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## MEMORANDUM

**TO: ALL INTERESTED DEFENSE COUNSEL**

**FROM: NATIONAL LEGAL PROFESSIONAL ASSOCIATES**

**NAME: WHITLEY**

**RE: US V. WHITLEY - DEVELOPMENTS THAT COULD HELP  
DEFENDANTS INVOLVED IN 924(c) AND CAREER CRIMINAL  
CHARGES!**

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In 2008 court developments in the U.S. v. Whitley case have made a determination that could potentially effect many defendants who are involved in 924(c) and career criminal enhancements.

In June, the United States Court of Appeals for the Second circuit decided a case that could have significant positive impact on individuals serving sentences for carrying, brandishing or discharging a firearm under 18 U.S.C. § 924(c) who were also sentenced as armed career criminals based on the same firearm. United States v. Whitley, 529 F.3d 150 (2nd Cir. 2008). Whitley participated in an armed robbery of a delicatessen in the Bronx in November 2004, during which he emptied the store's cash register, pointed a gun at employees, and inadvertently discharged the firearm, injuring himself in the face. The indictment charged three counts. Count One charged a Hobbs Act robbery, in violation of 18 U.S.C. § 1951. Count Two charged using, carrying, and possessing a firearm that was discharged during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Count Three, the armed career criminal offense, charged possessing a firearm after having been convicted of at least three violent felonies or serious drug offenses, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The jury ultimately returned guilty verdicts on all three counts. Whitley's pre-sentence report ("PSR") calculated an adjusted offense level of 34, based on a grouping of Counts One and Two, which, in Criminal History Category VI, yielded a sentencing range of 262 to 327 months. The PSR recommended a consecutive 120-month sentence on Count Two. Judge Casey sentenced Whitley to concurrent terms of 262 months on Counts One and Three, plus 120 months consecutively on Count II.

The validity of Whitley's 10-year consecutive term depended on the proper construction of the language contained in 18 U.S.C. § 924(c)(1)(A). The Second Circuit determined that the "except" clause of 18 U.S.C. § 924(c)(1)(A) should have been read literally. If the "except" clause of 18 U.S.C. § 924(c)(1)(A) meant what it literally said, the 10-year minimum sentence required by 18 U.S.C. § 924(c)(1)(A)(iii) of that subsection for discharge of a firearm, which had to run consecutively by virtue of 18 U.S.C. § 924(c)(1)(D)(ii), did not apply to Whitley because a greater minimum sentence was otherwise provided by law, namely, 18 U.S.C. § 924(e), which subjected

him to a 15-year minimum sentence. Thus, the clause exempted Whitley from the consecutive 10-year minimum sentence for discharging a firearm because he was subject to the higher 15-year minimum sentence provided by 18 U.S.C. § 924(e). Accordingly, the case had to be remanded for resentencing.

The only other United States Circuit Court of Appeals to address the issue has been the Fifth Circuit. See United States v. Kyles, 2008 U.S. App. LEXIS 25908 (5th Cir. Tex. Dec. 19, 2008). The Fifth Circuit found that any sentencing error (which was nearly identical to the error addressed in Whitley) was not clear or obvious based on other circuit decisions rejecting the same argument put forth in Whitley. Specifically, the Fifth Circuit cited three decisions that are contrary to Whitley's interpretation of the statute: United States v. Jolivet, 257 F.3d 581, 586-87 (6th Cir. 2001), United States v. Studifin, 240 F.3d 415, 423-24 (4th Cir. 2001), and United States v. Alaniz, 235 F.3d 386, 387-89 (8th Cir. 2000). Moreover, the Fifth circuit had previously agreed with the Fourth, Sixth, and Eighth Circuits' interpretation, although only in an unpublished decision. See United States v. Collins, 205 F. App'x 196, 198 (5th Cir. 2006) (per curiam).

One other Circuit Court and several United States District Courts have addressed claims based on Whitley, but as of yet none of them have actually reached a decision on the issue, deciding the respective cases on other grounds without analyzing the Second Circuit's logic. See United States v. Parker, 2008 U.S. App. LEXIS 24215 (1st Cir. N.H. Nov. 26, 2008); Davila v. Grondolsky, 2008 U.S. Dist. LEXIS 62160 (D.N.J. Aug. 11, 2008); Blackstock v. United States, 2008 U.S. Dist. LEXIS 66985 (E.D. Va. Sept. 2, 2008); Randolph v. United States, 2008 U.S. Dist. LEXIS 101558 (M.D. Fla. Dec. 5, 2008).

The Whitley decision could prove to have broad ranging impact on individuals serving sentences under 18 U.S.C. § 924(c). This is especially true if they were also sentenced as armed career criminals. We can only speculate at this time what the full scope and impact of the Whitley decision will ultimately be. However, it could potentially benefit thousands of federal inmates. If you have a client who is currently involved in charges such as these and would like to determine how NLPA can assist in this matter, please contact us today!

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