

# WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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## **COURTS RELY ON SUPREME COURT HOLDING IN BEGAY TO HOLD VARIOUS OFFENSES NOT “CRIMES OF VIOLENCE” UNDER CAREER OFFENDER GUIDELINE AND ARMED CAREER CRIMINAL**

In Begay v. United States, --- U.S. ---, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), the Supreme Court dealt with the interpretation of a provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B). The ACCA increases the mandatory minimum sentence for an offender who has prior convictions for a violent felony or serious drug offense. 18 U.S.C. 924(e)(1). The definition of violent felony is identical to that of “crime of violence” in the Guidelines context. See: U.S.S.G. §4B1.2.

In Begay, the Supreme Court held that driving under the influence of alcohol (DUI) was not a violent felony under the ACCA because it did not fall into the scope of the residual clause. Begay limits violent felonies to those crimes which are similar to the enumerated offenses in §924(e)(2)(B); namely, burglary, arson, extortion, or the use of explosives. Begay, 128 S.Ct. at 1585. The Begay court thus interpreted the residual clause of 924(e)(2)(B) as covering only those crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves. Id.

Since Begay, courts across the country are revisiting whether certain offenses meet this new limitation as applied to violent felonies

and crimes of violence. Here are some examples of crimes not meeting the new limitation:

Non-residential burglary. US v. Giggey, \_\_\_ F.3d \_\_\_, 2008 WL 5274834 (1st Cir. 2008).

Negligent vehicular homicide. US v. Herrick, 545 F.3d 53 (1<sup>st</sup> Cir. 2008).

Reckless endangerment. US v. Gray, 535 F.3d 128 (2d Cir. 2008).

Criminal sexual conduct second degree. US v. Barte, 529 F.3d 357 (6<sup>th</sup> Cir. 2008).

Walkaway escape and failure to report. US v. Templeton, 543 F.3d 378 (7<sup>th</sup> Cir. 2008).

Auto theft and auto tampering. US v. Williams, 537 F.3d 969 (8<sup>th</sup> Cir. 2008).

Carrying a concealed weapon. US v. Archer, 531 F.3d 1347 (11<sup>th</sup> Cir. 2008).

Escape. US v. Nichols, 563 F. Supp. 2d 631 (S.D. W. Va. 2008).

Fleeing and eluding. US v. Urbano, slip op. 2008 WL 1995074 (D. Kan. May 6, 2008).

DUI. US v. Tiger, 538 F.3d 1297 (10<sup>th</sup> Cir. 2008).

Possession sawed off shotgun. US v. Haste, 292 Fed. Appx. 249, 2008 WL 4218771 (4<sup>th</sup> Cir. Sept. 9, 2008).

Criminal negligence. US v. Smith, 544 F.3d 781 (7<sup>th</sup> Cir. 2008).

Resisting arrest. U.S. v. Gautier, \_\_\_ F.Supp. 2d \_\_\_, 2008 WL 5396469 (D. Mass. Dec. 23, 2008).

In any case involving Armed Career Criminal or Career Offender, it is important to insure this Begay limitation is applied to all possible predicate convictions.

## **NEW SENTENCING COMMISSION STUDY ON FEDERAL SENTENCING PRACTICES**

The United States Sentencing Commission has released a new publication called Changing Face of Federal Criminal Sentencing: Seventeen Years of Growth in the Federal Sentencing Caseload. This publication provides an overview of the number and types of offenses involved in the federal system from 1991 to 2007.

Overall, the publication provides valuable trend information. Some of the more interesting data include: annual conviction rate for 1991 (33,419) versus 2007 (72,865), and a break-down of today's most common federal offenses: Drugs: 37.3%; Immigration: 17.1%; Fraud: 11.5%; Firearms: 8.4%; Larceny: 4.3%; and Robbery: 2.9%.

To view this publication pending its release in hard copy, go to [www.ussc.gov](http://www.ussc.gov)

## **CJA PANEL ATTORNEY SENTENCING ADVOCACY WORKSHOP AVAILABLE**

The Office of Defender Services Training Branch is sponsoring a free Sentencing Advocacy Workshop for interested CJA panel attorneys. It will be held in Santa Fe, New Mexico March 26-28, 2009, and there is funding available for travel and lodging costs.

The program presents a comprehensive approach to sentencing advocacy. Participants will learn a process for the development of a persuasive, fact-based sentencing theory and the advocacy skills necessary to advance that theory in writing and during sentencing hearings. Among other subjects, presentations and demonstrations will address changes in federal sentencing law, judging at sentencing, use of a

mitigation specialist, storytelling and persuasive writing. The workshop consists of plenary sessions and small group breakout sessions. Registration information may be found at [www.fd.org](http://www.fd.org)

## **STUDY OF CJA PANEL ATTORNEY USE OF INVESTIGATORS**

The Office of Defender Services recently completed a district-wide study to determine how often CJA panel attorneys utilize the services of an investigator in the defense of criminal cases. The findings were somewhat startling. In some districts, the use of investigators topped 25%. In other districts, the findings were less than 1%. Here in the Northern District of West Virginia, 4.9% of the criminal cases had investigators actively involved.

Defender Services has asked that panel attorneys be reminded that the use of a criminal investigator is strongly encouraged in any case where such assistance would be beneficial. This includes both the guilt and sentencing phases of the criminal case. Funding may be obtained by filling out and providing the district court judges with a CJA-21 voucher for professional services. These forms are available on the Defender website at <http://wvn.fd.org>

Under the current procedures, a panel attorney has authority to incur up to \$500 in investigative expenses without prior court authorization; prior court authorization is needed if the cost is between \$500 and \$1600. Approval of the Fourth Circuit Court of Appeals is necessary if the cost exceeds \$1600.

## **2008 EDITION OF FEDERAL CONVICTIONS REVERSED**

Alex Bunin, the Federal Public Defender for the Northern District of New York, has published the 2008 edition of Federal Convictions Reversed. All cases are published opinions from either a federal court of appeals or the U.S. Supreme Court granting relief to criminal defendants. These cases have been collected since approximately 1995. With Mr. Bunin's permission, this publication is posted and available on our Defender website.

## **UPDATE ON CRACK REDUCTION RE-SENTENCING CASES**

On January 5, 2009, the Fourth Circuit issued its published opinion in United States v. Gena Dunphy, 08-6919. The Court held that the language contained in 28 U.S.C. §994(u), 18 U.S.C. §3582(c)(2), and U.S.S.G. §1B1.10 creates a jurisdictional bar to reducing sentences based on the crack cocaine amendments. Finding these provisions mandatory, the Court held that a defendant cannot receive more than the 2-level reduction suggested by the Sentencing Commission, and that the holdings of Booker and Kimbrough do not apply.

The Dunphy case originated from the Northern District of West Virginia. All total, there are 14 additional appeals pending before the Fourth Circuit raising an identical claim. Given the outcome in Dunphy, similar rulings are expected in the near future. Each defendant was recently contacted and their right to a petition for writ of certiorari to the Supreme Court was explained. It is unclear whether any of these defendants will request such relief.

As the Dunphy case and others like it work their way through the Courts, the district

court judges here in the Northern District of West Virginia are entertaining sentence reduction motions from those inmates who request a 2-level reduction and waive argument in support of a further reduction. These requests are usually being made by those inmates with current projected release dates in 2010 and 2011.

## **NEW ASSISTANT FEDERAL PUBLIC DEFENDER ON BOARD**

As some of you may have heard, Assistant Federal Public Defender Brian C. Crockett left the Martinsburg Defender Office in November to take a similar position in the District of Delaware at Wilmington.

After receiving authority to refill the position and completing the advertisement and interview process, the Defender Office recently hired Nicholas J. Compton as the new Assistant Federal Public Defender for the Martinsburg branch office. He graduated from William and Mary College; the Richmond College of Law; and has spent the last five years as a Captain in the Army JAG Corps. Nick Compton begins on February 2, 2009. Please welcome him to the district if you see him in Martinsburg.

## **2008 GUIDELINE AMENDMENTS**

The United States Sentencing Commission has amended a number of sentencing guidelines, commentary and policy statements which took effect on November 1, 2008. A short analysis of the more significant amendments appears below:

Introduction to Chapter One: In this amendment, the Commission characterizes the role of the guidelines, their evolution, and their relevance in light of recent Supreme Court rulings in Booker, Rita, Gall, and Kimbrough. Practitioners should be

aware that the Commission's perception regarding both its role and the import of recent Supreme Court decisions is controversial, and should be prepared to address these concerns when challenging the validity of a guideline provision or the weight that should be afforded to guideline sentencing recommendations.

Immigration Guideline, (USSG §2L1.2): This amendment alters the definitions of "crime of violence and drug-trafficking offense as used in 2L1.2. The amended definition of crimes of violence added an explanatory parenthetical to the definition of forcible sex offenses which reads: "including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced." The amendment adds to the definition of drug-trafficking an "offer to sell." This amendment also includes a departure provision for situations where the guideline offense level overstates or understates the seriousness of the enhancing prior conviction.

Disaster Fraud, (USSG 2B1.1): This amendment is a repromulgation of the temporary, emergency amendment that became effective on February 6, 2008. The amendment makes several changes to §2B1.1 as it relates to fraud offenses involving disaster relief or emergency benefits, and adds a downward departure provision where a defendant is also a victim of a major disaster or emergency. Practitioners should look for appropriate cases in which to raise the downward departure provision prior to November 1. Click here for an in-depth analysis of this amendment.

Other Proposed Guideline Amendments: The Commission proposed these amendments in addition to those discussed above:

It voted to reference offenses under the new 18 U.S.C. §227 (part of the Honest Leadership and Open Government Act of 2007) to §2C1.1.

It implemented the Animal Fighting Prohibition Enforcement Act of 2007 (which creates a new offense and increases penalties for existing offenses) by creating an additional offense level and setting forth a new ground for upward departure in §2E3.1.

It implemented the Court Security Improvement Act (which creates two new offenses) by adding enhancement provisions to §2A6.1 and §2H3.1. It also adds upward departure and cross-reference provisions to §2A6.1, and cross-reference and definitional instructions to §2H3.1.

It created in §2N2.1 an enhancement applicable when a defendant has a prior conviction for an offense under either the Federal Food, Drug, and Cosmetic Act or the Prescription Drug Marketing Act. It also amended this guideline provision to recommend an upward departure where the offense created a substantial risk of bodily injury or death.

#### **FOURTH CIRCUIT UPDATES THROUGH SLIP OPINIONS AND BLOG SITE**

All CJA panel attorneys in the Northern District of West Virginia continue to receive daily slip opinions from the Fourth Circuit Court of Appeals via a Defender Office email listing. If you change your email address, please contact CJA Panel Administrator Lisa Coleman at (304) 622-3823. A weekly synopsis of the most important opinions is available on the Fourth Circuit blog site found as a link on the Defender Office website under News and Case Summaries at <http://wvn.fd.org>