Fall 2019

Arresting developments

A Biannual Federal Criminal Defense Newsletter
Lisa A. Peebles, Federal Public Defender
Molly Corbett, Editor-in-Chief

In This Issue:

- Challenges to Immigration Detainers as the Sole Basis For Detention in Federal Criminal Cases 3
- Welcome to NDNY.....4
- Sentencing: Making the Best Objection and Preserving it 5
- Second Chair program 6
- Case Law Updates:
  - Supreme Court.....7
  - Second Circuit 9
- U.S. Supreme Court Cabins Sentencing Courts' Deference to Sentencing Commission.....13
- A New Path Explored....14
- The Presumption of Scienter Resurrected 15
- Judge's Corner 16
- Upcoming Training and Resources 17

Message from the Defender

Dear Colleagues:

We are celebrating our 20-year anniversary as an office. In September 1999, our doors opened for the first time. The passing of 20 years doesn't seem possible. It seems like just yesterday I sauntered in as a young – I emphasize young – Assistant Federal Public Defender. Back then, the Sentencing Guidelines were gospel, 5Ks flew through the air like abundant December flurries through the Syracuse skies, and I could run a marathon. Fast forward 20 years later: the Guidelines are now a battleground, getting a worthy 5K is like winning the Power Ball – well maybe a lucrative scratch off – and I fight through the pain to run 3 miles. The point is, a lot has changed. Some changes have been good, some not so good. I am very proud of our office and the dedicated team we have put together to push for positive criminal justice reform.

There have been many highs and lows as I reflect back over the past 20 years. I'll share one story that illustrates how the lowest point in my career recently turned into one of the greatest highlights. It was spring 2002, I was representing a 32-year-old African-American man charged with several crack cocaine offenses. He had an IQ of 72, and the prosecutor described him as a "worker-bee" for his co-defendant supplier. The real catch was the fact that my client had two prior drug felony convictions in state court from when he was only 16 years old. Following his release from state prison, he did well for many years. That changed when he was recruited by a drug supplier to peddle crack in the Utica area. It didn't take long for a confidential

(Continued on page 2)

Office of the Federal Public Defender
Northern District of New York

Syracuse Office
The Clinton Exchange
4 Clinton Square, 3rd Floor
Syracuse, New York 13202

Albany Office
39 North Pearl Street
5th Floor
Albany, New York 12207

© Office of the Federal Public Defender (NDNY)

Message from the Defender...*continued from pg. 1.*

informant to set up our "worker bee." He had the unfortunate luck of being snared by the feds because the CI was helping his brother work off serious federal drug charges. Enter our office and the case that would haunt me for almost two decades.

My client insisted on a trial. I explained if we lost after trial he was facing a mandatory life sentence. The judge would have zero discretion; that was the law. He followed the lead of his boss – they were tried together. I battled ferociously. The jury actually acquitted my "worker bee" client of the substantive possession with intent to distribute 50 grams of crack count. It was a hollow victory, however, because they found him guilty of conspiracy to possess more than 50 grams of crack. The fight wasn't over.

Ultimately, we wound up at sentencing -- a day I will never forget. I stood next to my client facing the judge and for the first time in my professional career I was speechless. There was nothing I could do or say. The judge was mandated to impose a life sentence. When the judge addressed me I couldn't get any words out. I felt tears welling up. I thought, Oh god, I can't cry in court. It was too late. The tears ran down my face as I listened to the judge, over his own objections, impose a life sentence. I'll never forget the sick feeling I had as I left the courtroom.

I thought about him constantly. Then in 2010, the law changed. Congress enacted the Fair Sentencing Act (FSA). The new crack-triggering amount for mandatory life with two priors is now 280 grams. That was good news, but it didn't help my worker bee because it wasn't retroactive.

In 2015, we had renewed hope with the Clemency Project. We put together petitions for three clients. My "worker bee" was one of them. Several months after we filed I got the call from the clemency project. Two out of our three petitions were granted. My worker bee--denied. It was another punch in the gut. I thought if that didn't work, nothing will. More bad news for my client. He didn't understand and neither did I. He couldn't catch a break.

Then came the First Step Act in December 2018. This new law made the FSA retroactive. I was ecstatic. Before I even read through the entire Act we quickly drafted our motion for our "worker bee's" immediate release. The judge scheduled us to appear in court with our client. The day came when we met him at the marshal lock-up. It had been years since I last saw him. Prison was not kind to him. His face was covered with a bushy beard and he was missing his front teeth. He was angry and demanded to know why he was dragged back to court. I told him I thought he had a chance to go home. He wasn't buying it. He pulled up his shirt to show us his battle scars from prison. It took my breath away. He had no faith he would ever taste freedom again. As our client was escorted into court with leg irons and chains around his waist, he stared angrily at me. We sat in silence nervously waiting. Finally, the judge took the bench. After hearing arguments, the words "time served" trumpeted out of the judge's mouth. Music to my ears. Our client was stunned. He didn't know how to react or what to say. "I'm going home? No halfway house?" I looked at him and said, "You're going home."

Days later, I called to check in with him. He was overwhelmed with gratitude. He laughed as he talked about how his nieces and nephews made fun of his cellphone ignorance. That was an awesome day.

And so I will close with this advice: Always go the extra mile. There is very little traffic.

- Lisa Peebles

According to the U.S. Sentencing Commission more than 1,666 individuals have received sentence reductions due to the First Step Act of 2018 and its retroactive application of the Fair Sentencing Act of 2010. Many have been released . More than 3,100 individuals have also been released because of clarification and application of the 54 -day good time credit .

Challenges to Immigration Detainers as the Sole Basis For Detention in Federal Criminal Cases

By: *Maria Jacob, Esq.*

There are always balancing interests when presented with a case where there is an administrative immigration detainer in place, especially when it comes time for a detention hearing. Traditionally, the mere presence of an immigration detainer deters criminal defendants from requesting release under the Bail Reform Act ("BRA").[1] There are legitimate apprehensions for requesting release when there is a detainer because the immigration detainer is typically executed thereby taking a criminal defendant out of federal custody and simply transporting them to immigration custody. Not only does this present a location obstacle hindering client/attorney communication but it also means that the defendant will lose credit for time served on the federal criminal case. When this is explained to criminal defendants, most of them justifiably elect to waive their detention hearings.

There are jurisdictions, including the Eastern District of New York, that have been recently challenging Immigration and Customs Enforcement's ("ICE") authority to execute a detainer after conditions of release have been fashioned under the Bail Reform Act. In the Eastern District of Virginia ("EDVA"), many assistant federal public defenders have recently followed suit and have begun making challenges based on the case law that has come out of other jurisdictions.[2] Federal courts around the country are recognizing that the order to release a criminal defendant under the Bail Reform Act should essentially "trump" an administrative order issued by ICE. These courts have ruled that in situations where the Bail Reform Act informs the release of an alien, the Executive Branch must make a choice. Either the Executive Branch decides to proceed with removal or they must make a determination to proceed with the criminal case. If the United States Attorney's Office proceeds with the criminal case, ICE must abide by the release order of the criminal court. If not, then the criminal charge should be dismissed.[3] The reasoning behind this is that the immigration detainer was never intended to circumvent the Bail Reform Act and it its only purpose is to ensure effectuation of removal proceedings.[4]

During my time as an assistant federal public defender in EDVA, there were many practical considerations that arose in the midst of these challenges. Firstly, many criminal defendants who have immigration detainers who are good candidates for release under the BRA also have a guideline range of 0-6 months, often making them eligible for a time-served sentence. More often than not, it was in the best interest of the client to expedite the criminal case in order to achieve this goal. Requesting release under the BRA was always met by resistance of the government and briefing at the magistrate and district court level would inevitably delay the case.

Secondly, simply explaining the existence of this remedy and potential for success to defendants presented difficulties given that most of the defendants were from different countries and often had limited educational backgrounds. The lack of education coupled with the language barrier in most cases made conveying this concept particularly difficult. Lastly, even when conditions of release were fashioned, ICE would typically still execute the detainers and further briefing was necessary to ask the district court for dismissal of the charge. The government's counter arguments sometimes succeeded, making the entire process extremely unpredictable for our clients.

While there have been courts in the EDVA who have released defendants under the BRA despite their immigration detainers, there has been difficulty in obtaining a formal decision after relief is sought when ICE does not abide by the release order of the criminal court. For example, in *United States v. Charlotte Gham*, the district court fashioned conditions of release for a criminal defendant with an immigration detainer. 1:18-CR-387 (EDVA). ICE then executed the detainer despite the Court's order. Defense counsel then filed a motion to dismiss the indictment. On the day that the hearing on

(Continued on page 4)

[1] The Bail Reform Act strongly favors release and a court is required to release a defendant unless there is no set of conditions that could reasonably assure his/her appearance or the safety of the community. 18 U.S.C. § 3142(b), (c), (e).

[2] See *United States v. Trujillo-Alvarez,* 900 F. Supp. 2d 1167, 1174 (D. Ore. 2012), *United States v. Nieto-Garcia*, No. 5:17CR32, 2017 WL 4125268, at *2 (N.D. W.Va. Sept. 18, 2017), *United States v. Stepanyan*, No. 3:15-cr-00234-CRB, 2015 WL 4498572, at *1 (N.D. Cal. July 23, 2015), *United States v. Valadez-Lara*, No. 3:14 CR 204, 2015 WL 1456530, at *4 (N.D. Ohio March 30, 2015), *United States v. Blas*, No. CRIM. 13-0178-WS-C, 2013 WL 5317228, at *6-8 (S.D. Ala. Sept. 20, 2013), *United States v. Hernandez-Bourdier*, No. 16-222-2, 2017 WL 56033, at *11 (W.D. Pa. Jan. 5, 2017). *United States v. Ventura*, No. 17-CR-418 (DLI), 2017 WL 5129012, at *2 (E.D.N.Y. Nov. 3, 2017), *remanded for clearer factfinding by* 2018 WL 4224333 (2d Cir. Sept. 6, 2018).

[3] Supra. note 2.

[4] Supra. note 2.

Challenges to Immigration Detainers...*continued from pg. 3*

the motion was to be heard, ICE decided to grant immigration bond to the defendant, making the motion moot.

There are other examples where unique circumstances prevent the district court from making a formal finding on this matter.[5]

However, there has been one court in EDVA that dismissed an indictment after it learned that the government could not make the defendant available for trial. In *United States v. Quisberth-Lazarraga*, the magistrate court released the defendant on conditions of release but ICE chose to activate the detainer. Defense counsel moved for dismissal but the court denied that motion and made a special finding explaining that as long as the criminal proceedings did not impede ICE's functions in carrying out removal proceedings, the court did not have a basis to dismiss the indictment. 1:18-CR-276 (EDVA). After learning that ICE proceeded with removal and the defendant was in fact deported as result, the court then dismissed the indictment. Id. This decision supports the idea that the government cannot have it both ways. The Executive Branch cannot hold someone in administrative custody and delay removal proceedings in order to allow for the completion of a criminal prosecution. While the court here did not dismiss the indictment initially, it essentially forced the Executive Branch to make a decision as to whether or not they would remove the defendant or move forward with a criminal prosecution and be required to abide by the BRA.

Each case should be approached individually as each criminal defendant has unique circumstances that might not warrant challenging detention. However, in scenarios where a defendant is a good candidate for release, the discussion is at least worth pursuing to determine which course is best.

---

[5] In *United States v. Sara Salvidar Monterrey*, 1:18-CR-207 (EDVA), the government dismissed the indictment after the court released Ms. Monterrey on conditions of release despite the immigration detainer in place. The government based their reason for dismissal on prosecutorial discretion rather than agreeing with the numerous yet non-binding case law in other jurisdictions. In *United States v. Henry Ramos-Polio*, the defendant was released on conditions of release including a secured bond which he could not ultimately pay. 1:18-MJ-514 (EDVA). In *United States v. Jose Armando Portillo Lopez*, the court granted release pursuant to the BRA and shortly thereafter, ICE decided to withdraw the detainer that was previously lodged. 1:18-MJ-567 (EDVA).

Welcome to the Office of the Federal Public Defender for the Northern District of New York

We have two new additions to our Defender family, Maria Jacob and David Jones.

Dave joined the Syracuse office as an Investigator in April of this year after serving in a similar capacity with the Oneida Indian Nation Police for 6 years. Prior to that Dave retired from his positon as a Narcotics Investigator after 30 years with the Syracuse Police Department. He resides in Oneida, New York with his wife and has three adult children.

Maria joined the Syracuse office in June as an Assistant Federal Public Defender. Prior to working in the NDNY, Maria was an AFPD in Alexandria, VA for about 3 years. Maria also was a County Public Defender in the Clark County Public Defender's Office, Las Vegas , Nevada for over 4 years. She has previously worked on prison reform policy in Bethesda, Maryland.

Sentencing: Making the Best Objection and Preserving it

By : *Melissa Tuohey, Esq.*

You've reviewed the Presentence Report, submitted your sentencing memorandum with objections, and section 3553(a) arguments now the sentencing proceeding has arrived. During this proceeding if you have objected to application of a certain sentencing guideline enhancements, guidelines, conditions of supervised release, etc., prior to sentencing, restate those objections at the hearing, and if the court denies your objection, at the end of the hearing you have to object again. If you do not, the issue is subject to plain error review on procedural reasonableness review in the circuit.

DOWNWARD DEPARTURE MOTION OR REQUESTING A VARIANCE

If you have mitigating evidence that falls under section 3553(a), and it technically could be raised through a downward departure motion **under chapter 5, part h or k**, please consider whether or not eligibility for these departures is on solid ground before raising by way of a specific downward departure motion. If it is not, the request for reduced sentence is almost always better asserted as a request for a "non-guideline sentence" otherwise known as a "variance" under 18 U.S.C. §3553(a) based upon the client's background and characteristics rather than tying yourself into a specific request for a downward departure motion. Instead, consider asking for a variance from the applicable ***advisory*** guideline range based on those specific mitigating factors that are discussed in **chapter 5, part h or k**.

Framing the sentence reduction as a variance puts the client on better appellate footing should the sentence not turn out as argued. The district court's refusal to depart under a specific guideline is not necessarily reviewable. In fact, there is case law in the circuit that says reasonableness review on appeal includes review of whether a downward departure was properly applied. Unfortunately there is still pre-Booker case law out there that says a decision to depart is not appealable ***unless the*** defendant can show the district court misunderstood its authority to depart. The latter is a very tough hurdle to overcome on appeal.

When a request for reduction is raised as a section 3553 factor in support of a variance, the denial is reviewable for reasonableness. Consequently on appeal, there is one less hurdle to overcome in arguing that a sentence is substantively unreasonable because client has x, y, and z, which is documented in the record. The sentence is thus unreasonable because: the district court failed to properly consider these mitigating factors; the sentence cannot be located within permissible range suggested by 3553(a) factors; the sentence failed to properly account for need to provide defendant with x,y,z in the most effective manner; and the district court placed too much weight on other factors (punishment/deterrence/protecting public). Also, a sentence can be found substantively unreasonable if it is just too long for this defendant because of the mitigating facts presented in the record that can be considered under 3553(a).

CRIMINAL HISTORY DEPARTURE AND VARIANCE

In addition, when it comes to **criminal history departures under chapter 4**, also known as "horizontal departures," you may wish to raise the request for a reduced sentence as a specific criminal history departure under §4a1.3, except for career offender**.** *See United States v. Ingram,* 721 F.3d 35 (2d Cir. 2013) (Calabresi, J. concurring). Judge Calabresi reminded the defense bar that with regard to career offenders, the court has the ability to give a non-guidelines sentence based upon a two-step process developed from *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001) (*Mishoe* factors) and *United States v. Preacely*, 628 F.3d 72 (2d Cir. 2010). The horizontal reduction in the criminal history category shifts to a new guidelines range. It is from that range that the court is then determining a variance.

Although the first few times it may feel awkward, remember when the court asks, "counsel is there anything else?"—your reply will be " actually, yes, your Honor, for the record, in the event there is an appeal, we object to the sentence imposed because we asked for x, y, and z, and the court denied x, y, and z, and we continue in our objection as stated in sentencing memo and as argued on the record" or something along those lines. In any form the reservation should be specific to the thing you initially objected to and/or specifically asked for, or offered for the court's consideration to avoid plain error review.

Although, the Second Circuit has not ruled that failure to object kicks in plain error review on substantive reasonableness review, it is best to renew objections at the close of sentencing. A recent grant of certiorari in *Holguin-Hernandez v. United States*, No. 18-7739

(Continued on page 6)

raises the specter of plain error because the Supreme Court has been asked to decide "whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence," the maintenance and renewal of objections to the sentencing and sentence is of significant importance.

SECOND CHAIR MENTOR PROGRAM

The *Second Chair Mentor Program* is designed for potential CJA panel applicants who require more experience in handling federal criminal matters but is otherwise qualified to practice in federal court. We provide a foundation and additional training in order to for the applicant to gain the experience in federal court so they are competent to represent individuals charged with federal crimes. We have the applicants shadow us at initial appearances, detention hearings, a pre-trial hearing, change of pleas, sentencing and, where possible, observe portions of a trial. We also review a number of the essential procedures in federal court such as how to calculate a sentence under United States Sentencing Guidelines, the benefits and detriments of a plea agreement, pre-trial reports as well as presentence reports and how to lodge objections. We give the inexperienced attorney an overview of how to handle a federal criminal case. Certain requirements must be met for our office to recommend the attorney to the CJA Panel Committee before a candidate is eligible to receive appointments

Becoming a member of the CJA panel in the Northern District of New York takes a number of steps as outlined on the Northern District's website at: www.nynd.uscourts.gov/criminal-justice-act.

Participants who successfully complete the program will be encouraged to file their application for appointment to the Panel. A completed Second Chair form is required and tracks the completion of each requirement with the necessary information. The Panel Review Committee will solicit the views of the Coordinator as to whether the participant qualifies for appointment or whether more training is needed.

For questions about the program please contact the Second Chair Coordinator: Randi Bianco, Assistant Federal Public Defender, 315-701-0080 or at randi_bianco@fd.org.

Supreme Court Update:
Recent Opinions and Pending Petitions

By: *Molly K. Corbett, Esq.*

Decisions

Warrant Requirement vs. Exigent Circumstances
Mitchell v. Wisconsin, 139 S. Ct. ___ (June 27, 2019).
Justice Alito wrote for a plurality (joined by CJ Roberts, Breyer and Kavanaugh) that the exigent circumstances exception to the warrant requirement "almost always permits a blood test without a warrant" when a breath test is impossible, such as when the motorist is unconscious. Justice Thomas concurred, adding the fifth vote, but his rationale is different. As he has previously proposed, he thinks a *per se* rule should apply because "the natural metabolism of alcohol in the blood stream 'creates an exigency once police have probable cause to believe the driver is drunk.'"

Double Jeopardy, Separate Sovereigns.
Gamble v. United States, 139 S. Ct. __ (June 17, 2019).
At its core, the Double Jeopardy Clause means that those acquitted or convicted of a particular 'offence' cannot be tried a second time for the same 'offence.' The Court has long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign. Under this 'dual-sovereignty' doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute. The Court upheld the dual sovereignty doctrine finding two offenses are not the "same offence" for double jeopardy purposes if prosecuted by separate sovereigns.

Eighth Amendment: Excessive Fines Clause.
Timbs v. Indiana, 139 S. Ct. 682 (Feb. 20, 2019).
Timbs was found guilty of dealing in a controlled substance and conspiracy to commit theft. He was sentenced him to one year of home detention and five years of probation, including a court supervised addiction-treatment program. He was also required to pay fees and costs totaling $1,203. At his arrest the police seized his Land Rover SUV purchased for about $42,000 with money from his deceased father's life insurance. The government sought forfeiture of the car for facilitating the crime. Tibbs fought the forfeiture under the Excessive Fines clause and the state court ruled the clause did not apply to the state action. The Supreme Court reversed ruling that like the Eighth Amendment's proscriptions of 'cruel and unusual punishment' and '[e]xcessive bail,' the protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. The Court held that the Excessive Fines Clause is incorporated by the Due Process Clause of the Fourteenth Amendment as a safeguard that is fundamental to the scheme of ordered liberty deeply rooted in our history and tradition.

Generic Burglary
Quarles v. United States, 139 S. Ct. 914 (June 10, 2019).
The Armed Career Criminal Act, 18 U.S.C. § 924(e), mandates a minimum 15-year prison sentence for a felon who unlawfully possesses a firearm and has three prior convictions for a "serious drug offense" or "violent felony." Section 924(e) defines "violent felony" to include "burglary." Under Taylor v. United States, the generic statutory term "burglary" means "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." The narrow question for the Court was whether remaining-in burglary (i) occurs only if a person has the intent to commit a crime at the exact moment when he or she first unlawfully remains in a building or structure, or (ii) more broadly, occurs when a person forms the intent to commit a crime at any time while unlawfully remaining in a building or structure. In a unanimous decision authored by Justice Kavanaugh, the Court adopted the more broad definition that "remaining-in burglary" occurs when the defendant forms the intent to commit a crime at any time while unlawfully remaining in a building or structure.

Johnson and 924(c).
United States v. Davis, 139 S. Ct. 782 (June 24, 2019).
In a 5-4 decision authored by Justice Gorsuch, the Court applying the same principles relied on in *Johnson* and *Dimaya* held the language 18 U.S.C. §924(c)(3)(B), which provides enhanced penalties for using a firearm during a "crime of violence," is unconstitutionally vague. "The statute's residual clause points to those felonies 'that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' §924(c)(3)(B). Even the government admitted that this language provides no reliable way to determine which offenses qualify as crimes of violence. Thus the clause is unconstitutionally vague.

(Continued on page 8)

[1] Some of the content was adapted from Paul Rashkind, Esq., UNITED STATES SUPREME COURT REVIEW-PREVIEW-OVERVIEW available at www.fd.org

Knowingly Possessing Firearm.
Rehaif v. United States, 139 S. Ct. 914 (June 21, 2019). Rehaif is a citizen of the UAE who overstayed his student visa. He was convicted under § 922(g)(5) for unlawful possession of a firearm and ammunition by an undocumented immigrant. At trial, the court instructed the jury that the government is not required to prove that the defendant knew that he was "illegally or unlawfully in the United States" at the time he possessed the firearm and ammunition. The Eleventh Circuit affirmed his conviction and the Supreme Court reversed the conviction. The question for the Court was whether the "knowingly" provision of 18 U.S.C. § 924(a)(2) applies to both the possession and status elements of an offense under § 922(g), or whether it applies only to the possession element. The Supreme Court reversed the conviction (7-2) in an opinion authored by Justice Breyer. The Court concluded that in a prosecution under 18 U.S.C. §922(g) and §924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

Mandatory Minimum Sentence for Supervised Release Violation
United States v. Haymond, 139 S. Ct. ___ (June 26, 2019).
Haymond was found in violation of his supervised release by viewing child pornography after a conviction for possession and attempted possession of child pornography. The district court applied 18 U.S.C. § 3583(k) to Haymond's violation, requiring revocation of supervised release and reimprisonment for at least five years. The court also imposed five years of supervised release. The revocation was affirmed on appeal but the court remanded for further proceedings to apply 18 U.S.C. § 3583(e)(3), not § 3583(k) because the requirement of revocation and reimprisonment for at least five years in §3583(k) violated the Fifth and Sixth Amendments stripping the sentencing judge of discretion to impose punishment within the statutorily prescribed range, and imposing heightened punishment on sex offenders based on new conduct for which they had not been convicted by a jury beyond a reasonable doubt.

The Supreme Court vacated and remanded for further proceedings. The plurality agreed with the application of *Alleyne v. United States*, 570 U.S. 99 (2013) to the supervised release proceedings because the statute imposes a mandatory minimum sentence affirming the findings of Fifth and Sixth amendment violations, but remanded for further consideration of remedial measures.

IAC: Failure to Appeal Following Plea Waiver.
*Garza v. Idaho***,** 139 S. Ct 738 (Feb. 27, 2019).
In a 6-3 decision authored by Justice Sotomayor, the Court held that the presumptive prejudice standard applies where counsel fails to appeal following a guilty plea in which the defendant waives the right to appeal. In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Supreme Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed "with no further showing from the defendant of the merits of his underlying claims." This case asks whether that rule applies even when the defendant has, in the course of pleading guilty, signed what is often called an "appeal waiver"—that is, an agreement forgoing certain, but not all, possible appellate claims. "We hold that the presumption of prejudice recognized in Flores-Ortega applies regardless of whether the defendant has signed an appeal waiver."

Argued Pending Decision

Insanity Defense
Kahler v. Kansas, No. 18-6135:
Question Presented:
Whether the Eighth and 14th Amendments permit a state to abolish the insanity defense? Merits briefing is available on the Supreme Court's website here (link is external). Argument October 7, 2019.

Sixth Amendment: Unanimous Verdicts.
Ramos v. Louisiana, No. 18-5924
Question presented:
Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

Cert. Grants

Reasonable Suspicion to Stop Motorist.
Kansas v. Glover, No. 18-556
Question Presented:
"[W]hether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary."

(Continued on page 12)

Second Circuit Highlights

By: *Courtenay McKeon, Esq.*

A summary of recent Second Circuit decisions relevant to criminal defense and representation.

Calculation of Criminal History

United States v. Valente, 915 F.3d 916 (2d Cir. 2019); appeal from NDNY (Sharpe, J.): The defendant was convicted of being a recidivist DWAI offender and sentenced to sixty days in jail. The sentence was never officially suspended or stayed, but the defendant did not serve the sentence because of medical issues. Later, he pled guilty to federal securities fraud. The district court assigned two criminal history points to the recidivist DWAI offender conviction over the defendant's objection. The district court sentenced the defendant to 240 months in prison. The Second Circuit vacated the sentence relying on the application notes to U.S.S.G. § 4A1.1(b), an offender receives two criminal history points for any conviction that results in a "sentence of imprisonment of at least sixty days." The Application Note states that "[t]o qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence." Here, the defendant had not actually served a period of imprisonment on the sentence. The district court 's incorrect calculation of the defendant's Criminal History Category from III to IV, increased his Guideline range from 188-235 months to 210-262 months requiring remand for resentencing.

Drug Quantity

United States v. Pauling, 924 F.3d 649 (2d Cir. 2019); appeal from SDNY: The defendant was charged with conspiracy to distribute 100 grams or more of heroin. Under 21 U.S.C. § 841(b)(1)(B), this charge carries a five-year mandatory minimum sentence. At trial, the government presented wiretap evidence of four transactions between the defendant and another drug dealer. The parties agreed that these transactions showed a conspiracy to distribute 89 grams of heroin. The government contended that wiretaps of the fourth transaction showed that the defendant conspired to distribute an additional 14 grams of heroin, for a total of 103 grams. The defense contended the conversation was ambiguous, and did not involve the co-conspirator named in the indictment. The jury found the defendant had conspired with the named co-conspirator to distribute 100 grams or more of heroin. The district court granted the defendant's motion to vacate the verdict entering a verdict to the lesser-included offense of conspiracy to distribute fewer than 100 grams of heroin without a mandatory minimum sentence. The government appealed. The Circuit affirmed finding that only "impermissible speculation" could have led the jury to conclude that the defendant and the named co-conspirator distributed more than 89 grams of heroin.

United States v. Burks, __F. App'x __, 2019 WL 4049857 (2d. Cir. 2019) appeal from WDNY: After the execution of a search warrant recovered 1.21 grams of cocaine residue, the defendant admitted in the Plea Agreement that he distributed cocaine in "1//2 ounce and one ounce amounts" and the drug quantity that "could be readily proven by the government" "was less than 50 grams." The PSR calculated an advisory guidelines range of 15-21 months' imprisonment based upon an amount of cash in the apartment searched to which Burks objected. After an evidentiary hearing at which a police officer who had been involved in the search testified, the court found a drug quantity (of between 500 grams to 2 kilograms) resulting in a range of 63-78 months. The sentence was vacated because to support its "approximation" of the drug quantity, a court "must rely on evidence that 'points specifically to a drug quantity for which the defendant is responsible.'" (quoting *United States v. Shonubi*, 103 F.3d 1085, 1090 (2d Cir. 1997)). "While approximations need not be exact, the court's underlying factual findings cannot be predicated on surmise and conjecture." The evidence may be circumstantial, but "it must be specific to the defendant and provide information regarding the quantity of illicit … goods." The district court had extrapolated a certain frequency of weekly drug sales from "a statement in the search warrant application from a police confidential source" that Burks "sold cocaine on 'multiple occasions' over six months.'" That evidence was not sufficient "to extrapolate any particular frequency of sales, let alone weekly sales." The Circuit noted that the PSR's use of the amount of currency calculate drug quantity would be permissible, if the evidence showed that the currency was the proceeds of drug trafficking.

Evidence

United States v. Ojudun, 915 F.3d 875 (2d Cir. 2019); appeal from SDNY: Practitioners and district court judges have a tendency to say that the Rules of Evidence do not apply in supervised release revocation proceedings. This decision demonstrates that this oft-repeated maxim is an oversimplification. The defendant was charged with violating the terms of his supervised release by cashing fraudulent checks. At his supervised release revocation hearing, the district court allowed a police officer to testify about statements made by the

(Continued on page 10)

driver of the car in which the defendant was a passenger at the time of his arrest. The defense objected that the driver's statements were hearsay, but the court admitted them under Federal Rule of Evidence 804(b)(3) as statements against penal interest. The defendant appealed. The Court concluded that the statements of the driver that incriminated Ojudun without incriminating the driver were not properly ruled statements against the interest of the driver under FRE Rule 804(b)(3) and that the district court did not perform the analyses required under Rule 804(b)(3)(B) or under Rule 32.1(b)(2)(C) of the Federal Rules of Criminal Procedure, in order to determine the admissibility of the declarant's other statements. The judgment was vacated and remanded for further proceedings.

Scrimo v. Lee, 935 F.3d 103 (2d Cir. 2019) state habeas petition : Scrimo was convicted of second degree murder following trial in New York state court and sentenced to 25 years to life. The chief evidence against the defendant was the testimony of John Kane. Kane admitted that he was with the victim and Scrimo the night of the murder, and in the victim's apartment during the crime. Kane claimed that he saw Scrimo strangle the victim after she insulted him. There was little corroboration of Kane's account and other evidence pointed to Kane as the killer, including DNA under the victim's fingernails. Kane also admitted that he had been at the scene of the killing, that he helped try to cover it up, and that he had a prior sexual relationship with the victim. At trial, the theory of defense was that Kane killed the victim. In support of this theory, the defense sought to offer evidence that Kane was a drug dealer; that he had previously sold drugs to the victim; that Kane and the victim had a dispute over the drugs he sold her; and that, some years earlier, when Kane had a dispute with a female drug customer, he choked her. That former customer survived and was proffered as a defense witness. The state trial court excluded a substantial portion of this evidence. The Second Circuit held that the exclusion of this evidence violated the defendant's clearly-established constitutional right to present a complete defense. The decision is a helpful resource for habeas standards and the constitutional right to present a complete defense, especially evidence tending to establish third-party culpability.

Jurors

United States v. Mehta, 919 F.3d 175 (2d Cir. 2019); appeal from NDNY (McAvoy, J.): During trial, five jurors approached the judge's clerk and asked if they could speak to the judge. Without advising counsel, the judge met privately with the jurors. The jurors reported that they were concerned because they felt that two of the defendants had been "lingering" and "staring" at them outside of the courtroom. The judge called the defendants' conduct "disturbing" and "inappropriate" and assigned a security officer to accompany the jurors to their cars. After meeting with the jurors, the judge told counsel that the meeting had happened and instructed the lawyers to tell their clients "to stay the hell away" from the jury. The defendants immediately moved for judgments of acquittal or a mistrial. The judge denied the motions. During jury instructions, the judge charged the jury that "[y]ou may consider the fact that a defendant's interest in the outcome of the case creates a motive for false testimony." The jury found the defendants guilty. The defendants appealed. The Second Circuit found that the court violated the defendants' rights under the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause to be present at every trial stage. The court reiterated that when a court receives an inquiry from jurors: (1) the jury inquiry should be in writing; (2) the note should be marked as the court's exhibit and read into the record with counsel and defendant present; (3) counsel should have an opportunity to suggest a response, and the judge should inform counsel of the response to be given; and (4) on the recall of the jury, the trial judge should read the note into the record, allowing an opportunity to the jury to correct the inquiry or to elaborate upon it. The district court's failure to follow that procedure was compounded by the impermissible jury instruction. The case was vacated and remanded. Retrial is currently set for November 4, 2019.

Plea Agreements

United States v. Wilson, 920 F.3d 155 (2d Cir. 2019); appeal from EDNY: The sentence was vacated when the government breached a plea agreement when it agreed to an estimated sentence in a defendant's plea bargain, then advocates for a substantially higher sentence at the defendant's sentencing hearing on the basis of information known to the Government at the time of the agreement. The defendant had agreed to a *Pimentel* estimate of 108-135 months' imprisonment when he pled guilty in 2011, and the government agreed that it would not deviate from this estimate in the absence of new information. After a delay of six years, due in substantial part the government's request while a trial proceeded against a co-defendant, the government sought several sentencing enhancements based on information that came out at trial but which the Government knew about at the time it negotiated the plea deal.

(Continued on page 11)

The Court held that, under these circumstances, the defendant could not have reasonably expected that the government would change its position when he consented to the Pimentel estimate in his plea bargain, and therefore the government breached the agreement. The sentence was not only vacated but also ordered the new sentence be imposed according to the original plea agreement.

United States v. Feldman, 939 F.3d 182 (2d Cir. 2019) appeal from WDNY: The defendant sought to vacate and stay a writ of execution that the government obtained to seize his retirement account and use for restitution because the government had made representations during plea negotiations indicating the retirement account would be safe. The defendant argues that the government violated their obligations as part of the plea negotiations and made false or misleading representations when the AUSA expressed optimism that the recommendation would be accepted by the DOJ. In vacating the writ, the Circuit cautioned the government. "To retract promises made in plea negotiations, simply omitting the representations from the written agreement may not be effective, explaining that "[i]f, prior to the conclusion of the agreement, the government wishes to retract promises and representations earlier made, it is free to do so," however, "the government may need to make clear to the defendant that prior commitments have been withdrawn." Id. *7. It "may not be able to rely exclusively on omissions of prior undertakings and representations from the four corners of the written agreement as effective nullification of them." Id. Although this decision did not seek to vacate the plea the decision includes an important discussion of the government's obligations relating to plea agreements.

Plea Colloquys

United States v. Prado, 933 F.3d 121 (2d Cir. 2019); appeal from SDNY: The Court vacated the convictions under the Maritime Drug Law Enforcement Act. This decision is important for its discussion of the standards for challenging a plea where the proof presented by the government does not support an element of the offense. The court rejected the government's claim that the defendants' challenges to their guilty pleas were barred because of the incorrect assertion that "a guilty plea waives all defects except to the court's jurisdiction." The court reaffirmed that this general principle "applies only to valid guilty pleas." And a guilty plea is not valid if, as in this case, the defendant is misinformed of the elements of the offense or there is no factual basis for the plea.

Prior Convictions as Sentencing Enhancements

United States v. Kroll, 918 F.3d 47 (2d Cir. 2019); appeal from EDNY: Vacating a life sentence, the Court held that a prior conviction under NY Penal Law § 130.45 was not a "prior sex offense" as defined in 18 U.S.C. §3559 (e)(1). Apply the categorical approach, the Court found the state statute applied to a broader range of conduct than the federal definition.

Sentencing

United States v. Brown, 935 F.3d 43 (2d Cir. 2019); appeal from SDNY: A 39-year sentence was remanded for de novo resentencing because it was uncertain whether the judge understood his discretion to consider the severity of the mandatory consecutive minimum sentences required by §924(c) in determining the sentence for the predicate offenses after *Dean v. United States*, 137 S.Ct. 1170 (2017),. The case involved two robberies and two §924(c)brandishing counts, which, before the First Step Act, required 7 years for the first and 25 years for the second §924(c) count. Counsel had asked for one day on the predicate robberies because the mandatory consecutive sentences were so severe. Prior to *Dean*, *United States v. Chavez*, 549 F.3d 119 (2d Cir. 2017) precluded such consideration. The court imposed 84 months for the predicate robberies. Because the *Dean* decision was not mentioned anywhere below, the Court could not determine whether the judge was aware of his discretion. And even though the defendant on appeal did not argue the judge misunderstood his discretion – arguing instead that the judge should have imposed minimal sentences on the predicates – the Court held the issue preserved for appeal.

Significantly, the Circuit remanded for full resentencing, in part to "afford Brown the opportunity to argue that he should benefit from section 403(b) of the First Step Act of 2018," which repealed the required bump-up for the second 924(c) providing authority for seeking plenary resentencing to gain the benefit of the First Step Act.

United States v. Thompson, 921 F.3d 82 (2d Cir. 2019); appeal from SDNY: Vacated the sentence and remanded because the two level upward adjustment for the violation of a court protection order requires the court issuing the order to have jurisdiction to do so. Under NY Family Court Act the court does not have personal jurisdiction over civil defendants until they are properly served.

(Continued on page 12)

Second Circuit Highlights *continued*

Speedy Trial

United States v. Black, 918 F.3d 243 (2d Cir. 2019); appeal from WDNY: The Circuit affirmed the district court's dismissal of the indictment after a 68 month delay from the original indictment. What started as a potential death penalty case ended as the third indictment dismissed for speedy trial violations in the WDNY. *See also . United States v. Tigano,* 880 F.3d 602 (2d Cir. 2018); *United States v. Pennick,* 713 F. App'x 33 (2d Cir. 2017) (summary order).

Supervised Release Conditions

There have been a number of successful challenges to special conditions of supervised release. The district court is required to determine the appropriateness of special conditions based upon a number of factors under §3553(a). Where the defendant has no history of or the offense does not involve the type of conduct or activity sought to be regulated or prohibited by the special condition, the condition should not apply or the court must make specific findings as a reason for imposing the limitations on a defendant's liberty. For examples see the recent decisions of:

United States v. Bleau, 930 F.3d 35 (2d Cir. 2019)
United States v. Boles, 914 F.3d 95 (2d. Cir. 2019)
United States v. Eagin, 913 F.3d 88 (2d Cir. 2019)
United States v. Parkins, 935 F.3d 63 (2d Cir. 2019)

Supreme Court Update...*continued from pg. 8*

Sentencing Minor to Life
Mathena v. Malvo, No. 18-217
Question Presented:
Whether the Fourth Circuit erred in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of the U.S. Supreme Court (Montgomery v. Louisiana, 136 S. Ct. 718 (2016)) addressing whether a new constitutional rule announced in an earlier decision (Miller v. Alabama, 567 U.S. 460 (2012)) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

Preservation of Sentencing Objection
Holguin-Hernandez v. United States, No. 18-7739
Question Presented:
Whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.

Fraud: Meaning of Property
Kelly v. United States, No. 18-1059:
Question Presented:
Whether a public official "defraud[s]" the government of its property by advancing a "public policy reason" for an official decision that is not her subjective "real reason" for making the decision.

Categorical Approach for Serious Drug Offense
Shular v. United States, No. 18-6662:
Question Presented:
Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the act.

United States v. Sineneng-Smith, No. 19-67:
Question Presented:
Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional.

U.S. Supreme Court Cabins Sentencing Courts' Deference to Sentencing Commission

By: John J. Dowling, III.†

Federal sentencing courts "reflexively" defer to the Sentencing Commission's application notes in interpreting the U.S. Sentencing Guidelines. This has been the practice since 1995, when the U.S. Supreme Court held that deference to the application notes is required unless doing so violates the Constitution, a federal statute, or the application note provides an inconsistent or plainly erroneous reading of the relevant Guideline. *See Stinson v. United States*, 508 U.S. 36, 38 (1993). And this practice has not been limited to unambiguous Guideline provisions.

Recently, the Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (Jun. 26, 2019), held that a court cannot defer to an agency's interpretation of its own regulation unless the regulation is "genuinely ambiguous." Thus *Kisor* is available for every sentencing proceeding to ensure the Commission's application notes are not relied on as a backdoor to increase a defendant's sentencing exposure unless the Guideline at issue is "genuinely ambiguous." For decades, federal sentencing courts have been required to defer to the U.S. Sentencing Commission's interpretation of the Sentencing Guidelines found in the Commission's "application notes" accompanying the Guidelines. This rule is based on the principle that courts defer to an agency's reasonable interpretation of its own ambiguous regulation. But the U.S. Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (Jun. 26, 2019), should curtail this practice because, according to *Kisor*, a federal court can no longer defer to an agency's interpretation of its own regulation unless the regulation is "genuinely ambiguous." As the Court put it: "If uncertainty does not exist, there is no plausible reason for deference." The federal defense bar should martial *Kisor* to avoid sentencing courts' "reflexive" deference to the Commission's application notes when interpreting provisions of the Sentencing Guidelines.

Proposed amendments to the Guidelines are subject to public notice and comment. But the "application notes" promulgated independently by the Commission which explain and interpret the Guidelines are not. This raises the question of whether and when a federal sentencing court can defer to the Commission's application notes in interpreting the Guidelines.

In 1993, the U.S. Supreme Court held that federal sentencing courts were required to defer to the Commission's application notes in interpreting the Guidelines unless doing so "violate[d] the Constitution or a federal statute, or [was] inconsistent with, or a plainly erroneous reading of, [the] guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). The rule that federal sentencing courts defer to the Commission's application notes is based on the principle that courts defer to an agency's reasonable interpretation of its own ambiguous regulation. This is commonly referred to as *Auer* or *Seminole Rock* deference following the Court's decisions in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand, Co.*, 325 U.S. 410 (1945). The so-called *Auer* deference invited federal courts to engage in, as the Court explained, "reflexive" deference.

But the *Kisor* court "cabined *Auer* in varied and critical ways." Under *Kisor*, courts cannot defer unless the regulation or Guideline is "genuinely ambiguous." The Court explained that a reviewing court "cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." Instead, courts "must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." The following example illustrates *Auer* deference in the context of federal sentencing before and after *Kisor*.

Section 4B1.1 of the Guidelines, known as the Career Offender Enhancement, increases an offender's punishment if he or she has previously been convicted of two or more "controlled substance offenses." A controlled substance offense is broadly defined as any state or federal felony criminalizing the manufacture, possession, distribution, import or export of a controlled substance. This definition is

(Continued on page 14)

† *John J. Dowling, III. is a third-year law student at Syracuse University College of Law and an extern at the Office of the Federal Public Defender for the Northern District of New York, Syracuse office.*

A New Path Explored

By: *Molly K. Corbett, Esq.*

In March of 2016, Judge John Gleeson, a district court judge in the Eastern District of New York announced he would be stepping down from the federal bench after more than twenty years of service. Before his appointment to the bench in 1994, Judge Gleeson was a federal prosecutor. He had served as Chief of Appeals, Chief of Special Prosecutions, Chief of Organized Crime and Chief of the Criminal Division. He has taught law for 30 years and currently teaches Complex Federal Investigations at Harvard Law School and Sentencing at New York University School of Law. He is also a co-author of Federal Criminal Practice: A Second Circuit Handbook. Many in the federal criminal defense bar were saddened to see him leave the bench.

As a judge, Gleeson had been known to challenge government plea deals and harsh mandatory minimum sentences. His experience and advocacy make two recent filings noteworthy. Now, as a practicing partner at Debevoise & Plimpton, LLP it appears that Judge Gleeson has decided to take on extremely long sentences under a recent grant of judicial authority in the First Step Act of 2018. He has filed at least two motions under 18 U.S.C. §3582(c)(1)(A) requesting reduction in sentences for "extraordinary and compelling reasons" in *United States v. Rose,* No. 3:04-cr-0067 (TJM)(N.D.N.Y. filed 9/26/19) and *United States v. Redd,* No. 1:97-cr-0006 (AJT)(E.D.Va. filed 10/9/19).

In *Rose* and *Redd*, Judge Gleeson has requested significant sentences, 92 years and 50 years respectively, be reduced to time served (approximately 15 years and 22 years respectively). Under revisions to §3582(c)(1)(A, enacted as part of the First Step Act, Judge Gleeson argues, the district courts are now empowered to reduce sentences once the request for reduction made to the Bureau of Prisons is denied or not acted upon in 30 days. See *Frist Step Act,* P.L. 115-391, 132 Stat. 5194, at § 603 (Dec. 21, 2018). Previously, the statute limited the ability to request release to the Bureau of Prisons for medical, age or extraordinary family circumstances. Historically, the Bureau of Prisons had not availed itself of the ability to grant such releases even after its own studies had found that elderly and ill inmates were draining its limited resources. Part of the intent of the First Step Act was to reduce the amount of elderly and ill inmates in custody as well as reduce sentences for non-violent drug offenders. Giving the district court's jurisdiction to review such requests is an attempt to remedy the prior deficiencies.

Currently this new path created by the First Step Act is being explored by Judge Gleeson in his quest to reduce excessively harsh sentences for certain types of offenders. Stay tuned.

U.S. Supreme Court Cabins Sentencing Courts' Deference from *pg. 13*

silent on inchoate crimes, but Application Note 1 expands the definition to include "the offenses of aiding and abetting, conspiring, and attempting to commit [a controlled substance offense]." *See* App. Note 1 to USSG § 4B1.2.

Up until last summer, the law in the Second Circuit held that federal sentencing courts could defer to Application Note 1 because doing so was not inconsistent with the text of the Guideline defining a controlled substance offense. *See United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995). Now, however, *Kisor* might mandate a different result. Under *Kisor*, sentencing courts should be barred from deferring to Application Note 1 unless the definition of "controlled substance offense" is "genuinely ambiguous." Application of *Kisor* to preclude deference to Application Note 1 is particularly robust because several courts of appeals, including the Second Circuit, have held that the text of the definition of controlled substance offense does not include inchoate crimes. *See, e.g.*, *United States v. Winstead*, 890 F.3d 1082, 1090 (D.C. Cir. 2018) (holding that there is "no question" that Application Note 1 "adds a crime" to the definition of a controlled substance offense); *United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995) (Application Note 1 "expand[s]" the definition of controlled substance offense). Deference is not accorded because the addition of offenses is not ambiguous, but rather contradictory or supplemental.

Relying on *Kisor* to limit application of the Career Offender Enhancement is but one example of the utility of this decision in the context of federal sentencing. The federal defense bar should be mindful of *Kisor* in all sentencing proceedings to ensure the Commission's application notes are not relied on as a backdoor to increase a defendant's sentencing exposure.

The Presumption of Scienter Resurrected

Rehaif v. United States, 139 S.Ct 2191 (2019) By: Molly K. Corbett Esq.

On June 21, 2019 the Supreme Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The decision held that to convict for a violation 21 U.S.C. §922(g) and §924(a)(2) , the government must prove that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons prohibited from possessing a firearm. Mr. Rehaif, in the United States on a college visa, left college and his visa was terminated. After that termination he went to a firing range, bought ammunition, and fired a firearm. Because he was an alien illegally in the country at that time he was barred from possessing the firearm and ammunition.

In the majority opinion Justice Breyer relies primarily on the longstanding presumption used to discern congressional intent behind criminal statutes: the presumption in favor of scienter. More specifically, "Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id*. at 2195. The statutory language and structure also contributed to the application of "knowingly" not just to possession element but also to the status element. The decision rejected the government's assertion that whether an illegal alien knew of their prohibited status was a question of law and "ignorance of the law" was no excuse. Breyer clarified the application of the "ignorance of the law" maxim to dispel confusion that has arisen in the case law. The maxim does not apply where a defendant has a mistaken impression concerning the legal effect of a "collateral matter" and that mistake results in misunderstanding the significance of the conduct, negating an element of the offense. A defendant who does not have knowledge of the relevant status does not have the guilty state of mind the statute requires.

As evident from the nine categories of prohibited status each category brings with it newly relevant facts that must be known by our clients at the time of the possession of the firearm or ammunition for a finding of guilt . This determination is going to require additional investigation, discovery obligations and proof to demonstrate the requisite knowledge. Consider the prohibited categories and the proof required to demonstrate knowledge of the prohibited status. (See *Prohibited Statuses in Section 922(g) on page 16*)

The subsections that involve prior sentences, adjudications, hearings, and other legal proceedings will need a review of those underlying proceedings and processes to ascertain what information was given to the client or notice provided. Whether the information provided was correct and the notice sufficient to impart knowledge. Even a charge based upon a prior conviction for a term exceeding a year may present a question of knowledge where the sentence is a lesser sentence or an alternative sentence so a client has not served a term of imprisonment exceeding a year so may not know that the sentence exceeded a year. Was the client advised that the conviction carried a sentence of a term exceeding a year. What does the client need to know to confer knowledge of the prohibited status?

Current Practice:

In the district court if you have a person charged in one of these categories you should be looking at whether the government can prove your client had knowledge of the prohibited status. Additional investigation surrounding the prohibited status is necessary. More discovery and *Brady* obligations are also imposed on the government.
If you have already pled and are awaiting sentencing or on direct appeal you may consider raising the issue on appeal in a challenge to the plea or finding of guilt. The plea violates due process because the guilty plea is involuntary in violation of due process because the client was not informed that knowledge of prohibited status is an element. See *United States v. Bousley*, 523 U.S. 614 (1998); *Henderson v. Morgan*, 426 U.S. 637 (1976). The plea should be vacated. (As with all challenges to pleas, evaluate whether vacating the plea will put your client in a worse position before challenging.)

In a case where the client went to trial challenge the conviction based on insufficient evidence and improper jury instructions. The government did not prove all the elements of the offense and the jury was not instructed to make a finding on whether the defendant knew of the prohibited status at the time of the possession. The evidence is insufficient and the verdict deficient thus the conviction should be vacated.

(Continued on page 16)

The Presumption of Scienter Resurrected...*continued from pg. 15*

Future Implications:
Upon reading the opinion you will note the government and the dissent's concern that requiring knowledge of the prohibited status to be proven raises questions about other statutes that arguably incorporate a scienter requirement for elements of the offense. This concern may be well-founded. For example, the Fifth Circuit recently requested supplemental briefing in an appeal of a bank fraud conviction under 18 U.S.C. §1344 where the government's theory at trial was the defendant's violation of internal lending rules of banks of which the defendant had no knowledge. The defendant had asked and been denied the following jury instruction:

> *"Knowingly" requirement applies to each element of the charged offense*:
> Where a statute requires that an offense be knowingly committed, you cannot find the defendant guilty of the offense unless you determine beyond a reasonable doubt that the defendant knowingly satisfied each element of the offense. For instance, if the offense requires that a defendant knowingly make a material misrepresentation, the government must prove that the defendant knew about both the misrepresentation and its materiality.

Rehaif means it is time to re-examine criminal statutes with regard to the presumption of scienter and whether a state of mind is required to be proven in relation to certain elements of the alleged offense.

Prohibited Statuses in Section 922(g) :

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—
(A) is illegally or unlawfully in the United States; or
(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(26))

(6) who has been discharged from the Armed Forces under dishonorable conditions

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—
(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence.

JUDGES' PRACTICE TIPS & SUGGESTIONS:

1) Magistrate Judge Thérèse Wiley Dancks:

a) CJA counsel should keep the Court updated as to their status (e.g., retiring, or unavailable for extended periods of time).

b) In illegal alien cases with immigration detainers, counsel may wish to consider waiving detention hearings with the understanding he/she can request one later, if necessary. Attorney time would be much better spent working out plea deals as quickly as possible, which usually involves time served on the lower offenses. The defendant then is moved to Batavia faster and processed out from there.

2) Chief Judge Glenn T. Suddaby:

a) All attorneys are encouraged to offer to give young attorneys an opportunity to perform oral argument by requesting the court grant oral argument for such purpose.

b) All attorneys are encouraged to conform its requests for relief (and their briefing of those requests) so they are proportional to the importance of the issue in light of the current state of law.

c) Reminder as to General Order #26:

Courthouse Security

(1) Screening and Search. All persons entering a federal courthouse in this district and all items carried by them are subject to appropriate screening and search by a United States Marshal, Court Security Officer, or any law enforcement officer. Persons may be requested to provide identification and to state the nature of their business in the courthouse. Anyone refusing to cooperate with these security measures may be denied entrance to the courthouse. Members of the Northern District Bar who present a valid New York State Court System identification, or any valid Federal Court or State Court identification, or at torneys or employees employed by the Federal Government with a valid Federal Agency identification, or law enforcement officers who are appearing for a proceeding before the Court, or who have business with the Clerks Offices of either the District Court or Bankruptcy Court, or another tenant agency within the Court house, will be permit ted to:

a) Proceed to the front of the line as directed by the Court Security Officers;
b) Retain belt and jewelry on their person;
c) Submit all other items (bags, electronics, etc.) carried by them for screening;
d) Submit to manual (hand held metal detector) screening, and
e) Retain their cell phone and electronic devices following screening.

Upcoming Training and Resources

» » » » » Upcoming CLE « « « « «

"Navigating the Minefield:
Issues in State and Federal Sentencing"

Wednesday , November 6, 2019, 3:30 p.m. – 5:30 p.m.
James T. Foley U.S. Courthouse, Albany, NY

Registration information available soon at: http://nyn.fd.org/

Sponsored by NDNY Federal Court Bar Association and the Office of the Federal Public Defender NDNY

RESOURCES:

On-line:
Defender Services: www.fd.org

Second Circuit decisions: https://blog.federaldefendersny.org/

United States Sentencing Commission: www.ussc.gov
-Interactive Data and Sentencing Statistics
https://isb.ussc.gov/index.html.
-Annual, Specific Subject and Congressional Reports
-Sentence and Offender Statistics

NDNY FPD : https://nyn.fd.org/

In Person:
Molly K. Corbett, 518-436-1850 x107 or at molly_corbett@fd.org

Article Submissions & Letters to the Editor

Molly K. Corbett, *Editor-in-Chief*

If you would like to have an article or letter featured in our next edition of Arresting Developments, please write us at: Office of the Federal Public Defender, 39 North Pearl St, 5th Floor Albany, NY 12207, or send an email to molly_corbett@fd.org