THE LEGAL EAGLE

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Criminal Defenders Newsletter

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From the desk of the Defender

The Office of the Federal Defender for the Western District of Tennessee serves the citizenry of West Tennessee with efficient adequate representation in Federal Court. Moreover, the Office supports the Criminal Justice Act Panel attorneys by providing training, sharing research from our developed brief banks and provide strategy sessions with CJA attorneys. It is important for criminal defense attorneys to know and realize that you cannot fool your clients that you genuinely care about what happens to them. During your initial meeting, the client will be sizing you up to determine whether you are there to help or hurt him. He expects the latter. However, your tone, demeanor and body language will cosign his ultimate decision. Be conscious of the tone you use during your initial meeting. Don't treat your client as if he has the plaque and don't act all stiff and superior. Everyone knows that you have a law degree and more likely than not your client doesn't. Ok, so you are a cotton field ahead of him in education but what are the comparable measurements in common sense. Treat your clients as though they are the dearest people to you and see how the treatment is reciprocated. *Doris Randle-Holt*

"I just wanted you to know that I appreciate everything you have done for me"

"I've never had anyone to fight for me."

" I owe you my life". Client quotes

Amendment 782 and what it means to your client

In 2014, the U.S. Sentencing Commission submitted to Congress an amendment to the federal sentencing guidelines that reduces the offense levels in the Drug Quantity Table. The Sentencing Commission estimates that over 51,000 persons nationally will benefit from the retroactive application of the "2 level reductions." This includes over 500 defendants who were sentenced in our district alone. The Sentencing Commission estimates that the average reduction for the average sentence will be 23 months, or 18 percent. 782 shall not be ordered unless the effective date of the court's order is November 1, 2015, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment is not effective prior to November 1, 2015.

The Federal Defender's Office has been handling most of the 2 level cases but private counsel and CJA attorneys have also been involved. So far, the process has been fairly straightforward for eligible defendants. The Federal Defender's Office confers with U.S. Probation and the United States Attorney's Office. If there is consensus that a defendant is eligible for a 2 level reduction, the Federal Defender's Office files joint or consent motions requesting the reduced sentences. The Federal Defender's Office is also litigating opposed motions when appropriate.

Not all individuals are eligible for 2 level reductions. In order to qualify, a defendant's original sentence must have been "based on" an offense level assigned in the Drug Quantity Table. Accordingly, defendants who were sentenced as career offenders are ineligible for a 2 level reduction because their original sentences were "based on" the career offender provisions under U.S.S.G. § 4B1.1 – rather than the Drug Quantity Table under U.S.S.G. § 2D1.1. There are other potential pitfalls including the operation of mandatory minimums and certain plea agreements that irrevocably fix a client's sentence at a certain level, regardless of the recent amendments to the Drug Quantity Table.

On balance, though, it appears that a majority of candidates will be deemed eligible for the 2 level reductions, and their sentences are being adjusted accordingly. This means that your clients will be coming home sooner and restarting their lives years or months ahead of schedule. That's a great result for your clients and their families.

If you would like additional information about the 2 level reductions, contact David Bell or Peter Oh at the Federal Defender's Office in Memphis or Christina Wimbley in Jackson. Kasey Weiland and James Powell are the assigned Assistant United States Attorneys in Memphis and Jackson, respectively. Lorie Green is the point person at U.S. Probation.

By Peter Oh

SUPREME COURT RULES

THE ARMED CAREER CRIMINAL ACT UNCONSTITUTIONAL

Before everyone gets excited, the Supreme Court has ***not*** yet so ruled. However, the Supreme Court will hear oral argument on this precise issue on April 20, 2015 in the case of *Johnson v United States*. So could the *Supremes* really strike down the mighty ACCA? Let's take a look at *Johnson* and its procedural posture to try and figure out the answer.

In *Johnson*, the Eighth Circuit affirmed the district court's ruling that the defendant's prior conviction for possession of a sawed off shotgun qualified as a predicate under the ACCA. As we all know, in order for the ACCA's 15 year mandatory minimum to apply, the defendant must have at least three prior violent felonies or serious drug felonies. In determining whether, a prior conviction qualifies as a serious drug felony, the process is fairly straightforward. Did the defendant face a potential ten year sentence? If the answer is yes, then it qualifies. Congress defined violent felony by specifically enumerating certain felonies that qualify ("burglary, arson, extortion, or the use of explosives"). Further, the felony qualifies if it "has as an element the use, attempted use, or threatened use of physical force against … another". Finally, Congress tacked on the infamous "residual clause," providing that any other felony qualifies if it "involves conduct that presents a serious potential risk of injury."

In *Johnson*, the defendant filed for writ of certiorari and simply argued that the possession of a sawed off shotgun did not qualify under the residual clause because by the very nature it did not present a serious potential risk of injury.

Admittedly, so far this does not sound like a groundbreaking case. After all, the Supreme Court has already decided four other cases dealing with the residual clause. To date, the Supreme Court has concluded that "vehicle flight from law enforcement" (*) and "attempted burglary" () qualify, while "driving under the influence" () and "failure to report for incarceration" () do not qualify.*

So what gives? Why all the fuss over this case? Well, on November 5, 2014, this case was heard by the Supreme Court. Wondering why oral argument is set for April 20, 2015? The answer is that after argument was heard, the Supreme Court sua sponte ordered the parties to brief whether the residual clause of the ACCA was unconstitutionally vague.

In *Sykes*, it was Justice Scalia who opined in his dissent that the residual clause of the ACCA was unconstitutionally vague. Obviously, the other Justices did not concur at the time. However, during oral argument, Justice Alito, asked the Solicitor General during oral argument, ""The residual clause has caused no end of problems for this Court. Can't the Justice Department propose some legislation to improve the situation?" Despite the fact the defendant's attorney stated in rebuttal that "this Court need not get into whether it was unconstitutionally vague," the Court ordered both sides to file briefs on this very issue and to return for oral argument.

So, the question now is whether Scalia has five votes to strike down the residual clause. I'll answer that with another question. If he did not, then why in the world would the Justices have ordered the parties *sua sponte* to brief the issue and then return for oral argument later? Is this a guarantee that the above headline will come to fruition. No. However, we must all prepare for that day as if it might happen. What does that mean? It

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By Ned Germany

United States District Court Judge, Samuel Hardy Mays, Jr. is planning to take senior status July 1, 2015. Judge Mays was nominated for appointment on January 23, 2002 by President George W. Bush. He received his commission on May 10, 2002. Judge Mays is a native son of Memphis, TN. He graduate cum laude with a B.A. from Amherst College in 1970 and in 1973 received his law degree from Yale University School of Law. He was a member of the Board of Editors on the Yale Law Journal.

Judge Mays had a stellar career before becoming a judge. He began as an Associate with Heiskell, Donelson, Adams, Williams & Kirsch, 1973-1979;Shareholder, Baker, Donelson, Bearman & Caldwell, 2000-2002; Legal Counsel 1995-1997 and Chief of Staff 1997-2000 to Governor Don Sundquist for the State of Tennessee.

Oh no, he is not going anywhere. Judge Mays plans to continue working as hard as ever. He plans to maintain a full criminal case load for the immediate future. We look forward to seeing his portrait hanging in his courtroom where he served.

By Doris Randle-Holt

Sixth Circuit Judicial Conference

The judicial conference for 2015 is an open conference. The Conference begins May 12-15 in Detroit, Michigan. An outstanding litany of speakers will engage the minds of the attendees including Supreme Justice Elena Kagan.

Amongst the topics are Cyber Security, Sentencing-Drug Policy, The Ted Stevens Trial and Evidence for Everyone (including Judges).