LEGAL PUBLICATIONS IN SPANISH

TO THE POINT

PRINT EDITION 77

Update on Two Point Reduction: It's Retroactive!

By Johanna S. Zapp, Esq.

The United States Sentencing Commission voted to reduce the sentencing guideline levels applicable to most federal drug trafficking offenders.

The Commission voted unanimously to amend the guidelines to lower the base offense levels in the Drug Quantity Table across drug types. The drug guidelines under the amendment would remain linked to statutory mandatory minimum penalties. The Commission estimates that approximately 70 percent of federal drug trafficking defendants would qualify for the change, with their sentences decreasing an average of 11 months, or 17 percent, from 62 to 51 months on average.

The Drug Quantity Table amendment would:

• Generally reduce by two levels the base offense levels for all drug types in the Drug Quantity Table in guideline §2D1.1, which governs drug trafficking cases;

• Ensure the guideline penalties remain consistent with existing five- and ten-year statutory mandatory minimum drug penalties by structuring the Drug Quantity Table so that offenders eligible for the five- and ten-year mandatory minimum penalties would receive base offense levels 24 and 30 (which correspond to a guideline range of 51 to 63 months and 97 to 121 months, respectively), rather than the existing levels of 26 and 32 (which correspond to 63 to 78 months and 121 to 151, respectively);

• Maintain 38 as the highest base offense level in the drug quantity table for the highest quantities of drugs;

This amendment will pass in November 2014, however, your lawyer MUST ask the court to apply it now. The policies for the US Attorney's offices appear to be that they will not object to the request made by your attorney to have the two point reduction applied to your sentence before the November date. However, it is required that your attorney ask for the two point reduction, it will not be offered by the government unless your attorney asks for it.

The U.S. Sentencing Commission voted unanimously to make the "Minus 2" amendment to the Offense Level for drug quantity fully retroactive. The amendment will have an instruction that **prohibits any person from getting released until Nov 1, 2015.**

About 47,000 inmates should benefit. Judges can begin to consider motions on Nov 1, 2014.

As of now, there is no information about how inmates can go about reducing their sentences. In the coming months, I would anticipate there will be more information. In the meantime, if you have federal defenders, or CJA, you must ask them to help you. Or, if you have retained counsel, write a letter to you lawyer and ask them for help.

I will send out more information once it becomes available.

If you have questions about the two point reduction, please contact your lawyer.

However, if you feel you must contact us, please do so BY EMAIL ONLY. Please do not call. Thank you.

Justice Prevails, Finally!

By Johanna S. Zapp, Esq.

An amazing and rare thing happened in a courtroom in the Eastern District of New York this past week. A defendant who had originally been sentenced to a mandatory 57 years was resentenced (after serving twenty years) to time served. Judge John Gleeson, a District Court Judge in the Eastern District of New York, made every effort possible to figure out a way to get Mr. Holloway's sentence changed. He himself made two separate requests to the US Attorney of the Eastern District of New York to vacate some of the charges so that the mandatory sentencing scheme (totaling 57 years) would not apply. He finally convinced the United States Attorney that it was the right and just thing to do.

You all should know that unfortunately, this is a very unique and rare occurrence. It was a truly extraordinary act done by an extraordinary judge whose sense of fairness is incomparable.

Below is an edited version of the New York Times article describing what Judge Gleeson did:

At Behest of Judge, U.S. Shortens Man's 57-Year Mandatory Sentence

By Monique O. Madan, July 29, 2014

A Queens man who had been serving a 57-year mandatory federal prison sentence was resentenced on Tuesday to time served, capping a judge's extraordinary efforts to undo the damage from what he believed was a grossly excessive sentence.

The resentencing hearing came to be only after the judge, John Gleeson, persuaded Loretta E. Lynch, the United States attorney for the Eastern District of New York, to vacate two of the three convictions against Francois Holloway, who had been prosecuted on carjacking and other charges.

Judge Gleeson, who presided over the hearing on Tuesday, did not argue that Mr. Holloway, 57, was innocent; his petition was based on what he called the unfairness of Mr. Holloway's mandatory sentence, which was calculated using a requirement known as "stacking." The provision, which some judges and lawyers argue is intended more as a recidivism measure, was applied to Mr. Holloway even though his crimes were committed hours apart.

Mr. Holloway was charged in 1995 with three counts of carjacking and using a gun during a violent crime (even though it was an accomplice, not Mr. Holloway, who carried the gun), along with participating in a chop shop.

Prosecutors offered him an 11-year plea deal that he turned down after his lawyer persuaded him that he would be acquitted at trial. Mr. Holloway lost.

For the first conviction on the gun count, the law required Mr. Holloway to receive five years. But for the second and third convictions, the law required 20 years for each one, served consecutively, in accordance with the stacking requirement.

Since prosecutors agreed last week

to vacate two of the three convictions, the stacking provision no longer applied to Mr. Holloway.

"A prosecutor who says nothing can be done about an unjust sentence because all appeals and collateral challenges have been exhausted is actually choosing to do nothing about the unjust sentence," Judge Gleeson wrote in a memorandum about Ms. Lynch's decision released on Monday. "Some will make a different choice, as Ms. Lynch did here."

All of Mr. Holloway's co-defendants pleaded guilty and served no more than six years.

Mr. Holloway, who was to have remained in prison until 2045, was given a sentence in 1996 that was more than twice the average sentence in the district for murder that year.

"Second looks in the federal criminal justice system just don't happen — ever," said Mr. Holloway's attorney. "Except when they do."

Mr. Holloway, in court on Tuesday, waved at the three relatives who attended the hearing, and then smiled.

"Do you know how many funerals he missed? Seven," his aunt, Sedatrius Hill, 63, said. "How many births he wasn't there for? So many. He missed 20 years of his life."

The last word went to Judge Gleeson, who spoke directly to Mr. Holloway.

"It says something about you that you are thanking me and the U.S. attorney's office," he said. "But it's important that you know that this is not an act of grace. It's an effort to do what we're here to do: be fair and exercise justice. You have been given back 30 years of your life. All I have to say is, make it count."

The Government is Reading Your Emails

By Johanna S. Zapp, Esq.

Lately, there has been a lot of discussion about the Corrlinks system and the privacy issues related to inmate-attorney correspondence. Below is an edited article that appeared in the New York Times about how the government used inmates' emails against them at trial.

It seems that some judge's are against the practice of monitoring, while others do not believe it infringes on privacy issues. It simply depends on the particular judge you have in your case. One Judge in Brooklyn was quoted as saying ""The government's policy does not 'unreasonably interfere' with [the inmate's] ability to consult his counsel, while another judge in the same courthouse in Brooklyn ruled against the government last month, barring it "from looking at any of the attorney-client emails, period."

This is a very real and serious issue that you all should be aware of. Your emails and your telephone calls to your attorneys, to your family and to your friends are being monitored.

Prosecutors Are Reading Emails From Inmates to Lawyers

By Stephanie Clifford, July 22, 2014

The extortion case against a reputed mafia boss, encompassed thousands of pages of evidence, including surveillance photographs, cellphone and property records, and hundreds of hours of audio recordings.

But even as the defendant's attorney sat in a jail cell, sending nearly daily emails to his lawyers on his case and his deteriorating health, federal prosecutors in Brooklyn sought to add another layer of evidence: those very emails. The prosecutors informed the defense attorney last month that they would be reading the emails sent to his lawyers from jail, potentially using his own words against him.

Jailhouse conversations have been many a defendant's downfall through incriminating words spoken to inmates or visitors, or in phone calls to friends or relatives. Inmates' calls to or from lawyers, however, are generally exempt from such monitoring. **But across the country, federal prosecutors have begun reading prisoners' emails to lawyers — a practice wholly embraced in Brooklyn, where prosecutors have said they intend to read such emails in almost every case.**

The issue has spurred court battles over whether inmates have a right to confidential email communications with their lawyers — a question on which federal judges have been divided.

An incarcerated former Pennsylvania state senator got into further trouble in 2011 when prosecutors seized his prison emails. In Georgia, officials built a contempt case against a man already in federal prison in part by using emails between him and his lawyers obtained in 2011. And in Austin, Tex., defense lawyers have accused members of law enforcement of recording attorney-client calls from jails, then using that information to tighten their cases.

"It's very troubling that the government's pushing to the margins of the attorney-client relationship," said Ellen C. Yaroshefsky, a professor at the Cardozo School of Law.

Defense lawyers say the government is overstepping its authority and taking away a necessary tool for an adequate defense. Some of them have refused to admit even the existence of sensitive emails — which, they say, perhaps predictably, are privileged.

All defendants using the federal prison email system, Trulincs, have to read and accept a notice that communications are monitored, prosecutors in Brooklyn pointed out. Prosecutors once had a "filter team" to set aside defendants' emails to and from lawyers, but budget cuts no longer allow for that, they said.

While prosecutors say there are other ways for defense lawyers to communicate with clients, defense lawyers say those are absurdly inefficient.

A scheduled visit to see an inmate at the Metropolitan Detention Center in Sunset Park, Brooklyn, took lawyers five hours, according to court documents filed by one of the inmate's lawyers. The trip included travel time from Manhattan and waiting for jail personnel to retrieve the inmate.

Getting confidential postal mail to inmates takes up to two weeks, one lawyer wrote. The detention center, like all federal jails, is supposed to allow inmates or lawyers to arrange unmonitored phone calls. But a paralegal spent four days and left eight messages requesting such a call and got nowhere.

David Zapp and Johanna Zapp articles are available on the web at http://davidzapp.com

Mr. Zapp and Ms. Zapp (daughter) are criminal defense lawyers specializing in narcotics, extradition and money laundering cases.

Mr. Zapp can be contacted at 917-414-4651 or davidzapp@aol.com.

Ms. Zapp can be contacted at 917-742-4953 or jszapp@aol.com

Write to us:
Legal Publications in Spanish
P. O. Box 5024
ATTN: David Zapp, Johanna Zapp
Montauk, NY 11954