WINTER 2018

Arresting developments

A Biannual Federal Criminal Defense Newsletter

Lisa A. Peebles, Federal Public Defender
Molly K. Corbett, Editor-in-Chief

In This Issue:

- Some Prior Drug Convictions May No Longer Be Used to Increase Your Client's Offense Level 2
- The Amy, Vicky, and Andy Child Pornography Victim Act.....4
- The First Step Act 6
- Summary of the 2018 Sentencing Guidelines Amendments.....10
- Second Chair program ..12
- Case Law Updates:
  - Supreme Court.....9
  - Second Circuit 13
- New Position & Addition in NDNY 17
- Judge's Corner 18
- Upcoming Training and Resources.....19

Message from the Defender

Dear Colleagues:

As we head into 2019, I would urge each of you to stay abreast of changes in federal criminal law. Your efforts can assist with the evolution of positive changes - particularly, when it comes to classifying a client's criminal history as a violent felon and/or a triggering drug offense for increased penalty provisions. The courts use a categorical approach to determine whether the prior crimes meet those definitions. Recent developments with federal definitions of a controlled substance offense under USSG Section 4B1.2 and attempt crimes are ripe for you to challenge. A state's controlled substance offense may not qualify as a federal controlled substance offense if it's not a regulated substance under the federal drug schedules. Likewise, attempt offenses, and arguably other inchoate crimes, are not included as crimes of violence. The Sixth Circuit noted a convincing argument made by the defense that because of the nature of the Sentencing Commission and the separation of powers doctrine, the Commission is prohibited from adding offenses through commentary rather than amendment. *See United States v. Havis* 2018 WL511787. You should begin to look at guideline commentaries with a fresh eye to determine whether the language is interpreting or adding offenses.

At our recent CLE in Albany, I announced that Molly Corbett would be our point of contact for panel attorneys seeking answers to legal questions. Her email address is: molly_corbett@fd.org. Obviously, if Molly is not available please do not hesitate to contact me or anyone else on our staff. I also informed attendees that our website will be beefed up with more references and sample filings for your review. If you

(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)

missed our Albany CLE the materials are on our website and they are worth reviewing.

Darren Howard, our regional counsel from BOP, presented on issues regarding the designation and classification of our clients. One important piece of advice he gave was to request the judge to recommend BOP programming and designations. You should be specific, including the kind of programming you are seeking and why it's necessary. Check the BOP website at https://www.bop.gov/inmates/custody and care/. According to Howard, the administration will always try to accommodate the recommendations of the judges.

Lastly, there has been a step in the right direction for our clients. The First Step Act was passed last month. The changes affect the penalty provisions in some drug cases and some 924(c) cases. The bill allows for a retroactive reduction in accordance with the Fair Sentencing Act of 2010. Any client who was sentenced under a statutory range changed by the Fair Sentencing Act of 2010 is now eligible for a reduction. There is also a prison reform provision of the bill that could impact plea negotiations, the content of the PSR, and the court's findings at sentencing. Please review the enclosed articles which summarize the changes, along with the bill itself which is on our website. Our office will take the lead on all cases in our district for those clients who may be eligible for a sentence reduction.

I will leave you with this closing thought: don't be satisfied with how things are. Fight for positive changes and always strive to improve. If you simply go along to get along you will never be a force to be reckoned with.

As always, I am interested in your thoughts and any contributions you would like to make to our newsletter or website.

- Lisa Peebles

Some Prior Drug Convictions May No Longer Be Used to Increase Your Client's Offense Level

By: *Randi Juda Bianco, Esq. & James Egan, Esq.*

The United States Sentencing Guidelines provide district courts a recommended guideline range[1] based on various factors concerning a defendant's instant offense (resulting in a Total Offense Level) and criminal history (resulting in a Criminal History Category). In nearly all cases, a defendant's prior convictions will increase the Criminal History Category.[2] In some cases, those same convictions will also increase a defendant's Total Offense Level. As relevant here, this may happen when a defendant, whose instant conviction for certain gun, drug, immigration, or "crimes of violence," has a qualifying prior conviction.

For example, the guidelines provide for a higher sentencing range when a defendant who has committed certain instant offenses involving drugs or "crimes of violence" has prior convictions for similar offenses. Sentencing Guideline 4B1.1, which directs the sentencing for so-called career offenders, calls for an increased guideline range when the defendant who is at least 18 years old at the time of the instant offense for either a "crime of violence" or "controlled substance offense" has two prior such convictions.

Prior convictions constituting "crime[s] of violence" and "controlled substance offense[s]" will also increase the offense level for certain instant firearm offenses falling within Chapter 2K of the Sentencing Guidelines, which is based on U.S.S.G. § 4B1.2.
Important for present purposes, the guidelines define the term "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. §4B1.2(b).

Even under the most recent immigration guidelines, the offense level of a defendant convicted of unlawfully entering or remaining in the country will be increased if he has prior convictions for "drug trafficking offenses." *See* U.S.S.G. § 2L1.2(b)(2)(E), (b)(3)(E). The guidelines identically define the terms "drug trafficking offense" in Chapter 2L and "controlled substance offense" in Chapters 2K and 4B.

Recent decisions in the Courts of Appeals for both the Second and District of Columbia Circuits have provided

(Continued on page 3)

[1] Be aware that following *United States v. Booker*, 543 U.S. 220 (2005), the sentencing guidelines are merely advisory, and a district court is free to sentence a defendant within, below, or above the range for reasons permitted or precluded by the Sentencing Commission.
[2] Certain convictions – given their type, age, and resulting sentence length – are never factored into a defendant's Criminal History Category. *See* U.S.S.G. §§4A1.1, 4A1.2.

fresh arguments that may help secure a lower sentence in cases involving prior drug offenses. More particularly, these cases have narrowed the reach of guidelines that increase a defendant's offense level on the basis of prior drug convictions by (1) excluding prior state offenses that include substances that are not controlled under federal law and (2) by excluding inchoate drug offenses.

Townsend and Overbroad State Drug Offenses

The Second Circuit recently decided United States v. Townsend, 897 F3d 66, (2d Cir. 2018). In Townsend, the defendant argued that one of his underlying drug offenses, Criminal Sale of a Controlled Substance in the Fifth Degree, under New York Penal Law § 220.31, was not a controlled substance under U.S.S.G. § 4B1.1 because the predicate New York offense includes a substance (Human Chorionic Gonadotropin (HCG)) that is not regulated under the federal Controlled Substances Act (CSA). The Second Circuit dealt with the issue of how to define the term "controlled substance offense" under U.S.S.G. § 4B1.2(b). Specifically, the Court had to decide whether the term "controlled substance offense" included only those substances controlled by federal law under the Controlled Substance Act or whether it also included substances regulated by various state laws. Adhering to the so-called Jerome presumption established in Jerome v. United States, 318 U.S. 101 (1943), the Second Circuit ultimately held that federal law does not depend on state law and that the term "controlled substance" in U.S.S.G. § 4B1.2(b) refers exclusively to those substances in the Controlled Substance Act. Following its earlier decision in Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017), the Court confirmed that New York Fifth Degree criminal sale of a controlled substance is categorically indivisible, meaning a prosecutor need not prove and a jury need not find beyond a reasonable doubt which of the substances regulated in New York the defendant was liable for selling. Accordingly, a defendant's conviction for New York Fifth Degree criminal sale of a controlled substance includes HCG. Therefore, it "sweeps more broadly than its federal counterpart" in the CSA and can never constitute a "controlled substance offense" under the guidelines.

The Second Circuit just recently confirmed that Townsend also applies to the immigration guidelines. In *United States v. Guerrero*, __F.3d__, 2018 WL 6441111 (2d Cir. 2018), the Court held that the phrase "controlled substance" as used in U.S.S.G. § 2L2.1's "drug trafficking offense" [3] refers exclusively to those substances regulated under federal law. Moreover, the Court held that because Arizona's possession, use, administration, acquisition, sale, manufacture or transportation of narcotic drugs, an indisputably indivisible offense as defined by Arizona Revised Statutes § 13-3408 (A)(7), criminalizes the transportation of two substances—benzylfentanyl and thenylfentanyl—that are not regulated under federal law, it is not a "drug trafficking offense" for guidelines purposes. Be aware that the reasoning of *Townsend* is limited to New York drug offenses that are based on the definition of "controlled substance," which includes substances like HCG that are not regulated under the federal CSA. It is not yet clear whether *Townsend* can be applied to New York drug offenses that are based on the definition of "narcotic drug," like New York Criminal Possession of a Controlled Substance in the Third Degree, in violation of N.Y. Penal Law § 220.16(1). This is because the term "narcotic drug" is more narrowly defined than the term "controlled substance." *Compare* N.Y. Penal Law § 220.00(5) (which defines "controlled substance" to include "any substance listed in schedule I, II, III, IV or V of section thirty-three hundred six of the public health law other than marihuana") *and* N.Y. Penal Law § 220.00(7) (which defines "narcotic drug" to include only a "controlled substance listed in schedule 1(b), 1(c), II(b) or II(c) other than methadone").

Winstead and Inchoate Drug Offenses

Another potential avenue of attack concerns the reliance on inchoate drug offenses, including attempts and conspiracies involving otherwise qualifying convictions. The text of Sentencing Guidelines defines the term "controlled substance offense" to include only completed offenses. U.S.S.G. § 4B1.2(b).

However, Application Note 1 to U.S.S.G. § 4B1.2(b) purports to extend the definition of "controlled substance offense" beyond the meaning specified within the Guideline itself. *Id.*, Application Note 1. This note states that the definition of "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id*.

The Supreme Court held that commentary issued by the Sentencing Commission is valid and authoritative unless it is inconsistent with the guideline it accompanies and does not violate the Constitution or a federal statute. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

(Continued on page 16)

[3] Although the *Guerrero* Court considered the 2014 version of U.S.S.G. § 2L2.1, both the current and 2014 version at issue in *Guerrero* use an identical definition of "drug trafficking offense," which is material indistinguishable from the term "controlled substance offense" as defined in U.S.S.G. § 4B1.2.

The Amy, Vicky, and Andy Child Pornography Victim Act

Summary adopted from Aamra Adams

On December 7, 2018 the President signed into law The Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Public Law No: 115-299. The Act is the legislative response to the Supreme Court's decision in *Paroline v. United States*, 572 U.S. 434, 458 (2014), where the Court found that in the "special context, where it can be shown both that a defendant possessed a victim's images and that a victim has outstanding losses caused by the continuing traffic in those images but where it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry," restitution should be ordered "in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses."

Of immediate significance to defendants in child pornography cases, the new law:

- imposes a mandatory minimum restitution amount of $3,000 on defendants convicted of a "trafficking in child pornography" offense where an identified victim has losses but has yet to be made whole;
- piles on a new mandatory "assessment" for child pornography offenses, with monetary caps that vary by offense;
- directs courts how to calculate restitution in "trafficking in child pornography" cases; and
- authorizes the court to demand an accounting from the victim of restitution paid by other defendants.

The law was enacted on December 7th. Consistent with the Ex Post Facto Clause, it states that defendants who have been convicted and are awaiting sentencing shall be subject to the statutory scheme that was in effect at the time the offenses were committed.

Eighth Amendment Concerns

Both the mandatory minimum restitution and the new mandatory assessment (with no minimum and capped depending on offense) may constitute a violation of the Eighth Amendment's excessive fines clause in a particular case.

In *Paroline*, the Supreme Court said that restitution is like a fine for constitutional purposes. The new assessment is likewise like a fine, especially in combination with the mandatory minimum restitution. The Court in *Paroline*, at 455-456, said:

> The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking contribution. That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment. To be sure, this Court has said that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). But while restitution under § 2259 is paid to a victim, it is imposed by the Government "at the culmination of a criminal proceeding and requires conviction of an underlying" crime, *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Thus, despite the differences between restitution and a traditional fine, restitution still implicates "the prosecutorial powers of government," *Browning–Ferris, supra*, at 275, 109 S.Ct. 2909. The primary goal of restitution is remedial or compensatory, *cf. Bajakajian, supra*, at 329, 118 S.Ct. 2028, but it also serves punitive purposes, *see Pasquantino v. United States*, 544 U.S. 349, 365, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005) ("The purpose of awarding restitution" under 18 U.S.C. § 3663A "is ... to mete out appropriate criminal punishment"); *Kelly*, 479 U.S., at 49, n. 10, 107 S.Ct. 353. That may be "sufficient to bring [it] within the purview of the Excessive Fines Clause," *Bajakajian, supra*, at 329, n. 4, 118 S.Ct. 2028. And there is a real question whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances. These concerns offer further reason not to interpret the statute the way the victim suggests.

The solution in *Paroline* – to limit restitution based on the individual defendant's limited role in the larger causal process – was crafted to avoid the Eighth Amendment concern that this legislative fix may have created in a particular case, depending on the defend

(Continued on page 5)

ant's role in the larger, ongoing offense.

Calculating Restitution

Pre-existing law already imposes mandatory restitution for any offense under chapter 110 of title 18, but the new law takes the additional step of setting a mandatory minimum restitution amount of $3,000 for offenses that fall in the category of "trafficking in child pornography." Under the new law, those are convictions for violating "section 2251(d), 2252, 2252A(a)(1) through (5), 2252A(g) (in cases in which the series of felony violations exclusively involves violations of section 2251(d), 2252, 2252A(a)(1) through (5), or 2260(b)), or 2260(b)."

Defense counsel should take the position that the mandatory $3,000 restitution is imposed per case/ defendant, not per victim. Also, the $3,000 minimum should apply only in cases where a victim has come forward and obtained a restitution order from the court, and even then only if that victim has not already been made whole from prior restitution payments (including the one-time payment ftom the Child Victims Reserve Fund).

In response to the Supreme Court's decision in *Paroline*, the new law instructs courts how to calculate a restitution order for defendants convicted of trafficking in child pornography. The court is to begin by determining "the full amount of the victim's losses that were incurred or reasonably projected to be incurred by the victim as a result of the trafficking in child pornography depicting the victim." Next, the court shall set a restitution amount that "reflects the defendant's relative role in the causal process that underlies the victim's losses, but which is no less than $3,000."

The "full amount of the victim's losses" includes "any costs incurred, or that are reasonably projected to be incurred in the future . . . as a proximate result of the offenses involving the victim." That includes losses that are a "proximate result of all trafficking in child pornography offenses involving the same victim." The new law lists the kind of losses that are relevant to the restitution calculation, just as the pre-existing law did. The victim is not limited by that list and may seek other losses. There is nothing new on the list (the only changes – that attorneys' fees must be reasonable and that any other losses must be relevant and incurred by the victim – are italicized here): (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) reasonable attorneys' fees, as well as other costs incurred; and (F) any other relevant losses incurred by the victim.

The court "may require" the victim to account for restitution paid in other cases for the same losses. Defense counsel should move the sentencing court to order the victim to give an accounting of restitution received thus far in all federal and state cases, and to provide ongoing updates on any future restitution payments made to the victim. Otherwise, "each possessor of her images [would be] liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue" for setting a limit, an approach "so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment." *Paroline*, 572 U.S. at 455.

The defendant's obligation to pay restitution is terminated once the victim receives restitution in full "as measured by the greatest amount of such losses found in any case involving that victim that has resulted in a final restitution order under this section." Defense counsel should move the sentencing court to order the victim to provide and document final restitution orders entered by other courts.

A victim in a child pornography case can choose to receive defined monetary assistance from the Child Pornography Victims Reserve. If the victim opts for defined monetary assistance, s/he will receive a one-time payment of $35,000 (indexed for inflation). Courts shall deduct the defined monetary assistance payment when calculating the victim's losses for purposes of restitution. A victim who decides to receive defined monetary assistance is not barred from receiving restitution for any other offenses. Victims are ineligible to receive defined monetary assistance if they have already collected restitution in an amount that exceeds the amount of defined monetary assistance. Attorney's fees for the victim's lawyer are capped at 15% of the defined monetary assistance payment, and exceeding that cap is a violation of law punishable by a fine and up to one year of incarceration.

New Assessments

The law requires a mandatory assessment, subject to caps, to be imposed in the following child pornography offenses:

- Cap of $17,000 for an offense under 18 USC sections 2552(a)(4) and 2252A(a)(5);
- Cap of $35,000 for any other "trafficking in child pornography" offense, defined by the new law as violations of section 2251(d), 2252, 2252A (a)(1) through (5), 2252A(g)(in cases in

(Continued on page 16)

The First Step Act (S. 756):
The Proactive & Retroactive Advantages for Past & Present Clients

The First Step Act closed 2018 with some potential gifts for our current and former clients. The following is a synopsis of some of the provisions to provide a starting point for addressing the needs of current and former clients.

The major components of the act for criminal defenders implicate four areas for clients. First, the Act includes sentencing reforms that reduce mandatory minimums for some recidivist drug offenders, restrict the qualifying offenses, increase eligibility for safety valve, clarify the use of convictions under §924(c), and retroactively apply parts of the Fair Sentencing Act of 2010. Second, the Act creates an additional method for earning credit towards earlier release to a half-way houses or alternatives, and revises the calculation of the credits towards release. Third, the Act gives clients the ability to apply themselves for compassionate release and lowers the age and time served requirements for consideration. Last, the Act encourages placement of clients in federal facilities near family and encourages home confinement for low risk offenders.

A large component of the Act also addresses recidivist reduction programming, new inmate assessments, incentives for participation and new reporting requirements for the Bureau of Prisons and Department of Justice.

I. *Clients with Cases Pending*

21 U.S.C. §841(b) & 960 (b)(1)

The Act reduces mandatory minimums under 841(b)(1)(A) and 960(b)(1) for one prior drug offense, now called a "serious drug felony," from 20 to 15 years. The man. min. under 841(b)(1)(A) for two "serious drug felonies" is reduced from life to 25 years.

The Act also adds new penalties to 841(b)(1)(A) and 960(b)(1). The same man. min. applies for one prior "serious violent felony" and for two or in combination with a serious drug felony. The Act further adds "serious violent felony" to 841(b)(1)(B) and 960(b)(2), as an additional trigger for the untouched mandatory minimum of 10 years.

"Serious drug felony" is defined as an offense described in §924(e)(2) with service of a prison term of more than 12 months and the release from imprisonment having occurred within 15 years of the commencement of the offense.

"Serious violent felony" is an offense partly from §3559(c)(2)(F) or any assault that would be a felony violation of 18 U.S.C. § 113 if committed in the special maritime and territorial jurisdiction and the term of imprisonment served was more than 12 months with no staleness limit.

18 U.S.C. §3559(c)(2) defines "serious violent felony" as enumerated offenses (a list of specific offenses) including inchoate offenses, and any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. This is just like §16(a), *except limited to force against the person*, and §16(b), *except limited to risk of force against the person*.

Caution should be taken in relation to the "new" definition of "serious violent felony" as it needs to be read within the context of the statute. Some of the enumerated offenses listed in §3559(c)(2)(F)(i) are defined in (c)(2)(A)-(E). Some may disqualify the enumerated prior offense because of the narrowness of the definition. There are also some limitations on offenses listed in (c)(2) in (c)(3) and (c)(6), which must apply here because they apply to (c)(2). For example under §3559(c)(3), robbery and arson are "nonqualifying felonies" under certain circumstances.

Other restrictions apply to the use of offenses committed on tribal lands and adjudicated according to the Indian tribal government unless the tribal government approves its application.

Current Representation Considerations

The amendments are not retroactive but do apply to sentencing occurring after the date of enactment December 21, 2018. It would violate the Ex Post Facto clause to enhance a sentence for an offense committed before enactment based on a prior "serious violent felony." Review the prior convictions to determine whether they currently meet the definition of "serious drug felony "or "serious violent felony." Contact the U.S. Attorney and Probation to be sure they are also aware.

If an §851 Information is filed, contest it. The ability to

(Continued on page 7)

contest the allegations related to the prior conviction is available up to the imposition of sentence. 21 U.S.C. §851(b). Further, the court must inquire of the defendant, after conviction but prior to pronouncing sentence whether he affirms or denies the allegations in the information. Id. The fact that the court has not yet inquired

does not preclude a challenge. Denial or contesting the information in a written response to the court requires a hearing and determination of what would preclude the increased punishment. 21 U.S.C. §851(c). The government can appeal a negative ruling postponing sentence. A defendant can appeal the order of postponement as if it were a final judgment post-sentence. 21 U.S.C. §851 (d)(2).

Safety Valve

The Act broadens the qualifications for safety valve eligibility. Under 18 U.S.C. § 3553(f) a client is safety valve eligible with up to 4 criminal history points excluding points from 1 point offenses, if no prior 3 point offense or no prior 2 point offense for certain violent offenses. A "violent offense" as used in §3553(f) is a "crime of violence" as defined by 18 U.S.C. §16 punishable by imprisonment. Qualifying 2-point offenses also must meet the rest of the criteria in 18 U.S.C. § 3553(f)(2)-(5); U.S.S.G. §5C1.2(a).

The Act limits the application of this provision to convictions entered on or after the date of enactment. (Issues may be developing around this limitation and updates will be provided)

Current Representation Considerations

Ask for 2 levels off the guidelines under U.S.S.G. § 2D1.1(b)(18). Section 2D1.1(b)(18) provides that if safety valve criteria are met a decrease of 2 levels is in order. Although U.S.S.G. § 5C1.2 has not been amended a request for 2 level decrease as a variance is supported by reading the guidelines consistent with Congressional intent in the First Step Act, and in anticipation of new amendments reflecting the new safety valve,.

Also recall § 16(b) is void for vagueness. Sessions v. Dimaya, 138 S.Ct. 1204 (2018).

18 U.S.C. § 924(c)(1)(C)

The Act restricts the practice of stacking gun charges against drug offenders. The sentencing enhancements for two violations of 924(c) only apply after the first conviction has become final.

II. *Previously Sentenced Clients*

Retroactive Application of the Fair Sentencing Act of 2010

The Act effectively made the Fair Sentencing Act (FSA) of 2010 retroactive. In 2010 the FSA reduced the statutory penalties for crack offenses to produce an approximate 18-to-1 crack-to-powder drug quantity ratio. The FSA also eliminated the mandatory minimum sentence for simple possession (18 U.S.C. §844 (a)) of crack while increasing the amounts required to qualify for the 5 and 10 year minimums. This provision expands the guideline reduction to "covered offenses" committed prior to the FSA's enactment on August 3, 2010.

A "covered offense" is an offense in violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the FSA. Section 2 increased the quantity of crack to 280 grams under 21 USC 841(b)(1)(A)(iii) and 960(b)(1)(C), and to 28 grams under 21 U.S.C. § 841(b)(1)(B)(iii) and 960(b)(2)(C). Section 3 eliminated the mandatory minimum for simple possession under 21 U.S.C. § 844(a).

Questions about Representation and Relief:

Numerous inquiries are being made about the implication of this part of the First Step Act. No motion should be made until a full assessment is done of the potential qualifying sentence. Advise former clients to contact our office or forward their names to us if they are asking for help or you think you have a prior case that may qualify.

Subsection (b) of the First Step Act provides its own procedure for seeking relief. There are some limitations on that relief and once a motion is denied a second shot may not be allowed. A court is not "required" to reduce the sentence.

A General Order has issued from the District Court appointing the Federal Defender Officer to indigent defendants to determine whether they qualify for relief.

Potential Eligibility

1). Sentences driven by crack whose mandatory minimum are reduced, career offenders whose statutory maximum is reduced, those who have already served more than the reduced statutory maximum, maybe those sentenced as career offenders who are not career offenders under current guidelines or other current law, and possibly those sentenced under 21 U.S.C. §848 (CCE) based upon drug amounts. There may be

(Continued on page 8)

additions as we further assess the retroactive implications.

2) The Federal Defender Office is working to identify defendants who may qualify.

If you have been contacted by former clients or think you have a former client who may qualify please forward the name to molly_corbett@fd.org

III. Current and Previous Clients

Recidivism Reduction Programs & Participation Incentives

Along with sentence reduction, reducing recidivism is a main component the First Step Act, creating a new "Risk and Needs Assessment System," individualizing correctional programs for each inmate and incentivizing participation. Part of the system expands recidivism reduction programs and activities with demonstrated results while seeking new ones.

To encourage continued participation and completion of the recidivism reduction programs and productive activities inmates earn rewards. One of the bigger incentives is earned "time credits" to contribute to an earlier eligibility for transfer to a half-way house or other post-prison custodial alternatives. Inmates considered by the BOP to have a low or minimum risk of reoffending can earn 15 days of credits for each 30 days of programming completed; medium- and high-risk individuals can earn 10 days of credits for each 30 days of programming completed.

Risk classifications are not permanent. An inmate will be regularly assessed and completion of programs and activities will contribute to decreasing risk levels. This timeline may change for good time credit because sentencing advocates believe that the delay in reassessing good time credits was not intended by the proponents of the legislation.

Time credits can be applied toward eligibility for pre-release custody or supervised release making qualifying prisoners eligible for release to non-incarceration custody earlier. An eligible inmate who earned 15 days credit may serve 15 days of his sentence in home detention or halfway house rather than in prison.

Certain convictions render a prisoner ineligible for the time credits. A review of the complete list is necessary (sec. 101 or 18 U.S.C. §3632(d)(4)(D)). It is too long to include here. Prisoners with immigration detainers can earn time credits but cannot have them applied for release consideration.
Other incentives toward completion of the programs and activities include additional visitation time, greater phone access, video visits, placement in a facility closer to family (if available), increased commissary spending limits and product offerings and other incentives determined appropriate by the Director. Inmates who are ineligible for time credits may still be eligible for these rewards.

Amendment of Good Time Credit and Calculations

The Act also addresses the calculation of good time credit. The Act substitutes 54 days of good time for the BOP's previously interpreted 47 days for each year of imprisonment that was imposed. For example under the First Step Act, an inmate will earn 540 days or 15% percent off for good time on a 10- year sentence. The time at which the good time credits begin to accrue is sooner and is pro-rated against the sentence at an earlier time. While the good time calculations will be retroactive questions remain as to how prior loss of good time will be calculated. Good time credit still does not apply to life sentences.

Current & Former Client Considerations

Current clients may inquire about eligibility for earning time credits, potential for earlier release to imprisonment alternatives and the other incentives. Be aware of the disqualifying conduct and offenses in 18 U.S.C. §3632(d)(4)(D) (sec. 101 of the First Step Act) when informing clients about their sentence. Disqualification also may provide grounds for variance under 18 U.S.C. §3553(a)(3) as it creates a very different and more onerous incarceration of the "kinds of sentence available."

Former clients may inquire about the new good time credit determination, earning rewards and time credits or earlier release opportunities. The amendments and additions outlined above found in Sections 101 and 102 of the First Step Act will be phased-in over the next two years or more.

The new Risk and Needs Assessment System must be completed and released by the Attorney General 210 days from the enactment date, or by July 19, 2019. The Bureau of Prisons then has 180 days, or until January 16, 2020 to complete the individual risk and needs assessment for each prisoner, including those imprisoned

(Continued on page 17)

Preservation Matters:

Recent Second Circuit Opinions & Supreme Court Review

By: *Molly Corbett, Esq.*

Two petitions of certiorari pending before the Supreme Court originate from the Second Circuit and a grant of certiorari in a Fifth Circuit case may impact Second Circuit precedent. Preserving the issues presented may afford similarly situated clients some relief if the court agrees with the defense arguments. Even though decided against the defendants in the Second Circuit, the challenged decisions may be vacated at a later date providing the potential for relief if preserved and/or if the case is pending on direct appeal when the opinion issues.

Pending Petitions for Certiorari

- ***United States v. Barrett***, No. 18-6985

Question Presented:
Whether the residual clause at 18 U.S.C. § 924(c)(3)(B) is void for vagueness, a question that evenly divides six Courts of Appeals.

Opinion Below 903 F.3d 166 (2d Cir. 2018) Holding: 1) Hobbs Act robbery categorically constituted predicate "crime of violence" under statute penalizing use of firearm during and in relation to crime of violence; 2) Hobbs Act robbery conspiracy categorically constituted crime of violence under statute penalizing use of firearm during and in relation to crime of violence; and 3) definition of "crime of violence" in statute penalizing use of firearm during and in relation to crime of violence was not unconstitutional.

The Supreme Court recently granted certiorari for the United States in *United States v. Davis,* No. 18-431 (*certiorari granted* Jan. 4, 2019). The United States appealed the Fifth Circuit decision finding § 924 (c)(3)(B) vague after applying *Dimaya* . The Court will address: "Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague." A decision may resolve the Circuit conflict and agree that the statute is vague vacating or effectively overruling the Second Circuit opinion in *Barrett*.

- ***Pereira-Gomez v. United States***, No. 18-6972

Question Presented:
Whether the New York State offense of robbery is a "crime of violence," that is, an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 2L1.2, appl. note 1(B)(iii) (Nov. 1, 2014). This question has divided the Second Circuit, in this case, and the Sixth Circuit, in Perez v. United States, 885 F.3d 984 (6th Cir. 2018), from the First Circuit, in United States v. Steed, 879 F.3d 440 (1st Cir. 2018).

This issue is also presently before this Court in *Stokeling v. United States* , No. 17-5554 (argued 10/ 9/18) in the context of the application of the identical "elements" clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), to Florida robbery. Florida robbery has been held to require the same degree of force as New York robbery. See *People v. Sailor*, 480 N.E.2d 701, 710-11 (N.Y. 1985).

Opinion below 903 F.3d 155 (2d Cir. 2018) (prior New York conviction for attempted robbery was a crime of violence under the Guideline's force clause)

Practitioners Toolbox: Tracking pending Supreme Court petitions, arguments and opinions.

The website SCOTUSblog is a wealth of information related to the cases pending at the Supreme Court. In addition to tracking cases from docketing to decision, the site provides commentary on cases, petitions to watch and other Supreme Court related news. The website is available at: www.scotusblog.com/

Summary of 2018 Amendments to the Sentencing Guidelines

Abridged Summary by Laura Mate, Sentencing Resource Counsel Project

I. Controlled Substances

- **Synthetic Cathinones** (Flakka, Khat, Bath Salts, etc.) **and Synthetic Cannabinoids** (Spice, K-2, Synthetic Marijuana etc.)

The Commission adopted a class-based approach to synthetic cathinones and synthetic cannabinoids setting the minimum base offense levels at 12 with different "converted drug weight[s]". A "synthetic cannabinoid" is defined as "any synthetic substance (other than synthetic tetrahydrocannabinoil) that binds to and activates type 1 cannabinoid receptors (CB1 receptors)." The Commission provided two important departure provisions for synthetic cathinones and cannabinoids based on potency. The departure recognizes "there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class." The application note invites a downward departure where a "substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class."

- **Fentanyl and Fentanyl Analogues**

The Commission treated fentanyl analogues more harshly than fentanyl under the marijuana equivalency (converted drug weight) despite its recognition that fentanyl analogues are generally of similar potency to fentanyl. A "fentanyl analogue" is defined to include "any substance (including any salt, isomer, or salt of isomer thereof), whether a controlled substance or not, that has a chemical structure that is similar to fentanyl (N-phenyl-N-[1-(2-phenylethyl)- 4-piperidnyl] propanamide)." The Commission also added a specific offense characteristic to §2D1.1, providing a four-level enhancement "[i]f the defendant *knowingly* misrepresented *knowingly* marketed as another substance any mixture or substance containing fentanyl . . . or a fentanyl analogue." (emphasis added.)

Practice tips for Synthetic Drugs:

For challenges to these new guidelines, including why the new ratios are wrong, the class definitions are inappropriate, and more, please see Defender comments on the proposed amendments on the Sentencing Commission website..

Whether a substance meets the definition of the synthetic is going to be the first line of inquiry. Is it close enough in chemical composition and affect to qualify? Also note that even with the new class-based approach, there is room to litigate that the specific synthetic drug at issue in a particular case should be punished less severely than others in the class. Remember the invited departure provisions for synthetic cathinones and cannabinoids list specific substances that can be used as comparisons. And for fentanyl analogues, pointing to the departure provisions for synthetic cathinones and cannabinoids may help support a variance based on potency or concentration of the fentanyl analogue as compared to the weight of the mixture with other substances. Finally, when applying the new specific offense characteristic for fentanyl, it is important to note its application is limited to situations in which the *defendant*, and not someone else involved in the offense, *knowingly* misrepresented or marketed fentanyl or fentanyl analogues.

II. Illegal Reentry (§ 2L1.2)

The Commission made two changes to §2L1.2 for defendants who (A) engaged in criminal conduct before the first order of deportation/removal but are not convicted until after, and (B) are revoked after a first order of deportation/removal.

- **Engaged in Criminal Conduct Before First Order of Deportation/Removal, But Convicted After**

The Commission amended §2L1.2(b)(2) to assign points when, before the defendant was ordered deported/removed for the first time, the defendant "engaged in criminal conduct that, at any time, resulted in" certain convictions set forth in §2L1.2(b)(2)(A)-(E). Previously, if a defendant engaged in the criminal conduct before

(Continued on page 11)

the first order of deportation/removal, but was not convicted until after that order, no points were assigned under §2L1.2 for that prior conviction.

- **Revoked After a First Order of Deportation**

The Commission further amended the definition of "sentence imposed" in the Commentary (rejecting prior decision of the 5th and 9th Circuits) to provide that the "length of the sentence imposed "includes any term of imprisonment given upon revocation of probation, parole, or supervised release, regardless of when the revocation occurred."

Practice tip: To help with variance arguments in cases where revocations affect the length of sentence imposed, please see Defender comments on why revocations should not count.

III. Acceptance of Responsibility (§ 3E1.1)

The Commission added clarifying language to the acceptance of responsibility Commentary advising that unsuccessful challenges to relevant conduct should *not* bar application of the acceptance reduction. Application Note 1(A) now reads: "A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, *but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous*." The amendement is an attempt to cure the "chilling effect" on defendants who may opt against making objections for fear of jeopardizing their eligibility for a reduction for acceptance of responsibility. *Practice tip:* This amendment may be of particular use to those in circuits fighting against bad precedent that equated "frivolously contest" or "falsely deny" with any unsuccessful challenge to relevant conduct. In fighting against that precedent, it may be helpful to cite the new language in conjunction with the Commission's explanation in the synopsis regarding the concerns that precipitated the amendment. In addition, the Commission characterizes this as a clarifying amendment, which may help arguments that it satisfies the various circuit standards to qualify as a "clarifying amendment," allowing it to be applied retroactively to those defendants still on direct appeal.

IV. Alternatives to Incarceration (§ 5C1.1)

The 2018 amendment adds new Commentary directing that courts "should consider imposing a sentence other than" imprisonment for nonviolent first offenders falling in Zones A and B. The Commission defines a "nonviolent first offender" as a defendant with "no prior convictions or other comparable judicial dispositions of any kind," and "who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction."
The Commission also amended the Commentary in §5F1.2 to provide that home detention need not include electronic monitoring.

Practice tip: The "nonviolent" requirement is tied to the defendant's actions, not the offense more generally, meaning defendants are not to be excluded on the basis of conduct by others, such as possession of a gun by a different participant in the offense. The Defender comments to the Commission may also help convince courts that alternatives to incarceration should be given in more cases and that juvenile adjudications should not preclude a person from getting a probationary sentence.

V. Tribal Issues

It is still the rule that tribal convictions do not count toward criminal history points. The Commission amended the Commentary in §4A1.3 to provide a non- exhaustive list of factors a court may consider in determining whether and to what extent to depart upward based on tribal court convictions. A definition was added to the Commentary in §1B1.1 for the term "'court protection order' to mean 'protection order' as defined by

(Continued on page 12)

2018 Amendments *continued from pg. 11*

18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b)."

VI. Social Security Fraud

The Commission added the 20th specific offense characteristic to §2B1.1. It provides a 4-level enhancement, and a floor of 12 for defendants convicted of certain forms of social security fraud. It also amends the Commentary to provide that if this new enhancement applies, the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does *not* apply. This is a narrow amendment, and will affect only those defendants who were both: convicted under 42 U.S.C. § 408(a), § 1011(a) or § 1383a(a); and (B) fall into the subset of defendants for whom the statutory minimum of ten years' imprisonment applies.

VII. Use of a Computer Enhancement (§ 2G1.3)

The amendment clarifies that Application Note 4 to §2G1.3 applies only to subsection (b)(3)(A) of the guideline. It addresses an application issue in which some courts determined the note was inconsistent with solicitation offenses. The two-level enhancement may apply whether using a computer to communicate directly with a minor or guardian or when used to solicit a third party.

SECOND CHAIR MENTOR PROGRAM

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. The *Second Chair Mentor Program* is designed to provide a foundation and additional training for a CJA panel applicant who requires more experience in handling federal criminal matters but is otherwise qualified to practice in federal court.

Second Chair Program Requirements

Applicants recommended for this program must complete the following within six months:

1) **Attendance, at minimum, at one CLE program hosted by the Federal Public Defender's Office of the NDNY or a National Conference.**

2) **Attendance at the following federal criminal court proceedings:**

   a. Two Initial Appearances
   b. Two Detention Hearings:
   c. One Pre-Trial Motion Hearing:
   d. One Jury Trial:
   e. Two Change of Pleas:
   f. Two Sentencing Hearings:
   g. Two Supervised Release Hearings:

3) **One half-day session with the Federal Public Defender for the NDNY. An applicant will be expected to demonstrate a working knowledge of the Federal Sentencing Guidelines and the Bail Reform 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.

Second Circuit Highlights

By: *Molly Corbett, Esq.*

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

Since the last newsletter the Circuit vacated convictions, required a suppression hearing in an immigration proceeding and invalidated a waiver of appeal. The following decisions address: hearsay, discovery, impeachment, appeal waivers, law enforcement conduct and the right to a suppression hearing.

Inadmissible Background Testimony

A panel of the Second Circuit reversed a decision from the Northern District in ***United States v. Demott*, 906 F.3d 231 (2d Cir. 2018).** The opinion has three holdings. The first two holdings address the constitutionality of the statute and the sufficiency of proof and jury instructions related to a drug prosecution involving analogue substances. The court found the erroneous instruction effectively deprived the defendants of a defense that they were ignorant as to the illegality of the substance and the mistake required a new trial.

The third holding would have reversed defendant Gambuzza's conviction because the district court erroneously admitted impermissible hearsay evidence as "background testimony." *Demott*, at 248-29. A detective testifying about how he became involved in the criminal investigation included reports from an informant about a new type of "Molly" in the market naming particular distributors, including Gambuzza, and other members of their organizations. *Demott* at 247. The source also advised of a planned robbery during a drug deal involving a kilo of cocaine. Id. The detective further explained how he corroborates his informants to insure reliability and credibility. He testified he used this informant, implying his report had been reliable. Id.

The Circuit found, and the government conceded, that the testimony relaying the statements of the informant was hearsay and not permissible background testimony. Id. Reiterating its cautionary approach from *United States v. Reyes*, 18 F.3d 65 (2d Cir. 1994) the court advised that while hearsay may be used to explain relevant background information, its probative value for its non-hearsay purpose must be outweighed by the danger of unfair prejudice from the impermissible hearsay use. In the present case, the value of explaining the detective's role in the investigation was "practically nil" while the prejudice from the jury's consideration of the content of the informant's tips was "substantial and obvious."

Keep an ear on the testifying agent to be ready for the irrelevant and prejudicial inclusion of hearsay that has little to do with providing a general background of the investigation or the agent's role.

Misleading Description of the Circumstances of a Defendant's Statement

In ***United States v. Vinas*, 2018 WL 6381164 (2d Cir. Dec. 6, 2018)** a panel vacated a conviction and remanded for a new trial based on the government's Rule 16 discovery violation. The government's notice advised that Vinas, a drug courier, had made a self-incriminating statement during the "initial inspection" of his luggage at an airport. The government's opening statement described the statement of the defendant as being given in a private search room, alerting the defense to the inaccurate disclosure and objections were made. Vinas had made the statement without *Miranda* warnings after four, armed, CBP officers took his passport and escorted him to a private search room, arguably a custodial setting. Counsel objected that the misleading disclosure caused him to forgo a suppression motion. The statement tended to prove knowledge while the defendant was arguing in defense that he had no knowledge of the drugs.

The Circuit reversed the district court's determination that the disclosure technically complied with Rule 16 because nothing was concealed or withheld. *Vinas* at *4 -5. The panel rejected the government's attempt to infuse the statement with accuracy by defining the events as one continual initial inspection, finding the disclosure misleading and a violation of Rule 16(a)(1)(A) discovery obligations. Id. at *6.

The Court found the error in the lower court's reliance upon Vinas' ability to provide the correct information. Id. at *7. The Circuit also found that Vinas had been substantially prejudiced by the lack of disclosure. The district court misapplied the standard when it found a lack of prejudice because it could not be said "with any fair degree of probability" that the statement would have been suppressed. Id. The defendant only had to demonstrate that the suppression motion sought "would not have been frivolous." The court further rejected the government attempt to litigate the suppression issue on appeal, advising an evidentiary hearing would determine the factual circumstances. Id.

The case gives hope to the diligent practitioner who gets blindsided at trial by undisclosed facts that would have

(Continued on page 14)

supported a suppression motion or even impacted a previous denial. Be prepared to argue that a viable suppression issue remains or is possibly subject to reconsideration.

Limitation on Impeachment Results in Deprivation of a Defense

The Circuit vacated another conviction in November because the district court abused its discretion by depriving a defendant "of the opportunity to defend himself against the evidence introduced at trial." ***United State v. Stewart*, 907 F.3d 677, 686 n.3 (2d Cir. 2018).**

In *Stewart,* an insider trading prosecution, the defendant, Sean Stewart, did not deny providing material, nonpublic information to his father, Robert Stewart. Instead, Sean denied knowing that his father would trade on the information. The key question for the jury was whether to believe Sean's denial. The government's case focused on a statement coined the "silver platter statement," made by the father during a recorded phone conversation with a cooperator in which Robert related, in sum and substance, that Sean told his father that he was handing him information on a "silver platter" and expecting his father to make millions. In response to the statement, the defense moved to admit excerpts from a post-arrest interview of his father as prior inconsistent statements under FRE 806. The district court denied the request because in the interview statements never specifically denied Sean made the statement and thus the two statements were not inconsistent.

The Circuit found the defendant should have been allowed to impeach the silver platter statement. The Court advised that a hearsay declarant's statement may be impeached by prior inconsistent statements because the declarant is in effect a witness and therefore his credibility is subject to impeachment as though he had in fact testified. *Stewart*, 907 F.3d at 687. The Court also noted that the prior statement "need not be diametrically opposed to be inconsistent." Citing to the Fifth Circuit, the Court explained that a statement could fall on a spectrum of inconsistency "ranging from a flat denial, to an admitted excuse, to a slant, to a disputed explanation, or to a convincing explanation"; and still be inconsistent. Id. (quoting *United States v. Meza*, 701 F.3d 411, 426 (5th Cir. 2012)).

Applying one of two tests to determine inconsistency, the panel assessed whether there was "any variance between" the impeachment material and the hearsay statement "that ha[d] a reasonable bearing on credibility." The panel found for purposes of Rule 806, it was enough that excerpts from the FBI interview varied from Robert's earlier recitation of the silver platter statement in a manner casting a different meaning on his discussions with Sean. *Stewart* at 687-688. "[I]f either, 'the fact of the inconsistency gives the jury an insight into the witness's state of mind [or] the inconsistency shows that the witness is either uncertain or untruthful,'… 'the inconsistency calls into question the witness's believability.' " Id. (quoting Robert P. Mosteller, et al., 1 McCormick on Evidence § 34 (7th ed.)).

The panel went on to find the exclusion of the statements was not harmless because of the high probability the evidentiary error affected the verdict after assessing the importance of improperly excluded evidence based on:

> (1) the importance of the unrebutted assertions to the government's case; (2) whether the excluded material was cumulative; (3) the presence or absence of evidence corroborating or contradicting the government's case on the factual questions at issue; (4) the extent to which the defendant was otherwise permitted to advance the defense; and (5) the overall strength of the prosecution's case.

Stewart at 688 (quoting *United States v. Oluwanisola*, 605 F.3d 124, 134 (2d Cir. 2010). The jury's decision on the crucial question of Sean's intent may have been influenced by a doubt as to whether Sean had truly said that he served up information on a silver platter or that he could not believe Robert had not traded on it. Robert's post-arrest statements did not repeat those critical details, the absence of which might have supported inferences that Sean did not know, expect, or intend that his father would invest based upon their discussions. If the silver platter statement is "damning proof" that Sean "acted with deliberate intent that his father trade on material nonpublic information," as argued by the government, S.D.N.Y Dkt. No. 101 at 20, then it hardly seems unlikely that Robert's alternative versions of the same conversation between himself and Sean might have influenced the jury's deliberations. Although Robert never expressly denied the silver platter statement, his post-arrest recollections offer a potentially different interpretation that could,at minimum, have tempered the statement's "devastating" effect.

This case, notable for the examination of the meaning of inconsistency and the error analysis also is of interest for the pre-trial motion practice that eventually lead to the father claiming his Fifth Amendment right.

(Continued on page 15)

Suppression After Execution of an Arrest Warrant

Two illegal aliens challenged a search and questioning during removal proceedings. In ***Zuniga-Perez v. Sessions*, 897 F.3d 114 (2d Cir. 2018)** the Circuit held that because petitioners made a sufficient showing of an egregious constitutional violation, they were entitled to a suppression hearing.

The petitioners shared a rented room in a house in Galen, New York when New York State Police, accompanied by two U.S. Customs and Border Patrol Officers, attempted to execute a felony search warrant. The officer shined their lights into the window of their room shouting for them to open the door and window. The petitioners did not give them access but another resident let them into the house after feeling he had no choice. The Form 213s indicated that the troopers were executing a felony search warrant at the house, indicating the search was based on information they received that a possible fugitive from justice was residing there along with known Hispanic migrants.

The petitioners' affidavits stated they remained in their room when the police entered the house, were rounded up with everyone in the house and taken to the living room where they were asked if they knew the fugitive. Petitioners stated that they "knew him but that he was not there," though he used to live in the same room as them. One of the Border Patrol officers then asked if they "had papers to be in the United States." Three of the residents (including petitioners) stated that they were citizens of Mexico and did not possess valid immigration documentation after which they were arrested by the Border Patrol agents for violating § 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA").

The petitioners moved to suppress the two Form I-213s and all evidence from the September 2011 raid and arrests. They argued that the Border Patrol agents had no articulable suspicion to believe that petitioners had violated the law; that the search was conducted without a warrant, consent, or exigent circumstances; that the Border Patrol agents used the access obtained by the police as a pretext to search; and that the search was conducted in violation of agency regulations requiring reasonable suspicion before stopping and seizing individuals. The petitioners also argued that the search was racially motivated because the police conducted the search because they believed there were "known Hispanic migrants" at the residence. The IJ denied the motion because the evidence was not obtained in violation of the U.S. Constitution, or any law or regulation of the United States and was not support by any evidence. The BIA affirmed and found the evidentiary hearing unaddressed by the IJ was unnecessary.

In overturning the BIA, the panel took the unusual step of applying the exclusionary rule to the deportation proceeding because of egregious violations of Fourth Amendment that were fundamentally unfair. In coming to its decision the panel reiterated the Constitution applies to citizens and non-citizens and that due process applies to deportation proceedings. *Zuniga-Perez* at 123. The panel further provided an overview of the law governing entry with a search warrant, entry with an arrest warrant, custodial interrogation and a reminder that a warrant may not be based on race or other improper considerations.

The court conducted two non-exclusive inquiries to aid the determination of whether an "egregious violation" of constitutional rights occurred. First, assessing the validity (or invalidity) of the stop, along with the characteristics and severity of the offending conduct. The second inquiry assesses a seizure that may not be especially severe, but may be "based on race (or some other grossly improper consideration)." *Zuniga-Perez* at 124-25. Egregious abuses transgress notions of fundamental fairness. The panel declared that the petitioners' affidavits had made a sufficient showing of an egregious constitutional violation to warrant an evidentiary hearing and remanded for a suppression hearing.

Appeal Waiver Invalidated Because of Lack of Consideration

In ***United States v. Lutchman*, 2018 WL 6362603 (2d Cir. Dec. 6, 2018),** the Second Circuit held a waiver of appeal contained in a plea agreement was invalid because it was not supported by consideration from the government. Lutchman pled guilty to one count of conspiracy to provide material support to a foreign terrorist organization pursuant to a plea agreement that calculated an advisory guidelines range at the statutory maximum and contained an appeal waiver for any sentence at or below the statutory maximum.

Although "a defendant's right to appeal his sentence may be waived in a plea agreement," the Circuit cautioned that it is not "that these contractual waivers are enforceable on a basis that is unlimited and unexamined." *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996), superseded on other grounds as stated in *United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013). The court reiterated that plea agreements are

(Continued on page 17)

Prior Drug Convictions continued from pg. 3

A reading of commentary that is inconsistent with the guideline section it interprets must be rejected. *United States v. Potes-Castillo*, 638 F.3d 106, 111 (2d Cir. 2011).

A recent D.C. Circuit decision held that an attempted drug offense is not a "controlled substance offense" under the career offender guideline, U.S.S.G. § 4B1.1. *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018). The court held that § 4B1.2(b) presents a very detailed definition of controlled substance offense that clearly excludes inchoate offenses. Neither attempting to distribute drugs nor attempted possession with the intent to distribute drugs is included in the guideline list. The Commission showed within § 4B1.2 itself that it knows how to include attempted offenses when it intends to do so. *See* U.S.S.G. § 4B1.2(a)(1) (defining a "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force . . . ."). *Id*. at 1091.

Though *Winstead* is not controlling, it is a straightforward application of *Stinson* to inchoate drug offenses and the Sixth Circuit agreed with its reasoning in *United States v. Havis*, 907 F.3d 439 (6th Cir. 2018). The Second Circuit has not yet addressed this issue. Therefore, you should make sure to challenge the use of inchoate drug offenses and preserve your argument for possible Circuit review.

Child Pornography Victim Act continued from pg. 5

which the series of felony violations exclusively involves

- violations of section 2251(d), 2252, 2252A(a)(1) through (5), or 2260(b)), or 2260(b);

•Cap of $50,000 for any "child pornography production" offense, defined by the new law as violations of subsections (a) through (c) of section 2251, section 2251A, section 2252A (g) (in cases in which the series of felony violations involves at least 1 of the violations listed in this subsection), section 2260(a), or any offense under chapter

- 109A or chapter 117 that involved the production of child pornography (as such term is defined in section 2256).

The assessment is mandatory ("the court shall assess") and it is "in addition to any other criminal penalty, restitution, or special assessment authorized by law." The caps "shall be adjusted annually in conformity with the Consumer Price Index," presumably by the court. The court must consider the factors listed in 18 U.S.C. § 3553(a) and § 3572 when imposing the assessment. That includes factors such as the defendant's financial resources and the financial burden that would be imposed on the defendant.

The imposition of an assessment "does not relieve a defendant of, or entitle a defendant to reduce the amount of[,] any other penalty by the amount of the assessment." The law lists the order of priorities for disbursing funds obtained from the defendant (first, to any special assessment under 18 U.S.C. § 3010, then toward restitution, then to this new assessment, and so on).

Other changes in the law – access to CP material, definition of "sexually explicit conduct," clerical amendments

The law expands the definition of "sexually explicit conduct" found in section 2256(2) by adding lascivious exhibition of the anus of any person. The definition already included lascivious exhibition of the genitals or pubic area. Additionally, the law makes clerical amendments to 18 USC 3613(c) and 18 U.S.C. § 2252A(a)(2) to conform with changes made by the Act.
The new law also provides victims, including their attorneys and experts, with "reasonable access to any property or material that constitutes child pornography, as defined under section 2256(8), depicting the victim, for inspection, viewing, and examination," within the confines of existing law (e.g., at a government facility or court, etc.). The material "may" – not shall – "be redacted to protect the privacy of third parties," which would allow the victim to gain additional information bout the defendant.

The First Step Act continued from pg. 8

prior to the enactment. The BOP then has two years to phase-in the program.

A "preliminary expansion" provision allows for immediate implementation in prisons that currently have "evidence-based recidivism reduction programs and productive activities." These prisons may offer successful participants the incentives and rewards in subchapter D. Arguably this may allow for some prisoners to accrue the benefits and rewards under the new 18 U.S.C. §3632 (d)(1)-(4) but is up to the prison to implement.

This time line and the possible individual prison initiatives will be updated once further information is received. An earlier release based on credits may not occur until July of this year depending on administrative actions.

Prisoner Re-Entry Initiative & Expansion of Compassionate Release

The Act also expands and eases the application for compassionate release for terminally ill and the elderly as part of a pilot program run by prisons chosen by the Attorney General. The qualifications increase the number of eligible inmates. The BOP must expedite the process for the terminally ill. More importantly the revisions allow for an inmate to apply directly to the sentencing court on their own when the BOP does not respond within 30 days to or the inmate has been denied and exhausted all administrative remedies at the BOP. These provisions are currently in effect but await the Attorney General's designation of facilities as pilot programs.

This article touches on a few of the more significant provisions applicable to many of our clients Other provisions may be relevant to the clients you serve. To fully inform your representation please read the Act in its entirety at: www.congress.gov/115/bills/s756/BILLS-115s756enr.pdf . Updates will be provided via email as they become available. As always please contact the Federal Public Defender Office with specific questions.

Second Circuit Highlights continued from pg. 15

construed according to contract law principles

reminding that, "a guilty plea can be challenged for contractual invalidity, including invalidity based on a lack of consideration." *United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004). Further, the Court advised that "because plea agreements are unique contracts, we temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." *Riggi*, 649 F.3d at 147 (internal quotation marks omitted).

Because Lutchman "received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement" the contract lacked sufficient consideration even where the government agreed not to oppose the two-level reduction under the guidelines for acceptance of responsibility and to move for the one-level reduction under U.S.S.G. 3E1.1(b) for Lutchman's timely notification of his intention to plead guilty did not constitute consideration for the appeal waiver because the combined three-level reduction was available outside the contract.

This case serves as a reminder to seriously scrutinize the benefit of the bargain in a plea agreement. Moreover, a prosecution resolved with a plea agreement and a sentence that triggers the waiver of appeal does not necessarily preclude the appeal and the obligation to file the notice of the appeal if requested to do so.

New Position and Addition in NDNY

The CJA panel representative has recently changed and the Office of the Federal Public Defender has a new addition.

- Gabrielle DiBella joined the Syracuse office of the Federal Public Defender on October 29, 2018 as an Assistant Federal Public Defender. Gabrielle formerly practiced in Cattaraugus County as a Public Defender. She hit the ground running on her return from Defender training and continues her commitment to the representation of indigent clients in the federal arena.
- Don Kinsella recently started serving his three year term as the new CJA Panel Representative for the Northern District of New York. He is available to address panel issues or concerns. His email is: dkinsella@khlaw.net. He can be reached by telephone at (518) 694-4600.

Judge's Corner

Hon. Glenn T. Suddaby, Chief Judge
United States District Court for the Northern District of New York

Introduction
The Board of Judges would like to convey the importance of concerns expressed to panel attorneys with the hope and expectation that the information will be reviewed and acted upon accordingly.

Reminders from the Bench
Some reminders for our CJA Attorneys:

1) Please keep phone numbers (office and mobile) up to date with the Court.
2) Please timely respond to the Courtroom Deputies when they call for assistance in scheduling court proceedings, especially initial appearances due to time constraints.
3) Please maintain regular and consistent contact with your clients. The Court receives too many complaints from Defendants that counsel have not been in communication with them in preparation for upcoming court appearances. In many instances, the Court has had to notify counsel that his/her client has mailed a written complaint(s) to the Court. It is not the Court's responsibility to ensure counsel is maintaining proper communication with their clients.
4) Please remember to allow additional time before a Court proceeding to have any discussions/review paperwork with your client. Many Judges have noticed that Counsel attempt to review paperwork with clients just prior to court proceedings and are not prepared to timely start the proceeding as scheduled. Plea agreements, cooperation agreements, Grand Jury waivers, sentencing documents, etc. - to name a few - should all be reviewed with clients ***before*** the day of scheduled proceedings.
5) Finally, please submit a final payment voucher within 30 days after the case has concluded so that payment may be timely processed.

Security
Various Judges have received complaints and/or comments about security screening in the Courthouses throughout the District. Most notably, Albany and Syracuse in conjunction with the opening of newly designed secure entrances.

Please understand that all Federal Courthouses across the country have security protocols that are required to be followed, ***without exception***.

The basic general rule is that unless you are an employee in the building with appropriate credentials or a building pass using an employee designated entrance, ***anyone*** entering through the main entrance of the Courthouse is subject to screening.

Because the secure entrances have been under construction for an extended period of time, less stringent measures have been utilized on occasion to accommodate the efficient flow of the public into the buildings.

However, the security protocols are required to be followed absent some extraordinary circumstances. Attorneys with appropriate N.Y.S. Court Identification Cards will be afforded certain professional accommodations, you are allowed to keep your cell phone and computers with you in the Courthouse and in the event of a backup of individuals attempting to gain access, attorneys will be afforded expedited screening so you will not have to wait for extended periods of time when trying to get to Court proceedings.

The Board of Judges recognize that the security screening represents an inconvenience to attorneys who are trying to efficiently carry out their professional responsibilities. Unfortunately, these are the times we live in, security is required whether in air travel or visiting government buildings. Please understand that every exception that is made to security protocols makes us all less safe and potentially endangers people's lives.
We ask for your patience and understanding as the Court Security Officers follow their required

duties to ensure the safety and security of all who enter our United States District Courthouses here in the Northern District of New York.

In Closing

Thank you for fulfilling your responsibilities to your clients and the Court in a professional and courteous manner. The Board of Judges wishes you all a very happy and healthy new year.

Upcoming Training and Resources

TRAINING:

The Law & Technology Series: Techniques in Electronic Case Management (TECM) Workshop I
3/7/19-3/9/19
A hands-on workshop limited to CJA practitioners, panel attorneys, their staff and federal defender staff. The Workshop introduces the legal, strategic, and technological considerations involved with electronic and/or voluminous discovery through plenary presentations and small group sessions. In addition to discovery organization, participants will learn basic and advanced features of three litigation support software programs (Adobe Acrobat Pro, dtSearch, and CaseMap/TimeMap suite). Attendees will better understand how legal litigation support programs work, how to coordinate thoughtful workflow processes with others.

There is no tuition, and materials are provided to participants free of charge. Limited financial assistance is available to qualifying CJA panel attorneys to cover a portion of travel costs. A financial assistance application is available on the training page of www.fd.org and is due January 23, 2019. Registration is available by cutting and pasting this URL into your browser: http://www.cvent.com/d/nbqtwc

Attendees are required to provide their own laptop computer and strongly encouraged to bring their own case materials (hearing/trial, small/large). The litigation support software programs used in this workshop are designed to use Windows, or a Mac laptop running a virtualized copy of Windows. All applicants are required to fill-out and submit a short skill set survey within one week of registering for the workshop.

For questions about the substance of the workshop. please contact Frank Draper at Frank_Draper@ao.uscourts.gov. For questions about registration or other logistics, please contact Rakita Johnson at Rakita_Johnson@ao.uscourts.gov. A draft agenda is available on www.fd.org.

NDNY CLEs:

The Federal Defender Office also hosts two CLEs annually. They alternate between Syracuse and Albany. The materials from the CLEs are available on our website at: https://nyn.fd.org/ The next CLE will be in the spring of 2019 in Syracuse so keep your eyes open for the invitation. If there is a topic related to federal criminal defense you would be interested in hearing discussed at a CLE please contact Molly Corbett at molly_corbett@fd.org.

OTHER RESOURCES:

www.fd.org *newly added*
The 3rd Chair's D.E.S.K. - Dialogue, Education, Strategy, and Knowledge
A podcast designed to provide valuable information and inspiration for federal criminal defense practitioners.
www.fd.org/training-division-podcasts

United States Sentencing Commission website
www.ussc.gov/
-interactive Data and Sentencing Statistics
https://isb.ussc.gov/index.html.
-Annual and Congressional Reports

The **NDNY FPD website** https://nyn.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.