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FAIR SENTENCING ACT OF 2010 NOT SO FAIR IN 2011

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In the face of numerous district court decisions from across the nation applying the Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (amending 21 U.S.C. § 841)[1] (hereinafter the "FSA") to defendants whose sentences were pending at the time the FSA was enacted, the United States Court of Appeals for the Second Circuit held on February 11, 2011, that the FSA did not apply in such cases. *See United States v. Acoff*, Docket No. 10-285-cr (2d Cir. 2011). In other words, if the offense was committed prior to the enactment of the legislation, then the defendant is to be sentenced under the old crack laws, laws which admittedly create unwarranted sentencing disparity, cannot be justified on fact or science, and appear to have been racially motivated.

The basis for the Circuit Court's decision lies in the general savings clause, 1 U.S.C. § 109, which provides that "[t]he 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." Some district court's have argued that "expressly" includes "by necessary implication" such that the will of Congress in enacting the FSA was to permit no further federal crack sentencing that are not "fair." *See e.g. United States v. Douglas*, 2010 WL 4260221 (D. Maine, Oct. 27, 2010).

[1] In an effort to "restore fairness to Federal cocaine sentencing," the FSA substantially reduced the statutory penalties for possession and trafficking in crack cocaine. The amount of crack necessary to trigger the ten-year mandatory minimum was raised from 50 grams to 280 grams, and the amount necessary to trigger the five-year mandatory minimum was raised from 5 grams to 28 grams. FSA § 2. The FSA also eliminated the mandatory minimum sentence for simple possession of crack. Id.

The Second Circuit's decision appears to create the beginning of a circuit split since it conflicts with *dicta* from the Tenth Circuit Court of Appeals in *United States v. Lewis*, 625 F.3d 1224 (10th Cir. 2010). There, the defendant, who was sentenced prior to FSA's enactment, did not argue that the new 18:1 ratio should apply to him; he merely challenged his sentence as procedurally and substantively unreasonable. In rejecting his sentencing appeal, the court detailed the history of federal crack sentencing, stating that the new 18:1 ratio would not apply to Mr. Lewis. Importantly, however, it also noted that "defendants being sentenced *henceforth* will be sentenced under a [ratio different than the one applicable to Mr. Lewis]." *Id*. at 1228 (emphasis added). This language suggests that the Tenth Circuit believes the 18:1 ratio should be applied immediately "henceforth" to all defendants after FSA's enactment.

In light of *Acoff*, preservation is the key for counsel in this district. Defense counsel in *Acoff* are planning to file a petition for a writ of certiorari to the United States Supreme Court and thus, until such time as the Supreme Court grants certiorari and issues a decision, counsel should preserve this issue for appeal. The federal defender website – www.fd.org – includes a compilation of district court cases addressing this specific issue. (Notably absent from the list, however, are *Acoff*, and our own Chief Judge's decision in *United States v. Figueras*, 09-CR-103(S) (also holding that the FSA is *not* applicable to defendants whose offense occurred prior to FSA's enactment), so the list may not be entirely complete). The list is quite extensive and provides numerous citations for you to use in preserving this issue for appeal.

If you have any questions on this or other appellate issues, please free to contact our office for assistance.

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2010 GUIDELINE AMENDMENTS

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The amendments to the Sentencing Guidelines, which went into effect on November 1, 2010, encourage enhanced discretion to consider mitigating factors in sentencing. They reflect the growing recognition that alternatives to incarceration are essential in meeting penalogical goals, including rehabilitation and reducing recidivism. They are also a response to what has been happening in the field as sentencing judges use their post-Booker discretion to consider a wide range of individual factors in trying to impose a just sentence.

A. Alternatives to Incarceration

The sentencing table in Chapter Five provides advisory sentencing ranges, including whether a defendant should receive a non-incarceration sentence. The amendments expand Zones B and C by one offense level. In other words, Zone B, authorizing a sentence of community confinement, now includes offense level 11, Criminal History Category I. Zone C, authorizing split sentences, includes offense level 13. Application note 6 is amended to clarify that a departure from Zone C to the community confinement options in Zone B is authorized if appropriate to accomplish a treatment purpose. The Commission explains that the departure should be considered only if the defendant is a controlled substance or alcohol abuser or suffers from a significant mental illness and the "defendant's criminality is related to the treatment problem to be addressed." USSG § 5C1.1, comment. (n.6) (Nov. 1, 2010).

A court should be able to give a defendant "credit" if the defendant has already spent time

in home detention or residential treatment as a condition of pretrial release. In other words, rather than repeating the rehabilitative program, the sentencing court can consider this condition satisfied under Zones B and C by the pretrial program. The Bureau of Prisons's prohibition on awarding prison credit for pretrial community confinement, *see Reno v. Koray*, 515 U.S. 50 (1995), does not preclude the court from crediting a pretrial condition toward a condition of probation or supervised release.

While the Commission recommends against the use of substitutes for imprisonment for defendants with a Criminal History Category of III or above, USSG § 5C1.1, comment. (n.7), the Commission has deleted the commentary that "such defendants have failed to reform despite the use of such alternatives." A client who has successfully completed treatment on supervised release could be the exception that proves the rule.

B. Specific Offender Characteristics

The Commission has identified three tiers of offender characteristics based on Congressional directives in the Sentencing Reform Act, which has governed and continue to govern the Commission's approach. *See* USSG, Chap. 5H, intro. comment. (Nov. 1, 2010). First, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to race, sex, national origin, creed, and socio-economic status. 28 U.S.C. § 994(d). These are the prohibited factors identified in *Koon v. United States*, 518 U.S. 81, 95-96 (1996); *see also* USSG § 5H1.10. Second, the Act directs the Commission to consider whether eleven characteristics – age, education, vocational skills, mental and emotional condition, physical condition, including drug dependence, previous employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood – are relevant. 28 U.S.C. § 994(d). The Guidelines specifically account for role in the offense, USSG §§ 3B1.1-3B1.3, criminal history, USSG Chap. 4, and criminal livelihood. § 4B1.3. Third, the Act directs the Commission to assure that the guidelines, "in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering" education, vocational skills, employment record, family ties and responsibilities, and community ties. 28 U.S.C. § 994(e).

This amendment cycle, the Commission asked for comments about the following specific offense characteristics: age, mental and emotional condition, physical condition, including drug or alcohol dependence or abuse and gambling addiction, miliary service, other good works, and lack of youthful guidance. Significantly, these factors are neither expressly forbidden by § 944(d), nor arguably discouraged by § 994(e). The Commission has now declared that some of these factors "may be relevant in determining whether a departure is warranted, if considerations based on [the factor] individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical case covered by the guidelines." Those factors are age (§5H1.1); mental and emotional condition (§ 5H1.3); physical condition, including drug or alcohol dependence or abuse (but not gambling addiction) (§5H1.4); and military service (but not other good works) (§5H.11). The Commission expressly notes that a downward departure based on mental or emotional condition, substance abuse and physical condition "may be appropriate to accomplish a specific treatment purpose." USSG §§ 5H1.3, 5H1.4 (citing §5C1.1, comment. (n.6)). A conforming amendment to the general departure provision, USSG § 5K2.0, removes these factors from the prohibited list. Specific arguments pertaining to the modified 5H factors are discussed below.

The Commission recognizes that the 5H policy statements "are evolving in nature." USSG Chap. 5, intro. comment. (citing USSG, Chap. One, Part A, Subpart 2; 28 U.S.C. § 994(o)). In other words, defense counsel should continue to urge additional factors as a basis for departure and variance, and courts are still free to consider them.

1. Age, USSG § 5H1.1

A defendant's age, either youth or seniority, may justify a non-Guideline sentence. As the Supreme Court has recognized, the young are less culpable than the average offender and have a high likelihood of reforming in a short period of time. *Roper v. Simmons*, 543 U.S. 551, 567, 569- 70 (2005) (holding death penalty for individuals who committed offense prior to age eighteen unconstitutional). "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* at 570 (internal quotation marks and citation omitted). The defendant's youth was a factor in the district court's decision to grant Mr. Gall probation, a factor approved by the Supreme Court. *Gall v. United States*, 552 U.S. 38, 57-58 (2007); *see also United States v. Collington*, 461 F.3d 805 (6th Cir. 2006).

A defendant's advanced age may also support a non-Guideline sentence. *See, e.g., United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009); *United States v. Simmons*, 568 F.3d 564, 570 (5th Cir. 2009). Recidivism rates for older offenders decline dramatically. *See* USSG Fifteen Year Report Release 1 (Measuring Recidivism), Exh. 9 (May 2004). The elderly suffer an increased likelihood of chronic and terminal illness not readily treatable in the prison system and impose substantial costs during their incarceration. *See, e.g.*, U.S. Dept. of Justice, National Institute of Corrections, Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates 11 (2004), available at: http://www.nicic.org/pubs/2004/018735.pdf.

2. Mental Illness, Mental and Emotional Condition, USSG §§ 5H1.13, 5K2.13

The Commission has authorized a departure for diminished capacity if: (1) a defendant is convicted of a non-violent offense; (2) he or she committed the offense while suffering from a "substantially reduced mental capacity" which contributed substantially to the crime but did not result from voluntary use of intoxicants; and (3) the criminal history does not show a need for incarceration. USSG § 5K2.13. *See, e.g., United States v. Risse*, 83 F.3d 212 (8th Cir. 1996); *United States v. Gifford*, 17 F.3d 462 (1st Cir. 1994); *United States v. Cantu*, 12 F.3d 1506 (9th Cir. 1993) (post-traumatic stress syndrome); *United States v. Lewinson*, 988 F.2d 1005 (9th Cir. 1993) (psychological departure available where government failed to establish defendant used drugs during offense). The diminished capacity departure is broader than the insanity defense as the departure is available if the defendant was unable to understand the wrongfulness of his behavior or exercise his power of reason or control behavior he knew was wrongful. USSG § 5K2.13, comment. (n.1); *see, e.g., United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997).

A mental condition not rising to the standards for diminished capacity may still support a variance. *See e.g. United States v. Feker*, 2009 WL 3379177 (E.D. Wis. Oct. 19, 2009) (epilepsy). The courts have also recognized that a sentence of imprisonment for defendants with mental conditions may be counterproductive, especially where it would disrupt current treatment protocols. *See United States v. Olhovsky*, 562 F.3d 530, 549 (3d Cir. 2009); *United States v. Polito*, 215 Fed. App'x 354, 356 (5th Cir. 2007); *United States v. Repp*, 466 F. Supp. 2d 788, 791 (E.D. Wis. 2006); *United States v. Krutsinger*, 449

F.3d 827, 829-30 (8th Cir. 2006) (extraordinary rehabilitation, mental issues).

3. Physical Condition, Including Drug or Alcohol Dependence or Abuse, USSG § 5H1.4

The Supreme Court approved Gall's efforts to overcome his addiction to drugs and alcohol as a basis for the non-Guidelines sentence. *Gall*, 552 U.S. at 57. An alternative to incarceration is recommended if it would more effectively treat a defendant's condition.

It has become readily apparent that the Bureau of Prisons cannot effectively treat serious health conditions. A recent audit by the Office of the Inspector General found systemic deficiencies in the Bureau of Prisons's delivery of health services. See U.S. Dept. of Justice, Office of the Inspector General Audit Division, The Federal Bureau of Prison's Efforts to Manage Inmate Health Care ii-xix, 32-34 (Feb. 2008), available at: www.justice.gov/oig/reports/BOP/a0808/final.pdf.

Examples of below Guidelines sentences include *United States v. Martin*, 363 F.3d 25 (1st Cir. 2004) (Crohn's disease); *United States v. Jimenez*, 212 F. Supp. 2d 214, 219-20 (S.D.N.Y. 2002) (post-offense medical condition erodes her threat to society); *see also United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000) (abuse of discretion to rely on BOP form letter assuring ability to provide care).

In *United States v. Lara*, 905 F.2d 599, 601 (2d Cir. 1990), the Second Circuit upheld a departure based on the defendant's "potential for victimization" due to his "diminutive size, immature appearance and bisexual orientation." Shortly thereafter, the Commission put the kibosh on this basis for departure. Nevertheless, the courts continue to consider a defendant's vulnerability in prison in granting a lower sentence. *United States v. Long*, 977 F.2d 1264 (8th Cir. 1992); *United States v. K*, 160 F. Supp. 2d 421 (E.D.N.Y. 2001). The 2010 amendments supersede the previous prohibition.

4. Military Service, USSG § 5H1.11

In *Rita v. United States*, 551 U.S. 338 (2007), Justices Stevens and Ginsburg specifically recognized that a court could consider a defendant's military service as a basis for a sentence below the guidelines. 551 U.S. at 364-67 (concurring). Prior to the promulgation of § 5H1.11, a number of courts had recognized military service as a basis for departure. *See, e.g., United States v. McCaleb*, 908 F.2d 176, 179 (7th Cir. 1990); *United States v. Neil*, 903 F.2d 564, 566 (8th Cir. 1990); *United States v. Pipich*, 688 F. Supp. 191, 193 (D. Md. 1988). With numerous veterans returning from service suffering from severe physical and mental disabilities, *see, e.g.*, RAND Center for Military Health Policy Research, Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequence, and Services to Assist Recovery xxi (Tanielian & Jaycox, eds. 2008), military service may increasingly be a basis for a lower sentence.

C. Criminal History: Recency Points

The Sentencing Commission has eliminated the criminal history points for commission of an offense within two years of release from prison, known as the recency points. USSG §4A1.1(e). In a press release, the Commission explained that it deleted this provision, "in part, because when combined with other guideline calculations for firearms or unlawful reentry (immigration) offense, the addition of recency 'points' may result in a single criminal history event having excessive weight in the determination of the applicable guideline range. The commission further determined that deletion of the provision did not detract from the overall ability of the criminal history score (resulting from the guidelines calculation) to predict an offender's likelihood of recidivism." *See* http://www.ussc.gov/PRESS/rel20100419.htm. (Nov. 1, 2010).

In some cases, the Commission's reasoning may support an additional variance. Before the amendment, for example, a single prior conviction could result in four enhancements in an illegal reentry case: (1) an offense level enhancement; (2) three criminal history points after the probation was revoked upon the defendant's return; (3) two points for being under a criminal justice sentence during the commission of the offense; and (4) another point for returning within two years and/or being in prison when found. The elimination of USSG § 4A1.1(e) addresses one of these. It does not address the multiple counting of the conviction, which may dramatically increase the offense level and add some five criminal history points. *See e.g. United States v. Santos*, 406 F. Supp. 2d 320 (S.D.N.Y. 2005). In fact, the Commission's data reveal that the § 4A1.1(d) status points, i.e., for being under supervision, like the recency points, do not contribute significantly to an assessment of the likelihood of recidivism. *See* USSC Fifteen Year Report Release 3, Exh. 5 (Jan. 2005).

D. Cultural Assimilation

The 2010 amendments encourage departure from the § 2L1.2 Guideline for illegal reentry where (A) the defendant formed cultural ties primarily in the United States having resided continuously in the United States since childhood, (B) those ties were the primary motivation for the defendant's return or illegal presence, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

The Commission recommends consideration of the following factors "among other things": (1) the age when the defendant began residing in the United States continuously; (2) how long the defendant attended school in the United States; (3) the duration of continuous residence; (4) the duration of the defendant's presence outside the United States; (5) the nature of the defendant's familial and cultural ties both in and outside of the United States; (6) the seriousness of the defendant's criminal history; and (7) whether the defendant engaged in additional criminal activity upon his return. Further, the Supreme Court has itself recognized that deportation can be an extremely harsh collateral consequence. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481, 1486 (2010).

E. Application Instructions

In amending its application instructions, the Commission has essentially adopted the three-step procedure already in place within the Fifth Circuit. The amended Guideline directs the sentencing court to: (1) determine the guideline range; (2) consider the Guideline manual provisions addressing departures; and (3) consider the applicable factors set forth in 18 U.S.C. § 3553(a) "taken as a whole." *See* USSG § 1B1.1.

Jim Grable, a partner at Connors & Vilardo, LLP and member of our CJA Trial Panel, has been appointed by the United States Sentencing Commission to serve a three-year term as a Voting Member of the Practitioners Advisory Group (PAG). The PAG's membership consists of a single Voting Member from each Federal Circuit and three at-large Voting Members. It provides guidance and insight from the private criminal defense bar to the U.S. Sentencing Commission. Jim's term as an at-large voting member will run through 2013.

Congratulations Jim from all of us at the Federal Public Defender's Office!

SECOND CIRCUIT UPDATE ON CHILD PORNOGRAPHY ISSUES

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A. Court Rejects Sentencing Judge's Unsupported Child Porn Gene Theory

Reasoning that it was impermissible for a sentencing court to base its determination of a defendant's propensity to reoffend on its own "unsupported theory of genetics," the Second Circuit vacated a sentence imposed on convicted child porn possessor Gary Cossey and remanded the case to a different sentencing judge. *United States v. Cossey*, __ F.3d __, 2011 WL 257441 (Jan. 28, 2011). In *Cossey*, the defendant pleaded guilty to one count of possessing child pornography in violation of 18 U.S.C. § 2252(a)(5)(B), and reserved the right to appeal any sentence greater that 57 months. Several months following his plea, District Judge Gary L. Sharpe, N.D.N.Y., sentenced Cossey to a term of 78 months imprisonment and a life term of supervised release.

In rendering his sentence, Judge Sharpe rejected two psychological reports, one of which was prepared at the request of pretrial services, that evaluated Cossey at a low to moderate risk to reoffend. "The opinions of the psychologists and the psychiatrists as to what harm you may pose to those children in the future is virtually worthless here[,]" Judge Sharpe explained, because those professionals "are all over the board on those issues."

Declaring his lack of faith in the profession of psychology as a whole, the judge instead predicated his sentencing decision on his own theory that Cossey was incapable of controlling himself from looking at child pornography because of an as yet undiscovered gene. Addressing Cossey, the judge predicted that some fifty years in the future scientists would discover that Cossey's conduct was actually caused by "a gene you were born with," a gene which – in the Judge's view – Cossey could not get rid of. The sentencing court also opined that Cossey's efforts at therapy "could only lead, to a sincere effort on your part to control it, but you can't get rid of it." *Cossey*, 2011 WL 257441, at *3. "You are what you are born with," the Judge asserted, "[a]nd that's the only explanation for what I see here." *Id.*

On appeal, the Second Circuit found that the district judge impermissibly based its decision to sentence Cossey to a lengthy prison term and lifetime supervised release solely on its unfounded belief that Cossey was genetically incapable of controlling his urges. The appellate court likened the Cossey case to *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010), in which the district court assumed that the defendant was likely to actually assault a child, a view that was controverted by the record evidence. "It is uncontroversial to conclude that a sentencing decision that relies on factual findings that were unsupported in the record, and thus could not possibly have been established by a preponderance of the evidence, seriously affects the fairness, integrity, and public reputation of judicial proceedings," the *Cossey* Court stated. The Court of Appeals concluded that the district judge committed plain error by basing his sentencing decision on his prediction of a genetic discovery some 50 years in the future. But the Court also acknowledged that there was evidence in the record to support the conclusion that Cossey would reoffend, specifically, the fact that he had reoffended at least once after his crime was discovered.

The appellate court vacated the sentence and remanded it to another judge, a mandate only imposed "in the rare instance in which the

judge's fairness or the appearance of the judge's fairness is seriously in doubt." *Cossey*, 2011 WL 257441, at *5 (citing *United States v. Bradley*, 812 F.2d 774, 782, n.9 (2d Cir. 1987)). The extent of Judge Sharpe's discussion on Cossey's genetic predisposition to reoffend raised serious concerns for the appellate court about the judge's objectivity, compelling the decision to remand the case to a different judge with instructions "to make clear the basis upon which the sentence rests. *Cossey*, 2011 WL 257441, at *4.

If as a practitioner, you believe that a sentencing judge has relied on any unsupported theories regarding your client's propensity to reoffend, be sure to clarify the theoretical basis on the record and preserve your objection at sentencing. A judge's reliance on his or her preconceived, unscientific notions, if they are not based on the record evidence, could form the basis of a successful appeal.

B. No First Amendment Protection for Sexual Photos Altered to Include Minors

The Second Circuit Court of Appeals has ruled that photos of adults engaged in sexually explicit conduct that have been digitally altered to display the faces of children are not protected speech under the First Amendment. *United States v. Hotaling*, 09-3935-cr, __ F.3d __, 2011 WL 677398 (Feb. 28, 2011). Defendant John C. Hotaling pleaded guilty to one count of possession of child pornography. As part of his plea, Hotaling admitted that he digitally created sexually explicit images of six minor females by a process known as "morphing." Specifically, the defendant admitted that he had "cut" the heads of the minor females from their original non-pornographic images and "superimposed" the minor's faces over images of women engaged in sexually explicit conduct. Defendant obtained the images of the actual minors from a computer he was repairing for one of the minors' families and from photographs taken by Hotaling's daughters and their friends.

In one of the images, Hotaling digitally "pasted" his own face over that of a man depicted having intercourse with a nude female altered to look like one of the minor victims. Another image had been altered to make it appear that one of the minor females was partially nude, handcuffed, shackled, wearing a collar and leash, and tied to a dresser. Although there was no evidence that Hotaling had distributed the images on the internet, some of the images had been indexed on his computer, encoded with Hypertext Markup Language ("HTML"), and labeled with the internet uniform resource locator ("URL") "www.upstateteens.com."

Hotaling originally challenged his indictment arguing that the statute as applied to him was unconstitutionally vague and overbroad. Specifically, he asserted that no actual minor was harmed by his creation of the images which he created solely to "record his mental fantasies." As such, Hotaling contended, the images were protected speech under the First Amendment. United States District Court Judge Norman Mordue, N.D.N.Y., disagreed, however, ruling that pornographic images of known minors created by morphing were not protected speech. After Defendant pleaded guilty, the district judge sentenced him to 78 months in prison, a sentence which included a 4-level enhancement under U.S.S.G. § 2G2.2(b)(4), because the images Defendant possessed portrayed sadistic or masochistic conduct.

On appeal, the Second Circuit (Judges Jon O. Newman and Peter W. Hall and, sitting by designation and writing for the panel, Judge Jane A. Restani of the U.S. Court for International Trade) rejected Hotaling's contention that the interests of actual minors were not implicated because they were not engaged in sexual activity during the digital

creation of the photographs, and upheld his conviction by guilty plea.

Specifically, the *Hotaling* Court disagreed with Defendant's argument that the facts of his case were distinguishable from those in *United States v. Bach*, 400 F.3d 622 (2005), in which the Eighth Circuit Court of Appeals held that morphed sexual images using the faces and bodies of actual minors was not protected expressive speech. In so holding, the court in *Bach* reasoned "although there is no contention that the nude body actually is that of [the minor] or that he was involved in the production of the image, a lasting record has been created of [him,] an identifiable minor child, seemingly engaged in sexually explicit activity." *Bach*, 400 F.3d at 632. The Eighth Circuit went on to hold that "the interests of real children are implicated in the image received by Bach showing a boy with the identifiable face of [a minor] in a lascivious pose. This image involves the type of harm which can be constitutionally prosecutable under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *New York v. Ferber*, 458 U.S. 747 (1982)." (In these two cases, the United States Supreme Court held that the distribution of child pornography was "intrinsically related" to the sexual abuse of children.)

In Hotaling's case, the Second Circuit explicitly agreed with the Eighth Circuit that interests of "actual minors are implicated" when their faces are used to create morphed images that make it appear that they are performing sexually explicit acts. "In this case, even though the bodies in the images belonged to adult females, they had been digitally altered such that the only recognizable persons were the minors," Judge Restani reasoned. "Furthermore, the actual names of the minors were added to many of the photographs, making it easier to identify them and bolstering the connection between the actual minor and the sexually explicit conduct." Here, Restani opined "we have six identifiable minor females who were at risk of reputational harm and suffered the psychological harm of knowing that their images were exploited and prepared for distribution by a trusted adult."

Hotaling also argued unsuccessfully that his case differed from *Bach* because the defendant in that case received his morphed photos over the Internet and was therefore involved in the ongoing distribution of the images whereas Hotaling was not. Rejecting this argument, the Second Circuit held that the morphed images "fit clearly within the bounds *Ferber*" and acknowledged the Supreme Court's clear holding that "the harm [to a child victim] begins when the images are created." *Hotaling*, 2011 WL 677398, at *4 (citing *Free Speech Coal.*, 535 U.S. at 254). The appellate court was "especially concerned" that Hotaling had formatted and prepared the sexually explicit images, labeling many of them with a URL and encoding the files in HTML. "These are not mere records of the defendant's fantasies, but child pornography that implicates actual minors and is primed for entry into the distribution chain," Judge Restani wrote.

With respect to the sentencing enhancement for sadistic or masochistic conduct, the Second Circuit held that the district court committed no clear error in applying it. Under U.S.S.G. § 2G2.2(b)(4), "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence," a defendant's offense level is increased by four levels. Hotaling argued that the sentencing enhancement was improperly applied because a panel of the Second Circuit previously held in *United States v. Freeman*, 578 F.3d 142, 148 (2d Cir. 2009), that for an image to qualify, it must depict a minor engaged in sexual activity that would cause the minor pain. The appellate court disagreed with Hotaling's argument that the restraints in the morphed photo depicting the minor were an insufficient basis to impose the enhancement.

The Court of Appeals explicitly held that U.S.S.G. § 2G2.2(b)(4) "applies in cases of morphed child pornography where a sentencing court, applying an objective standard, finds by a preponderance of the evidence that the morphed image portrays both sexual activity involving a minor and sadistic conduct which includes the likely 'infliction of pain,' 'delight in mental or physical cruelty,' the use of 'excessive cruelty,' or other 'depictions of violence.'" *Freeman*, 578 F.3d at 146. The *Hotaling* Court reasoned that the image of the partially nude, handcuffed, collared and leashed minor tied to a dresser portrayed a "situation that involves physical and mental cruelty, here in the form of a physical restraint."

That the image was a morphed one did not make the enhancement inappropriate, the Court found. "An image of an identifiable, real child involving sadistic conduct – even if manipulated to portray conduct that was not actually inflicted on that child – is still harmful, and the amount of emotional harm will likely correspond to the severity of the conduct depicted." *Hotaling*, 2001 WL 677398, at *5 (quoting *United States v. Hoey*, 508 F.3d 687, 693 (1st Cir. 2007)). Ultimately, the Court of Appeals held that the district court properly applied the sentencing enhancement to Hotaling's case.

According to the New York Law Journal, Assistant Federal Public Defender Gene V. Primomo, who argued for Defendant, is weighing whether to seek a rehearing *en banc* from the Second Circuit or to petition for a writ of certiorari from the United States Supreme Court. "This is an issue of first impression, in any circuit, with these particular facts and whether or not this is child pornography," Mr. Primomo said. While the judges analyzed the harm to children, there was "no pornography in the first place. They were kind of extrapolating that he was 'going to' or 'intending to.' But he never distributed any of it. Ever."

A CONVICTION OF USER OR ADDICT IN POSSESSION OF A FIREARM DOES NOT REQUIRE ONE TO BE DETAINED AFTER PLEA OR VERDICT OF GUILTY

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A defendant enters a guilty plea or is found guilty after trial of being a user or addict in possession of a firearm in violation of 18 U.S.C. § 922(g)(3). The prosecutor moves the Court to remand the individual into custody pending sentencing. The government contends 18 U.S.C. § 3143(2) requires detention as such possession is a crime of violence under 18 U.S.C. § 3142(f)(1)(A). You recall something about felon in possession – 18 U.S.C. § 922(g)(1) – being a crime of violence, but you can't remember anything about an addict in possession meeting that definition. You are correct. It hasn't been found to be a crime of violence in the Circuit. Thus, the mandatory remand provision is inapplicable to one convicted of 18 U.S.C. § 922(g)(3).

The Bail Reform Act, 18 U.S.C. § 3143(a)(2), normally requires the defendant's remand into custody at the time of plea. That necessitates a finding that one was convicted of an offense described in § 3142(f)(1)(A), (B), or (C). Subsection (A) is the one that is most applicable. That includes those offenses designated as a "crime of violence." The term "crime of violence" is defined in 18 U.S.C. § 3156(a)(4). Again, the most applicable sections would be subsections (A) & (B) to § 3156(a)(4).

In *United States v. Dillard,* 214 F.3d 88 (2d Cir. 2000), a panel of the Second Circuit held that felon in possession of a firearm (18 U.S.C. § 922(g)(1)) is a crime of violence for purposes of the Bail Reform Act. Such conclusion

would normally require the Court to remand the defendant into custody at the time of his plea of guilty to felon in possession of a firearm. However, the Second Circuit has not decided whether the separate offense of user or addict in possession of firearm is a crime of violence pursuant to § 3156(a)(4). The only decided case I could locate which held that user in possession of a firearm is a crime of violence is unpublished. It is *United States v. Ditrapano*, 2006 WL 1805848 (S.D.W.Va, 2006). Though *Ditrapano* held user or addict in possession to be a crime of violence, there was no analysis of the statute supporting the conclusion that user in possession of a firearm is a "crime of violence." The district court simply relied on the Second Circuit's rationale in the *Dillard* case. Such analysis does not logically apply to user in possession prosecutions. Most of the *Dillard* opinion was devoted to the ills of society (i.e., danger) by convicted felons having firearms. That is not usually present in the addict in possession case.

Congress amended the detention statute in 2006 as part of the Adam Walsh Act. A new subsection (E) was added to 18 U.S.C. § 3142(f)(1). It permits the government to move for detention in a case that involves "any felony that is not otherwise a crime of violence that involves a minor victim or that involves a possession or use of a firearm . . . ." This section was added to address the circuit split over whether a felon in possession charge was a crime of violence for purposes of the Bail Reform Act. The amended section includes the charge of user in possession of a firearm regardless if it is determined to be a crime of violence or not. Simply put, the government has a separate basis to seek detention for anyone charged with a felony firearm offense: § 3142(f)(1)(E).

18 U.S.C. § 3143(a)(2) requires the defendant's remand into custody when convicted of certain offenses. That mandatory remand section *only* applies to those found guilty of offenses under § 3142(A), (B), or (C). Unless one is convicted of a crime of violence or another statutory crime under those subsections, he is not required to be detained upon plea or verdict. Here, it must be assumed that Congress meant what it said when it created § 3142(f)(1)(E). There is no reason that individuals convicted of those offenses in subsection (E) be mandatorily remanded. Those offenses identified in § 3142(f)(1)(E) are specifically excluded from those cited in the mandatory remand section § 3143(a)(2).

An addict in possession of a firearm is not convicted of a crime of violence as defined under the Bail Reform Act. Thus, such conviction does not qualify as an offense requiring mandatory remand under 18 U.S.C. § 3143(a)(2). Assuming your client is not likely to flee or pose a danger to the safety of any other person or the community and the Court makes such finding, he should be continued on the previous conditions of release.

UPCOMING CLES

FEDERAL DEATH PENALTY 101 SEMINAR
Friday, April 1, 2011
See details on Page 15

FEDERAL CRIMINAL DEFENSE PRACTICE SPRING 2011 SEMINAR
Friday, May 6, 2011

FEDERAL CRIMINAL DEFENSE PRACTICE FALL 2011 SEMINAR
Friday, November 4, 2011

Genesee Community College
Batavia, New York

Save the dates on your calendar and look for our seminar mailings!

ABBOTT, WILLIAMS, AND PENDING APPEALS

Jay S. Ovsiovitch
Research & Writing Attorney
Federal Public Defender's Office

For a short period of time, some of our clients in the Western District of New York benefitted from the Second Circuit's holdings in *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), and *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). These cases held that the mandatory minimum five-year consecutive sentence did *not* apply to a defendant who was subject to a higher mandatory minimum sentence. As we should all be aware by now, the holding in *Williams* was abrogated by the Supreme Court in *Abbott v. United States*, 562 U.S. __, 131 S.Ct. 18, 178 L.Ed.2d 348 (2010); *see also United States v. Tejada*, No. 07-3419-cr(L), ___ F.3d ___, 2011 WL 420670, at *4 (2d Cir. Feb. 9, 2011) (acknowledging that *Whitley* and *Williams* were abrogated by *Abbott*). As one panel attorney recently pointed out to me, the holding in *Abbott* has created an unusual danger for defendants who have benefitted from *Whitley* and/or *Williams*, but have appeals pending post-*Abbott*. While this is an unusual situation that most attorneys will not encounter, it provides an important reminder to stay abreast of current case-law, and reexamining the applicability of the current law to your pending cases.

The panel attorney came to my office to discuss a brief he was preparing to file with the Court of Appeals. Following a jury trial, the defendant was convicted of possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(A), and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The defendant was sentenced to 120 months imprisonment for the § 841 conviction. Applying *Williams*, the District Court then sentenced the defendant to a 60 months concurrent sentence for the § 924(c) conviction. The panel attorney, aware that his client's appeal issues were weak, wanted to discuss the possible impact *Abbott* would have on his client even if he was only challenging his client's conviction, and not the sentence. It was prudent of counsel to consider these questions.

Whitley, *Williams* and *Abbott*, a Review

Title 18 section 924(c)(1) sets forth a mandatory consecutive term of imprisonment for a defendant who, "during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." An exception to the mandatory consecutive term of imprisonment is provided if "a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." 18 U.S.C. § 924(c)(1)(A).

In *United States v. Whitley*, 529 F.3d 150, 151 (2d Cir. 2008), the Second Circuit panel was presented with the question whether § 924(c)(1)(A) exempted him from the imposition of a ten-year minimum sentence because he was subject to a higher mandatory minimum sentence as an armed career criminal. Adopting a literal reading of § 924(c)(1)(A)'s except clause, the panel held that Whitley was exempt from the ten-year mandatory minimum sentence because he was subject to a higher fifteen-year minimum sentence. *See id*. at 158. A subsequent Second Circuit panel, in *United States v. Williams*, 558 F.3d 166, 168 (2d Cir. 2009), expanded *Whitley*'s holding by concluding that the § 924(c)(1)(A)'s mandatory minimum sentence was inapplicable to a defendant who was subject to a longer mandatory minimum sentence for a drug trafficking offense that was part of the same criminal transaction.

Though the government unsuccessfully sought a rehearing in Whitley, it did not seek a petition for a writ of certiorari. *See United States v.*

Whitley, 540 F.3d 87 (2d Cir. 2008). But, the government did seek a petition for a writ of certiorari in *Williams*. The Supreme Court did not initially grant the petition *Williams*. *See United States v. Williams*, 562 U.S. ___, 131 S.Ct. 632, 178 L.Ed.2d 471 (2010) (granting the petition for a writ of certiorari and vacating the judgment). However, it did grant the petition for a writ of certiorari in two other cases, *Abbott v. United States*, and *Gould v. United States*. The question presented in *Gould* referenced the conflict between the Fifth Circuit and the Second Circuit. *See* 90-7073, *Gould v. United States* (presenting the question: "Did the U.S. Court of Appeals for the Fifth Circuit correctly hold, in direct conflict with the Second Circuit (but in accordance with several other circuits), that a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(I)(A) applies to a count when another count already carries a greater mandatory minimum sentence?").

In *Abbott*, the Supreme Court disagreed with the Second Circuit's literal interpretation of § 924(c)(1)(A)'s except clause. Instead, the Supreme Court held that, "a defendant is subject to a mandatory, consecutive sentence for a § 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction. . . . He is . . . subject to the highest mandatory minimum specified for his conduct in § 924(c), unless another provision of law directed to conduct proscribed by § 924(c) imposes an even greater mandatory minimum." *Abbott*, 131 S.Ct. at 23. This holding's effect was to abrogate *Whitley* and *Williams*. *See United States v. Tejada*, Nos. 07-3419-cr(L), 07-5289-cr(CON), 08-2665(cr(CON), ___ F.3d ___, 2011 WL 420670, at *4 (2d Cir. Feb. 9, 2011) (concluding that *Whitley* and *Williams* was abrogated by *Abbott*).

Cases in the Pipeline

After *Abbott*, the Second Circuit has been rejecting appeals by defendants who challenged the imposition of a mandatory consecutive sentence under § 924(c)(1)(A). *See Tejada*, 2011 WL 420670, at *1; *United States v. De La Cruz*, No. 07-0841-cr, 2011 WL 489827 (2d Cir. Feb. 14, 2011) (summary order); *United States v. Reed*, No. 09-2477-cr, 2011 WL 454708 (2d Cir. Feb. 10, 2011) (summary order). In cases where a Second Circuit panel had previously remanded a case for reconsideration of a consecutive sentence, *see, e.g., United States v. Brown*, 623 F.3d 104, 110-111 (2d Cir. 2010), we can expect the District Court to follow *Abbott*. (Although in one case, the Federal Public Defender's Office has seen the government move the Court of Appeals to recall its mandate in light of *Abbott*.)

The question also remains as to the effect of *Abbott* on clients who benefitted from *Whitley* or *Williams*. If neither the client nor the government appealed, *Abbott* should have no effect whatsoever. In other words, there was a brief period of time when the rule in the Second Circuit was that the mandatory minimum consecutive sentence under § 924(c)(1)(A) did not apply when the defendant received a greater mandatory minimum sentence on another charge. Of course, if the government has appealed the sentence, we can expect the Court to remand the case for resentencing based on *Abbott*. The pressing question arises regarding a client who benefitted from *Whitley* or *Williams*, but is appealing his conviction or some other aspect of his or sentence. As the old adage goes, be careful for what you wish for.

If successful on appeal, and the client is going to be resentenced, the resentencing, within limits, will be *de novo*. *See generally*, *United States v. Hernandez*, 604 F.3d 48, 54 (2d Cir. 2010) ("Although there is a presumption that resentencing would be limited, not *de novo*, that presumption yields if the defendant can show that (1) the 'spirit of the mandate' requires *de novo* resentencing, (2) an issue became relevant only after the initial appellate review, or (3) there is a 'cogent' or

'compelling' reason for resentencing *de novo*, such as a change in controlling law."(quotation omitted)); *United States v. Maldonado*, 996 .2d 598, 599 (2d Cir. 1993) (per curiam) ("when a sentence has been vacated, the defendant is placed in the same position as if he had never been sentenced"). Thus, even on a limited remand, given the change in the controlling law, the client will lose the benefits gained by *Whitley* or *Williams*, and thus, will have a longer sentence imposed.

One thing the client should not have to worry about, absent a cross-appeal on the *Whitley*/*Williams* issue, is the Circuit *nostra sponte* remanding the matter based on *Abbott*. (*Nostra sponte* is the plural form of *sua sponte*, which is Latin for, "of one's own accord.") As the Supreme Court has explained, the "cross-appeal rule" precludes an appellate court from altering a judgment to benefit a nonappealing party. *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). In *Greenlaw*, the defendant was convicted of, amongst other things, two violations of 18 U.S.C. § 924(c)(1)(A). *Id*. at 241. The sentencing court imposed a five year sentence for the first § 924(c) conviction. As to the second § 924(c) conviction, the sentencing court rejected the government's request a 25-year minimum sentence, as required under § 924(c)(1)(C), imposing a 10-year sentence as prescribed by § 924(c)(1)(A)(ii). *Id*. at 241-242. The government did not cross-appeal and challenge this sentence, though it noted the sentencing court's error in its response to the defendant's appeal. *Id*. at 242. The appellate panel rejected the defendant's appeal, but remanded the case for resentencing in order to correct the sentencing court's error in applying § 924(c)(1)(C). (The effect of this was to increase the defendant's sentence by 15 years.) In overturning the intermediate appellate court's decision, the Supreme Court explained that, "a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence. And if the Government filed a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence" *Id*. at 252. Thus, an appellate court cannot increase a defendant's sentence absent a government appeal. However, a limited remand for resentencing can expose a defendant to a longer sentence.

Conclusion

This essay began by noting a discussion I had with a CJA attorney who was concerned about pursuing an appeal on behalf of his client because client risked losing the benefit he obtained from *Williams*. When last we spoke, counsel was working his way through the BOP maze to advise his client on *Abbott*. By keeping abreast of the changes in the law, the CJA attorney is in a position to best serve his client's interests, especially when the changes in the law could lead to an increased sentence.

Check out the district court website:
www.nywd.uscourts.gov
to access the new Local Rules of Criminal Procedure,
which went into effect January 1, 2011

FEDERAL DEATH PENALTY - 101

Genesee Community College - Tech 102 - Batavia, NY
Friday, April 1, 2011 - 8:30 am - 5:00 pm

Presented by: Federal Death Penalty Resource Counsel
Jean D. Barrett, Esq., Anthony Ricco, Esq., and David A. Ruhnke, Esq.

8:30 am **Check-In** (Coffee and Danish)

8:45 am **Opening Remarks-** The Federal Death Penalty Comes to WDNY

8:50 am **History of the Federal Death Penalty**

10:30 am **Morning Break**

10:45 am **Nuts and Bolts Issues**

12:30 pm **Lunch** (Provided)

1:30 pm **Special Players and Special Rules in Death Penalty Cases**

3:15 pm **Afternoon Break**

3:30 pm **Verdict sheets and jury findings**

4:30 pm **Panel Wrap-Up and Q & A Session**

5:00 pm **Closing Remarks** - CLE Certificate Distribution

REGISTRATION FORM

Federal Death Penalty - 101

The seminar registration fee is $25 for all participants.

Please make check payable to:

MONROE COUNTY BAR CENTER FOR EDUCATION

and mail with this registration form
NO LATER THAN March 18, 2011 to:

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Please accept my registration as:

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