CHERYL J. STURM
Attorney-At-Law
387 Ring Road
Chadds Ford, PA 19317
484-771-2000
Sturmtriallaw@gmail.com

NEWSLETTER: FEDERAL AND STATE
NOVEMBER, 2021

I. THIRD CIRCUIT COURT OF APPEALS REAFFIRMS HOLDING THAT INCHOATE CRIMES MAY NOT BE USED TO INVOKE CAREER OFFENDER GUIDELINES

In ***United States v. Malik Nasir***, 2021 U.S. App, Lexis 33109, __F4th___ (11/8/2021), The Third Circuit en banc reaffirmed its previous en banc holding that the definition of a controlled substance offense in Section 4B1.2(b) of the federal sentencing guidelines does not include inchoate offenses. This means that conspiracies, solicitations and attempts are not included in the definition of controlled substance.

II. SUPREME COURT OF NEW JERSEY HELD THAT SENTENCING JUDGE MAY NOT CONSIDER ACQUITTED CONDUCT IN IMPOSING THE SENTENCE

In ***State v. Melvin***, 2021 N.J. Lexis 890 (NJ 2021), the Supreme Court of New Jersey held that the sentencing judge may not consider acquitted conduct in imposing the sentence. The Court stated that when a jury has specifically determined that the defendant did not engage in certain conduct, the verdict is final and binding. It held that verdict restores the presumption of innocence, and the acquitted conduct may not be used as an aggravating factor. Consideration of the acquitted conduct as an aggravating factor is inconsistent with the presumption of innocence. The Court stated that the findings of a jury cannot be nullified by lower standard fact findings at sentencing. Specifically, the Court held that the trial judge cannot consider at sentencing a defendant's alleged conduct for crimes for which a jury has returned a not guilty verdict.

III. COMMUTATIONS FOR PENNSYLVANIA PRISONERS

State prisoners are eligible to apply for commutation of sentence, which means a reduction in sentence. Lifers can apply, and receive consideration. The application should be read by a competent professional. The application must contain a concise description of the crime. The application should be supported by letters from family and friends. The letters should be genuine and meaningful. They should offer real support; for example, housing, money, job, transportation, clothing. Letters should state why you are not a threat to public safety. The application will get a merits review by the Board of Pardons. Following favorable review, there will be an in-person hearing.

IV. FEDERAL PRISONERS: COMPASSIONATE RELEASE AND MEANING OF EXTRAORDINARY AND COMPELLING CIRCUMSTANCES

The First Step Act amended 18 U.S.C. 3582. In Section 603 of the Act, Congress amended 18 U.S.C. 3582(c)(1)(A) to permit defendants to file a motion with the sentencing court for modification of the sentence "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such request by the warden of the defendant's facility, whichever is earlier." The statute provides an opportunity to apply to the sentencing court for a sentence reduction based on extraordinary and compelling reasons. The motion must demonstrate extraordinary and compelling circumstances. Such circumstances include the Covid-19 virus, and the prison conditions spreading the virus, plus advanced age or some other recognized CDC threat from the virus. For instance, a prisoner who had had a heart attack won his release from a 360 month-sentence by providing documentation of the heart attack and the threat to his life from the prison conditions. Prisoners have won sentence reductions from the failure on the part of the First Step Act to make changes to 924(c)(1)(C) retroactive. At least one district court has held that 3582(c)(1)(A) can be used to reduce the very long sentences arising from stacking sentences for second or subsequent convictions for possession of a firearm during a drug trafficking offense before the first conviction became final.

V. SCOPE OF PRACTICE

My practice encompasses plea negotiations, sentencing consultation, sentencing, preparation of sentencing memoranda, disciplinary problems, parole representation, parole appeals, parole memoranda, 2241 habeas corpus petitions, presidential pardons and commutations, state pardons and commutations, 2254 habeas corpus petitions, and 2255 motions, direct appeals in all Circuits, U.S. Supreme Court practice, treaty transfers, convention transfers, derivative citizenship claims, removal (deportation) proceedings, civil commitments, and other immigration matters. Published cases include, but are not limited to, the following: Harris v. Martin, 834 F2d 361 (3d Cir. 1987), United States v. Reshenberg, 893 F2d 1333 (3d Cir. 1989), United States v. Calabrese, 942 F2d 218 (3d Cir. 1991), United States v. Cole, 813 F2d 43 (3d Cir. 1987), United States v. Day, 969 F2d 39 (3d Cir. 1992), Farese v. Luther, 953 F2d 49 (3d Cir. 1992), Schiano v. Luther, 954 F2d 910 (3d Cir. 1992), United States v. Mathews, 11 F3d 583 (6th Cir. 1993), United States v. Nanfro, 64 F3d 98 (2d Cir. 2005), United States v. Henson, 948 F.Supp. 431 (MDPA 1996), United States v. Miller, 849 F2d 896 (4th Cir. 1988), Phifer v. Warden, 53 F3d 859 (7th Cir. 1995), Prioleau v. United States, 828 F.Supp. 261 (SDNY 1993), United States v. Tiller, 91 F3d 127 (3d Cir. 1996), United States v. Amerman, [2255 granted, sentence reduced) (EDPA 92-498-02) affirmed 14 F3d 49 (2000); United States v. Eyer, 113 F3d 470 (3d Cir. 1997); United States v. Fields, 113 F3d 313 (2d Cir.1997); United States v. DePace, 120 F3d 233 (11th Cir. 1997); United States v. Derrick Williams, 158 F3d 736 (3d Cir. 1998), Paters v. United States, 159 F3d 1043 (7th Cir. 1998); United States v. Conhaim, 160 F3d 893 (2d Cir. 1998); United States v. DiPina, 178 F3d 68 (1st Cir. 1999), In re Weatherwax, CTA3 No. 99-3550 [Hazel-Atlas independent action is not a second or successive 2255 motion], Cullen v. United States, 194 F3d 401 (2d Cir. 1999), United States v. Almodovar, 100 F.Supp. 2d 301 (EDPA 2000, Ludwig, J.) Dabelko v. United States, 211 F3d 1268 (6th Cir.

2000); United States v. Carmichael, 216 F3d 224 (2d Cir. 2000); United States v. Williams, 247 F3d 353 (2d Cir. 2001); United States ex rel. Bryant v. Warden, 50 Fed. Appx. 13 (2d Cir. 2002), United States v. Peyton, 12 Fed. Appx. 145 (4th Cir. 2001); United States v. Smith, 348 F3d 545 (6th Cir. 2003); Blount v. United States, 330 F.Supp.2d 493 (EDPA 2004); Commonwealth v. Hanna, 964 A2d 923 (PA Super. 2009). Commonwealth v. Fulton, 179 A3d 475 (PA 2018)[warrantless search of cell phone, all evidence suppressed, conviction and sentence vacated], Commonwealth v. Bickerstaff, 204 A3d 988 (PA Super. 2019) (held trial counsel ineffective and vacated sentence), Commonwealth v. Cherry, 2017 PA Super. 28 (PA Super. 2017), Lambert v. SCI Warden, Greene, 861 F3d 459 (3d Cir. 2017)[habeas granted], Commonwealth v. Henkel, 90 A3d 16 (PA Super. 2014) wherein the Superior Court refused to apply Martinez v. Ryan, 566 U.S. l, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) to claim of ineffective assistance of trial counsel combined with ineffective assistance of PCRA counsel and then see Henkel v, Gilmore, 2015 U.S. Dist. Lexis 124341 (WDPA) [Martinez applied and habeas granted], Important unpublished cases include: United States v. Lopez, 93-246-01 (EDPA, Hutton, J,)[2255 granted]; United States v. Garcia-Cintron, 93CVl771 (EDPA, Gawthrop)[2255 granted, sentence reduced]; United States v. Fazekas, C.A. No. 94-1542 [WDPA, Diamond C.J.][2255 motion granted, sentence reduced from 30 years to 10 years], Henry Jones v. United States, 2:90CV 4291 [DNJ, Sarokin, J.][2255 motion granted for ineffective assistance, prisoner released]; Hearn v. United States, CA. 93-464 [WDVA], [misclassification of methamphetamine, sentence reduced from 180 months to 90 months], United States v. Richard H. Wilson, 90 CRIM 69-01, 91 CIV 3326 [EDPA, Gawthrop][2255 motion granted, actual innocence; immediate release], United States v. Gevares, 961 F.Supp. 192 (NDOH, ED 1996)[2255 granted; firearms sentence vacated; government motion to resentence denied], United States v. Cross, CTA6 No. 03-3562 (sentence vacated, and reduced on remand), United States vs. Alexander, C'TA3 No. 96-1696 [sentence reduced, and case remanded for hearing on distinction between cocaine base and crack cocaine], United States v. Kostrick, 103 F3d 114 (3d Cir. 1996)[848 vacated], United States v. Michaels, 2001 U.S. Dist. Lexis 191 15 (EDPA, Fullam, J.)[term of supervised release reduced], United States v. Williams, 146 Fed. Appx. 656 (2d Cir. 2002)[sentence vacated and reduced], United States v. R. Thomas, 273 Fed. Appx. 103 (2d Cir. 2008)[sentence vacated and reduced], United States v. Matos, 92 Cr 39-A (EDVA, Ellis, J. granted, sentence reduced], United States v. Diaz, Crim. No. 92-78-02 [EDPA] [sentence reduced for miscalculation of criminal history category], United States v. Eberly, 5 F3d 1491 (3d Cir. 1993)[2255 granted, sentence vacated], United States v. Forde, 92-429-A [ED VA, Hilton] [2255 granted, life sentence vacated; sentence reduced]; United States v. Cruz-Pagan, 91-006 [EDPA, life sentence vacated; sentence reduced], United States v. Ostreicher, 91 cv 3576 [EDNY, Weinstein, J.] [2255 motion vacated, special parole term vacated]; United States v. S. Jones, 22 F3d 304 (3d Cir. 1994)[2255 granted, sentence vacated]; United States v. S. Jones, 47 F3d 1162 (3d Cir. 1995)[2255 granted, sentence vacated, sentence reduced]; United States ex rel. Maurice Roberts v. Warden, 93-CV-1064 [NDNY] [Probation Department's imposition of restrictions on employment violated due process], Darryl Pierce v. United States, 89CR176 (MDPA, Rambo, J.)[2255 granted in part, sentence reduced], Baron v. United States, 97CV290 [DUT][2255 granted, sentence reduced and prisoner released]; Simpkins v. United States, 1999CR22 [NDWV, 2255 granted; failure to properly file 851 special information; sentence reduced]; United States v. Vernon, 92-340-01 [EDPA, Dalzell, J.] [2255 granted, restitution order vacated and modified]; United States v. Cora Love, 92-504-16 [EDPA, Giles, C.J., 2255 motion granted, sentence reduced]; United States v. Rosa, 90-38 [DNJ][2255

granted; sentence reduced]; United States v. Broadus, 91 CR209, 97CV965 [MDNC, Tilley, J.] [2255 granted in part, sentence reduced by 20 years]; United States v. Arevalo, 94CR702, 97 CV 946 [SDFLA, Moreno, J.] [2255 granted, sentence reduced]; United States v. H. Cruz, 93CR341 [SDFLA, Highsmith, J.] [2255 granted, sentence reduced]; Stocker v. Warden, 2004 U.S. Dist. Lexis 5395 [EDPA, Giles, C.J. Habeas corpus granted based on actual innocence, sentence vacated], Stovall v. Warden, 2005 U.S. Dist. Lexis 6758 (EDPA Diamond)[2254 habeas granted in part restoring right to appeal]; Pedretri v. United States, 1996 U.S. Dist. Lexis 6315 (NDNY, McAvoy C.J .)[2255 granted, sentence reduced]; United States v. Boggi, 1997 U.S. Dist. Lexis 14165 (EDPA 1997)[2255 granted, sentence reduced]; United States ex rel. Shriner v. Warden, 1:CV03-0481 (MDPA, Rambo, J.) [[2241 habeas granted, sentence reduced], Commonwealth v. Keenan Copeland, [CP 9607-1215 1/3 Greenspan, J.] [PCRA granted based on ineffective assistance of trial and appellate counsel. Conviction for first degree murder vacated. Life sentence vacated], Boyd v. Nish et al., 2007 U.S. Dist. Lexis 7176 (EDPA 2007, Tucker, J.)[Section 2254 habeas corpus granted to state prisoner based on ineffective assistance of trial counsel], Dockery v. DiGuglielmo, et al., Civil No. 04-6025 (EDPA 2007, Buckwalter, habeas granted, sentence reduced], Jones v. Piazza, CTA3 No. 07-1868 (3d Cir. 2007)[reversed order denying habeas corpus under 28 U. S.C. 2254; remanded for resentencing, sentence reduced on remand], Commonwealth vs. Charlton Pinnock C.P. 8910-0148 [PCRA granted, sentence reduced, Keogh, CJ), McKeever v. Warden, 2005 U.S. Dist. Lexis 4714 (EDP A, Diamond, J.)[2254 habeas granted, remanded to state for resentencing], United States v. Futch, CR. 402-232 [SDGA, Savannah Div.] [2255 granted, sentence reduced], United States v. Danon, Cr. 90-43 [DNJ, Lifland] [treaty transfer to Israel prior to completion of term of imprisonment], Commonwealth v. Maurice Jones, October Term, 1989, No. 0185-0187 [The Third Circuit Court of Appeals granted habeas corpus. Subsequently, the sentencing judge reduced the sentence], United States v. Coleman, 206 Fed. Appx. 80 (2d Cir. 2006) [remanded for resentencing, sentence reduced], United States v. Wayne, 2008 U.S. Dist. Lexis 52133 (WDPA 2008)[3582(c)(2) motion granted sentence reduced], United States v. Fermin, 277 Fed. Appx. 28 (2d Cir. 2008)[Sentence vacated and reduced], United States v. Manigault, 2010 U.S. App. Lexis 20350 (3d Cir. 2010)[sentence reduced pursuant to 1 8 USC 3582(c)(2) despite career offender classification],.], In re: Fredrick Pereira A 027 489 318: Removal order voided and petitioner allowed to remain in the United States]United States v. Omar Mendoza, 2009 U.S. Dist. Lexis 487205 2:05 CV 294 (NDTX, Amarillo) [2255 motion granted based on claim of ineffective assistance of trial counsel, sentence reduced to time served], United States v. Johnson, 2011 U.S. App. Lexis 5677 (3d Cir. 2011)[sentence reduced from 360 months to 222 months as a result of a 2255 motion], United States v. Bruce Wayne Mohammed, 94CR17 [WDPA, Cohill, J.][Two 3582(c)(2) motions granted, sentence reduced twice] Jeffries v. United States, 1:15CV814, 1 Crim. 127-01 [MDNC, Schroeder, J. 2255 motion granted for ineffective assistance of trial counsel and ex post facto violation, sentence vacated], Abdullah v. Dallas, 498 Fed. Appx 122 (3d Cir. 2012)[conviction and sentence reversed as a result of Rule 60 motion based on change in the law]. Commonwealth v. Poole, 2018 PA Super Unpub. Lexis 934 (PA Super. 2018)[evidentiary hearing granted to determine the date critical witness recanted testimony not the date he considered recanting testimony], United States v. Teddy Young, Criminal No. 05-56-01, Civ. 10-6836 [Stengel, J. 2255 motion granted based on IAC, sentence reduced], See also United States v. Young, 588 Fed. Appx. 209 (3d Cir. 2015)[Reversed order denying 2255 evidentiary hearing], , Wade v. Monroe County District Attorney, 2019 U.S. Dist. Lexis 79826

(MDPA 2019), Commonwealth v. Blackson, 2019 PA Super Unpub. Lexis 2235 (6/7/19), Gaines v. Marsh, 2021 U.S. Dist. Lexis 56372 (EDPA 2021. 3/24/21))

For information about representation, please call or write at the phone number or address above or E-Mail Sturmtriallaw@gmail.com