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# WHEN THE UNITED STATES LOSES IN A CRIMINAL CASE: THE GOVERNMENT APPEAL PROCESS

Margaret D. McGaughey\*

## I. INTRODUCTION

If a criminal defendant has been found not guilty after trial, the United States has no right of appeal because the Double Jeopardy Clause precludes trying a defendant a second time on the same charges.<sup>1</sup> For the same reason, the United States has no right to appeal a ruling made during trial, even if it is patently wrong.

Three statutes, however, authorize appeals by the United States in criminal cases under limited circumstances: 18 U.S.C. § 3731, 18 U.S.C. § 3742(b), and 28 U.S.C. § 1291. In addition, the Federal Rules of Appellate Procedure provide means by which the United States can seek further review of an adverse decision of a federal court of appeals.<sup>2</sup>

Although the United States Attorneys for the ninety-four federal districts are allowed to make many choices concerning criminal prosecutions themselves, the same is not true of the decision to exercise the limited authority to appeal or to seek further review of a loss in one of the federal courts of appeals. Rather, there is an extensive internal Department of Justice

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1. U.S. CONST. amend. V, cl. 2 (providing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb").

2. This article will not address mandamus, which is a drastic remedy that is aimed at confining a lower court to the exercise of its jurisdiction or compelling a court to exercise its authority when it has a duty to do so. *E.g.*, *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 402 (1976) (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). Mandamus is not available where other remedies, such as appeal, suffice. *Id.*

process for obtaining authorization to pursue those remedies that only the Solicitor General of the United States can grant. This process can—and occasionally does—lead to disagreement among the relevant US Attorney’s office, that office’s counterpart in the Criminal Appellate Division of the Department of Justice (DOJ), the Office of the Solicitor General (OSG), or all three. The result is that appeals by the United States and further appellate review of government losses in criminal cases are relatively rare.

## II. STATUTORY AUTHORIZATION FOR AN APPEAL BY THE UNITED STATES FROM A DECISION IN THE DISTRICT COURT

### *A. 18 U.S.C. § 3731*

The principal vehicle for the United States to appeal an adverse decision of a district court is 18 U.S.C. § 3731.<sup>3</sup> That statute authorizes government appeals of three types of rulings. The first is an order dismissing an indictment or information.<sup>4</sup>

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3. The statute reads as follows:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

18 U.S.C. § 3731 (2012) (available at [uscode.house.gov](http://uscode.house.gov)).

4. An information is a charging instrument filed by the US Attorney if a defendant waives the right to be prosecuted by an indictment returned by a grand jury. FED. R. CRIM. P. 7(b) (requiring waiver to be made “in open court and after [the defendant’s] being advised of the nature of the charge and of the defendant’s rights”). Like an indictment, the information “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” FED. R. CRIM. P. 7(c)(1).

By statute, that option is available only if there are no double jeopardy consequences.<sup>5</sup> It is generally understood that jeopardy attaches once the jury is empaneled and sworn.<sup>6</sup> As a result, federal prosecutors endeavor to have dismissal motions decided well in advance of trial. For a time, some judges who feared being reversed would frustrate the government appeal process by ruling on a potentially appealable motion only after the jury had been chosen. That timing divested the United States of its statutory right to appeal. It now appears to be settled law that although a trial court may not have an absolute duty to decide a motion encompassed by § 3731 before trial begins, it should do so.<sup>7</sup> Double jeopardy concerns are not implicated by an appeal of a dismissal order entered before trial because if the United States prevails, the indictment or information is simply reinstated and the case proceeds to trial in the ordinary course.<sup>8</sup>

A second type of appeal that § 3731 allows is from an order granting a new trial after verdict or judgment. In this instance as well, there are no double jeopardy implications because if the United States succeeds, the court of appeals merely reinstates the verdict or judgment.<sup>9</sup> A complication with respect to appeals of new trial orders arises in cases that are resolved by means of a bench trial, where a judge, not a jury, decides the issue of a defendant's factual guilt or innocence. A judgment of acquittal that follows a bench trial is the same as a verdict of acquittal

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5. *United States v. Szpyt*, 785 F.3d 31 (1st Cir. 2015) (discussing double jeopardy bar, but concluding that it did not apply).

6. *Crist v. Bretz*, 437 U.S. 28, 36 (1978) (confirming, after review of earlier cases, that “jeopardy attaches when the jury is empaneled and sworn”).

7. *United States v. Barletta*, 644 F.2d 50, 59 (1st Cir. 1981) (concluding that “once a district court has decided that a motion may be raised prior to trial . . . that an issue is sufficiently ‘capable of determination without the trial of the general issue’ it may then find no ‘good cause’ for deferring a ruling . . . , since to do so would adversely affect the government’s right to appeal under § 3731,” but also recognizing that “it is relatively unusual to empower a party to compel a district court to act,” and “emphasiz[ing] the significant limitations that this holding places upon the government’s ability to require a pretrial ruling”).

8. *United States v. Carter*, 860 F.3d 39, 40 (1st Cir. 2017) (noting that case involved “a conviction, a vacation of that conviction on appeal, a dismissal of the indictment on remand, a government appeal of that dismissal, and the subsequent issuance of controlling authority making it clear that the original conviction was proper”).

9. *United States v. Coleman*, 811 F.2d 804, 808 (3d Cir. 1987) (“Having determined that appellee Coleman’s motion for a new trial was out of time, we reverse the district court’s grant of a new trial and reinstate the jury verdict as to him.”).

after a jury trial: it cannot be appealed.<sup>10</sup> A judge who appreciates that a ruling against the United States might be subject to question will hold true to the responsibility not to frustrate the government's statutory right to appeal. Rather than simply find the defendant not guilty, the judge will enter a finding of guilty, but then grant a new trial so that the questionable ruling may be appealed. If the post-trial order is reversed, the verdict of guilty can be reinstated, with the result that there are no further proceedings on the question of guilt or innocence, and the defendant is not placed in jeopardy a second time.

Section 3731 also permits an appeal by the United States of an order granting a motion to suppress or exclude evidence or requiring the return of seized property in a criminal case. A § 3731 appeal is available to challenge not only traditional suppression orders, but also pretrial orders granting motions in limine, which seek a ruling in advance of trial as to whether, for example, other-bad-acts evidence will be admitted pursuant to Rules 404(b) and 403 of the Federal Rules of Evidence.<sup>11</sup> Consistent with the statute, suppression or exclusion orders, like orders dismissing indictments, are appealable only before the defendant has been placed in jeopardy and thus must be entered before the jury is sworn. By statute, this third type of appeal also requires the US Attorney to make two certifications to the district court: "that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."<sup>12</sup> The purpose of the certification requirements is to ensure that the prosecutor has carefully analyzed the case before deciding to appeal.<sup>13</sup> Although the late filing of the certifications will not defeat appellate jurisdiction, it does permit

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10. *United States v. Hunt*, 212 F.3d 539, 543 (10th Cir. 2000) (recognizing as "well-settled" rule indicating that "the Double Jeopardy Clause bars some government appeals," and quoting *United States v. Scott*, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.")).

11. *United States v. Decines*, 808 F.3d 785, 790 (9th Cir. 2015).

12. 18 U.S.C. § 3731.

13. *United States v. Salisbury*, 158 F.3d 1204, 1207 (11th Cir. 1998) (noting that "the purpose of the certification process is defeated when the prosecutor files her representation after initiating the appeal" and announcing that government appeals certified only after filing would not be heard).

the court of appeals to exercise its discretion to dismiss the appeal pursuant to Rule 3(a).<sup>14</sup> Thus, as a matter of precaution, and consistent with the rulings of most courts that the certifications are a prerequisite to a government appeal, federal prosecutors take a variety of steps to conform to the statutory requirement.<sup>15</sup>

Finally, § 3731 allows the United States to appeal an order releasing a person following conviction or refusing to revoke or modify the conditions of release. Release orders within the purview of this provision refer to “a temporary period when a criminal defendant is permitted to remain free from detention while awaiting trial, sentencing, or appeal.”<sup>16</sup> Section 3731 does not encompass revocation of probation (an alternative to imprisonment)<sup>17</sup> or revocation of supervised release (a form of conditional liberty that follows completion of a prison term).<sup>18</sup> Statutory authorization to appeal release orders operates to vindicate the public’s interest in ensuring that the conditions of temporary liberty while awaiting trial, sentencing, or appeal are sufficient to prevent a defendant from fleeing or committing

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14. *United States v. Romaszko*, 253 F.3d 757, 760 (2d Cir. 2001) (referring to Fed. R. App. P. 3(a)).

15. *See, e.g., United States v. McNeil*, 484 F.3d 301, 308–09 (4th Cir. 2007) (setting out one US Attorney’s efforts to regularize office procedures for filing certifications, opining that in cases to come “the certification must be filed with the notice of appeal,” so that “the government will have determined that the appeal is warranted under § 3731 before disrupting the trial process by noticing an appeal,” and noting that “other courts . . . have imposed a similar requirement” (citations omitted)); *United States v. Smith*, 263 F.3d 571, 578 (6th Cir. 2001) (noting that delayed filing is “disfavored” and characterizing “failure to timely file a certificate” as “an irregularity in perfecting the appeal”); *Romaszko*, 253 F.3d at 760 (noting that the Solicitor General had authorized the appeal, which “likely ensure[d] that the purposes of section 3731 were met,” and also noting that “there does not appear to be any prejudice resulting from the belated filing”); *United States v. Bailey*, 136 F.3d 1160, 1163–64 (7th Cir. 1998) (recognizing that the “prosecution engaged in a reasoned pre-appeal analysis” and concluding that exercise of discretion to proceed to a decision on the merits was warranted). Many US Attorney’s offices include the certification in the notice of appeal itself. An added safeguard, which is the practice in the office with which the author was associated, is to file the notice of appeal from the US Attorney’s electronic filing account.

16. *United States v. Peterson*, 394 F.3d 98, 102 (2d Cir. 2005).

17. 18 U.S.C. §§ 3561–3564 (2012) (available at [uscode.house.gov](http://uscode.house.gov)).

18. Supervised release, which replaced special parole, is governed by 18 U.S.C. §3583. *See, e.g., Rich v. Maranville*, 369 F.3d 83, 89–90 (2d Cir. 2004).

further crimes.<sup>19</sup> In part, authorization for the government to appeal release orders reflects the statutory presumption against bail pending appeal that is reinforced by case precedents.<sup>20</sup> In this last type of § 3731 appeal there is no double jeopardy concern because there is no trial on the merits of the underlying criminal charge.

*B. 18 U.S.C. § 3742(b).*

A second statute that authorizes an appeal by the United States is 18 U.S.C. § 3742(b).<sup>21</sup> The circumstances under which the United States can appeal under this provision are the inverse of those in which the defendant is permitted to appeal under subsection (a) of the same statute, with one exception.<sup>22</sup> First, a government appeal is authorized if the sentence was imposed in

19. *Cf.* *United States v. Delker*, 757 F.2d 1390, 1391–93 (3d Cir. 1985) (discussing defendant’s past conduct and then-new Bail Reform Act’s broad focus on dangers in addition to physical violence and its broad aim of ensuring community-wide safety).

20. *E.g.*, *United States v. Chilingrian*, 280 F.3d 704, 709 (6th Cir. 2000) (acknowledging that Bail Reform Act “creates a presumption against release pending appeal” (citing *United States v. Vance*, 851 F.2d 166, 168 (6th Cir. 1988)).

21. That statute reads:

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release . . . than the minimum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

18 U.S.C. § 3742(b) (2012) (available at [uscode.house.gov](http://uscode.house.gov)) (footnote omitted).

22. Subsection 18 U.S.C. § 3742(b)(3) provides the one ground for an appeal by the United States that does not track a ground for appeal appearing in § 3742(a). Instead, its analogue is 18 U.S.C. § 3742(a)(3) (allowing defendant’s appeal when sentence imposed “includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release . . . than the maximum established in the guideline range”).

violation of law—for example, it was below a mandatory minimum term required by such statutes as 18 U.S.C. § 924(e)(1), which addresses firearms offenses, or 21 U.S.C. § 841(b), which concerns drug offenses.<sup>23</sup> Second, the United States can appeal a sentence that was imposed as a result of an incorrect application of the United States Sentencing Guidelines,<sup>24</sup> which might occur if, for example, a sentencing judge refused to impose a guideline enhancement.<sup>25</sup> The third type of § 3742(b) appeal by the United States is of a sentence that was below the guideline range, whether achieved by a downward departure or a downward variance.<sup>26</sup> Finally, the United States can appeal a sentence that was imposed for a crime for which there is no guideline range and the sentence is patently unreasonable.<sup>27</sup> Section 3742(b) specifically provides that the government needs the “personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General” when undertaking an appeal.<sup>28</sup> Before the Supreme Court’s decision in *United States v. Booker*<sup>29</sup> made the Sentencing Guidelines advisory instead of mandatory, § 3742(b) appeals by the United States were somewhat common. After *Booker*, however, sentencing judges have significantly greater discretion in the choice of penalty, and the number of government sentencing appeals has diminished markedly.

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23. 18 U.S.C. § 3742(b)(1).

24. 18 U.S.C. § 3742(b)(2).

25. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2016) (directing enhancement of sentence for a defendant who has obstructed justice by such means as lying under oath).

26. A departure is a deviation from the Guideline range of sentences that the Sentencing Guidelines specifically authorize. A variance is an increase or decrease from the guideline range that is based on a wider range of factors. *United States v. Robinson*, 454 F.3d 839, 842 (8th Cir. 2006) (recognizing that “departures and . . . ‘variances’ are not the same,” that “the Guidelines are just one of the . . . factors to be considered in determining a reasonable sentence,” that some “cases that would not justify a departure under the Guidelines . . . are appropriate for a variance,” and that, in others, “a Guidelines departure and other . . . factors may produce a lower reasonable sentence than a departure alone”).

27. 18 U.S.C. § 3742(b)(4).

28. 18 U.S.C. § 3742(b).

29. 543 U.S. 220 (2005).

*C. 28 U.S.C. § 1291 Appeals from Grants of Habeas Corpus*

Finally, the United States is permitted to appeal an order granting habeas corpus relief under 28 U.S.C. § 2255, which offers the defendant a means of attacking the sentence, but, technically, not the underlying conviction.<sup>30</sup> Although § 2255 petitions arise from criminal cases, they are hybrid proceedings that in some respects are treated as civil actions.<sup>31</sup> Thus, the grant of habeas relief can be appealed pursuant to the final judgment rule of 28 U.S.C. § 1291.<sup>32</sup> There are no double jeopardy problems with respect to this category of appeal because if the order granting habeas relief is reversed, the judgment and sentence are reinstated and there are no further proceedings with regard to guilt or innocence.

In prior years, appeals by the United States of § 2255 decisions were very rare because most petitions are filed by pro se litigants who raise ineffective-assistance claims against their trial or appellate lawyers, or sometimes both. To prevail on this type of challenge, the petitioner has the two-part burden of proving first that the lawyer's performance fell below the standard of proficiency that is generally accepted in the profession.<sup>33</sup> In addition, the petitioner must show that but for the deficient performance, the outcome of the proceeding would have been different.<sup>34</sup> This means that the challenger must show

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30. The statute provides that

[a] prisoner in custody . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (2012) (available at [uscode.house.gov](http://uscode.house.gov)). It provides further that “[a]n appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.” 28 U.S.C. § 2255(d).

31. *United States v. Sampson*, 58 F. Supp. 3d 136, 147 (D. Mass. 2012) (noting that “[a]rguably, § 2255 proceedings are hybrids, which in some contexts should be considered criminal actions and in other contexts should be considered civil actions”).

32. The statute provides that the federal courts of appeals “shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.” 28 U.S.C. § 1291 (2012) (available at [uscode.house.gov](http://uscode.house.gov)).

33. *Strickland v. Wash.*, 466 U.S. 668, 687 (1984).

34. *Id.*

a reasonable probability that, for example, he would not have pleaded guilty, he would not have been convicted after trial, he would have received a lower sentence, or the conviction would have been reversed on appeal. That demanding standard generally immunizes lawyers' conduct from hindsight second-guessing, especially insofar as tactical decisions are concerned.<sup>35</sup> In the past, pro se § 2255 challengers seldom prevailed, so there was nothing for the United States to appeal. A series of Supreme Court decisions involving the Armed Career Criminal Act (ACCA)<sup>36</sup> changed that.

The ACCA requires a mandatory minimum sentence of fifteen years for any defendant who has been convicted of a qualifying firearms offense and has previously been convicted at least three times of a "violent felony," a "serious drug offense," or a combination of the two. The Supreme Court ruled in 2010 that to amount to a felony that is "violent," a crime must require proof of the use of force that is "capable of causing physical pain or injury to another person."<sup>37</sup> Five years later, the Supreme Court held that the so-called "residual clause" of the ACCA, which deemed a crime to be violent if it "involves conduct that presents a serious potential risk of physical injury to another," was void for vagueness.<sup>38</sup> The Court did not then "call into question the application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."<sup>39</sup> Thus, a crime can still qualify as violent if it "has as an element the use, attempted use, or threatened use of physical

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35. *Id.* at 689 (referring to the "constitutionally protected independence of counsel" and the danger of restricting "the wide latitude counsel must have in making tactical decisions").

36. 18 U.S.C. § 924(e)(1) (2012) (setting out enhanced fines and minimum prison terms, and prohibiting suspended or probationary sentences for those who have three prior convictions for violent felonies or serious drug offenses) (available at [uscode.house.gov](http://uscode.house.gov)).

37. *Johnson v. United States*, 559 U.S. 133, 140 (2010) [hereinafter *Johnson I*].

38. *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551, 2557 (2015) (opining that "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges" and that "[i]ncreasing a defendant's sentence under the clause denies due process of law," and acknowledging that "[t]wo features of the residual clause conspire to make it unconstitutionally vague") [hereinafter *Johnson II*].

39. *Id.* at 2563 (referring to burglary, arson, extortion, and use of explosives, all enumerated in 18 U.S.C. § 924(e)(2)(B)(ii)).

force against the person of another”<sup>40</sup> or is, categorically, burglary, arson, or extortion, or involves the use of explosives.<sup>41</sup>

In *Descamps*,<sup>42</sup> and *Mathis*,<sup>43</sup> the Supreme Court added two more twists. *Descamps* requires analysis of whether a statute is “divisible” in that it “sets out one or more elements of the offense in the alternative.”<sup>44</sup> A statute is “indivisible” if the various ways of violating it cannot be separated from each other. Thus, for an “indivisible” statute to punish a crime that can be considered an ACCA predicate, all ways of violating it must qualify. By contrast, if a statute is “divisible,” sentencing courts may apply a “modified categorical approach” that permits them to consult a limited category of court documents to determine whether the crime satisfies the ACCA’s definition.<sup>45</sup> With “divisible” statutes, there is the additional issue of whether the different ways of committing the crime amount to “elements” or are instead “means.”<sup>46</sup> “Elements” are “‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’”<sup>47</sup> By contrast, “means” are the “underlying brute facts” of “[h]ow a given defendant actually perpetrated the crime.”<sup>48</sup> If the differences in the ways a statute can be violated are not “elements,” but “means,” courts cannot apply a “modified categorical approach.”<sup>49</sup> Rather, they are limited to evaluating the statutory definition of the crime as interpreted by the relevant state’s highest appellate court, a federal court of appeals, or the Supreme Court.

As a result of those decisions, US Attorney’s Offices around the country have been flooded with § 2255 challenges to ACCA sentences. Most of the ACCA predicates are violations of state law, which means there are countless variations in the elements, means, and *mens rea* requirements needed for a conviction. Faced with statutes that may or may not be

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40. 18 U.S.C. § 924(e)(2)(B)(i).

41. 18 U.S.C. § 924(e)(2)(B)(ii).

42. *Descamps v. United States*, 570 U.S. 254 (2015).

43. *Mathis v. United States*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2243 (2016).

44. *Descamps*, 570 U.S. at 257.

45. *Id.*

46. *Mathis*, 136 S. Ct. at 2248.

47. *Id.* (citation omitted).

48. *Id.* at 2251 (citation omitted).

49. *Id.*

“divisible,” and the uncertainty as to whether the differences are “elements” or “means,” federal prosecutors began trolling court records in an effort to establish the precise nature of prior convictions by reference to charging instruments, plea colloquies, judgments, or the other approved court records.<sup>50</sup> The question is not what the defendant actually did, but instead what the elements of the crime of conviction are.<sup>51</sup> Thus, complaints or the account of a prior crime that is contained in a presentence report do not suffice.<sup>52</sup> In many instances, the necessary court records have long since been destroyed. Equally often, the relevant statutes—those in force when the defendant was charged and convicted—have undergone many revisions and the applicable version can pre-date the materials available in research databases like Westlaw or be difficult to obtain for other reasons. Thus, unlike upholding Sixth Amendment claims, which ordinarily can be defended on the existing or expanded record, upholding ACCA sentences can be quite challenging.

Perhaps sharing the public’s considerable criticism of mandatory minimum sentences,<sup>53</sup> district courts around the country began granting § 2255 relief from ACCA sentences in light of the *Johnson I-Johnson II-Descamps-Mathis* line of cases. To the general public, the logic of these decisions can—and probably does—seem counter-intuitive. Among the crimes that courts have ruled do not qualify as “violent felonies” are armed robbery,<sup>54</sup> aggravated assault,<sup>55</sup> and resisting arrest.<sup>56</sup> Because of their impact on law enforcement across the nation, those decisions became prime candidates for government appeals. There was also substantial concern that the logic of

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50. *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that “a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented” and that courts should not look to “police reports” and “complaint applications”).

51. *Mathis*, 136 S. Ct. at 2248.

52. *Shepard*, 544 U.S. at 16.

53. See, e.g., Steven Nauman, Note, *Brown v. Plata: Renewing the Call to End Mandatory Sentences*, 65 FLA. L. REV. 855, 866–68 (2013) (recounting illustrative mandatory-sentencing “horror stories” and referring to “countless victims” who are serving “ridiculous and unjust” mandatory sentences).

54. *United States v. Parnell*, 818 F.3d 974, 978 (9th Cir. 2016).

55. *United States v. McMurray*, 653 F.3d 367, 374–76 (6th Cir. 2011).

56. *United States v. Faust*, 853 F.3d 39, 55 (1st Cir. 2017).

*Johnson II*, which invalidated the ACCA’s “residual clause,” would be extended to the Sentencing Guidelines, which define the analogous term “crime of violence” in language almost identical to the ACCA definition of “violent felony” and, until a recent revision, contained a “residual clause” that was worded identically to the ACCA definition that *Johnson II* invalidated.<sup>57</sup> The result is that the requests by the United States for authorization to appeal § 2255 rulings have skyrocketed.

### III. FURTHER APPELLATE REVIEW

When the United States loses in a federal court of appeals, it has three options. The first is a petition for panel rehearing, which is the only remedy for an appellate loss in a criminal case that a US Attorney’s office can pursue without authorization from the Solicitor General. Petitions for panel rehearing seldom succeed.

The second option in the case of a lost appeal is the petition for rehearing en banc, which is not favored, and like the petition for panel rehearing, is seldom granted.<sup>58</sup> If one is to be pursued, the US Attorney’s office that handled the case in the court of appeals files the Rule 35 petition. However, that office is authorized to go forward with en banc review only if it obtains the permission of the OSG. This is true even though the United States frequently combines in the same pleading a petition for panel rehearing (which needs no permission) and a suggestion for rehearing en banc (which requires permission).

A final form of further appellate review is petitioning the Supreme Court of the United States for a writ of certiorari. These petitions can be filed only by the OSG. They, too, are

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57. Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2016) (providing that “[t]he term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another”) with U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2015) (providing that “[t]he term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another or . . . otherwise involves conduct that presents a serious potential risk of physical injury to another).

58. FED. R. APP. P. 35(a) (providing that rehearing en banc is “not favored and ordinarily will not be ordered”).

rarely successful. As pertains to the United States as a litigant, certiorari relief is available if one federal court of appeals has entered a decision that conflicts with the decision of another on “the same important matter” or its decision has “so far departed from the accepted and usual course of judicial proceedings” that review by the Supreme Court in the exercise of its supervisory powers is necessary.<sup>59</sup> A writ of certiorari may also be sought if a federal court of appeals “has decided an important question of federal law that has not been, but should be” settled by the Supreme Court, or “has decided an important federal question in a way that conflicts with relevant decisions” of the Supreme Court.<sup>60</sup> A writ of certiorari is generally reserved for questions of law. It is almost never granted when the asserted error is one of fact or misapplication of properly stated law.<sup>61</sup>

In very rare cases, a writ of certiorari can be invoked to review a case that is still pending in a federal court of appeals upon “a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice” and requires the Supreme Court’s “immediate determination.”<sup>62</sup> This procedure was followed in *United States v. Fanfan*,<sup>63</sup> the companion to *Booker*, which fundamentally altered the role of the Sentencing Guidelines. Although US Attorney’s offices can and do make recommendations with respect to certiorari petitions, the OSG has exclusive responsibility for any case that reaches the certiorari stage or goes to briefing and argument before the Supreme Court.

#### IV. THE AUTHORIZATION PROCESS

What is known to federal prosecutors as the adverse-decision process applies to losses by the United States in both the federal district courts and the federal courts of appeals. On one hand, this process has the benefits of bringing many minds to bear on significant issues of law and securing uniformity of

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59. SUP. CT. R. 10(a).

60. SUP. CT. R. 10(c).

61. *Id.*

62. SUP. CT. R. 11.

63. 543 U.S. 220, 229 (2005).

positions among the ninety-four federal districts. On the other hand, the process can produce frustrations for all concerned.

Whenever a trial judge enters an order that by statute is appealable, the line Assistant United States Attorney (AUSA) responsible for the case, or the office's appellate specialist, if there is one, must prepare a memorandum recommending either that an appeal be taken or that there be no appeal. A similar memorandum is prepared whenever the United States loses a case in a federal court of appeals. A potential appeal or effort to seek further appellate review cannot be allowed to lapse simply because the US Attorney's office has no interest in pursuing it. The US Attorney can, however, accelerate the decisionmaking process by notifying that office's contact in the Appellate Section of the Criminal Division of the DOJ that the US Attorney does not recommend pursuing the case. A US Attorney's Office is almost never required to take an appeal over its opposition.

When the US Attorney's Office recommends appeal, its memorandum gives a brief description of the case, identifies the issue or issues that could be appealed or considered en banc, supports the recommendation with case authorities, and explains why the case should be appealed. The reason for a recommendation of appeal will vary with the circumstances surrounding the case. A US Attorney's office might want to appeal if, for example, the office has had an ongoing problem with a particular judge's treatment of an issue, but that issue has never before arisen in an appealable posture. A second reason might be a conflict among the judges within a district on a legal question, because only the court of appeals can resolve that difference. A third consideration is the significance of the issue to the particular office—for example, the qualification of state-law convictions from that district as ACCA predicates.<sup>64</sup> By far

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64. The District of Maine, for example, has focused extensively on the statutory ban on firearms possession by persons who have been convicted of a misdemeanor crime of domestic violence. Issues regarding 18 U.S.C. § 922(g)(9), which prohibits any person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm, have landed in the Supreme Court twice—once in a case that originated in Maine after a domestic abuser was arrested for killing a baby bald eagle. *Voisine v. United States*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2272, 2277 (2016); *see also* *United States v. Castleman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1405 (2014) (arising in Tennessee and concerning a conviction for black-market sales of firearms preceded by a conviction for domestic assault).

the weightiest factor, however, is the likelihood of success on appeal.

United States Attorneys take appeal recommendations very seriously. They personally review them and often sign off on them only after considerable discussion and editing within the office. If the US Attorney agrees that an appeal is warranted, the memorandum is submitted with the pertinent papers (the indictment, ruling, and transcripts) to that office's contact in the Appellate Section of the Criminal Division of the DOJ. Because each DOJ lawyer is assigned to a specific circuit, they and the AUSAs within that circuit deal with each other often. Line AUSAs look to their designated DOJ lawyers for assistance in avoiding or defending appeals and confer with their DOJ contacts before making any major concessions that they think are necessary in their pending cases. Even before submitting a memorandum, the line AUSA frequently alerts the assigned DOJ contact that an adverse decision has issued and a recommendation is coming.

The line AUSA also carefully tracks the thirty-day period in which the United States may file a notice of appeal.<sup>65</sup> AUSAs are encouraged not to file a notice of appeal too quickly because doing so causes the case to be docketed in the court of appeals and docketing triggers the running of deadlines. Reviewers at the various levels need time to evaluate a case. Delay in filing a notice of appeal also helps to save face for a US Attorney's office. When the recommendation is against appeal, the adverse decision process can sometimes be completed before the notice of appeal is due. It can be better never to appeal at all than to file a notice of appeal only to dismiss it voluntarily. A district judge can mistake voluntary dismissal as a signal that an appeal was not authorized and conclude that the ruling at trial was therefore correct.

A petition for rehearing en banc has a much shorter deadline: it must be filed within fourteen days of the entry of judgment.<sup>66</sup> The practice with respect to these pleadings is to request extensions in the filing deadline until the review process can be completed. Although the federal courts of appeals are

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65. FED. R. APP. P. 4(b)(1)(B).

66. FED. R. APP. P. 35(c) (referring to Rule 40 provision addressing petitions for rehearing as source of fourteen-day rule).

aware that the Solicitor General's approval is required for en banc review, and know that approval can take weeks or even months to obtain, courts want to keep their dockets moving and so are reluctant to grant too many extension requests.

On receiving the US Attorney's recommendation, the DOJ Criminal Appellate attorney undertakes an independent evaluation of the case that considers the factors the US Attorney's office has identified, but with an eye to nationwide consistency. One of the functions of the adverse-decision process is to prevent AUSAs in one district or circuit from taking positions that contradict the position of another US Attorney's office somewhere else. Although the strength of the US Attorney's recommendation that a case should be appealed or taken en banc carries weight with the DOJ lawyers, it does not carry the day. The DOJ lawyer's memorandum identifies both additional arguments that support an appeal and those that could sound the death knell. While this first level of review is underway, the DOJ lawyer and line AUSA often communicate with each other informally to clarify points of fact or the record. The DOJ lawyer then writes a second memorandum that takes a position as to whether an appeal or further appellate review should be authorized.

Whether the DOJ Criminal Appellate lawyer agrees with the US Attorney's office or not, both sets of memoranda are forwarded to the OSG. There, an Assistant to the Solicitor General undertakes yet another independent review of the case and prepares yet another memorandum recommending for or against appeal. The same considerations that applied in the first two steps of the adverse-decision process are in play when the case gets to the OSG. At the OSG level, however, there can also be consideration of the prospect of review by the Supreme Court. Occasionally, OSG will have a special interest in an issue that is percolating through the courts around the country and will authorize an appeal in part for the purpose of attempting to create or intensify a split among the circuits. There are even cases in which the issue is so significant that OSG will initiate contact with US Attorney's offices to find a case that can be postured for Supreme Court review. One successful example of

this strategy is *Fanfan*.<sup>67</sup> In effort to bring the widespread differences among the circuits with respect to the Sentencing Guidelines to the Supreme Court's prompt attention, the OSG and DOJ canvassed US Attorney's Offices around the country for prospects, plucked *Fanfan*'s case from the First Circuit while it was still pending there, and took it directly to the Supreme Court. Such active involvement by OSG is, however, extremely rare.

OSG generally authorizes appeals only if they hinge on questions of law, not questions of fact. Suppression rulings, especially those that pertain to evolving technological advances such as cellphones, are good candidates for government appeals or petitions for en banc review or certiorari.<sup>68</sup> By contrast, although government sentencing appeals are allowed by statute, they often revolve around case-specific facts that have little or no legal importance. Unless a sentencing appeal relates to misapplication of a statute or addresses an issue concerning the Sentencing Guidelines generally,<sup>69</sup> OSG is disinclined to pursue it.

With respect to requests to seek further appellate review, a significant factor is whether the panel decision was unanimous or had a dissenting or concurring opinion. A split within a panel may suggest a division within the court as a whole. Another consideration for en banc review is whether the panel consisted only of regularly sitting members of the court or included a senior judge, a visiting judge from another circuit, or a district judge sitting by designation. An opinion that is authored or joined by a visitor can be viewed as more vulnerable than one decided by a panel consisting only of regular members of the court.<sup>70</sup> The same is not true, however, of opinions written or

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67. See 543 U.S. at 229.

68. See, e.g., *Riley v. Cal.*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2473 (2014) (holding that neither interest in protecting officers' safety nor interest in preventing destruction of evidence justified warrantless searches of cell phones).

69. *Beckles v. United States*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 886 (2017), which addressed the question of whether the Sentencing Guidelines definition of "crime of violence" was unconstitutionally vague, was one such case.

70. Cf. Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 695–96 (2001) (noting that "judges from other circuits . . . may have less knowledge of, or regard for, the practices and precedents of the host circuit than do the circuit's own judges" and that they "can

joined by judges who have taken senior status. Many of those judges continue to sit with their active colleagues with the result that their influence on the court persists.<sup>71</sup>

At the OSG level, an appeal or en banc review is more likely to be authorized if the US Attorney's office, the DOJ Criminal Appellate lawyer, and the Assistant Solicitor General agree. Although the DOJ's view may carry somewhat greater weight than the US Attorney's does, neither recommendation controls. After the Assistant SG writes a third memorandum analyzing the pros and cons of an appeal, the US Attorney's office is generally notified at least informally of that recommendation. All three memoranda are then reviewed by the Deputy SG in charge of criminal cases. A thirty-plus year veteran of the OSG, this Deputy has personally argued over 100 cases before the Supreme Court and is functionally the decision-maker with respect to criminal cases.<sup>72</sup> If there is disagreement among the three parties (the US Attorney's office, Criminal Appellate, and OSG), a telephone conference may be held in an effort to thrash out the differences and persuade the dissenter to yield. With or without such a conference, the Deputy SG makes his own recommendation. Occasionally, this fourth assessment is in the form of a formal memorandum. More often, however, the Deputy's analysis is written by hand across the margins of the Assistant SG's memorandum. Its seeming informality notwithstanding, this is no stream-of-consciousness musing. Instead, the handwritten analysis invariably goes to the core of the issue and ends with the bottom line: further action or none.

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significantly affect the cohesiveness, the continuity, and perhaps even the legitimacy of circuit court decision-making").

71. See, e.g., Ruggero J. Aldisert, *A Nonagenarian Discusses Life as a Senior Circuit Judge*, 14 J. APP. PRAC. & PROCESS 183, 184 (2013) (reporting that senior circuit judges were "responsible for nearly one-fifth of the total participation in appeals considered by the federal courts of appeals across the country: 18.2 percent of those cases in 2008, 17.8 percent in 2009, 21.6 percent in 2010, 21.7 percent in 2011, 20.4 percent in 2012, and 19.9 percent in 2013"); Cooper & Berman, *supra* note 70, at 695 (pointing out that "where an appellate panel includes a senior judge from the panel's own circuit, the panel's functioning may be largely unaffected since the senior judge, by dint of experience, is likely familiar not only with circuit precedent and the formal local rules, but also with informal traditions and the personalities of the judges within the circuit").

72. In July 2017, Deputy Solicitor General Michael Dreeben joined the investigation by Special Counsel Robert S. Mueller III into possible coordination between President Donald J. Trump's associates and Russian officials. As of this writing, however, he is continuing his work as a Deputy SG.

Attached to the OSG's memorandum with the handwritten commentary is a cover sheet on which the box "Appeal" or "No appeal" or "En Banc" or "No En Banc" is checked. Only if the "Appeal" or "En Banc" box is checked can the case proceed.

## V. DIFFERENCES OF PERSPECTIVE

There is substantial logic to confining to OSG the final authority to permit the United States to appeal or seek further appellate review. As the exclusive advocate for the United States before the Supreme Court in both civil and criminal cases, OSG has its finger on the pulse of legal trends around the country. That there is logic to that allocation of authority, however, does not mean that OSG, DOJ Criminal Appellate, and US Attorneys always share the same interests or perspectives.

One difference is that line AUSAs generally, and a district's appellate specialists especially, appear in their circuits regularly—some as often as one or more times each month. Appellate AUSAs in particular are both well known to the judges in their circuits and familiar with the judges' individual personalities, orientations, judicial demeanor, alignments with other judges, and interests in particular issues. By contrast, lawyers from DOJ and OSG appear in the federal courts of appeals far less often. They generally assume responsibility for a criminal appeal only at the request of the US Attorney's office, which may have inadequate recourses to handle a massive, time-consuming appeal. Well-trained and capable advocates that they are, DOJ and OSG lawyers nonetheless lack the insiders' familiarity with specific federal courts of appeals that can give an advocate an advantage. With respect to en banc proceedings, line AUSAs also often have a better feel as to which judges who did not sit with a panel are amenable to a different outcome and which judges are intractable.

Another difference is in perspective. US Attorneys' offices are largely focused on the specific problems within their districts. They may want to take an appeal or seek en banc review knowing they will lose simply because the crime is especially heinous, the case particularly notorious, or the injury to the victim in special need of vindication. In the instance of a loss on appeal following a lengthy jury trial, a US Attorney's

office may want to pursue every possible recourse simply because, apart from the time and effort of drafting another pleading, there is little left to lose. OSG has a more national—sometimes seemingly abstract—view of issues. OSG’s concern can be more with the danger of creating bad precedent or threatening case authority that favors the United States than with the result in a particular case. Thus, OSG can be more reluctant to appeal than US Attorneys might like.

A third difference is the relationship between a US Attorney’s office and the trial judges in that district. There will be times when a US Attorney’s office will want to appeal because a district judge has repeatedly misapplied some precept and only a decision from the court of appeals will stem the tide. Rather than authorize an appeal, however, Criminal Appellate or OSG may recommend alternative tactics: bringing a different set of charges against the same defendant or submitting revised jury instructions in future cases. There also may be times when disagreement arises because a particular US Attorney’s office has prevailed on a given issue either in the district court, the court of appeals, or both, but OSG decides as a matter of nationwide policy to confess error and consent to an order of the Supreme Court vacating and remanding the case to the district court.<sup>73</sup> Line AUSAs, not lawyers from DOJ or OSG, must appear again before the court or courts in which they succeeded, and the judges whose decisions have been vacated and remanded with the Solicitor General’s consent may perceive the AUSA as having led them down the primrose path. But these awkward moments come with the territory; AUSAs know that they are inevitable in a process that involves so many layers of decisionmaking authority. Occasionally, line AUSAs will receive instructions from Washington to take a particular position in a pending case only to have that position be altered as a matter of DOJ policy. Reversing course while a case is still before any court can be very awkward for an AUSA, but this too is part of the job.

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73. In *United States v. Russell*, 728 F.3d 23 (1st Cir. 2013), both the district court and the First Circuit ruled in the Government’s favor, but after the Solicitor General confessed error, the judgment was vacated and the case remanded to the First Circuit. *Russell v. United States*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 1872 (2014) (mem.).

## VI. AT THE SUPREME COURT

Although OSG is the exclusive advocate for the United States before the Supreme Court, the involvement of line AUSAs in a case does not end if certiorari is sought, opposed, or granted. Rather, as a matter of both courtesy and understanding the practical implications of an issue, OSG continues to consult with the line AUSA during any Supreme Court proceedings. Before certiorari petitions or oppositions to certiorari are filed, OSG lawyers send one or more drafts to the responsible line AUSA for comment. OSG lawyers may turn to their appellate contacts around the country to understand the impact of a given issue on federal criminal practice across the nation. If certiorari is granted, whether at OSG's behest or over its opposition, the OSG brief undergoes numerous drafts and revisions and the responsible AUSA is commonly included in those discussions. Very often, the line AUSA participates in the moot court exercises that are held before the case is argued in the Supreme Court. Although never allowed to address the Supreme Court, the line AUSA is often invited to sit with the OSG lawyer during the oral argument and takes home the traditional souvenir of a Supreme Court appearance: one of the quill pens that are laid across each other at counsel table. The quill is a small, but tangible and meaningful reminder of a sometimes arduous process that can end with a chance to be present in the Supreme Court during oral argument—a peak experience in any lawyer's career.

