the *Johnson* case with Doug Olson, my co-counsel, and with help from everyone in our office. I learned how to try a case, with the exception of my first trial, always with someone else sitting at counsel table with me. Later I was in charge of training newer lawyers in our office, and that was also a very collaborative effort. So I would say when I was in the Defender's Office, I would balance handling my own cases alone with working with other lawyers on complicated cases. Also there was always an environment of brainstorming and collegiality and mutual support that meant that even if it's a case that you handled alone, you always kicked it around with your colleagues.

DG: You mentioned the *Johnson* case. What was it like to argue before the United States Supreme Court?

KM: It was great. I mean, it was the most challenging, most satisfying, most rigorous legal work I've ever gotten to do. It's rare in our business, especially being public defenders, that we have the luxury of immersing ourselves in a single issue for an extended period of

time. There are just too many cases and too many clients that need too much from us every day, and we try to do our very best on every issue. But once you get cert granted and know you're taking an issue to the Supreme Court — you know, Doug and I had no choice but to devote an enormous amount of our time and effort to that one case. And I loved the opportunity to go that deeply into what we thought was going to be one issue, and then to get to do it again on an even more complicated issue with our second cert grant. It was great. And the act of actually writing to the Supreme Court and arguing to the Supreme Court really makes you perform at the very height of your practice. You have to write the best you've ever written, you have to argue the best you've ever argued, and you have to be open to the idea that you can do better yet as you prepare. So it was great. It was great.

DG: Did you have any rewrites of your brief?

KM: Oh, yeah, we worked — I was lead author on all of our briefs, because I felt pretty strongly that since I was the one that was going to be standing there defending them, I needed to be accountable for every word in those briefs, the good stuff and bad. But there is no way that those were solo efforts. Doug was my right-hand man throughout, and I could not have done it without his co-counsel. And we had lots of help from the research and writing attorneys in our office, who are amazing, and from our other colleagues. And then we had a whole committee of defenders who had volunteered from around the country to review briefs, make suggestions, provide edits, even help with research on particular issues. So it was definitely a collective undertaking to get those briefs to be the quality that they ultimately were. And, even so, there's things I wish I could fix to this day, things I think we could have done better and stronger. But we revised and revised and revised until the very last opportunity to submit each brief to the printer.

RG: How did the Supreme Court Justices treat you during the oral argument, and were there any surprises that you found in arguing before the nine Justices?

KM: The whole thing was surprising. I had never seen an argument before we went to Washington in the lead-up to our first argument. We were advised to go watch an argument a couple days ahead of ours just to get a sense for the physical space, and I'm really glad that I did, because it's, frankly, an intimidating setting. I was shocked by how physically close the podium is to the Justices and what an intimate and conversational feeling that sets up, which is at odds with the formality of the environment and with the gravity of the undertaking. So that was a surprise. I was surprised at how much I loved it even though I was nervous. The moment the first argument ended, literally the second they banged the gavel, I was trying to gather my papers, and for the first time my hands started shaking while I was trying to put my papers in my bag. Katherian came over to help me, and the first words I said to her were, "I want to do that again." And we joked that the Court must have overheard us, because then they granted cert the second time, and I got an opportunity to do it again. And after the second argument, I'm pretty sure Katherian's first words to me were, "Don't say it." Even though it was a thrill to get to do it twice, it was a huge burden on our office to hit pause on all my other work and to give Doug

and I the degree of support from all the lawyers that they gave us, handling our other obligations, helping us with research. It might have crippled us to do three arguments in a row.

DG: Were they complimentary, the Justices?

KM: No. No. I mean, I guess it depends on who you ask. Some people on our team thought that some of the Justices seemed very supportive of our argument, but they don't spend time assuaging your vulnerable ego. If you can't argue your case well, I think that they think you really don't belong there. So I guess Doug and I felt like we'd done a good enough job by the end, because we were asked back a second time to address a question that we'd chosen not to address the first time, and because ultimately we were successful. But the justices don't really try to make you feel like you did a great job. There were no high fives from the bench.

RG: Walking in, given the level of your preparedness, do you feel that you knew the issue better than anyone in the courtroom? Were you that confident?

KM: That was my goal. That is always my goal. Katherian Roe, my mentor, always taught me that you have to be the most prepared person in any room, and I think I probably was for both arguments the single most prepared person in those rooms. It's not that the solicitor general isn't unbelievably impressive and very prepared, and each one of their attorneys, I'm sure, knew the issue inside and out. But I think that for them, it is more routine to take a case to the Supreme Court, and our anxiety and newness probably made us prepare even more than they did. Also, we represented Mr. Johnson, a human whose life depended on — the future of his life depended on the outcome. For the government, it's an important issue, it's a legal issue, it matters on a policy level, but they don't have a Mr. Johnson who inspires them to be their very best. And Doug and I tried to always remember more than anything else that we were there first for Mr. Johnson and second for whoever else might benefit from the decision.

RG: What was Mr. Johnson's reaction after he heard of the victory?

KM: Well, one thing about representing him was that he always showed great faith in Doug and I, particularly in Doug, who had represented him at the District Court. He knew that other elite law firms would happily have taken this case over for him, and he trusted us to handle it even though he knew we had not previously argued to the Supreme Court. So his trust in us was humbling. Both times his wife attended the argument and could tell him right away her opinion of how we had done, and she was very appreciative and thankful for our work. And as soon as we learned of the decision and got news to him, they were both beyond ecstatic about the idea that he would not have to serve a mandatory 15-year sentence. In fact Mr. Johnson was resentenced, his sentence was reduced significantly, and he is now at a halfway house, about ready to go home.

DG: And not only Mr. Johnson, but hundreds of others, probably.

KM: Yeah. It sounds like thousands of resentencings have already happened nationwide. I know that before I left the Defender's Office, we had a large handful of cases where the people had served

more than the new 10-year maximum and walked straight out the door once we got the papers filed — not just coming back for resentencing, but going from prison to home overnight. Those were some of the most fun calls to make, the most satisfying challenges to have, trying to figure out for a client who might get out tomorrow or the next day, how they were going to get home. That's a great problem to have.

DG: Well, thanks to you, I have a resentencing in March. Your and Doug's work and that of your colleagues who supported you in the Federal Defender System is literally going to change the lives of thousands and thousands of people. All of that hard work is not just for Mr. Johnson, but everyone else that will be in a similar situation.

KM: You know, that is something that going into the case, we never anticipated. We intentionally didn't brief the vagueness issue in the cert petition. I made that decision on purpose strategically, because we thought the question of whether mere possession of a short-barrel shotgun is a violent felony was strong enough on its own to have a chance at certiorari, even knowing how overwhelming the odds are against that. And we thought that raising the vagueness issue might make it stand out less. Once cert was granted, we even got some criticism about that decision, because a lot of people who think about these issues thought that we should have also sought cert on the vagueness question. And then some people encouraged us to raise the vagueness issue in the first round of briefing even though it wasn't part of the cert. petition, and we decided we could not do that in good conscience. First of all, our duty was to Mr. Johnson, and the cleaner we made the issue, the better chance we thought we had to win on his behalf. There was also a real question about whether the Supreme Court would have welcomed briefing on an issue that wasn't raised in the cert petition. We certainly flagged the history of the statute and the lack of clarity around its interpretation in our briefing, but we decided not to do more. So we had no idea that our case would be the vehicle to finally take down the residual clause, and the magnitude of that started to become clear to us when we were working on the second round of briefing. That's when we started to realize that we had the possibility of either helping an awful lot of people or making permanent a really bad section of a statute that is onerous and arbitrary at the same time. So that's when the pressure got bigger. And even then we didn't realize the numbers of people that would be helped if we won. We didn't really start to see that until later. Even today the real impact remains unclear, because the Supreme Court is deciding whether *Johnson* applies to the guidelines retroactively or not. If the Court decides that it does, the number of people who are eligible for resentencing grows almost exponentially.

DG: What made you decide to put your hat in the ring, so to speak, for the magistrate's job?

KM: Well, it was a really hard decision for me, because I loved being an Assistant Federal Defender, and I knew that I was very lucky and had a great job in a wonderful office. But I started to feel like I might be ready for a new challenge, and I never wanted to burn out. I never wanted to lose sight of the fact that every single client, every single issue, no matter how mundane, is of

utmost importance to that person, and after 18 years of sort of doing the same thing, I was afraid that I might started to think of it as routine, and I did not — I didn't want that. And I love the challenge of learning new things, especially things about which I know nothing; I knew that becoming a magistrate, a great deal of the work that I would do every day would be brand new to me and I would have to constantly learn and research and study and educate myself in order to be good at it. That was a major part of the appeal.

RG: Now that you're doing a lot of civil work or presiding over civil work, what are some noticeable differences compared to criminal lawyers?

KM: Civil litigators are much more willing to write a great deal, even about things that might not require as much writing. And civil attorneys are often amazingly very well prepared. But I am struck by how often I see acrimony and even aggressive advocacy, both in writing and in court from civil litigators, when that's something I almost never saw with criminal litigators. I am also learning a great deal about the role that attorneys' fees play in civil litigation, which was something I was sort of protected from as a public defender.

RG: Any closing remarks?

KM: Nope. It's been fun reminiscing with you.

Magistrate Judge Kate Menendez

The Case for Hiring a Mitigation Specialist

By Amy B. Butler

"It's better to fight for something than against something." -Anonymous

As criminal defense attorneys, you know how to fight the good fight. One may say that the most basic definition of your job is to make sure your client is afforded all of the rights and protections provided through the laws and constitutions of federal and state governments. This responsibility (or fight) does not end when a client admits guilt or is found guilty. Sometimes, it is not even a question of guilt or innocence, but a question of how to get an appropriate, truly beneficial sentence.

Of course, attorneys can and do handle sentencing hearings all by themselves all the time. Some cases are straight forward enough where there honestly isn't much else that can be done. But there are many, many cases where a mitigation specialist/dispositional advisor could play a pivotal role in determining the outcome of the case.

As a mitigation specialist/dispositional advisor, I specialize in working with guilty people and/or the poor souls who may actually be innocent, but are smart enough to recognize the system is sometimes set up to make a guilty plea more advantageous than risking an incorrect verdict. I am not an attorney, nor do I want to be an attorney. But what I can do is give your client an actual opportunity to be heard by the Court in a way that (sorry, no offense) their attorney cannot.

The criminal justice system is one largely based on fear of both the known and the unknown. Bad decisions are often based on fear, both in and out of the courtroom. Judges are human and as much as we would like to deny it, some of our criminal clients are scary- at least on paper. It is easy for us to lose sight of this when you spend the time to actually get to know clients, their families, etc., but who else normally has that opportunity? Probation officers?

The same way it is important to know everything about your client's criminal case, it is important to know everything about their background. Much of the information presented to the Court is superficial in nature. Or, it is overly academic. Both lack the humanity necessary to truly increase understanding of clients and their needs from a practical standpoint.

When you hire a mitigation specialist, prepare to know a lot about your client. Ideally, this will allow you to minimize both the unknown and the known fears. Only when you are aware of the issues can you begin to plan for how to address them. Also, only when you know a person's strengths can you start to use them.

Without the assistance of a mitigation specialist/dispositional advisor, your clients may be at the mercy of corrections officers to adequately tell their personal story. Much of the decision making, along with the future planning, is typically left to the Department of Corrections, as well. Nothing against corrections officers, I recognize they have a difficult job and are overworked, but imagine the relief your clients would feel just knowing someone else will also have a say.

In the most basic sense, mitigation specialists provide the court with information they would otherwise not have access to. My experience, working on cases throughout Minnesota (and one in Iowa), tells me that judges genuinely appreciate this extra information. This paves the way for plea agreements and sentences that truly reflect the individual standing before the Court.

We work in a system that is shockingly inept at times. As defense attorneys, you work in a system that is often stacked against you and your clients. A mitigation specialist will not change the facts of your case, but an experienced one will level the playing field and possibly give your client a greater sense of justice- regardless of the outcome. No small feat, if you ask me.

Personally, I will consider any case. There is no case too horrific and no client beyond any hope, because my reports are completely individualized. Depending on the situation, the assignment changes. Ideally, there is reason to fight *for* someone or something better than the typical punitive sentence. It is much more effective to focus on what is/was "right" about my client, than to highlight what is wrong about the system or others. However, even if it is a rare client whose weaknesses clearly outweigh their strengths, then it is time to figure out feasible ways to tilt the scale back in the right direction (harkening back to my mental health caseworker days). Or, in the worst case scenario, maybe my job is simply to give the client a little dignity.

For example, federal cases can sometimes feel like an exercise in futility. Now, *there* is a deck stacked against you and your client! While a sentence reduction of a few months may not seem like much to you (or me), to your clients, it could mean one less birthday or family function missed, having a few more months to spend with an ailing parent or a juvenile child, and less time without a paycheck. Suddenly, those "few months" are priceless.

Recently, I was hired to work on a federal panel case for defense attorney Ryan Garry, whose client was second on the indictment in a multi-mikllion dollar check fraud case. This particular client needed much reassurance that absolutely everything possible was being done for him. Prior to my involvement in the case, Mr. Garry arranged for a psychological evaluation that uncovered previously undiagnosed mental health problems. After interviewing the client, speaking with his family and loved ones, and reviewing some of the relevant discovery, I provided Mr. Garry with a memorandum that highlighted *why* the findings of the psychological evaluation were relevant and *how* his client's condition impacted his relationships, daily life, and criminal history. Because I know the available community resources, I could also provide information on *what* might actually help the client upon his eventual release. My goal was to explain his client in a relatable and understandable manner while also allowing his client to have his say- but not be his own worst enemy, which was a particular problem in this case. I gave his client one more person to truly listen to him and, although the outcome of this case is not yet known, ideally this lessened the burden on Mr. Garry.

While those are all great reasons to consider bringing a mitigation specialist on board, I know outcomes are really what matters to defense attorneys and their clients. Information provided by a mitigation specialist could save your client a lot of jail/prison time. Obviously, each client and case is unique and

there is no guarantee, but I have personally worked on several serious, even violent, offenses where, despite the seriousness of the crime, it was apparent upon closer inspection that the person did not belong in prison.

In my experience, the personal attributes of certain clients (i.e. their potential, the changes they've made since offense, etc.) can be enough to overcome the offense itself when it comes to sentencing decisions. Defense attorney Kristi McNeilly asked me to work on a recent case involving a firearm. There were bullets fired and mere inches allowed our client to avoid seriously injuring the victims. The PSI writer recommended the maximum allowed sentence, which was seven years in prison. Our client received probation and 365 days in jail, half of which he had already served while the case was pending. The departure was all based on the young man's potential and other mitigating factors previously overlooked.

Judges have a lot of discretion. A mitigation specialist, when utilized appropriately, can provide the information to give judges the confidence necessary to use their discretion to your client's advantage.

No one likes to lose, especially when the stakes are as high as they are as criminal defense attorneys. Your client's immediate future depends on you. When you hire a mitigation specialist, you send a message to your client that the fight has not ended, but merely changed focus. You begin fighting for their second chance and have a real opportunity to help guide your client as they attempt to change for the better.

Your client is a real, live person, not just any "defendant." The work of a mitigation specialist can transcend the legal issues and create big picture solutions. Your client will be treated with respect and an encouraging demeanor, something sorely lacking at times during the legal process. Judges are increasingly growing weary of incarceration for the sake of incarceration and I have personally found they tend to welcome the information I can uncover.

A mitigation specialist provides one more valuable way to fight *for* your client right up until the end. For the right client, it could make all the difference.

If you have questions regarding my work, or a case you'd like to consult with me, please contact me at (651) 231-5356 or connect with me on Facebook (Amy B. Butler). More information can also be found on my website, www.amybbutler.com.

Amy B. Butler is a Mitigation Specialist/ Dispositional Advisor that provides criminal defense attorneys with assistance related to sentencing and mitigation issues. Amy believes in telling a client's "whole story" and her work is often credited, by judges and attorneys, as the difference maker.

Great ideas come from when we all work together.

Influence and guide MACDL's future while building your own reputation in the Criminal Defense Community. Gain first-hand knowledge on what it takes to be an MACDL Board Member. Meet and work with the people who are fighting injustice at the top levels of our state.

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Membership – Plan happy hours, create retention strategies, involve our outstate members, keep members engaged with the work!

CLE Committee – Decide who presents at our CLEs, choose locations, decide the menu and more!

Dinner Committee – Do you have a flair for the extravagant? Use that talent to help us keep the dinner entertaining, help us obtain auction items, and more!

Diversity Committee – Help us tackle diversity issues both big and small both inside the organization and in the Criminal Defense Community.

Amicus Committee – Assist writing legal briefs, memoranda of law, and oral arguments on significant legal issues where MACDL has asked to appear.

Communications Committee – Design this magazine! Help select people to interview and stories to tell. Keep our website current, write content for the website, emails, brochures and more!

MACDL needs YOU to Volunteer!

Contact Chriss@macdl.us for more information or to join a committee.

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