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Federal Defender Newsletter
September 2011

CJA PANEL TRAINING

Panel training in Sacramento will resume on September 21 at 5:30 p.m. at 801 I St., in the 4th floor conference room. Trial and Habeas Attorney Tivon Schardl will be training on "The Ethics of Representing the Mentally Impaired." This session will explore the ethical responsibilities of a defense attorney who represents a defendant with mental illness, intellectual disability, or a developmental disorder. Topics include the relevant standards of professional responsibility and cases applying them, diagnostic criteria, and the ways in which symptoms impair competence for trial. This presentation qualifies for ethics MCLE credit.

Fresno panel training will resume on September 20 at 5:30 p.m. at the Downtown Club, 2120 Kern St. Immigration attorney Lorenzo Salazar will present on the "Immigration Consequences of Criminal Convictions."

CLIENT CLOTHES CLOSET

If you need clothing for a client going to trial or for a client released from the jail, or are interested in donating clothing to the client clothes closet, please contact Debra Lancaster at 498-5700.

CADC BROWN BAG/CCAP ROUNDTABLE COMBO EVENT

Date: Friday, September 2, 2011
Time: Noon - 1:00 P.M.
Place: 801 I St., 4th Floor Conference Room
"Nuts, Bolts and Emerging Issues in Gang Cases"

Diane Nichols will be presenting this informative lecture on gang cases litigated under California's STEP act (Penal Code, sec. 186.22). The lecture will be beneficial for both appellate and trial attorneys. Ms. Nichols will be discussing the often confusing elements within Penal Code section 186.22, the boundaries of "gang expert" testimony, and emerging gang related issues, some of which are on review in the California Supreme Court. Ms. Nichols has been an appellate attorney practicing criminal law for 15 years. She was a staff attorney at Appellate Defenders in San Diego for 10 years and currently handles appointed appeals in the Third, Fourth, and Fifth Districts. She has litigated numerous cases in the California Supreme Court, including People v. Rodriguez, which is currently pending review. The interesting issue in Rodriguez is whether a defendant can be found guilty of violating Penal Code section 186.22, subdivision (a), when acting alone.

REDUCED PRICES ON CASEMAP/ TIMEMAP/DOCPREVIEWER/TEXTMAP PRODUCTS FOR CJA COUNSEL

Due to the popularity and interest of the FDO and CJA community, LexisNexis has agreed to offer the CaseMap / TimeMap / DocPreviewer and TextMap products at a special reduced price through November 15, 2011. LexisNexis is offering CJA panel attorneys the following additional price reductions: $290.50 for the CaseMap / TimeMap / DocPreviewer license set; $97.00 for the TextMap license. CaseMap is a fact management database application used to manage, organize and connect case facts, legal issues, key players, and documents. Reports can be easily produced to give snapshots of critical case detail including an outline of issues for the case, a fact chronology, and all supporting people, organizations, and documents in the case. TimeMap is a timeline graphing software that enables the user to create a timeline of events from critical case details. DocPreviewer is a plug-in software which allows for enhanced integration between CaseMap and Adobe Acrobat Pro or Pro Extended. TextMap is a transcript summary tool that can be integrated with CaseMap. TextMap offers the ability to link transcripts from case depositions, examinations, and other proceedings to case exhibits and other documents. It can also be used to play video and audio that has been synched with transcript text.

After November 15, LexisNexis will still offer reduced pricing to FDOs and CJA panel attorneys: CaseMap / TimeMap / DocPreviewer for $387.50 per license set (normally $775.00) and TextMap for $161.00 per license (normally $322.00).

For CJA panel attorney inquires: contact Carolyn Winiarz at 904-373-2201 or carolyn.winiarz@lexisnexis.com for assistance and questions.

If you have any questions regarding the use of CaseMap within CJA panel attorneys' offices, please contact either Alex Roberts or Kelly Scribner of the National Litigation Support Team at 510-637-3500, or by email: alex_roberts@fd.org, kelly_scribner@fd.org.

TENTH ANNUAL FEDERAL DEFENDER'S GOLF TOURNAMENT

The Federal Defender's Golf Tournament will be held September 9, 2011 at the Empire Ranch Golf Club in Folsom, with a shotgun start at 1:30 p.m. There will be a dinner (tri tip, chicken, or salmon/vegetarian) to follow the golf tournament. The tournament features hole prizes, raffle prizes, and a winner's trophy. Entry includes golf, cart, range balls, a full tournament set up, and a free 90 minute clinic from head professional (to be redeemed in the future later.)

All skill levels are welcome to play. Scoring is individual with an established handicap. Cost is $90.00 per person, and should be sent to Henry Hawkins before September 9th. Please include your handicap, proposed foursome, and dining request for fish or vegetarian. Hole sponsor spaces are also available this year.

Please share this announcement with peers, friends and family. As always, any donations for prizes will be gratefully appreciated. Any questions, please call Henry Hawkins at 498-5700.

RESENTENCINGS UNDER THE FSA

On July 15, 2011, Attorney General Eric Holder reversed the position of the DOJ and stated that the reduced mandatory minimums in the Fair Sentencing Act should apply to all crack cocaine defendants sentenced after August 3, 2010: "I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place."

Any defendants that have been sentenced after that date to mandatory minimums that pre-existed the FSA may be eligible for relief. If you represented a client in this situation, please contact Rachelle Barbour at rachelle_barbour@fd.org and provide the name of the client and case number. The Federal Defender's Sentencing Resource Counsel are providing guidance on how to address those cases where defendants received too much time under the FSA because of the government's insistence that pre-FSA mandatory minimums continued to apply.

TOPICS FOR FUTURE TRAINING SESSIONS

If you know of a good speaker for the Federal Defender's panel training program, or if you would like the office to address a particular legal topic or practice area, please e-mail your suggestions to Melody Walcott (Fresno) melody_walcott@fd.org or Lexi Negin (Sacramento) at lexi_negin@fd.org.

ADDRESS, PHONE OR EMAIL UPDATES

Please help us ensure that you receive this newsletter. If your address, phone number or email address has changed, or if you are having problems with the email version of the newsletter or attachments, please call Kurt Heiser at (916) 498-5700. Also, if you are receiving a hard copy of the newsletter but would prefer to receive the newsletter via email, contact Karen Sanders at the same number.

NOTABLE CASES

Lee v. Lampert, No. 09-35276 (8-2-11)(en banc)(Thomas writing with a concurrence by Kozinski). The Ninth Circuit holds that a credible showing of "actual innocence" under Schlup equitably tolls the statute of limitations bar imposed by AEDPA. However, the petitioner here failed to present such credible evidence. Kozinski, concurring, notes that the decision as to whether actual innocence can excuse AEDPA should be put off for another day and another decision because under the facts here, the petitioner presented no credible evidence.

US v. Aguila-Montes de Oca, No. 05-50170 (8-11-11)(en banc)(per curiam). Applying the Ninth Circuit's modified categorical analysis to California Penal Code § 459 (first degree burglary), a majority of the en banc court overrules precedent that previously held it is a crime of violence for USSG § 2L1.2 purposes if the California charging document or jury verdict merely has the allegation of "unlawful entry." The California statute is broader than the generic definition because its definition of "unlawful" allows for a privileged or consensual entry into a structure with felonious intent. This is insufficient for generic burglary. In this case, the defendant's prior cannot be used as a crime of violence under § 2L1.2. In an opinion by a different majority, the court eliminates the Navarro-Lopez rule and its line of cases, which held that the modified categorical approach could not be used if the state statute was missing a required element.

U.S. v. Marguet-Pillado, No. 10-50041 (8-12-11)(Gwin, D.J., with B. Fletcher; dissent by N. Smith). "The law of the case doctrine" does not preclude the defendant, at a second trial, from getting a jury instruction on the government's failure to prove beyond a reasonable doubt that the defendant had not obtained derivative citizenship. Here, the defendant's stepfather was a U.S. citizen. He regarded the defendant as his son, although born in Mexico from a prior relationship, and had so informed immigration. When defendant got into trouble, and was convicted, he argued derivative citizenship to the immigration judge to no avail. At the first trial, which was to the court, the court also rejected the argument. On appeal, the Ninth Circuit reversed on other grounds related to inadmissible hearsay. It affirmed on the

derivative citizenship issue. At a second trial, this time before a jury, the defendant asked for a jury instruction focused on the government failure to prove that the defendant was not a derivative citizen. The trial court denied the instruction. On appeal, the Ninth Circuit holds this was error, and vacates the conviction and remands for a new trial. The law of the case doctrine operates in a different context in a criminal matter, because of constitutional concerns. Applying the doctrine, after a guilty verdict had been vacated, raised confrontation and burden-shifting issues. Moreover, the defendant was correct in arguing that the government bore the burden to prove guilt on each element beyond a reasonable doubt to a jury. The jury was the trier of fact. Lastly, the evidence was different at the second trial.

U.S. v. Parker, No. 10-50248 (8-22-11)(per curiam with B. Fletcher, Wardlaw and Kavanaugh, D.J.). The military on Vandenburg Air Force Base issued a "barment" letter when the defendant refused to relocate his protests from Ocean Avenue, a public road that crosses the base to an area outside the base's main gate. This did not stop the defendant, who continued his protests. These 18 USC § 1382 misdemeanor charges followed. On appeal, the Ninth Circuit reversed the conviction, holding that 18 USC § 1382, prohibiting entry onto a base, requires that the government have absolute ownership or exclusive possession of the property. The road here, Ocean Avenue, is a public one, with the county and the military each having concurrent jurisdiction. The government argued that such exclusive ownership is not required, but the circuit precedent bars such a position. Since the defendant was always on the public road's easement, his protest activities cannot violate § 1328.

U.S. v. Clements, No. 09-10034 (8-22-11)(per curiam with O'Scannlain, Rawlinson, and Bea). The defendant was convicted of a SORNA violation for failing to register as a sex offender on February 15, 2008. The Ninth Circuit reverses and remands for dismissal of the indictment because of U.S. v. Valverde, 628 F.3d 1159 (9th Cir. 2010). In Valverde, the Ninth Circuit held that SORNA's registration requirements did not become effective until August 1, 2008, because the AG's interim regulations failed to comply with the APA.

Dougherty v. City of Covina, 2011 WL 3583404 (9th Cir. Aug. 16, 2011). The Ninth Circuit holds that molestation alone provides insufficient probable cause to support a search for child pornography. Teacher Doughery was accused of inappropriately touching several students. This prompted a police officer to seek a search warrant; in the application, the officer described his own experience working on sex crimes. The warrant issued, Dougherty's computer was searched, nothing was found, and Dougherty filed a § 1983 claim. The district court dismissed his complaint, finding the warrant supported by probable cause. The court held that under the totality of the circumstances, a search warrant issued to search a suspect's home computer and electronic equipment lacks probable cause when (1) no evidence of possession or attempt to possess child pornography was submitted to the issuing magistrate; (2) no evidence was submitted to the magistrate regarding computer or electronics used by the suspect; and (3) the only evidence linking the suspect's attempted child molestation to possession of child pornography is the experience of the requesting police officer, with no further explanation. The affidavit included only a three-year-old allegation of attempted molestation by one student and current allegations of inappropriate touching of and looking at students.

U.S. v. Barajas-Alvarado, No. 10-50134 (8-24-11)(Ikuta with Rymer and Tallman). The Ninth Circuit holds that courts must conduct some "some meaningful review" of

an expedited removal order being used as a predicate for a § 1326 criminal prosecution. The defendant here was facing a § 1326 charge, with the expedited removal order being used to show that he had been removed. He sought to challenge, alleging its unconstitutionality for lack of a court being able to assess its fairness. The Ninth Circuit holds that there has to be some meaningful review to determine whether the removal proceeding was "fundamentally unfair because it violated the alien's due process rights and resulted in prejudice."

U.S. v. Matus-Zayas, No. 09-10294 (8-24-11)(Rawlinson with B. Fletcher and Tallman). If a court is going to let the government admit a witnesses' deposition at trial, the government must offer some evidence of the witnesses' unavailability. Here, in this alien smuggling case, the government introduced material witnesses' depositions but failed to show why they were unavailable. This was error.

Chism v. Washington State, No. 10-35085 (8-25-11). (Paez with B. Fletcher, Ikuta, dissenting). Another excellent civil opinion challenging the government's actions in a child pornography investigation. Police officers focused on the plaintiff because of internet information indicating that his joint credit card account was linked to hosting fees for illegal pornographic websites. In obtaining a search warrant, officers made false statements that Chism downloaded illegal images and that the credit card was used to purchase illegal images. The officers also omitted relevant information, including that IP addresses connected with those websites were traced to other people, that Chism's wife's name was linked to the websites, and that the user accounts for those websites contained nonsensical identifying information. The warrant issued, the family's house was searched and computer seized, and Chism was arrested. No images were found and no charges were filed. The Ninth held that the officer's statements could constitute intentional or reckless deception under the Fourth Amendment, and that the district court erred in granting summary judgment. Both Chism and Dougherty caution the government against overreaching in the early stages of a child pornography investigation.

GUIDELINE AMENDMENTS 2011

Marjorie A. Meyers, Federal Public Defender
Southern District of Texas

The Sentencing Commission's primary focus this year has been on the crimes that have captivated the nation's attention, that is, health care fraud and firearms trafficking. The Commission has also clarified the availability of the minor role reduction, has offered limited relief to undocumented aliens whose prior convictions are remote and has made permanent the emergency FSA amendments. The Commission has also turned its attention to supervised release, a penalty that has often been a neglected afterthought at sentencing.

A. Health Care Fraud

The Patient Protection and Affordable Care Act, Pub. L. 111-148, contains a number of directives concerning health care fraud. In response, the 2011 proposed Guideline amendments include two amendments that apply where a defendant is "convicted of a Federal health care offense involving a Government health care program." First, the amendments create three tiered enhancements that apply if losses in a "government health care program" are greater than $1,000,000, $7,000,000 and $20,000,000. USSG § 2B1.1(b)(8) (Nov. 1, 2011). A "government health care program" is defined as a plan or program that provides health benefits, "whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government." Examples include Medicare, Medicaid and CHIP. USSG § 2B1.1, comment. (n.1) (Nov. 1, 2011). Second, the aggregate amount of

fraudulent bills constitutes "prima facie evidence of the amount of intended loss." USSG § 2B1.1, comment (n.3(F)(viii)) (Nov. 1, 2011).

Recognizing that the loss enhancements in property, particularly fraud, offenses may over-represent the seriousness of a minor player's offense, the Commission has added a provision to USSG § 3B1.2, comment. (n.3(A)), that "a defendant who is accountable under [relevant conduct principles] for a loss amount . . . that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from [a mitigating role] adjustment under this guideline." The Commission offers as an example a nominal owner in a health care fraud scheme.

B. Firearms

The recent spate of violence in Mexico has resulted in a number of amendments directed at firearms offenses. First, the Commission increased penalties for straw purchasers convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) based on uncharged conduct where the defendant "committed the offense with knowledge, intent or reason to believe that the offense would result in the transfer of a firearm to a prohibited person." The purchaser will now receive the same base offense level, fourteen, as the prohibited person, USSG § 2K2.1(a)(6)(C) (Nov. 1, 2011), and twenty if the firearm is a Title 26 weapon or large capacity semi-automatic. USSG § 2K2.1(a)(4)(B) (Nov. 1, 2011). The Commission also added a four-level enhancement (minimum offense level eighteen) if the defendant possessed a firearm or ammunition while leaving or attempting to leave the United States or possessed or transferred it with knowledge, intent, or reason to believe it would be transported out of the United States. USSG § 2K2.1(b)(6)(A) (Nov. 1, 2011). Recognizing, however, that straw purchasers are sometimes the least culpable individuals, the Commission encourages departure where the subsection (b) enhancements do not apply, the defendant was "motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense," and the defendant received no monetary compensation for the offense. USSG § 2K2.1, comment. (n.15) (Nov. 1, 2011).

The Commission also amended the Guideline governing export of weapons. The Guideline currently sets the base offense level at 26 unless the offense involved only non-fully automatic small arms and the number of weapons did not exceed ten, in which case the offense level is fourteen. USSG § 2M5.2(a)(1) & (2). The amended Guideline establishes the lower base offense level of fourteen only if there were no more than two weapons. The Commission addressed an anomaly under the previous Guideline, which did not provide a lower offense level for possession of ammunition. The lower level of fourteen will apply to possession of 500 rounds of ammunition or less, and may apply to possession of both the weapon and the ammunition. See USSG § 2M5.2(a)(1) & (2) (Nov. 1, 2011).

C. Minor Role

In spite of its previous effort to encourage the use of mitigating role adjustments, provisions in the commentary have served to limit implementation. In the 2011 amendment cycle, the Commission struck from USSG § 3B1.2, comment. (n.3(C)), the statement that a court "is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted." It has also deleted the admonishment in note 4 that it is "intended that the downward adjustment for minimal participant will be used infrequently," which had resulted in infrequent application of the minor role reduction as well. The new commentary emphasizes that the determination should be "based on the

totality of the circumstances" and is heavily fact dependent. USSG § 3B1.2, comment. (n.3(C)) (Nov. 1, 2011).

D. Supervised Release

The 2011 amendments encourage more discretion in the imposition of supervised release where a term is not statutorily required. The Commission discourages imposition of supervised release for non-citizen defendants who will be deported. See USSG § 5D1.1(c) (Nov. 1, 2011). This revision is designed to "help courts and probation offices focus limited supervision resources on offenders who need supervision." Id. (citing Johnson v. United States, 529 U.S. 694, 709 (2000)). Consideration of the factors set forth in 18 U.S.C. § 3553(a) supports elimination of a supervised release term for a non-citizen. Supervised release does not benefit a non-citizen subject to deportation because he cannot be supervised. Nor is it necessary as a deterrent to an alien already facing a potential twenty-year sentence should he return illegally. See 8 U.S.C. § 1326(b)(2).

The 2011 amendments also lower the advisory minimum term of supervised release to two years for Class A and B felonies and one year for Class C and D felonies. USSG § 5D1.2(a) (Nov. 1, 2011). In addition to the statutory factors set forth in 18 U.S.C. § 3583, the Commission recommends that the court consider a defendant's criminal history and substance abuse in deciding whether and for how long to impose supervised release. USSG § 5D1.1, comment. (n.3). The Commission also encourages early termination where appropriate. USSG § 5D1.2, comment. (n.5) (Nov. 1, 2011).

E. Illegal Reentry – Remote Convictions

In contrast to other Guideline provisions, an alien's convictions are included in calculating the offense level for illegal reentry under USSG § 2L1.2 regardless of whether they count for criminal history purposes. In United States v. Amezcua-Vasquez, 567 F.3d 1050 (9th Cir. 2009), the Ninth Circuit held that the age of a defendant's prior conviction could be the basis for a sentence below the Guidelines. The Commission has taken to heart the Ninth Circuit's reasoning in Amezcua-Vasquez. The 2011 amendments provide that a sixteen-level enhancement that does not count for criminal history should receive only twelve levels, while a remote twelve-level conviction should receive eight levels. USSG § 2L1.2(b)(1)(A), (B) (Nov. 1, 2011). The Commission emphasizes that with the exception of this amendment, convictions count in determining the offense level regardless of whether they receive criminal history points. USSG § 2L1.2, comment. (n.1(C)) (Nov. 1, 2011).

The Sentencing Commission encourages departure where the offense level "substantially overstates or understates the seriousness of the prior conviction." USSG § 2L1.2, comment. (n.7). For example, an upward departure is authorized where a defendant is convicted of simple possession or transportation but the quantity involved exceeds a quantity consistent with personal use. Downward departure is encouraged where the defendant receives a sixteen-level enhancement for a conviction that does not meet the definition of aggravated felony. Id. The 2011 amendments add an upward departure based on the extent or seriousness of the conduct underlying the offense in cases where the new reduced offense level for remote convictions applies. USSG § 2L1.2, comment. (n.7) (Nov. 1, 2011).

F. Miscellaneous

1. Drug Disposal Act

Certain people, i.e., ultimate users and long-term care facilities, are authorized to possess certain controlled substances and to deliver them for disposal. If such a person is convicted of a drug offense resulting from this authorization, the two-level enhancement for abuse of trust will normally

apply. See USSG § 3B1.3, comment. (n.8) (Nov. 1, 2011).

2. Child Support

Offense levels for willful failure to pay child support are generally determined under the property guideline. USSG § 2B1.1. See USSG § 2J1.1 (Contempt). The circuit courts are divided over whether application of the § 2B1.1(b)(8)(C) enhancement for violation of a court order is double counting. Compare United States v. Maloney, 406 F.3d 149, 153-54 (2d Cir. 2005) (allowing enhancement because it addresses distinct harm); United States v. Phillips, 363 F.3d 1167, 1169 (11th Cir. 2004) (same), with United States v. Bell, 598 F.3d 366 (7th Cir. 2010) (enhancement is impermissible). The Commission has resolved the split by directing courts not to apply the enhancement for violation of a court order. USSG § 2J1.1, comment. (n.2) (Nov. 1, 2011).

G. FSA Adjustments

As indicated, the temporary amendments promulgated under the Fair Sentencing Act ("FSA") have been made permanent. The full text of these amendments is available in the 2010 Guidelines manual and they are discussed in detail in a previous edition of this bulletin. See also infra, text, at 9-10. The following is a brief summary of amendments.

In addition to reducing the offense levels for crack, these amendments contain enhancements if the defendant: 1) used, threatened or directed the use of violence, USSG § 2D1.1(b)(2); 2) bribed a law enforcement official, § 2D1.1(b)(11), or 3) maintained a premises for the purpose of manufacturing or distributing a controlled substance. USSG § 2D1.1(b)(12). The 2011 amendments clarify that distribution includes storage of a controlled substance for purposes of distribution. The FSA provisions also provide a single two-level enhancement if the defendant receives an aggravating role adjustment and the offense involved: 1) the use of fear or a special relationship to involve another individual in trafficking, USSG § 2D1.1(b)(14)(A); 2) the defendant distributed a controlled substance to or involved in the offense an individual who is younger than 18, 65 or older, pregnant, or unusually vulnerable, USSG § 2D1.1(b)(14)(B); 3) the defendant was "directly involved" in the importation of a controlled substance, § 2D1.1(b)(14)(C); 4) the defendant engaged in obstruction of justice, USSG § 2D1.1(b)(14)(D), or 5) the defendant committed the offense as "part of a pattern of criminal conduct engaged in as a livelihood." USSG § 2D1.1(b)(14)(E).

The FSA amendments also contain a reduction and an offense level cap for a defendant who is minimally involved, was motivated by fear or an intimate relationship and received no monetary compensation. See USSG § 2D1.1(b)(15). The 2011 amendments extend the cap of thirty-two to all minimal participants. USSG § 2D1.1(a)(5).

New Identification Technology Raises 8 U.S.C. § 1326 Concerns

Michael L. Herman, Trial Chief
Southern District of Texas

The Department of Homeland Security (DHS), in cooperation with the FBI, continues to develop and deploy enhanced technology to identify any alien arrested anywhere in the United States. Defense counsel should keep informed of these developments because it is only through an understanding of when and where a § 1326 client was first identified by immigration authorities that counsel is able to evaluate whether venue is proper and whether the prosecution was commenced within the five-year statute of limitations period.

Under the "Secure Communities" program instituted over the past three years, DHS has linked its fingerprint database (IDENT) to the FBI's IAFIS system of computerized fingerprint verification. As the

federal government provides electronic fingerprint scanning equipment to law enforcement around the country, local officials now take electronic fingerprints as part of regular booking procedures. Those fingerprints are fed into the IAFIS system to check warrants and criminal history. At the same time, those prints are transmitted to DHS and checked against the IDENT system, which contains fingerprints of all aliens who have had contact with DHS systems, including, for example, in removal proceedings or visa processing. Centralized DHS terminals then transmit matches to local ICE offices within a period of a few hours from initial scanning. Local ICE officials determine at that point whether the identified alien falls within categories of prioritization that would require issuance of a detainer to be filed with local authorities, with previously deported aggravated felons receiving the highest priority. More information is available at www.ice.gov/secure_communities.

DHS plans nationwide coverage for Secure Communities. As of September 2010, all Texas jurisdictions were covered by the program. More recently, DHS determined that it did not need the agreement of local or state authorities to implement the program because the information sharing occurs as a federal interchange between FBI and DHS. So efforts by some states to opt out of Secure Communities will not end the program even in those jurisdictions.

Now, the FBI is planning even more advanced capabilities. The "Next Generation Identification" system under development would replace IAFIS in stages with a more extensive system including full palm-print verification, iris scan information, facial recognition capabilities, and enhanced photo transmission (such as photos of tattoos and scars). All indications are that DHS will continue its partnership by upgrading its information matching capabilities in IDENT.

The use of these advanced identification systems creates problems and possibilities in § 1326 prosecutions. Both venue and statute of limitations dates are determined by ICE's first identification of the alien. With these upgraded systems in local jurisdictions, that first identification should be presumed to occur on the date and at the location of arrest – not when an Immigration agent at some later date interviews the alien. Because not all Secure Communities identifications will generate a detainer on the alien (for example, when the local ICE official determines that the alien's prioritization is not high enough), attorneys defending a § 1326 prosecution cannot assume that the lack of a detainer means no identification occurred. A request for discovery specifically for Secure Communities "hits" will be necessary. These requests are especially important in cases where the alien may have been arrested on state charges outside the statute of limitations, but the indictment recites a later date based on a subsequent agent interview in state prison facilities. Attorneys can expect more difficulty in these investigations because Secure Communities "hits" may only be electronic, without producing a form that would otherwise be included in the A-file, and many local jurisdictions may claim not to use the electronic systems available to them for all cases all the time. On the other hand, a Secure Communities "hit" based on electronic fingerprint comparisons should be a definitive identification of the defendant even if the defendant uses an alias in the booking process.

Once immigration authorities have found a defendant, whether through a Secure Communities "hit" or through some other encounter, venue is only proper in that district. See, e.g., United States v. Hernandez-Hernandez, 291 F. Supp. 2d 490, 496-97 (W.D. Tex. 2003). Similarly, prosecutors have five years from the time the defendant is found by immigration authorities (not just from the date that a detainer is filed or the date that a defendant

comes to ICE custody) to bring criminal charges pursuant to § 1326 against that defendant. See, e.g., United States v. Gunera, 479 F.3d 373, 376-77 (5th Cir. 2007).

All of this means that attorneys and the courts will need to stay informed as the FBI and DHS roll out increasingly powerful technology to identify aliens and possible defendants for § 1326 prosecutions.

CRACK UPDATE: RETROACTIVITY
Marjorie A. Meyers, Federal Public Defender
Southern District of Texas

Last year saw legislative and guideline reductions in the federal crack cocaine penalties. The Fair Sentencing Act ("FSA") took effect on August 3, 2010, changing the crack powder ratio from 100:1 to 18:1. In other words, it now takes 28 grams of crack to trigger the mandatory five-year minimum and 280 grams to trigger the ten-year minimum. The Act also eliminated the mandatory minimum sentence for possession of crack.

A. The FSA

Although the FSA does not specify whether it is to be applied retroactively, a number of courts have applied it to defendants pending sentencing as of the Act's effective date, reasoning that an Act designed to restore fairness in crack sentencing should be applied immediately. See, e.g., United States v. Douglas, 746 F. Supp. 2d 220, 224 (D. Me. 2010), aff'd 2011 WL 2120163 (1st Cir. May 31, 2011); see also United States v. Rojas, 2011 WL 2623579 (11th Cir. July 6, 2011). Although the Department of Justice originally disagreed with this view, on July 15, 2011, the Attorney General concluded that fair and expeditious implementation of the FSA requires application of the new law to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The Attorney General anticipates that the courts will be asked to revisit some sentences imposed on or after August 3, 2010, presumably through the filing of an agreed motion to vacate the original sentence. Note that the courts have uniformly held, however, that the reduced FSA penalties do not apply to defendants who were sentenced before the Act's effective date. See, e.g., United States v. Doggins, 633 F.3d 379 (5th Cir. 2011).

B. The Guidelines

As directed by the FSA, the Sentencing Commission reduced the guideline ranges for crack cocaine on an emergency basis to reflect the new statutory penalties. The Commission continues to tie the base offense level to the statutory minimums. See USSG § 2D1.1(c). Thus, the base offense level for trafficking in 28 grams of crack is 26. Id. The November 2011 amendments make these changes permanent.

As it did with the previous crack reduction, the Commission has made the new crack guidelines retroactive, pursuant to USSG § 1B1.10 (Nov. 1, 2011). Generally, a defendant whose guideline range would be lower under the new range is eligible for a reduction "if such a reduction is consistent with applicable policy statements by the Sentencing Commission." 18 U.S.C. § 3582(c). The devil is in the details.

As amended by the Commission in 2007, USSG § 1B1.10 provided that in determining whether, and to what extent, to grant a reduction, the court is to "substitute only the [retroactive] amendments" and was to "leave all other guideline application decisions unaffected." USSG § 1B1.10(b)(1). Further, a sentence below the new guideline range was prohibited, USSG § 1B1.10(b)(2)(A), unless the defendant previously received a below-Guidelines sentence, in which case a comparable reduction was recommended. USSG § 1B1.1(b)(2)(B). The Commission discouraged a reduction if the original term of imprisonment was a non-guideline Booker

sentence. Id.

Litigation involving the 2007 amendments will guide the § 3582 decisions this time around. In Dillon v. United States, 130 S.Ct. 2683 (2010), the Supreme Court upheld the Commission's limitation of the court's consideration to the reduced guideline rather than allowing a full Booker resentencing. The Court reasoned that a § 3582(c) determination is not a full resentencing. Dillon, 130 S.Ct. 2690-92. Under the statute, however, the court must consider the § 3553(a) factors in determining the extent of the reduction. See United States v. Henderson, 636 F.3d 713, 718-19 (5th Cir. 2011). Further, given the complexity of the retroactivity determination under USSG § 1B1.10, appointment of counsel to assist the defendant may well be in the interests of justice. See United States v. Robinson, 542 F.3d 1045, 1052-53 (5th Cir. 2008).

This year, a sharply divided Supreme Court addressed the availability of a retroactive reduction for defendants sentenced under a binding plea agreement, pursuant to Fed. R. Crim. P. 11(c)(1)(C). See Freeman v. United States, 131 S.Ct. 2685, 2690 (2011). The four-justice plurality held that Freeman could obtain a reduction, reasoning that a sentencing court must consider the guideline range in deciding whether to accept an 11(c)(1)(C) agreement. 131 S.Ct. at 2692. Justice Sotomayor, providing the fifth vote, concluded that Freeman's sentence could be said to be based on the crack guideline range only because of the agreement's specific reference to the range. 131 S.Ct. at 2698.

The plurality emphasized that § 1B1.10 is designed to "isolate whatever marginal effect the since-rejected Guideline had on the defendant's sentence. Working backwards from this purpose, § 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement." Freeman, 131 S.Ct. at 2692-93 (emphasis added). This emphasis on the guideline range's being a "relevant part of the analytic framework" may provide § 3582(c) relief to defendants previously deemed ineligible. For example, as in the plea context, the sentencing court must determine the base offense level under the regular guideline range prior to determining whether the career offender guideline should apply. See United States v. Lynch, 378 F.3d 445, 447-48 (5th Cir. 2004) (relevant conduct determination is necessary first step in applying career offender guideline).

Finally, in making the FSA guidelines retroactive, the Commission has once again amended USSG § 1B1.10. The guideline in effect as of November 1, 2011 limits the authority of a district court to impose a sentence below the revised guidelines range. Regardless of whether the court applied a downward departure at a defendant's initial sentence, the court may only impose a sentence less than the revised guidelines range if the original basis for the downward departure was a government motion based upon a defendant's cooperation. The amended guideline prohibits defendants who received sentences less than the guidelines range for any other reason, such as over-representation of criminal history, from again receiving a downward departure upon resentencing after November 1, 2011.

PEPPER AND TAPIA: What's a Sentencing Court to Consider?
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In United States v. Booker, 543 U.S. 220, 233-35, 244, 259-61 (2005), the Supreme Court struck down the mandatory Guideline regime and directed courts to impose sentences pursuant to the considerations set

forth in18 U.S.C. § 3553(a). In Gall v. United States, 552 U.S. 38 (2007), the Court emphasized the sentencing court's discretion to impose sentences based on the individual circumstances of the defendant and the case. 552 U.S. at 52. This term, in Pepper v. United States, 131 S.Ct. 1229 (2011), the Court once again struck down statutory and Guideline provisions that impermissibly limited a court's ability to consider relevant factors in imposing sentence.

The substantive issue in Pepper was whether, at a re-sentencing after an appellate remand, a court could consider post-sentencing rehabilitation, which was prohibited under both 18 U.S.C. § 3742(g)(2) and USSG § 5K2.19. Emphasizing that "no limitation shall be placed on the information" considered by the sentencing court (subject to constitutional limitations), the Supreme Court rejected this categorical limitation. Pepper, 131 S.Ct. at 1236, 1240. Indeed, the Court reiterated that there is a longstanding tradition for sentencing judges to "consider every convicted person as an individual," 131 S.Ct. at 1239-40 citing Koon v. United States, 518 U.S. 81, 113 (1996), and the principle that "the punishment should fit the offender and not merely the crime." Id. citing Williams v. New York, 337 U.S. 241, 247 (1949). The Court excised § 3742(g)(2), deeming it inconsistent with an advisory Guideline regime, 131 S.Ct. at 1246-47, and concluded that USSG § 5K2.19 was not worthy of deference because it rested on faulty assumptions. 131 S.Ct. at 1247-48. The Court's reliance on Williams, which is a pre-Guidelines case, further opens the door to a wide consideration of the defendant's circumstances in sentencing.

Pepper also addressed other issues peculiar to resentencing. The defendant had actually been resentenced three times, the third time by a different judge who ruled that she was not bound to give the same downward departure as had the original sentencing judge. Rejecting Pepper's law of the case argument, the Supreme Court held that a "general remand for resentencing" is a de novo sentencing, and that the new judge could thus revisit whether a departure was warranted. 131 S.Ct. at 1250. The validity of Fifth Circuit precedent limiting consideration of new issues on remand, see e.g. United States v. Marmolejo, 139 F.3d 528, 531 (5th Cir. 1998), may be called into question by Pepper. Of course, due process still prohibits a trial judge from increasing the sentence in retaliation for a successful appeal. See North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

In Tapia v. United States, 131 S.Ct. 2382 (2011), the Supreme Court upheld Congress's efforts to insure that a particular kind of sentence actually furthers the particular sentencing goal. Specifically, Congress has specified that a court should consider the factors set forth in 18 U.S.C. § 3553(a) in determining whether to impose a term of imprisonment and in determining the length of the term. 18 U.S.C. § 3582(a). Congress recognized, however, that "imprisonment is not an appropriate means of promoting correction and rehabilitation." Id. Congress also directed the Sentencing Commission to ensure that the Guidelines reflect the inappropriateness of imposing a term of imprisonment for purposes of rehabilitation, education, or treatment. See 28 U.S.C. § 994(k); see also Tapia, 131 S.Ct. at 2390.

Noting that lawmakers and treatment professionals have become increasingly skeptical about prison programs' ability to rehabilitate individuals, Tapia, 131 S.Ct. 2386-87, the Court held that a sentencing court cannot impose a longer prison sentence for the purpose of providing drug treatment. Id. at 2390-93. This is not to say that the court cannot recommend treatment while the defendant is incarcerated or as a condition of supervision. Id. at 2392. The court cannot, however, increase the sentence to make certain treatment

programs available. Id. at 2393.

One caveat is in order. Tapia and § 3582 address the initial sentencing, not the revocation of supervised release, which is governed by 18 U.S.C. § 3583. Emphasizing that § 3583(c) requires consideration of rehabilitation in setting conditions of supervised release and that § 3583 is silent about rehabilitation and prison, the Fifth Circuit recently held that rehabilitation can be considered in determining the length of imprisonment upon revocation of supervision. See United States v. Breland, 2011 WL 2811984, at *4-*5 (5th Cir. July 19, 2011); but see United States v. Molignaro, 2011 WL 2628330 (1st Cir. July 6, 2011).

SUPREME COURT CASES TO WATCH
Summaries by the Federal Defender's Office Southern District of Texas

Reynolds v. United States, 131 S.Ct. 1043 (2011); decision below 380 Fed. App'x 125 (3d Cir. 2010).
Question presented: Does a sex offender convicted before enactment of SORNA have standing to contest the validity of the Interim Rule, issued by the Attorney General, specifiying SORNA's applicability to such offenders?
Overview: Reynolds was convicted of a Missouri sex offense in 2001. Five years later, Congress passed SORNA. In May 2007, the Attorney General issued interim regulations applying SORNA to persons convicted prior to SORNA's enactment and, in July 2008, the Attorney General enacted final regulations adopting this position. Reynolds was charged with violating SORNA based upon interstate travel during the period the interim regulation was in effect. He moved to dismiss the indictment, alleging that the Attorney General had violated the Administrative Procedure Act when it adopted the interim regulation. On appeal, the Third Circuit rejected the defendant's challenge because it found that he lacked standing to assert this claim.

Florence v. Board of Chosen Freeholders, 131 S.Ct. 1816 (2011); decision below 621 F.3d 296 (3d Cir. 2010).
Question presented: Does the Fourth Amendment permit a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances?
Overview: Florence was arrested by state police based upon a warrant for civil contempt that had been rescinded but had not been removed from the state's computer system. During the week-long period until he was brought before a judge, he was twice strip searched, despite the lack of any criminal history or reason to believe he had contraband. After his release, Florence filed a civil suit against the responsible local officials and police officers.

United States v. Jones, 131 S. Ct. ___ (2011); decision below at 615 F.3d 544 (D.C. Cir. 2010).
Question presented: Does the Fourth Amendment require the police to obtain a warrant before placing a GPS device on a person's car and then using that device to track the car's movements on public streets?
Overview: Police obtained a warrant authorizing them to install in the District of Columbia within ten days a GPS on Jones's car, and then to monitor the GPS for up to 90 days. Eleven days after the warrant issued, police installed the GPS on the car while it was in a public parking lot in Maryland. The district court overruled Jones's motion to suppress, but the Fourth Circuit reversed his conviction.

Setser v. United States, 131 S. Ct. ___ (2011); decision below at 607 F.3d 128 (5th Cir. 2010).
Question presented: Can a federal court order that a federal criminal sentence start to run only after the defendant has finished serving a state sentence, when the state sentence has not yet been imposed?
Overview: While serving a five-year

state-imposed term of probation, Setser was arrested for new drug-related activities by state authorities and charged with a new state offense. Before the revocation of his probation or new state charge was resolved, he was brought on a writ into federal custody, charged with new federal offenses, and convicted. At the federal sentencing, the district court ordered that Setser serve his federal sentence consecutive to whatever sentence might be imposed for his probation revocation, but concurrent to any sentence for the new state charge. The state court subsequently sentenced him to serve concurrent terms of imprisonment on the revocation of probation and new state charge.

Smith v. Louisiana, 131 S. Ct. ___ (2011); decision below at 45 So.3d 1065 (La. 2011). Questions presented: In this Louisiana criminal case, the state trial court, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court, without making any factual findings, or providing any reasons for their rulings, denied Petitioner Juan Smith post-conviction relief. Smith contends that the Louisiana state courts reached this result only by disregarding firmly-established precedents of the Supreme Court regarding suppression of material evidence favorable to a defendant and presentation of false or misleading evidence by a prosecutor. (1) Is there a reasonable probability that, given the cumulative effect of the Brady and Napue/Giglio violations in Smith's case, the outcome of the trial would have been different? (2) Did the Louisiana state courts ignore fundamental principles of due process in rejecting Smith's Brady and Napue/Giglio claims?

Williams v. Illinois, 131 S. Ct. ___ (2011); decision below at 238 Ill. 2d 125 (2011). Question presented: Does a court violate a criminal defendant's rights under the Confrontation Clause by allowing an expert witness to testify about the results of DNA testing conducted by another analyst who has not appeared as a witness at the trial?

Overview: This case presents one of the issues that Justice Sotomayor observed remained unresolved after last Term's decision in Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). The prosecution presented evidence of forensic DNA analysis through the testimony of an expert witness who had not taken any part in conducting the scientific tests and had no knowledge of the procedures used during the tests. The forensic report was not itself introduced into evidence. Because the rules of evidence permitted the expert to testify regarding the facts and data underlying her opinion even when such evidence would otherwise be inadmissible, the state courts held that the Confrontation Clause did not bar the expert's testimony regarding the forensic report.

Perry v. New Hampshire, 131 S. Ct. 2932 (2011); decision below at N.H. Supreme Court 2009-0590 App1 (unpublished). Question presented: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances or only when the suggestive circumstances were orchestrated by the police?
Overview: While the police were investigating thefts from cars in an apartment building's parking lot, they interviewed a black male, Perry, in that parking lot. During the interview, Perry was the only black male visible. A witness in the apartment building saw Perry being interviewed and volunteered to police that he was the man she had seen breaking into cars. Subsequently, the witness was unable to pick out Perry in a photo line-up and she never provided any substantial description of him. Based in part upon this witness's identification testimony, Perry was convicted after a trial.