Federal Criminal Law News

PRE & POST CONVICTION LAW PUBLICATION

Vol. 27 No. 4 ♦Federal Criminal Law Center ♦ 4th Quarter 2010

Firm update:

1. Marcia G. Shein, speaker at the GACDL Fall 2010 Seminar on Anticipating Federal Sentencing Mitigation and Appeal Issues at Trial.
2. Marcia G. Shein, author of Post Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan, Published in The Federal Lawyer, September 2010, Volume 57, Number Eight.
3. Recent letter from client. *See* page 10

Commission Adopts Emergency Crack Guideline

On August 3, 2010, the Fair Sentencing Act of 2010, Pub. L. 111-220, changed the ratio of crack to powder cocaine from 100-to-1 to about 18-to-1, by raising the minimum quantity of crack cocaine required to trigger a five-year sentence from five grams to 28 grams. The minimum amount of powder cocaine required to trigger a five-year sentence remains at 500 grams. The law also eliminates the mandatory minimum sentence for simple possession of crack. On October 21, the Commission adopted an emergency amendment, effective November 1, 2010 to conform the guidelines to the new law. The offense levels for crack cocaine in §2D1.1 are changed to give offenses involving 28 grams or more of crack cocaine a base offense level of 26 and offenses involving 280 grams or more of crack cocaine a base offense level of 32. Other levels are set by extrapolating upward and downward. The amendment also reduces the marijuana equivalency of 1 gram of crack cocaine to 3,571 grams of marijuana. There is a cap of level 32 if the defendant's role was minimal. Two-level increases are provided if the defendant used or threatened violence, or bribed, or attempted to bribe, a law enforcement officer, or maintained a premises to manufacture or sell drugs. An additional 2-level increase is provided if the defendant had an aggravating role in an offense that involved certain "super-aggravating" factors. On the other hand, a 2-level reduction is provided if the defendant's role was minimal and there were certain other mitigating factors. *Amendment __, effective November 1, 2010.*

PROPOSED GUIDELINE AMENDMENTS TAKE EFFECT ON NOVEMBER 1, 2010

The Sentencing Commission has proposed several important amendments to the guidelines that will become effective November 1, 2010, unless disapproved by Congress. The new amendments will:

- Increase alternatives to imprisonment by expanding Zones B and C of the Sentencing Table by one level.
- Relax the standards for departures based on age, mental and physical condition and military service.
- Authorize downward departures in immigration cases for cultural assimilation.
- Require courts to consider departing before granting a variance.
- Eliminate "recency" points from criminal history.
- Add hate crimes based on gender and military service to guidelines.
- Amend organizational guidelines regarding compliance and ethics programs.

Commission requires courts to consider departures before granting a variance. The Commission noted that most circuits already agree on a three-step approach, in which the court first computes the guideline range and then considers whether to depart from the guidelines before determining whether the applicable factors in 18 U.S.C. §3553(a) justify a *Booker* "variance" from the guidelines. Nevertheless, to resolve a circuit conflict on this issue, the Commission amended guideline §1B1.1 (application instructions) specifically to adopt the three-step approach, and to make it clear that departures are not "obsolete" as the Seventh Circuit has stated. *Proposed Amendment 4, effective November 1, 2010.*

Commission allows departure in immigration cases for cultural assimilation. Recognizing that several circuits have upheld departures based on cultural assimilation in immigration cases, the Commission added a new Application Note 8 to guideline §2L1.2 to provide that a downward departure may be appropriate on the basis of cultural assimilation. The Note says that a departure may be appropriate if (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those

FEDERAL CRIMINAL LAW CENTER
2392 North Decatur Road• Decatur, GA 30033
(404) 633-3797 • (404) 633-7980 (Fax) • email: Marcia@MsheinLaw.com • www.federalcriminallawcenter.com • www.federalappealslawyer.com

ties provided the primary motivation for the defendant's illegal re-entry or continued presence in the United States, and (C) such departure is not likely to increase the risk to the public from further crimes of the Defendant. *Proposed Amendment 3, effective November 1, 2010.*

Commission eliminates "recency" points from criminal history. At present, §4A1.1(e) requires two points to be added to defendant's criminal history if the defendant committed the instant offense less than two years after release from imprisonment or while in imprisonment or escape status. The Commission decided to eliminate these two points because recent research, testimony and public comment suggested that this "recency" factor does not necessarily reflect increased culpability. Accordingly, the Commission deleted subsection (e) from the guidelines as unnecessary to adequately account for criminal history. *Proposed Amendment 5, effective November 1, 2010.*

Commission relaxes departures for age, mental and physical condition and military service. In response to the increased use of variances, the Sentencing Commission revised the Introductory Commentary to Chapter 5H to explain that the purpose of the specific offender characteristics guidelines is to provide a framework for addressing specific offender characteristics in a reasonably consistent manner. The Commission also amended sections 5H1.1 (Age), 5H1.3 (Mental and Emotional Conditions), and 5H1.4 (Physical Condition including Drug or Alcohol Dependence or Abuse; Gambling Addiction). The amendments provide that these specific offender characteristics "may be relevant in determining whether a departure is warranted" if the characteristic "is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." The Commission also amended §5H1.11 to provide that military service "may be relevant in determining whether a departure is warranted," if it is present "to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." *Proposed Amendment 2, effective November 1, 2010.*

Supreme Court holds that second drug possession offense is not aggravated felony. Under 8 U.S.C. §1101(a)(43)(B) an "aggravated felony" is defined in part to be a "drug-trafficking crime." That term is defined in 18 U.S.C. §924(c) to mean a "felony" punishable under the Controlled Substance Act. Simple possession of a controlled substance is usually a misdemeanor, but a conviction for a misdemeanor drug offense after a prior conviction under state law is "punishable" as a "felony" under §924(c)(2). Defendant had two convictions under state law for misdemeanor drug offenses, but the state had not treated the second conviction as a felony. The Supreme Court held that second or subsequent simple possession offenses are not "aggravated felonies" under §1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction. *Carachuri-Rosendo v. Holder*, 560 U.S. _, 130 S.Ct. _ (June 14, 2010).

Supreme Court to decide if substantial assistance departure is law of the case on remand. At defendant's sentencing for drug-trafficking crimes, the government sought a sentence 15 percent below defendant's Guidelines range of 97 to 121 months based on defendant's substantial assistance to the government. The district court granted 40 percent departure based on substantial assistance, and a further downward variance based on his post-offense rehabilitation. After a government appeal, the case was remanded for resentencing before a different judge. Defendant claimed that the law-of-the-case doctrine required the new judge to grant 40 percent reduction. The judge rejected that contention and departed down only 20 percent for substantial assistance. The court also declined to reduce defendant's sentence for post-offense rehabilitation. The Supreme Court granted certiorari to decide (1) whether at defendant's resentencing, the district court was required to apply the same percentage departure for substantial assistance as at the initial sentencing; and (2) whether post-sentencing rehabilitation is a proper basis for a downward variance. In its response to the certiorari petition, the government agreed that post-sentence rehabilitation was a permissible basis for a variance. *Pepper v. U.S.*, 561 U.S. _, 130 S.CT _ (June 28, 2010) (granting certiorari).

Case Law from the Circuits

Very Important Case!!! Attorneys now need to carefully assess prior convictions before sentencing. May be grounds for a §2255.

7th Circuit holds that *Begay* applies retroactively to collateral review. Defendant was sentenced under the Armed Career Criminal Act based in part on his prior Illinois conviction for aggravated fleeing or attempting to elude a police officer. He brought a motion under 28 U.S.C. § 2255 to vacate the sentence, arguing that the offense was not a violent felony. The district court denied the motion, but on appeal, the Seventh Circuit considered whether the Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008) applied retroactively. *Begay* held that in order to qualify as a violent felony under the ACCA, a crime must be similar in kind to the enumerated offenses. New substantive rules apply retroactively on collateral review, but procedural rules generally do not apply. *Teague v. Lane*,

489 U.S. 288 (1988). Here, the Seventh Circuit held that the *Begay* rule is retroactive on collateral review. That decision narrowed substantially defendant's exposure to a sentence of imprisonment, and therefore was a substantive change, not a procedural device. *Welch v. U.S.*, 604 F.3d 408 (7th Cir. 2010).

2nd Circuit says resentencing court cannot consider procedural errors at original sentencing. The district court ruled that defendant was not eligible for resentencing under §3582(c)(2) based on the crack amendments, because he was originally sentenced as a career offender. On appeal, defendant argued that the district court erred at his *original* sentencing because it did not state in open court the reasons for applying the career offender guideline. Therefore, he argued that the court also erred in relying on its prior erroneous application of U.S.S.G. §4B1.1 to deny his motion for a sentence reduction. The Second Circuit held that defendant misunderstood the scope of the district court's authority under §3582(c)(2). As the Supreme Court recently made clear in *Dillon v. U.S.*, 130 S.Ct 2683 (June 17, 2010), §3582(c)(2) only authorizes a "limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." Therefore, neither the district court nor the appellate court was free to address defendant's arguments regarding procedural errors in his original sentencing. *U.S. v. Mock*, _F.3d_ (2d Cir. July 19, 2010) No. 09-4154-cr.

3rd Circuit says career offender who received downward departure can get crack sentence reduction. The district court denied defendant's §3582(c)(2) motion for a sentence reduction, concluding that it lacked authority to reduce his sentence because he was a career offender. On appeal, defendant argued that he was eligible for a sentence reduction because the district court had granted him a downward departure under §4A1.3, and sentenced him within the guidelines range for crack cocaine offenses. After noting a circuit split on this issue, the Third Circuit joined the First, Second, and Fourth Circuits in concluding that such a defendant is eligible for a sentence reduction under §3582(c)(2). Defendant was sentenced "based on a sentencing range" that was lowered by Amendment 706; his sentence was not "based on" the career offender guideline. The panel found it ambiguous whether Amendment 706 had the effect of lowering defendant's "applicable guideline range," and under the rule of lenity, resolved the ambiguity in defendant's favor. *U.S. v. Flemming*, _F.3d_ (3rd Cir. July 27, 2010) No. 09-2726.

6th Circuit says court cannot resentence under a guideline amendment not designated as retroactive. In 2001, defendant received a 204-month sentence based on the district court's finding that he was a career offender. In 2008, he moved for resentencing based on Amendment 709, arguing that he was not a career offender under the amendment because his two prior robbery convictions would no longer count as separate offenses. However, the Sentencing Commission has declined to designate Amendment 709 for retroactive application. The district court nevertheless granted defendant's motion for resentencing, finding that, as a matter of statutory construction and as an application of *Booker*, the Sentencing Commission's designation of amendments as non-retroactive does not bind district courts. The Sixth Circuit reversed, holding that the district court lacked the authority to resentence defendant. Under 18 U.S.C. §3582(c)(2) and guideline §1B1.10, the Sentencing Commission's retroactivity determination controls whether district courts may resentence defendant, and the Commission has not designated Amendment 709 for retroactive application. *U.S. v. Horn*, _F.3d_ (6th Cir. July 26, 2010) No. 09-5090.

7th Circuit remands where court may have denied reduction based on incorrect facts. In denying defendant's motion for a sentence reduction based on the recent crack amendments, the judge explained that its previously imposed 137-month sentence was necessary under the facts of this case, and had the guideline amendment been in effect when the original sentence was imposed, it still would have imposed a sentence of 137 months. Two weeks later, the judge amended his explanation to add that defendant's post-sentencing conduct did not warrant a reduction, noting that prison officials told the court that defendant was recently found guilty in an administrative hearing of performing a lewd act in front of a female corrections officer. The Seventh Circuit vacated and remanded for a new decision. The problem was not the lack of notice, but that the judge may not have his facts straight. Defendant contended that the judge was mistaken, and the record did not contain a copy of defendant's prison disciplinary record. By withholding the information until the day on which the time for appeal expired, the district court prevented defendant from requesting a hearing or presenting any evidence of his own that would call into question the judge's understanding of his record. *U.S. v. Neal*, _F.3d_ (7th Cir. July 6, 2010) No. 08-3611.

OFFENSE CONDUCT

5th Circuit remands where court failed to link firearm to defendant or a co-conspirator. Defendant pled guilty to cocaine charges for his role as the broker in a drug deal. Defendant had arranged for the buyer and a confidential informant to obtain cocaine from a truck at the seller's mother's house. Defendant met with the buyer and seller at this location during their inspection of the cocaine and negotiation for the sale of the drugs. Police arrived and found over five kilograms of cocaine under the hood of the truck. A later search revealed a loaded handgun inside a small refrigerator in the garage. The Fifth Circuit rejected a

§2D1.1(b)(1) enhancement for possession of a dangerous weapon, because the district court failed to find that defendant possessed the weapon or that a co-conspirator possessed the weapon and that possession was reasonably foreseeable to defendant. The court never connected the handgun to any particular co-participant, which is a prerequisite before the court can find that the co-participant's possession was foreseeable to defendant. *U.S. v. Zapata-Lara*, _F.3d_ (5th Cir. Aug. 13, 2010) No. 09-40627.

8th Circuit reverses increase for being "in the business" of laundering funds. Defendant was convicted of money laundering for cashing money orders for Epherson, a drug dealer. The district court imposed a four-level enhancement under §2S1.1(B)(2)(c), determining that defendant was "in the business of laundering funds." The Eighth Circuit reversed, finding defendant was not similar to a professional fence. The propriety of the enhancement depended on whether defendant regularly laundered money for an extended period of time and generated a substantial amount of revenue from it. The judge concluded that defendant had "generated a substantial amount of money" based upon the premise that defendant had negotiated money orders totaling about $42,000. The trial evidence did not support this conclusion. Epherson paid defendant between $50 and $100 per money order cashed, and defendant cashed about 45 money orders for Epherson. Thus, defendant only generated between $2,250 and $4,500 in total from Epherson over 16 to 18 months. *U.S. v. Mitchell*, _F.3d_ (8th Cir. July 30, 2010) No. 09-3041.

2nd Circuit criticizes §2G2.2 in ruling that guideline sentence for child porn was unreasonable. Defendant pled guilty to distributing child pornography. The guideline range of 262-327 months exceeded the statutory maximum of 240 months. The Second Circuit ruled that the 233-month sentence was substantively unreasonable. First, the district court's apparent assumption that defendant was likely to sexually assault a child was not supported by the record. The court also gave no clear reason why the maximum available sentence was required to deter defendant. The panel noted that §2G2.2 is fundamentally different from most guidelines, because its sentencing enhancements routinely result in a guideline range at or near the statutory maximum, even in run-of-the-mill cases. Section 2G2.2 makes virtually no distinction between sentences for average defendants and the sentences for the most dangerous offenders. By concentrating all offenders at or near the statutory maximum, §2G2.2 eviscerates the fundamental statutory requirement in §3553(a) for the district court to consider the nature and circumstances of the offense and the history and characteristics of the defendant. *U.S. v. Dorvee*, _F.3d_ (2d Cir. August 4, 2010) No. 09-0648-cr, *superseding U.S. v. Dorvee*, 604 F.3d 84 (2d Cir. May 11, 2010).

9th Circuit requires clear and convincing proof to use murder guideline in immigration offense. Defendant was convicted of transportation of illegal aliens resulting in death, in violation of 8 U.S.C. §1324(a)(1). If the district court had used the guideline for that offense, 2L1.1, defendant would have had an offense level of 168 to 210 months. Section 2L1.1 provides, however, that if the death of an alien constituted murder as defined under federal law, the court should use the murder guideline. The district court followed the reference, used the murder guideline, and sentenced defendant to life imprisonment. The Ninth Circuit held that a court could not follow the cross-reference in §2L1.1 unless it found that defendant acted with malice aforethought. It then held that because the finding of malice aforethought had a disproportionate impact on the sentence imposed, the district court was required to make that finding by clear and convincing evidence. *U.S. v. Pineda-Doval*, _F.3d_ (9th Cir. Aug. 10, 2010) No. 08-10240.

9th Circuit reverses court's finding that defendant stole 1500 financial instruments. Malone stole 1000 money orders and 500 cashier's checks from a bank. He gave a small fraction of them to defendant, with instructions to purchase computer equipment. Authorities later arrested defendant after she mailed 35 stolen instruments to Apple Computers as payment for eight separate orders. She pled guilty to a single count of mail fraud. Although defendant's guideline range was 24-30 months, the district court sentenced her to 48 months, noting that the circumstances of the offense were serious, since defendant stole 1000 money orders and 500 cashier's checks from a bank. The Sixth Circuit held that the court plainly erred by selecting defendant's sentence based on the clearly erroneous premise that she had stolen 1500 financial instruments. The error plainly affected defendant's substantial rights, because the erroneous belief that defendant had stolen hundreds of financial instruments was an important factor in determining her sentence. *U.S. v. Wilson*, _F.3d_ (6th Cir. July 19, 2010) No. 08-1963.

9th Circuit allows identity theft sentence to be reduced to offset mandatory minimum. Under 18 U.S.C. .s 1028A, a defendant who commits aggravated identity theft is subject to a two-year mandatory sentence that must be imposed consecutively to the underlying "predicate" identity theft offense. Defendant pleaded guilty to mail fraud, theft of government property, tax evasion, and aggravated identity theft. At sentencing, the district court imposed the two-year mandatory minimum required by §1028A and a consecutive 108-month within-Guidelines sentence for defendant's remaining offenses. Defendant argued that the district court failed to recognize that it had

the authority to impose a sentence below the Guidelines range in light of the two-year mandatory minimum required by §1028A. The Ninth Circuit agreed, holding that a court has discretion to reduce defendant's sentence for a non-predicate offense to offset the two-year mandatory minimum. *U.S. v. Wahid*, _F.3d_ (9th Cir. Aug. 10, 2010) No. 09-50036.

7th Circuit reverses for failure to address defendant's argument about crack ratio. Defendant pled guilty to conspiracy to distribute 50 grams or more of crack cocaine. At sentencing, defense counsel asked the district court apply a one-to-one cocaine-powder ratio and to sentence defendant to the mandatory minimum 120-month term of imprisonment. The court, without mentioning the proposed one-to-one ratio, sentenced defendant to 151 months, the low-end of the adjusted guideline range. The Seventh Circuit held that the court did not adequately consider defendant's arguments, and remanded for resentencing. The application of the one-to-one ratio was one of defendant's principal sentencing arguments. Because the argument was non-frivolous, the court was required to address it. *U.S. v. Arberry*, _F.3d_ (7th Cir. July 16, 2010) No. 09-2668.

2nd Circuit says court misunderstood its authority to depart from child porn guidelines. Although defendant requested a downward departure for his child pornography offense, the district court sentenced him to 168 months, the bottom of his advisory guideline range. The Second circuit held that the district court committed procedural error when it concluded that it could not consider a broad policy-based challenge to the child porn guidelines. Various recent decisions have made it clear that a court may depart solely on a policy disagreement with the Guidelines, even where the disagreement applies to a wide class of offenders. Moreover, as the circuit recognized in *U.S. v. Dorvee*, 604 F.3d 84 (2d Cir. 2010), the child pornography Guidelines raise a number of concerns, including that they were Congressionally directed, rather than based on empirical data, that they contain enhancements that apply in virtually every case, resulting in Guidelines ranges that are usually near or above the statutory maximum, and that they make virtually no distinction between the sentences for an ordinary first-time offender and the sentences for the most dangerous offenders. *U.S. v. Tutty*, _F.3d_ (2d Cir. July 16, 2010) No. 09-2705-cr.

5th Circuit says immigration sentence cannot be enhanced for prior sentence of probation even though probation was later revoked. Defendant pled guilty to being unlawfully present in the U.S. after having been deported for an aggravated felony. At sentencing the district court applied a 16-level enhancement under §2L1.2 on the ground that he had reentered the U.S. after being convicted of a drug trafficking felony for which the sentence imposed exceeded 13 months. Defendant argued that the enhancement was improper, because at the time he was deported, and at the time he reentered the country, he had only received a sentence of probation. It was not until he had been present in the country illegally for two years that his probation was revoked and he was given a sentence of imprisonment that exceeded 13 months. The Fifth Circuit held that §2L1.2 was ambiguous and thus must be read in defendant's favor. Defendant's interpretation was the most natural reading of §2L1.2 and its commentary – it was counterintuitive that a guideline enhancement designed to reflect the nature of a defendant's illegal reentry offense could be triggered by unrelated conduct that occurred long after the reentry. *U.S. v. Bustillos-Pena*, _F.3d_ (5th Cir. July 26, 2010) No. 09-20360.

1st Circuit reverses mandatory life term for uncharged murder. Defendants were found guilty of conspiracy to commit carjacking, and aiding and abetting a carjacking resulting in death. They were sentenced to 60 months for the conspiracy count, to be served concurrently with a term of life imprisonment for the carjacking. Defendants argued on appeal that the district court erred in sentencing them to a mandatory term of life imprisonment for a murder that they were neither charged with nor convicted of committing. The government conceded that the district court committed plain error during the sentencing hearing, and agreed that the error warranted vacating defendants' sentence, and remanding for resentencing. The district court referred to the defendants' crime of conviction as "first degree murder in the context of carjacking." The district court compounded its mistake by also stating on more than one occasion that the statutory penalty for the crime was life imprisonment. This was incorrect since the statutory penalty for carjacking resulting in death was "any number of years up to life." 18 U.S.C. § 2119(3). The First Circuit agreed, and remanded for resentencing. *U.S. v. Castro-Davis*, _F.3d_ (1st Cir. July 16, 2010) No. 08-2108.

1st Circuit holds that claim that fraud "affected financial institution" must be alleged in indictment. At the time of the fraud in this case, a wire fraud conviction carried a maximum term of five years, but if the fraud affected a financial institution, the statutory maximum was thirty years. See 18 U.S.C. §1343. The government conceded that the indictment did not allege that the wire fraud affected financial institutions, and conceded that the enhancement did not apply because it was not alleged in the indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt, as required by *Jones v. U.S.*, 526 U.S. 227 (1999). See *U.S. v. Ubakanma*, 215 F.3d 421, 426 (4th Cir. 2000). Nevertheless, the First Circuit found that defendant's 84-month sentence was not plain error because the sentence was concurrent to an identical 84-month sentence on the money laundering count which

was within the ten year statutory maximum under the money laundering statute, and the court made it clear at sentencing that the sentence was guided by the 18 U.S.C. §3553(a) factors, not by the statutory maximum. *U.S. v. Matos*, _F.3d_ (1st Cir. July 7, 2010) No. 09-1178.

8th Circuit grants habeas relief for lack of proof that offense involved more than five kilos of cocaine. The PSR noted that "there is not enough evidence to support that the defendant was involved with five kilograms of cocaine." Inexplicably, however, the PSR applied the ten-year mandatory minimum for distribution of five kilograms. At sentencing the district court agreed that five kilograms was not supported by the evidence, but nevertheless imposed the mandatory 120-month sentence for five kilograms or more of cocaine. Defendant did not appeal his sentence and the error was discovered only in a later habeas corpus proceeding. In a 2-1 opinion, the Eighth Circuit granted habeas relief and remanded the case for resentencing on the amount of cocaine the district court found to have been proved. Chief Judge Riley dissented, arguing that defendant was not prejudiced because he was liable for a mandatory minimum ten year sentence for 50 grams of cocaine base in an uncharged crack cocaine conspiracy. *Theus v. U.S.*, _F.3d_ (8th Cir. July 13, 2010) No. 09-1015.

6th Circuit holds judge had authority to reduce sentence based on fast-track disparity. Defendant pled guilty to unlawful reentry into the US after deportation and was sentenced to 57 months. He sought a remand for the district court to consider whether to impose a lower sentence based on the disparities created by the existence of "fast-track" early disposition programs for illegal-entry cases in other jurisdictions. Because defendant was sentenced before *Kimbrough v. U.S.*, 552 U.S. 85 (2007), and because *Kimbrough* permits district court judges to impose a variance based on disagreement with the policy underlying a guideline (here, the fast-track disparity), the Sixth Circuit vacated defendant's sentence and remanded the case for resentencing. *U.S. v. Camacho-Arellano*, _F.3d_ (6th Cir. July 16, 2010) No. 07-5427.

8th Circuit counts drug offenses that occurred during conspiracy as prior drug offenses. Defendant pled guilty to drug conspiracy charges based on drug dealing that spanned from 1996 through November 2007. The district court found that he had two prior drug offenses, and thus was subject to a mandatory life sentence under 21 U.S.C. §841(B)(1)(A). Defendant argued because the prior convictions became final in 2000, during the time span of the conspiracy, the convictions should not be used to enhance his sentence. However, numerous cases have held that where the charged conspiracy began before and continued after a defendant's qualifying felony drug conviction, the federal drug conviction may be considered a "prior" conviction for purposes of applying the §841 enhancement so long as the defendant committed an overt act in furtherance of the conspiracy after the date of the conviction. See, e.g. *U.S. v. Pratt*, 553 F.3d 1165 (8th Cir. 2009). Defendant committed overt acts in furtherance of the conspiracy after these two convictions became final in 2000, as evidenced by the May 2007 search of the house where he was arrested. *U.S. v. McCarther*, 596 F.3d 438 (8th Cir. 2010).

7th Circuit confirms that variance is allowed from career offender guideline range. Defendant was convicted of trafficking in crack cocaine. At sentencing, the district court found that defendant was a career offender. As a result, defendant had a sentencing range of 360 months to life. Defendant sought a sentence below the range in part based on the disparity between the guidelines for crack offenses and those for powder cocaine offenses. Relying on prior Seventh Circuit law, the district court found that it could not vary from a career offender sentence. In *U.S. v. Corner*, 598 F.3d 411 (7th Cir. 2010) (en banc), the court held that all guidelines, including the career offender guideline, are advisory. Based on *Corner*, the Seventh Circuit remanded to allow the district court to determine whether defendant should receive a lower sentence based on the disparity between crack and powder offenses. *U.S. v. Womack*, _F.3d_ (7th Cir. June 25, 2010) No. 09-2488.

CRIMINAL HISTORY

11th Circuit finds defendant innocent of being a career offender and entitled to habeas relief. In 1995, based in part on a prior concealed weapon conviction, defendant was sentenced as a career offender. In 1999, he filed an unsuccessful §2255 motion to vacate his sentence. In 2008, based on the Supreme Court's decision in *Begay v. U.S.*, 553 U.S. 137 (2008), the Eleventh Circuit reversed its prior holding that carrying a concealed weapon was a crime of violence. See *U.S. v. Archer*, 531 F.3d 1347 (11th Cir. 2008). Defendant moved to reopen his §2255 motion, arguing that the court could treat the motion as one for relief under §2241, pursuant to the savings clause of §2255, under *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999) and the doctrine of "actual innocence." The Eleventh Circuit agreed. *Begay* was a "circuit law busting, retroactive Supreme Court decision," yet circuit law foreclosed a claim under *Begay* and *Archer*. The district court found defendant to be a career offender, but under *Begay* and *Archer* it was clear he was not now, nor ever had been, a career offender. Such a defect called into question the fundamental legality of defendant's conviction and sentence. For federal sentencing purposes, being a career offender is essentially a separate offense, requiring proof of a separate element and additional punishment. Defendant was entitled to relief because he was actually innocent of his sentence enhancement, and his continued incarceration for the illegal enhancement was a

miscarriage of justice. *Gilbert v. U.S.*, _F.3d_ (11th Cir. June 21, 2010) No. 09-12513.

4th Circuit holds that *Alford* plea to second-degree assault did not establish violent felony. In sentencing defendant under the Armed Career Criminal Act, 18 U.S.C. §924(e), the district court relied on a prior conviction resulting from defendant's *Alford* plea to a Maryland charge of second-degree assault. Under Maryland law, second-degree assault encompasses several distinct crimes, only some of which qualify as violent felonies. The transcript of defendant's *Alford* plea proceeding showed that the state prosecutor's proffer of facts that the State would have presented at trial indicated that defendant committed a violent felony, but defendant never admitted to those facts. The Fourth Circuit held that the district court improperly counted the *Alford* plea conviction as a violent felony. *Shepard v. U.S.*, 544 U.S. 13 (2005) prevents a court from assessing whether a prior conviction counts as an ACCA predicate conviction by relying on facts neither inherent in the conviction nor admitted by the defendant. In entering an *Alford* plea, the defendant waives trial and accepts punishment, but he does not admit guilt. The prosecutor's proffer of what the State would have proved at trial did not amount to an admission or acceptance of facts by the defendant. *U.S. v. Alston*, _F.3d_ 4th Cir. July 2, 2010) No. 09-4375.

7th Circuit reverses for failure to explain basis for higher sentence. The PSR calculated defendant's criminal history as IV, but the district court stated that defendant's criminal history was understated, and that it should be at least a category V. It sentenced him to 96 months, which would be at the top of the guideline range if defendant had a criminal history category of V. The Seventh Circuit ruled that the district court failed to adequately explain its sentence. The court imposed a sentence above the guideline range calculated in the PSR without explaining how it arrived at the higher range and in spite of its statement that it was sentencing based on the PSR's calculations. Although the record showed that the sentencing judge believed defendant's criminal history category was underrepresented, it was unclear as to how that finding was used to calculate defendant's sentence. *U.S. v. Johnson*, _F.3d_ (7th Cir. July 16, 2010) No. 09-3247.

8th Circuit reverses career offender sentence where "grouped" predicate offenses did not count in criminal history. In counting groups of related offenses, §4A1.2(a)(2) directs a court to use the longest sentence if concurrent sentences were imposed, and the aggregate sentence in the case of consecutive sentences. Defendant's career offender sentence was based on two groups of related offenses which were given a single criminal history point under §4A1.1(c). The first group had four sentences, including a drug trafficking sentence, but the only sentence that could serve as a predicate under §4B1.1 was a sentence for resisting arrest. Under §4A1.2(a)(2), the drug trafficking sentence received the criminal history point because it was the longest. So defendant argued that the resisting arrest sentence could not be a predicate for §4B1.1. The other group presented a similar situation, except there, defendant received equivalent suspended sentences for the resisting arrest charge and another count which could not serve as a predicate career offender offense. The Eighth Circuit found that defendant's reading of the guidelines was plausible. A conviction is not a "prior felony" within the meaning of §4B1.1 unless it receives a criminal history point under subsection (a), (b) or (c). The district court erred in sentencing defendant under §4B1.1. *King v. U.S.*, 595 F.3d 844 (8th Cir. 2010).

DETERMINING THE SENTENCE

7th Circuit says participation in Inmate Responsibility Program is voluntary. At sentencing, the district court imposed a fine of $500 "to be paid from prison earnings and thereafter . . . at the rate of 10% of [defendant's] net earnings per month." The judgment stated that defendant was "to begin making payments toward the fine imposed through the Inmate Responsibility Program earnings." The Seventh Circuit held that mandating payment from the Inmate Responsibility Program was clear error because participation in the IFRP is voluntary. The government conceded as much. Accordingly, the Seventh Circuit modified the district court's sentence to clarify that defendant's participation in the IFRP was voluntary. *U.S. v. Munoz*, _F.3d_ (7th Cir. July 9, 2010) No. 09-1118.

Supreme Court upholds BOP method of calculating good time credit. Under 18 U.S.C. §3624(b)(1), a federal prisoner may receive "up to 54 days at the end of each year" in good time credit. The Bureau of Prisons awards a prisoner good time credit at the end of each year of imprisonment. When the difference between the time remaining in the sentence and the amount of accumulated credit is less than one year, the BOP awards a prorated amount of credit for that final year proportional to the awards in other years. For the remaining time in the prisoner's term, BOP prorates the amount of good time, with the result that a defendant sentenced to 10 years' imprisonment could receive a maximum reduction in sentence of about 470 days. In a decision by Justice Breyer, the Supreme Court upheld the BOP's method of calculating good-time credit, and rejected petitioner's claim that the statute permits a maximum good time award of 540 days (10 years times 54 days), not the 470 days that the method described above would allow. Justice Kennedy wrote a dissent, which Justices Stevens and Ginsburg joined. *Barber v. Thomas*, 560 U.S. __, 130 S.Ct. __(June 7, 2010).

ADJUSTMENTS

7th Circuit reverses for lack of sufficient findings to support obstruction increase. During a traffic stop, defendant admitted to officers that he had a gun in his pocket, and the officers then found a gun in his front pants pocket and arrested him. He was convicted of being a felon in possession of a firearm. At trial, he denied having a gun, or even seeing a gun, on the day of his arrest, and stated that the first time he had seen the gun was at trial. The Seventh Circuit held that the district court failed to make sufficient findings to support a §3C1.1 obstruction of justice enhancement. The court did not articulate clear and separate findings as to the falsity, materiality, and intent of any statement made by defendant. Although the judge noted that the jury did not believe defendant's testimony, he did not clearly state his belief that defendant made a false statement. The judge further obscured the basis for his determination that defendant committed perjury by transitioning directly into a discussion about defendant's prior felonies. *U.S. v. Johnson*, _F.3d_ (7th Cir. July 16, 2010) No. 09-03247.

8th Circuit finds error in applying enhancement absent stipulation to supporting facts. A police officer responded to a complaint that defendant was playing loud music at his home. The officer knocked on defendant's door and identified himself three times; each time, defendant told him to go away. After the third time the officer knocked, defendant fired two shots through the door. Police officers later arrested defendant, and he pleaded guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. §922(g). The plea agreement stipulated that the officer identified himself; but not that defendant knew that the person at his door was a police officer. At sentencing, the district court relied on the plea agreement to find that defendant knew the person at his door was a police officer. The court enhanced defendant's offense level under §3A1.2(c)(1), which provides for a six-level enhancement if the defendant, "knowing or having reasonable cause to believe that a person was a police officer, assaulted such officer during the course of the offense. The Eighth Circuit held that the district court erred because defendant did not stipulate that he knew the person at the door was a police officer. *U.S. v. Robinson*, _F.3d_ (8th Cir. June 24, 2010) No. 09-1925.

APPEAL OF SENTENCE

9th Circuit says error is not harmless even if district court would have imposed same sentence. At defendant's sentencing, the district court erred in calculating defendant's offense level. The court stated, however, that it would have imposed the same sentence if it had calculated the guidelines in the manner advanced by defendant. On appeal, the Ninth Circuit held that the district court erred in calculating the guidelines and that the court should have used the approach advocated by defendant. The court found that the error was not harmless because the court started with an incorrect guideline calculation. The court found that *U.S. v. Menyweather*, 447 F.3d 625 (9th Cir. 2006), which found guidelines error harmless when the district court made clear that it would impose the same sentence regardless of the error, had been overruled by subsequent Supreme Court cases. *U.S. v. Munoz-Camarena*, _F.3d_ (9th Cir. Sept. 3, 2010) No. 09-50088.

6th Circuit holds that appellate waiver was unenforceable. Defendant's plea agreement provided that he waived his right to a direct appeal, but the waiver was not discussed in open court when the district court accepted defendant's guilty plea. The court asked defendant at his re-arraignment hearing, "[d]o you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?" Defendant indicated that he understood. This question did not alert defendant that the plea agreement required him to waive his right to appeal, nor did it show that defendant understood the appellate waiver provision of the plea agreement. In fact, the court's comments informed defendant that he *had* the right to appeal. Further, at the sentencing hearing, the court explicitly informed defendant that he had a right to appeal his sentence. The Sixth Circuit held that the district court committed plain error by failing to elicit defendant's understanding of the appellate waiver, and ruled that the waiver was unenforceable against the defendant. *U.S. v. Almany*, _F.3d_ (6th Cir. Mar. 10, 2010) No. 08-6027.

DEPARTURES AND *BOOKER* VARIANCES

2nd Circuit holds that court improperly ignored substantial assistance letter. Defendant signed a plea agreement which provided in part that the applicable guidelines term of imprisonment was 18-24 months, that the Guidelines were advisory and the court was required to consider the §3553(a) factors, and that defendant agreed not to appeal any sentence below 27 months. Based on defendant's later cooperation, the government submitted a §5K1.1 letter to the court urging it to consider a sentence below the 18-24 month range. The district court refused, reasoning that the government's advocacy of a below-Guidelines sentence was an impermissible attempt to repudiate or amend the plea agreement. In effect, the court believed that because of the appeal waiver, *any* sentence at or below 27 months was appropriate. The court sentenced defendant to 18 months, and defendant appealed. The Second Circuit vacated the sentence because the district court (1) improperly "relied" on the plea agreement to the exclusion of the §5K1.1 letter and the §3553(a) factors; and (2) misread the plea agreement as manifesting defendant's enforceable concession that any sentence at or below 27 months obviated the need to consider the §5K1.1 letter and

the §3553(a) factors. *U.S. v. Woltmann*, _F.3d_ (2d Cir. July 6, 2010) No. 10-413.

8th Circuit affirms significant downward variance for bank robbery defendant. Defendant was convicted of bank robbery and firearms charges, resulting in an applicable guideline range of 360 months to life. The district court varied significantly from the guideline range and imposed a sentence of 180 months. The court stated that given defendant's age and the length of the sentence, he would probably not pose a serious threat to public safety by the time he was released. The court also considered defendant's lengthy battle with substance abuse, the fact that no one was injured in the robbery, and the absence of adverse statements from the robbery victims. The government did not object to the court's explanation, but did cross-appeal the sentence. Reviewing for plain error, the Eighth Circuit held that defendant's sentence was procedurally and substantively reasonable. The court recognized the applicable guideline range, and its discretion to vary from the Guidelines. It also explicitly considered several factors in §3553(a). Although the government disagreed with the court's characterization and evaluation of the relevant factors, the court did not rely on any clearly erroneous findings of fact that would justify reversal. *U.S. v. Stenger*, _F.3d_ (8th Cir. May 14, 2020) No. 09-1330.

APPLICATION PRINCIPLES

1st Circuit allows resentencing where career offender's sentence was based on crack guidelines. Defendants were convicted of crack cocaine offenses, and qualified as career offenders. In both cases, the district court departed downward and imposed a sentence under the crack guidelines without applying the career offender designation. Both defendants later sought resentencing based on the recent amendments to the crack Guidelines. The First Circuit held that when a defendant's existing sentence was determined by the crack cocaine guidelines rather than the career offender guideline, resentencing is within the discretion of the district court. However, a mere reference to the lower sentences provided by the crack cocaine guidelines is not enough to find that a sentence is based on the crack guidelines. Here, at defendant Cardosa's sentencing, the judge stated that the career offender guideline was not a "true reflection" of defendant's criminal history, and that it was departing downward to the offense level without the career offender status. Thus, Cardosa's sentence was plainly "based on" the crack cocaine guidelines. The situation was less clear for defendant Rodriquez, so the panel remanded to let the district judge decide in the first instance whether the sentence was or was not based on the crack cocaine guidelines. *U.S. v. Cardosa*, 605 F.3d 16 (1st Cir. 2010).

9th Circuit reaffirms that court on remand may resentence on all counts. On defendant's appeal, the Ninth Circuit vacated three of six counts on which defendant was convicted and remanded for a new trial. On remand, the government dismissed the vacated counts. The district court then reexamined the sentence on all three counts, and it imposed a lower sentence on two of the counts. Nevertheless, on appeal, defendant argued that the district court lacked jurisdiction on remand to examine the entire sentence. The Ninth Circuit reaffirmed prior cases holding that when a defendant is sentenced on multiple counts and one is later vacated on appeal, the sentencing package becomes "unbundled," and the district court has the authority to resentence on all counts. *U.S. v. Avila-Anguiano*, _F.3d_ (9th Cir. July 13, 2010) No. 09-10160.

From the Federal Sentencing Guide:
Vol. 21, No. 8, April 12, 2010; Vol. 21, No. 13, June 21, 2010; Vol. 21, No. 14, July 5, 2010; Vol. 21, No. 15, July 19, 2010; Vol. 21, No. 16, August 2, 2010; Vol. 21, No. 17, August 16, 2010; Vol. 21, No. 18, August 30, 2010; Vol. 21, No. 19, September 13, 2010.

Retroactivity and Post Conviction Relief on Direct Appeal, 2255, and 2254 Petitions now available for prior convictions where the defendant was not advised of immigration consequences in a plea bargain agreement. *See* Padilla v. Kentucky, 130 S.Ct. 1473 (2009). Also, new litigation on prior convictions not applicable to the Armed Career Criminal Act or Career Criminal enhancements under the Federal Sentencing Guidelines. *See, for example,* Chambers v. United States, 130 S.Ct. 678 (2009). There are many examples of prior convictions that should not have applied to the ACA or CCE enhancements. (For more on this list see our third quarter news letter.) If you think your prior conviction should not have applied to these provisions as violent felonies, you may have relief from the enhancement available.

Dear Friend,

Chances are that if you're reading my letter, you or someone you know are in trouble with the United States Government in one way or another. Maybe, like me, this is your first time in trouble with the Government.

Whatever your particular case may be, I can assure you that the Federal law(s) are a complex, sometimes changing and often (very) confusing to the average person. Because of this entangling web of laws, we certainly need an experienced attorney who not only knows and understands the laws, but also knows our rights and will fight for them and our freedom.
Enter: **Marcia Shein.**

I won't go into detail about Attorney Shein's impressive credentials. Rather I want to tell you how, as my attorney, she is committed to me on a personal level. Unlike many attorneys, Ms. Shein actually CARES about her clients and what happens to them. To her, we're not simply "another inmate in prison", rather we're people too and we still have rights.

Attorney SHein understands the complexity of the laws to such an extreme degree, that I trust her FULLY as my attorney and to always have my best interests at hand. Ms. Shein and her experienced staff have impressed me so much, that their aggressive, fighting ways inspired me to write this letter of recommendation. (I can assure you that I was NOT paid to write this NOR was I even asked to do so) Honestly, when was the last time you read anything 'good' from a client about his or her attorney?

So, no matter what crime you may be charged with (committed/convicted thereof) I **HIGHLY RECOMMEND** Marcia Shein and her knowledgeable staff to handle your case. I am confident that she will fight just as hard for you, as she did for me. The only regret I have is not hiring them sooner.

I urge you not to leave your case to chance. You can guarantee that the FBI, DEA, ATF and others will be working HARD to prosecute you - so in return, you need someone who will work just as hard (and harder) to protect you and your rights. In my case, (and possibly yours) those people were Attorney Marcia SHein and her Firm.

Bobby D. Wann

B.D.W.

FEDERAL CRIMINAL LAW CENTER
2392 North Decatur Road • Decatur, GA 30033
(404) 633-3797 • (404) 633-7980 (Fax) • email: Marcia@MsheinLaw.com • www.federalcriminallawcenter.com • www.federalappealslawyer.com