Fall 2020

Arresting developments

A Biannual Federal Criminal Defense Newsletter
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In This Issue:

- Second Chair program 2
- The Dissenter's Hope 3
- Defeating the Attenuation Doctrine, and then some 6
- Re-examining NY Narcotic Offenses as Sentence Enhancing Predicates 9
- First Step Act of 2018...Relief for Many, and Growing.....10
- Case Law Updates:
  - Supreme Court.....11
  - Second Circuit 12
- Credit for Time Served Prior to Sentencing.....15
- Positive Outcomes.....16
- Acquiring Information: How to FOIA.....20
- Judge's Corner 21
- Upcoming Training and Resources 23

Message from the Defender

Dear Colleagues:

The past six months have tested our defender community's mettle. It's been a struggle to zealously represent our clients and maintain effective, meaningful communication with them. Speedy trial rights, among other constitutional safeguards, had to give way to public health and safety concerns. We've all had to learn to adjust to working remotely, relying on technology to stay connected. In many ways it has forced some of us out of our comfort zones. It's amazing what we can do when left with no choice.

Our office went into overdrive assisting clients with preexisting health conditions file for compassionate release from prison. COVID-19 has ravaged the Bureau of Prisons. The statistics change daily. Currently there are 1,568 federal inmates and 724 BOP staff who have confirmed positive test results for COVID-19. There have been 125 federal inmate deaths and 2 staff deaths attributed to COVID-19. We have submitted more than 90 motions. Of those, only nine were granted. Although we only have a 10 percent success rate, it was worth every bit of the effort. We received heartfelt thank yous from clients and their families, including those who were denied. We hold our breath hoping no one denied will succumb to this highly contagious virus.

It's been a depressing year, but there have been some bright spots. I thought our newsletters should begin to highlight some of those feel-good stories. Moving forward, we will share the stories of clients released early, either

(Continued on page 2)

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

because they were granted compassionate release or benefitted from a change in the law. This will be the first edition that will feature those successes. Our hope is to inspire you during these frustrating times.

Throughout the months ahead, our office will host virtual trainings to assist you with your federal practice. By this time next year, I hope we'll be able to do our annual in-person trainings. Zoom, Skype, phases, masks and six -foot distances will give way to life as we once knew it.

Complications can either weaken or strengthen us. In our case the adversity has reinforced our dedication to fight on. In honor of Justice Ginsburg may you all muscle forward in your commitment to justice and equality under the law.

- Lisa Peebles

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.

THE DISSENTER'S HOPE

By: *Melissa A. Tuohey, Esq.*

Ruth Bader Ginsburg

(March 15, 1933-September 18, 2020)
Associate Justice of the Supreme Court of the United States
(August 10, 1993-September 18, 2020).

On August 10, 1993, Ruth Bader Ginsburg became the 107th Supreme Court Justice, and only the second woman to be appointed to the High Court. More than two decades later, reflecting on her appointment and near unanimous senate confirmation, Justice Ginsburg said, "When I was appointed, the vote was 96 to 3 –and I was known as a flaming feminist."[1] Justice Ginsburg received other apt monikers in her lifetime, including, "the Thurgood Marshall of Women's Rights," and the stuff t-shirts are now made of "The Notorious R.B.G."[2]

The Justice's rock-star status, which she was known to "giggle" about,[3] came 57 years' after [4] her entry into Harvard Law School, as one of nine women in a class of 500.[5] She attended Harvard Law School with her beloved husband, Martin D. Ginsburg (June 10, 1932-June 27, 2010), who fell ill with testicular cancer in his third year and Justice Ginsburg's second year of law school.[6] While tending to their young child, and caring for her husband, Justice Ginsburg attended her husband's classes, along with her own, so he would not fall behind in his studies. With his wife's assistance, Martin Ginsburg recovered and graduated from Harvard Law School in 1958. He obtained employment with a law firm in New York City and Justice Ginsburg transferred to Columbia Law School where she graduated at the top of her class.[7] Justice Ginsburg became the first woman to make law review at both Harvard and Columbia.[8]

In 2020, these academic achievements would bring job offers from far and wide, with employers competing for the worthy candidate—regardless of the candidate's gender—through promises of competitive salaries and attractive benefit packages, but for Ruth Bader Ginsburg, she was virtually unemployable. She applied to numerous law firms, but none would hire her. Commenting on this now-obvious absurdity, Justice Ginsburg said of the time period, "In the Fifties, the traditional law firms were just beginning to turn around on hiring Jews…But to be a woman, a Jew and a mother to boot—that combination was a bit too much." [9]

In 1959, Justice Ginsburg obtained a clerkship with the Honorable Edward Palmieri, United States District Court

(Continued on page 4)

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[1] https://www.cbsnews.com/news/remembering-rbg-justice-ruth-bader-ginsburg-a-woman-who-lived-a-life-defying-expectations/.

[2] Lithwick, Dahlia (March 16, 2015), "Justice LOLZ Grumpycat Notorious R.B.G.," Slate; Ryan, Patrick (September 18, 2020), "'RBG': How 'Notorious' Ruth Bader Ginsburg became a pop culture icon," USA Today.

[3] Totenberg, Nina (October 26, 2015), "Notorious RBG: The Supreme Court Justice Turned Cultural Icon," National Public Radio.

[4] While attending New York University Law School in 2013, Shana Knizhnik created the "Notorious R.B.G." Tumblr account. See https://notoriousrbg.tumblr.com.

[5] Bader Ginsburg, Ruth (2004), "The Changing Complexion of Harvard Law School," Harvard Women's Law Journal 27:303.

[6] Id. at 27:306

[7] "Ruth Bader Ginsburg," The Oyez Project, Chicago-Kent College of Law (March 19, 2007).

[8] Id.

[9] Margolick, David (June 25, 1993), "Trial by Adversity Shapes Jurist's Outlook, The New York Times.

The Dissenter's Hope...*continued*

Judge for the Southern District of New York, only after her professor at Columbia Law School strong-armed the judge into hiring her. As told by the Justice, her professor made the following offer: "He said if you give her a chance, I have arranged for a young man in my class who is going to a Wall Street firm, if she doesn't work out he'll jump in and take over;" "That was the carrot. And the stick was, if you don't give her a chance, I'll never recommend another Columbia student." [10] She served as Judge Palmieri's law clerk until 1961.

In 1960—thirty-three years before her Supreme Court appointment—the Honorable Felix Frankfurter, Associate Justice of the Supreme Court (1939-1962), refused Ruth Bader Ginsburg a judicial clerkship because he was not ready to hire a woman.[11] The rejection came even though she had been highly recommended for the position by the dean of Harvard Law School, Justice Frankfurter's alma mater.[12]

The irony here is that Justice Frankfurter was a co-founder of the American Civil Liberties Union (ACLU), where Justice Ginsburg became a prominent figure between 1970 and 1980, first as a volunteer lawyer, and later as the Director and co-founder of the ACLU Women's Rights Project.[13] Between 1973 and 1976, she argued six gender discrimination cases before the Supreme Court, winning five, leading to her first moniker, "the Thurgood Marshall of gender equality law."[14]

Justice Ginsburg used the law as a tool for fairness and equality for all people. Her experiences of being treated differently based on her gender, guided her into the arena of gender equality law. She acted strategically to achieve incremental change in the law to achieve gender equality for men and women. Justice Ginsburg agreed with her predecessor, Benjamin Nathan Cardozo, Associate Justice of the Supreme Court (1932-1938), that "Justice is not to be taken by storm. She is to be wooed by slow advances."[15]

These slow advances are reflected in Justice Ginsburg's rise to her seat on the Supreme Court. Before reaching the ACLU, Justice Ginsburg was part of an equal pay campaign with her women colleagues on the faculty of Rutgers Law School who were being paid less than that of their male colleagues.[16] The campaign was successful.

In 1980, Justice Ginsburg was appointed to the United States Court of Appeals for the District of Columbia Circuit, where she remained until her Supreme Court appointment. During her Supreme Court confirmation hearing, Congresswoman Eleanor Holmes Norton said of the Justice:

> When Ruth Ginsburg founded the ACLU women's rights project, today's axiom that the 14th Amendment applies to women was not axiomatic at all. As one of Judge Ginsburg's former students has said, "People forget how things were."[17]

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[10] Syckle, Katie Van (January 22, 2018), "This is Justice Ruth Bader Ginsburg's #MeToo Story," The Cut.

[11] Lewis, Neil A. (June 15, 1993), "THE SUPREME COURT: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg, The New York Times.

[12] https://en.wikipedia.org/wiki/Fexlix_Frankfurter

[13] https://www.aclu.org/press-releases/aclu-statement-passing-justice-ruth-bader-ginsburg

[14] Lewis, Neil A. (June 15, 1993), "THE SUPREME COURT: Woman in the News: Rejected as a Clerk, Choses as a Justice: Ruth Joan Bader Ginsburg," The New York Times.

[15] Judiciary Hearings (Ginsburg testimony, July 20, 1993, p. 51)

[16] https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff.

[17] Hearings Before the Committee on the Judiciary: Nomination of Ruth Bader Ginsburg, to be an Associate Justice of the Supreme Court of the United States, 103rd Cong. 172 (1993) (hereinafter Judiciary Hearings) (statement of Congresswoman Eleanor Holmes Norton, July 20, 1993, p. 12).

The Dissenter's Hope...*continued*

Once confirmed, it was here that Justice Ginsburg received her second moniker, "The Notorious R.B.G." Justice Ginsburg was most taken with how she received the title, explaining that a law student (Shana Knizhnik) was "outraged" by the Supreme Court's decision in a voting rights case [*Shelby County v. Holder,* 570 U.S. 529 (2013)],"[b]ut instead of just venting her anger, she took up my dissent."

It has been said that the Justice found her voice on the Supreme Court through her dissents, which she would read from the bench. "To read a dissent aloud is an act of theater that justices use to convey their view that the majority is not only mistaken, but profoundly wrong."

As best explained by the Justice herself, "Dissents speak to a future age. It's not simply to say, 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions, and gradually over time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today but for tomorrow."

Justice Ginsburg always carried hope in her briefcase. From graduating at the top of her law school class to being unemployable to becoming a winning advocate for gender equality to a U.S. Court of Appeals Judge to a Supreme Court Justice, she worked steadily and efficiently throughout her life to ensure that the injustices of her "today" would not remain in the "tomorrows" of future generations. The Justice's legacy can best be summed up in the words of advice she conveyed to a young female high school student:

> Follow your dream. As I said before, no doors are closed if you genuinely have the will to do it. And that whatever you choose to do, leave tracks. And that means, don't do just for yourself because in the end it's not going to be fully satisfying. I think you will want to leave the world a little better for your having lived. And there's no satisfaction that a person can gain that's equal to the satisfaction that you get from knowing that you had made another's life, your community, a little better for your effort.

Thank you, Justice Ginsburg, for making the world a little better for you having lived.

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[18] Galanes, Philip (November 14, 2015), "Ruth Bader Ginsburg and Gloria Steinem on the Unending Fight for Women's Rights," The New York Times.

[19] Greenhouse, Linda (May 31, 2007), "In dissent, Ginsburg finds her voice at the Supreme Court," The New York Times.

[20] Id.

[21] Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States, Interview with Nina Totenberg of National Public Radio (May 2, 2002).

[22] https://youtu.be/RoBmvf4uEo8

Defeating the Attenuation Doctrine, and then some...

By: *Molly K. Corbett, Esq.*

This summer a panel of the Second Circuit decided *United States v. Walker,* 965 F.3d 180 (2d Cir. 2020), reversing the denial of suppression. The appeals court not only found that the officers' stop was without reasonable suspicion, but also the intervening discovery of a warrant did not support application of an exception to the exclusionary rule under the attenuation doctrine, because the officers had acted purposefully and flagrantly. The facts presented were distinct from law enforcement conduct in the controlling case of *Utah v. Strieff*, 36 S.Ct. 2056 (2016).

Early on a Saturday evening in September 2017, Jaquan Walker was walking with a friend through the busy central business district of Troy, New York. As he and his friend cut through Church Street alley, Troy Police Sergeant, Peter Montanino, drove past them from the opposite direction. Driving past, Montanino was reminded of an email received the day before seeking the identification of a suspect in a shooting that took place two days earlier. The email included a photograph with a message that the sender was "trying to ID suspect #2 in this photo," named another suspect, and asked that anyone who knew the identity of "suspect #2" or had interacted with the other suspect contact the lead officers on the case. Montanino pulled up the email on his iPhone 6, looked at the photograph, and decided to identify the two. He testified Walker and his companion reminded him of the suspect in the email because they were "medium to dark skin toned black males, were thin build, and were wearing glasses at the time. Both had facial hair. Both appeared to have goatees." Montanino called Officers Owen Conway and Martin Furciniti, and withour explaining his suspicion, asked if they could identify the two pedestrians. When they could not, Montanino asked the officers to "stop out" and identify them.

The "stop out" is a standard practice of the Troy Police Department in which officers stop, exit their vehicle, approach pedestrians, request information and identification, and check for outstanding warrants. Sgt. Montanino testified that the "stop out" practice is typically employed with individuals unknown to the officers who are set to patrol a certain zone.

The "stop out" of Walker and Hopkins involved Conway and Furciniti stopping ahead of Walker and Hopkins, and Montanino pulling up behind them before they all converged. Walker and his friend were instructed to stop by the officers. Furciniti testified that the officers asked if they could have a word with the men. The officers asked for identification, and Walker provided it.

In the meantime Montanino showed Furciniti the photograph in the email. Montanino also showed the photograph to Hopkins. The officers ran a file check for warrants and driver licenses. It was later determined that Walker was not the person depicted in the photograph on which Montanino relied.

Walker had an outstanding arrest warrant. Upon discovery he was brought to the police car where Furciniti conducted a search incident to arrest. Marijuana was found on Walker and as Furciniti continued to pat him down he felt a bulge in Walker's groin area. Furciniti asked Walker if there was anything else he needed to know and Walker replied that he possessed approximately fifty grams of crack cocaine. Walker offered to retrieve the narcotics and also provided officers with information about drug and gun activity. Walker was later charged with possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1).

The stop and search were challenged as lacking reasonable suspicion because of the breadth of the description of the "suspect," the poor quality of the photograph, the fact that both suspects were identified prior to the stop, and the overall lack of facts specific to Walker. The district court refused to suppress finding the officers had reasonable suspicion. He entered a conditional plea and appealed the denial of suppression of the physical evidence and his statements.

On appeal the Court found the officers lacked reasonable suspicion to stop Walker. First, the email and photograph depicting suspect #2 did not include a specific and articulable facts that a crime had occurred. There was no mention of any crime connected to suspect #2. The court further declared even if the officers knew the identity of suspect #2 there were no facts allowing for a stop.

The court also advised that even if the email had connected suspect #2 to a crime, the fact that both suspect #2 and Walker are medium-to-dark skin males with thin builds and facial hair was insufficient to for a reasonable suspicion that Walker was suspect #2. The panel

(Continued on page 7)

adopted the defense argument that, "black male" and "medium-to-dark skin" described a wide swath of individuals as did having facial hair and wearing glasses. Even in combination, the set of characteristics did not narrow the subset of young men of color enough to support reasonable suspicion that Walker was suspect #2 and thus allow a *Terry* stop. The added fact that Walker had been walking a few blocks from the scene of a previous shooting was also insufficient to provide reasonable suspicion that he was involved in the shooting. In the area where he was, the central business district of Troy, it was common for pedestrians to be at the time Walker was stopped.

The lack of reasonable suspicion did not end the review. The government asserted that even if the stop was unconstitutional, an exception to the exclusionary rule, the attenuation doctrine allowed the admission of the tainted evidence. Under that doctrine, evidence is admissible if the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by an intervening circumstance so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. Relying on *Utah v. Strieff*. 136 S.Ct. 2056 (2016) the government argued for the first time on appeal that the discovery of the warrant unrelated to the unconstitutional stop was an intervening circumstance permitting the arrest and search of Walker.

The Court looked to the three factors in determining whether the doctrine applied: 1) the temporal proximity between the unconstitutional conduct and the discovery of evidence; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct. The closeness of the discovery of the police conduct and the discovery of evidence weighed in favor of attenuation. The intervening circumstance, discovery of the warrant, weighed in favor. The fight was about the purposeful and flagrant nature of the police conduct.

Walker argued the stop was conducted pursuant to a standardized policy known as a "stop out," and that the warrant check occurred after any suspicion would have been dispelled, making the stop purposeful and flagrant conduct. The argument, especially at oral argument, centered on the focus of Montanino on two young African-American men because of an email, a grainy screen shot from a business video from an unknown location and the otherwise innocent conduct of walking through a busy area of Troy on a Saturday evening. Walker further asserted that the privacy and liberty interests, the ability to walk freely down a street without being stopped by police and questioned, would be best served by suppression of the evidence.

The Court found the lack of reasonable suspicion to be "extreme" and the lack of indication in the email and photograph that the individual had committed any crime "glaring." Montanino's justification for stopping Walker was so obviously deficient it constituted "deliberate, reckless, or grossly negligent conduct." The court then went further even though it had already concluded that the conduct was flagrant and purposeful, throwing the attenuation argument out the window.

The court advised that any reliance on the fact that Walker, like the photographed individual, was a black male with medium-to-dark skin tone, glasses, facial hair, and long hair was so unsound that it could not be characterized as mere negligence, especially when considering the significant costs of such conduct. The court reminded that specificity in articulating the basis for a stop is necessary in part because according the police unfettered discretion to stop and frisk could lead to harassment of minority groups and severely exacerbate police-community tensions, in addition to subjecting individuals to the "humiliations of [] unconstitutional searches" based on race, as so aptly noted by the Second Circuit's own Justice Sotomayor in her dissenting opinion in *Strieff,* 136 S. Ct. at 2070. With "discretionary policing" comes "opportunities for racial profiling." Sarah A. Seo, Policing the Open Road 264 (2019). The court went on to conclude that reliance on the photograph to stop Walker involved impermissible and manifest stereotyping, which cannot be characterized as merely negligent conduct.

The Court distinguished *Strieff* which had applied the attenuation doctrine finding the discovery of a warrant an intervening event allowing the exception to exclusion of the evidence. Unlike in *Strieff,* in which the suspicion of criminal activity was based on two independent sources suggesting drug activity in the house Strieff had exited, absolutely nothing supported Montanino's belief that the person in the emailed photograph had committed a crime. Moreover the officer in *Strieff* had based his suspicions of Strieff's criminality on observing him exit the suspected drug house, Montanino's suspicions were largely based on Walker's skin color.

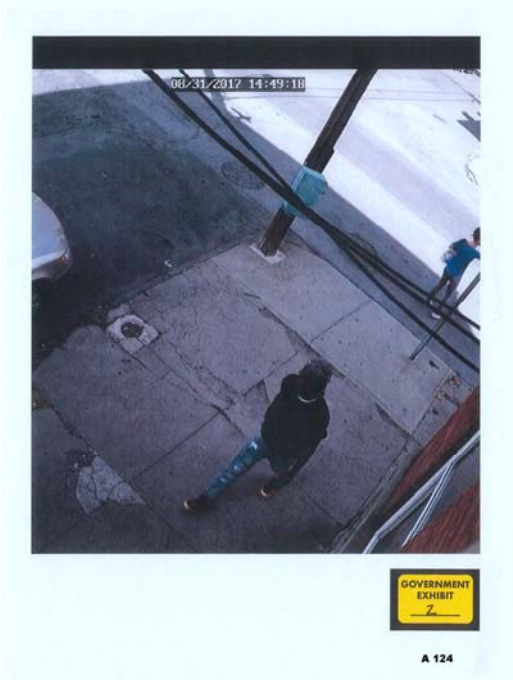
(Continued on page 8)

Defeating the Attenuation Doctrine...*continued*

In addition to Montanino's woefully anemic justification, the court also found the officers' acted purposefully or flagrantly by continuing the stop after any suspicion that Walker was the individual in the photograph was dispelled when Montanino approached Walker and could confirm that he was not the photographed suspect. Nonetheless, pursuant to the Troy Police Department's stop-out practice, the officers ran a search for outstanding warrants against Walker and Hopkins. The court advised that after the dissipation of any reasonable suspicion, there was simply no cause to run Walker and Hopkins's identifications for warrants. The court did not address whether the stop out practice would itself be flagrant and purposeful conduct precluding attenuation. That is ripe for another contest.

The decision reinforces the need to explore the surrounding circumstances of a stop, not just the facts as presented at the time of the stop. In *Walker*, the photograph and the emails surrounding the distribution of the photograph laid the foundation for assessing the lack of Montanino's justification of the stop. Take the time to recreate the full setting in which the officer's actions took place. The pleadings in the district court did not allege racial profiling as basis for contesting the stop, but with little more than skin color offered by an officer, the court concluded here was not much else driving the officer's actions. Walker will now provide a basis for prompting district courts to more deeply examine the set of facts and whether the totality, in view of creating specific reasonable suspicion, supports an officer's actions. "Extreme" lack of reasonable suspicion can be purposeful and flagrant police conduct. Walker also presents more authority for challenges on the dissipation of reasonable suspicion prior to a warrant check. *Use this Case*!

Photograph of Suspect #2— approximately the size of the IPhone 6 Screen relied on by Sgt, Montanino as the basis for the stop of Jaquan Walker



Re-examining NY Narcotic Offenses as Sentence Enhancing Predicates

By : *James P. Egan, Esq.*

For the past several years, the categorical approach has restricted the reliance on certain prior convictions to enhance federal sentences. Perhaps most relevant for practitioners in the Northern District, the Second Circuit has held in a line of cases that certain New York State drug offenses may no longer serve as predicates in federal courts. For example, in *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018), the Court held that a New York State conviction for fifth-degree criminal sale of a controlled substance (NYPL § 220.31) is not a predicate "controlled substance offense" under the Sentencing Guidelines. More recently, the Second Circuit held in *United States v. Thompson*, 961 F.3d 545 (2d Cir. 2020), that the same offense also may not serve as a predicate under 21 U.S.C. §§ 802, 841.

In each of these cases, the Second Circuit held that courts must apply the categorical approach to compare the list of substances controlled under state law with the list of substances controlled under federal law. Because the term "controlled substance" referred to in NYPL § 220.31 includes at least one substance (Human Chorionic Gonadotropin (HCG)) that is not found in the Controlled Substances Act, New York law is broader than federal law and § 220.31 cannot serve as a predicate offense under either U.S.S.G. § 4B1.2 or 21 U.S.C. § 841.

Initially, it was thought that the impact of *Townsend* and *Thompson* would be limited to New York State felony drug offenses based on the term "controlled substance," which, at present, is found only in NYPL § 220.31.

However, defendants first represented by the Federal Defenders of New York have begun to challenge the use of New York State predicates that rest on the term "narcotic drug."[1] Additional research has disclosed that that least two substances have been removed from the CSA,[2] yet remain on the relevant New York State schedules. For example, the DEA removed naloxegol and naldemedine from the CSA after determining that neither met the statutory criteria for federal control.[3] Yet, the substances are still controlled as narcotic drugs in New York State. As a consequence, the term "narcotic drug" is broader than the CSA, at least since 2015.[5] And New York State drug offenses based on the term "narcotic drug" can no longer serve as federal predicates. This includes at least the New York State offense of third-degree criminal possession of a controlled substance, NYPL § 220.16(1).[6]

[1] In New York State, the term "controlled substance" is defined as any substance listed in schedule I, II, III, IV, or V of NY Health Law § 3306. *See* NY Penal Law § 220.00(5). New York State defines the term "narcotic drug" much more narrowly, to include "any substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone. NY Penal Law§ 220.00(7).

[2] The geometric isomer 3-mehylfentanyl also appears to have been removed from the CSA.

[3] See Schedule of Controlled Substances: Removal of Naldemedine from Control, 82 Fed. Reg. 45436–01 (Sept. 29, 2017) (available at 2017 WL 4311001). Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468–01 (Jan. 23, 2015) (same) (available at 2015 WL 273535).

[4] Compare 21 C.F.R. 1308.11, with N.Y. Pub. Health Law § 3306

[5] The argument as to whether a New York State offense committed before 2015 can serve as a federal predicate is a bit more complicated, but rests on the time-of-sentencing concept that governs the federal statute .

[6] Other subsections of § 220.16, with the possible exception of subsection (12), are unaffected by this argument.

First Step Act of 2018...Relief for Many, and Growing

By: *Molly K. Corbett, Esq.*

The First Step Act of 2018 has produced significant changes in the federal criminal practice. The amendments lowered certain mandatory minimums for drug offenses, eased safety valve eligibility, and changed the definitions for prior convictions that serve as enhancements for drug offenses. For those inmates who were post-conviction, the first, and most quickly attainable relief was release based on the recalculation of good time credit. In the first year 3100 inmates were released on the simple recalculation of good time credits.

At the same time, motions to reduce sentences under section 404(b) of the First Step Act were filed, and continue to be filed, for inmates who were convicted of covered offenses. Many circuit courts have now adopted an expansive view of "covered offense" allowing more offenses to be eligible for relief including the Second Circuit in *United State v. Johnson*, 961 F.3d 181, 187 (2d Cir. 2020)(listing cases). It is the statute penalty for the offense of which a client is convicted, and not the actual conduct, that determines whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a) of the First Step Act. *Id*. at 187; see *id*. at 190–91.

"[U]nder Section 404(a) of the First Step Act, if the statutory penalties associated with a particular 'Federal criminal statute' were modified by Section 2 or 3 of the Fair Sentencing Act, then any defendant sentenced for violating that 'Federal criminal statute' has been sentenced for a 'covered offense.' " *Id*. at 189-90. The fact that an advisory sentencing range has not changed does not affect eligibility or preclude a reduction in sentence. *United States v. Holloway*, 956 F.3d 660 (2d. Cir. 2020). The only limit on eligibility related to whether the client had a sentence previously imposed, reduced, or a reduction denied, under the Fair Sentencing Act of 2010 or section 404(b) of the First Step Act. Inmates were eligible for reductions in sentences, and a court had the discretion to grant such reductions.

Due to the breadth of the definition of "covered offense" clients have obtained reduced sentences after convictions for multi-drug conspiracies that included crack, racketeering activities involving crack, and criminal enterprises involving crack. *See e.g., United States v. Luna*, 436 F. Supp. 3d 478, 484 (D. Conn. 2020)(multi-drug conspiracy); *United States v. Burrell*, No. 97 CR 998-1 (RJD), 2020 WL 5014783, at *8 (E.D.N.Y. Aug. 25, 2020)(CCE offense);*United States v. Aller*, No. 00-CR-977 (JGK), 2020 WL 5494622, at *14 (S.D.N.Y. Sept. 11, 2020)(Section 841(b)(1)(C) offenses); *United States v. Jones*, No. 3:99-CR-264-1 (VAB), 2020 WL 2791862, at *10 (D. Conn. May 29, 2020)(RICO, RICO conspiracy and crack convictions were inextricably related offenses under sentencing package doctrine). Section 404 had also been used to reduce terms of supervised release for eligible clients.

The First Step Act also expanded the eligibility for Home Confinement and Compassionate Release to broader range of elderly (60 years or more) and infirm inmates, and allowed inmates to seek compassionate release directly with the district courts, 30 days after requesting relief from the Bureau of Prisons. The direct petition to the district courts includes sentence reduction requests not only for age, and health issues but also for "extraordinary and compelling reasons." 18 U.S.C. §3582(c)(1)(A)(i). The "extraordinary and compelling reasons" provision opened a post-sentencing opportunity for requesting a district court re-examine prior sentences. This potential for a sentence reduction based on extraordinary and compelling reasons was recently expanded by the Second Circuit's decision in *United States v. Brooker*, ___ F.3d ___, No. 19-3218-CR, 2020 WL 5739712 (2d Cir. Sept. 25, 2020) which, rejected the Bureau of Prison's constraints on what qualified as extraordinary and compelling circumstances, further expanding the opportunities for clients to seek and obtain sentence reductions.

The significance of this avenue for relief was realized in recent federal criminal motions practice precipitated by the COVID-19 pandemic. In mid-March when BOP was slow to respond to the COVID-19 emergency and infections began to run rampant in BOP facilities federal defenders worked to release vulnerable inmates as many began to fall seriously ill and die across the country. As COVID-19 infected BOP institutions and rapidly spread, federal defenders filed compassionate release motions seeking release to home confinement, furlough or sentence reductions to remove vulnerable inmates from potential exposure to coronavirus. FCI Elkton, Danbury, Butner, Oakland, Lompoc, and Terminal Island were the subject of class actions forcing government authorities to reckon with judicial oversight of inmates compassionate release and home confinement requests.

(Continued on page 11)

First Step Act of 2018...*continued*

More than a thousand inmates have been released thanks to the efforts of federal criminal defenders and it continues. The impact of broadening what constitutes "extraordinary and compelling reasons" to serve as a basis for a reduction in sentence was more deeply felt in the present circumstances created by the coronavirus pandemic. The future impact is yet to be determined.

Close to two years since the passage of the First Step Act, some still wish for a second step. Until that time the defender community can work with what we have, after all it's what we've always done.

No victory is too small, and many have been great.

Supreme Court Update

Decisions

Holguin-Hernandez v. U.S., No. 18-7739
(Decided 2.26.2020)
Holding: Holguin-Hernandez's district-court argument for a specific sentence (nothing or less than 12 months) preserved his claim on appeal that the sentence imposed was unreasonably long.

Kansas v. Glover, No. 18-556 (Decided 4.6.2020)
Holding: When a police officer lacks information negating an inference that a person driving is the vehicle's owner, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.

Kelly v. U.S., No. 18-1059 (Decided 5.7.2020)
Holding: Because the scheme to reduce the number of George Washington Bridge toll lanes dedicated to Fort Lee, New Jersey, morning commuters as political retribution against Fort Lee's mayor did not aim to obtain money or property from the federal Port Authority, William Baroni and Bridget Kelly could not have violated the federal-program fraud or wire fraud laws.

Pending Argument

Torres v. Madrid, No. 19-292
(Argument 10.14.2020)
Question Presented: Whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" within the meaning of the Fourth Amendment, as the U.S. Courts of Appeals for the 8th, 9th and 11th Circuits and the New Mexico Supreme Court hold, or whether physical force must be successful in detaining a suspect to constitute a "seizure," as the U.S. Court of Appeals for the 10th Circuit and the District of Columbia Court of Appeals hold.

Borden v. United States, No. 19-5410
(Argument 11.3.2020)
Question Presented: Whether the "use of force" clause in the Armed Career Criminal Act encompasses crimes with a mens rea of mere recklessness.

Second Circuit Highlights

By: *Courtenay McKeon, Esq.*

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

The Second Circuit has kept churning out decisions despite the COVID-19 pandemic. Four of those decisions---three of which arose in the Northern District of New York---will be particularly helpful for the criminal defense bar.

Search and Seizure

United States v. Weaver, ___ F.3d ___, No. 18-1697, 2020 WL 5523210 (2d Cir. Sept. 15, 2020) (Pooler, Calabresi) (concurrence by Calabresi) (dissent by Livingston) (appeal from N.D.N.Y., Suddaby):

The facts of this case will sound familiar to anyone who has ever filed a motion to suppress. Three police officers slowly drove their unmarked car through a neighborhood in the City of Syracuse that has a majority Black population. The officers saw a man, Calvin Weaver, walking down the street. As the officer drove by, Weaver "stared into their vehicle, continued to stare, as they approached, as they passed, and continued to stare as they proceeded past him." According to one officer, this lasted "probably a few seconds but it seemed longer than one would typically look at a vehicle." As Weaver walked toward a gray sedan, he adjusted his waistband with "just a subtle tug." Weaver got into the front passenger seat and the sedan drove away. A few minutes later, the officers stopped the sedan for signaling a turn at a stop sign rather than signaling 100 feet prior to the turn. As an officer approached the sedan on foot, he observed Weaver "with both hands kind of pushing down on his pelvic area and squirming kinda in the seat . . . with a downward motion, trying to push something down." The officer asked Weaver to show him his hands, which Weaver did. Weaver said "I don't got nothin'." The officer asked Weaver to put his hands on his head, which Weaver did. The officer asked Weaver if he had identification, and Weaver said he did. The officer looked at Weaver, concluded that "it didn't appear there was any bulges in his pocket," and instructed him to slowly use his right hand to remove his identification from his pocket. Weaver complied. The officer then ordered Weaver to step out of the car, place his hands on the trunk, and spread his feet apart. In the ensuing search, the officer and his partners found cocaine and a gun, although Weaver squirmed to try to avoid being searched.

Weaver was charged in both state and federal court. The state court granted Weaver's motion to suppress the evidence. The federal court did not. The district court found that the officers had reasonable suspicion to search Weaver because (1) he watched the police vehicle as it drove by him; (2) he pulled up his pants while walking; (3) he slouched in his seat and moved back and forth; (4) he told the officer "I don't got nothin'"; and (5) he tried to prevent the officers from searching his waist area. The district court found that there would have been reasonable suspicion even if Weaver had not tried to prevent the officers from searching his waist area. After his federal motion to suppress was denied, Weaver pled guilty and was sentenced to 87 months in prison. He appealed.

The Second Circuit reversed. The court found that the search began when the officer ordered Weaver to place his hands on the trunk and spread his feet apart. Accordingly, the fact that Weaver then squirmed to avoid being searched was irrelevant. The issue, rather, was whether the events that occurred before the officer gave the order were sufficient to give the officers "an objectively reasonable belief that Weaver was armed and presently dangerous to the officers and others." The court found that while it was objectively reasonable to believe that Weaver was hiding *something* based on his behavior before the order, it was *not* objectively reasonable to believe that he was hiding a weapon. Therefore, the search was illegal and the evidence should have been suppressed. "To conclude otherwise," the majority opinion stated, "would yield the troubling result of adverse consequences for the exercise of basic rights---something we see far too much of in the case law as it is."

This case will be useful to many of our clients. And, as the cherry on top, Judge Calabresi's concurring opinion is a must-read for anyone who's ever despaired about the erosion of Fourth Amendment rights.

Possession of Firearms

United States v. Bramer, 956 F.3d 91 (2d Cir. Apr. 16, 2020) (Hall, Katzmann, Lynch) (appeal from N.D.N.Y., Sharpe):

The Town of Malta Justice Court issued a protective order against Michael Bramer prohibiting him from contacting the mother of his child. A week or so later, Bramer went to a gun shop and completed an ATF form

(Continued on page 13)

that is required of potential gun purchasers. The form asked whether Bramer was "subject to a court order restraining him from harassing, stalking, or threatening his child or an intimate partner or child of such partner." Bramer checked the box for "no."

When these facts came to light, Bramer was indicted for providing false information to a licensed dealer in connection with the attempted acquisition of a firearm. The case proceeded to trial. At trial, the government did not introduce a transcript or recording of the proceedings in the Town of Malta Justice Court. Bramer moved for a judgment of acquittal. Bramer noted that the term "court order" as defined in 18 U.S.C. § 922(g)(8) requires that the domestic violence protective order be issued after a "hearing" of which the defendant received "actual notice" and in which he had an "opportunity to participate." Bramer argued that the government had not met its burden of showing that he had actual notice or an opportunity to participate in a proceeding that qualified as a "hearing" before the protective order was issued. The district court denied the motion and the jury found Bramer guilty. Bramer appealed.

The Second Circuit reversed. It held that a defendant has only received "an opportunity to participate" in a proceeding for the purposes of § 922(g)(8) if "a reasonable person in [the defendant's] position would have understood that he was permitted to interpose objections or make an argument as to why an order of protection should not be imposed." The Second Circuit found that the evidence presented at trial about the underlying justice court proceeding "only allows us to conclude that Bramer attended it, that Bramer was not physically prevented from speaking, and that the judge explained to Bramer the charges against him and what an order of protection was." *Id*. This evidence, the Second Circuit concluded, was insufficient to support a finding that the defendant was subject to a domestic violence restraining order issued after a hearing in which he had an "opportunity to participate."

This case is useful to any of our clients who are being prosecuted for false statements on gun applications or for possessing a firearm in violation of 18 U.S.C. § 922 (g)(8). Even more fundamentally, it serves as an excellent reminder for us to carefully examine the definition of each word or phrase in the laws our clients are charged with breaking. Those definitions can often mean the difference between jail and freedom for our clients.

Prior Convictions as Predicates for Higher Mandatory Minimum Sentences

United States v. Thompson, 961 F.3d 545 (2d Cir. June 8, 2020) (Walker, Carney, Koeltl) (appeal from N.D.N.Y., Mordue)

21 U.S.C. § 841(b)(1)(B) sets a five-year mandatory minimum sentence for anyone convicted of manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, certain amounts of certain controlled substances. As phrased prior to a December 2018 amendment, the statute provided that if, however, the defendant has a prior conviction for a "felony drug offense," the mandatory minimum sentence was increased to ten years.

When he was sentenced for one count of marijuana distribution in April 2018, Jeremy Thompson had a prior conviction for attempted sale of a controlled substance in the fifth degree in violation of New York Penal Law § 220.31. Over Thompson's objection, the district court found that the prior conviction qualified as a "felony drug offense" and sentenced him to ten years in prison. The Second Circuit reversed. The court found that, under the categorical approach, New York Penal Law § 220.31 does not qualify as a "felony drug offense." Under the categorical approach, the actual conduct that led to the defendant's prior conviction is irrelevant. The categorical approach holds that a state conviction does not qualify as a predicate offense if the state law prohibits broader conduct than federal law does, regardless of what the defendant himself did. That was the case here. Under New York Penal Law § 220.31, a "person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance." "Controlled substance" is defined under New York Public Health Law § 3306. The Public Health Law's list of controlled substances includes hCG, a pregnancy hormone. Federal law, unlike New York law, does not regulate hCG. Thus, the state law prohibits broader conduct than the federal law does. Accordingly, Thompson's previous conviction did not qualify as a prior "felony drug offense," even though his

(Continued on page 14)

particular conviction did not involve hCG. His mandatory minimum sentence, therefore, was only five years rather than ten.

It is common in state court for people charged with third degree drug crimes to plead down to fifth degree. As a result, many of our clients have prior convictions under New York Penal Law § 220.31. The *Thompson* case should result in shorter sentences for these clients.

Sentence Reduction/Compassionate Release

United States v. Brooker, ___ F.3d ___, No. 19-3218-CR, 2020 WL 5739712 (2d Cir. Sept. 25, 2020) (Calabresi, Chin, Winter) (appeal from D. Vermont):

Under 18 U.S.C. § 3582(c)(1)(a), a district court may reduce a federal inmate's sentence "after considering the factors set forth in section 3553(a) . . . , if it finds that [] extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." A sentence reduction under the statute is commonly referred to as "compassionate release."

Until 2018, the statute stated that district courts could only reduce an inmate's sentence if the Bureau of Prisons ("BOP") filed a motion seeking the reduction. The Sentencing Commission's policy statement, Sentencing Guideline § 1B1.13, reflected that requirement and also limited the definition of "extraordinary and compelling reasons" to situations where (1) the inmate was suffering from a terminal illness; (2) the inmate was not expected to recover from a serious physical or medical condition or a serious functional or cognitive impairment that diminished the inmate's ability to provide self-care in prison; (3) the inmate was at least 65 years old, was experiencing a deterioration in physical or mental health because of the aging process, and had served at least 10 years or 75% of the sentence imposed; (4) the caregiver of the inmate's minor child or children died or became incapacitated; or (5) the inmate's spouse or registered domestic partner became incapacitated and the inmate was the only available caregiver.

In 2018, the First Step Act ("FSA") was enacted. One section of the FSA, titled "Increasing the Use and Transparency of Compassionate Release," amended the compassionate release law. Under the new version of the compassionate release law, inmates are now allowed to file their own motions for sentence reduction rather than being dependent on the BOP to do it for them.

The Sentencing Commission has not had a quorum since the FSA was passed. As a result, the Sentencing Commission's policy statement has not been updated to reflect the changes in the compassionate release statute. The COVID-19 pandemic brought a wave of compassionate release motions, as desperate inmates sought release from prisons where the lack of social distancing created tinderbox conditions for the disease. In response to many of these motions, the government argued (and many courts agreed) that compassionate release could only be granted to inmates who met one of the definitions set forth in Sentencing Guideline § 1B.13. Inmates, on the other hand, argued that the Guideline was not an "applicable policy statement" because it was not consistent with the current version of the compassionate release statute. This dispute had serious consequences. Under the government's view, inmates who could suffer catastrophic consequences if they contracted COVID-19 were not eligible for compassionate release unless they fit within the narrow confines of the Guideline.

The Second Circuit resolved that dispute in the inmates' favor. The Second Circuit held that "the First Step Act freed district courts to consider any potentially extraordinary and compelling reasons that a defendant might raise for compassionate release." The Guideline is applicable only to motions brought by the BOP, not to motions filed directly by an inmate.

Brooker is a major victory for our clients. Court are now free to define "extraordinary and compelling" reasons on their own without being bound by the Guideline. The only limitation on the court's discretion is that "[r]ehabilitation alone shall not be considered an extraordinary and compelling reason." As a result, many people will be eligible for release who would not have been previously.

"Credit" for Time Served Prior to Sentencing

By: *James P. Egan, Esq.*

Recently, our office has seen well-intentioned, yet improper, attempts to "backdate" the start of an instant federal sentence in an attempt to "credit" a defendant awaiting sentencing.

Here's an example:

- D is convicted and sentenced to 60 months in WDNY in 2018 and has been serving that sentence since 2018.
- D is then convicted in NDNY on September 1, 2019 for unrelated conduct.
- D is sentenced to 80 months in NDNY on September 1, 2020.
- The district court orders the NDNY sentence to run concurrent with WDNY sentence.
- The district court "backdates" the beginning of NDNY sentence to September 1, 2019 to "credit" D for 12 months spent in custody awaiting NDNY sentence.

Unfortunately, a district court has no authority to "backdate" the beginning of a sentence. See *United States v. Gonzalez*, 192 F.3d 350, 353 (2d Cir. 1999). Instead, "[t]he Bureau of Prisons, and not the courts, determines when a defendant's sentence starts and whether the defendant should receive credit for any time spent in custody." *United States v. Montez-Gaviria*, 163 F.3d 697, 700-01 (2d Cir. 1998). Therefore, even when the district court's intentions are perfectly clear to "backdate" the beginning of the instant sentence to credit certain time spent in custody, the BOP is under no obligation to (and likely will not) honor that intention.

Pursuant to 18 U.S.C. § 3585, "[a] sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." In the example above, § 3585 requires the defendant's sentence to begin on the date of the NDNY sentencing.

The "backdating" confusion appears to arise from the fact that Congress did permit defendants to receive credit for time spent in custody. See 18 U.S.C. § 3585(b). However, that provision comes with an important exception: credit will be awarded only when the time spent in custody has not been credited against another sentence. In our example, the time spent from 2018 will be credited against the WDNY sentence. Therefore, no portion of that time can be credited to the NDNY sentence, even if the district court attempts to "backdate" the beginning of the sentence.

Fortunately, there is a way for a district court to "credit" the time a defendant spent awaiting sentencing on the instant offense. U.S.S.G. § 5G1.3 authorizes a district court to grant a downward departure from the otherwise final sentence to "credit" the time the BOP will not credit against the instant sentence. As explained in U.S.S.G. § 5G1.3, application note 4(E), "[t]o avoid confusion with the Bureau of Prisons' exclusive authority provided under 18 U.S.C. § 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to §5G1.3(d), rather than as a credit for time served."

The next time the court attempts to backdate the beginning of your client's sentence, consider respectfully requesting that the court apply a downward departure instead.

Positive Outcomes:

profiles after sentence reduction and release

By: *John O'Brien, Inv.*

Benjamin Rountree

An unexpected ally stepped up for Benjamin Rountree when he needed someone to vouch for his release from prison.

Rountree's case manager at Schuylkill Federal Correctional Institution told the Federal Public Defender's Office he would do whatever he could to help. Rountree had made a name for himself among the prison staff for tutoring inmates with special needs. The case manager rushed Rountree's records to the Federal Public Defender's Office.

His advocacy helped Assistant Federal Public Defender Courtenay McKeon convince Senior U.S. District Court Judge Lawrence Kahn to grant her motion for Rountree to be freed on compassionate release grounds due to the pandemic.

"Rountree's exemplary record during this period of incarceration testifies to his character and weighs heavily in his favor," Judge Kahn wrote in May, when he resentenced Rountree to time-served on a 15-year drug conviction. Judge Kahn cited Rountree's work with special needs inmates as an indication he'd been rehabilitated.

Since his release on May 20, Rountree has continued his success story on the outside. "He's just been there for people," said Marty Stanton, associate pastor of Victory Christian Church in Albany. Stanton is himself an ex-con who has seen plenty of prisoners claim to have found religion behind bars, only to drop the facade and go back to their old ways when they get out.
"I saw a lot of guys we called fakin' jacks," Stanton said. "They play religion then when they get out, they get rid of it. Not Ben. He's the real deal."

Rountree works two maintenance jobs that he got through Second Chance Opportunities in Albany. He spends a lot of time working at the church, and is making plans to speak to young people at risk of going down the same drug-dealing path he did. That's on hold for now, because the pandemic makes it impossible to meet with them.

Rountree carries a business card for his work as a motivational speaker that reads, "My story can change your life. Let's rise together. Life should be lived, not taken."

He has a reason for having a place in his heart for people with developmental disabilities. His brother has special needs. "We been dealing with that all our lives," Rountree said. "I feel like this: we're all human. Just because someone has a special need doesn't mean they're not strong in other places. You just have to take the time to work with that person."

In prison, Rountree came to the rescue of special-needs inmates who were magnets for abuse from other inmates, he said. He recalled stepping in to stop a rape. "I actually got in the middle of it and said, 'That's wrong -- don't be doing that,'" he said. "I mean, it was about to go down." That's how he made a name for himself among the inmates, and the guards, he said.

"When people really seen that I was serious about helping people, I basically got a name for myself," he said. "People started respecting my cause and what I was trying to do."

(Continued on page 17)

Positive Outcomes ...continued

Judge Kahn ordered Rountree to spend the first two weeks in quarantine, which he did, and his first two years on electronic ankle bracelet, confined to his Albany home with the exception of trips for work, medical care, religious or community service.

Rountree said proudly that his hourly wage jumped from $15 an hour to $18.43 in just two months, and that he's working about 35 hours a week. He's a 56-year-old father of five and a grandfather who loves to barbecue for his family. He served eight years of his sentence before his health problems – diabetes and high blood pressure – put him at higher risk of serious illness if he contracted coronavirus. His release date had been January 2025.

Rountree's wife Cindy and daughter went to pick him up in New York City at a bus station after he was released from Schuylkill FCI in Pennsylvania. Cindy shrieked with joy when she got the news that he was getting out.

She won't let him forget the years that she had to live without him, she said.

"It's fabulous, darlin'!" she said. "It's all good. He's doing everything. He's chauffeuring me! I sit in the back seat of the truck, honey! He owes me all that, so I'm taking advantage of him!"

Dewayne Comer

It was a cold January day in 1996. Dewayne Comer was freezing outside the Carrier Dome, scalping tickets – not the usual place for a supposedly wealthy drug kingpin.

But that's how police portrayed Dewayne when they arrested him that day outside the Dome. He was only 25 years old. He didn't grasp the gravity of what lay ahead.

After a 4 1/2-month jury trial, he was convicted of engaging in a continuing criminal enterprise that involved 1.5 kilos of crack cocaine. His prison sentence: Life.

"I remember pulling up in the bus and seeing a statue of a guy with the world on his back," Comer said. "They announced, 'Welcome to Lewisburg, the roughest penitentiary in the United States.' I remember thinking I'm never getting out of here because of my sentence."

Dewayne thought he had to fight to get out of there. He didn't want to give up. He hoped his sentence would be cut down to 19 or 20 years after his appeal went through.

"Here I was, someone with no violent past going into a very, very, very dangerous atmosphere," he said. "There were murders going on and they went straight to lockdown when I got there. The blacks and whites were rioting in the facility."

The cuffs weren't even off him when he heard other inmates yelling, "Fresh meat! Fresh meat coming through!"

He was under 24-hour lockdown. The black inmates yelled to him that they would talk to him at rec. The first day Dewayne was being escorted to the yard the black inmates were screaming to the guards, pounding on doors, trying to warn the them that white inmates were waiting on the other side. The CO realized what was happening and didn't open the door.

"If they would have put me in there, they would have stabbed me up," Comer said. "Everyone was trippin'. The CO realized what was happening and took me back. I had to stay in the SHU for two months."

(Continued on page 18)

Positive Outcomes ...continued

When Dewayne got out of the SHU, he had to show his paperwork. He had to prove he wasn't a snitch. "You don't have a choice," he said. "You meet with the New York guys."

One of the New York state inmates, Tommy Walker, helped Dewayne. "I got to the gym, he tells me, 'Get your back against the wall,'" Dewayne said. "There were like 20 guys stabbing each other up from Chicago. You can't be involved in that. They don't know whose side you're on. If you come off the wall, you'll be stabbed."

Dewayne had to quickly learn how to survive the dangers of living in a penitentiary. He didn't understand what he was doing in a maximum-security facility. Walker tutored him on the law and how to survive. Dewayne was told that his public safety factor was high because he was responsible for more than 5 grams of crack.

"I only had six points, but my sentence was so Draconian I was forced into a pen," he said. "Some of the best legal minds were in there. They encouraged me to learn what I could. I really thought I was going to get some type of relief, but that never happened."

After spending 12 years in Lewisburg, Dewayne was transferred to other USPs, including, Atwater, Terre Haute, and Waymart.

"Atwater was a whole different animal," he said. "It's gangs, gangs and more gangs. Crips, Bloods and Surenos. No one speaks to no one outside of each other. If anyone comes from the outside of the gang, they kill-in' 'em. Ain't no playing, talking or nothing. It's a war zone when they fight."

In Atwater, Dewayne had to stick with the east coast contingency. If he messed up, they would abandon him because none of them wanted to be killed, he said. "If the east coast fights, they have to move everyone," he said. "They have to because someone is dying."

Dewayne described it as a battlefield when a fight broke out between DC and Baltimore. For his safety, he had to be placed in the SHU for 9 1/2 months, until his transfer to Terre Haute.

"There's so much tension," he said. "They flick the lights to let you know who started the fight. The police were running in every direction."

Dewayne tried to maintain a low profile. When he was transferred to Terre Haute, where death row inmates are housed, his paperwork didn't follow him. He couldn't prove he wasn't a snitch. His life was in danger. He was exhausted and couldn't imagine being put in the SHU again. He didn't have a choice. Members of the prison's Security Investigation Squad announced he had no paperwork – which sent him back to the SHU.

After 18 years, Dewayne was moved to FCI Bennettsville, S.C. Finally, he didn't have to constantly look over his shoulder. He spent most of his time studying the law.

"You could feel the security level drop," he said. "I felt like I could breathe. You could see a tree."

The inmates housed at an FCI have release dates. They are prioritized for programs based on their release dates. "I felt like I was dead to the system," he said. "I didn't have a release date so I couldn't do programs."

That changed three years into his stay at Bennettsville. He developed a rapport with his counselor. Dewayne tutored other inmates. He was eventually authorized to participate in programs. He regained hope.

Dewayne was 46 years old when our office filed his clemency petition. He had already exhausted all possible

(Continued on page 19)

avenues of review in the courts. He met the clemency criteria announced by President Barack Obama.

"The day I learned about my release, it was 9 a.m.," he said. "I was approached by an officer who said at 1 p.m. they want to see me at the lieutenant's office. There was a whole line of COs and I was directed to the assistant warden's office. They told me my lawyer wanted to talk to me. I'm thinking I'm going to the SHU. Lisa was on the phone. She said, 'Have a seat.' I told her I was OK. Then she told me what Obama did. I told her I had to go. I was in shock. It happened so quick."

Dewayne had a plan. He didn't want to tell anyone he was getting out. But the minute he opened the door to the assistant warden's office, he blurted out the news. He couldn't hold it in.

"I told everyone," he said. "The whole dorm was clapping. It was like a basketball game. Like a Syracuse game. Everyone was clapping."

The day Dewayne was released he described feeling like a baby. Everything seemed new. He arrived in Syracuse on Sept. 1, 2016. He went to Peace Inc. It was his first day out. They put him to work volunteering.

"I was doing a little bit of everything," he said.
He was invited to a luncheon where they were talking about the Hope organization. They mentioned working with formerly incarcerated people. "I thought, 'Oh, that's a natural fit for me,'" he said.

Dewayne took advantage of opportunities presented to him. Dominick Robinson set him up with a job at the volunteer lawyer's project. "I was doing certificates of relief, reentry and landlord tenant court." Dewayne said. "I worked there almost a year. I was discouraged when I saw so many people I knew."

He transferred to Upstate Entrepreneurs. "I created a 17-page survey for homeless people," he said. "They didn't think I'd get them to talk to me. I got over 500 filled out. The organization got a grant because of it."

While working full-time, Dewayne also earned his associate's degree in business administration from Onondaga Community College.

Today, he's working for National Street Certified, an organization recently created to help formerly incarcerated people find jobs, homes and community resources. He's being trained as an organizer for the northeast region. He hopes to help released inmates work through the trauma of incarceration.

"No one with a non-violent past should ever have to go through what I went through," Dewayne said. "Working through the trauma is hard for anyone in the justice system to understand. You have to have that conversation. You have to be able to relate to the person."

He had to reestablish relationships with his family. But he first needed to work on himself. He wasn't at peace with the trauma he experienced. He saw guys come back through the system because they didn't address the trauma. "You get into a state where you don't care," he said. "'Send me back' is their attitude."

He studied spirituality and character development. Leaving a violent environment and learning to develop those relationships on the outside was a challenge. Dewayne worked tirelessly to overcome the tensions he felt when he was released.

His commitment to working with others similarly situated has been the best medicine. "You need to help other dudes in the same situation," he said. "Don't worry about money. Worry about education and helping others. The money will come."

Dewayne is grateful for the love and support of his family. His four kids were babies when he went to prison. Today, they're young adults with children of their own. He is a proud grandfather. When asked what he cherished the most he gave a one-word answer: Freedom.

Acquiring Information: How to FOIA

By: *John O'Brien, Inv.*

Defense lawyers can't always use subpoenas to dig up documents and recordings. If what they're looking for isn't specific to a case, a subpoena won't do.

The second most-powerful weapon in a defense lawyer's arsenal is FOIL – the Freedom of Information Law, or FOIA if it's a federal agency you're going after.

FOIL requests became even more powerful in New York State in June, when the state legislature repealed a 44-year-old law that banned the release of a police officer's disciplinary record. The repeal came in the wake of national outrage over the death of George Floyd in Minnesota.

By eliminating the law, known as Section 50-a, previously secret complaints against police can be made public for the first time. That includes not only the complaints, but any transcript or recordings of disciplinary hearings, and final dispositions. The records should be made public whether the police's internal affairs department substantiates the allegations or not.

Now defense lawyers can use FOIL to look for any hint that an officer testifying in their case has a history of dishonesty or misconduct and use it to discredit him or her on the stand.

But those records can only be unearthed with FOIL. Here are some tips on making a request:

- File early. Don't wait until months into the case to submit the FOIL request. Police agencies and municipalities have ways of dragging out their response for months, even more than a year.
- In your request, be sure to ask that the records be provided electronically – either as an attachment to an email or on a thumb drive, CD or DVD. If you're not specific, the agency could assume you want paper copies. That will result in a huge expense for you and likely a much longer wait for the records.
- Include in your FOIL a request that, if the agency denies any portion of it, they specify under which FOIL exemption they're basing the denial.
- Ask that the agency provide the name and contact information of its FOIL appeals officer.
- Pay attention to deadlines. For a NY FOIL request, the agency has five days to respond, even it's to say they're working on the request and that they expect to give you an answer by a certain date. For federal requests, that initial deadline is 10 days.
- Don't wait forever for a response. If the agency fails to give you an answer, you can take the position that that's a "constructive denial" – meaning you can appeal their refusal to turn over the records. If they ignore your appeal after the required deadline, you can make the same argument and take them to court.

If you appeal an agency's denial, look for help from the state's Committee on Open Government. The agency posts its advisory opinions, organized by subject matter, on its web site: https://www.dos.ny.gov/coog/
Find the opinion that backs up your argument and attach it to your appeal.

Here's the federal statute: https://www.foia.gov/foia-statute.html

Here's the state statute: https://www.dos.ny.gov/coog/foil2.html

Judge's Corner

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

Status of Court Operations During Covid-19 Pandemic

First and foremost the Board of Judges would like to thank the members of the Bar for all their extraordinary efforts in representing their clients during these unprecedented and challenging times.

The Court has maintained operations throughout the pandemic by utilizing information technology which enabled us to conduct remote proceedings. This provided all persons involved (Defendants, lawyers, law enforcement, Court staff, the public, the media and Judges) with the ability to participate safely.

Setting up and maintaining the equipment to conduct proceedings remotely required a remarkable effort by the Court's IT staff and the NDNY Clerk's office. The cooperation and patience of all enabled us to keep our Court open and working, thus fulfilling our constitutional mandate in the NDNY.

The Court has employed a "phased" approach in an attempt to get back to "normal" operations while keeping the health and safety of all our number one priority. (Please see the next page Court reopening chart for further information).

The Court has issued General Orders based upon the declaration of a national emergency and pursuant to the passing of the CARES Act, H.R. 748 (CARES Act) by the U.S. Congress. Of particular note are General Order #58 Coronavirus Covid-19 Public Emergency; General Order #59 Criminal Case Operations in Response to Coronavirus Covid-19 Public Emergency; as well as General Order #61 Concerning Face Masks/Coverings in Public Areas of NDNY Courthouses.

On Monday, October 5th the Court will advance to the next stage of its reopening plan. During this next stage, the focus will be on increasing the in-office presence of the NDNY Clerk's office. We will be migrating from a three-team system to a two-team system with Clerk's office employees teleworking every other week. The public hours of the Clerk's office will remain from 10:00 AM to 3:00 PM. We have installed document drop boxes, with time stamping capability, in each of our courthouse lobbies. This will allow individuals to physically file documents during normal courthouse hours (8:30 AM to 4:30 PM).

From a trial standpoint, the NDNY conducted two civil trials in September. As you can imagine, a great deal of preparation is needed to conduct these proceedings in a safe and efficient manner. On October 20th from 3:00 to 5:30 PM, representatives from the NDNY will be participating in a New York State- Federal Judicial Council sponsored CLE program discussing civil and criminal procedures and practices in state in federal courts during the COVID 19 pandemic. I would encourage all interested parties to participate in this complimentary program. The link to register can be found at ***http://ww2.ca2.uscourts.gov/event.***

The Board of Judges thanks you again for your patience and cooperation during these challenging times.

Best wishes for you and your loved ones to remain safe and healthy.

Hon. Glenn T. Suddaby
Chief U.S. District Judge

NDNY COVID 19 Reopening Chart					
	Current Status. April 29 - May 17	Phase One May 18 - June 12	Phase Two June June 15 - July 12	Phase Three July 13 - August 10	Phase Four. August 10 forward
In person felony pleas and sentencings	Prohibited	Allowed but subject to USMS and facility limitations			
Civil Bench Trials	Prohibited	Prohibited	Court will assess viability of holding bench trials		
In person civil-motions and conferences	Prohibited	Prohibited	Allowed but with social distancing protocols		
Convening current grand juries	Prohibited	Prohibited	Court will assess viability of convening grand juries.		
Inter-divisional office travel	Prohibited	Prohibited	Allowed for Judicial proceedings only	Court will reassess business travel	
Petit and grand jury empanelment	Prohibited	Prohibited	Prohibited	Court will assess viability of jury empanelments.	
Chambers staffing:	Reduced - See chambers template	Reduced - See chambers template	Reduced - See chambers template	Court will reassess chambers staffing	
Clerk's office staffing:	Reduced: See attached chart.	Reduced: See attached chart.	Reduced: See attached chart.	Court will reassess clerk's office staffing	
Clerk's office public hours	10:00 AM - 2:00 PM	10:00 AM - 2:00 PM	10:00 AM - 2:00 PM	10:00 AM - 2:00 PM	Court will reassess public hours.
Naturalization ceremonies	Postponed	Postponed	Postponed	Postponed	Viability will be determined on a case by case basis
In-person preliminary criminal proceedings	Prohibited	Prohibited	Prohibited	Prohibited	Viability will be determined on a case by case basis

Upcoming Training and Resources

» » » » » Upcoming CLE « « « « «

Tuesday, October 20th from 3:00 p.m. to 5:30 p.m.
New York State– Federal Judicial Council
Civil and Criminal Procedures and Practices in state and federal courts during the COVID 19 pandemic.

The link to register can be found at *http://ww2.ca2.uscourts.gov/event*.

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 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