



# THE LIBERTY LEGEND

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NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

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## NAFD NEWSLETTER

### National Association of Federal Defenders

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## THOUGHTS FROM THE PRESIDENT

Last column as prez. What to say? I could start by thanking everyone who contributed over the last two years to the organization's continued success, but there is not enough space to thank all those people – people who wrote innovative and winning briefs in the highest court, who filed amazing motions and made awesome (I'm not too old to use that word, am I?) arguments, who succeeded in giving voice and comfort to those persons least able to defend themselves, who edited and guided our spectacular newsletters, who convincingly testified in unfriendly forums, who put together our cases and organized the reports, who wrote insightful articles for this and other journals, who taught at seminars, who found those missing witnesses, who sold hats and t-shirts, who bought hats and t-shirts, who drank beer together, danced until dawn and still showed up the next morning, who encouraged and inspired us all.

Like I said, not enough space.

For better *and* worse, this has been an extraordinary year. Consider:

Abu Ghraib.

*Blakely, Booker, Shepard, Hamdi v. Rumsfeld.*

The closing of boot camp.

The conviction of attorney Lynne Stewart for doing what she thought she needed to do to represent her client.

The murders of Michael Lefkow and Donna Humphrey, Judge Joan Lefkow's husband and mother.

The uproar about judicial security.

The House Majority Leader threatening to impeach – or worse – every judge who dares to disagree with him.

Hard to know what to focus on or how to make sense of it all. For me, and for many of us here in Chicago, Michael Lefkow was a good friend and colleague, a long-time member of our CJA Panel. His murder cast a pall over the City in a way I have never before experienced. It made me question for the first time

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whether I could actually participate in finding a defense lawyer for someone. (Turns out, I could.)

It made me think a lot about those persons who are so desperate they feel they have no way out. Do we fix that problem with more judicial security? Or do we look for other ways to help? And aren't those other ways the same ways federal defenders have always advocated? More treatment, real treatment, education, jobs, fairness, someone to listen, understanding? Aren't those the things that *Booker* once again actually allows us to present to judges? Isn't that really what justice is all about? The whole picture, not just selected parts? Decisions by the men and women on the bench, not the men and women in the prosecutor's office? The opportunity to present the cruel and inevitable effects of racism and poverty?

It is because of the talent and dedication of each and every one of you that we have arrived at a place where we can make these arguments. Despite the naysayers, the negative court opinions, the finger wagging, the Patriot Act's intrusiveness, the legislative threats. It is because of the indomitable spirit and energy of each and every one of you, who are willing to stand up and speak out, even when afraid, maybe especially when afraid, most often alone. It is because of your vision, your love of justice, your desire to help those unfairly treated, that our system continues to exist. And for that I thank you most of all.

I leave the presidency in terrific hands. The Nominating Committee proposed Tim Crooks from the Houston office to be our next president and I am delighted to report that Tim accepted. His term will begin in June in San

Antonio. Tim brings us brains and energy and talent. He is an excellent teacher, a great thinker and a really nice guy. I know with your support he will take our organization to new heights.

I want to close with the final verses of a poem by W. H. Auden that Michael Lefkow once sent me. The poem is called *September 1, 1939*, referring to another dark time in history – the beginning of World War II.

All I have is a voice  
To undo the folded lie,  
The romantic lie in the brain  
Of the sensual man-in-the-street  
And the lie of Authority  
Whose buildings grope the sky;  
There is no such thing as the State  
And no one exists alone;  
Hunger allows no choice  
To the citizen or the police;  
We must love one another or die.

Defenceless under the night  
Our world in stupor lies;  
Yet, dotted everywhere,  
Ironic points of light  
Flash out wherever the Just  
Exchange their messages:  
May I, composed like them  
Of Eros and of dust,  
Beleaguered by the same  
Negation and despair,  
Show an affirming flame.

Each of you has repeatedly met the challenge of showing that affirming flame. I have been honored to serve as your president.

*Carol*

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**UNITED STATES V. BOOKER, 125 S. CT. 738 (2005):  
NOW THAT WE HAVE BOOKER, WHAT DO WE DO?**

*by Douglas A. Morris, Assistant Federal Public Defender, Northern District of Texas*

**I. Introduction<sup>1</sup>**

At the risk of offending those new to federal criminal defense or those who have been living in a cave, this Article does not retread the well explained opinion of Booker. If you do not know anything about Booker, I suggest that you read, the National Association of Criminal Defense Lawyer’s magazine, The Champion. In March 2005, three Federal Public Defenders wrote an excellent article discussing Booker. As to the Article before you, it discusses the

status of the Guidelines, district court and appeal court cases that applied Booker and an example of a sentencing memorandum. With that said, it is clear that federal criminal practitioners now have a modified, indeterminate sentence scheme that is qualified by reasonableness. Sentencing now consists of an advisory set of guidelines and the factors included in 18 U.S.C. § 3553(a). In addition to this, reviewing courts will only examine the sentence for “reasonableness.” What does this all mean?

**A. “Status” of the Guidelines**

Presently, the Circuit Courts that have addressed Booker have mostly dealt with the issue of retroactivity and whether Booker allows remand on plain error. Accordingly, the district courts are the primary focus of the “status” of the guidelines.

**1. The Guidelines Present the Presumptive Sentence Range or Should be Given**

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<sup>1</sup> The listed cases do not represent **all** of the cases that address Booker, but I have tried to include those that are of some assistance. If you desire a complete listing and analysis, go to the following website:  
[http://www.fd.org/pdf lib/Post Booker Decision Outline.pdf](http://www.fd.org/pdf_lib/Post_Booker_Decision_Outline.pdf).  
At that website you will find a 42-page listing of cases addressing various aspects of Booker. Frances H. Pratt, who is an attorney with the Office of the Federal Public Defender, Alexandria, Virginia, has assembled this very helpful document.

### **Substantial Weight**

The following district court cases have determined that judges should give the guidelines considerable or substantial weight at sentencing. United States v. Peach, 356 F. Supp. 2d 1018 (D. N.D. 2005); United States v. Wanning, 354 F. Supp. 2d 1056 (D. Neb. 2005); United States v. Wilson, 355 F. Supp. 2d 1269 (D. Utah 2005); *see, e.g.*, United States v. Kuhn, 351 F. Supp. 2d 696, 708 (E.D. Mich. 2005); United States v. Mascolo, No. 04-CR-0310 (RWS), 2005 WL 351108 (S.D.N.Y. Feb. 9, 2005). As to reviewing courts, United States v. Mares, No. 03-21035, 2005 WL 503715, at \*6-7 (5th Cir. Mar. 4, 2005), appears to give substantial weight to the guidelines and, intentionally or not, discourages courts from giving “non-guideline” sentences.

### **2. The Guidelines are Not Presumptive, but are Only a Factor at Sentencing**

The following district court cases held that the guidelines are only one of the factors to consider at sentencing in conjunction with statutes that govern sentencing. Simon v. United States, No. CR-90-216 (CPS) (E.D.N.Y. Mar. 17, 2005); United States v. Jaber, No. 02-CR-10201-NG, 2005 WL 605787 (D. Mass. Mar. 3, 2005); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005);<sup>2</sup> United States v. Galvez-Barrios, 355 F. Supp. 2d 958 (E.D. Wis. 2005); United States v. West, No. 03-CR-508 (RWS), 2005 WL 180 930 (S.D. N.Y. Jan. 27, 2005); United States v. Myers, 353 F. Supp. 2d 1026 (S.D. Iowa 2005); United States v. Jones, 352 F. Supp. 2d 22 (D. Me. 2005); United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005); *see, e.g.*, United States v. Naylor, No. 1:04-CR-00051, 2005 WL 525409 (W.D. Va. Mar. 7, 2005); United States v. Mullins, 356 F. Supp. 2d 617 (W.D. Va. 2005); United States v. Revock, 353 F. Supp. 2d 127 (D. Me. 2005). West is interesting in that it does not give presumptive weight to the guidelines and it based

the sentence “upon the facts admitted in connection with his plea and upon those facts found by the Court in the context of analysis under subsection 3553(a), as limited by *Apprendi* and *Booker*.” West, 2005 WL 180930, at \*3. In doing so, it sentenced based on the plea agreement, which included less loss and two less offense-levels than probation asserted in the Presentence Report (PSR). Id. at \*3-5.

### **3. Miscellaneous Highlights and “Lowlights”**

- a. United States v. Kelley, 355 F. Supp. 2d 1031 (D. Neb. 2005).

This case is a variation on the above test of not giving greater weight to either the advisory guidelines or 18 U.S.C. § 3553(a). The primary focus on this case is “reasonableness,” which is the standard of review upon appeal. Most interesting is that Kelley holds that a defendant cannot waive “the right to have the government prove its case beyond a reasonable doubt[,]” and that “[w]hatever the constitutional limitations on the advisory sentencing scheme, the court finds that it can never be ‘reasonable’ to base any significant increase in a defendant’s sentence on facts that have not been proved beyond a reasonable doubt.” Kelley, 355 F. Supp. 2d 1031 at 1036-1039 (citing Ring, 536 U.S. at 592-93, n.1). Kelley imposes this rule by noting that it is up to the sentencing court to determine what is reasonable and that Booker does not preclude such a standard. Kelley, 355 F. Supp. 2d 1031 at 1039. This same district judge issued a similar opinion in United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019 (D. Neb. 2005). This case dealt with 8 U.S.C. § 1326(b)(1). In addition to considering 18 U.S.C. § 3553(a), the court analyzed the bases to the defendant’s criminal history, the nature of the underlying “crime of violence,” and the age of that underlying offense to determine that the sentencing range of 70-87 months was not reasonable; a sentence of 36 months, however, was reasonable. Huerta-Rodriguez, 355 F. Supp. 2d 1019 at 1024.

- b. United States v. Barkley, No. 04-CR-

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<sup>2</sup> This is an excellent case, if you have an “older” client, a client involved in crack cocaine, or a client whose sentence is based on a number of “buy-busts.”

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119-H, 2005 U.S. Dist. LEXIS 2060 (N.D. Okla. Jan. 24, 2005).

For the most part, this unusual case basically ignored the remedial majority opinion in Booker and stated that “[t]his Court . . . believes that as a matter of history, policy, and common sense, the best sentencing system is one that both is mandatory and fully accommodates such *Sixth Amendment* rights.” Barkley, 2005 U.S. Dist. LEXIS 2060, at \*14, 22-24. It also held that the FEDERAL RULES OF EVIDENCE apply at sentencing and that the standard of proof is proof beyond a reasonable doubt. Id. at \*32-39. Barkley also held that a defendant can waive rights available pursuant to the Sixth Amendment Id. at 28-32; cf. United States v. Rohira, 355 F. Supp. 2d 894 (N.D. Ohio 2005).

- c. United States v. Duran, No. 2:04-CR-00396-PGC, 2005 WL 395439 (D. Utah Feb. 17, 2005).

The district court disagreed with the government’s contention that, in relation to “safety valve,” the guidelines are mandatory. Cf. United States v. Serrano-Beauvaix, 400 F.3d 50 (1st Cir. 2005); United States v. Ochoa-Suarez, No. 03-CR-747 (JFK), 2005 WL 287400 (S.D.N.Y. Feb. 7, 2005).

- d. United States v. Greer, No. 4:04-CR-06 (CDL), 2005 WL 396368 (M.D. Ga. Feb. 17, 2005).

This case is different than the others in that it uses the Booker/Blakely/Apprendi rule – “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt[.]” id. at \*2 (quoting Booker, 125 S. Ct. at 756)– to limit the imposition of an enhancement pursuant to 18 U.S.C. § 924(e). Id. at \*2. Specifically, this case dissects the Almendarez-Torres exception; that is, it distinguishes between the facts related to the nature of the prior conviction and the fact of the prior conviction. Greer,

2005 WL 396368, at \*3; but see United States v. Barnett, 398 F.3d 516 at 523-526 (6th Cir. 2005). This parsing out is restricted to mandatory sentence enhancements and even in that context it allows limited judicial fact finding, which is strikingly similar to the restrictions found in Taylor v. United States, 495 U.S. 575 (1990). A thorough advocate might use Greer, Galvez-Barrios, and Huerta-Rodriguez to seek a reduction in illegal re-entry cases and armed career offender cases.

- e. United States v. Smith, No. 02-CR-163, 2005 WL 549057 (E.D. Wis. Mar. 3, 2005).

This is another case from the author of Ranum and Galvez-Barrios. Here, the Honorable Lynn Adelman, United States District Judge, Eastern District of Wisconsin, performs a very helpful analysis of 18 U.S.C. § 3553; of particular note, Judge Adelman discusses the wide discrepancy between the guidelines for crack cocaine versus powder cocaine. Judge Adelman further notes the racial discrepancy between the users of the two types of cocaine and how the punishment is more severe for Blacks who represent 80% to 90% of federal crack cocaine defendants, compared to 20% to 30% of powder cocaine offenders.” After a lengthy discussion of this subject, Judge Adelman reduced the powder-cocaine-to-crack-cocaine sentencing ratio from 100:1 to 20:1. See, e.g., Simon v. United States, No. CR-90-216 (CPS) (E.D.N.Y. Mar. 17, 2005).

- f. United States v. Naylor, No. 1:04-CR-00051, 2005 WL 525409 (W.D. Va. Mar. 7, 2005).

This case examines the career offender enhancement, and incorporates the Court’s recent holding in Roper v. Simmons, 125 S. Ct. 1183 (2005), into the analysis to discount, for criminal history purposes, those offenses the defendant committed as a juvenile. Naylor, 2005 WL 525409, at \*2-3. Based on the fact that the defendant’s criminal history included offenses committed as a juvenile, but sentenced as an adult, the judge reduced the sentence

from a range of 188 to 235 months to a sentence of 120 months. *Id.* at \*1-3. (There is more to the analysis than this nutshell, but this represents the gist of the holding.)

- g. United States v. Wenzel, Nos. 04-212; 99-33, 2005 WL 579064 (W.D. Pa. Mar. 2, 2005).

This “grateful” defendant cast aspersions upon one of our own by stating that his Assistant Federal Public Defender rendered ineffective assistance of counsel, because he failed to raise a claim under Apprendi. Wenzel, 2005 WL 579064, at \*5-6. The judge stated that the attorney “was not ineffective either in failing to forecast the change in the legal landscape brought about by . . . Blakely or in concluding that an Apprendi challenge was unlikely to succeed.” *Id.* at \*6; see United States v. Muniz, No. 04-CIV-10209 (SHS), 2005 WL 589396 (S.D.N.Y. Mar. 14, 2005).

- h. United States v. Harper, No. 1:04-CR-90, 2005 WL 646366 (E.D. Tex. Mar. 17, 2005).

**This case is a must read.** The judge incorporates United States v. Shepard, 125 S. Ct. 1254 (2005), into the sentencing process to arrive at its holding that is similar to the merits majority opinion of Booker.

It seems clear that the Supreme Court has ruled that sentencing enhancements must be based upon jury findings, prior convictions, the court documents and statutory definitions pertinent to such convictions, and admissions by a defendant. Accordingly, a sentence enhancement should not be applied in this case based upon the court’s choice of which of two possible inferences may be drawn, by a preponderance of evidence, from facts admitted by Defendant. Harper, 2005 WL 646366, at \*2.

- i. United States v. Carvajal, No. 04-CR-222AKH, 2005 WL 476125 (S.D.N.Y. Feb. 22, 2005).

What makes this case interesting, beyond the significant reduction in the sentence of this career offender, is the district court’s statement regarding rehabilitation, which seems foreign in today’s punishment based climate.

Rehabilitation is also a goal of punishment. 18 U.S.C. 3553(a)(2)(D). That goal cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind, for we are all created in the image of God. A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life. Punishment should not be more severe than that necessary to satisfy the goals of punishment. Carvajal, 2005 WL 476125, at \*6.

#### **4. Burden of Proof at Sentencing**

As noted above, the following cases require proof beyond a reasonable doubt: Kelley, Huerta-Rodriguez, Barkley, and (in limited circumstances) Greer and West. See also Harper, 2005 WL 646366, at \*2; see, e.g., United States v. Gray, No. CRIM.A 3:03-00182, 2005 WL 613645, \*4-8 (S.D. W.Va. Mar. 17, 2005). All of the other cases either did not mention it or relied on the preponderance-of-evidence standard. See, e.g., U.S.S.G. § 6A1.3, p.s., comment.

#### **B. Determining the Sentence**

It is clear that the status of the Guidelines is not clear. Nonetheless, no matter what the status of the guidelines is, the guidelines do factor into the determination of the sentence. Booker, 125 S. Ct. at 745-71. Indeed, a PSR will be constructed and it will include an examination and application of the Federal Sentencing Guidelines. See 18 U.S.C. § 3552; Fed. R. Crim. P. 32. Once the PSR has been produced, it will be important to examine it and make objections like you would have in the past. See United States v. Mares, No. 03-21035, 2005 WL 503715 (5th Cir. Mar. 4, 2005); United States v. Crosby, 397 F.3d 103 (2nd Cir. 2005). As with most issues related to the new sentencing scheme, it is not clear whether defendants need to continue to make motions for

downward departures. Mares and Crosby offer guidance on how the sentencing process could work, including the continued use of departures and distinguishing “guideline sentences” from “non-guideline” sentences.

1. The sentencing judge has a duty to *consider* the guidelines, which “normally require[s] the] determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements.” Crosby, 397 F.3d at 113; see 18 U.S.C. § 3553(a)(4); Mares, 2005 WL 503715, at \*6-7. This also includes determining whether the case warrants a departure from the applicable guideline range, as that term was previously known. See Mares, 2005 WL 503715, at \*6-7; Crosby, 397 F.3d at 113; Smith, 2005 WL 549057; cf. Koon v. United States, 518 U.S. 81 (1996).

2. The sentencing court then should consider the factors set forth in 18 U.S.C. § 3553(a). Mares, 2005 WL 503715, at \*6-7; Crosby, 397 F.3d at 113; see 18 U.S.C. §§ 3551 and 3582.

3. “[A]fter considering the Guidelines and all the other factors set forth in section 3553(a),” the sentencing judge should decide “whether (I) to impose the sentence that would have been imposed under the Guidelines, *i.e.*, a sentence within the applicable Guidelines range or within permissible departure authority, or . . . [II] to impose a non-Guideline sentence. Crosby, 397 F.3d at 113; see, e.g., 18 U.S.C. §§ 3551, 3553, and 3582.

In distinguishing the two types of sentences, Crosby stated the following:

We think it advisable to refer to a sentence that is neither within the applicable Guidelines range nor imposed pursuant to the departure authority in the Commission’s policy statements as a ‘non-Guidelines sentence’ in order to distinguish it from the term ‘departure.’ A ‘departure,’ in the jurisprudence of the mandatory Guidelines regime, meant a sentence above or below the applicable Guidelines range when

permitted under the standards governing departures. A ‘departure’ was not a sentence within applicable Guidelines range, but it was nonetheless a ‘Guidelines sentence,’ *i.e.*, imposed pursuant to the departure provisions of the policy statements in the Guidelines, as well as the departure authority of subsection 3553(b)(1). Crosby, 397 F.3d at 111, n.9; see Mares, 2005 WL 503715, at \*6-7, n.7<sup>3</sup>.

Crosby does not go any further in explaining why courts and practitioners should distinguish between the two types of sentences. One possibility, however, is that the government considers a guidelines sentence to be a reasonable sentence, which is the new standard of review for sentences. In a letter dated January 28, 2005, Deputy Attorney General James B. Comey stated that “Federal Prosecutors must actively seek sentences within the range established by the Sentencing Guidelines in all but extraordinary cases.” Available at: [http://www.nacdl.org/public.nsf/MediaSources/Booker\\_Press/\\$FILE/DAGMemoonBooker1.pdf](http://www.nacdl.org/public.nsf/MediaSources/Booker_Press/$FILE/DAGMemoonBooker1.pdf).

Mr. Comey continued by ordering federal prosecutors to “preserve the ability of the United States to appeal ‘unreasonable’ sentences.” He continued by stating that if “the sentence imposed is below the appropriate Sentencing Guidelines range (except uncontested departures pursuant to the Guidelines, with supervisory approval), federal prosecutors must oppose the sentence and ensure that the record is sufficiently developed to place the United States in the best possible position to appeal.”

This clearly indicates that the government considers a guidelines sentence to be a reasonable

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<sup>3</sup> If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines. Given the deference due the sentencing judge’s discretion under the *Booker/Fanfan* regime, it will be rare for a reviewing court to say such a sentence is ‘unreasonable.’

Mares, 2005 WL 503715, at \*7.

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sentence and a sentence that is outside of the guideline range, (usually one that is below), is considered to be an unreasonable sentence that should be appealed. Another, (ulterior (?)) reason for the position of the government is that such a position that focuses on the guidelines range and uncontested departures maintains the validity of downward departures for substantial assistance. See, e.g., United States Sentencing Commission, Guidelines Manual, § 5K1.1 (Nov. 2004). If the primary focus shifts to 18 U.S.C. § 3553, then the value of a reduction for substantial assistance lessens. This is just a thought; the author is not aware of any government official who has made

this observation. Be that as it may, if the defendant has a valid basis to argue for a downward departure, it is best to make the initial argument through that tool and then make a similar argument using the factors of 18 U.S.C. § 3553.

Beyond this, after determining the applicable guideline range and the availability of any departure, the next step is to apply the defendant’s facts to the factors in § 3553. See Crosby, 397 F.3d at 110-14; see also Booker, 125 S. Ct. at 756-71. I have included an example of an analysis under § 3553 in the form of a sentencing memorandum, which follows:

\*\*\*\*\*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF QUIXOTE  
PANGLOSSIAN DIVISION**

UNITED STATES OF AMERICA, )  
                  *Plaintiff,* )  
vs. )                   W:0X-CR-YYY-Z  
                  ) )  
BOB CRATCHIT, )  
                  *Defendant.* )

**SENTENCING MEMORANDUM**

NOW COMES Defendant, Bob Cratchit (Mr. Cratchit), by and through his counsel, Assistant Federal Public Defender I.M. Optimistic, who provides the following sentencing memorandum, which is in compliance with United States v. Booker, 125 S. Ct. 738 (2005) and United States v. Mares, No. 03-21035, 2005 WL 503715 (5th Cir. Mar. 4, 2005).

**18 U.S.C. § 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. In regards to the sufficiency of the sentence, “[t]he court, in determining the particular sentence to be imposed, shall consider--**

...

**(2) the need for the sentence imposed--**

**(A)[1] to reflect the seriousness of the offense, [2] to promote respect for the law, and [3] to provide just punishment for the offense;**

1. In this case, Mr. Cratchit manufactured counterfeit currency with a face value of \$50 and passed that counterfeit currency. Like most all federal offenses, this is a serious offense. However, there is no doubt that there are levels of seriousness amongst offenses and within the offense itself. Here, the guidelines impose an offense level of 15. See U.S.S.G. § 2B5.1. Comparatively speaking, this offense level is nearly the same as embezzling between \$70,000 and \$120,000, see U.S.S.G. § 2B1.1; it is more offense levels than selling more than the five kilograms of marijuana, but less than 10 kilograms marijuana or selling at least 5 grams of heroin, but less than 10 grams of

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heroin, see U.S.S.G. § 2D1.1(c)(13); a non-residential burglar, who steals more than \$50,000 but less than \$250,000, receives this same offense level, see U.S.S.G. § 2B2.1; someone who distributes obscenity to a minor receives the same offense level, see U.S.S.G. § 2G3.1; Mr. Cratchit's offense level is three offense-levels more than that imposed for criminally negligent, involuntary manslaughter, see U.S.S.G. § 2A1.4, and his offense level is less than a person's who cheats the government out of at least \$30,000 but not more than \$80,000 worth of taxes, see U.S.S.G. §§ 2T1.1, 2T4.1. Comparing Mr. Cratchit to a fellow counterfeiter shows that his simple scanning of a few bills into his antiquated work computer and printing them out on an equally antiquated printer gives him the equivalent offense levels as someone who passed, but did not manufacture, counterfeit currency with a face value of at least \$30,000 but less than \$70,000. See U.S.S.G. §§ 2B1.1, 2B5.1.

As stated, counterfeiting is a serious offense. Yet, when one is examining the punishment in relation to the offense, as 18 U.S.C. § 3553(a) requires, it cannot be denied that, in relation to this offense and the offense levels given out to other offenses, a gross offense-level of 15 results in a punishment far "greater than necessary" to "reflect the seriousness of the offense." See § 3553(a).

1. As to promoting respect for the law, Mr. Cratchit stands here, now, as a person who is now a convicted felon. This is a tremendous burden that he must bear, which will not only impact his public life, but will impact his personal life as well. For the rest of his life he is branded a felon. Why? Not because he has a great disrespect for the law, it is because in a fit of desperation he copied some currency and then bought medicine for his desperately ill son, Tiny Tim. Does he need to go to prison to teach him respect for the law? No. A term of probation, community service, and perhaps a term of home confinement are *all that is necessary* to promote respect for the law. If they are not, there is no doubt Probation will soon have Mr. Cratchit back before this Court for further lessons in respect in the form of a revocation hearing.

1. As to providing just punishment for the offense, one must admit that this is a theoretical question at best. What is just punishment? Be that as it may, based on the aforementioned arguments, a sentence of probation, combined with home confinement, restitution, or even community service represent *all that is necessary to provide just punishment*. Such a sentence impresses upon Mr. Cratchit that no matter how desperate his personal situation, there is a price to pay for even a desperate act such as this, that the government takes serious even these relatively slight acts of counterfeiting, and it should serve as a clear sign that this Court, the Department of Justice, and the United States Secret Service take even this level of counterfeiting serious.

**(A) to afford adequate deterrence to criminal conduct;**

For much of the same reason stated above, a term of probation, home confinement, restitution, community service, or a combination of any or all of these are *all that is necessary* to serve as a deterrent to any further criminal conduct. Indeed, Mr. Cratchit has never violated the law, which indicates that he does not have a propensity to get involved in criminal conduct, and Mr. Cratchit's status as the father of a chronically ill son will greatly deter any further criminal conduct. Beyond this, if this Court imposes a term of probation, Mr. Cratchit will be subject to a Probation Officer's continuous and surprise visits and will, most importantly, be subject to incarceration for even non-criminal behavior that would constitute a violation of the terms of his probation. As to dissuading others from criminal conduct, a felony conviction, a term of probation, and other terms of the sentence do not constitute a "free ride." The aforementioned sentencing options are *all that is necessary* to put others on notice, if such a thing is possible, that the government and this Court take all levels of counterfeiting serious.

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**(C) to protect the public from further crimes of the defendant;**

This factor, like others, is related to others factors within 18 U.S.C. § 3553. *All that is necessary* to protect the public from Mr. Cratchit is the omnipresent eye of Probation and Mr. Cratchit's knowledge that he could go to prison if he violates probation or does not complete any requirement of sentencing that this Court imposes. There is no evidence that Mr. Cratchit will be involved in further criminal activity. Though Ebenezer Scrooge fired Mr. Cratchit for this transgression, he currently is working as a greeter at the local Wal-Mart; and he hopes to continue be a good husband and father. In sum, Mr. Cratchit knows that a life of crime is not the path for him, and he hopes to prove to himself, his family, and this Court that this one desperate act was an aberration in his life. The requested sentence should be *all that is necessary* to protect the public from Mr. Cratchit.

**(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;**

There is no doubt that a number of the folks who appear in court are in dire need of all of these forms of assistance. Mr. Cratchit, however, is fortunate in that he currently has one of the best jobs available. He does not have health insurance for himself or his family, but he enjoys good health, and the Bureau of Prisons would not provide health insurance for his family anyway. As to job training, Mr. Cratchit hopes to soon receive further training from Wal-Mart that will allow him to move up in the business. As to other correctional treatment, family responsibilities, a Probation Officer, a sentence of probation, and other conditions will provide *all that is necessary* to encourage Mr. Cratchit to chose the ethical and moral path that will keep him from returning to this Court or any other court.

**(3) the kinds of sentences available;**

As previously noted, there are different sentencing options available in this case. This Court can impose a term of imprisonment, but with slight adjustments it can also impose a term of probation. Here, while imprisonment is an option, a term of probation is *all that is necessary* to meet the aforementioned factors.

**(4) the kinds of sentence and the sentencing range established for--**

- (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--**
- (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and**
  - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced;**

Mr. Cratchit is in criminal history category I and he has a net offense-level of 13, which gives him a sentence range of 12-18 months. Because this places Mr. Cratchit in Zone D, pursuant to the Guidelines he is not eligible for probation. See U.S.S.G. § 5C1.1(f). However, United States v. Booker, 125 S. Ct. 738, 756-71 (2005), altered the sentencing calculus by changing the Guidelines from mandatory to advisory and by giving 18 U.S.C. § 3553 some unstated level of weight in the sentencing process. Accordingly, while the sentence range based on the advisory guidelines is 12-18 months, § 3553 factors into the sentencing calculus to either mitigate or aggravate the

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sentence or not impact the sentencing at all. In the end, a sentence of probation will be lower than the advisory guideline range, unless this Court grants a downward departure.

**(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct ;**

Mr. Cratchit contends that due to Booker, it is probably incorrect to compare his case to pre-Booker cases. Pre-Booker cases did not have the benefit of a modified indeterminate sentencing scheme where the overall test of the sentence is “reasonableness.” Booker, 125 S. Ct. at 765-69. All guidelines sentences before Booker that were within the guideline range were, arguably, without error. Now, this might not be so. Booker changed this so the only way to accurately fulfill this factor is to compare Mr. Cratchit to an identical person: the same offense conduct, the same criminal history, the same family background, the same physical condition, etcetera. Absent these same factors, any comparison would not be accurate. Thus, we are not able to determine, based on this factor, what punishment is *necessary*. What can be said is that a year in prison for manufacturing and passing counterfeit currency with a face value of \$50 is significantly excessive when compared to the harm others created, which results in the same imprisonment.

The last factor, which is actually the first of 18 U.S.C. § 3553, is that this Court should consider the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). This factor is different in that it does not have the qualifier of imposing “a sentence sufficient, but not greater than necessary[.]” 18 U.S.C. § 3553(a). With that said, this memorandum has already discussed Mr. Cratchit’s characteristics: he has no criminal history; he is a middle-age man with little chance of violating probation; he is employed; he has a relatively stable life; he regularly attends religious services; and he hopes to advance at his current employment. As to the circumstances and nature of this offense, this memorandum has noted that for many reasons the assessed offense level significantly overrepresents the instant offense conduct, and the conduct is not of the nature of the “average” counterfeiter. In relation to other offenses, this offense is certainly not as egregious as those offenses previously noted where the offense level is nearly the same.

### Conclusion to the Sentencing Memorandum

Mr. Cratchit understands that this Court must consider the advisory sentencing guidelines, but he also knows that this Court must also consider 18 U.S.C. § 3553. Mr. Cratchit contends that while the advisory guidelines suggest that a term of imprisonment is necessary, § 3553 clearly indicates that the guideline sentence here is a sentence that is “*greater than necessary*” to comply with the purposes set forth in § 3553(a)(2). See also 18 U.S.C. §§ 3551, 3553, and 3582. In fact, a term of probation, as opposed to prison, is a sentence sufficient to comply with 3553(a)(2). See § 3553(a)(2). Accordingly, Mr. Cratchit humbly asks this Court to impose a sentence of probation with any additional terms that this Court sees fit to impose.

Respectfully submitted,

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## II. Upon Review: Booker in the Reviewing Courts

### A. Standard of Review

In the past, the appeals court reviewed *de novo*

a district court’s interpretation and application of the Sentencing Guidelines and reviewed findings of fact for clear error. United States v. Charles, 301 F.3d 309, 312-13 (5th Cir. 2002) (*en banc*). Pursuant to Booker, reviewing courts will examine preserved

complaints for “reasonableness.” Booker, 125 S. Ct. at 765-69. It appears that the previous analysis might remain the same, but the properly determined sentence will be reviewed for “reasonableness.” See United States v. Garcia, et. al., No. 03-10350, 2005 WL 646342 (11th Cir. Mar. 22, 2005)(*per curiam*); United States v. Villegas, No. 03-21220, 2005 WL 627963, at \*2-5 (5th Cir. Mar. 17, 2005) (*per curiam*); United States v. Hazelwood, 398 F.3d 792, 795, 800-01 (6th Cir. 2005).

### **B. Habeas/Retroactivity and Booker**

There is no good news on this issue. Reviewing courts have ruled that Booker is not retroactively applied. See United States v. Price, 400 F.3d 844 (10th Cir. 2005); Bey v. United States, 399 F.3d 1266 (10th Cir. 2005); Humphress v. United States, 398 F.3d 855 (6th Cir. 2005); Varela v. United States, 400 F.3d 864 (11th Cir. 2005); McReynolds v. United States, 397 F.3d 479 (7th Cir. 2005); and Green v. United States, 397 F.3d 101 (2nd Cir. 2005); cf. Booker, 125 S. Ct. at 769.

### **C. Plain Error and Booker**

Many United States Court of Appeals has spoken on Booker, and most that have spoken have, in one form or another, remanded cases on plain error. Yet, as one could expect, the Circuits have various tests.

#### *1. Automatic Remand under Plain Error*

Upon a showing of an error pursuant to Booker, the following courts have issued automatic remands under plain error. See United States v. Ameline, 400 F.3d 646 (9th Cir. 2005); United States v. Oliver, 397 F.3d 369 (6th Cir. 2005); United States v. Hughes, 396 F.3d 374 (4th Cir. 2005).

#### *2. Limited Remand to the District Court*

Upon a showing of an error pursuant to Booker, the following courts have issued limited remands under plain error. Specifically, these courts

retain appellate jurisdiction, but remand the case to the district court so that court can determine whether it would impose a lesser sentence. See United States v. Paladino, Nos. 03-2296, 03-2383, 032386, 04-1951, 04-2339, 04-2378, 2005 WL 435430 (7th Cir. Feb. 25, 2005); United States v. Crosby, 397 F.3d 103 (2nd Cir. 2005).

#### *3. The Defendant Bears the Burden of Proving the Elements of Plain Error Before Remand*

Upon a showing of an error pursuant to Booker, the following courts require the defendant to prove that the sentence would be different upon remand. See United States v. Smith, No. 03-3087, 2005 WL 627077 (D.C. Cir. Mar. 18, 2005) (*per curiam*); United States v. Mares, No. 03-21035, 2005 WL 503715, at \*4-7 (5th Cir. Mar. 4, 2005); United States v. Shelton, No. 04-12602, 2005 WL 435120 (11th Cir. Feb. 25, 2005); United States v. Antonakopoulos, 399 F.3d 68 (1st Cir. 2005).

### **D. Example of an Objection that Preserved Booker for Appeal**

In three separate cases, the United States Court of Appeals for the Eighth Circuit “held that when a defendant objects to a District Court’s determination of drug quantity at sentencing, the defendant preserves a Booker-based challenge to his sentence and is entitled to a new sentencing proceeding.” United States v. Sdoulam, 398 F.3d 981 at 994 (8th Cir. 2005) (citing United States v. Coffey, 395 F.3d 856 (8th Cir. 2005); United States v. Fox, 396 F.3d 1018 (8th Cir. 2005)).

### **E. Appeal Waivers and Booker**

Various courts have also ruled on how a defendant’s waiver of the right to appeal will impact their ability to appeal the issues addressed in Booker. Generally, the following courts found that the defendants’ waivers included within their plea agreements acted as a bar to pursuing an appeal pursuant to Booker. See United States v. Grinard-

Henry, 399 F.3d 1294 (11th Cir. 2005); United States v. Killgo, 397 F.3d 628 (8th Cir. 2005); United States v. Rubbo, 396 F.3d 1330 (11th Cir. 2005); cf. United States v. Sahlin, 399 F.3d 27 (1st Cir. 2005).

#### **F. Booker and Mandatory Minimums**

Harris is an interesting case in that it held that after Booker the enhancement contained in [18 U.S.C.] § 924 Firearm-Type Provisions can[not] be imposed on the basis of judicial fact-finding. United States v. Harris, 397 F.3d 404 at 411 (6th Cir. Feb. 8, 2005). Correspondingly, Harris also held that the type of firearm has to be included in the indictment and proved to a jury beyond a reasonable doubt; Harris also allows punishment based on the defendant's admission to the type of firearm. Harris, 397 F.3d 404 at 413.

In Sharpley, the defendant received the mandatory minimum of 180 months, which was higher than the defendant's guideline range of 108-135 months imprisonment. United States v. Sharpley, 399 F.3d 123 at 126 (2nd Cir. 2005). Sharpley noted that the defendant could not receive a lower sentence upon remand, but that the district court's reliance on the mandatory guidelines *harmed the government*; after all, if the district court would have considered 18 U.S.C. § 3553, which Booker mandates, the factors may have shown that this pedophile, who had a previous conviction for first degree sexual abuse, would have received a higher sentence. Id. at 127.

United States v. Vieth, 397 F.3d 615 (8th Cir. 2005), addressed the issue of mandatory minimums in the context of a defendant suffering a drug conviction with a prior drug conviction and held that defendant was sentenced based on the statutory minimum facts found by a jury and not the Guidelines; thus, Booker did not apply to the defendant's case. Cf. United States v. Bach, 400 F.3d 622, at 632-634 (8th Cir. 2005).

#### **G. Booker and Almendarez-Torres**

The following cases state that Booker did not

overrule United States v. Almendarez-Torres, 523 U.S. 224 (1998), which is the basis of the prior conviction exception to the Apprendi rule. See United States v. Moore, No. 04-8078, 2005 WL 668813 (10th Cir. Mar. 23, 2005); United States v. Bradley, 400 F.3d 459 (6th Cir. 2005); United States v. Bach, 400 F.3d 622 at 634 (8th Cir. 2005); United States v. Ordaz, 398 F.3d 236 (3rd Cir. 2005); United States v. Vieth, 397 F.3d 615 (8th Cir. 2005); see, e.g., United States v. Shepard, 125 S. Ct. 1254 (2005); cf. United States v. Little Dog, 398 F.3d 1032 (8th Cir. 2005).

#### **H. Booker and Ineffective Assistance of Counsel**

Though Apprendi was not in effect during the initial trial, the appellate attorney's failure to raise a valid claim on direct review based on Apprendi rendered ineffective assistance of counsel. See Ballard v. United States, 400 F.3d 404 (6th Cir. 2005); see also Knox v. United States, 400 F.3d 519 (7th Cir. 2005).

#### **I. Booker, the *Ex Post Facto* Clause, and the Due Process Clause**

##### *1. The Ex Post Facto Clause*

There is an argument to be made that when the remedial majority in Booker interpreted what Congress would do if given the choice, it acted as a legislative body; in doing so, Booker violated the *Ex Post Facto* Clause of Article I, § 9, cl. 3. As a result, the defendant has a right to have the sentence determined under the mandatory guidelines with the protections associated with the Sixth Amendment applied to the case. Crosby specifically noted that it "intimated no view at this time as to whether the *Ex Post Facto* Clause would prohibit a court from imposing a more severe sentence than a defendant would have received had the Guidelines remained mandatory." Crosby, 397 F.3d at 117, n.17 (citation omitted).

2. *Fair Notice and the Due Process Clause*

Similar to the argument under the *Ex Post Facto* Clause, the argument under the Due Process Clause is that the defendant did not have fair notice of the Court's change and as a result the defendant is suffering an increase in punishment over what the defendant would have received under the mandatory guidelines with the protections provided by the Sixth Amendment. The *Ex Post Facto* Clause offers the strongest protection by providing that such legislative action is *per se* unconstitutional. The Due Process Clause, however, does not offer such blanket protection and is subject to a variety of tests. United States v. Duncan, No. 03-15315, 2005 WL 428414 (11th Cir. Feb. 24, 2005), has held that the application

of the remedial majority opinion of Booker did not violate the defendant's rights under the Due Process Clause. See Duncan, 2005 WL 428414, at \*8-9.

III. Conclusion

There is no doubt that Booker significantly changed sentencing as we in the federal system knew it. As such, Booker offers a number of opportunities for creative defense attorneys to present new arguments that might help clients. I encourage all defense attorneys to make creative arguments. If you win, that is great, if you do not win, your preserved argument may create yet further favorable change. This may be quixotic, but it is worth trying.

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REPORT OF THE AMICUS COMMITTEE

*By Fran Pratt, Co-Chair of Amicus Committee, Research & Writing Attorney,  
Eastern District of Virginia, Alexandria*

Since the last report in the Fall 2004 issue of *The Liberty Legend*, the NAFD has been involved as an amicus in two cases before the Supreme Court. The first is *Dodd v. United States*, No. 04-5286, a case out of the Federal Defender office in Fort Lauderdale that was briefed by AFPD Janice Bergman and RWSA Peter Fucci, and argued by Janice on March 22, 2005. The question presented addresses when the statute of limitations on a first section 2255 motion begins to run for claims based on newly recognized rights. The NAFD joined the NACDL in its amicus brief, which is available on Westlaw at 2005 WL 122089. The brief was written by Jeff Green of Sidley Austin Brown & Woods and his associate Katrice Bridges, with editorial assistance provided in part by NAFD Amicus co-chair David McColgin.

The second Supreme Court case in which the NAFD is participating is *Halbert v. Michigan*, No. 03-10198. The principal question in *Halbert* asks whether Michigan's law and practice of not appointing counsel to indigent defendants convicted

by guilty plea violate the petitioner's Fourteenth Amendment right to due process. The Supreme Court had previously granted *certiorari* on this issue in *Kowalski v. Tesmer*, but then dismissed the case for lack of standing. The amicus brief filed in *Halbert* by the NACDL, written by attorneys at Arnold & Porter, and available at 2005 WL 435906, was essentially the same one filed in *Kowalski*, which the NAFD Committee had previously voted to join. The case is scheduled for argument on April 25.

In addition to the briefs filed in the Supreme Court, the NAFD Amicus Committee is joining the NACDL, the PACDL, and FAMM in support of rehearing in the case of *O'Donald v. Johns*, No. 04-2990 (3d Cir. Mar. 22, 2005). Based on *pro se* filings, the Third Circuit decided to uphold the Bureau of Prison's interpretation of the language of 18 U.S.C. § 3624(b) in calculating good time credits based on the amount of time actually served, not the sentence as imposed, as the prisoner argued. The Third Circuit found that because the statutory language is unclear and ambiguous, the court should defer to the BOP's

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interpretation, as that interpretation is a reasonable one. In so ruling, the Third Circuit joins the First, Seventh, and Ninth Circuits in upholding the BOP on this issue.

If you are aware of a case that might benefit from NAFD amicus support, please contact an Amicus Committee co-chair (listed below) as early in the process as possible. By so doing, we can look at the issue, forward it to the full committee for input

and vote and, if it is decided that the NAFD should participate, find a writer or another organization with which to join.

Finally, if you are interested in being involved in the work of the Amicus Committee, please contact any of the three co-chairs: Henry Bemporad in San Antonio, Texas, David McColgin in Philadelphia, Pennsylvania, or me, Fran Pratt, in Alexandria, Virginia.

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## FAREWELL DEAR CARMEN

After many many years of devoted service, Carmen Hernandez is leaving us, seeking new challenges and opportunities. It is hard to decide what Carmen is best known for – the remarkable reinvigoration of our CJA training programs that she accomplished while at the AO Training Division, the prodigious amount of work she did to help us understand and litigate the sentencing

guidelines, her willingness to travel anywhere to train staff or panel attorneys, the helpful alliances she formed between federal defenders and other groups and organizations, the insight she had into the workings of the legislature or her wonderful smile and warm heart. It is fair to say that everyone who knew Carmen was better for it – intellectually and emotionally. She will be sorely missed.

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## KUDOSKORNER

We congratulate **Tom Concannon**, long time **Attorney-in-Charge, Federal Defenders for the Eastern Division of New York, Brooklyn**, for receiving the prestigious "American Inns of Court

Professionalism Award for the Second Circuit." The award was presented to Tom at a special ceremony at the Manhattan Federal Courthouse on September 29, 2004. The award is available to be given annually by each federal circuit. It honors "a senior practicing lawyer or judge whose life and practice display sterling character and unquestioned integrity, coupled with ongoing dedication to the highest standards of the legal profession and the rule of law." In the nominating papers, Tom was described as "a tireless advocate and mentor to hundreds of lawyers, judges and clients throughout his career." Tom is the second federal defender to receive the award nationwide.

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You might remember from the previous issue of *The Liberty Legend* that **Donna Elm** and **Milagros Cisneros, AFPDs, District of Arizona, Phoenix**, had gotten an acquittal in a first degree murder case. Well, they did it again! In a case involving the same defendant, same charge, but a different victim, Donna and Milagros got another acquittal in a first degree murder case. The victim was despondent over the death of his wife, had a drug debt, was drinking and using drugs, and may have jumped into a rival gang after his wife died. Although the government had no proof as to how the shooting occurred, the government's case was based on the theory that the victim was killed when he was last seen with the defendant. The defendant and the victim were brothers and after the victim supposedly left the gang, the defendant had to enforce loyalty. However, Donna and Milagros were able to use the government's expert to prove that the victim was killed elsewhere and moved. Because, the body was found within 500' of the reservation border, the nexus with the reservation was never established. Donna and Milagros offered three other more plausible theories for the death including, suicide, drug debt hit, or a gang execution for jumping ship. The judge took the Rule 29 motions "under advisement" pending the verdict and after 15 months of holding the defendant in custody on little evidence, he walked free.

**Gerald Williams, AFPD, District of Arizona, Phoenix**, got an aggravated sexual abuse case dismissed after two mistrials. The prosecution arose from the Navajo Indian Reservation and falls under the Major Crimes Act jurisdiction, 18 U.S.C. 1153. The victim, a young niece, accused the defendant of aggravated sexual abuse. The defendant denied, although there was a "confession." Moreover, there was contradictory evidence such as no injuries, the victim's account did not jibe with how it could have occurred, and there were others in the house at the time. The prosecution was fueled by the victim's father, who was vocal. It came down to a "he said/she said" defense, with Gerald explaining why someone would "confess" falsely to the FBI. The case hung twice with the majority voting to acquit both times. The government finally dismissed.

**Jason Hannan** and **Chris Kilburn, AFPDs, District of Arizona, Tucson**, got an acquittal in a case involving an assault on a federal officer. Jason and Chris represented the so-called leader of Ranch Rescue, a volunteer organization working to keep most of the Tucson office clients (undocumented aliens) out of the U.S.; this is not to be confused with "helping" the Border Patrol. In fact, the client was so not helping the Border Patrol that they tried to pull him over without probable cause and without sirens or lights. Their reports said that they thought he might be smuggling aliens. The client was charged with several counts of assaulting federal officers by threatening them in an overheard call he made to 911/Cochise County Sheriff. He was in solitary for the six months he waited for his speedy trial, and at trial, the FBI disclosed for the first time, a video tape, an audio tape, and a grand jury transcript with plenty of misrepresentations.

**Kathleen Williams, FPD, Southern District of Florida, Miami**, was recognized at the annual chief defenders administrative conference in Miami in December. Henry Martin, on behalf of the

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Association and the federal defenders, presented Kathy with a compass, symbolic of her leadership of the defender program as Chair of the Defender Services Advisory Group. Henry recalled how Williams in delivering the key note address for the Assistant Defender Orientation Program told the new lawyers how important it is to keep their moral compass in the coming months and years of stress and adversity and then gave each lawyer a small compass to serve as a reminder. Henry noted that as DSAG chair, Williams had balanced political realism with inexhaustible defender passion to guide our program with integrity, wisdom and wit through a minefield of issues coming before the Defender Services Committee of the Judicial Conference. To show Kathy our appreciation, she was given a standing ovation and a reproduction of the compass that Meriwether Lewis purchased in Philadelphia as he outfitted for his expedition to the far Northwest, and later presented to Jefferson upon his return. It was fitting that she received the compass in the Bicentennial year of the great expedition.

**Ann Koszuth, AFPD, Western District of Missouri, Springfield**, recently obtained a splendid not guilty verdict and prevented a 28-year old African-American male from spending the rest of his life in federal prison. In this district, the government has a virtually non-negotiable policy of always filing § 851 enhancements and for Ann's client, who was charged with possession with intent to distribute under 841(b)(1)(A), this meant mandatory life under the statute. Through her creative lawyering and her tireless investigation, Ann was able to discredit the snitch/informant. Ann turned the tables on the government with a theory of defense that showed the snitch was the real drug dealer and not her innocent client. Her client's only sin was his unfortunate addiction to crack, that had him buying it in the wrong place, at the wrong time and from the wrong guy. The case was submitted to the jury just before lunch. The jury ordered pizza in, did whatever else juries do on breaks, deliberated and came back with a verdict in less than an hour and a half. Congratulations to Ann for her fabulous and inspirational victory!

**Laine Cardarella, AFPD, Western District of Missouri**, beat the odds in a trial for felon in possession of a firearm. The client, who had sold some drugs from his house in the recent past, was charged after the police executed a search warrant. No drugs were found, but a pistol was hidden in the ceiling tiles of his bedroom. Arguing the house had been burglarized recently and the defendant had moved into the residence within the past few months Laine wove a spell of doubt convincing the jury her client was innocent. Just another example of the outstanding work done by AFPDs nationwide.

**Doug Thoresen, AFPD, Middle District of Tennessee** along with **Investigators Lupe Botts, Michelle Hendrix** and **Richard Moore**, had a motion to suppress granted in a traffic stop drug case based on proof of methodology being used by I-40 cops to identify and stop vehicles.

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**AFPD's Ron Small, Jay Steed, and R&WS Jennifer Coffin, Middle District of Tennessee** also had success with a motion to suppress. The district court suppressed 23.5 kilos of cocaine in a traffic stop eventually leading to dismissal (but only after the government tried to compel the defendant to testify against her co-defendants even while the government was appealing the suppression issue!).

**Jay Steed, AFPD, Middle District of Tennessee** represented a client on an acute psychiatric ward charged with threatening VA employees. Jay subpoenaed half the staff at the VA. The AUSA made 6 closing arguments in an effort to persuade the judge not to acquit. In a last effort to avoid the acquittal, the AUSA asked the judge to give them time to bring other charges rather than letting the client off. Client was acquitted.

**AFPD's Caryll Alpert & David Baker and Investigator Lupe Botts, Middle District of Tennessee** had a large scale marijuana transporting conspiracy case with a 10-year mandatory minimum dismissed by government the week before trial.

**Sumter Camp, AFPD, Middle District of Tennessee** had a case in the 6th Circuit, reversing the conviction for aiding and abetting a failure to appear. Judge Cook dissented from the decision because she found that the failure of the government to establish one of the elements of the offense did not "seriously affect the fairness, integrity or public reputation of judicial proceedings".

**AFPD's Caryll Alpert & Hugh Mundy, R&WS Gretchen Swift and Investigator Richard Moore, Middle District of Tennessee** had a case in the 6th Circuit involving a habeas appeal reversing the client's murder conviction based on the trial court's failure to provide the defendant at the re-trial a transcript of the first trial which had ended in a hung jury. Adding insult to injury, the prosecutor used a transcript of the client's testimony from the first trial to impeach him at the second trial.

**AFPD's Caryll Alpert & David Baker and Investigator Richard Moore, Middle District of Tennessee** won a suppression motion in which the district court suppressed all of the evidence in an Armed Career Criminal case, saving the client at least 15 years!

If you read **The Liberty Legend** regularly, you may have wondered why your much deserved **Kudo** was conspicuously missing. The editors solicit **Kudos** before every edition. If we are not told of successes and achievements, we have no way of sharing them with the Association. What are you waiting for? The editors are accepting **Kudos** 24/7 at [Tony\\_Lacy@fd.org](mailto:Tony_Lacy@fd.org) and [Lori\\_Ulrich@fd.org](mailto:Lori_Ulrich@fd.org).

# RECIDIVIST ENHANCEMENTS IN THE AFTERMATH OF *U.S. v. SHEPARD*

by Felicia Sarner, Supervisory Assistant Federal Defender, Eastern District of Pennsylvania, Philadelphia

*United States v. Shepard*, 125 S. Ct. 1254 (2005), a 5-4 decision issued on March 7, 2005 and authored by Justice Souter.

Many thanks to Alan Dubois for his excellent outline on this subject, to David McColgin, and to the national federal defender community for its ongoing, always enlightening, dialogue.

## I. Introduction

Think about it. We're back almost full circle to the year 2000, immediately after *Apprendi v. New Jersey* was decided,<sup>1</sup> when Justice Thomas' concurrence promised the imminent demise of recidivist enhancements as mere sentencing factors. Constrained by its earlier decision in *Almendarez-Torres v. United States*,<sup>2</sup> the majority in *Apprendi* made prior convictions the exception to its holding. But Justice Thomas made his disagreement with that exception clear, by announcing in his concurring opinion that his swing-vote with the majority in *Almendarez-Torres* had been wrong. It seemed only a matter of time before the Court reversed itself and included recidivism in its Sixth Amendment analysis, such that prior convictions, like all other enhancing factors, would have to be charged and proven beyond a reasonable doubt, or admitted by the defendant.

In expectation of *Almendarez-Torres*'

imminent reversal, districts nationwide took prophylactic steps in the year 2000 and many began charging prior convictions in the indictment and litigating them before juries in bifurcated proceedings. But nothing ultimately happened. The Supreme Court denied certiorari in case after case, and things gradually went back to the way they'd always been, with recidivist enhancements viewed as sentencing factors, not elements of the offense, to be proven to the judge by a preponderance of the evidence.

Then *Blakely*<sup>3</sup> rocked the world, clarifying the term "statutory maximum," followed by *Booker/Fanfan*,<sup>4</sup> which applied the Sixth Amendment analysis to the federal sentencing guidelines and rendered them advisory only. While both opinions paid lip service to the "prior conviction" exception, we now have *Shepard*, which again raises serious doubt about the vitality of that exception.

The decision does not reverse *Almendarez-Torres* but instead restricts the facts courts can consider in determining whether a prior conviction qualifies for the enhanced penalty. If the analysis works to disqualify the conviction, which it did for the defendant in *Shepard*, the enhanced penalty will not apply. But if the analysis works to your client's detriment and the prior conviction qualifies, the *Shepard* opinion invites the argument that a given recidivist statute is unconstitutional on its face.<sup>5</sup> *Shepard's* application to the federal sentencing

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<sup>1</sup> 530 U.S. 466 (2000). *Apprendi* held that *other than the fact of a prior conviction*, the Sixth Amendment demands that all other factors which enhance a sentence beyond the statutory maximum must be charged and proven beyond a reasonable doubt, or admitted by the defendant.

<sup>2</sup> 523 U.S. 224 (1998). The 5-4 majority concluded that recidivist enhancements were sentencing factors, not elements, to be proven to the judge at sentencing by a preponderance of the evidence.

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<sup>3</sup> *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

<sup>4</sup> *United States v. Booker*, 125 S. Ct. 738 (2005).

<sup>5</sup> Needless to say, vulnerable statutes are those which treat prior convictions as sentencing factors, and does not include 18 U.S.C. § 922(g)(1), the felon-in-possession statute, where the prior conviction is an element of the offense.

guidelines is less clear, given their advisory nature, but a broad reading also invites its application in that context.

The bottom line is that as effective advocates, we must continue raising and preserving all possible objections to recidivist enhancements, based upon *Shepard* and the Sixth Amendment's jury trial guarantee set forth in the *Apprendi* line of cases.

### II. *Shepard's Holding*

The Sixth Amendment's application to recidivist enhancements was not directly raised in *Shepard*, and thus was not decided in the Court's opinion. *Shepard* was an Armed Career Criminal Act (ACCA) case, where the defendant pled guilty to felon-in-possession (18 U.S.C. § 922(g)(1)) and the government sought the 15-year mandatory minimum recidivist enhancement under § 924(e). At issue was the sentencing court's fact finding authority regarding the prior convictions and whether they constitute "violent felonies" within the meaning of the ACCA statute. Mr. Shepard had three Massachusetts burglary convictions, and under the Supreme Court's earlier decision in *Taylor v. United States*,<sup>6</sup> only "generic" burglary (i.e., unlawful entry into a building or structure with intent to commit a crime) qualified as a "violent felony" for ACCA purposes. Massachusetts has a broad, "non-generic" burglary statute, meaning that it prohibits unlawful entries not just into buildings or structures but also vehicles and boats. The issue at Mr. Shepard's sentencing was how far the court could go in determining whether the conduct underlying his conviction was "generic" or "non-generic" burglary.

In *Taylor*, the prior burglary conviction resulted from a jury trial, and the Supreme Court limited the sentencing judge's fact finding to the statutory elements, the charging documents, and the jury instructions from the prior conviction. The problem at Mr. Shepard's sentencing was that he had pled guilty to the prior burglaries, so there were no

jury instructions, and the statutory elements and charging documents did not clarify whether his pleas were to generic or non-generic burglary. The government wanted the judge to consider police reports and other documents outside of *Taylor's* restrictions, which the judge felt unauthorized to do and therefore refused to apply the ACCA recidivist enhancement.

The 5-4 *Shepard* majority held that where a defendant pled guilty to a non-generic statute, inquiry to determine whether this amounted to generic burglary was limited to the charging documents, the plea agreement and the guilty plea colloquy. It refused to extend the court's fact finding authority to police reports and similar documents, for to do so would erode *Taylor's* conclusion that "respect for congressional intent and avoidance of collateral trials require confining generic conviction evidence to the convicting court's records approaching the certainty of the record of conviction in a generic crime State." It thus affirmed the sentencing judge's refusal to sentence Mr. Shepard under ACCA's harsh recidivist enhancement.

In Part III of the opinion, a four-member plurality relied on the doctrine of constitutional avoidance as an additional reason for its holding. The plurality pointed out that Sixth Amendment concerns are raised when a judge resolves a factual dispute over the nature of a burglary, for although it is a fact "about" a prior conviction, "it is too far removed from the conclusive significance of a prior judicial record, and too much like the finding subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." Justice Thomas did not join in Part III, and filed a separate concurring opinion explaining that he saw not constitutional doubt, but constitutional error, in such judicial fact finding.

Like in *Apprendi*, Justice Thomas' concurrence laments that "the constitutional infirmity of [the ACCA statute] ... makes today's decision an unnecessary exercise." He goes on to observe that "*Almendarez-Torres*, like *Taylor*, has been eroded by

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<sup>6</sup> 495 U.S. 575 (1990).

this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.... The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*’ continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*.... ”

This language is strong and unequivocal, so how can it be doubted that recidivist enhancements as sentencing factors will be short lived? Just because Justice Thomas is saying the same thing now that he said in *Apprendi*, and nothing happened in these intervening years, does not mean that major change for recidivist enhancements is not now around the corner. The Court’s Sixth Amendment jurisprudence is substantially more developed now as compared to then. One cannot help but conclude, as we did back in 2000, that the continued viability of *Almendarez-Torres* is again hanging on a thread (but *for real* this time!).

*Shepard* raises many questions, not the least of which is why the Court didn’t simply reverse *Almendarez-Torres* and be done with it? Was it only because the issue was not directly raised by the parties? Is the Court that afraid of “judicial activism” accusations and the anticipated wrath of Congress? And why didn’t the so-called majority that Thomas references, those who “now recognize[] that *Almendarez-Torres* was wrongly decided,” join his concurring opinion?

Whatever the answers, the *Shepard* majority avoided the constitutional question by construing the ACCA statute in a manner that did not require it to rely on *Almendarez-Torres*: by limiting inquiry into the facts of the prior conviction to those already contained in the prior judicial record, thus eliminating affirmative fact finding by the sentencing judge. To do otherwise would have required it to decide whether such fact finding is authorized by *Almendarez-Torres*. And given the Court’s Sixth Amendment jurisprudence since *Apprendi*, it seems inescapable

that only a jury can make findings that increase the statutory maximum. So for now, *Almendarez-Torres* has not yet been reversed, and *Shepard*’s holding only *directly* helps defendants convicted of non-generic burglaries in circuits that permitted courts to look at police reports and similar documents to determine if generic burglary was actually committed.

Nonetheless, the *Shepard* analysis has far-reaching potential, impacting both statutory and guideline recidivist enhancements. Defense practitioners should be creative and expansive in utilizing it, and must prudently raise and preserve the issue wherever possible, from the district court through to a petition for certiorari in the Supreme Court.

### **III. Litigation Strategies in Light of *Shepard***

#### **A. Statutory Recidivist Enhancements**

##### **1. Determine If The Priors Qualify**

Together, the categorical approach of *Shepard* and *Taylor* restricts those facts a court can consider in deciding whether prior convictions qualify for the enhanced penalty. It worked for the defendant in *Shepard* because the permissive records of the prior convictions did not clarify that generic burglary had been committed. It is therefore critical to review both the statutes and the court records from the prior convictions, including the plea colloquy in guilty plea cases (when available), to see if the requisite facts are present.

Like Massachusetts’ non-generic burglary statute in *Shepard*, a number of states have statutes addressing drugs or violence that may or may not meet the federal statute’s definition of a predicate conviction. For example, under Pennsylvania law, a trafficking offense involving marijuana carries a 5-year statutory maximum, and thus does not meet the ACCA’s definition of “serious drug offense,” which requires that it be punishable by at least ten years’ imprisonment. 18 U.S.C. § 924(e)(2)(A). In a post-*Shepard* ACCA sentencing here in Philadelphia, the

court disqualified a prior conviction because the conspiracy offense involved possession with intent to distribute heroin, cocaine and marijuana. It was not clear from the statutory definition, the charging document (the bill of information)<sup>7</sup> and the remaining records permitted under *Shepard* (the written plea agreement and the transcript from the plea colloquy) which substance was attributable to the defendant. The plea colloquy had been conducted simultaneously with that of two co-defendants, and although the factual basis included an allegation of a direct sale of cocaine by the defendant among other facts, the defendant was never asked whether he agreed to that specific fact.<sup>8</sup> Ultimately, the court disqualified the conviction because the records did not establish a plea to anything more than possession with intent to distribute marijuana.<sup>9</sup>

Carefully scrutinizing court records may be very fruitful in remote cases, where records may be incomplete or no longer in existence. You should also carefully check the criminal history section of the presentence report if it contains information harmful to your client, to ensure that the report has not relied on impermissible documents (such as arrest reports, witness interviews, former presentence reports or records from probation or parole files) in setting forth the facts of a prior conviction.

Remember the related argument that factors necessary for application of certain enhancements may go beyond the mere fact of conviction. Under the ACCA, for example, there must still be a finding that the priors constitute either a “violent felony” or a

“serious drug offense,”<sup>10</sup> and they must be found to have been “committed on occasions different from one another...” 18 U.S.C. § 924(e). The illegal reentry statute, for its part, requires findings about the timing of the removal proceeding in relation to when the conviction was sustained and whether the conviction constitutes an “aggravated felony.” 18 U.S.C. § 1326(b). Since *Almendarez-Torres* does not clearly authorize a judge to make such findings about the nature or timing of the prior convictions, those facts must be apparent from the face of the permissible documents and records or the enhanced penalty cannot apply. Counsel should object and preserve the issue whenever appropriate.

### **2. If Priors Qualify, Raise The Constitutional Challenge**

Assuming the prior convictions qualify under *Shepard* and *Taylor* for the enhanced penalty, it is wholly appropriate to use the reasoning in Justice Thomas’ concurrence to argue that the applicable recidivist statute is unconstitutional on its face. In addition to the ACCA, other statutes vulnerable to the challenge include 8 U.S.C. § 1326(b) (illegal reentry after deportation following aggravated felony conviction), 21 U.S.C. § 841(b) and § 851 (enhancements for prior drug convictions), 18 U.S.C. § 3559(c) and (e) (“Three Strikes” and offenses against children), and 18 U.S.C. § 2241 *et seq.* and § 2426 (sexual abuse). Given the tenuous viability of *Almendarez-Torres*, there is no reason to ever waive this issue unless you are getting something substantial in return from the government. The constitutional challenge should be made and preserved through appeal, including a petition for certiorari to the U.S. Supreme Court.

The challenge relies on the fact that they can run, but they can’t hide forever! *Shepard* avoided the constitutional issue, but it will have to be confronted

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<sup>7</sup> The prosecutor was unsuccessful in persuading the court to consider the criminal complaint, which specifically alleged a cocaine sale by the defendant, because under Pa.’s rules of criminal procedure, the bill of information, not the complaint, is the charging document.

<sup>8</sup> *Shepard* allows consideration of “explicit factual finding[s] by the trial judge [from the prior conviction]” but only those “to which the defendant assented.” 125 S. Ct. at 1257.

<sup>9</sup> Great work by Cathy Henry and Ben Cooper of the Philadelphia Federal Defender’s Office!

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<sup>10</sup> Are these factual findings or conclusions of law? The answer is not settled in this climate, and it is appropriate to argue that these are findings of fact.

by the Supreme Court at some point.<sup>11</sup> The argument is that *Almendarez-Torres* must be overruled, because prior convictions cannot logically be distinguished from other enhancement factors that increase the statutory maximum. Pursuant to the *Apprendi* line of cases, the Sixth Amendment demands that the fact of a prior conviction likewise must be charged and found by the jury beyond a reasonable doubt, or admitted by the defendant, before the enhanced penalty can apply. Moreover, *Almendarez-Torres* can be distinguished because its vulnerability mandates that it be read narrowly and strictly confined to the facts of that case. Those facts include an *admission* to the prior conviction and a Fifth (not Sixth) Amendment challenge under the due process clause. As such, it can possibly be argued that it is not controlling, especially where a defendant did not admit the prior conviction.

But given *Almendarez-Torres*' holding that recidivism is a sentencing factor and not an element, and that it has not yet been reversed, we can't expect district courts to rule in our favor at this time.<sup>12</sup> The goal should be to preserve the issue for appeal.

### **3. Jury Trials for Recidivist Enhancements**

The government, and some courts, may respond by invoking the doctrine of constitutional avoidance, reading a jury trial requirement into the statute to salvage it. As noted earlier, this was done in many districts in the aftermath of *Apprendi*, when the government began alleging priors in the indictment. Such allegations are surplusage, and motions to strike priors from the indictment should be filed, as explained below.

Although the constitutional challenge asserts

that jury findings are required, you must object to proceeding with a jury trial because it is not authorized by any of the recidivist statutes and is contrary to Congress' plain intent. That intent, which is that prior convictions are sentencing factors, not elements, to be proven to the judge by a preponderance of the evidence, has been confirmed by every court to consider the issue, up to the Supreme Court in *Almendarez-Torres*. Courts cannot legislate such deficiencies away, by construing a statute in a manner that coerces a jury trial and is plainly contrary to the intent of Congress.<sup>13</sup>

If you are ultimately forced, over objection, to try the issue of prior convictions to a jury, there should be a bifurcated proceeding during which the priors are separately addressed, after guilt has been determined on the underlying offense. The defendant can always offer to waive the jury and have the judge decide the prior conviction issue beyond a reasonable doubt. *Do not stipulate to the prior convictions*, because doing so may waive the issue altogether.

### **4. Motions To Strike Priors As Surplusage**

If the government alleges the priors in the indictment, you should object and move to strike them as surplusage pursuant to Fed.R.Crim.P. 7(d) and the due process clause. Many similar motions were filed in the aftermath of *Blakely*, when non-recidivist factors were being included in indictments. Many district courts granted those motions, although the reported decisions considering the issue are split, because of the state of confusion post-*Blakely*.<sup>14</sup>

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<sup>11</sup> Sixth Amendment jurisprudence since *Apprendi*, has evolved past the point of no return, and the issue will be ever harder for the Supreme Court to evade.

<sup>12</sup> It is the "[Supreme] Court's prerogative *alone* to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (emphasis added).

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<sup>13</sup> *United States v. Jackson*, 390 U.S. 570, 580 (1968) (courts are not free to impose upon an unwilling defendant a jury fact finding procedure not authorized by Congress, solely for the purpose of rescuing a statute from the charge of unconstitutionality).

<sup>14</sup> Compare *United States v. Jardine*, 2004 WL 2314511 (E.D.PA., Oct. 8, 2004) (granting motion to strike) with *United States v. Bortnick*, 2004 WL 2861868 (E.D.PA., Nov. 30, 2004) (denying motion to strike).

**5. Do Not Admit To The Prior Convictions**

It is extremely important, from this point forward, to *not admit to the prior convictions* at trial, in a written plea agreement, during a guilty plea colloquy, during a presentence investigation and, if possible, at sentencing. If your client has already done so, argue that it was not a knowing admission and try to clarify the record as best you can. If the government or the court tries to force the issue at the plea colloquy or at sentencing, remind them of the defendant's Fifth Amendment privilege under *United States v. Mitchell*.<sup>15</sup>

This could come up at a plea colloquy, for example, where your client is asked to acknowledge the 10-year statutory minimum and life maximum in a drug case where quantity would have triggered the 5-year minimum and 40-year maximum, but the government filed notice under 21 U.S.C. § 851 of a prior drug conviction to trigger the enhanced penalty. In *Mitchell*, the defendant could not be forced to answer questions as to drug quantity because of the Fifth Amendment privilege, and the same should hold true for prior convictions, given that *Almendarez-Torres* still regards them as sentencing factors. Make it clear that your client is not admitting the prior conviction to preserve this issue, and as long as the judge advises of the "possibility" of a life maximum, the colloquy is intact and the plea should be accepted. You should also object to the presentence report insofar as it reflects an enhanced penalty because of the prior conviction.

At sentencing, however, you may need to argue facts related to a prior conviction to lower the advisory guideline range and/or bolster your ultimate argument under 18 U.S.C. § 3553(a) for a reasonable sentence. For example, you may have a solid argument that a prior does not qualify as an aggravated felony, such that it warrants only a 4-level (not a 16-level) enhancement under USSG § 2L1.2, or that the criminal history category significantly over

represents the seriousness of your client's record. In most cases, you should not forfeit meritorious sentencing arguments to avoid admitting the prior convictions, but it could come down to a judgment call. Be aware of this potential dilemma and whenever possible, try to avoid it by articulating the merits of your legal argument carefully, perhaps hypothetically, without affirmatively admitting that your client sustained the conviction.

**B. Shepard's Application to Federal Sentencing Guidelines**

As noted earlier, *Shepard's* application to the sentencing guidelines is less clear, given their advisory nature. It is also possible that restricting the information courts can consider about prior convictions under the guidelines may work to a defendant's detriment, depending on the case. There may be a scenario where police reports and other extraneous documents are particularly helpful, perhaps in arguing why certain prior convictions are "related" and should not count as separate convictions. The point is to carefully consider whether *Shepard's* applicability to the guidelines benefits your client, and don't make the argument if it does not. In any event, if the underlying conduct is helpful in mitigating a prior conviction, it can always be argued as a mitigating factor under § 3553(a), in pursuit of a reasonable sentence that is not harsher than necessary.<sup>16</sup>

**1. Guideline Recidivist Enhancements**

In the career offender context, USSG § 4B1.1, a number of circuit courts across the country, including the Third Circuit, have been restricting the information courts can consider about prior

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<sup>15</sup> 526 U.S. 314 (1999).

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<sup>16</sup> Alternatively, it can be argued as an appropriate departure ground from the advisory range (assuming you concede that "departures" remain a viable concept post-*Booker*). *United States v. Harris*, 165 F.3d 1062, 1068 (6<sup>th</sup> Cir. 1999).

convictions for many years.<sup>17</sup> *Shepard* further clarifies what courts should consider in prior guilty plea cases. Section 4B1.2's definition of "crime of violence," which applies to the career offender guideline, includes (1) an elemental analysis, where the statute of conviction "has as an element the use, attempted use, or threatened use of physical force against the person of another; (2) enumerated categories of offenses, including "burglary of a dwelling, arson, or extortion" and the additional categories set forth in Application Note 1 (murder, kidnapping, aggravated assault, etc.); and (3) a catch-all provision which includes offenses for conduct that "involves the use of explosives" or "presents a serious potential risk of physical injury to another," which conduct the commentary in Application Note 1 instructs *must be* "expressly charged...in the count of which the defendant was convicted...." If that conduct is not expressly charged, the conviction does not qualify.

*Shepard* can be read broadly as also restricting the court's fact finding authority regarding other recidivist enhancements in the guidelines, including those found in § 2K2.1 (firearms), §2L1.2 (illegal reentry), and § 4B1.5 (repeat sex offender against minors). There is no logical reason to apply restrictions to the career offender guideline but not to similar recidivist guidelines. The concern for ensuring the reliability of information and avoiding collateral, mini-trials at sentencing proceedings is equally applicable.

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<sup>17</sup> *See, e.g., United States v. Joshua*, 976 F.2d 844, 856 (3d Cir. 1992) (must look solely to conduct alleged in count of conviction); *United States v. Parson*, 955 F.2d 858, 862-73 (3d Cir. 1992) (where statute of conviction indicates offense involved serious potential risk of physical injury to another," do not look to underlying conduct); *United States v. McAllister*, 927 F.2d 136, 138-39 (3d Cir. 1991) (follows *Taylor*); *United States v. Gaitan*, 954 F.2d 1005, 1008-11 (5<sup>th</sup> Cir. 1992) (cannot consider conduct underlying state possession conviction to expand to trafficking offense); *United States v. Damon*, 127 F.3d 139, 140-45 (1<sup>st</sup> Cir. 1997); *United States v. Hernandez*, 145 F.3d 1433, 1440 (11<sup>th</sup> Cir. 1998) (error to use arrest affidavits to determine if convictions were for selling rather than buying drugs).

## 2. Calculating Criminal History Points

Because Part III of the *Shepard* decision states that it is unclear whether *Almendarez-Torres* authorizes a court to make findings beyond the fact of conviction, it can be argued in appropriate cases that *Shepard* restricts the court's fact finding authority in calculating criminal history points as well. Even given that the guidelines are now advisory, the Supreme Court's clear directive that nothing outside of the judicial records of prior convictions should be considered is compelling, at least by way of guidance. Criminal history points are assigned based upon many factors that go beyond the mere fact of conviction and that may not be reflected in the court records sanctioned by the *Shepard/Taylor* analysis. These include the length of the prior sentence imposed, how long ago it was imposed, its relatedness to other prior convictions, and whether the offense conduct occurred while the defendant was under court supervision or within two years of release from imprisonment.

Judicial records of the prior conviction should be carefully reviewed, for they may not contain the facts necessary for the assignment of criminal history points. For example, a judgment order may reflect only a flat "time served" sentence, without specifying the time actually served that was being credited. In that scenario, argue that the court should not go beyond the *Shepard* and *Taylor* restraints to determine how long the defendant spent in custody, and that only one criminal history point should apply under § 4A1.1(c). If the court wants to exceed those restraints because of the advisory nature of the guidelines, it can also be argued that the resulting sentence would be unreasonable, within the meaning of *Booker*.

## C. Cases on Appeal

For cases that are on direct appeal, it is prudent to file supplemental briefs challenging *Almendarez-Torres* and any recidivist enhancements that were imposed. If the case was on appeal and was remanded for re-sentencing after *Booker*, such proceedings are *de novo*, and defendants can challenge ACCA and other enhancements at the new

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## THE LIBERTY LEGEND

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sentencing proceeding.

### IV. Conclusion

The *Shepard* analysis is not confined to the Armed Career Criminal Act (ACCA) and should apply to all statutory recidivist enhancements that treat prior convictions as sentencing factors. The exact

reach of the analysis, especially in the sentencing guidelines context, remains to be seen, but a broad reading of it invites the arguments suggested above. The decision opens up new arenas for challenging criminal history enhancements, and in this climate of uncertainty, they should be creatively pursued whenever possible.

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## REMEMBERING GUANTANAMO BAY

*by David Mote, former Deputy Chief Federal Defender for the Central District of Illinois, Peoria, whose passing on October 11, 2003, was a great loss to the entire defender community.*

Last month, attention was focused on the two year anniversary of the brutal attacks of September 11, 2001. It is appropriate that we remember what happened and the Americans who were lost on that day. It is also appropriate to remember that during the following two years, significantly more than 600 citizens of more than forty nations have been detained by American forces and held captive in Guantanamo Bay, Cuba. None have yet been tried. Last month, Secretary Rumsfeld made it clear that putting the detainees on trial was not a priority. "Our interest is in not trying them and letting them out," he said. "Our interest is in – during this global war on terror – keeping them off the streets, and so that's what's taking place." The Pentagon has asserted the right to hold the combatants (whom it contends are not prisoners of war with rights under the Geneva convention) until the end of the hostilities. It is acknowledged, however, that the war on terrorism could go on for decades. Reflecting on the situation in Guantanamo Bay, the classic, catchy Beach Boys' tune *Kokomo* came to my mind. Despite the seriousness of the subject, I thought satirical lyrics to that Beach Boys' classic might kindle a little awareness to the situation in Guantanamo Bay, so without further ado, your musically-stunted writer presents the following:

### Guantanamo

Lyrics by David Mote @ 2003  
(to the Beach Boys tune, *Kokomo*)

Afghani, Iraqi ooh I wanna take you  
Las Tunas, Matanzas you'll never see your mamas  
No trials, appeals baby why don't we go Havana  
Outside the law  
There's a place called Guantanamo  
That's where you gonna go to get away from it all

Bodies in the sand  
Tropical drink in your capture's hand  
He'll interrogate you  
To the rhythm of a oil drum band  
Down in Guantanamo

Afghani, Iraqi ooh I wanna take you  
To Las Tunas, Matanzas you'll never see your  
mamas

No trials, appeals baby why don't we go  
Ooh I wanna take you down to Guantanamo

We'll get there fast And then we'll sweat you slow  
That's where we wanna go  
Way down to Guantanamo

Past Martinique, with that Muslim mystique  
We'll put out to sea And we'll perfect our chemistry  
By and by we'll defy a little bit of sanity  
Afternoon sunlight  
Truth serum and muggy nights  
That foreign look in your eye  
Give me a tropical contact high  
Way down in Guantanamo

