FEDERAL PUBLIC DEFENDER REPORT

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UNITED STATES v. RAMIREZ, 421 F.3d 159 (2005) - WHAT STATE PRACTITIONERS NEED TO KNOW ABOUT THE HAZARDS OF CONDITIONAL DISCHARGES

MaryBeth Covert
Timothy W. Hoover

Beware

Hey, state practitioners, we know you regularly seek conditional discharge sentences in all the City/Village/Town courts, especially for non-criminal violation offenses, because of the lack of a term of imprisonment and the lack of supervision that a conditional discharge affords. We know that conditional discharges are regularly offered by prosecutors and imposed by state judges as a way to clear massive New York city, town and village court dockets, and are regularly accepted as a way to quickly resolve a case and to avoid incarceration. And we know a conditional discharge sentence is one of the most lenient sentences permissible under New York law.

Statistical evidence confirms that conditional discharge sentences are given in the overwhelming majority of misdemeanor offenses prosecuted in New York State. (80,000 in the year 2000 and nearly 70,000 in 2001). And, these numbers do not even include the greater number of defendants who received conditional discharge sentences for violation/petty offenses! Compare these numbers to those receiving probation - less than 10,000 in each of the years reported. See Crime and Justice Annual Report 2000 and 2001 at *http://criminaljustice.state.ny.us/crimnet/ojsa/cja_00_01/sec3.pdf* (last accessed Nov. 15, 2005).
Beware of taking them anymore! For clients who may one day end up in federal court, *United States*

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v. Ramirez, 421 F.3d 159 (2005) makes the one year conditional discharge for violation offenses count for federal criminal history purposes.

The Guidelines: petty offense sentences are presumptively not counted under USSG §4A1.2(c)(1)

By way of background, USSG §4A1.2(c)(1) excludes the scoring of criminal history points for the fifteen 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) (emphasis added). The fifteen offenses include, *inter alia*, careless or reckless driving, disorderly conduct, driving without a license or with a revoked or suspended license, fish and game violations, insufficient funds check, local ordinance violations and trespassing, as well as, in most circumstances, the unlisted offense of second degree harassment involving garden variety harassment conduct.

In 2003, some (but not all) of the Buffalo district judges, at the urging of the federal probation office, started counting New York State conditional discharge sentences, finding them akin to a sentence of probation. That is what Chief United States District Judge Richard J. Arcara did in *Ramirez*. This came after nearly 15 years (1987 to 2002) in which one year conditional discharges were never counted for criminal history purposes.

In June 2003, Mr. Ramirez pleaded guilty, pursuant to a plea agreement, to one count of conspiracy to possess heroin with the intent to distribute. The applicable Guideline range under the Plea Agreement's calculations was 27 to 33 months' imprisonment. Prior to sentencing, the Probation Office issued a PSR that suggested Ramirez had been involved in past criminal conduct unaccounted for in the plea agreement. The PSR disclosed two violations in New York state court for which Ramirez received "conditional discharge" sentences under N.Y. Penal Law § 65.05: a 1996 plea to one count of non-criminal/violation disorderly conduct, and a 1997 plea to one count of non-criminal/violation driving without a license. The PSR recommended adding one criminal-history point for each of these convictions under U.S.S.G. § 4A1.1(c).

With the addition of these points and six more for two out-of-state convictions, Mr. Ramirez's criminal-history score jumped to a total of 10 criminal history points, and placed him in a higher criminal history category, resulting in a recommended Guidelines range of 46 to 57 months' imprisonment.

Judge Arcara agreed with the probation calculations over Mr. Ramirez's strident objections, finding that a one-year conditional-discharge sentence under New York law "is [the] equivalent of a one-year term of probation for purposes of [U.S.S.G. § 4A1.2(c)(1)(A)]" because the statute describing conditional discharge, N.Y. Penal Law § 65.05, provides that such a sentence can be modified or revoked if the terms of the discharge are violated.

Circuit decision

Mr. Ramirez appealed to the United States Court of Appeals for the Second Circuit which, unfortunately, agreed with the district court. The circuit panel was unpersuaded by New York States' distinction between probation and conditional discharge sentences and by its prior precedents that bore on the issue:

> The section of the Guidelines dealing with criminal history is designed to account for convictions "in the federal system, fifty state systems, the District of Columbia, territories, and foreign, tribal, and military courts," and to accommodate "jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pronouncement." U.S.S.G. § 4A1.1 cmt. background. Thus, the terminology of punishment employed by a particular state is of limited value in interpreting the meaning of the guideline.

Finding that supervision is not a necessary component of federal probation, the Circuit found that “probation” as that term is used in the Guideline section is a broader concept. Id. at 164, citing. *Black's Law Dictionary* 1220 (7th ed.1999) (defining probation as "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison."); *Webster's Third New International Dictionary* 1806 (1981) (defining probation as "the action of suspending the

sentence of a convicted offender in such a way that the offender is given freedom after promising good behavior and agreeing to a varying degree of supervision, to the *usually* imposed condition of making a report to a particular officer or court at stated intervals, and to any other additionally specified conditions") (emphasis added).

Our (To no avail) disagreement with the Second Circuit decision

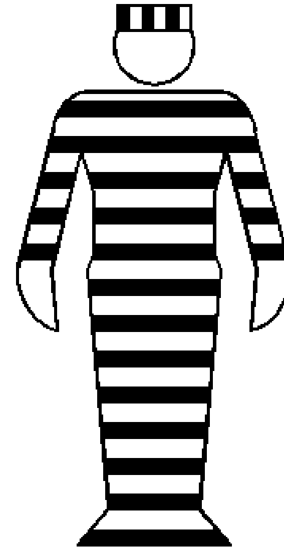
Some of you may be saying, "but probation can only be imposed following a defendant's conviction for a 'crime' under New York law; it cannot be imposed, as can conditional discharge, following conviction for a 'violation' or traffic infraction." And you would be right, see N.Y. Penal Law §§ 65.00, 65.05, but that too made no difference to the Circuit court. *Id.* Nor was the fact that when a court imposes probation, it must require that the defendant report to a probation officer and remain within the jurisdiction of the court, *see* N.Y. Penal Law § 65.10(3), while a court is not obliged to include these requirements when imposing a sentence of conditional discharge, *see id.* § 65.10. Nor for that matter, was the Court persuaded by the fact that these violation offenses carry a maximum of only fifteen days in jail (far short of the thirty day or more exception built into the guideline). This can be fairly seen as part of a greater circuit trend – exemplified by the Court's decisions in Guideline treatment of New York youthful offender adjudications, see *http://circuit2.blogspot.com/2005/09/circuit-continues-down-wrong-road-new.html* – of ignoring New York State law and focusing solely on a Sentencing Guideline "common law", if you will, in interpreting New York state sentencing provisions where the substance of the state provision at issue is key.

But, until the Guideline is, if ever, amended, this is the law in the circuit, given that the full Second Circuit denied Ramirez's petition for en banc review. Fortunately, there are options to mitigate or avoid the later consequence of a one year conditional discharge, both in state court in the first instance, and at a federal sentencing if a one year conditional discharge has already been imposed.

Options at original state/local court sentencing

What does this mean for state practitioners? First and foremost you will need to have a rather frank discussion with your state client before accepting a conditional discharge, if there is any indication that this brush with the law will not be your client's last. The client needs to understand that such a sentence, despite not counting in state court, would subject him/her to a higher criminal history category in federal court should they be charged with a federal offense in the future. Recidivists beware!

Your client does have options, including one unpleasant one, to avoid the potential federal sentencing implications of a conditional discharge.



You guessed it – jail time! Since USSG §4A1.2(c)(1) excludes sentences of imprisonment up to thirty days from inclusion in the criminal history category, your state client can serve a sentence of up to 29 days (keep in mind the statutory maximum on violations are 15 days) before the sentence gets counted federally. It goes without saying that this may be a hard sell to your client - not to mention a blow to one's legal reputation, but hey, maybe you can get weekends! This is precisely the bizarre result which the Second Circuit was urged to avoid, but it seems to embrace by its decision.

Another option may be to seek an *unconditional* discharge. There are two reasons for this. First, unconditional discharges surely cannot be found to be equivalent to probation under USSG §4A1.2(c)(1). Second, even if they were, you may be able to avoid the two additional points under USSG §4A1.1(d) (points that will be added when the federal offense was committed during the conditional discharge period). While 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)) – unconditional discharges do not constitute a

"criminal justice sentence" because they are not revocable, and points cannot be added under USSG §4A1.1(d). *United States v. Sanders*, 205 F.3d 549, 552 n.8 (2d Cir. 2000) (per curiam)

Third, while by operation of New York law, a conditional discharge is one year in length, you can still ask the local judge to make the conditional discharge for some period less than one year – say, one month or six months. If that is what the local criminal judgment entry provides, the conditional discharge cannot be counted by the federal judge under USSG §4A1.2(c)(1).

Options at federal sentencing

If you are considering a plea or approaching a federal sentencing and the one year conditional discharge has already been imposed in the local court, and there is no basis under which you could get the client resentenced in the local court (to something other than a one year conditional discharge) or get the local conviction vacated, there are still two major options that can mitigate the effect of the one point.

First, USSG §4A1.3(b)(1) which provides for the possibility "that a defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes," and authorizes the sentencing court to consider a downward departure to rectify any injustice created by faithful application of the Guidelines. *See id.*; § 4A1.1, cmt. background ("In recognition of the imperfection of the [method used in the Guidelines to calculate criminal history] ... § 4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances."). The Second Circuit in *Ramirez* specifically recognized that this provision can be properly used in the appropriate case where including the conditional discharge would result in anomalous results. (The Second Circuit's discussion of such a departure as a basis supporting its decision was curious, given that at Ramirez's sentencing he asked for such a departure, and that departure was denied.)

Second, you can and should continue to seek a non-guideline sentence per *United States v. Booker*, 543 U.S. --, 125 S.Ct. 738 (2005). The unjustified result of including a conditional discharge can be added in the 3553(a)(2) mix in making your sentence request for a sentence below the advisory Guidelines range. Indeed, Ramirez's case has been returned by the Second Circuit to the District Court for reconsideration of whether to resentence under *Booker* and the Second Circuit's seminal *Crosby* decision. Continue to ensure that you preserve your ability to ask for a non-Guideline sentence in any plea agreement that your client enters into, barring some extraordinary circumstances where it is not necessary.

As a practice tip, you should be loathe to, despite *Ramirez*, ever agree that a conditional discharge sentence for a noncriminal violation should be counted, at least as part of a plea agreement. The government must be made to prove, at a minimum, that the conditional discharge was for one year, and was imposed in a proceeding at which the defendant had effective counsel. There is no harm in refusing to agree to the higher sentencing range as part of a plea agreement and keeping your options open. Even if the conditional discharge is ultimately counted, you will have carved out a better possibility to appeal by way of a narrower appeal waiver (i.e., you believe the range is actually lower than it turned out to be, and you will be able to appeal if the actual sentence comes in higher than the high end of the lower range that you believed was appropriate).

To discuss conditional discharge issues as they may affect your individual cases, contact MaryBeth Covert or Tim Hoover at (716) 551-3341.

* * *

FEDERAL CRIMINAL DEFENSE PRACTICE FALL 2005 SEMINAR

Friday, December 2, 2005
8:30 a.m. - 3:00 p.m.
The Holiday Inn Batavia
Batavia, New York

Just a reminder -

if you registered for the Fall 2005 Seminar it is just one week away!

One of the highlights of the program will be a presentation by Honorable Eugene F. Pigott, Jr., Presiding Justice, Appellate Division, Supreme Court, who will discuss attorney ethics and the grievance process. United States Magistrate Judge Marian W. Payson will provide her perspective in a View From the Bench. A joint presentation by Marianne Mariano and MaryBeth Covert will address the current status of *Booker*, seeking interaction from audience members on their experiences, and Herb Greenman will present his ever-popular overview of recent important developments in the Second Circuit.

See you there!

Joe Mistrett
Federal Public Defender

Announcing...

The Federal Public Defender's Office is pleased to announce that ***Elizabeth Jean Switzer*** has joined the Rochester Office as an Assistant Federal Defender. Ms. Switzer is a graduate of Lawrence University (B.S., *cum laude*, 1991), and received her juris doctor from the University of Wisconsin-Madison Law School (1994). Ms. Switzer was most recently employed at the Monroe County Public Defender's Office, as an Assistant Public Defender since 1995.

Also, ***Roxanne Mendez Johnson*** is transferring from our Rochester Office to our Buffalo Office as an Assistant Federal Defender. Ms. Johnson is a graduate of the University of Notre Dame (B.A., Spanish Literature) and received her Juris Doctor, from the University of Arizona College of Law. Ms. Johnson previously worked at the Genesee County Public Defender's Office in Batavia, New York and the Federal Public Defender's Office in Tucson, Arizona..

We congratulate Beth and Roxanne on their new positions and wish them both much happiness and success!

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The Federal Public Defender's Office has been re-qualified as an Accredited Provider of Continuing Legal Education!

Attendance at an FPD seminar counts toward your CLE requirement for CJA Panel Attorneys and the CLE requirement for New York State.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT REVIEW
SELECT CRIMINAL CASES FROM JANUARY 2005 THROUGH SEPTEMBER 2005

PREPARED BY MARK D. HOSKEN, ASSISTANT FEDERAL DEFENDER

I. SEARCH & SEIZURE

A. Warrantless Searches

1. *United States v. Gandia*, 424 F.3d 255 (2d Cir. Sept. 19, 2005).

Protective sweep exception recognized in *Maryland v. Buie*, 494 U.S. 325 (1990), was inapplicable where the police officers were without reasonable, articuable suspicion that the house harbored a person posing a danger to those on the arrest scene.

B. Vehicle Stops

1. *United States v. Singh*, 415 F.3d 288 (2d Cir. 2005).

Vehicle stops by roving patrols near an international border must be supported by reasonable suspicion. Court follows rule established in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

II. MOTION PRACTICE

A. Defendant's Affidavit

1. *United States v. Watson*, 404 F.3d 163 (2d Cir. 2005).

The court upholds refusal to conduct a pretrial suppression hearing because defendant failed demonstrate standing. The defendant did not provide an affidavit establishing a legitimate expectation of privacy in the searched residence. The attorney's affidavit relied on the government's theory to support the claimed Fourth Amendment violation. The defendant cannot challenge the search of a residence merely because he anticipated the government will link the objects recovered in that search to the defendant at trial.

2. *United States v. Agudelo*, 414 F.3d 345 (2d Cir. 2005).

Defendant filed an affidavit in support of his attorney's motion to suppress statements. The defendant alleged that the agents continued their questioning after he requested an attorney. The defendant did not testify at the suppression hearing. The agents testified that the defendant never requested an attorney. The court reaffirmed the general rule that the enhancement for obstruction is appropriate only where the defendant acts with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. Here, the defendant's affidavit in support of the motion to suppress was sufficiently vague to avoid the obstruction enhancement.

III. FIREARMS

A. Sufficiency

1. *United States v. Lewter*, 402 F.3d 319 (2d Cir. 2005).

The court rejected a sufficiency of evidence claim. Defendant was convicted of 18 U.S.C. 924(c) and 18 U.S.C. 922(k). The Court upheld the 924(c) conviction. The test is whether a reasonable jury could find beyond a reasonable doubt that possession of the firearm facilitated a drug trafficking crime, keeping in mind that "in furtherance" means that the gun afforded some advantage, actual or potential, real or contingent, relevant to drug trafficking. Here, the evidence was sufficient to find that the defendant possessed a gun to defend his drug stash, which clearly furthered the crime of possession with the intent to distribute according to the court. Similarly, the court rejected the defendant's argument that because the serial number on the gun was so neatly obliterated, it was not self evident from the appearance of the gun that a serial number had ever been there. The court found that a reasonable jury could have found the defendant knew the serial number had been obliterated, relying on the fact that the gun was in the defendant's apartment within arm's reach, that he was a drug dealer who would want an untraceable gun, and more likely to have

inspected it carefully before purchasing it. The court also suggested that because the jury inspected the gun during deliberations, they were competent to decide whether the defendant would have realized that the serial number had been obliterated.

B. Felon in Possession

1. *United States v. Amante*, 418 F.3d 220 (2d Cir. 2005).

The court rejects the bifurcation of a single count "felon in possession"trial [18 U.S.C. 922(g)(1)]. Bifurcation might be appropriate in an "extraordinary unusual" case, such as where the facts of the prior felony are so heinous as to overwhelm the trial on possession. Bifurcation is limited to trials involving multiple counts.

2. *United States v. Rivera*, 415 F.3d 284 (2d Cir. 2005).

Court holds that an inoperable gun qualifies as a firearm within the meaning of 18 U.S.C. 921(a)(3) and 18 U.S.C. 922(g)(1), "felon in possession" statute.

IV. CHILD PORNOGRAPHY

A. Venue

1. *United States v. Rowe*, 414 F.3d 271 (2d Cir. 2005).

A prosecution for advertising to receive, exchange, or distribute child pornography, in violation of 18 U.S.C. 2251(d), is proper wherever the ad is seen or accessed. Here, a Kentucky man electronically placed a notice on his computer seeking others to trade child pornography. A detective working in Rockland County accessed this site from his desk. The court held sufficient nexus existed within the SDNY to establish venue in the district court.

B. Search Warrants

1. *United States v. Martin*, 418 F.3d 148 (2d Cir. 2005).

Defendant joined a list server known as Girls 12-16. Members were permitted to access various features of the group including receiving e-mails from another member if the joining member so chose. The agent who authorized the search warrant affidavit alleged that any joining member would automatically receive all e-mails sent by other members. There was no evidence that the defendant received any e-mails from the group. A search warrant was issued based on the defendant's listing as a member of the list serve. The denial of the defendant's motion to suppress was upheld. The court reasoned that probable cause existed without the agent's false statement. Justice Pooler dissented challenging the majority's opinion as a dangerous precedent.

2. *United States v. Coreas*, 419 F.3d 151 (2d Cir. 2005).

A different panel found a search warrant based on the same affidavit as was used in *United States v. Martin* was insufficient to establish probable cause. This panel states *Martin* was wrongly decided. However, based on the earlier opinion in *Martin*, and rules of the circuit, the panel upheld the search warrant.

V. GUILTY PLEAS, PLEA AGREEMENTS, & PROFFER AGREEMENTS

A. Government's Conduct

1. *United States v. Amico*, 416 F.3d 163 (2d Cir. 2005).

The Presentence Report included two enhancements not included in the plea agreement. The government initially told the court that it agreed with everything in the PSR. The government retracted its statement that it agreed with the PSR after the defendant complained. The government filed an amended statement declining to advocate for the two enhancements. However, the government did file a response to the defendant's objections which set forth a discussion of the law governing the enhancements and included citations to cases supporting application of the enhancements. The court found no breach of the plea agreement by the government interpreting the plea agreement to permit the government to explain the law concerning these enhancements once the defendant objected as long as the government did not advocate for them.

2. *United States v. Vaval*, 404 F.3d 144 (2d Cir. 2005).

Defendant pled guilty pursuant to a plea agreement. The government agreed (1) to take no position concerning where the defendant should be sentenced within the applicable guideline range and (2) not to seek an upward departure. At sentencing, the prosecutor sought a higher role adjustment than was contained in the plea agreement complaining that a mistake was due to a misunderstanding of the law. The

government argued that the criminal history category was too low characterizing the defendant's history as appalling. The prosecutor challenged the defendant's own statement in mitigation claiming it was disingenuous. Lastly, the prosecutor gave a lengthy description of the offense and the defendant's conduct asking the judge to consider all of the facts when deciding on the appropriate sentence. The judge sentenced the defendant at the top of the range. The court found the government's conduct established a breach of the plea agreement. A resentencing before a different judge was the appropriate remedy because it would cure the government's breach of the plea agreement.

B. Defendant's Conduct

1. *United States v. Byrd*, 413 F.3d 249 (2d Cir. 2005).

The court holds that the preponderance of evidence standard governs the determination of whether a defendant has breached a plea agreement notwithstanding *United States v. Booker*, 125 S. Ct. 738 (2005).

C. Proffer Agreements

1. *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005).

Defendant was accused of selling crack cocaine to an informant/undercover officer on various dates in 2001. The defendant, attempting to assist himself, agreed to try and cooperate. He attended three debriefings with the government during the first half of 2002. He executed a proffer agreement at each session which permitted the prosecutors to use any statements that the defendant made "as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of the defendant at any stage of the criminal proceeding." Later, the defendant decided against further cooperation. The case proceeded to trial. During the defendant's opening statement, counsel alleged that the trial was one of mistaken identity. The defense argued that the four sales charged in the indictment were the result of sales by the defendant's brother, a co-defendant. Also, defense counsel challenged a detective who testified regarding one of those sales. He accused the officer of manufacturing testimony about a meeting with an informant on that particular date. The district court permitted the government, over objection, to introduce the proffer statements made by the defendant that he sold crack cocaine at the address where the charged sales occurred in 2001. The proffer statements were permitted as they fairly rebutted counsel's assertions, notwithstanding the defendant had not admitted selling on the precise dates charged in the indictment. The court concluded that the defense attorney's conduct had triggered the waiver based upon his opening and his cross-examination of the detective.

D. Pleas in Open Court

1. *United States v. Alcantara,* 396 F.3d 189 (2d Cir. 2005).

General application of the First Amendment right of access to the courtroom. Here, the court rejected the district court's practice of conducting pleas and sentencing in the judge's robing room. The court exercised its supervisory powers, vacated the plea and sentencing proceedings, and remanded to the district court.

VI. Statements

A. Miranda & Pedigree Information

1. *Rosa v. McCray*, 396 F.3d 210 (2d Cir.), *cert. denied,* 126 S.Ct. 215 (2005).

The court reversed a grant of a habeas petition rejecting the defendant's claim that his statements to a detective in response to pedigree questions were not preceded by *Miranda* warnings. While completing a booking form, the detective noticed the defendant's hair color was bright blonde including the roots. The detective asked the defendant, "What is your real hair color?" The defendant responded, "Brown, I colored my hair yesterday." The district court permitted the statement to be introduced at trial, finding that the detective could not reasonably have expected that the defendant would volunteer the additional information when he was asked "What is your real hair color?" The court found the incriminating information was volunteered by the defendant and, therefore, outside the scope of the detective's question.

VII. Miscellaneous

A. Jury Instructions

1. *United States v. Carr*, 424 F.3d 213 (2d Cir. Sept. 14, 2005).

It is not error for the district court to instruct the jury that it has a duty to convict if it finds that

the government has proven the defendant's guilt beyond a reasonable doubt. Circuit has previously held that a trial court is not required to inform a jury of its power to nullify. *United States v. Edwards*, 101 F.3d 17 (2d Cir. 1996).

B. Forfeiture

1. *United States v. Razmilovic*, 419 F.3d 134 (2d Cir. 2005).

Court held that 28 U.S.C. 2461(c) does not authorize pretrial restraint of assets notwithstanding the general authorization for forfeiture as a punishment for any act for which civil forfeiture is authorized. This section may be limited to defendants accused of fraud offenses.

C. Double Jeopardy

1. *McCullough v. Bennett*, 413 F.3d 244 (2d Cir. 2005).

Defendant's conviction and consecutive sentences on two counts of Criminal Possession of a Weapon, Second Degree, did not violate his double jeopardy rights when the two counts reflected shootings at two victims getting out of the same vehicle in rapid succession. The issue of intent was presented to the jury and the jury found that the defendant had the requisite intent to commit two weapons possession offenses. This did not violate the Double Jeopardy Clause.

D. Confrontation & Crawford

1. *United States v. Logan*, 419 F.3d 172 (2d Cir. 2005).

The defendant was indicted for conspiring with two others to burn down a rented residence. Shortly after the house burned, the defendant confessed his participation to the police. He denied knowing that others wanted to commit arson when they broke into the house. The defendant also told the police that prior to the arson, his fellow participants had concocted an alibi that they would use after the house was burned in case of a police investigation. When the police later interviewed the others the alibi previously previewed was used. At the defendant's trial, the government introduced the others' statements setting out the alibi to the police apparently for the purpose of showing that they and the defendant conspired to burn down the house. The court rejected the defendant's claim that the introduction of the alibi statements violated his confrontation clause rights in pursuant to *Crawford v. Washington*, 541 U. S. 36 (2004). Court found no violation as the statements were not offered to prove the alibi. Rather, they were offered to corroborate the defendant's own statement that the others were planning to use the alibi. Thus, no confrontation clause violation occurred.

2. *United States v. Martinez*, 413 F.3d 239 (2d Cir. 2005).

The court held that the Sixth Amendment Right of Confrontation does not apply to sentencing hearings notwithstanding *Crawford v. Washington*, 541 U.S. 36 (2004), and *United States v. Booker*, 125 S.Ct. 738 (2005). The court found it significant that in a post-*Booker* world, judges possessed greater sentencing discretion. As hearsay testimony was previously considered and not prohibited under a mandatory sentencing practice, there was no basis for concluding that it was prohibited under the current system of advisory guidelines.

E. Superceding Indictment

1. *United States v. Milstein*, 401 F.3d 53 (2d Cir. 2005).

The court approved the procedure used by the district court which allowed the government during the trial to amend the indictment that had initially failed to allege a necessary jurisdictional element. However, an additional count returned in the new indictment was found to be a constructive amendment and subject to dismissal.

F. Attorney-Client Privilege

1. *In re Grand Jury Inv.*, 399 F.3d 527 (2d Cir. 2005).

The court holds that the attorney-client privilege operates with respect to government officials and their government lawyers to the same extent that applies in the private arena. The court reaffirms the public interest served by the privilege.

VIII. SENTENCING

A. *Booker* Trilogy

1. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

The court explains the practical application of *Booker* in the Circuit. The sentencing judge is entitled to find all the facts that the guidelines make relevant to the determination of a Guideline sentence and all the facts relevant to the determination of a non-Guidelines sentence.

There is no specific requirement that the sentencing court precisely calculate the applicable Guideline range. Nor did the court explain what degree of consideration or what weight the sentencing judge should normally give the Guideline range. The court endeavors to address a standard of "reasonableness". Reasonableness may be considered in the length of the sentence as well as whether any legal errors led to the imposition of the challenged sentence. Another aspect of the opinion is further sentencing proceedings for pre-*Booker* sentences pending on direct appeal. The Court remanded to the district court, not for the purpose of resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence.

2. *United States v. Fleming*, 397 F.3d 95 (2d Cir. 2005).

The court refines the "reasonableness" review of sentences. The court determines that the court should exhibit restraint, not micro management when reviewing whether or not a sentence was reasonable. The court commented that the brevity or the length of a sentence may exceed the bounds of "reasonableness" but the court anticipates encountering those circumstances infrequently.

3. *Green v. United States*, 397 F.3d 101 (2d Cir. 2005).

The court held that Booker does not apply retroactively to a defendant's collateral challenge pursuant to a 2255 petition. The court explained that *Booker* noted that its holding in the case applied to all cases on direct review but made no explicit statement of retroactivity to collateral cases.

B. *Booker* Issues-Reasonableness

1. *United States v. Rubenstein*, 403 F.3d 93 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 388 (2005).

The court decided to vacate the defendant's sentence rather than evaluate for reasonableness. The court found the influence of the erroneous 4-level enhancement was so pronounced that it could cause resentencing after remand to be unreasonable.

2. *United States v. Doe*, 128 Fed.Appx. 179 (2d Cir. 2005) (unpublished).

The court vacated a sentence as unreasonable under *Booker*. PSR determined that the applicable Guideline range was 6 to 12 months and recommended a sentence of time served. The defendant had been in custody for nearly 18 months prior to sentencing. The defendant had no criminal history. District court upwardly departed to the statutory maximum of 10 years because of the defendant's refusal to disclose his true identity. The court remanded the case to a different judge for resentencing.

3. *United States v. Savarese*, 404 F.3d 651 (2d Cir. 2005).

The court vacated district court's sentence after a robbery conviction finding that a 5-level Guidelines enhancement was erroneously imposed. There was no determination of reasonableness. Rather, the court vacated and remanded finding that the 5-level enhancement for possessing or brandishing a firearm during a robbery was improperly applied by the sentencing court.

4. *United States v. Godding*, 405 F.3d 125 (2d Cir. 2005).

The court remanded for a *Crosby* resentencing after the government initially appealed the district court's downward departure. The court cautioned that there may be reason to question the reasonableness of this non-Guideline sentence based on the language used by the district court.

5. *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005).

The court holds that if the defendant raised a *Blakely v. Washington*, 542 U.S. 296, (2004), objection to the Guidelines at sentencing, then the court will remand the case for a full resentencing and not merely a *Crosby* remand. The defendant's objection, based on *Blakely*, to the compulsory use of the Guidelines was sufficient to preserve a Sixth Amendment objection because it sufficiently alerted the district court to the claim that it was unlawful to use the Guidelines in a compulsory manner.

C. *Booker* Issues-Preservation

1. *Guzman v. United States*, 404 F.3d 139 (2d Cir. 2005), *petition for cert. filed*, ___ U.S. ___ (July 5, 2005) (No. 05-5187).

The court holds that *Booker* relief does not apply to any cases that became final before January 12, 2005, the day *Booker* was decided.

Defendant's motion to vacate his sentence of six life terms plus 145 years was denied.

2. *United States v. Morgan*, 406 F.3d 135 (2d Cir. 2005), *cert. denied*, ___ S.Ct. ___, 2005 WL 1786635 (Oct. 31, 2005).

The court held that an appeal waiver will be enforced even if the plea agreement was entered into after *Apprendi v. New Jersey*, 530 U.S. 466 (2000) but before *Booker*. The possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements.

3. *United States v. Lake*, 419 F.3d 111 (2d Cir. 2005).

The court held that whenever a defendant, pre-*Booker*, objected to the use of mandatory Guidelines per a Sixth Amendment challenge to enhancements based on facts not found by a jury, the matter will be remanded for resentencing unless the government can establish the sentencing error was harmless.

4. *United States v. Maloney*, 406 F.3d 149 (2d Cir. 2005).

The court upheld a challenge to a Guideline enhancement rejecting the claim it was double counting. The court decided to reach the issue (notwithstanding the fact the Guidelines were merely advisory) finding that the district court on remand remains under an obligation to consider the sentence that would have been imposed under the Guidelines.

5. *United States v. Lewis*, 424 F.3d239 (2d Cir. Sept. 15, 2005).

18 U.S.C. 3553(c)(2) requires the district court to provide a contemporaneous statement of reasons for imposing a specific sentence. Failure to comply caused the court to vacate the sentence imposed and remand for further proceedings.

D. Youthful Offender

1. *United States v. Jones*, 415 F.3d 256 (2d Cir. 2005).

A youthful offender adjudication obtained under New York State law qualifies as an adult conviction under the Career Offender guideline (U.S.S.G. § 4B1.1). The court continues to erode the protections offered by a youthful offender adjudication.

2. *United States v. Fernandez*, 390 F.Supp.2d 277 (S.D.N.Y. Jan. 31, 2005).

The court held that a New York State youthful offender adjudication does not serve as a predicate conviction for sentencing enhancement under 18 U.S.C. 924(e), the Armed Career Criminal Act.

E. Drug Quantity

1. *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005).

Drug quantity is an element of 21 U.S.C. § 841(a) and any fact that potentially exposes the defendant to a greater sentence must be presented to the jury or admitted by the defendant. Although the conspiracy charged distribution of 50 grams or more or cocaine base, (carrying a minimum of 20 years and a maximum of life imprisonment), the defendant entered a guilty plea and disputed the drug quantity. The court vacated the defendant's plea and remanded for further proceedings.

2. *United States v. Cordoba-Murgas*, 422 F.3d 65 (2d Cir. Sept. 7, 2005).

The court held that the defendant could not be sentenced to more than 20 years because the indictment failed to allege a particular drug quantity. Here, defendant was indicted for a violation of 21 U.S.C. 841 without a specified quantity of drugs. Notwithstanding the defendant's plea allocution to a particular quantity, it did not operate as a waiver of the required elements of an indictment. Thus, he could not be sentenced to a term of imprisonment greater than the statutory maximum set forth in 841(b)(1)(C) for violation of 841(a) without a specified charged quantity.

F. Consecutive & Concurrent Sentences

1. *Abdul-Malik v. Hawk-Sawyer*, 403 F.3d 72 (2d Cir. 2005).

Defendant filed a § 2241 petition challenging the Federal Bureau of Prisons' failure to designate the state prison where he was serving his state sentence as the place for the service of his federal sentence. The court upheld the Bureau of Prisons' refusal, but directed that the Clerk of the Court to transmit a copy of the opinion to the House and Senate Judiciary Committees with the hope that Congress may resolve the issue. Defendant was arrested by New York authorities in 1992 and held in custody pending trial. He was indicted federally on unrelated charges and was brought to federal

court under a *writ of habeas corpus ad prosequendum*. He was convicted and sentenced in federal court to 30 years imprisonment. The federal court did not indicate whether the sentence should run concurrent or consecutive to any future state sentence. The defendant was returned to state custody, eventually convicted, and sentenced to 17 years in New York state custody. The state court indicated that the state sentence should run concurrent with the federal sentence. Unfortunately, the state had "primary jurisdiction" over the defendant. This resulted in the defendant serving a cumulative sentence of 47 years.

2. *Wilson v. McGinnis*, 413 F.3d 196 (2d Cir. 2005).

The court rejects a habeas claim from a defendant who pleaded guilty in New York State court. He claimed that his plea was not knowing and voluntary as he was not informed that his sentence would be imposed consecutive to another sentence he was serving. The court decided that the petitioner's claim was the result of a collateral consequence not a direct consequence of his guilty plea. It did not render the defendant's guilty plea involuntary, unknowing, or unintelligent. Thus, he was not entitled to habeas relief.

G. Miscellaneous

1. *United States v. Glen*, 418 F.3d 181 (2d Cir. 2005).

The court decides when a prior conviction for a felony drug offense has become final [21 U.S.C. 841(b)]. The defendant was convicted in New York State court and filed his timely Notice of Appeal with the Fourth Department. The matter has remained pending since 1977. The state prosecutor never moved to dismiss the unperfected appeal. The court construed the Fourth Department's rules to mean that absent a motion to dismiss the defendant/appellant could perfect his appeals at any time. An avenue of direct appeal remained open to the defendant. Since those convictions were not final, the government may not seek enhanced punishment in the federal prosecution.

2. *United States v. Ayers*, 416 F.3d 131 (2d Cir. 2005).

Defendant allegedly shot and killed another. During the investigation by the state authorities, the defendant allegedly asked another to destroy the gun used in the shooting. The defendant was initially prosecuted in state court for murder and criminal possession of a weapon. He was acquitted of both felonies after trial, but convicted of a misdemeanor possession of a weapon count. Thereafter, he was indicted in federal court for illegally possessing a firearm based on an earlier felony conviction. Here, the defendant's attempt to have another destroy the gun was sufficient to establishment the enhancement for obstruction of justice. Though the state investigation was for a different but related crime, the enhancement was properly applied. Notwithstanding the Guideline requirement (U.S.S.G. 3C1.1) that the obstruction be conducted during the course of the investigation, prosecution, or sentencing, of the instant offense of conviction, the court held the state investigation encompassed the federal crime as well. Thus, the enhancement was properly applied.

* * *

From Steve Sady, Chief Deputy Federal Public Defender Portland, Oregon:
SUPREME COURT REVIEW: LESSONS IN POST-*APPRENDI* LITIGATION

As the new Term begins, our office’s annual review of Supreme Court decisions from the criminal defense perspective, *Reviewing The Supreme Court 2004-05 Term From A Defense Perspective*, is available here: http://circuit9.blogspot.com/2005/11/supreme-court-review-lessons-in-post.html/. Three major themes emerged from the opinions. First, the protection of core constitutional rights has solidified in a surprising number of cases. Second, the Doctrine of Constitutional Avoidance continues to provide a key analytical framework for federal litigation. Lastly, the Court’s devotion of so much time to the rules of statutory construction emphasizes the need for federal defense attorneys to incorporate them into our litigation vocabulary. The overall message is to hit constitutional issues hard, but layer them with statutory arguments that avoid the necessity of resolving the constitutional questions.

The basic lesson on how best to litigate for our clients in the post-*Apprendi*, post-*Blakely* world is illustrated by a recent sentencing in Utah. Professor Paul Cassell, after his famous advocacy against *Miranda* came to an end in *Dickerson*, became Judge Cassell of the District of Utah. Very soon after taking the bench, he was confronted with the nightmare case of Weldon Angelos: a first-time offender who carried a gun to several sales of marijuana. Back in 1993, Justice Scalia, in a classic exercise of his textualism, read 18 U.S.C. § 924(c) to require consecutive mandatory minimum sentences for use of a firearm in six bank robberies charged in a single indictment (*Deal*). Judge Cassell, faced with the inexorable math of five years followed by two successive 25 year consecutive sentences, and a prosecutor who refused to make reasonable charging decisions, put out a call for any theories that could help him avoid imposing an outrageous sentence.

To no avail. He heard theories about due process, cruel and unusual punishment, equal protection. But he felt constrained by constitutional precedent that bound him to a sentence he characterized as "unjust, cruel and irrational." So he imposed the 55-year sentence, complete with a plea to Congress to rewrite the laws and to President Bush to commute the sentence he imposed (available here).

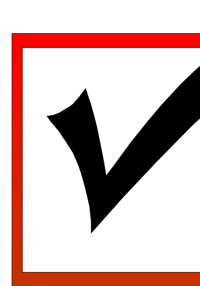
What seems to have been missed is the statutory language. § 924(c) defines "crime of violence" (such as bank robbery) narrowly to refer to "an offense". In contrast, "drug trafficking crime" means "any felony." This statutory difference in language reflects Congress’s intention that the questions be approached differently. Which makes perfect sense in light of the Guidelines grouping policies: crimes of violence are treated as separate offenses under Chapter 3, while drug trafficking offenses are treated as a single offense with a cumulation of the drug quantity. Which also makes perfect policy sense because drug crimes can be charged to simply require a two-level gun bump or can be fragmented into multiple offenses based on the prosecutor's creativity in drafting the indictment. And a statutory ruling would avoid the necessity of addressing the troubling constitutional issues. Professor Erik Luna, in his appeal of the *Angelos* case, is giving the Tenth Circuit the opportunity to consider some powerful constitutional arguments, but resolve the case based on the statute.

Almost every important post-*Apprendi*, post-*Blakely* issue is susceptible of layered arguments: the Fifth and Sixth Amendment issues undergirded by statutory arguments based on the Doctrine of Statutory Avoidance and other canons of statutory construction. The Blog Summary on the right sets out arguments on reasonable doubt, confrontation at sentencing, the Armed Career Criminal Act, and the illegal reentry statute that raise constitutional doubt, then invite ruling on statutory grounds. Why try to kick a 55 yard field goal when you get the same points from 35 yards out? Why only argue that *Almendarez-Torres* has been overruled when reinterpretation of a statute under the Doctrine of Constitutional Avoidance reaches the same result?

If you still have doubt about the efficacy of layering the statutory arguments, check out this article (linked from the ever-helpful Professor Doug Berman) by Professor Ward Farnsworth on *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*. His chart on page 3 breaks out the Justices' voting in non-unanimous cases involving criminal law issues. The Justices are ranked by frequency of voting with the government, and therefore against the individual, in both constitutional and non-constitutional cases. For the most conservative of the Justices, with the exception of Justice Thomas, favorable rulings are significantly more frequent on statutory than on constitutional grounds. My bet is that our district and circuit judges would have an even greater preference for favorable statutory rulings over favorable constitutional rulings.

If we can establish constitutional doubt, the defendant should always win under the Doctrine of Constitutional Avoidance. If we can establish statutory ambiguity, the defendant should always win under the Rule of Lenity. Although the government has no equivalent rule of construction, we know that our clients sometimes lose because they are defendants, because they are accused of crime, and because the government receives an often unwarranted level of deference from the courts. But the overall lesson from the 2004-05 Term is that the Justices are intensely interested in statutory construction, want to avoid reaching unnecessary constitutional decisions, and are quite willing – on occasion – to apply the rules of statutory construction to the advantage of our clients.

Panel Members: Do We Have Your Correct Postal and E-mail Address?



If you are on any of the CJA Panels (Trial, Training, Appellate), please make sure that we have your correct **postal and e-mail address**. This will allow us to communicate with you more efficiently on matters of case appointment and district policy. We have had several mailings returned as recently as undeliverable, so please provide us with any change of address. If we receive a mailing back as undeliverable, we will regretfully remove you from our mailing list - so please advise us of any changes to avoid interruption of mailings.

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FEDERAL CRIMINAL DEFENSE PRACTICE
SPRING 2006 SEMINAR
Friday, June 16, 2006
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Batavia, New York

SECOND CIRCUIT ADOPTS NEW INTERIM LOCAL RULES

The Second Circuit recently adopted Interim Local Rule 32(a)(1) and Interim Local Rule 25 effective December 1, 2005, following which permanent adoption will be considered. The rules require digital briefs in counseled cases, and one unbound copy of all paper filings, including joint appendices.

In summary, the new rules provide that every brief filed by a party represented by counsel must be submitted in a Portable Document Format (PDF) (converting a document into PDF format by scanning does not comply with this rule), in addition to the required number of paper copies, unless counsel certifies that submission of a brief as a PDF document is not practical or would constitute hardship. The PDF version of the brief must be submitted as an email attachment to <briefs@ca2.uscourts.gov> and to all parties represented by counsel who have not been exempted from filing a PDF brief, and to those parties not represented by counsel who elected to submit a PDF brief. A manual signature is not required on the PDF filings.

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Also, Interim Local Rule 25 now requires *any* paper filing, except a paper brief accompanied by a PDF brief submitted pursuant to Local Rule 32(a)(1)(A), must include one unbound copy (papers not stapled together or otherwise attached). You may use paper clips or rubber bands to secure the document.

MAKE SURE YOU REVIEW YOUR CLIENT'S JUDGMENT (2)

Timothy W. Hoover, Assistant Federal Defender

Back in March 2001, John F. Humann presciently warned us all that we must carefully scrutinize the written Judgment that is issued after sentencing – see http://www.frontiernet.net/~fpdnywro/news/2001-03.htm. John's advice is as timely now as it was then. Mistakes happen not infrequently, in the form of a) judicial recommendations made at sentencing that are not accurately transposed in the Judgment; b) variances between the sentence orally pronounced and the sentence as written in the Judgment, particularly as to special conditions of supervision; and, c) inclusion of conditions of supervision that are not authorized and were not pronounced at sentencing. Obviously, errors in the judgments can negatively impact our clients.

Five examples will suffice. Recently (over the past several months), in five judgments in misdemeanor cases, the signed judgments reflected that the defendants would have to provide a DNA sample (per 42 U.S.C. § 14135a) as part of their supervision, because such samples were authorized by law to be taken. The only problem was that no law, including 42 U.S.C. § 14135a, authorized such DNA collection – collection is authorized (to the extent it is constitutional, an issue pending at the Second Circuit) in felony cases and only in misdemeanor sex and violence-related cases. Amended judgments were later issued deleting the condition after appeals to the District Court were filed and the error was pointed out. But despite the error being pointed out when it was spotted in the first judgment, the subsequent misdemeanor judgments kept repeating the same error by including the DNA collection condition.

Keep reviewing those judgments carefully, so that you can a) appeal where necessary; b) move to correct where necessary; or c) ask that the error be corrected without the filing of a formal motion.

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If you would like to submit an article or information related to criminal defense issues for publication, please feel free to mail, fax or e-mail your information to:

MaryBeth Covert
Jo Anne De Voy
Editors
Federal Public Defender's Office
300 Pearl Street, Suite 450
Buffalo, New York 14202
716-551-3341/FAX: 716-551-3346

e-mail:
marybeth_covert@fd.org
jo_anne_de_voy@fd.org

web site:
www.frontiernet.net/~fpdnywro