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THE USE OF NEW YORK STATE YOUTHFUL OFFENDER ADJUDICATIONS UNDER THE FEDERAL SENTENCING GUIDELINES

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Recent decisions have clarified the circumstances when a defendant's prior youthful offender adjudication can be used in determining criminal history and base offense level. This article will attempt to explain the current status of the law and practice in the Western District of New York.

First, a basic understanding of youthful offender procedure in New York is required. Article 720 of the N.Y. Criminal Procedure Law sets forth the youthful offender procedure. The purpose of the provision is to provide the sentencing court with discretion when presented with an eligible youth. Generally, an eligible youth is one between the ages of 16 and 19 years old who is convicted of a misdemeanor or felony offense. [N.Y. CPL § 720.10(1)] The court may make a finding that the offender is a youthful offender (YO). That finding, once made, substitutes for the conviction under N.Y. law. [CPL § 720.10(4)] The sentencing judge then imposes a youthful offender sentence. That sentence is limited to no more than 6 months for a misdemeanor. Should the YO finding substitute for a felony offense, the maximum sentence cannot exceed 4 years. [N.Y. Penal Law § 60.02] The youthful offender finding together with the youthful offender sentence is considered a youthful offender adjudication. [CPL § 720.10(6)]. According to CPL

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§ 720.35(1), “a youthful offender adjudication is not a judgment of conviction for a crime or any other offense.”

Next, an understanding of how the sentencing guidelines compute criminal history is in order. An individual’s criminal history is determined by the application of Sentencing Guidelines §§ 4A1.1 – 4B1.5. The sentencing guidelines calculate criminal history based on prior sentences. The guidelines assign from 0 to 3 points for prior sentences depending on the length of the sentence. Additional points are assessed if the offense was committed while under an earlier sentence and/or committed within 2 years of release from a term of imprisonment. § 4A1.2(d) addresses those situations wherein the defendant was less than 18 years of age when he received a prior sentence. Two points are assessed for each adult or juvenile sentence of at least 60 days if the defendant was released from that sentence within 5 years of the commission of the instant offense. A single point is added for each adult or juvenile sentence that was imposed within 5 years that did not exceed 60 days. § 4A1.2(j) prohibits the counting of expunged convictions.

In *United States v. Matthews*, 205 F.3d 544 (2nd Cir. 2000), the Second Circuit found that a Youthful Offender adjudication under New York State law was not an expunged conviction under § 4A1.2(j). The panel determined the NY State statutory scheme was meant to remove the stigma associated with a criminal conviction, as that language is used in Application Note 10 to § 4A1.2. The opinion interpreted the New York YO protection to be a mere set aside rather than an expunged conviction. *Id.* at 548. The Circuit upheld the district court’s inclusion of the YO in calculating the defendant’s criminal history. If you represent a client with an out-of-state YO adjudication compare the out-of-state statute to CPL Article 720. See *United States v. Beaulieu*, 959 F.2d 375 (2^d Cir. 1992).

In *United States v. Driskell*, 277 F.3d 150 (2nd Cir. 2002), the Second Circuit again discussed New York’s YO statutory scheme and the inclusion of such a finding in determining one’s criminal history. Driskell argued that “a conviction for an offense committed prior to age eighteen but replaced by a youthful offender adjudication, regardless if expunged or simply set aside, may not be considered at all.” *Id.* at 154. Drawing from *Matthews*, the Circuit determined NY’s YO determination was not

binding. “Rather than finding New York’s label conclusive, we believe the better course is for a district court to examine the substance of the prior conviction at issue; to focus on the nature of the proceedings, the sentence received, and the actual time served.” *Id.* at 157. The panel held that a prior conviction that was adjudicated as a YO under New York law may be counted in calculating one’s criminal history.

If your client has a YO adjudication, it is important to consider if the YO is being used for criminal history purposes or offense level purposes. A YO adjudication that may receive three points for criminal history purposes may not be the equivalent of a felony conviction for offense level purposes. A common example one may find is the defendant who is convicted of possession of a firearm or ammunition after sustaining a felony conviction in violation of 18 U.S.C. § 922(g)(1). The offense level guideline for 18 U.S.C. § 922(g)(1) is found at § 2K2.1. Section 2K2.1 sets forth numerous base offense levels determined by the individual’s prior criminal record. One possibility is a base offense level of 14. However, if that defendant has a prior felony conviction for either a crime of violence or a controlled substance offense, the base offense level is increased to a level 20. Should the defendant have two or more such felony convictions the level increases to a level 24. The inclusion of a prior YO adjudication may increase the defendant’s level to at least a level 20 and maybe 24 resulting in a much higher sentencing range.

In a recent case, the United States Probation and Pretrial Service office for the Western District of New York interpreted the *Driskell* holding (that YO adjudications may be counted in calculating criminal history) to apply to the determination of one’s offense level who was pending sentencing for felon in possession of a firearm [18 U.S.C. § 922(g)(1)]. The defendant pleaded guilty to violating § 922(g)(1). The parties relied on his prior felony conviction and agreed to an increased base offense level of 20. The parties did not consider a YO adjudication for Attempted Criminal Sale of a Controlled Substance in the 3rd Degree. The PreSentence Report determined that the YO should count not only as a sentence for criminal history purposes per *Driskell*, but it should also count in determining the base offense level under § 2K2.1. The resulting calculations increased the guideline range from 30-37 months to 57-71 months. The

defendant objected to Probation's assumption that *Driskell* supported the counting of the YO to increase the offense level. Counsel contended that neither the language of the guideline nor the *Driskell* opinion supported Probation's assumption.

In a well reasoned opinion, Judge Telesca rejected Probation's conclusion and held that the YO may not be considered as a predicate felony under § 2K2.1 in determining one's offense level. *United States v. Jamesale Davis*, 2003 WL 252143, Docket # 02-CR-6118T (decided January 29, 2003). Judge Telesca's opinion distinguished *Driskell* finding the language in the respective guidelines are different. § 4A1.2 requires "only that the defendant be convicted as an adult whereas under Guideline § 2K2.1, the section relevant in this case, the guideline is applicable only if the prior conviction is treated as an adult conviction by the jurisdiction imposing the sentence." *Id at page 4*. The analysis continued, "while a youthful offender conviction may be used to determine a defendant's criminal history category, as the Court did in *Driskell*, the plain language of application note 5 of § 2K2.1 provides that a youthful offender conviction may not be considered in determining the defendant's offense level." *Id at page 5*.

Based on Judge Telesca's decision, the United States Attorney's Office for the Western District of New York recently advised another district court judge that the government has adopted a consistent policy throughout the district. The United States will not include in base offense level computations youthful offender adjudications based on felony crimes committed prior to age 18. The United States will count YO adjudications after age 18 in § 2K2.1 computations relying on the language in application note 5.

Similarly, the United States Probation and Pretrial Services office has disavowed their earlier attempts to include New York YO adjudications for offenses committed prior to age 18. Hereinafter, Probation will adopt the government's policy against counting YO adjudications under § 2K2.1.

Other statutory and guideline sections apply enhancements for prior convictions. These include § 4B1.1 (career offender), 18 U.S.C. § 924(e) (armed career criminal), and 21 U.S.C. §§ 841(b)(1)(A)&(B) (controlled substances). The

issue of the applicability of an individual's YO adjudication is repeating in these areas as well.

In *United States v. Pinion*, 4 F.3d 941 (11th Cir. 1993), the Eleventh Circuit counted a defendant's South Carolina YO determination in subjecting the defendant to Career Offender status pursuant to § 4B1.1. South Carolina did not classify the conviction as adult or juvenile. The South Carolina law treated defendants under 25 years old as youthful offenders. The Eleventh Circuit focused on the defendant being convicted in adult court and serving an adult sentence (27 months) in upholding the district court's ruling that the defendant was a career offender. This decision was cited with approval in the Second Circuit's decision in *Driskell*.

In *United States v. Greene*, 187 F.Supp.2d 595 (E.D.Va., 2002), the district court judge determined that two prior YO adjudications in New York for attempted criminal sale of controlled substances should be counted. This finding resulted in the defendant being sentenced as a career offender pursuant to § 4B1.1. The opinion relied on the Second Circuit's decisions in *Matthews* and *Driskell*. Though *Driskell* decided a New York YO adjudication should be counted for criminal history purposes, the district judge in Virginia decided the analysis was appropriate and included the YO in the career offender calculus.

Probation advises that they will no longer seek to include YO adjudications in determining whether a defendant qualifies for career offender treatment pursuant to § 4B1.1.

An individual who is convicted of 18 U.S.C. § 922(g)(1) after being convicted of three previous convictions for a violent felony or a serious drug offense must be imprisoned no less than fifteen years. See 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4(a). The Armed Career Criminal Act defines violent felony and serious drug offense differently than the interpretation used in the above situations. More importantly, "conviction includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." 18 U.S.C. § 924(e)(2)(C). Counsel should consider this section when defending a felon in possession offense.

The Third Circuit suggests an approach to determine whether an underlying act of juvenile delinquency enhances a defendant's sentence under

the Armed Career Criminal Act. The district court must consider the underlying act of juvenile delinquency and whether it involved the use or carrying of a firearm, knife, or destructive device. This requires a categorical approach in reaching the result. That is, does the underlying state statute require as an element, the use or carrying of a firearm, knife, or destructive device. If the underlying statute does not require that element, there is no further need to examine the charging documents. *United States v. Richardson*, 313 F.3d 121 (3rd Cir. 2002).

Youthful Offender adjudications have also been used to increase the potential minimum and maximum sentences under the Controlled Substances Act, 21 U.S.C. § 841 et al. In *United States v. Acosta*, 287 F.3d 1034 (11th Cir. 2002), the Eleventh Circuit construed a New York YO to be a countable predicate offense to enhance the defendant's sentence to a 20 year minimum. Though the decision determined the defendant committed the earlier offense at age 16, the panel opinion held that what is or is not a prior conviction for a felony drug offense must be determined by federal law, not state law. The court found the "fact that New York law does not consider a youthful offender adjudication to be a conviction," not binding. *Id.* at 1037. Thus, the court upheld the imposition of the greater sentence.

In a recent decision by Judge Larimer, *United States v. Juma Sampson*, Docket # 00-CR-6083L (entered February 26, 2003), the court determined that the defendant's prior YO adjudications for Criminal Sale and Criminal Possession of a Controlled Substance in the 3rd Degree met the definition of a prior conviction for a felony drug offense. This resulted in an increase in the mandatory minimum from 10 years to 20 years. Though this was an oral decision issued during Mr. Sampson's sentencing hearing, it is believed that Judge Larimer found the *Acosta* reasoning persuasive.

Recent decisions permit the inclusion of New York Youthful Offender adjudications in calculating the defendant's criminal history. Youthful Offender adjudications are also being considered in determining whether or not the defendant's current sentence should be enhanced as a Career Offender, an Armed Career Criminal or as an individual who has a prior conviction for a felony drug offense. The

traditional belief that a New York Youthful Offender adjudication could not be used to increase an individual's sentence is no longer valid. Counsel needs to review the specifics of the prior YO to determine the defendant's age at the time of the commission of that act, the nature of the charge that formed the basis of the adjudication, the underlying acts supporting the adjudication, the sentence that was imposed, and the nature of the facility wherein the defendant completed his sentence. The adjudication must be investigated as if it was a prior felony conviction. In addition, counsel should determine how the adjudication is being used, i.e., statutory enhancement, criminal history, offense level, or career offender. Each application has different rules concerning the use of YO adjudications. Otherwise, counsel may find the defendant's sentencing range, his criminal history, his minimum and maximum to be far different from that which was contained in the plea agreement.

The current status of the law can be summarized as follows:

- 1) YO adjudications count when calculating the defendant's criminal history;
- 2) YO adjudications for acts committed prior to age 18 do not count when calculating the defendant's base offense level pursuant to § 2K2.1;
- 3) YO adjudications for acts committed after age 18 may count under § 2K2.1;
- 4) YO adjudications will not be considered by the U.S. Probation office in calculating Career Offender pursuant to § 4B1.1;
- 5) YO adjudications may count in calculating Armed Career Criminal status pursuant to 18 U.S.C. § 924(e) and § 4B1.4(a);
- 6) YO adjudications count when calculating whether the defendant is subject to the increased statutory minimum and maximum sentences under the Controlled Substances Act (21 U.S.C. § 841 et al).



DAY WITH THE DEFENDER

Back by popular demand, a "Day with the Defender" will be hosted in our Buffalo and Rochester Offices for those of you who wish to learn (or be refreshed on) the fundamentals of federal criminal defense practice. The two sessions will run from 9:00 a.m. to 3:00 p.m. in our Buffalo and Rochester offices on September 9 and 11, 2003 respectively.

The program is presently being planned for training panel and less-experienced trial panel members who still need and/or want some basic training. The program will cover bail, pretrial motions, sentencing, appellate practice and other topics. The format will be discussion-type, with plenty of time to ask questions.

Attendance for the entirety of one of these sessions will fulfill your annual education requirement under the district's CJA Plan. New York State CLE credit will **not** be awarded. Attendees should bring with them a copy of the Federal Criminal Code and Rules and a copy of the Sentencing Guidelines Manual.

If you wish to attend, you must make a reservation with:

Carol Steinbruckner at (716) 551-3341 in Buffalo or

Diane Pomponio at (585) 263-6201 in Rochester.

Attendance will be limited to the first 12 lawyers to register at each site.

AMENDMENT TO FEDERAL RULE of EVIDENCE 608(b)

Federal Rule of Evidence 608(b) is amended effective December 1, 2003, unless acted on by Congress prior to that date. The amendment to Rule 608(b) (specific instances of conduct) clarifies the prohibition on using extrinsic evidence, as was originally intended by the rule, to apply only in cases in which the proponent's sole reason for proffering the evidence is to attack or support the witness's "character for truthfulness," rather than to permit a potentially broader literal reading of the reference to the witness's "credibility" under the existing rule.

Notwithstanding the original intent of the drafters of Rule 608(b) and the decision in *United States v. Abel*, 469 U.S. 45 (1984), holding that Rule 608(b) extrinsic evidence prohibition does not apply

when it is offered for a purpose other than proving the witness's character for veracity, a number of cases have construed "credibility" more broadly and prohibited extrinsic evidence proffered to prove non-character forms of impeachment.

By expressly limiting the application of the rule to proof of a witness's character for truthfulness as originally intended, the amendment leaves open the admissibility of extrinsic evidence offered for other grounds of impeachment (e.g. prior inconsistent statement, bias, and mental capacity), also as originally intended. The admissibility of extrinsic evidence offered to impeach a witness on grounds other than character continues to be governed by Rules 402 and 403.

AMBER Alert Bill (The Feeney Amendment)

On April 30, 2003, President George W. Bush signed into law the Protect Act of 2003, previously known as the AMBER Alert bill, which included provisions for raising the penalties for child abduction and abuse. An amendment to the bill made significant changes to federal sentencing practices by limiting departure discretion and enhancing sentences and has potentially serious repercussions for the federal defense bar. Detailed below are the significant provisions of the amendment.

Significant Provisions:

1. Amends 18 U.S.C. §3553(a) (factors to be considered in imposing sentence) and §5K2.0 (general departure authority) to restrict departures for certain child-related and sex offenses -- child kidnaping, sex trafficking, obscenity, sexual abuse, sexual exploitation and transportation for the purpose of illegal sexual activity:
 - a. To depart downward, a mitigating circumstance must have been “affirmatively and specifically identified as a permissible ground for downward departure.”
 - b. The sentencing court can only consider the sentencing guidelines, policy statements, and official commentary of the Commission, together with any amendments by Congress.
 - c. Downward departures are limited to those enumerated in §5K, notwithstanding any other reference to an authority to depart elsewhere in the Sentencing Manual. The ground must be expressly enumerated.
 - d. For the above sex offenses, the following cannot be grounds for downward departure: substance abuse or gambling dependence, aberrant behavior, community ties. Age can be a basis for departure.
 - e. Amends 18 U.S.C. §3553(c) to require district court to state with specificity reasons for sentence in written J & C.
2. Sentencing Appeals (18 U.S.C. §3742(e))
 - a. Amends the standard of review: If the district court fails to provide a written statement of reasons for a sentence or departs, the standard of review changed: the court of appeals shall review *de novo* the district court’s application of the guidelines to the facts. (The previous standard required “due deference” to district court’s application of the guidelines to facts.)
 - b. Changes the procedure for re-sentencing on remand to district court:
 - (1) in determining range, district court must apply guidelines in effect on date of the previous sentencing, together with any Congressional amendments in effect on that date; and
 - (2) district court cannot impose a sentence outside the range UNLESS the ground was specifically included in prior statement of reasons in imposing sentence AND was held by the court of appeals to be a permissible ground for departure.
3. Acceptance of Responsibility
 - a. Prior law - allowed 1 additional point decrease if offense level 16 or greater if defendant (1) timely provided complete information to government about his offense involvement; or (2) timely notified authorities of intention to plead guilty, permitting the government to avoid preparing for trial and the court to allocate its resources efficiently.
 - b. Amendment - requires motion from the government “stating that defendant has assisted authorities in the investigation of his own misconduct” by timely notice of intention to plead guilty, permitting government to avoid trial preparation and government and court to allocate resources efficiently. (Note: eliminates sub-part (1) above.)
 - c. Application Note to amendment: “Because the Government is in the best position to determine whether the defendant has

assisted authorities in a manner that avoids preparing for trial” an adjustment can only be granted upon government motion.

4. Information Gathering

Within 30 days of entry of judgment, sentencing court must prepare written report of sentence, including reason for departure.

Sentencing Commission required to provide information to Congress and inform Congress of districts not complying.

Commission shall make same reports available to the Attorney General.

5. Guideline for possession of child pornography amended by imposing graduated offense level increases based on number of images possessed.
6. Sentencing Commission ordered not to promulgate any amendments inconsistent with changes to sex offenses or ADD any new grounds for downward departure for all cases.
7. Sentencing Commission may not promulgate any amendments that would alter or appeal new law on sentencing remands.
8. Directs Attorney General to report to Congress detailing policies and procedures that:
 - a. ensure DOJ opposes sentencing adjustments and downward departures not supported by facts and law;
 - b. make a sufficient record to permit appeal;
 - c. delineate objective criteria for considering whether to appeal;
 - d. ensure district court offices inform main justice of adverse sentencing decisions; and
 - e. ensure vigorous pursuit of such appeals.

In addition, the Attorney General must, within 15 days, notify Congress of the district court’s granting of a downward departure and submit a detailed report on the case. Within 5 days of the Solicitor General’s decision on whether to appeal, report on the decision and reasons for the decision.

9. “Reform of Existing Permissible Grounds of Downward Departure”

Not later than 6 months upon enactment of this bill, the Sentencing Commission shall:

- a. review grounds for downward departure; and
 - b. promulgate guideline amendments, policy statements, and commentary “to ensure the incidence of downward departures are substantially reduced”; revise §5K2.0; and adopt a policy statement authorizing not more than a 4 level downward departure if the government files such a motion pursuant to an early disposition program authorized by the DOJ.
10. Limits number of judges on the Sentencing Commission to 3.

* * *

Amendments to Local Rules Effective May 1, 2003

Recent amendments to the Local Rules of Civil and Criminal Procedure for the United States District Court for the Western District of New York became effective May 1, 2003.

CJA Panel attorneys are encouraged to download the amendments from the Court's website at www.nywd.uscourts.gov/.

Attorneys without internet access may pick up a copy from the District Court Clerk's Office.

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Access Dockets at 2d Cir. Website

Log on to www.ca2.uscourts.gov to gain access to appellate dockets through PACER. Access to appellate dockets is done in the same manner as district court dockets obtained at www.nywd.uscourts.gov. A valid PACER account is required, and CJA counsel should contact the clerk’s office regarding access at no charge on CJA cases. PACER replaces the old dial-up method. Opinions and summary orders remain available at no charge without an account.

UPDATE: Bank Larceny & the DNA Backlog Elimination Act

Robert Smith, AFD
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The July 2002 edition of the FEDERAL PUBLIC DEFENDER REPORT reported on several pending cases in which the United States Probation Office sought to obtain DNA Samples from persons on probation and supervised release. See Robert G. Smith, et al., *Arguments Pending on Whether Bank Larceny Probationers May Be Compelled to Give DNA Samples*, FED. PUB. DEF. REP. (July 2002), at 1. In one of the pending cases, Magistrate Judge Feldman recently ruled that misdemeanor bank larceny is not a qualifying Federal offense under the DNA Analysis Backlog Elimination Act, 42 U.S.C. § 14135a(d)(1)(E). See *United States v. Curtis*, No. 03-CR-6030L, ___ F.Supp.2d ___, 2003 WL 396198, at *3-6 (W.D.N.Y. Feb. 18, 2003) (Appendix A, Decision and Order of Magistrate Judge Feldman). On appeal to the District Court, Judge Larimer affirmed Magistrate Judge Feldman's Decision and Order. *Id.* at *1-2.

The DNA Analysis Backlog Elimination Act enumerates those offenses which require an individual to supply a DNA sample. 42 U.S.C. § 14135a(d). Offenses involving robbery or burglary, as described in 18 U.S.C. §§ 2111 - 2114, 2116, and 2118 - 2119, are qualifying Federal offenses. 42 U.S.C. § 14135a(d)(1)(E). The government argued that misdemeanor bank larceny, which is codified under 18 U.S.C. § 2113(b), is a qualifying Federal offense even though bank larceny was not an enumerated offense under 42 U.S.C. § 14135a(d)(1)(E).

Judge Feldman rejected the government's argument and relied instead on the plain language of § 14135a(d)(1)(E). 2003 WL 396198, at *4. According to Judge Feldman, § 14135a(d)(1)(E) "reflects Congress' intent to make defendants convicted of *specified* offenses within *distinct* sections of the federal law subject to DNA testing." *Id.* (emphasis in original). Judge Feldman explained that:

[a]ccording to the plain language of the subsection (E), the distinct federal offenses for which DNA collection is required are those offenses involving robbery and burglary as described in sections 2111, 2112, 2113, 2114, 2116, 2118 and 2119 of

Title 18. The clear import of the statute is that any offense in the seven enumerated statutory sections that *involves* "burglary or robbery" is a qualifying Federal offense for DNA testing purposes.

Id. Judge Feldman also noted several ways in which Congress could have easily included bank larceny among the enumerated offenses. *Id.* at *5. Nonetheless, the Judge concluded that it is the plain meaning of the statute that controls. *Id.*

On appeal to the District Court, Judge Larimer affirmed Magistrate Judge Feldman's Decision and Order, incorporating the Decision and Order an appendix to the District Court's Opinion. *Id.* at *1. Judge Larimer concurred "with the Magistrate Judge's determination that the DNA Act was intended to require DNA testing for the more serious and violent offenses." *Id.* In addition, Judge Larimer rejected the government's argument that the Court should defer to the Attorney General's position, as set forth in 28 C.F.R. § 28.2, that bank larceny is a qualifying offense. Given the unambiguous nature of 42 U.S.C. § 14135a(d)(1), Judge Larimer saw no need to defer to the Attorney General's interpretation of the statute. *Id.* Most recently, the government moved to withdraw its appeal to the Second Circuit in this case.

Another Court has also found that larceny is not a qualifying Federal offense for purposes of 42 U.S.C. § 14135a(d)(1). In the Eastern District of Wisconsin, Chief Judge Rudolph T. Randa came to the same conclusion as Judges Feldman and Larimer, and enjoined the U.S. Department of Probation from collecting a DNA sample from a defendant serving a term of probation. See *United States v. Henderson*, No 01-CR-197, slip op. (E.D.Wis. Feb. 18, 2003). According to Chief Judge Randa, "[a] fair and logical reading of any one or all of the Sections of Chapter 103 listed in 14135a(d)(1)(E) produces no description that brings larceny into the definition of robbery or burglary or within the directive of § 14135a(d)(1)(E) that it be 'described' as robbery or burglary." *Id.* at 4. Chief Judge Randa went on to conclude that, "[l]arceny therefore must be one of the 'incidental' crimes references in the title of § 2113. It is not bank robbery, simple robbery or burglary and is therefor not a 'qualifying' offense under § 14135a(d)(1)(E)." *Id.*

This issue is still pending before United States District Judge William M. Skretny.

**SCORING OF STATE PETTY OFFENSES
(WITH CONDITIONAL DISCHARGE
SENTENCES) UNDER USSG
§4A1.2(c)(1)(A)**

Timothy W. Hoover, AFD

USSG §4A1.2(c)(1) excludes the scoring of criminal history points for the listed prior petty offense convictions, and offenses "similar to them," unless:

(A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense.

USSG §4A1.2(c)(1).

For the most part, petty state convictions for disorderly conduct (listed), harassment (not listed, but see *United States v. Morales*, 239 F.3d 113 (2d Cir. 2000)), disturbing the peace (listed), and the like will *not* count for criminal history points.

The exceptions generally have rare application. Take, for example, a second degree harassment conviction. The underlying offense conduct, even that involving an actual physical assault, will most likely not be categorically more serious than the listed offenses, so the conviction should not count even though harassment is not listed. *United States v. Morales*, 239 F.3d 113, 119-20 (2d Cir. 2000). For a defendant facing a federal felony drug conviction, the prior harassment offense will not be similar to the instant federal drug offense, so the USSG §4A1.2(c)(1)(B) exception will not apply. And, second degree harassment, N.Y. Penal Law § 240.26, is punishable by only fifteen days in jail, so the thirty days of imprisonment exception under USSG §4A1.2(c)(1)(A) will not apply.

Finally, a typical sentence for harassment is a one year conditional discharge, which, for purposes of USSG §4A1.2(c)(1)(A), does not constitute a one year term of probation, so the one year probation exception under USSG §4A1.2(c)(1)(A) will not apply. This conclusion is compelled not just the Practice Commentaries to the N.Y. Penal Law regarding conditional discharges, see William C. Donnino, *Practice Commentary*, McKinney's Cons. Laws of N.Y., Book 39, Penal Law art. 65, at 300-01 (1998), but by binding Second Circuit precedent. *United States v. Morales*, 239 F.3d 113, 116, 116 n.2 (2d Cir. 2000) (considering scoring of harassment conviction where the sentence was a one year conditional discharge,

noting that such offenses are not counted "in the absence of certain aggravating circumstances [i.e., one year probation sentence] not relevant to the pending case.").

With all of this said, a word of caution regarding petty offenses that resulted in one year conditional discharge sentences. You may see a PSR that attempts to count a petty offense (harassment, disorderly conduct) with a sentence of a one year conditional discharge, as one point. The Probation Office *may* argue that a one year conditional discharge is the equivalent of a one year probation sentence. This is wrong, is *contra* Second Circuit published precedent, and is inconsistent with how such petty offenses have been treated for years by the Judges and Probation Office in this District. If you see such attempt to score the petty offense as one point on the conditional discharge basis, object, and the PSR will either be changed or you will be successful with your objection to the District or Magistrate Judge. We can provide support with listings of numerous cases where such petty offenses with conditional discharges were not counted for criminal history purposes over the years, and sample briefing.

All of this is another way of emphasizing that vigilance is key when going over the criminal history calculations, especially with petty offenses. Inclusion of one point under USSG §4A1.2(c)(1), for whatever reason, can quickly balloon into two additional points under USSG §4A1.1(d) or (e). With a total of three criminal history points, your client faces an increased range generally and, in some drugs cases, may lose the two offense level reduction for the safety valve. *Morales*, 239 F.3d 113, is a chilling example of this. If the petty offense is not counted under §4A1.2(c)(1), points cannot be added under §4A1.1(d) or (e). If a PSR attempts to count a petty offense (either because of the conditional discharge issue, or claiming that actual harassment conduct was more serious than a listed offense), objections should be lodged, and you should almost always prevail.

Speaking of USSG §4A1.1(d), conditional discharges will constitute a "criminal justice sentence" for purposes of two additional points – *so long as they are revocable*. *United States v. Labella-Szuba*, 92 F.3d 136, 138 (2d Cir. 1996). That is, unconditional discharges do not constitute a "criminal justice sentence" because they are not revocable, and points cannot be added under USSG §4A1.1(d). And, conditional discharges that are not actually revocable do not constitute a criminal justice sentence either, for purposes of USSG §4A1.1(d). *United States v. Sanders*, 205 F.3d 549, 552 n.8 (2d Cir. 2000) (*per curiam*) ("the government makes no claim that Sanders's conditional discharge should qualify as a

"criminal justice sentence" under § 4A1.1(d). Moreover, Sanders conditional discharge requires only that he perform one day of community service, and thus lacks any "custodial or supervisory component" akin to that present in *Labella-Szuba*.").

This is not just an academic discussion – when faced with two additional points under USSG §4A1.1(d), you should object and make the government prove that the conditional discharge was actually revocable. The government will have a hard time doing so, especially where the state court judgment of conviction is silent as to any conditions of the conditional discharge, and it was not – despite the pendency of federal charges – actually revoked. The government's pat response – that a conditional discharge is revocable by operation of the New York

statute – is unsatisfactory, because the result in *Sanders* would have been impossible if that was the case. The Second Circuit will ultimately resolve this question, and was presented with the issue recently, but declined to reach the merits as the case was vacated and remanded because of a lack of fact-finding at sentencing. *United States v. Davis*, No. 02-1537, 2003 U.S. App. LEXIS 6188 (2d Cir. Mar. 28, 2003). Until the Second Circuit definitely rules, objections should be lodged and the government should be made to prove that a conditional discharge was revocable. We have briefing and memoranda available for your use. Contact Tim Hoover at (716) 551-3341 or at timothy_hoover@fd.org to get copies.

REVERSIBLE ERRORS 2003

In March 2001 we reprinted Reversible Errors from the Second Circuit from 1995-2000. We are reprinting here the Second Circuit cases identified in Reversible Errors from 2000-2003 published by the Office of the Federal Public Defender for the Districts of Northern New York and Vermont. The publication identifies cases from all of the circuits in which a criminal defendant received relief from an United States Court of Appeals or the United States Supreme Court.

If a case is preceded by an asterisk (*), that means the case may have been distinguished by another panel of the circuit or by another circuit. It should be researched to see if it remains authority in this jurisdiction.

If you wish to receive future publications of Reversible Errors please send your name, e-mail address, area-code and phone number to alex.bunin@fd.org.

Counsel

United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (Actual conflict between counsel and one defendant).

Estoppel

Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001) (Jeopardy attaches at unconditional acceptance of guilty plea).

Guilty Pleas

United States v. Yu, 285F.3d 192 (2d Cir. 2002) (Allocution must settle drug quantity to satisfy Apprendi).

Jury Selection

Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000) (Merely finding strike of juror was rational does not determine whether there was purposeful discrimination).

United States v. Nelson, 277 F.3d 164 (2d Cir. 2002) (Defendant cannot be forced to trade for consent to seat biased juror).

Defenses

United States v. Crowley, 236 F.3d 104 (2d Cir. 2000) (Jury should have been charged on voluntary intoxication).

Variance

United States v. McDermott, 245 F.3d 133 (2d Cir. 2001) (Variance between conspiracy charged and proof at trial).

Firearms

United States v. Howard, 214 F. 3d 361(2d Cir. 2000) (Jury could not infer defendant knew firearm was stolen merely because he was felon, or that firearm was found next to one with obliterated serial number).

United States v. Finley, 245 F.3d 199 (2d Cir. 2001) (Single gun could not be used for two possessions during a drug trafficking crime).

Drugs

United States v. Bryce, 208 F.3d 346 (2d Cir. 2000) (Uncorroborated admissions were insufficient to establish possession or distribution).

CCE / RICO

United States v. Desena, 260 F.3d 150 (2d Cir. 2001) (Talk of “war” and “grabbing shirts” did not support CCE).

Violent Crimes

United States v. Baker, 262 F.3d 124 (2d Cir. 2001) (Instruction allowed conviction without proving all elements of murder with intent to obstruct justice).

United States v. Parker, 312 F.3d 58 (2d Cir. 2002) (Insufficient evidence to convict of murder while engaged in a conspiracy to possess with intent to distribute cocaine base).

Miscellaneous Crimes

United States v. Naiman, 211 F.3d 40 (2d Cir. 2000) (Receipt of the funds is a jurisdictional element of commercial bribery).

Sentencing - General

United States v. Velasquez, 246 F.3d 204 (2d Cir. 2001) (Sentence exceeded statutory maximum without proof of death or serious bodily injury).

United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002) (Where conspiracy involved multiple controlled substances defendant may only be sentenced regarding drug with lowest statutory maximum).

Sentencing - Heroin

United States v. Guevara, 277 F.3d 111 (2d Cir.), amended 298 F.3d 124 (2002) (When quantity of heroin was not pled or proven to jury, defendant is subject to range for heroin proven, not higher statutory maximum).

Sentencing - Crack

United States v. Williams, 247 F.3d 353 (2d Cir. 2001) (Drugs meant for personal use were not to be counted toward distribution conspiracy).

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (Failure to plead and prove amount of crack limits punishment to lowest statutory maximum).

Sentencing - Firearms

United States v. Ahmad, 202 F.3d 588 (2d Cir. 2000) (Firearms that were not prohibited cannot be counted toward specific offense characteristic).

Career Enhancements

**Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (Not all felony DUIs in New York are crimes of violence).

Obstruction of Justice

**United States v. Woodard*, 239 F.3d 159 (2d Cir. 2001) (Unless defendant left district intending to miss court, it was not obstruction).

Criminal History

United States v. Morales, 239 F.3d 113 (2d Cir. 2001) (No criminal history point for 2nd degree harassment).

Upward Departures

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002) (Court should have begun departure from guideline of charged offense).

Downward Departures

United States v. Ventrilla, 233 F.3d 166 (2d Cir. 2000) (Judge was mistaken about authority to depart for diminished mental capacity).

Ineffective Assistance of Counsel

United States v. Davis, 239 F.3d 283 (2d Cir. 2001) (Counsel was ineffective by threatening to withhold services to encourage plea).

Mark your calendar now . . .

FEDERAL CRIMINAL DEFENSE PRACTICE FALL 2003 SEMINAR

**Friday, December 5, 2003
9:00 a.m. - 3:00 p.m.**

Plans are underway for the upcoming Federal Criminal Defense Practice Fall 2003 Seminar scheduled this year for Friday, December 5, 2003. This early notice is being provided to enable all attorneys who wish to attend an opportunity to clear their calendars for this date.

FEDERAL PUBLIC DEFENDER REPORT

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