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PROMOTING ADEQUATE AND EFFECTIVE POST-CONVICTION REMEDIES

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Ascertaining Validity of Predicate Convictions

By Brian A. Morris, the Paralegal That Rides

When the government relies on a prior conviction to subject you or your client to an enhanced sentence, can you prove that the prior conviction does not legally qualify for enhancement purposes? The answer depends on numerous factors.

Many prior convictions do not legally qualify as predicate convictions for federal sentencing enhancement purposes because the maximum sentence authorized for those prior convictions is too short. Even when the sentence appears to qualify, there is a possibility that the prior conviction or sentence itself may be subject to a successful postconviction challenge. Ultimately, establishing that a prior conviction does not legally qualify for enhancement purposes can in effect—and actually—have several benefits (i.e., alternatives to prison, shorter sentences, lower custody ratings, better prison designations, etc.…).

According to Bureau of Justice Statistics, more than three-fourths of felony defendants have a prior arrest history, with 69% having multiple prior arrests. While there is no "rigid, per se" rule requiring defense counsel to do a complete review of any prior convictions relied on by the prosecution, *see Rompilla v. Beard*, 545 U.S. 374 (2005), whenever a sentence may be enhanced due to a predicate conviction, effective lawyering should include a realistic examination into the viability of challenging the predicate conviction's actual qualification.

When the prior conviction and sentence facially appear to qualify for enhancement purposes, counsel should ascertain the viability of collaterally challenging the prior conviction or sentence. Without such an examination, there can be no valid reason, tactical or otherwise, for trial counsel to advise their clients to admit to prior felony allegations that could subject their clients to additional years of imprisonment.

To count as a prior "felony drug offense" for purposes of 21 U.S.C. §§ 841(b) and 851, the prior conviction must be for a drug offense "that is punishable by imprisonment for more than one year." 21 U.S.C. § 802(44). The underlying "felony" for purposes of a conviction for felon in possession of a firearm is a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Under the ACCA, a predicate "violent felony" is an offense "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(2)(B). A predicate "serious drug offense" is one "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A). For purposes of the career offender guideline, a prior "crime of violence" or "controlled substance offense" must be "punishable by imprisonment for a term exceeding one year." USSG § 4B1.2(a), (b).

In *Carachuri-Rosendo*, the Supreme Court decided whether a prior Texas drug conviction qualified as an "aggravated felony" under the Immigration and Nationality Act. The Court held that in order for the prior conviction to qualify as a "felony," Carachuri had to have been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year." 560 U.S. at 576. Under Texas law in effect at the time of his prior offense, Carachuri could have received a sentence of more than 12 months, but only if the state proved that he had been previously convicted of a drug offense. Because the state did not do so, Carachuri could not have received a sentence of more than one year, and was thus not actually convicted of a qualifying "aggravated felony." *Id*. at 581-82.

The Fourth, Eighth, and Tenth Circuits have applied the reasoning of *Carachuri-Rosendo* to convictions under the structured sentencing schemes in North Carolina and Kansas. In *U.S. v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (*en banc*), the issue was whether the defendant's prior State of North Carolina conviction was punishable by imprisonment for more

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than one year. The Fourth Circuit held that a prior North Carolina conviction for possession with intent to sell no more than ten pounds of marijuana was not a "felony drug offense" for purposes of a § 851 enhancement. The Fourth Circuit found that the defendant, with a "prior record level" of only 1 and where the prosecutor alleged no facts in aggravation sufficient to warrant an aggravated sentence, was subject to a statutory maximum sentence of eight months' community punishment (no imprisonment) under the state's sentencing system. 649 F.3d 237, 241 (4th Cir. 2011) (*en banc*).

In *United States v. Haltiwanger*, on remand from the Supreme Court for further consideration in light of *Carachuri-Rosendo*, the Eighth Circuit held that a prior Kansas conviction for possession of a controlled substance without affixing a tax stamp does not qualify as a "felony drug offense" for purposes of § 851. The Court found that Haltiwanger could not have actually been sentenced to more than seven months. 637 F.3d 881, 884 (8th Cir. 2011) (reversing a prior decision upholding the 20-year mandatory minimum). The Court concluded that "where a maximum term of imprisonment of more than one year is directly tied to recidivism, *Carachuri-Rosendo* and [*United States v. Rodriquez*, 553 U.S. 377 (2008)] require that an actual recidivist finding—rather than the mere possibility of a recidivist finding—must be part of a particular defendant's record of conviction to qualify as a "felony" for enhancement purposes.

In *U.S. v. Brooks*, 751 F.3d 1204, 1211-12 (10th Cir. 2014), the Tenth Circuit similarly held that under *Carachuri-Rosendo* a prior Kansas conviction for fleeing and eluding, for which the defendant could not have actually been sentenced to more than seven months, does not qualify as a "felony" nor a "crime of violence" under the career offender guideline. The Court found that "the maximum amount of prison time a particular defendant could have received controls[.]" The *Brooks* Court rejected consideration of "hypothetical possibilities," focusing directly on whether the defendant actually faced a sentence of more than one year. The Tenth Circuit has reiterated this principle in *U.S. v. Romero-Leon*, 622 Fed. Appx. 712 (10th Cir. 2015).

In the Fifth Circuit, the government conceded that under *Carachuri-Rosendo*, a defendant previously convicted of drug offenses in Oregon and sentenced under the state's presumptive guideline system was not convicted of qualifying "felony drug trafficking offenses" for purposes of the illegal reentry guideline at USSG § 2L1.2. The government recognized that the maximum sentence that the state court could have imposed under the Oregon guidelines, absent additional fact-finding by a jury or factual admissions by the defendant, was 90 to 180 days. *United States v. Ernesto Martinez,* No. 14-41020 (5th Cir. Jan. 15, 2015) (United States Agreed Motion for Summary Remand). As the government put it, "a prior state conviction must establish all the elements and sentencing factors necessary to authorize the punishment beyond one year," *id.*, *citing Carachuri-Rosendo* and *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685-87 (2013). The Fifth Circuit remanded for resentencing.

Under North Carolina law, the Fourth Circuit's decision in *Simmons* sets out the relevant analysis. The Eighth Circuit's decision in *Haltiwanger* and the Tenth Circuit's decision in *Brooks* set out the relevant analysis for convictions under Kansas law. The agreed order in *Ernesto Martinez* is a good starting place for convictions under Oregon law. Other states, especially Florida, most likely have similar sentencing guidelines schemes that make the decision in *Carachuri-Rosendo* significant to direct and post-conviction challenges against enhanced sentences.

As mentioned, whether a prior conviction counts as a qualifying predicate for enhancement purposes depends on many factors. For example, which federal provision is at issue, the particular circumstances of the prior conviction (as shown by the record of conviction and sentence), the date of the prior conviction and, in many cases, whether the legality of the prior conviction or sentence is subject to a successful post-conviction challenge.

This article primarily focuses on how to apply the reasoning of *Carachuri-Rosendo* to Florida convictions under Florida's constantly changing sentencing guideline schemes. When the government relies on prior Florida convictions for enhancement purposes, familiarity with Florida's constantly changing sentencing schemes, post-conviction remedies and applicable decisional authorities can and frequently will preclude the enhancement. After addressing how the decision entered in *Carachuri-Rosendo* applies to prior Florida convictions, this article focuses on Florida's post-conviction remedies that may available to preclude the enhancement.

Examining the constantly changing sentencing guideline schemes in Florida, and addressing *Carachuri-Rosendo* as it applies to prior Florida convictions under those systems, the issue becomes complex but often rewarding.

Florida's guidelines were subjected to numerous beneficial decisional

authorities in ways material to a meaningful analysis here. This article does not reflect the entire universe of amendments and successful constitutional challenges to Florida's sentencing guidelines, when a prior Florida conviction is used for enhancement purposes, a full array of due process claims exists that may establish the conviction or sentence does not legally qualify.

From 1983 to 1998, Florida employed a presumptive guideline system that placed legal limits on the maximum term of imprisonment that a judge could impose for a given offense based on the particulars of the offense and the offender. *See Miller v. Florida*, 482 U.S. 423, 424-27 (1987) (describing the Florida sentencing scheme enacted in 1983). Through 1993, offenses were grouped into nine "offense categories," such as "robbery" (Category 3) or "drug offenses" (Category 7). *See* Fla. R. Crim. P. 3.701, 3.988 (1986).

Florida's guidelines were not only amended on several occasions, they were also subjected to several successful constitutional challenges. The guidelines as originally adopted on October 1, 1983, are set forth in In re Rules of Criminal Procedure (Sentencing Guidelines), 439 So. 2d 848 (Fla. 1983), but were held unconstitutional because they were predominantly substantive law but not adopted by the Florida Legislature. *See Smith v. State*, 537 So.2d 982 (Fla.1989).

The guidelines as amended effective July 1, 1984, are set forth in *The Florida Bar: Amendment to Rules of Criminal Procedure* (3.701, 3988 - Sentencing Guidelines), 451 So. 2d 824 (Fla. 1984). The guidelines as amended effective July 1, 1986 (except for a modification relating to burglary offenses), are set forth in *The Florida Bar: Amendment to Rules of Criminal Procedure* (3.701, 3.988 - Sentencing Guidelines), 482 So. 2d 311 (Fla. 1985). The guidelines as amended effective July 1, 1988, are set forth in *Florida Rules of Criminal Procedure Re: Sentencing Guidelines*, 522 So. 2d 374 (1988).

Restated, these amendments do not reflect the entire universe of amendments to Florida's sentencing guidelines. Nonetheless, it's important to note that even though the rules as amended through 1993 appear in the current edition of the Florida Rules of Criminal Procedure, *see* Fla. R. Crim. P. 3.701, 3.988 (2014), they may be misleading as they include amendments that may not have applied at the time the prior offense was allegedly committed.

With every prior Florida conviction, the actual scoresheet used (and filed with the court) will be helpful, but for complete accuracy, it is important to consult the guidelines as they legally existed at the time the prior offense was allegedly committed. Perhaps more important, the master key to our exceptionally high success rate in the post-conviction arena follows our thorough familiarization with decisional, procedural, and statutory authorities applicable to both the guidelines and the substantive offense.

Florida's sentencing guidelines opened so many windows of opportunities for criminal defendants and their attorneys that we no longer ask, "can we get the conviction or sentence overturned." Rather, "which route are we going to take to get the conviction or sentence overturned" is generally the more appropriate question. For example, if you or your client committed a crime in Florida between 1994 and 1997, entitlement to relief will likely be found under the Florida Supreme Court's decision entered in *Heggs v. State*, 759 So. 2d 620 (Fla. 2000) (which resulted in the resentencing and immediate release of thousands of Florida prisoners).

Under Florida's initial sentencing guidelines, a "scoresheet" was prepared based on a defendant's primary offense category. Points were assigned based on the primary offense, additional offenses, prior record, legal status at the time of the offense, and victim injury. The defendant's total guidelines score was then compared to a categorical chart for the primary offense at conviction, which provided a presumptive sentence for the composite score. *See Miller*, 482 U.S. at 426.

The presumptive guideline sentence was "assumed to be appropriate for the composite score of the offender." Fla. R. Crim. P. 3701(d)(8) (1986). Departures were to be "avoided unless there were clear and convincing reasons to warrant aggravating or mitigating the sentence." Id. 3701(d)(11).

Departures were required to be "accompanied by a written statement delineating the reason for the departure," *id*., which also "shall be articulated at the time sentence is imposed." *Id.* Committee Note (d)(11). If the judge failed to articulate a legitimate reason for a sentence greater than the presumptive guideline range, the sentence was illegal. *See Williams v. Florida,* 500 So.2d 501 (Fla. 1986); *State v. Whitfield*, 487 So.2d 1045, 1046-47 (Fla. 1986); *see also Miller*, 482 U.S. at 425 (recognizing that the guideline system had "the force and effect of law"), and Florida Rule of Criminal Procedure 3.800(a) (authorizing the courts to correct an illegal sentence "at any time").

In 1988, the guidelines were amended to add a "permitted range," where the court could legally impose sentence without meeting the requirements for departure, so that the top of the "permitted range" became the maximum legal sentence. *See Florida Rules of Criminal Procedure Re: Sentencing Guidelines*, 522 So. 2d 374 (1988) ["1988 Sentencing Guidelines"].

This guideline system was revised in 1994, and again in 1995, though it remained a system setting forth presumptive maximum sentences based on the number of points. *See* Fla R. Crim. P 3.703, 3.992 (1994 Rules as Amended). In 1998, it was replaced by the Criminal Punishment Code. *See* Fla. Stat. § 921.002. Under the Criminal Punishment Code, the sentencing judge has the discretion to "impose a sentence up to and including the statutory maximum for any offense." *See id*. § 921.002(1)(g).

When the government attempts to utilize prior Florida convictions for enhancement purposes, the most common issue will be whether the prior Florida conviction was actually punishable by more than one year in prison. Thus, constituting a "felony" for purposes of determining whether the defendant was previously convicted of a "felony drug offense" for purposes of § 851, a "violent felony" for purposes of the ACCA (or the "felony" underlying the § 922(g) conviction itself), or a "crime of violence" or "controlled substance offense" for purposes of the career offender guideline. The answer will depend largely on the date that the defendant's prior offense was allegedly committed.

From 1983 to 1988, the first guideline cell on the chart for all offense categories, both recommended and permitted, only authorized a sentence of "any nonstate prison sanction." Florida law established that the maximum term of imprisonment that could qualify as a "nonstate prison sanction" was imprisonment in the county jail for no more than 364 days. *See Stinson v. State*, 590 So. 2d 31 (Fla. Dist. Ct. App. 5th Dist. 1991); *State v. Hopkins*, 520 So. 2d 301 (Fla. Dist. Ct. App. 3d Dist. 1988, citing *State v. Mestas*, 507 So.2d 587 (Fla. 1987)).

Under *Carachuri-Rosendo*, a person sentenced between 1983 and 1988, whose presumptive guideline range was "any nonstate prison sentence" was not convicted of an offense punishable by more than one year in prison, and thus, not convicted of an enhancement qualifying "felony."

In 1988, the Florida legislature provided that for any felony offense committed after October 1, 1988, with a presumptive guideline range of "any non-state prison sanction," the judge could sentence the defendant up to 22 months' incarceration and the sentence was not subject to appeal. Fla. Stat. § 921.001(5) (1988 Supp.); *see In re Florida Rules of Criminal Procedure*, 566 So. 2d 770 (1988). Unless there is a successful post-conviction challenge against the prior conviction or sentence, those sentenced while this law was in place will not likely be able to show their conviction is not a qualifying "felony" under *Carachuri-Rosendo*.

In 1994, the legislature revised the Florida Sentencing Commission's organic statute so that it no longer specified that a defendant whose presumptive sentence was a "nonstate prison sanction" could be sentenced up to 22 months in prison. The guidelines were revised, and the method for calculating total points was changed substantially. Fla. R. Crim. P. 3.702(d)(16), 3.990 (1994). From then until 1997, a defendant with 40 points or less could not legally be sentenced to state prison, and thus could only receive "any nonstate prison sanction," *see id.* 3.702(d)(16), 3.990 (1994), which meant 364 days or less in the county jail. Under *Carachuri-Rosendo*, his prior conviction is not a "felony."

In 1997, the 1994 rules were amended so that a defendant *with at least one prior felony* whose presumptive range was "any nonstate prison sanction" could be sentenced to incarceration not to exceed 22 months. *See* Fla. R. Crim. P. 3.703(d)(27). But a first-time offender with 40 points or less still could not be sentenced to state prison, and thus could not have been sentenced to more than 364 days in the county jail. Fla. R. Crim. P. 3.703, 3.991. Under *Carachuri-Rosendo*, his prior conviction is not a "felony."

Another question that may arise is whether a prior conviction was for a "serious drug offense" under the ACCA, *i.e.*, one "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A).

In 1986, a person convicted in Florida of a drug offense (Category 7) with 163 to 184 points had a "recommended" range of 5.5 to 7 years' imprisonment. Thus, a client sentenced in 1986 for a drug offense with 182 points could not have been sentenced to more than 7 years in prison absent valid, written reasons for departure. Similarly, a client sentenced in 1988 for a drug offense with 182 points had a "permitted" range of 4.5 to 9 years, and could not have been sentenced to more than 9 years without valid, written reasons for departure. *See 1988 Sentencing*

Guidelines. Under *Carachuri-Rosendo*, neither prior conviction would qualify today as a "serious drug offense" under the ACCA because it does not have a "maximum term of imprisonment of ten years or more." *See* 18 U.S.C. § 924(e)(2)(A).

To determine whether a prior Florida conviction counts as a predicate offense, you will need the record of conviction and sentencing (judgment and sentencing papers, sentencing guidelines scoresheet, and the governing guidelines).

Not long ago, an applicant for clemency alerted his attorney to the possibility that his 1987 Florida drug conviction, for which he was sentenced under the Florida sentencing guidelines, was not actually punishable by more than one year in prison, and was therefore not a "felony" for purposes of the career offender guideline under the reasoning of *Carachuri-Rosendo*. The clemency applicant was correct. Some prior Florida convictions from the 1980s and 1990s do not count as a predicate conviction for purposes of § 851, the ACCA, or the career offender guideline because the defendant could not legally be sentenced under Florida law to the required term of imprisonment.

In the unfortunate instances where the prior state conviction qualifies for federal enhancement purposes, counsel is urged to inform their clients that failing to promptly initiate action toward overturning their predicate conviction, once it is used for enhancement purposes, will likely preclude belated §2255 relief— even if the predicate conviction is ultimately vacated.

In *Johnson v. United States*, 544 U.S. 295, 125 S.Ct. 1571, 161 L.Ed.2d 542 (2005), the Supreme Court addressed the issue of "when the 1–year statute of limitations in [§2255] begins to run in a case of a prisoner's collateral attack against his federal sentence on the ground that a state conviction used to enhance that sentence has since been vacated." *Id*. at 298. The petitioner, Johnson, had been sentenced in federal court in 1994 as a career offender under U.S. Sentencing Guidelines Manual § 4B1.1 on the basis of two 1989 drug convictions in Georgia. *Id*. In 1998, one of those convictions was vacated. Johnson then filed a §2255 motion in federal district court seeking to vacate the enhanced federal sentence on the basis of the vacatur of the state conviction. *Id*. at 300–01. The district court denied the motion as untimely under the Antiterrorism and Effective Death Penalty Act's 1–year statute of limitations, and the Eleventh Circuit affirmed. *Id*. at 301–02.

The Supreme Court held that the vacatur of the state conviction was a "fact" triggering a new 1–year limitations period under 28 U .S.C. §2255(f)(4), but that a petitioner may only take advantage of that provision if he has "sought [the vacatur of the predicate conviction] with due diligence in state court, after entry of judgment in the federal case with the enhanced sentence." *Id*. at 298. Because Johnson unreasonably delayed attacking his state court conviction, the Court affirmed the dismissal of his §2255 motion. *Id*. at 311.

In its decision entered in *Cuevas v. U.S.*, 778 F.3d 267 (1st Cir. 2015), the court granted §2255 relief where the petitioner argued that, under J*ohnson*, *United States v. Pettiford*, 101 F.3d 199 (1st Cir.1996), and like cases, he was entitled to reopen his federal sentence in light of the vacatur of the underlying state convictions.

Fortunately, for those who wish to collaterally challenge prior state convictions, every state currently permits at least some form of post-trial relief on the basis of newly discovered evidence. *See* 1 DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF: WITH FORMS*, § 1-13, at 55–58 (2001)(noting that every state offers a direct remedy in the form of a new trial motion based on newly discovered evidence, and many allow newly discovered evidence as a ground for collateral, post-conviction relief). *See also*, Rule 3.800. Rule 3.850, Fla. R. Crim. P., and Rule 9.141, Fla. R. App. P.

Gathering files and records to conduct meaningful evaluations into post-conviction challenges against prior and often old state convictions is also possible because each state now has a law, similar to the federal Freedom of Information Act, affirming the public's right to inspect and copy government documents. *See*, for example, Florida Statute § 119 (Florida Public Records Act).

Initiating prompt action toward challenging a prior conviction or sentence is critical. In reversing the district court's order dismissing a belated §2255 motion as "'second or successive' [under] the Antiterrorism and Effective Death Penalty Act ('AEDPA')," the Eleventh Circuit expressed its finding that, among other things, the defendant promptly initiated challenging his predicate state convictions by way of "gathering records and transcripts related to the state convictions…." *Stewart v. U.S.*, 646 F.3d 856, 857-58 (2011). It is essential for effective lawyering to conduct meaningful evaluations to determine if viable grounds exists to collaterally challenge prior convictions or sentences the government uses against their clients.

Some states are more liberal than others in granting belated post-conviction review based on newly discovered evidence. For example, in *Porter v. State*, 670 So. 2d 1126 (Fla. 2d DCA 1996), Florida's Second District Court of Appeal reversed an order denying a belated post-conviction claim of newly discovered evidence based on ineffective assistance of counsel.

Porter's claim assailed counsel's failure to discover and make use of readily available police reports containing exculpatory statements from key witnesses. In reversing the order denying the motion as untimely, the appellate court concluded that a defendant cannot be charged with "constructive knowledge of what evidence is available through public records when [the] claim assails counsel for failing to discover the evidence." *Porter*; *see also*, *Bailey v. State*, 768 So.2d 508 (Fla. 2d DCA 2000) (*citing Porter* in reversing an order denying a claim of newly discovered evidence of counsel's ineffectiveness as untimely and reiterating that a defendant cannot be charged with constructive knowledge of evidence available through public records where defendant's ineffective assistance claim assails counsel for failing to discover the evidence.).

The most viable challenges under *Carachuri-Rosendo* are contemporaneous or direct challenges to the qualifications and use of prior convictions for enhancement purposes. For habeas purposes, in the absence of any retroactive appellate decisions, a §2255 petition raising a claim under *Johnson* will be most viable when filed within one year of finality, *see* 28 U.S.C. §2255(f)(1), provided due diligence is exercised to seek vacatur of the predicate conviction once it is used for enhancement purposes.

The necessity for promptly and thoroughly ascertaining the legality of predicate convictions used for enhancement purposes can never be overemphasized. When the lawyer is able to preclude an enhanced sentence, the outcome is generally much more favorable to the client. In the words of Attorney Benson Weintraub, a prominent federal defense attorney, "effective lawyering accentuates the recognition that you, as an advocate for the defense, are often your client's last best hope and "Liberty's Last Champion.'"

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Full Sentencing and Post-Conviction Assistance

Our Full Sentencing and Post-Conviction Services involve having our researchers work hand-in-hand with your attorney and you. In this capacity NPLDG would assist counsel in the preparation of: Objections to and/or Motions to Correct the Presentence Investigation Report (PSR) and Supportive Memorandum of Law, Post-Conviction Evaluations of both Current and Prior Convictions (State or Federal), Prison Consultations/Litigation, Appeals, RDAP and Re-Entry Assistance.

Oftentimes, the government's practice is to inject the Pre-Sentence Investigation Report (PSR) with derogatory information concerning the defendant's alleged activities. The PSR is prepared by the United States Probation Office, if erroneous information in the PSR is not corrected by counsel prior to sentencing, it could result in the imposition of a significantly enhanced sentence, as sentences are generally based upon many of the allegations contained in the PSR.

Rule 32 of the Federal Rules of Criminal Procedure lays out the specific requirements that must be followed procedurally by counsel if the defendant controverts statements contained in the Pre-Sentence Investigation Report, which the court's rely on to determine an appropriate sentence. Federal Rule of Criminal Procedure 32(f) requires objections to the Presentence Report and Recommendation be filed no later than 14 days following the disclosure of the report. NPLDG could assist your attorney in the preparation of meaningful objections to the report and, if necessary, a motion to correct the report.

The necessity to file a written memorandum objecting to the Pre-Sentence Investigation Re-port is to correct the error at the first opportunity. Written objections also ensure that the defendant makes a proper record in the trial court, which is essential to meaningful appellate review.

A Detailed Sentencing Memorandum.

The sentencing memorandum helps to explain to the Judge all of the additional reasons the sentence should be lower than what the PSR recommends and addresses downward departure issues, mitigating information and alternative sentencing programs that the court can utilize to grant a lower sentence than requested by the prosecutor. NPLDG can also assist counsel in making a formal request to the court for specific designation to a facility near the client's family to serve any sentence ultimately imposed.

There are over 100 downward departure provisions that the judge could use to help a defendant receive a lower sentence. Of course, not all of these apply to every case. However, the judge will obviously not be the person "burning the midnight oil" the night before sentencing trying to come up with

ways of giving a defendant a lower sentence than the prosecution is requesting. That is the defense's job and an area where we shine.

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Bad Advice Amounts To Ineffective Assistance of Counsel, High Court Rules

Ineffective assistance of counsel is the most common claim presented in a 28 U.S.C. §2255 motion.

A §2255 motion is used by federal prisoners to seek relief from their conviction or sentence. Under section 2255, a federal prisoner may move to vacate, set aside, or correct their sentence if it was (1) imposed in violation of the constitution; (2) imposed in violation of the laws of the United States; (3) the sentence exceeds the maximum authorized by law; (4) the conviction or sentence was imposed without jurisdiction; or (5) the sentence is otherwise subject to collateral attack.

There are strict time frames for seeking 2255 relief. In general, a 2255 motion must be filed within one year after a prisoner's case becomes "final." 28 U.S.C. §2255(f)(1). If no appeal is taken after sentencing, unless exceptional circumstances exist, the motion must be filed no later than one year and 14 days after the entry of judgment. If the defendant files a direct appeal, the 2255 motion must be filed one year after: (1) the date the appeals court enters its opinion plus 90 days, if review with the Supreme Court is not sought; (2) the date the appellate court denies rehearing plus 90 days, if review with the Supreme Court is not sought; or (3) the Supreme Court denies certiorari.

To prove ineffective assistance of counsel, a defendant must demonstrate by a preponderance of the evidence that (1) his or her counsel rendered deficient performance and (2) the defendant was prejudiced by those errors or omissions. Preju-dice is typically shown through a reasonable probability of a different outcome but for counsel's deficient performance.

The Supreme Court Refines the "Prejudice" Inquiry for Guilty Plea Ineffective Assistance of Counsel Claims

Recently, the Supreme Court decided an extremely important case involving guilty plea ineffectiveness. The case is called *Lee v. United States*, 2017 WL 2694701 (2017).

Jae Lee moved to the United States from South Korea when he was 13. He worked in Tennessee running two restaurants. For over 35 years, he never returned to South Korea. Lee, however, never applied for citizenship and only had lawful permanent residence.

In 2008 Lee was arrested and charged with possession with intent to distribute ecstasy. Lee pled guilty pursuant to a plea agreement-- after his attorney assured him that he would not be deported if he pled guilty. He received a year and a day in prison.

After arriving in the BOP, Lee learned that his attorney incorrectly assured him that he would not be deported. Lee had pled guilty to an "aggravated felony," which except in limited situations requires deportation. So Lee filed a 2255 motion arguing that his attorney was ineffective for misadvising him about the deportation consequences of his plea.

A magistrate judge recommended that Lee be granted relief after receiving testimony from Lee and his former lawyer. It was unequivocal that Lee had been misadvised. Lee's lawyer admit-ted this. Lee's lawyer testified that he would have recom-mended that Lee go to trial if he had known that Lee would be deported as a result of his plea. Thus, per the magistrate, Lee's lawyer had rendered ineffective assistance of counsel.

Nevertheless, the district judge rejected the magistrate's recommendation. According to the district court, Lee was not prejudiced by his lawyer's misadvise because there was virtually no chance that Lee would have been acquitted if he would have gone to trial.

The Sixth Circuit upheld the district judge's decision on appeal. According to the Sixth Circuit, Lee could not show prejudice because "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence."

Lee appealed to the Supreme Court. In an opinion by Chief Justice Roberts, the Supreme Court reversed.

Justice Roberts began by drawing a distinction between claims of prejudice arising from "attorney error during the course of a legal proceeding" versus "deficient performance [that] arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." In the former situation, prejudice is most typically shown through "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

In the latter situation, as Chief Justice Roberts wrote:

"When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain. That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings,' 'we cannot accord' any such presumption 'to judicial proceedings that never took place. We instead consider whether the

defendant was prejudiced by the 'denial of the entire judicial proceeding … to which he had a right.'

When a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"
Lee v. United States, Docket No. 16-327 (June 23, 2017).

The Court recognized that sometimes a defendant will have to show "that he would have been better off going to trial." *Id.* But that showing is only required "when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession." *Id.*

In Lee's case, according to the Chief Justice, "the error was instead one that affected Lee's understanding of the consequences of pleading guilty." *Id.*

The Government argued for "a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial." However, the Court held that the adoption of a categorical rule would be inappropriate because (1) claims of ineffective assistance of counsel require a "case-by-case examination" of the "totality of the evidence"; and (2) the relevant inquiry "focuses on a defendant's decision-making, which may not turn solely on the likelihood of conviction after trial."

The Court recognized that defendants with little to no chance of success at trial will often have a hard time proving that they would have gone to trial instead of pleading guilty. But this is not because of the possible outcome of the trial, but because of how the prospect of success would have affected the defendant's decision to plead.

Nevertheless, the Court recognized that sometimes the potential consequences of going to trial versus pleading guilty can both be bad. According to the Court, "when those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20–year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." *Id.*

The Court was careful to make clear that "courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

As applied to Lee, the Court found that Lee had demonstrated a reasonable probability that he would have gone to trial had he been properly advised by his counsel.

The Supreme Court explained:

"We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that 'almost' could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so."

The judgment of the Sixth Circuit affirming the denial of 2255 relief was accordingly reversed. *Lee v. United States*, 2017 WL 2694701 (2017).

Plain Language Takeaways about Ineffective Assistance of Counsel under *Lee*

While *Lee* may have been decided in the context of bad advice about deportation consequences, the impact of this decision will be felt much more broadly. That is because defendants frequently assert that they would have gone to trial but for incorrect advice by their lawyer.

Lee is extremely important because it makes clear that the prejudice inquiry in the context of this kind of ineffective assistance of counsel claim must focus on the *decision-making* of the defendant. Sometimes the prospects of winning at trial will be slim, but compared to a 20 or 30 year sentence, the chances of losing at trial versus a possible acquittal may have been worth it.

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