

IN HOT PURSUIT of Federal Criminal Justice

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Court's Commitment to Advisory Guidelines Reaffirmed

Michael S. Nachmanoff

In one of the most significant federal sentencing cases this term, the Supreme Court clearly reaffirmed its commitment in *United States v. Pepper* to advisory guidelines and the *Booker, Gall, and Kimbrough* line of cases by holding that “a district court at re-sentencing may consider evidence of the defendant’s post-sentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines range.”

Justice Sotomayor wrote for the majority in a 6-2 decision. The case involved Jason Pepper, who was charged with distribution of methamphetamine and subject to a pre-*Booker* mandatory guideline range of 97-121 months. The court departed to 24 months of imprisonment, well below the sentence sought by the government in its motion for a substantial assistance departure. The government appealed, and the district court—on re-sentencing post-*Booker*—once again imposed a sentence of 24 months, based on the fact Pepper had successfully completed the intensive drug treatment program in the Bureau of Prisons, enrolled in community college, and obtained stable employment. The Eighth Circuit reversed, holding that post-sentencing rehabilitation was categorically prohibited as basis for a variance. The Supreme Court, reversing the Eighth Circuit, now makes clear that such considerations are proper under 18 U.S.C. § 3661 and 18 U.S.C. 3553(a).

Although *Pepper*’s focus is on post-sentencing rehabilitation, Justice Sotomayor’s opinion casts perhaps an equally bright spotlight on the importance of considering rehabilitation prior to initial sentencing. Leading

with forceful language from the Court’s opinion in *United States v. Williams*, now codified at 18 U.S.C. § 3661, and 18 U.S.C. § 3553(a)(1), the majority opinion emphasizes that it is “highly relevant - if not essential” in the sentencing process to examine the “life and characteristics” of a defendant.

This case represents a great win for the consideration of post-sentencing rehabilitation (and every other factor relevant to sentencing under §§ 3661 and 3553(a)), but also serves to underscore the value of de-constructing the guidelines and policy statements to show that they were not developed in the commission’s “characteristic institutional role” and constitute unsound policy. In response to the argument that the Eighth Circuit’s decision should be upheld because the commission had also prohibited consideration of post-sentencing rehabilitation in a policy statement, the majority stated: “[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views. That is particularly true where, as here, the Commission’s views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.” *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011).

Justice Breyer filed an opinion concurring in part, and concurring in the judgment. Justice Alito filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part. Justice Thomas filed a dissenting opinion, Justice Kagan took no part in the consideration or decision of the case. Opinion at www.supremecourt.gov/opinions/10pdf/09-6822.pdf. **IHP**

Letter from the Chair

Michael Sklaire

On behalf of the Board of the Criminal Law Section, I want to express our appreciation to all of the members of our section who have provided articles and case updates, and all those who have assisted with CLE presentations during the past year. We have put on successful events in San Francisco, Phoenix, New Orleans, and Washington, D.C., and are looking forward to an upcoming white-collar crime CLE program in Los Angeles. Our focus has been on reaching out to the local chapters and other sections to expand our network and broaden our lawyers’ exposure. We are currently in the process of staffing section leadership for the upcoming two-year term that begins in October. If you are interested in being on the Board and taking a more active role in the direction of the section, please contact me at sklairem@gtlaw.com. Also, as always, we are looking for writers who want to submit articles for the next newsletter. Let me know if you are interested. Finally, we welcome input on how to improve the section or our outreach. I hope to see you all at the FBA’s Annual Meeting and Convention in Chicago on Sept. 8–10, 2011. **IHP**

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A Trap for the Unwary: Comparing Federal and State Practices Regarding Admonitions of Secrecy Made to Grand Jury Witnesses

Mike Emmick

As an assistant U.S. attorney in Los Angeles for 25 years, I became very familiar with the federal grand jury secrecy provisions of Rule 6(e). Now that I'm in private practice, I sometimes represent clients in state grand jury proceedings, and I've been quite surprised at how much the state practices can differ from the federal practice, particularly regarding whether grand jury secrecy obligations extend to witnesses. For instance, although federal grand jury secrecy rules generally do not apply to witnesses at all, district attorneys in Los Angeles routinely admonish grand jury witnesses that they may not disclose the substance of their testimony to anyone. Similarly, the DA's letters that accompany grand jury subpoenas routinely advise the recipients that they may not disclose even the fact of the subpoena.

The differences between federal and state practices in this area can create a "trap for the unwary" federal practitioner, which prompts this short article on the subject. Under Rule 6(e), absent a court order, "matters occurring before the grand jury" generally may not be disclosed by prosecutors, case agents, grand jurors, court reporters, or interpreters. Violations are punishable by contempt.

Grand jury witnesses, however, are not bound by this rule and therefore may tell friends, family, lawyers, the press, or even the target of the investigation about their testimony in the grand jury. Likewise, federal prosecutors generally may not direct or admonish witnesses not to disclose their testimony. State grand jury practice is sometimes very different from the federal practice. In particular, states do not uniformly exempt witnesses from the obligation of grand jury secrecy. Roughly a dozen states prohibit witnesses from disclosing their grand jury testimony—including, for example, New York, New Jersey, and New Mexico.

Adding to that uncertainty, some state-law prohibitions on witness disclo-

sure are not set forth expressly; they are simply inferred from the state's general provisions regarding grand jury secrecy. California law, for example, is silent on the question of the witness's obligation of secrecy. Nonetheless, California grand juries routinely admonish witnesses not to disclose their testimony. That practice is based on a 1983 Opinion of the California Attorney General, which is based on inferences from the state's overall goal of conducting grand-jury sessions in secret.

In states where grand jury witnesses are covered by the obligation of secrecy, some unfamiliar questions arise regarding the scope of the prohibition. For example, "How long does the secrecy obligation last for witnesses?" In the federal system, where the secrecy obligation applies principally to grand jurors, prosecutors, and case agents, that obligation generally lasts forever or until a court order permits disclosure. In states where witnesses are under an obligation of secrecy, however, the rules are a bit more lax, because witnesses have a stronger countervailing First Amendment interest in discussing their testimony. Most states permit witnesses to speak publicly after the case has been indicted or the investigation has been terminated. Other states are not quite so clear about when or even whether such witness disclosure is permitted.

An important related question is, "What is the witness prohibited from disclosing—is it just the grand jury testimony itself, or is it also the historical facts underlying that testimony?" In theory, the answer to this question should be quite clear: At most, witnesses should be barred from discussing only their testimony, not the underlying facts. Otherwise, entire blocks of important historical facts could effectively be made unavailable simply because a prosecutor chose to ask the witness some questions about them.

The state statutes, however, are not always so accommodating. In 1990, the U.S. Supreme Court addressed the

two above-described disclosure issues in *Butterworth v. Smith*, 494 U.S. 624 (1990). There, the Court considered a Florida grand jury secrecy statute that imposed an obligation of secrecy on witnesses; prohibited any discussion of either the testimony or the historical facts underlying that testimony; and imposed that obligation forever. The Court acknowledged that states may have a right to forbid witnesses from making some disclosures about their testimony, but held that Florida's interests in such an extensive prohibition were outweighed by the witness's First Amendment interests. The full implications of *Butterworth* are not entirely clear, however, because the invalidated Florida law combined several kinds of witness restraints in the same statute.

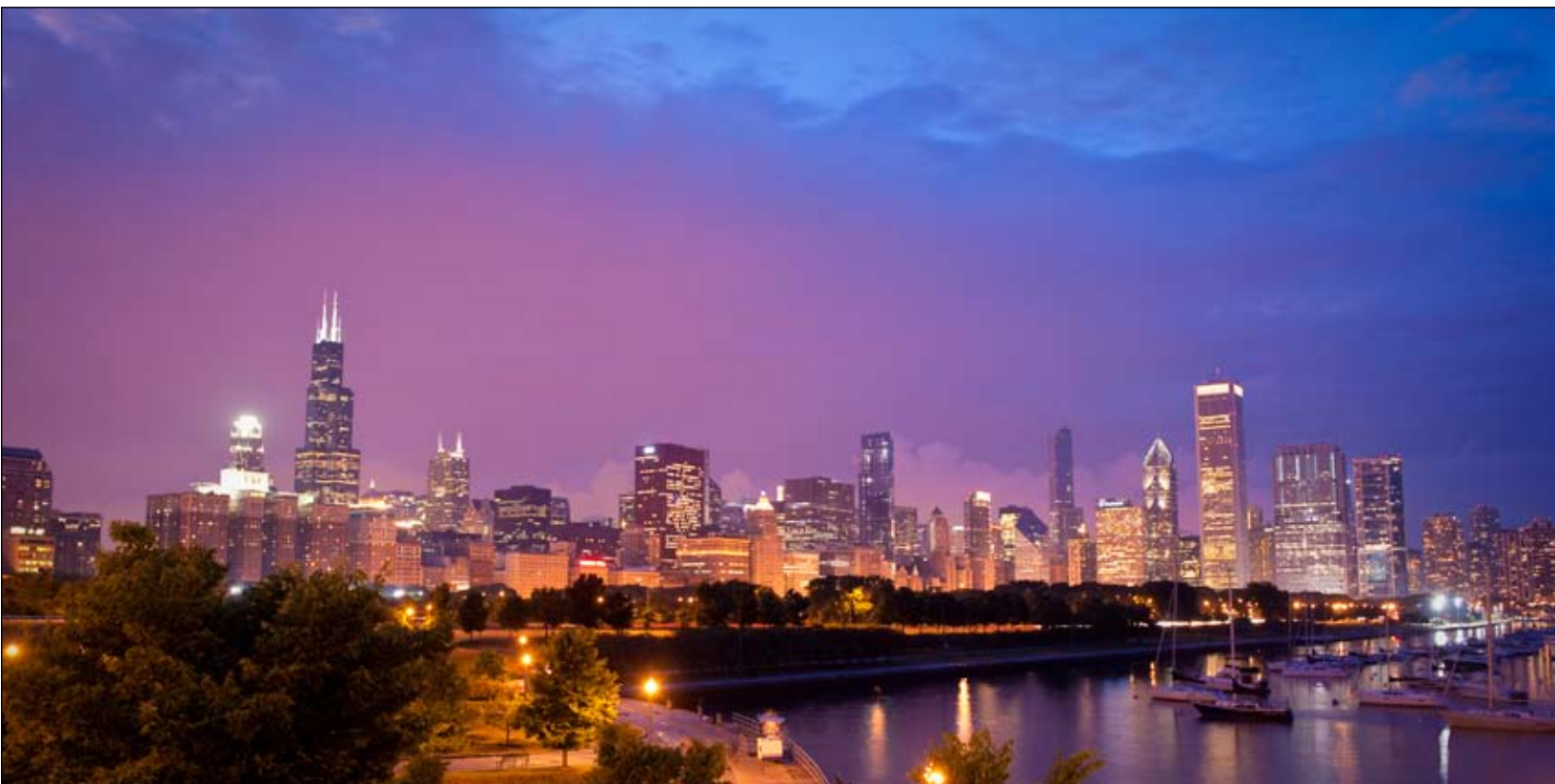
A surprising third issue is occasionally noted by commentators: "In states where grand jury secrecy rules apply to witnesses, are witnesses permitted to disclose their testimony to their own counsel?" As a matter of common sense, that question should be easy to answer. After all, an attorney stands in the shoes of the client, and an attorney could not meaningfully represent a grand jury witness if the attorney could not learn what the witness had been asked or told. Most states that prohibit grand-jury-witness disclosure also expressly exempt a witness's disclosures to his own counsel—examples are New York, Michigan, and Colorado—but three states do not (Mississippi, Missouri, and Washington).

Despite the commentators, I firmly believe that courts would permit such disclosure even without express statutory authorization, but the matter is not clearly settled. At a minimum, attorneys should be aware that their clients may become confused by the prosecutor's nondisclosure admonition, and should be prepared to explain that obligation authoritatively.

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September 8-11, 2011

Supreme Court Updates

Virginia Laughlin Schleuter and Geoff Cheshire

On Jan. 19, 2011, the U.S. Supreme Court overturned awards of habeas corpus relief granted by the Ninth Circuit in two cases involving claims of ineffective assistance of counsel.

***Harrington v. Richter*, No. 09-587**

In *Harrington v. Richter*, the court announced that state court decisions summarily disposing of federal claims without explanation are entitled to federal courts' deference under the federal habeas corpus statute. The court went on to decide that the Ninth Circuit in this case failed to accord the deference due the state court's summary denial of the petitioner's claim that his trial attorney provided ineffective assistance by failing to present expert testimony on blood evidence that might have bolstered the defense case. See the opinion at www.supremecourt.gov/opinions/10pdf/09-587.pdf.

***Premo v. Moore*, No. 09-658**

In *Premo v. Moore*, the court ruled that the Ninth Circuit erred in concluding that the state court unreasonably applied federal law when it rejected the petitioner's claim that his counsel provided ineffective assistance in neglecting to challenge the admissibility of a confession before advising the petitioner to accept a plea bargain offered by prosecutors. See the opinion at www.supremecourt.gov/opinions/10pdf/09-658.pdf.

***Tapia v. United States*, No. 10-5400**

In *Tapia v. United States* (10-5400), decided June 16, 2011, Justice Kagan, writing for a unanimous Court, confirms that a district judge may not impose or lengthen a criminal sentence for the purpose of assisting rehabilitation. 18 USC 3582(a) categorically states that "imprisonment is not an appropriate means of promoting correction and rehabilitation."

The Sentencing Reform Act guides how 18 USC 3553(a)(2) factors may be used in fashioning a sentence. For example, retribution may not be a factor in the imposition of a term of supervised release. Valid 3553(a) factors for determining the length of incarceration include incapacitation, retribution, and deterrence. Left open is whether reduction of a prison sentence in order to promote rehabilitation would be permissible. See the opinion at www.supremecourt.gov/opinions/10pdf/10-5400.pdf.

***Bullcoming v. New Mexico*, No. 09-10876**

The June 23, 2011, 5-4 ruling in *Bullcoming v. New Mexico* (09-10876) followed the Court's confrontation clause decision of *Melendez-Diaz v. Massachusetts*, 557 U. S. ___ (2009), which held that a forensic lab report confirming the presence of illegal narcotics was testimonial under Crawford and the Sixth Amendment. Where the defense declines to stipulate to such facts, prosecutors must produce a live witness at trial who can be subject to cross examination. *Bullcoming* concerned the introduction of a forensic lab report prepared in anticipation of criminal prosecution through the in-court testimony of a lab supervisor who did not perform or observe the tests and holds that such "surrogate testimony" does not pass constitutional muster. "[T]he accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." The dissenters chided the majority for barring "reliable" evidence of criminal conduct out of a "wooden formalism" in their application of the Confrontation Clause. See the opinion at www.supremecourt.gov/opinions/10pdf/09-10876.pdf.

***J.D.B. v. North Carolina*, No. 09-11121**

J.D.B. v. North Carolina (09-11121),

decided June 16, 2011 in a 5-4 decision authored by Justice Sotomayor, held that police must consider the age of a juvenile they are questioning when deciding whether the setting becomes custodial and Miranda warnings must be given. The petitioner in this case was a 13-year-old special education student in the seventh grade who was removed from class by uniformed police officers and questioned for at least a half hour by police and school administrators in a closed conference room. He was not explained his rights, nor was a legal guardian present. Following the questioning, the petitioner admitted to breaking in and stealing a camera. Relying on a "common sense" approach, the opinion noted the relative vulnerability of young juveniles and that age must be a consideration in determining if a child subjected to police questioning feels free to leave. The Court remanded to the state for a determination of this issue in light of his age at the time of questioning. See the opinion at www.supremecourt.gov/opinions/10pdf/09-11121.pdf.

***Turner v. Rogers, et al.*, No. 10-10**

In another 5-4 decision the Court held on June 20, 2011 in *Turner v. Rogers, et al.* (10-10) that the Fourteenth Amendment's Due Process Clause does not always require a state to provide counsel for the subject of a civil contempt proceeding, even where jail is a possible sanction. The case involved a noncustodial parent who was seriously delinquent in child support payments. The state family court sentenced him to 12-months in jail for failure to pay as ordered. Justice Breyer, writing for the majority, wrote that where an individual facing incarceration in a civil proceeding is not represented by counsel, a court must provide the person with other procedural safeguards to ensure they understand their rights and are not wrongfully incarcerated, and outlines some of the safeguards in a case like the one under consideration, where ability to pay is the critical issue. In this case, it

was the failure to provide such procedural safeguards, not the failure to appoint counsel by itself, that warranted reversal. See the opinion at www.supremecourt.gov/opinions/10pdf/10-10.pdf.

***David v. United States,*
No. 09-11328**

Davis v. United States (09-11328), decided on June 16, 2011, addressed the retroactive application of *Arizona v. Gant*, 556 U.S. __ (2009). Davis was convicted of possessing a firearm discovered during a routine traffic stop after unsuccessfully moving for its suppression. *Gant* was decided while his case was on appeal with the Eleventh Circuit. Although the Eleventh Circuit agreed that the search incident to arrest violated *Gant*, it nevertheless upheld his conviction, concluding that excluding evidence obtained in reliance on prior circuit case law would do little or nothing to deter future Fourth Amendment violations. The Supreme Court, 7-2 in an opinion by Justice Alito, agreed, holding that a good faith exception to the exclusionary rule applies. Absence of police culpability at the time of the search precludes application of the exclusionary rule and thereby limits retroactive application of *Gant*.

Justice Breyer and Ginsburg, dissenting, commented on the Court’s finding that, as in *Gant* a Fourth Amendment violation lead to the evidence resulting in conviction, but unlike *Gant*, Davis lacks a remedy. The dissenters stated that *Gant* does not articulate a new rule, but rather the correct interpretation of the Constitution, and worries that the “good faith” approach further undermines the exclusionary rule. See the opinion at www.supremecourt.gov/opinions/10pdf/09-11328.pdf.

***Freeman v. United States,*
No. 09-10245**

Freeman v. United States (09-10245), June 23, 2011, considered whether a defendant entering into a F.R.C.P. 11(c)(1)(C) plea agreement, which provides for a particular sentence of incarceration, is eligible for a sentence reduction if his guideline is subsequently lowered. Justice Sotomayor, casting her vote with only a portion of Justice Kennedy’s plurality opinion, limited such reductions to a narrow class of 11(c)(1)(C) cases: those where the plea agreement specifically states that the sentence is based upon the Sentencing Guidelines. See the opinion at www.supremecourt.gov/opinions/10pdf/09-10245.pdf. **IHP**

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To sum up, defense counsel who practice predominantly in federal court should think twice and do their homework when practicing before an unfamiliar state grand jury, because the applicable state grand jury secrecy provisions may be quite different than they expected. These grand jury secrecy issues are likely to arise more and more, as states are increasingly using grand juries to investigate complex crimes and avoid the difficulties of conducting full-blown preliminary hearings. That trend is significant, because in states that prohibit such witness disclosure, attorneys engaged in pre-indictment representation will find it much more difficult to monitor investigative developments and advise their clients meaningfully. **IHP**

Mike Emmick is a white collar defense specialist at Sheppard Mullin Richter & Hampton LLP in Los Angeles. He was an AUSA in Los Angeles for 25 years, and Chief of the Public Corruption & Government Fraud Section for 8 years.

Photos from the 2010 Annual Meeting and Convention in New Orleans



(l to r) Judge Gerard Lynch, U.S. Court of Appeals for the Second Circuit; Mike Sklaire, section chair; and Ashley Belleau, FBA national president.



(l to r) Mike Sklaire, Seth Rodner, Jeffrey Tsai, and L.T. Lafferty hosted a panel on Corporate Fraud in the Post-Madoff Era.

USSC Retroactive Application of the Crack Cocaine Guidelines

The U.S. Sentencing Commission voted recently to make the new 18:1 crack guidelines retroactive. Thus, previously sentenced defendants will be able to petition the court pursuant to 18 U.S.C. Section 3582(c)(2) and Guidelines Section 1B1.10 for application of the new 18:1 crack guidelines. This will not take effect until Nov. 1, 2011. We are not sure how these changes will be implemented at this time. The commission's vote does not make the actual Fair Sentencing Act retroactive. Thus, the old law mandatory minimums would still apply to those defendants. This would limit the effect of the guideline reduction on many defendants. A copy of the amendment, explanation and the Sentencing Commission's press release with more info can be found at www.ussc.gov. **IHP**

New Section Leadership

We are pleased to announce our leadership slate for the 2012-2013 term. Beginning in October, Geoff Cheshire will be chair of the Criminal Law Section. Geoff is an assistant federal public defender from Tucson currently detailed to the Administrative Office of the U.S. Courts. The vice chair will be Hartley West, an assistant U.S. attorney from the Northern District of California. The Treasurer will be Kathy Massing, a partner with the law firm Marshall, Dennehey, Warner, Coleman & Goggin in Tampa, Fla., and the secretary will be Michael Nachmanoff, the federal public defender for

the Eastern District of Virginia. The other members of our board are listed below. We are honored and pleased to have such a great team leading us for the next two years. If you would like to participate on the section's Board, please send Michael Sklaire an email at sklairem@gtlaw.com. **IHP**

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