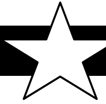

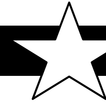

Federal Criminal Law News

PRE & POST CONVICTION LAW PUBLICATION

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PRETRIAL, TRIAL, PLEA AGREEMENTS & SENTENCING MITIGATION UPDATES

WHAT YOU NEED TO KNOW ABOUT FCLC AND ITS ATTORNEYS

Though our track record is well illustrated through our statistics, we thought you would like to know what else we have been doing to protect the rights of our clients.

In November, 2008 Attorney Shein was asked to speak at the NACDL Winter Seminar at Georgetown University on White Collar Crime and mitigation issues that affect the case from start to finish.

In November 2009, NACDL invited Attorney Shein to speak at the Las Vegas Convention on matters dealing with Plea and Sentencing issues in drug offenses including the latest developments in changing the crack-cocaine disparities.

Attorney Shein was successful in 2008 in getting a federal indictment dismissed for a case involving the bombing death of a child. Our pretrial investigation of the case proved our client did not commit the offense.

We are proud of what we do and work hard to get our clients the best possible outcome in their cases.

Attorney Elizabeth Brandenburg has recently joined our Firm from Mercer School of Law. She graduated Summa Cum Laude and was on Law Review. We are pleased to have her with us.

A. U.S.S.G. § 2D1.1(B)(1) FIREARMS ENHANCEMENT ARGUMENT

Another one of our cases involved possession of narcotics with 14 guns found in the residence with the drugs. We were successful in getting the 2-point enhancement for U.S.S.G. §2D1.1(b)(1) removed based on our legal arguments.

The probation officer attempted to interpret the case law regarding United States v. Stallings, 463 F.3d 1218 (11th Cir. 2006) by citing the case of United States v. Hall, 46 F.3d 62, 63 (11th Cir. 1995). The Hall case did not apply and has been refined by more recent case law that was cited in the Objections to the Presentence Report that reflected specifically the requirement of a drug offense nexus in relationship to guns found in a residence. Specifically, in United States v. Stallings, 463 F.3d at 1220, this case specifically spoke to the issue stating that "although experience . . . has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade, the mere fact that a drug offender possesses a firearm does not necessarily give rise to the firearms enhancement. The government must show some nexus beyond mere possession between the firearms and the drug crime" before the burden shifts to the defendant. Id. at 1221 (citations omitted). The government must show that the firearm had "some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." Id. at 1220; See also United States v. Timmons, 283 F.3d 1246, 1251 (11th Cir. 2002) at 1251 (citing Smith v. United States, 508 U.S. 223, 238 (1993)). Specifically in Stallings, the government provided no evidence connecting three pistols to the defendant that were found in his home to any alleged drug activity and since the government never addressed the possibility that the weapons belonged to any of the other adults residing in the home, the government failed to meet its burden to apply the 2-point enhancement. Significantly, Stallings is particularly on point with the concerns of the defendant in this case and the government has not shown, as noted in Timmons, that the firearms had "some purpose or effect with respect to drug trafficking crimes; its presence or involvement cannot be result of accident or coincidence."[1]

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[1] The PSR left out the additional cases of Timmons and Smith from the Addendum to the Presentence Report which reflects specifically why Stallings applies and why the government agreed to not apply the 2-point enhancement. If the 2 points do not apply to the gun enhancement provision of U.S.S.G. § 2D1.1 then the safety valve, U.S.S.G. §5C1.2, would apply to this defendant.

Furthermore, even assuming that the burden shifts to the defendant, it can be "clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1 comment. (n.3). Note 3 of the commentary of § 2D1.1 provides this exception and goes on to illustrate an example of when the connection between a drug crime and a weapon is "clearly improbable:" where the "defendant, arrested at his residence, had an unloaded hunting rifle in the closet." This example reveals three factors: (1) whether a firearm is loaded; (2) whether the weapon has a use or purpose other than protecting drugs; and (3) whether the weapon is accessible.

B. WAIVER LANGUAGE ISSUES IN PLEA AGREEMENTS

(a) There has been some conflict concerning whether you can waive your Booker rights. The Fifth Circuit determined that in pre Booker sentences, rights could not be waived and that the entire statute had to be considered by the court in determining the sentence. *See* United States v. Reyes-Celestino, 443 F.3d 451, 453 (5th Cir.2006). The defendant explicitly consented to be sentenced pursuant to the applicable Sentencing Guidelines but did not waive appeal rights in general.

(b) However, such waivers now seem valid in most circuits–
United States v. Compean, 214 Fed. Appx. 428 (5th Cir. 2007); U.S. v. Castro 2009 WL 2145304 (5th Cir. July 20, 2009).
United States v. Magouirk, 468 F.3d 943 (6th Cir. 2006).
United States v. Isaacs, 301 Fed. Appx. 183 (3d Cir. 2008).
United States v. Rubbo, 396 F.3d 1330 (11th Cir. 2005).
United States v. Blick, 408 F.3d 162 (4th Cir. 2005).
United States v. Green, 405 F.3d 1180 (10th Cir.2005). But see United States v. Cole, 158 Fed Appx. 130 (10th Cir. 2005) (preservation of right to appeal gun enhancement was broad enough to include Booker where court sentenced defendant mandatorily).
United States v. Reeves, 410 F.3d 1031 (8th Cir. 2005).
United States v. Cortez-Arias, 425 F.3d 547 (9th Cir. 2005).

(c) Reserve right to appeal a sentence above a certain guideline level or sentence while at the same time using the "elements of the offense" to establish what you are trying to accomplish. Place the facts needed to support the sentencing recommendation into the plea agreement.

(d) Getting more out of waivers with additional plea concessions (Not including IAC or Prosecutorial misconduct): "As part of the agreement get a 2 level reduction in the sentencing Guideline range pursuant to Section 5K2.0 USSG for waiver of your appeal rights.

(e) Leave the appeal rights alone: "The parties reserve the right to appeal any sentence imposed." Review of a waiver of appeal is conducted de novo. United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992). As the Government states, a defendant may waive the right to appeal his sentence through a valid plea agreement, however, this right has limitations. *See* United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991). In evaluating a waiver of appeal there is a two-fold analysis. The first question is whether the waiver is valid as a knowing and intelligent waiver. Id. The second step in appeal waiver analysis is to determine if the issues asserted are within the scope of the waiver.

A defendant who agrees to a "waiver of the right to appeal his sentence in a plea agreement 'does not [always] subject himself to being sentenced entirely at the whim of the district court,' but retains the right to obtain appellate review of his sentence on certain limited grounds." Id. (quoting Marin, 961 F.2d at 496). There are grounds that are never waived by a defendant, and those that fit into the individual terms of the defendant's plea agreement. The grounds that are not waived include where the defendant was denied his Sixth Amendment right to effective assistance of counsel, Attar, 38 F.3d at 733, where the defendant was sentenced in consideration of an unconstitutional factor such as race, or in excess of the statutory maximum for the offense. Marin, 961 F.2d at 496.

In United States v. Bowden, 975 F.2d 1080, 1081 (4th Cir. 1992), the Fourth Circuit examined a similar situation where the defendant signed a plea agreement with the following pertinent language: "By this agreement Defendant waives any appeal and the right to exercise any post-conviction rights . . . if the sentence imposed herein is within the guidelines . . ." The Fourth Circuit held that this language preserved the appellant's right to challenge the district court's application of the Guidelines and a armed career criminal enhancement where the appellant argued that his sentence was not within the correct Guidelines. Id.

A First Circuit case following the Fourth Circuit's holding in Bowden, further explains this issue. In United States v. McCoy, 508 F.3d 74, 77 (1st Cir. 2007), the defendant waived his right to appeal "a sentence which does not exceed that being recommended by the U.S. Attorney, as set out in Paragraph 4 [(which stated that the government will request "[i]ncarceration within the guideline range")] and, even if the Court rejects one or more positions advocated by the U.S. Attorney or Defendant with regard to the application of the U.S. Sentencing Guidelines." The court held that, at best, this language is ambiguous and thus the appellant had the right to appeal the application of the Guidelines to his case. Id. at 78.

Language is also ambiguous by its use of the term "variance" in connection with the Guidelines. Variance evokes the § 3553(a) factors, not the Guidelines. Departures must comply with the guidelines, while variances must have

a reasonable basis in the §3553(a) factors. United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006). Using the term "variance" can reasonably lead a defendant to conclude that he/she has a right to appeal variances, and the misapplication of the §3553(a) factors."

C. ACCEPTANCE OF RESPONSIBILITY ISSUES

U.S. v. Sainz-Preciado, 566 F.3d 708 (7th Cir. 2009) – A government motion is a necessary prerequisite to a § 3E1.1(b) reduction and the government was justified in not filing such where the defendant did not admit all alleged conduct, thus forcing the government to prepare evidence for sentencing.

D. 851 ENHANCEMENTS

United States v. Reed, 575 F.3d 900 (9th Cir. August 4, 2009) Case No. 06-50040 - not plain error for the district court to give Williams a § 851(b) colloquy, because a full Rule 11 colloquy was not required.

E. CRACK COCAINE UPDATES

1. Amendment 706

a) The amendment allowing an 18 U.S.C. § 3582 motion to be filed for two level adjustments in crack cocaine cases is not reviewable for any additional reductions of the sentence. United States v. Doublin, 572 F.3 235 (5th Cir. June 22, 2009).

b) Of the ten Courts who have considered this issue, the First through Fifth, Seventh, Eighth, Tenth, and Eleventh have rejected Booker's application to sentence reductions under 18 U.S.C. § 3582, and have held the Guideline § 1B1.10 (which prohibits reductions "to a term that is less than the minimum of the amended guideline range") limitation to be mandatory. See United States v. Fanfan, 558 F.3d 105 (1st Cir.2009); United States v. Savoy, 567 F.3d 71 (2d Cir.2009); United States v. Doe, 564 F.3d 305 (3d Cir.2009); United States v. Dunphy, 551 F.3d 247 (4th Cir.2009); United States v. Cunningham, 554 F.3d 703 (7th Cir.2009); United States v. Starks, 551 F.3d 839 (8th Cir.2009); United States v. Rhodes, 549 F.3d 833 (10th Cir.2008); United States v. Melvin, 556 F.3d 1190 (11th Cir. 2009).

c) Only the Ninth Circuit has held that, for an 18 U.S.C. § 3582(c)(2) resentencing, district courts can reduce the sentence below the amended guideline range. United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007).

d) However, the motion for reduction of sentence is appealable. United States v. Colson, 573 F.3d 915 (9th Cir. July 23, 2009) and United States v. Leniear, 574 F.3d 668 (9th Cir. June 18, 2009).

e) Nothing can be given below the mandatory minimum. United States v. Goh, 564 F.3d 305 (3rd Cir. 2009).

f) There is no right to counsel on 3582 crack amendment motions. United States v. Harris, 568 F.3d 666 (8th Cir. 2009). Since this is reviewable on appeal, then a right to counsel may attach at that level.

g) Offenders **are not eligible** for resentencing below **career offender** status under 3582(c)

- United States v. Martinez, 572 F.3d 82 (2d Cir. 2009)
- United States v. Mateo, 560 F.3d 152 (3d Cir. 2009)

h) A defendant is not eligible for the two points even if they are serving a sentence that exceeds a sentence received in the crack cocaine offense. In United States v. Gamble, 572 F.3d 472 (8th Cir. 2009), Gamble had already served the 60-month sentence on the crack cocaine offense but was serving a 15-year consecutive term of imprisonment. Once the 60 months had passed he was no longer eligible for the crack deduction. See also U.S. v. Tolliver, 570 F.3d 1062 (8th Cir. 2009).

i) Be creative on crack offender issues by asking for departure on career offender overrepresentation of the criminal history score. The court knows of the crack controversy and may give some flexibility without even identifying why. *See* United States v. Myers, 569 F.3d 794 (7th Cir. 2009). Obviously, be able to support the overrepresentation issue by identifying that there were old priors or they were minor offenses.

2. Guidelines Ratio

a) Spears v. United States, 129 S. Ct. 840 (2009) - Sentencing judges possess authority to reject categorically the sentencing range prescribed by the Guidelines, even in "a mine-run case where there are no 'particular circumstances' that would otherwise justify a variance from the Guidelines' sentencing range." *Spears* recognized that district courts possess the "authority to vary from the crack cocaine Guidelines based on a *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."

b) Five district courts have held that they will always apply a 1:1 ratio on sentencing of crack offenders following Spears reasoning.

1) United States v. Gully, Criminal No. 08-3005, 2009 WL 1370898 (N.D. Iowa May 18, 2009);

2) United States v. Lewis, 623 F. Supp. 42 (D.D.C. June 9, 2009);

3) United States v. Medina, No. 08CR256-L, 2009 WL 2948325 (S.D.Cal. Sept. 11, 2009);

4) Henderson v. United States, No. 09-20, 2009 WL 2969507 (E.D.La. Sept. 11, 2009);

5) United States v. Russell, Crim. No. 06-72 Erie, 2009 WL 2485734 (W.D.Pa. Aug. 12, 2009).

F. SENTENCING MANIPULATION/ENTRAPMENT UPDATES

1. United States v. Beltran, 571 F.3d 1013 (10th Cir. June 12, 2009) No. 08-2191. After Booker, a claim of sentencing factor manipulation may be raised not only as a request for departure, but also as a request for a variance based on § 3553(a)'s requirement that a district court consider the "nature and circumstances of the offense."

2. United States v. Docampo, 573 F.3d 1091 (11th Cir. June 15, 2009) - "To bring sting operations within the ambit of sentencing factor manipulation, the government must engage in extraordinary misconduct." The 11th Circuit has not yet recognized a defense of sentencing factor manipulation or permitted its application to a defendant's sentence, although does not foreclose the possibility.

3. The 7th Circuit has rejected the sentencing manipulation premise indicating that there must be a complete lack of predisposition to commit the crime and that the will of the defendant was overcome by "relentless government persistence." United States v. Turner, 569 F.3d 637 (7th Cir. 2009).

4. Claiming entrapment may result in loss of acceptance of responsibility. This occurred in an attempt to withdraw the plea in United States v. Berkeley, 567 F.3d 703 (D.C. Cir. 2009).

5. The Ninth Circuit permits district courts to depart downward if a defendant can establish "imperfect entrapment," which is not a complete defense to a criminal charge but may provide a basis for a downward departure at sentencing. United States v. Mejia, 559 F.3d 1113 (9th Cir. 2009).

G. PRIOR RECORD ISSUES AND UPDATES

a) Non-violent felonies (ACCA and Career Offender)– The Supreme Court has decided a case that dealt with the question of whether a prior conviction is a violent felony in each of the past three sessions.

1. James v. United States, 550 U.S. 192 (2007) (attempted burglary is a violent felony even if, on *some* occasions, it can be committed in a way that poses no serious risk of physical harm).

2. Begay v. United States, 128 S. Ct. 1581 (2008) – DUI conviction is not a violent felony even though it involves conduct that "presents a serious risk of physical injury to another" (as required by residual clause of the ACCA) because it is unlike the examples provided in the ACCA (burglary, arson, extortion, or crimes involving the use of explosives) and does not involve purposeful, violent, and aggressive conduct.

3. Chambers v. United States, 129 S. Ct. 678 (2009) - Illinois' crime of failure to report for penal confinement falls outside the scope of ACCA's "violent felony" definition, even though it falls under an escape statute. The courts must identify the category of escape and whether it is applicable to a violent felony.

4. Cert. has been granted in United States v. Johnson, 129 S.Ct. 1315, 08-6925 (2009), opinion below 528 F.3d 1318 (11th Cir. 2008), to decide if Florida conviction for battery is a violent crime, even where the Florida Supreme Court has held that force or violence is not an element of the offense.

b) Circuit cases that have held the prior conviction was not a violent felony (not exhaustive)

1. Escape - United States v. Mills, 570 F.3d 508 (2d Cir. 2009) (noting escape defined by Connecticut law as including both affirmative escape from custody as well as failure to return to custody); Compare United States v. Pratt, 568 F.3d 11 (1st Cir. 2009)(escape from secure custody is a violent felony within the meaning of the ACCA).

2. Carrying concealed weapon - United States v. Canty, 570 F.3d 1251 (11th Cir. June 11, 2009) Carrying a concealed weapon is not a "violent felony," such as may be used as predicate conviction to enhance defendant's sentence under the Armed Career Criminal Act (ACCA)

3. Vehicular homicide felony is not a crime of violence. United States v. Herrick, 545 F.3d 53 (1st Cir. 2008).

4. Reckless endangerment does not fall within the definition of "crime of violence" because it does not involve purposeful conduct. United States v. Gray, 535 F.3d 128 (2d Cir. 2008); United States v. Baker, 559 F.3d 443 (6th Cir. 2009); United States v. Smith, 544 F.3d 781 (7th Cir. 2008)(criminal recklessness)

5. Nonforcible sexual activity is not sufficiently "similar, in kind as well as in degree of risk posed to the examples" of burglary, arson, extortion, and crimes involving explosives. United States v. Thornton, 554 F.3d 443 (2009)(carnal knowledge of a child between 13 and 15); See also United States v. Christensen, 559 F.3d 1092 (9th Cir. 2009)(statutory rape); United States v. Wynn, -- F.3d --, 2009 WL 2768496, *1+ (6th Cir. Sep 02, 2009) (sexual battery); U.S. v. Bartee, 529 F.3d 357, 358+ (6th Cir. 2008) (attempted criminal sexual conduct); but see **United States v. Daye**, 571 F.3d 225 (2d Cir. 2009) (sexual assault of child under 15 involved serious potential risk of injury and likelihood of force)

6. Involuntary Manslaughter, crimes with the mens rea of recklessness do not fall within their scope. United States v. Woods, 576 F.3d 400 (7th Cir. 2009).

7. Fleeing a peace officer in a motor vehicle does not typically "involves conduct that presents a serious potential risk of physical injury to another." United States v. Tyler, 2009 WL 2835171, (8th Cir. Sep 04, 2009).

8. Resisting a police officer is not crime of violence. United States v. Mosley, 576 F.3d 603 (6th Cir. 2009) amending and superseding U.S. v. Mosley, 567 F.3d 241 (6th Cir. 2009) use of force element is required). See also U.S. v Stinson, 574 F.3d 244 (3d Cir. 2009) *Rehearing Granted, Judgment Vacated* (Sep 24, 2009). Pennsylvania conviction for resisting arrest was a crime of violence. Here the statute classified the offense as a misdemeanor but carried more than one year in prison used terms that are considered violent, e.g. purposeful, violent and aggressive.

9. Virginia abduction offense is not a generic kidnapping and therefore not a crime of violence. *See* United States v. De Jesus-Ventura, 565 F.3d 870 (D.C. Cir. 2009).

10. Attempts to commit violent felonies are crimes of violence. See U.S. Saavedra-Velazquez, 578 F.3d 1103 (9th Cir. 2009) (attempted robbery) and U.S. v. Rivera-Ramos, 578 F.3d 1111 (9th Cir. 2009)(attempted burglary).

c) Serious Drug Offense 18 § 924(e)

1. The Court has not been receptive to attempts to distinguish prior drug offenses from **serious drug offenses** that carry a maximum penalty of ten years. See United States v. Rodriguez, 128 S. Ct. 1783 (2008) (holding that conviction under state law where maximum penalty of ten years only applied to recidivists was a serious drug conviction regardless of the fact that maximum nonrecidivist punishment is only five years and defendant only received 48 months.

2. The Armed Career Criminal Act's purpose is to punish the worst of the worst offenders – violent criminals and serious drug offenders – who carry weapons. See Taylor v. United States, 495 U.S. 575, 587-88 (1990). The fifteen year minimum was intended to "incapacitate the armed career criminal for the rest of the normal time span of his career which usually starts at about age 15 and continues to about age 30." S. Rep. No. 97-585, at 7. "Some offenses that result in probation, low prison terms, or concurrent sentences will trigger the ACCA while some offenses that result in months or years of prison time will not . . . As a result, many dangerous criminals cannot be charged under the ACCA, while some relatively minor offenders can find themselves facing fifteen years to life." Ethan Davis "The Sentence Imposed Versus the Statutory Maximum: Repairing the Armed Career Criminal Act," 118 YALE L. J. 369-70 (2008). The disparity among offenders is based only on the state where they happened to commit their crimes and the punishments statutorily defined for those crimes. "The Armed Career Criminal Act does not adequately distinguish hard-core, repeat criminals from relatively minor offenders. By focusing on the maximum term of imprisonment prescribed by law for prior offenses rather than on the actual sentence imposed, the ACCA allows many dangerous, recidivist criminals to escape its grasp and tolerates inequitable sentencing decisions." Davis, *supra*, 118 YALE L. J. at 377.

3. District courts are mandated to exercise their judicial discretion in imposing **individualized sentences** for the actual conduct being punished. *See* 18 U.S.C. § 3553(a). The ACCA eliminates that discretion and thus we are left with disparate sentences that are not determined on an individualized basis. Even in circumstances where a court may determine that a particular individual does not conform with the intent of the ACCA's mandatory sentencing scheme, the resulting sentence will be determined only on the fact of prior conviction and the statutory definition of the prior offenses. Taylor, 495 U.S. at 602.

4. It is likely that the only remedy will be Congressional amendment of ACCA.

5. Granted Petition for Cert.: United States v. O'Brien, 542 F.3d 921 (1st Cir. 2009) *(USSC Docket No.* 08-1569)

Issue: Whether the mandatory minimum sentence enhancement under 18 U.S.C. § 924(c)(1) to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence. Start objecting in order to preserve the issue.

6. Positive bill in Congress: **HR 2933** – amending § 924(c) to require that the second or subsequent conviction to trigger enhanced sentence must be "after a prior conviction has become final."

7. Petitions for Cert. to Watch: United States v. Easter, 553 F.3d 519 (7th Cir. 2009)(USSC Docket No. 08-9560, McSwain v. United States)((agrees with majority that the exception does not forclose consecutive time); United States v. Williams, 558 F.3d 166 (2d Cir. 2009)(USSC Docket No. 09A247)(exception forcloses consecutive time).

Issue: Whether 924(c) exception means that the mandatory minimum sentence under section 924(c)(1)(A) was inapplicable where the defendant was subject to a longer mandatory minimum sentence for a career criminal firearm possession violation, and where the defendant is subject to a longer mandatory minimum sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense.
United States v. Segarra, No. 08-17181, 2009 WL 2932242 (11th Cir. Sep. 15, 2009) (agrees with majority of circuits that the exception does not forclose consecutive time).

d) Controlled Substance Offense U.S.S.G. § 4B1.2

1. Offense of simple possession of a controlled substance is not a "controlled substance offense" within meaning of career offender Sentencing Guideline. U.S.S.G. §§ 4B1.1, 4B1.2(b). Salinas v. United States, 547 U.S. 188 (2006).

2. Conviction under California Health & Safety Code § 11352 does not categorically qualify as a predicate conviction for a career offender enhancement United States v. Kovac, 367 F.3d 1116, 1119 (9th Cir. 2004).

3. Certain California drug crimes do not require enhancements. It is important to check California health and safety code pursuant to U.S.S.G. 4A1.2(c)(2). See also United States v Calderon-Espinoza, 569 F.3d 1005 (9th Cir. June 24, 2009). California Health and Safety Code Section 11379(a) states:

> Every person who transports, imports into this state, sells, furnishes, administer, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance . . . shall be punished by imprisonment in the state prison for a period of two, three, or four years.
>
> A "drug trafficking offense" as listed in section 2L1.2(b)(1)(A)(i) is defined as:
>
> "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of or offer to sell a controlled substance or the possession of a controlled substance with intent to manufacture, import, export, distribute, or dispense. § 2L1.2 Application Note 1(B)(iv)."

In Garcia-Medina, the Eighth Circuit recognized the Fifth Circuit's holding in United States v. Gutierrez-Ramirez, 405 F.3d 352, 359 (5th Cir. 2005), that the language in the California statute is "overinclusive for purposes of section 2L1.2's drug trafficking enhancement because it included acts that do not meet section 2L1.2's definition of drug trafficking." Garcia-Medina, 497 F.3d 875,877 (8th Cir. 2007).

The Eighth Circuit also recognized the Ninth Circuit's holding in United States v. Navidad-Marcos, 367 F.3d 903, 906, 908 (9th Cir. 2004) that the language in section 11379(a), which is identical to that examined in Gutierrez-Ramirez and Garcia-Medina, "includes acts that fall outside the Guideline's 'drug trafficking' definition." Id. In Navidad-Marcos, the Ninth Circuit listed such acts that fall outside the definition: "transportation of [controlled substance] for personal use; offers to transport, sell, furnish, administer, or give away [controlled substance]; and solicitation of the prohibited acts. Additionally, the Eighth Circuit recognized another Ninth Circuit holding that California code section 11360's identical language was an "extremely broad statute" and that "a conviction under the section can be supported by a charge of simple transportation of marijuana for personal use." Id. (quoting United States v. Rivera-Sanchez, 247 F.3d 905 (908-09 (9th Cir. 2001)).

The Eighth Circuit adopted the Fifth and Ninth Circuit's holdings that the language in these sections "criminalizes both conduct that would qualify a defendant for an enhancement as well as conduct that would not do so," and held that "the statute is overinclusive." Garcia-Medina, 497 F.3d at 877. Therefore, in accordance with the Eighth Circuit, a conviction under section 11379(a), on its face, does not automatically fall within the purview of section 2L1.2's definition of "drug trafficking."

The Eighth Circuit allows "terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant" to be considered by the District Court in making its determination as to the nature of the prior conviction. Id. (quoting United States v.

Vasquez-Garcia, 449 F.3d 870, 872 (8th Cir. 2006) and Shepard v. United States, 544 U.S. 13, 21, 26 (2005)).

H. CHALLENGING THE PSR

1. Acceptance of Responsibility

A defendant cannot lose **acceptance of responsibility** if he admits some conduct, but challenges additional charges, role, firearms, or other enhancements and he succeeds on that challenge. *See* United States v. Barner, 572 F.3d 1239 (11th Cir. 2009). In Barner the defendant first intended to plead guilty and cooperated. However, there were multiple superseding indictments and the defendant did not want to plead guilty to the superseding indictment and requested a bench trial. After the bench trial, there was a directed verdict on eight counts. Defendant never took the stand and never denied his first plea and accepted responsibility for possessing ecstasy. The court reversed for resentencing with the acceptance of responsibility credit.

2. Role Adjustment: Runners versus managers

a) Stocking drugs at drug points, collecting proceeds and delivering those proceeds to owners and leaders is not enough for 3-point enhancement for role. *See* United States v. Flores-De-Jesus, 569 F.3d 8 (1st Cir. 2009).

b) Leadership upheld even though the court did not identify the persons being led. The defendant agreed to using two people to sell drugs for him. (Dumb and Dumber) *See* United States v. Zayas, 568 F.3d 43 (1st Cir. 2009).

3. Guns

Multiple firearms and consecutive sentences. 924(c). The mandatory add-on sentence flowing from using guns in a crime of violence may not be used to justify a lower sentence on the underlying offense. *See* United States v. Calabrese, 572 F.3d 362 (7th Cir. 2009).

4. Quantity

a) Minimum mandatory not dictated by drug quantity alleged in the indictment, court is authorized to find another amount. *See* United States v. Cox, 565 F.3d 1013 (6th Cir. 2009) (After a bench trial, the court found defendant responsible for 2 kilos of cocaine rather than the 5 kilos for which he was indicted).

b) Statutory minimums do not hinge on the particular defendant's relevant conduct, every coconspirator is liable for the sometimes broader set of transactions that were reasonably foreseeable acts in furtherance of the entire conspiracy. United States v. Easter, 553 F.3d 519 (7th Cir. 2009) *petition for certiorari filed* May 29, 2009 (08-10584). **Waste water** – this is something to consider. The district court did not commit error in finding the five-year mandatory minimum sentence applied to Clarke because the entire weight of the biphase liquid was properly attributed to Clarke under 21 U.S.C. § 841(b)(1)(B) United States v. Clarke, 564 F.3d 949 (8th Cir. 2009).

5. Safety Valve Adjustments

It is not illusory and is a guideline issue and must be applied if the defendant meets the requirements. United States v. Zayas, 568 F.3d 43 (4th Cir. 2009).

I. DEPARTURES

1. Calculate the guidelines before Booker.

2. Motions for departures, courts must rule on them first.

3. Then incorporate 3553 factors to be considered.

Combine departures and variances if one is not enough. Departures are still under a heartland analysis even though Booker indicates the guidelines are not mandatory. However, using this analysis on departures you may be able to get a departure more readily than a variance. Using the departure and variance factors together may be enough for a lesser sentence.

a) Departures require notice, variance applications, whether upward or downward, do not require notice. *See* United States v. Vanderwerfhorst, 576 F.3d 929 (9th Cir. 2009). But see United States v. Garcia-Robles, 562 F.3d 763 (6th Cir. 2009) (sentence was procedurally unreasonable because the district court failed to provide defendant with an opportunity meaningfully to address the district court's chosen sentence above the guidelines).

b) Guidelines are not presumptively reasonable to sentencing court. *See* United States v. Smith, 566 F.3d 410 (4th Cir. 2009).

c) Mere reference to 3553 factors is enough to avoid an inference of a presumption. *See* United States v. Boyce, 564 F.3d 911 (8th Cir. 2009).

J. 3553 FACTORS/VARIANCES

1. The judge did not give reason for one month more than guideline range. United States v. Grams, 566 F.3d 683 (6th Cir. 2009).

2. The court held that the appeal of guidelines calculation was unimportant because the judge "could have" (but didn't) sentence the defendant above the guidelines for being a bad guy now that the guidelines are advisory. United States v. Sanner, 565 F.3d 400 (7th Cir. 2009).

3. Variances can also be applied to conditions of confinement if you can prove the conditions were unusually harsh. *See* United States v. Turner, 569 F.3d 637 (7th Cir. 2009)(allowing without deciding the possibility).

4. One court has determined that the District court does not have to explain whether an above guideline sentence was a departure or variance. See U.S. Herrera-Zuniga, 571 F.3d 568 (6th Cir. 2009). Other circuits do require this distinction since they both constitute different standards. This case discusses those differences.

5. The Seventh Circuit has also held that departures are now "obsolete," and the only consideration is variance under § 3553. United States v. Turner, 569 F.3d 637 (7th Cir. 2009)

***CHANGES IN BOP DRUG PROGRAM*:**

Early release under 18 U.S.C. § 3621(e) for successful completion of RDAP has been changed. (See Program Statement 5331-02. Offenders who previously completed RDAP and were otherwise eligible for early release were eligible for a sentence reduction of up to 12 months. The new policy reduces the eligibility timeframe. Only those eligible inmates serving 37 months or more will now be eligible for up to a 12-month early release. Offenders serving 31-36 months will be eligible for only up to a none-month sentence reduction, and those serving less than 31 months will be eligible for no more than a six-month sentence reduction.

K. WHAT DOES INEFFECTIVE ASSISTANCE OF COUNSEL REALLY MEAN?

Hoffman v. Arave, 455 F.3d 926 (9th Cir. (Idaho) July 5, 2006. Petitioner was prejudiced by trial counsel's ineffective assistance in advising petitioner to reject an offer to plead guilty to first-degree murder in exchange for the state's agreement not to seek death. Counsel based his advice on the Ninth Circuit's decision in Adamson v. Ricketts, 865 F.2d 1011 (1988), holding Arizona's death penalty scheme unconstitutional.

Edward v. Lamarque, (9th Cir. Dec. 12, 2005). Counsel was ineffective because "he fundamentally misunderstood the marital privilege, and thus lacked the legal understanding necessary for competent tactical decision (whether to elicit favorable parts of the conversation even though defendant's confession would also be elicited).

Riggs v. Fairman, 399 F.3d 1179, 1183 (C.A. 9 (Cal.), 2005). Ineffective assistance to reject plea agreement for 5 years because lawyer was ignorant of true maximum client was facing.

Flores v. Demskie, 215 F.3d 293 (2nd Cir. 2000). State trial counsel was ineffective because of a misunderstanding of well-established state rule that failure of prosecutor to deliver prior statement of witness whom prosecutor intended to call at trial constituted per se error requiring new trial, waiving violation of disclosure at trial that would have entitled defendant to new trial.

DeLuca v. Lord, 77 F.3d 578, 586-87 (2nd Cir. 1996). Trial strategy based on misunderstanding of law was not entitled to deference under Strickland.

Counsel "has a duty to bring to bear such skill *and knowledge* as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984). Trial counsel is obligated to have a general comprehension of the law governing the case at issue. Counsel's failure to recognize this change in the law was ineffective assistance. Lewandowski v. Makel, 949 F.2d 884, 887 (6th Cir. 1991); United States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990); Iaea v. Sunn, 800 F.2d 861, 865 (9th Cir. 1986).

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