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Newsletter

Legal News Briefs for Law Libraries & Defense Attorneys

POSITIVE DEVELOPMENTS IN GOOD TIME INCREASES ON THE HORIZON FOR FEDERAL INMATES

In February, 2011 Attorney General Holder announced that President Obama's Fiscal Year 2012 (FY 2012) budget proposal that for the first time includes planning that would save the U.S. Taxpayers $41Million as a result of passage of the proposed legislation that would expand the federal Good Time credit. It would also increase reentry programs for prisoners. In part the proposal states that:

"*The Administration will continue to explore fiscally-sound, data driven administrative procedures to address population stress on the prison system such as expanded use of alternatives to incarceration, increased reliance on risk assessments, and diversion for non-violent offenders. In addition, drug treatment and prisoner re-entry programs will be expanded to enhance returning prisoners' prospects for successful re-entry.*"

Needless to say the budget also includes plans for the spending of new prison facilities as well in an effort to accommodate the immensely growing prison population "through the activation of a newly constructed prison at Aliceville, Alabama, which will add more than 1,750 beds". If you're interested in reviewing excerpts of the FY 2012 budget proposal as it relates to the Department of Justice, that information is enclosed.

Federal Good Time presently is up to 54 days of good time per year served but, of course, has a very tricky calculation method to determine exactly how much each defendant actually receives for each year they serve. For more information about the calculation of federal Good Time credit please visit the Bureau of Prison's (BOP) website at: www.bop.gov.

Many of you have heard the rumors that have been circulating through the prison system for years now about the reinstatement of federal parole and increased good time. Federal parole began in 1910 and by the 1980's was replaced by the United States Sentencing Commission's determinate guidelines which were first introduced on November 1, 1987. It took many years just to "phase out" federal parole as the Board still held responsibility to defendants serving indeterminate sentences imposed prior to November 1, 1987. Therefore, we can only expect that any bill designed to reintroduce federal parole will also take many years to be successful. While any bill designed to reinstate federal parole has yet to pass, the FY 2012 budget proposal itself may at least assist in the increase of Good Time credit to the significant number of federal inmates.

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The Second Chance Act of 2007 increased reentry programs and the abilities of many to apply for long-term halfway house/CTC placement. Every year new proposals are being made - some of which pass and some that continue to be resubmitted. The Federal Prison Work Incentive Act of 2009 (H.R. 1475) was proposed to increase the federal Good Time thus far, has failed to pass

The encouraging aspect of all this is that we can at least see that Congress is finally realizing that a large emphasis needs to be placed on correcting the ever-amounting trouble of the prison population. Having a full realization of the problem is the first step and a step that we hope will continue a trend of helping to decrease the growing number of inmates in this country. NLPA fully supports this proposed increase in good time and is continuing to monitor this matter.

UNITED STATES SENTENCING COMMISSION MAKES CRACK GUIDELINE AMENDMENTS PERMANENT...AND SCHEDULES HEARING ON RETROACTIVITY

On April 6, 2011 the Commission voted to send a series of guidelines amendments to Congress. The voting of this meeting resulted as follows:

The temporary crack-cocaine guideline amendments were made permanent. The Commission voted to make the temporary guidelines enacted on November 1, 2010 to lower crack cocaine sentences permanent. The amended crack-cocaine guidelines will remain the same as was passed last year.

No decision on "all drugs minus two". Several spoke at the meeting about their concerns in maintaining "proportionality" among drug guidelines - namely, they did not want the crack guidelines to start lower than the guidelines for other drugs. As to keeping the guideline ranges for crack offenses at levels 26 and 32, the commissioners who spoke at the hearing said that they would look at all drug guidelines to review why the original Commission chose to set guidelines ranges that were slightly higher than the mandatory minimums that anchored them. However, they stated that this would be done next year but indicated that maybe after this review does occur they would be able to consider adjusting all drug guidelines downward - and perhaps to move away from quantity-based sentences to ones that take into account better the other factors such as role in the offense.

Still no vote on the retroactive application of the crack cocaine guidelines. The vote on retroactivity was put off (despite the Commission advising they had received more than 15, 000 letters in just two weeks) and the Commission was seeking another round of comments. Their request for further comment should be published shortly and anyone who did not send in comment after the first request are encouraged to send them then. The Commission did announce that they will hold a public hearing on the retroactivity of the crack guidelines on June 1, 2011. Please refer to the enclosed News Release from the United States Sentencing Commission dated April 6, 2011.

We will continue to monitor the actions and developments along this road to fairness in sentencing.

H.R. 223 - The Federal Prison Bureau Non-Violent Offender Relief Act of 2011

H.R. 223 was introduced by Rep. Sheila Jackson Lee (D-TX) on January 7, 2011 and would direct the Bureau of Prisons (BOP) to release individuals from prison who have served 50% or more of their sentence if they: 1) Are 45 years of age or older; 2) Have never been convicted of a crime of violence and; 3) Have not engaged in any violation (involving violent conduct) of institutional disciplinary regulations.

Obviously the bill's main focus is to reduce overcrowding issue in our federal prison system and give those non-violent offenders a second chance.

The bill is still in the first stages of legislation after being introduced on January 7, 2011 and has now been referred to the Subcommittee on Crime, Terrorism and Homeland Security on January 24, 2011.

SPOTLIGHT: CASES OF INTEREST

Freeman v. US: Oral argument was held in March, 2011 in Freeman v. US, which concerns eligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) when as sentence was imposed pursuant to a Rule 11(c)(1)(C) plea agreement (SCOTUS blog). An article in the Louisville Courier-Journal, headlined "US Supreme Court to consider Louisville man's crack-cocaine sentence," provides effective background on the case.

A too-quick review of the transcripts reveals that all the Justices (save, of course, the always silent Justice Thomas) seem very engaged (and perhaps metaphysically challenged) by the question of just whether and when a federal sentence is "based on" the sentencing guidelines. Especially interesting is how the Justices work around to wondering collectively whether, now that Booker has made the guidelines merely advisory, any federal sentence imposed after Booker can or should be deemed "based on" the guidelines.

Even though the oral argument never discusses the rule of lenity, and even though the philosophical foundation for the rule of lenity might not be considered directly applicable in this specific setting, the Justices' interesting debate concerning the meaning and reach of the statutory term "based on" in 3582(c)(2) might well be sensibly resolved by the Court concluding, in essence, that an "interpretive tie" should goes to the criminal defendant in this little case. A too-quick review of the transcripts reveals that all the Justices (save, of course, the always silent Justice Thomas) seem very engaged (and perhaps metaphysically challenged) by the question of just whether and when a federal sentence is "based on" the sentencing guidelines. Especially interesting is how the Justices work around to wondering collectively whether, now that Booker has made the guidelines merely advisory, any federal sentence imposed after Booker can or should be deemed "based on" the guidelines.

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Pepper v. US - The significant federal sentencing ruling by the Supreme Court today in Pepper is only technically concerned with whether district judges are permitted to consider evidence of a defendant's post-sentencing rehabilitation at a re-sentencing following an appellate reversal of a defendant's original sentence. But in the course of saying that district judges do have authority to consider this kind of evidence, Justice Sotomayor' opinion for the Court highlights reasons why any evidence of a defendant's rehabilitation is a critically important concern for an initial sentencing decision in which a district judge is seeking to comply with the statutory instructions of 18 U.S.C. §3553(a). Consider in this context these passages (with some cites omitted) from the Pepper opinion:

> [E]vidence of postsentencing rehabilitation may be highly relevant to several of the §3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of postsentencing rehabilitation may plainly be relevant to "the history and characteristics of the defendant." §3553(a)(1). Such evidence may also be pertinent to "the need for the sentence imposed" to serve the general purposes of sentencing set forth in §3553(a)(2) — in particular, to "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training . . . or other correctional treatment in the most effective manner." §§3553(a)(2)(B)–(D).... Postsentencing rehabilitation may also critically inform a sentencing judge's overarching duty under §3553(a) to "impose a sentence sufficient, but not greater than necessary" to comply with the sentencing purposes set forth in §3553(a)(2)....
>
> Pepper's postsentencing conduct also sheds light on the likelihood that he will engage in future criminal conduct, a central factor that district courts must assess when imposing sentence. See §§3553(a)(2)(B)–(C); Gall, 552 U.S., at 59 ("Gall's self-motivated rehabilitation ... lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts" (citing §§3553(a)(2)(B)–(C))). As recognized by Pepper's probation officer, Pepper's steady employment, as well as his successful completion of a 500-hour drug treatment program and his drug-free condition, also suggest a diminished need for "educational or vocational

> training ... or other correctional treatment." §3553(a)(2)(D). Finally, Pepper's exemplary postsentencing conduct may be taken as the most accurate indicator of "his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." Ashe, 302 U.S., at 55. Accordingly, evidence of Pepper's postsentencing rehabilitation bears directly on the District Court's overarching duty to "impose a sentence sufficient, but not greater than necessary" to serve the purposes of sentencing. §3553(a).

As the question in the title of this post is designed to highlight, one could readily replace the word "postsentencing" in these passages with the word "post-offense" without any loss of meaning. All the substantive reasons why the Court says sentencing judges should be concerned with postsentencing rehabilitation apply with equal force — and maybe with even greater force — to post-offense rehabilitation. (Indeed, the cite/quote from the Gall opinion in this context, a case concerning only post-offense rehabilitation, reinforces the point that a majority of Justices views these considerations comparably.)

Since Booker (and even before Booker), it has been common for federal defense attorneys to stress evidence of a defendant's post-offense rehabilitation before an initial sentencing. And since Booker (and especially since Gall), some (many?) federal district judges have been inclined to give some (or even considerable) weight to such evidence. But I have always sensed that some (many?) federal district judges have been unwilling to give too much (or even any) weight to such evidence. I am certain Pepper will prompt defense attorneys to be even more aggressive when presenting and making arguments based on post-offense rehabilitation. But, as my post title suggests, I am less sure if Pepper will lead many more federal sentencing judges to focus on such evidence when discharging, as Pepper puts it, their "overarching duty to 'impose a sentence sufficient, but not greater than necessary' to serve the purposes of sentencing. §3553(a)."

McNeill v. US - In McNeill, Clifton T. v. United States (No. 10-5258) the Supreme Court will address whether the plain meaning of "is prescribed by law" which the Armed Career Criminal Act (ACCA) uses to define a predicate "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by current state law for a drug offense at the time of the instant federal offense, regardless of whether the state has made that current sentencing law retroactive.

ACCA defines a "serious drug offense" in relevant part as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). The Fourth Circuit affirmed the district court's classification of Mr. McNeill's North Carolina drug offenses as "serious drug offenses" under ACCA, even though at the time of his federal sentencing, North Carolina's current sentencing law did not prescribe a maximum term of imprisonment of at least ten years for those state drug offenses. The Fourth Circuit held that since North Carolina did not apply its current sentencing law retroactively, the fact that Mr. McNeill's drug offenses were punishable by imprisonment for at least ten years under the version of the law in effect at the time he committed the offenses qualified them as "serious drug offenses" under ACCA.

The other two cases in which the Court granted review present issues regarding ineffective assistance of counsel at the plea stage. In Lafler v. Cooper (No. 10-209) the Court will address whether a state habeas petitioner is entitled to relief where his attorney advised him to reject a favorable plea bargain, based on counsel's misunderstanding of the law, and petitioner was later convicted at trial. In Missouri v. Frye (No. 10-444) the Court will review a habeas petitioner's claim that, but for his attorney's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms. In both cases, the Court will also address the following: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the Defendant was later convicted and sentenced pursuant to Constitutionally adequate procedures?"

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US v. Grant (No. 07-3831 6th Cir. Jan. 11, 2011) Defendant–appellant Kevin Grant pled guilty to possession of a firearm, conspiracy to commit money laundering, and operation of a continuing criminal enterprise. The district court sentenced Grant to twenty-five years in prison, the mandatory minimum sentence for those charges. After Grant's sentence was affirmed by a panel of this court, the government filed a motion pursuant to Federal Rule of Criminal Procedure 35(b) to reduce his sentence based on his substantial assistance in the prosecution of others. The district court granted the motion and reduced Grant's sentence to sixteen years. Grant now appeals. He claims first that the district court erred by not considering the 18 U.S.C. § 3553(a) factors when deciding the Rule 35(b) motion. Second, Grant claims that the district court erred in its calculation under the United States Sentencing Guidelines during his original sentencing.

While appearing to find that the district court should have considered § 3553(a) factors in determining the new sentence after the Rule 35 motion, the court affirmed the sentence. Looks like this will go to the Supreme Court. This first paragraph from the principal dissent highlights why there is so much to this federal sentencing case:

> In an apparent attempt to craft a tacit compromise, the en banc majority and concurring opinions shift their focus away from Petitioner and instead create an unmanageable legal standard. Because the district court erroneously concluded that it may not consider the factors enumerated in 18 U.S.C. § 3553(a) on a Rule 35(b) motion, this Court should vacate the district court's decision and remand for reconsideration. Without deciding whether the district court was required to consider § 3553(a), it is clear, as the panel majority found, that a district court is not prohibited from doing so. In finding that it was prohibited from doing so, the district court committed legal error. I therefore respectfully dissent.

NLPA CONTINUES A TREND OF EXCELLENCE - A REFLECTION ON THE SUCCESSFUL OUTCOMES WE HELPED TO ACHIEVE DURING THE FIRST QUARTER OF 2011:

Osuji, P - NLPA was hired by the firm of Robinson & Brandt in the case of Mr. Osuji's appeal. The appeal was heard in the 4th CCA (No. 08-5207) and involved charges stemming from USDC WD NC (No. 3:06-cr-00415-1) of Conspiracy to Defraud the United States; Attempted and Conspiracy to Commit Mail Fraud; Health Care Fraud; Money Laundering - Conspiracy; Promotion Money Laundering. Mr. Osuji had been convicted and sentenced in 2008 to 211 months. The Court of Appeals upheld the conviction but vacated the sentence and remanded the case back to the District Court for a re-sentencing!

Cedillo, R - NLPA assisted Mr. Cedillo's counsel in the preparation of sentencing research to help fight a guideline range of 70-87 months. His case was heard in the USDC ED TX (No. 4:10-cr-00067-1) and involved charges of Reentry of Deported Alien. Mr. Cedillo plead guilty in the case. However, at sentencing, the court imposed a term of confinement of 61 months - saving Mr. Cedillo more than two years in prison!

Martin, N - NLPA assisted Mr. Martin's counsel in the preparation of sentencing research for his case which was heard in the USDC WD KY (No. 1:10-cr-00014-1). His charges included Sell, Distibute or Dispense Contolled Substance; Aiding and Abetting; and Felon in Possession of a Firearm. His PSI listed a guideline range of 151-188 months. However, at sentencing the court imposed 121 months and also made recommendation for designation close to his family

and participation in the drug treatment program - saving Mr. Martin more than five years in prison or more than six once he has successfully completed the BOP's RDAP program!

McClam, L- NLPA assisted Mr. McClam and counsel in preparing a case evaluation of potential appellate issues for his case which was being heard in the 4th CCA (No. 09-4737). His charges stemmed from USDC SC (No. 4:07-cr-01277-1) and included: Interference with Commerce by Threat or Violence; Using and Carrying a Firearm in the Furtherance of a Crime of Violence. He was sentenced to 276 months in 2009. Upon filing of the opening brief, the government filed a motion to rescind briefing and agreed that a remand for resentencing was appropriate! His case was remanded for a re-sentencing to be held soon.

Thompson, W - NLPA assisted Mr. Thompson's attorney in the preparation of sentencing research for his case heard in the USDC ND NY (Case No. 1:10-cr-00310) involving charge of Conspiracy to Distribute a Controlled Substance; Sale/Distribution of a Controlled Substance. The PSI in the case listed a guideline range of 120-135 months. However, at sentencing the court instead imposed 70 months - saving Mr. Thompson more than five years in prison!

Wright, C - NLPA assisted counsel for Mr. Wright in the preparation of sentencing research for his case heard in the USDC WD KY (Case No. 3:09-cr-00179-2) involving charges of Conspiracy to Distribute Controlled Substance (Cocaine). Mr. Wright plead guilty and his guideline range was 262-327 months. However, at the sentencing hearing the court imposed only 120 months - saving Mr. Wright more than SEVENTEEN YEARS IN PRISON!

Grimes, W - NLPA assisted counsel in the preparation of sentencing research in Mr. Grimes' case which was heard in the USDC WD NY (Case No. 6:06-cr-06229-11) and involved charges of narcotics and conspiracy. The PSI listed a guideline range of 360-LIFE in prison. However, at sentencing the judge instead imposed a term of confinement of 168 months - saving Mr. Grimes SIXTEEN YEARS TO LIFE IN PRISON!

Bickerstaff, T - NLPA assisted Mr. Bickerstaff's counsel in the preparation of an appeal in the State of Ohio appeal court for Jefferson County (Case No. 9JE33). Counsel advised that although the court did not grant all issues presented on the appeal, it did grant relief on the fourth issue presented and remanded the case for a re-sentencing to take place.

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NEWS RELEASE

For Immediate Release

April 6, 2011

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U.S. SENTENCING COMMISSION PROMULGATES PERMANENT AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES COVERING CRACK COCAINE, OTHER DRUG TRAFFICKING OFFENSES

Also promulgates amendments regarding firearms and other offenses

WASHINGTON, D.C. - Today the United States Sentencing Commission promulgated amendments to the federal sentencing guidelines covering drug trafficking offenses, firearms offenses, and other federal offenses.

The Commission promulgated a permanent amendment implementing the provisions of the Fair Sentencing Act of 2010 (Pub. L. No. 111-220). The Fair Sentencing Act, signed by the President on August 3, 2010, among other things, reduced the statutory mandatory minimum penalties for crack cocaine trafficking and eliminated the mandatory minimum sentence for simple possession of crack cocaine. Specifically, the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by raising the quantities required to trigger statutory mandatory minimum terms of imprisonment - from 5 grams to 28 grams for a five-year mandatory minimum and from 50 to 280 grams for a 10-year mandatory minimum. The Act also contained directives to the Commission to review and amend the federal sentencing guidelines to account for certain aggravating and mitigating circumstances in drug trafficking cases to better account for offender culpability.

Commission chair, Judge Patti B. Saris (District of Massachusetts) said, "The Fair Sentencing Act was among the most significant pieces of criminal justice legislation passed by Congress in the last three decades. For over 15 years, the Commission has advocated for changes to the statutory penalty structure for crack cocaine offenses. The Commission applauds Congress and the Administration for addressing the sentencing disparity between crack cocaine and powder cocaine offenders."

No crack cocaine offenders will see his or her sentence increase based solely on the quantity thresholds the Commission set today in the federal sentencing guidelines. As a result of today's action, the federal sentencing guidelines will focus more on offender culpability by placing greater emphasis on factors other than drug quantity.

Based on an analysis of the most recent sentencing data, the Commission estimates that crack cocaine offenders sentenced after November 1, 2011, will receive sentences that are approximately 25 percent lower on average as a result of the changes made to the federal sentencing guidelines today. Moreover, the Commission estimates that these changes may reduce the cost of incarceration for crack cocaine offenders in the federal prison system in the future.

Today's vote by the Commission will set the triggering quantities of crack cocaine for the five and 10-year mandatory minimum penalties (28 grams and 280 grams, respectively) at base offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months, respectively, for a defendant with little or no criminal history. The action maintains proportionality with other drug types insofar as the quantity of illegal drugs, including crack cocaine, required to trigger the five- and ten-year statutory mandatory minimum penalties is subject to the same base offense level no matter the drug type.

Pursuant to statute, the Commission must consider whether its amendment to the federal sentencing guidelines implementing the Fair Sentencing Act should apply retroactively. The Commission plans to hold a hearing on June 1, 2011, to consider retroactivity, and voted today to seek public comment on the issue.

The Commission also voted to promulgate an amendment to increase penalties for certain firearms offenses. For example, the Commission voted to provide increased penalties for certain "straw purchasers" of firearms and for offenders who illegally traffic firearms across the United States border. Judge Saris stated, "Firearms trafficking across our borders is a national security issue. The Commission is aware of the view by some that firearms trafficking is fueling drug violence along our southwest border. We sincerely appreciate all of the public input we received from criminal justice stakeholders on this very important issue. The Commission's decision to increase penalties for these offenses will promote public safety and deterrance."

In addition, the Commission voted to promulgate amendments implementing the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111-148), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203), and the Secure and Responsible Drug Disposal Act of 2010 (Pub. L. No. 111-273). More information regarding these amendments and other amendments promulgated today, will be forthcoming on the Commissions' website at www.ussc.gov.

The Commission must submit its 2010-2011 amendment package to Congress by May 1, 2011. Congress has 180 days to review the amendments submitted by the Commission. The amendments have a designated effective date of November 1, 2011, unless Congress acts affirmatively to modify or disapprove them.

The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop national sentencing policy for the federal courts. The resulting sentencing guidelines structure the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

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