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THE SECOND CIRCUIT DECLARES THE CHILD PORNOGRAPHY GUIDELINES "ECCENTRIC," FLAWED AND NON-EMPIRICAL

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Condemning U.S.S.G. § 2G2.2 as "an eccentric Guideline of highly unusual provenance," the Second Circuit struck down as procedurally and substantively unreasonable a within-Guideline, statutory maximum sentence of 240 months for a defendant who sent sexually explicit images of minors to an undercover officer, whom the defendant believed to be a 14-year old boy. United States v. Dorvee, – F.3d – (2d Cir. Aug. 4, 2010).[1] In satisfaction of his plea to one count of distribution of child pornography, which carries a 20-year maximum sentence, Justin Dorvee admitted to the following facts: that at separate times he conversed online with two 14-year old boys named "Matt" and "Seth," who were in reality adult undercover police officers; that he admitted to "Matt" that he had crushes on males that were "far too young" for him and to his fetish for young boys' feet; that he had taken 300 non-explicit photos of neighborhood children in an attempt to capture their feet; he had sent "Matt" non-explicit images of boys between the ages of 11 and 15; that he engaged in sexually explicit conversations with "Seth" and sent him via the internet videos and images of minors engaged in sexually explicit acts and of himself masturbating; and that he arranged to meet "Seth" after expressing an interest in photographing and having sexual relations with him. When he arrived for his meeting

[1]The original decision in Dorvee came down on May 11, 2010 (see United States v. Dorvee, 604 F.3d 84 (2d Cir. 2010). That opinion was amended and superseded by United States v. Dorvee, 2010 WL 3023799 issued on August 4, 2010. While the holding remained the same, the Court strengthened the language and included additional citations in support of its analysis.

with "Seth," Dorvee had a camera in his backpack which by his own admission he intended to use to photograph Seth's feet and penis. A subsequent search of Dorvee's home computer yielded several thousand still images and approximately 100 to 125 videos of minors (including prepubescent ones) engaged in sexually explicit conduct (some sadomasochistic). Dorvee had traded these pornographic materials with approximately 20 other individuals.

Dorvee's presentence report calculated his base offense level at a 39 with a criminal history of I, resulting in a Guidelines range of 262 to 327. This preliminary range, starting with a base offense level of 22, was precipitously increased by applying numerous enhancements under U.S.S.G. § 2G2.2, including a two-level increase for material involving prepubescent minor (§ 2G2.2(b)(2)), a seven-level increase for distributing these illegal materials to a minor in an attempt to persuade, induce, entice, coerce or facilitate the minor to engage in prohibited sexual conduct (§ 2G2.2(b)(3)(E)), a four-level increase because the offense involved sadistic or masochistic conduct (§ 2G2.2 (b)(4)), a two-level increase based on Dorvee's use of a computer to commit the offense (§ 2G2.2(b)(6)), and a five-level increase because the offense involved more than 600 images (§ 2G2.2(b)(7)). The PSR explicitly stated that because the statutory maximum for Dorvee's offense was 20 years of incarceration, the Guideline range was in fact 240 months.

Dorvee challenged several of the enhancements and argued for a below-Guideline sentence on the ground that the statutory maximum sentence was substantively unreasonable. He submitted reports from two therapists who diagnosed Dorvee with Major Depressive Disorder and a profound Schizoid Personality Disorder and observed that he was painfully shy, socially isolated due to his homosexuality, clinically depressed, and suicidal. One therapist opined that Dorvee was simply "too passive, shy, socially anxious, retiring, introverted, submissive, unsure of himself and distrustful" to "push or develop a relationship with any other person, child or adult, unless the other person took the lead." The therapist also concluded that because of his social problems, Dorvee could not be a predator and, with the proper treatment, was unlikely to re-offend.

Despite the medical reports from Dorvee's doctors, the sentencing court concluded that Dorvee was a "pedophile" who "if given the opportunity . . . would have sexual relations . . . with a younger boy, ages 6 to 15." The court stressed that Dorvee needed to be deterred from re-offending and that his sentence should "send a message" to others inclined to distribute child pornography. In rendering Dorvee's sentence, the district court acknowledged the 262 to 327 month range calculated in the PSR, the 240 statutory maximum sentence, and the approximately 6 months that Dorvee had already served in state custody for state charges arising from the same conduct. The district court ultimately sentenced Dorvee to 240 months less the time he had already served in state prison, characterizing its sentence as "relatively far below the Guideline, although not terribly far . . ." and "enough but not more than necessary."

In striking down Dorvee's sentence, the Second Circuit (Cabranes, Parker, and Underhill, D.J.) found that by using the Guideline range of 262 to 327 months as the operative range (rather than the 240 month statutory maximum), the sentencing court committed procedural error. Specifically, the district court failed to properly apply U.S.S.G. § 5G1.1(a), which explicitly states that "where the statutorily authorized maximum sentence is less than the minimum guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." The sentencing court's description of Dorvee's

sentence as a below guideline sentence, the appellate court reasoned, confirmed that it was using the higher guideline calculation as its starting point in fashioning his sentence.

Even more significantly, the Dorvee Court found that his sentence was substantively unreasonable, meaning that it fell within the class of sentences that are "shockingly high,... or otherwise unsupportable as a matter of law." Citing "serious flaws in U.S.S.G. § 2G2.2," the Second Circuit reiterated its prior holding in United States v. Cavera, 550 F.3d 180, 189 (2008), that "[e]ven where a district court has properly calculated the Guidelines, it may not presume that a Guidelines sentence is reasonable for any particular defendant." The appellate court stated that it was "troubled" by the sentencing court's apparent assumption that Dorvee was likely to actually assault a child, despite record evidence from experts to the contrary and Dorvee's lack of any such criminal history. Particularly offensive to the Dorvee Court was the district judge's statement "[f]or an adult of Justin's age to engage in sexual conduct with somebody under the age of 14 . . . might be worse that sticking somebody with a knife or shooting them with a gun," in the absence of any evidence that Dorvee had ever had any actual contact with a child. The district court also failed to explain why the maximum available sentence, as opposed to some lower sentence, was necessary to deter Dorvee or other offenders with similar history and characteristics.

Equally troubling to the appellate court was the district court's assumption that its statutory maximum sentence would probably be upheld on appeal because it was "relatively far below" the initial Guideline calculation of 262 to 327 months. "As the Supreme Court made clear in United States v. Gall, 552 U.S. 38, 46-47 (2007), the amount by which a sentence deviates from the applicable Guideline range is not the measure of how 'reasonable' a sentence is. Reasonableness is determined instead by the district court's individualized application of the statutory sentencing factors."

Using uniquely critical language, the Dorvee characterized the child pornography Guideline as "fundamentally different" from most in that it lacks any empirical basis; constitutes a blatant disregard and marginalization of the Sentencing Commission by Congress; and effectively negates the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness. As a prelude to a historical analysis of the child pornography guidelines, the Court states that the district court's errors at sentencing were "compounded by the fact that the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires." What follows is a lengthy historical recitation (with relevant citations of authority) on the development of the child pornography guidelines:

> Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. *See Rita*, 551 U.S. at 349. However, the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties. *See* United States Sentencing Commission, *The History of the Child Pornography Guidelines*, Oct. 2009, *available at* http://www.ussc.gov /general/ 20091030_ History_Child_

Pornography_Guidelines.pdf (last visited April 19, 2010). Alan Vinegrad, the former United States Attorney for the Eastern District of New York, has noted that the recent changes effected by the PROTECT Act of 2003 evince a "blatant" disregard for the Commission and are "the most significant effort to marginalize the role of the Sentencing Commission in the federal sentencing process since the Commission was created by Congress," as Congress:

> (i) adopted sentencing reforms without consulting the Commission, (ii) ignored the statutorily-prescribed process for creating guideline amendments, (iii) amended the Guidelines directly through legislation, (iv) required that sentencing data be furnished directly to Congress rather than to the Commission, (v) directed the Commission to reduce the frequency of downward departures regardless of the Commission's view of the necessity of such a measure, and (vi) prohibited the Commission from promulgating any new downward departure guidelines for the next two years.

Alan Vinegrad, *The New Federal Sentencing Law*, 15 Fed. Sent. R. 310, 315 (June 2003). The PROTECT Act of 2003 was the first instance since the inception of the Guidelines where Congress directly amended the *Guidelines Manual*. *See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, 2004, at 72, available at http://www.ussc.gov/15_ year/chap2.pdf (last visited April 15, 2010).

The Commission has often openly opposed these Congressionally directed changes. In 1991, as Congress was considering a proposal to direct the Commission to alter the child pornography Guidelines (by revoking the Commission's earlier creation of a new, lower base level for receipt, possession, and transportation of images than for sale or possession with intent to sell), the Chair of the Commission wrote to the House of Representatives stating that the proposed Congressional action "would negate the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness," and would instead "require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity among similar defendants." *See* Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, January 1, 2009, at 4-9, available at http://www.fd.org/pdf_lib/child%porn%20july%20revision.pdf (unpublished Comment, last visited July 28, 2010). Congress did not follow the Chair's advice. In 1996, the Commission criticized the two-level computer enhancement (which is currently set forth at § 2G2.2(b)(6) and was adopted pursuant to statutory direction) on the ground that it fails to distinguish serious commercial distributors of online pornography from more run-of-the-mill users. *See* United

> States Sentencing Commission, *Report to Congress: Sex Offenses Against Children Findings and Recommendations Regarding Federal Penalties*, June 1996, at 25-30, available at http://www.ussc.gov/r_congress/SCAC.PDF (last visited April 15, 2010). Speaking broadly, the Commission has also noted that "specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress." See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform, supra*, at 73.

The Court specifically acknowledged the Commission's criticism of the two-level computer enhancement (§ 2G2.2(b)(6)) as one that fails to distinguish serious commercial distributors of online pornography from more "run of the mill" users. It opined that "[t]he § 2G2.2 sentencing enhancements cobbled together . . . routinely result in Guidelines projections near or exceeding the statutory maximum, even in run of the mill cases." "Consequently," the Dorvee Court stated, "adherence to the [child pornography] guidelines results in virtually no distinction between the sentences for defendants like Dorvee, and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories." In this respect, U.S.S.G. § 2G2.2 "eviscerates with fundamental statutory requirement in 18 U.S.C. § 3553(a) that the district court consider the nature and circumstances of the offense and the history and characteristics of the offender."

Acknowledging that the child pornography Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role," the Dorvee court cautioned the district courts within the Circuit about rendering sentences in child pornography cases:

> District judges are encouraged to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 – ones that can range from non-custodial sentences to the statutory maximum – bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.

Finding that Dorvee's sentence constituted an unreasonable result, the appellate court vacated his sentence and remanded the case to the district court for resentencing.

It is difficult to imagine a more fundamental indictment of the child pornography Guideline from the Second Circuit. With respect to sentencing in child pornography cases, Dorvee gives teeth to the parsimony clause where before there were none. Dorvee does not stand alone. Prior to the Court's amended opinion on August 4th, the Circuit issued a decision in United States v. Tutty, ___ F.3d ___, 2010 WL 2794601 (2d Cir. July 16, 2010), in which the Circuit found that the district court committed procedural error when it concluded that it could not consider a broad, policy-based challenge to the child pornography guidelines. Accordingly the Circuit vacated the judgment and remanded to the district court for resentencing with specific instructions to "consider the policy concerns addressed in Dorvee." After detailing, yet again, the lack of empirical data, the Congressional directives and the

enhancements applicable in every case, the Court cautioned:

> On remand, and after hearing from the parties, the district court should take note of these policy considerations, which do apply to a wide class of defendants or offenses, and bear in mind that the "eccentric" child pornography Guidelines, with their "highly unusual provenance," "can easily generate unreasonable results" if they are not "carefully applied." Dorvee, 604 F.3d at 98.

If you represent a person charged with distribution of child pornography, you should commit Dorvee's language to memory, particularly if your client is not alleged to have sexually abused a child or commercially distributed child pornography. Dorvee, original and amended, as well as Tutty, demonstrate that appellate review of the substantive reasonableness of sentences in child pornography cases is something you should no longer waive in the plea agreement, absent some significant concession.

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FEDERAL CRIMINAL DEFENSE PRACTICE FALL 2010 SEMINAR

Friday, November 5, 2009
8:30 a.m. - 3:00 p.m.
Genesee Community College
Batavia, New York

Save the date on your calendar and look for our seminar mailing in the months ahead!

NEW CJA PLAN ADOPTED IN THE WESTERN DISTRICT OF NEW YORK

Effective June 18, 2010, the Judges for the Western District of New York approved the CJA Committees' proposed CJA Plan. The new CJA Plan has some significant modifications of which existing and prospective Panel members should be aware, including the following:

- Eliminates the Appellate Panel - The Second Circuit Court of Appeals now maintains a CJA Appellate Panel for assignments on appeals.

- Eliminates the Training Panel - The goal of the former Training Panel was to allow otherwise qualified attorneys without the requisite trial or federal experience to eventually be admitted to the Trial Panel after gaining experience by shadowing another attorney. The provisions of the Training Panel never worked as envisioned. Training Panel attorneys were not frequently assigned and it was difficult for Training Panel attorneys who were assigned to work pro bono the amount of time involved to gain the requisite experience.

- Creates a probationary period for otherwise qualified attorneys who do not have the requisite trial or federal experience who seek admission to the Trial Panel - The amended Plan allows less experienced attorneys to be added to the CJA Trial Panel for a probationary period. The probationary period spans the length of the attorney's representation on his or her first three assignments. During that period, the attorney is required to attend all seminars hosted by the Federal Public Defender's Office and participate in the Mentoring Program (see below). The probationary CJA Trial Panel

attorney is compensated for his or her work at regular CJA rates. At the end of the probationary period, the CJA Committee reviews the attorney's performance and makes a recommendation to the Chief Judge as to whether the attorney should be admitted to the Trial Panel, continued on probation, or removed from the panel altogether.

- Creates an Emeritus Panel - This Panel includes highly experienced attorneys who, while not interested in being on the Trial Panel, are willing to accept assignments by the Court as CJA Counsel for more complex cases.

- Modifies the Mentoring Program - When an attorney is added to the CJA Trial Panel as a probationary member, he or she will be assigned an attorney from the Trial Panel and a specific attorney within the Federal Public Defender's Office to serve as mentors. Mentors will assist the probationary Trial Panel member with both substantive legal issues, procedural issues and issues concerning vouchers.

- Modifies the process by which a substandard attorney may be removed from the CJA Trial Panel - The new CJA Plan is modified to include a specific process to address concerns raised about the performance of a CJA Trial or Emeritus Panel attorney, including a mechanism for removing an attorney from the Panel when appropriate. Mechanisms for removal under the old plan have not operated effectively or with transparency.

  The amendment provides the Court with a more formal procedure for occasions when it has concerns about the performance of a specific attorney and allows for a variety of remedies, including removal when appropriate. A Judge, the CJA Committee, another attorney, a client or any concerned person can initiate an investigation by submitting a written complaint to the Chief Judge. If warranted, the Chief Judge can direct the CJA Committee to conduct an investigation. The attorney who is the subject of the complaint is provided notice and an opportunity to respond. At the conclusion of the investigation, the Committee will recommend a course of action to the Chief Judge, ranging from removal from the Panel, increased attendance at specific CLE programs, limitations on the types of cases assigned to the attorney or dismissal of the complaint. The Chief Judge will ultimately determine the best course of action.

- Updates the provision in the CJA Plan regarding compensation and referral of a voucher for review by the CJA Committee - These revisions more accurately reflect the procedures for compensation outlined in the Guide to Judiciary Policies and Procedures, Vol. 7, Guidelines for the Administration of the Criminal Justice Act and the practice of this District. A discussion of Mega Case Budgeting procedures has been added. Also, the referral of a voucher for investigation by the Committee is now initiated by a non-public confidential memorandum to avoid unwarranted embarrassment prior to the completion of the investigation.

Check out the full plan on the District Court website - www.nywd.uscourts.gov - under the menu heading "CJA Panel Attorney Information."

CRACK/POWDER DISPARITY REDUCED TO 18:1

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On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, Pub.L.No. 111-220, 124 Stat. 2732. For the defense bar, and for our future clients, the Fair Sentencing Act of 2010 is a start at addressing discrepancies in the Federal drug laws. However, like other Congressional actions, there are many who believe that Congress did not go far enough.

The Major Provisions of the Fair Sentencing Act

The major impact of this law is to reduce the sentencing disparity between crack cocaine and powder cocaine from 100 to one to 18 to one. Simply put, for a client to face a five year statutory mandatory minimum sentence for offenses relating to crack cocaine, he will now have to possess 28 grams of cocaine base instead of five grams. Fair Sentencing Act §§ 2(a)(1) (amending 21 U.S.C. § 841(b)(1)) & (b)(1) (amending 21 U.S.C. § 960(b)). A ten year statutory mandatory minimum sentence applies to offenses involving a minimum of 280 grams of cocaine base, rather than 50 grams. Fair Sentencing Act §§ 2(a)(2) (amending 21 U.S.C. § 841(b)(1)) & (b)(2) (amending 21 U.S.C. § 960(b)). The Act also eliminated the mandatory minimum for simple possession of cocaine base. Fair Sentencing Act § 3.

While Congress reduced some imprisonment penalties, it also increased other financial penalties for "major drug traffickers." Fair Sentencing Act § 4. In addition, Congress directed the Sentencing Commission to review and amend the Guidelines. First, Congress directed the Sentencing Commission to consider a 2 level enhancement for a number of aggravating factors including: if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense, if the defendant bribed or attempted to bribe a law enforcement official in connection with a drug trafficking offense, or if the defendant is an organizer, leader, manager, or supervisor of drug trafficking activities. Fair Sentencing Act §§ 5 & 6(3). The Act also directs the Commission to ensure at least a 2 level enhancement for "superaggravating factors" where:

> (i) The defendant—
>
> > (I) used another person to purchase, sell, transport, or store controlled substances;
> >
> > (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
> >
> > (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.
>
> (ii) The defendant—
>
> > (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
> >
> > (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
> >
> > (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who

> was particularly susceptible to criminal conduct; or
>
> (IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.
>
> (iii) The defendant was involved in the importation into the United States of a controlled substance.
>
> (iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.
>
> (v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

Fair Sentencing Act § 6(3)(B)(I)-(v).

Striking an unprecedented balance, Congress also directed the Sentencing Commission to review and amend the Guidelines and policy statements to take into account certain mitigating factors, including setting the minimal role cap at level 32 and adding a 2 level reduction if the defendant:

> (A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;
>
> (B) was to receive no monetary compensation from the illegal transaction; and
>
> (C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

Fair Sentencing Act § 7.

The Sentencing Commission was directed under their emergency amendment authority to promulgate the guidelines, policy statements, or amendments provided for in the Fair Sentencing Act within 90 days after the date of enactment. Fair Sentencing Act § 8(1). The Sentencing Commission must also report on the effectiveness of drug courts within the next year.

The Fair Sentencing Act and Pipeline Cases

One of the major questions within the criminal defense bar is the Fair Sentencing Act's impact on pending cases. At present, to the disappointment, dismay, and surprise of many defense attorneys, no benefits are included in the Act for clients who have cases within the pipeline, *i.e.*, cases where there is a pending indictment prior to the enactment of the Fair Sentencing Act. This is due to the way courts have interpreted the "savings statute," 1 U.S.C. § 109. According to the savings statute:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the

> enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

Then Second Circuit Judge Sonia Sotomayor explained that, the purpose of the savings statute is to "ensure that a convicted criminal defendant does not fortuitously benefit from more lenient laws that may be passed after he or she has been convicted." *United States v. Smith*, 354 F.3d 171, 175 (2d Cir. 2003) (citing *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974)). The Second Circuit has interpreted 1 U.S.C. § 109 to mean that the repeal of a criminal statute does not abate the offense or affect its penalties with respect to acts committed prior to repeal unless the repealing statute explicitly provides otherwise. *See United States v. Ross*, 464 F.2d 376, 378-79 (2d Cir. 1972) (holding that defendant was properly sentenced to mandatory minimum ten year term of imprisonment under the statute in effect at time of commission of offense rather than under the Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective prior to the conviction and sentencing of defendant); *United States v. Singleton*, 460 F.2d 1148 (2d Cir. 1972) (rejecting the defendant's claim that he should have been sentenced under the provisions of 21 U.S.C. § 841(b)(1)(A) rather than under 26 U.S.C. §§ 7237(b) & (d), which had been repealed prior to his trial but after his indictment was handed down); *United States v. Fiotto*, 454 F.2d 252, 254-55 (2d Cir. 1972) (rejecting defendants' claim that they should have been sentenced under 21 U.S.C. § 841(1970) rather than under 26 U.S.C. § 7237 (1964) (repealed 1970)). Courts in other Circuits have reached the same conclusion. *See, e.g., United States v. Stitt*, 552 F.3d 345, 354 (4th Cir. 2008) (holding that, "courts are in agreement that 'sentencing provisions' are saved as part of the 'prosecution' of a 'penalty' even when a later change alters the availability of a particular sentence"); *United States v. Havener*, 905 F.2d 3, 5 (1st Cir.1990) (holding that, "new statutes that decrease punishment normally do not affect pending prosecutions"); *United States v. Van Horn*, 836 F.2d 1235, 1237 (9th Cir. 1988) (holding that § 109 "precludes the general application of new criminal sentencing laws repealing harsher ones in force at the time the offense was committed").

To address the pipeline cases, and the difficulties encountered by the savings statute, it is suggested that defense counsel move to continue plea and sentencing hearings until after the Sentencing Commission promulgates its changes to the Guidelines and to argue that all defendants in the pipeline cases are covered by the new law. In support of this argument, defense counsel should look toward *United States v. Kolter*, 849 F.2d 541 (11th Cir. 1988), and *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

In *Kolter*, the defendant was tried and convicted after 18 U.S.C. § 921(a)(20) went into effect, even though the charged offense occurred prior to the law's enactment. Section 921(a)(20) defined--and still defines--what constituted a conviction, and stated that "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *See Kolter*, 849 F.2d at 543. Prior to the amendment the defendant would have been a convicted felon even though the Georgia State Board of Pardons and Paroles has unqualifiedly restored all of the defendant's civil and political rights that he had lost as a result of an earlier burglary conviction. *Id*. at 542-43. While the 11th Circuit panel agreed with the government that the savings statute applied to the case, the panel rejected the government's argument that the prior law

should be applied because "the redefinition of 'convicted felon' did not affect the punishment provided but merely altered the class of persons for whom the specified conduct is prohibited." *Id*. at 544, *see also United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977) (law that changed penalty from criminal to civil was a "procedural and remedial" change not included within reach of general savings clause); *United States v. Mechem*, 509 F.2d 1193 (10th Cir. 1975) (general savings statute did not save adult prosecution of juvenile offender; Federal Juvenile Delinquency Act, even though it changed "penalty" for act predominantly worked a remedial procedural change). Not all circuits have followed Kolter but the Second Circuit has yet to weigh in.

Though not directly analogous, *Hamm* is also seen as supporting application of the amended statute to the pipeline cases. *Hamm*, and its companion case, is a "sit-in" case that commenced in the South. The petitioners were being prosecuted, and ultimately were convicted under state laws, for refusing to leave department store lunch counters after being denied service. *See* 379 U.S. at 307-308. The United States Supreme Court held that the Civil Rights Act of 1964 required that the convictions be vacated and the prosecutions dismissed because the petitioners' conduct could not have been the subject of a criminal prosecution after the passage of the Act. *Id*. at 308-310. In addressing the federal savings statute, the Court explained that the Civil Rights Act "substitutes a right for a crime." *Id*. at 314. The Court continued its explanation, noting its belief that "Congress, in enacting such a far-reaching and comprehensive scheme, intended the Act to operate less effectively then the run-of-the-mill." *Id.* The purpose of the Civil Rights Act, the Court continued, "was to obliterate the effect of a distressing chapter of our history." *Id*. at 315. Determining that the Civil Rights Act was constitutionally required under the Supremacy Clause, the Court recognized that any "convictions for pre-enactment violations would be equally unconstitutional and abatement necessarily follows." *Id*. The purpose of the Fair Sentencing Act is to correct unfair sentencing practices that, disproportionately discriminate along racial and economic lines. Given this purpose, and Congress' immediate failure to apply the Act retroactively, *Hamm* presents another approach to argue that the Act be applied to the pipeline cases.

Lastly, our office recently forwarded some sample pleadings from the Middle District of Florida which that office successfully used to have the Fair Sentencing Act of 2010 apply at a recent sentencing. The client would have been subject to a 10-year mandatory minimum under the old law, but with 168 grams of crack, he was subject only to a 5 year mandatory minimum under the new law. The government advocated for the 10 year mandatory minimum. The attorney quoted from the legislative history in memo regarding the discrimination under the old law and particularly how the Department of Justice advocated for the new law. The district court judge expressed annoyance with the government's change in position and applied the new law. No word yet on whether the government is appealing.

Final Observation

The question of retroactivity is likely to be heavily litigated in the months ahead. Look for emails coming from our office which are sure to include motion papers and legal arguments which you can use for your pipeline cases, and, as always, feel free to contact one of the attorneys in our office to discuss your case.

* * *

EX POST FACTO PROTECTION REMAINS IN A POST-*BOOKER* SENTENCING WORLD

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The Ex Post Facto clause (U.S. Const. Art. I, §9) prohibits laws that increase the punishment for a crime after its commission. *Garner v. Jones,* 529 U.S. 244, 249 (2000). That protection is extended to the application of the United States Sentencing Guidelines. *See* USSG §1B1.11(b)(1). Section 1B1.11 directs the application of an earlier guideline manual if application of a later manual would violate the Ex Post Facto clause. If an amended guideline section or enhancement substantially disadvantages the defendant, the application of the section or enhancement would violate the Ex Post Facto clause. *Miller v. Florida,* 482 U.S. 423, 432-433 (1987).

The Department of Justice is litigating a different position. The government maintains that Ex Post Facto protection is no longer relevant in determining which version of the Guidelines manual applies even if the amended section is more onerous to the defendant. The argument seemingly relies on *Booker's* holding that the guidelines are advisory. Simply put, the contention is that since the guidelines are advisory, there can be no risk of increased punishment. For various reasons, the government's position is flawed.

In *Miller*, the Supreme Court held that the application of a Florida sentencing scheme, similar to the U.S. Sentencing Guidelines, violated the defendant's Ex Post Facto protection. The decision addressed the central inquiry of the Ex Post Facto protection: was the defendant given fair notice of the punishment? The necessary analysis is whether the law applies to events occurring before its enactment and whether it substantially disadvantages the defendant. The Florida sentencing scheme set a sentencing range of 3 1/2 years to 4 1/2 years at the time the defendant committed his offense. Later changes increased the range to 5 1/2 years to 7 years when the defendant was sentenced. This substantially disadvantaged the defendant as it made "more onerous the punishment for (conduct) committed before its enactment." *Id.* at 435. As a result, the Ex Post Facto clause was violated.

A recent example demonstrates the continued viability of the Ex Post Facto protection. A defendant is convicted of defrauding the United States (18 U.S.C. § 641) in that he secured federal FEMA funds by falsely claiming he resided in New Orleans during Hurricane Katrina. The defendant's criminal conduct was complete in September 2005.

Congress increased the punishment for future fraud-related offenses similar to those occasioned by the Katrina disaster. Lawmakers enacted 18 U.S.C. § 1040 pursuant to Pub.L. 110-179, which created a 30 year felony (Fraud in Connection with a Major Disaster or Emergency Benefits) instead of the 10 year maximum under 18 U.S.C. § 641. The effective date for the new crime was January 7, 2008, 27 months after the criminal conduct was completed in our example. The Sentencing Commission created an enhancement [§2B1.1(b)(11)] to implement the directives of the new statute. This enhancement, if applied to the defendant's completed conduct, would result in a doubling of the offense level from 6 to 12. The amended enhancement became effective on November 1, 2008, 37 months after the criminal conduct was completed in our example.

U.S.S.G. §1B1.11(a) directs the use of the Guideline Manual in effect on the date of

sentencing. Such application is modified by subsection (b)(1). This caveat requires the application of the earlier manual (date of offense) if the later edition violates the Ex Post Facto clause. Thus, the proper Guideline Manual is the earlier one in our example.

The government argues the sentencing court need not use the earlier - and more favorable to the defendant - Guideline Manual. Such a claim ignores the Supreme Court's direction that the Guidelines remain the starting point and the initial benchmark in every sentencing proceeding. *Gall v. United States,* 552 U.S. 38, 49 (2007). Numerous courts rejected the government's claim and applied the Ex Post Facto protection to post-*Booker* sentencings. *See United States v. Turner,* 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008) (using a later version of the guidelines created a substantial risk that the defendant's sentence was more severe, thus resulting in a violation of the Ex Post Facto Clause); *United States v. Lanham*, 2010 WL 3305937, *12 (6th Cir. Aug. 24, 2010) ("the advisory nature of Guidelines does not completely eliminate Ex Post Facto concerns"); *United States v. Lewis,* 603 F.Supp.2d 874, 877 (E.D. Va. 2009) (the clear preponderance of reviewing courts seem to favor post-*Booker* application of the Ex Post Facto Clause to sentencing guidelines calculations); *United States v. Doyle,* 621 F.Supp.2d 345 (W.D. Va. 2009) (rejecting the use of the higher 2008 guidelines and instead applying the 2003 guidelines in effect at the time of the commission of the child exploitation offenses); *United States v. Kladek,* 651 F.Supp.2d 992 (D. Minn. 2009) (rejecting the use of the higher 2008 guidelines and instead applying the 2000 guidelines in effect at the time of the commission of the tax offenses); *United States v. Sweeney,* __F.Supp.2d__, 2010 WL 2222264, *4 (S.D.N.Y. June 3, 2010), (collecting cases and applying the 2003 guidelines in effect at the time of the conduct rather than the more onerous 2008 guidelines in effect at sentencing in a child exploitation case); *United States v. Kilkenny,* 493 F.3d 122, 127 (2d Cir. 2007) (holding that, the application of a particular version of the sentencing guidelines is retrospective, for purposes of the Ex Post Facto Clause, if the version went into effect after the last date of the offense of conviction); *United States v. Johnson*, 558 F.3d 193, 194 & n.1 (2d Cir. 2009) (per curiam) (explaining *Kilkenny*); and *United States v. Gilmore,* 599 F.3d 160, 166 (2d Cir. 2010) (at a minimum, in order to raise an Ex Post Facto concern, a law must apply to events occurring before its enactment).

The Second Circuit recently reaffirmed the Ex Post Facto principle in a post-*Booker* analysis. Though the reasoning was not determinative to the issue before the Court, the panel agreed the Ex Post Facto Clause applies: "Our holding continues to prevent the Sentencing Commission and Congress from imposing a heightened punishment following the commission of the criminal conduct triggering that punishment." *United States v. Kumar,*___F.3d__, 2010 WL 3169270,*12 (2d Cir. Aug. 12, 2010). Judge Sack, in his dissenting opinion, agrees with the majority on this point:

> The majority and I begin on common ground. We first assume that the Ex Post Facto doctrine applies to the Sentencing Guidelines after the Supreme Court decided, in *United States v. Booker,* (citation omitted), that the guidelines are advisory. We then agree that [f]or a law to contravene the Ex Post Facto clause, two critical elements must be present: First, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it.

Id. at *25.

Recently, the Honorable David G. Larimer rejected the government's argument that the application of a more severe guideline enhancement would not impact the Ex Post Facto protections. Judge Larimer recognized the higher guideline sought by the government would disadvantage the defendant. The Court decided the importance of the guidelines as a starting point in the sentencing process was enough to trigger the use of the earlier, less severe guideline manual. *United States v. Lewis,* Docket No. 10-CR-6060-001, WDNY, (decided Aug. 19, 2010).

The use of the later book in our example to apply the enhancement would violate the protections of the Ex Post Facto clause. The enhancement doubling the guideline range is the result of legislative action by Congress many months after the offender's conduct was complete. The government seeks to retroactively apply the onerous enhancement to the defendant. If successful, that guideline enhancement would apply to events that ended before the legislative amendment. Moreover, such application would disadvantage the defendant by doubling his guideline range. As a result, application of the enhancement would be unconstitutional. The proper guideline to be applied in our example is the earlier manual. Contrary to the government's contention, the protections of the Ex Post Facto clause remain for post-*Booker* sentencings.

* * *

AN INTRODUCTION TO FEDERAL SENTENCING

The Twelfth Edition of "AN INTRODUCTION TO FEDERAL SENTENCING" by Henry J. Bemporad, Office of the Federal Public Defender, Western District of Texas - published in June 2010 is now available on the Office of Defender Services Training Website - www.fd.org. As Henry writes:

> For over a quarter century, sentencing has been the major source of litigation in federal criminal practice. The battles began with the Sentencing Reform Act of 1984, which replaced traditional judicial discretion with far more limited authority, controlled by a complex set of mandatory federal sentencing guidelines promulgated by the U.S. Sentencing Commission. Sentencing practice was again fundamentally altered by the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which excised the mandatory guideline provisions of the Sentencing Reform Act, rendering them merely advisory.
>
> While *Booker* returned discretion to the sentencing judge, it left open many questions about the scope of that discretion, and it did not address the changes in sentencing procedure that the newly advisory guidelines might require. The Supreme Court has begun to answer these questions in a series of important decisions about post-*Booker* sentencing practice, the effects of which are emerging in sentencing courts around the country. What does this mean for defense counsel? That we must be prepared to practice in a time of potential change, and great opportunity.

While many of you have been handling sentencings in federal court for many years, AN INTRODUCTION TO FEDERAL SENTENCING provides a great reminder and overview of some of the oft overlooked issues unique to federal sentencings. Take a look!

* * *

HOW I SPENT MY SUMMER VACATION

Tracy Hayes
Assistant Federal Defender

In my youth, like many of you, I spent my school months looking forward to the start of summer. I knew that summer meant spending time with friends, traveling with family and playing sports. Really, I couldn't wait for the school term to end. Things have surely changed.

This year, instead, I found myself eagerly hoping I could attend summer school! I wanted to attend the program I had heard about from countless attorneys across the country - the National Criminal Defense College' Trial Practice Institute. In March, I applied for the program, but discovered that because of the large number of applicants they receive, not everyone who applies is automatically accepted. I eagerly awaited a response over the next few months. Finally, I learned that the NCDC accepted my application and I was off to school in July.

NCDC is an annual event held twice each summer on the campus of Mercer Law School in Macon, GA. The program is highly regarded throughout the country.

Prior to our session, the participants received a packet of materials with hypothetical cases enclosed. We were told to review the materials and prepare a brief theory of the cases involved.

On the first day at NCDC we had a welcome dinner and met our classmates and faculty for the first week. This year my class included a diverse group of 96 participants of varying practice experience from 22 States and Argentina. We were split into small sections of 8 participants each, with each section consisting of a mix of state public defenders, private counsel and federal public defenders. Classes generally began at 8:30 am and lasted until 6 PM, during the week.

Each day the small sections were taught by a new instructor from the nationally recognized faculty. We covered topics such as client interviews, jury selection, direct and cross examination, impeachment and openings and closing arguments. We spent the mornings with our small group working on the topic for the day. For instance, we spent our first Wednesday practicing opening statements. Our individual exercises were video recorded. We received feedback not only from the instructors, but from one another and we were able to tailor feedback according to one another's strengths and weaknesses. I watched myself and other classmates improve their skills tremendously over the course of the two week program.

At the end of each day, the large group met in a lecture room and observed faculty demonstrations of the day's topic. NCDC also employed improvisational actors who portrayed our clients and witnesses.

Without doubt, NCDC was the highlight of my summer. As a youth I never would have imagined school would be so enjoyable, instructive and rewarding. I more than got my money's worth and know my skills and confidence level have improved. For those of you interested, the admissions process begins in March and a limited number of scholarships are available to cover all or partial tuition for those whose financial circumstances would otherwise prevent their attendance. Check out the website at www.ncdc.net. I highly recommend the college as a destination spot for your summer vacation!

* * *

WHEN SENTENCING GOES AWRY

MaryBeth Covert
Research & Writing Attorney

It is well established in the Second Circuit that a knowing and voluntary waiver of the right to appeal is enforceable. *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001). However, the Circuit "scrutinize[s]" claimed waivers of appellate rights "closely and appl[ies] them narrowly." *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996). Furthermore, aware of the Government's advantage in bargaining power and recognizing that the Government usually drafts plea agreements, plea agreements are construed "strictly against the Government." Id. at 559. The Circuit in *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995), recognized that a waiver of appellate rights does not foreclose appeal in every case. 70 F.3d at 748.

The question becomes when is an appeal waiver unenforceable?

In *United States v. Rosa*, 123 F.3d 94, 98 (2d Cir. 1997), the Court stated, "[w]e have not held criminal defendants to their waivers of this right in every circumstance." The *Rosa* court went on to note that:

> Our oversight role permits us to accept appeal of a case where the sentence or the agreement calls for it, despite our preference for deferring to the parties' freedom to contract. We will certainly often be willing to set aside the waiver and accept appeal when constitutional concerns are implicated, whether those concerns be related to a particular constitutional provision such as the ex post facto clause, or whether it simply appears that the ultimate sentence is so far beyond the anticipated range that to deny the right of appeal would raise serious questions of fundamental fairness. We may also be willing to accept such an appeal for lesser improprieties, including abuse of judicial discretion. We are not prepared today to outline an exhaustive list of the circumstances under which we would or would not accept such an appeal.

123 F.3d at 101.

In *United States v. Woltmann*, No. 10-413 (2d Cir. July 6, 2010) (Jacobs, Winter, Walker, CJJ), the Circuit added two additional categories of cases where the Court may be willing to set aside a waiver and accept appeal - those where the sentence was "reached in a manner that the plea agreement did not anticipate" or where the sentencing court "failed to enunciate any rationale for the defendant's sentence, thus amounting to an abdication of judicial responsibility."

Woltmann defendant pled guilty to tax fraud, then provided substantial assistance to the government in the successful prosecution of another tax case. The plea agreement provided for a sentencing range of 18 to 24 months, anticipated that a USSG § 5K1.1 letter would be filed for the cooperation and also contained a waiver provision where the defendant waived appeal of any sentence below 27 months.

The government filed a USSG § 5K1. cooperation letter that expressly asked for a sentence below the 18 to 24 month guideline range provided for in the plea agreement. The district court judge refused to consider the 5K letter, viewing it as an effort to repudiate the plea agreement. To the judge, that provision trumped both the 5K1.1 letter and the remaining § 3553(a) factors. He sentenced Woltmann to 18 months' imprisonment, the bottom of the range and significantly below the waiver of appeal cut off of 27 months.

After the defendant filed a notice of appeal, the government moved to dismiss based on the plea agreement's appeal waiver. Construing the plea agreement under "ordinary contract principles" but with "special due process concerns for fairness," the court found the waiver unenforceable because the sentence was "reached in a manner that the plea agreement did not anticipate" and the sentencing court "failed to enunciate any rationale for the defendant's sentence," thus abdicating its judicial responsibility.

First, the judge insisted on relying on the guideline range in the agreement - calling the agreement, amongst other things, "the controlling instrument." The district court imposed a sentence "inconsistent with the parties' expectations," since the agreement, by its unambiguous terms, contemplated that the sentence would be imposed only after consideration of the 5K1.1 letter and § 3553(a). It was accordingly improper for the judge to reject the 5K1.1 letter because he felt it "repudiated" the agreement. In short, the judge "refused to consider the 5K1.1 motion and the § 3553(a) factors on the ground that the appeal waiver and the sentencing range in the [a]greement obviated anything else." This rendered the appeal waiver unenforceable.

Second, the Court held that the district court's belief that the plea agreement constituted an "enforceable concession by Woltmann that any sentence at or below 27 months was appropriate" was likewise error. It amounted to an abdication of judicial responsibility - a second reason to deem the appeal waiver unenforceable.

Now, admittedly the circumstances of Woltmann are unique – we don't have district court judges who regularly refuse to consider 5K letters as attempts to get around valid plea agreements –but, the broad language of the decision should cause one to pause and consider a possible appeal when sentencing goes awry. Might the case fall into one of the enumerated categories where the Circuit has already recognized its willingness to set aside a waiver and accept an appeal? Consider the following questions regarding your client's particular sentence:

- Did the sentence or agreement call for a waiver?
- Are constitutional concerns implicated such as the ex post facto clause, or does it appear that the ultimate sentence is so far beyond the anticipated range that to deny the right of appeal would raise serious questions of fundamental fairness?
- Has there been an abuse of judicial discretion?
- Was the sentence reached in a manner that the plea agreement did not anticipate?
- Did the sentencing court fail to enunciate any rationale for the defendant's sentence, thus amounting to an abdication of judicial responsibility?

If you have an unusual sentencing, consider trying to frame an appellate issue into one of these categories to be able to set aside the appellate waiver, or argue for a new addition to the checklist! Feel free to contact any of the lawyers in our office to brainstorm.

* * *

Announcing...

The Federal Public Defender's Office is pleased to announce the newest additions to our office staff:

Brandon Vogel joined our offices as a Computer Systems Administrator in July. For the past nine years he worked as a Network and Systems Manager at Access International in Cambridge, Massachusetts. He is Microsoft and Novel certified.

Iris Rivera has joined the Buffalo office as a Part-time Receptionist. After spending 26 years working for the Buffalo Board of Education, Iris spent the past several years home schooling her young children. She is fluent in speaking and writing Spanish.

Fonda Dawn Kubiak has joined the Buffalo Office as an Assistant Federal Defender. Fonda has extensive experience in federal and state criminal defense having practiced in Western New York for the past 15 years. She has been a member for the CJA Panel since 1995. Since 2003, Fonda has operated The Kubiak Law Firm, PLLC in Buffalo, New York as a solo practitioner, handling federal and state criminal cases involving complex litigation issues in capital and non-capital cases. Fonda received her J.D. Doctor from the University at Buffalo, School of Law in 1994 and her B.A., magna cum laude, in History from Ithaca College in 1991. She is a member of the Erie County Bar Association, Criminal Law & Real Property Law Committee as well as a member of the New York State Bar Association, New York State Defenders Association, New York State Association of Criminal Defense Lawyers and the Western New York Chapter of the Woman's Bar Association of New York.

Welcome to all three. Bienvenida por todas!

* * *

From England to the United States. . . .

By Rajnie Zaman and Rujina Hussain
Legal Interns

By way of introduction, the two of us are legal interns with the Federal Public Defender's Office in Rochester, New York. We are currently studying for our post graduate masters of law in International Human Rights at Birmingham City University in the United Kingdom. Both of us graduated from university in 2009 with a Bachelors of Law with Honours. We were intrigued by the International Human Rights program at Birmingham thought it would be very interesting to learn about human rights in countries outside of the UK.

During the course of our studies, we have come across human rights issues which many of us are not aware of: How people face injustice on a daily basis due to our legal systems? How many of these injustices try to be hidden away from the public eye and media? Our course studies thus far have included Public International law, Refugees and the Law, Critical Perspectives on Human Rights, International Human Rights in the USA, Globalization and Justice and Human Rights and Social Change. All these modules have brought to light many issues that before we started studying the course we had no idea about.

The program then offered us the opportunity to carry out a 10-12 week internship in a law based environment in an international country as the final part of our masters studies. Since we both decided to pursue our careers in human rights, we felt that the work experience would be invaluable. Birmingham City University found us an internship program within the United States at the Federal Public Defender's Office in Rochester. We were guided by one of our lecturers and told that

this would be an internship where we could learn more about how the United States legal system works and its impact on international human rights.

We have been working here for nearly 6 weeks and have attended court on a regular basis – witnessed trials, hearings, motions, sentencing, jury selection, direct and cross examinations and pleas. We have noticed many differences between the UK and US legal systems. For example, the responsibilities of a British solicitor versus an American lawyer.

In the UK, solicitors are lawyers who traditionally deal with any legal matter apart from conducting proceedings in court (advocacy), with some exceptions. In the United Kingdom and the Republic of Ireland, the legal profession is split between solicitors and barristers, and a lawyer will usually only hold one title. Solicitors in England and Wales are represented by, and therefore pay their practicing fees to the Law Society of England and Wales. The Solicitors Regulation Authority (SRA) and Legal Complaints Service act independently of the Law Society, but conjunctively make up the whole system of professional regulation for solicitors.

To be a solicitor, the first step would be having a qualifying law degree (or any other qualifying route). A prospective solicitor must enroll with the law society as a student member and take a one-year course called the Legal Practice Course (LPC), usually followed by a two-year apprenticeship known as a training contract. During the apprenticeship, you are considered a "trainee solicitor." In England and Wales, the broad line between the roles of solicitors and barristers has been weakening as solicitors regularly appear not only in the lower courts, but (subject to passing a test) increasingly in the higher courts too, like the High Court of Justice of England and Wales and the Court of Appeals. However, the independent bar still exists in a largely unchanged state, a minority of firms of solicitors now employ their own barristers, and solicitor advocates to do some court work.

Historically, the United States had solicitors, however they became obsolete by the late 1800s. The US 'solicitor' is also used synonymously with salesman. Many countries, including the United States, do not observe a distinction between barristers and solicitors. Attorneys are permitted to conduct all areas of litigation and appear before those courts where they have been admitted to the bar. In England and Wales, a barrister must be a member of one of the Four Inns of Court. The Inns of Court perform scholastic and social roles, and in all cases, provide financial aid to student barristers (subject to merit) through scholarships. Student barristers must complete a Bar Professional Training Course. When completed, the student barristers are 'called' to the bar by their Inns and are elevated to the degree of 'barrister.' Nonetheless, to practice independently they must undertake twelve months of pupillage. This includes six months of shadowing and six months of their own court work. Barristers have the rights of audience in the higher courts, they usually have more specialized knowledge of case law and precedent. Solicitors work more directly with the clients and a barrister usually speaks on the client's behalf in court when instructed by a solicitor. The distinction between the two is starting to merge more recently, but the bottom-line is that the profession of a barrister in England and Wales is a separate role from that of solicitor.

We have learned much about the legal system in the United States during our brief time here and look forward to learning more during the next half of our internship.

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