

Friday, July 18, 2008

### **Circuits are split on sex offense as crime of violence.**

Â Bill of Rights.Â (From the public domain.)Â Following is a brief overview of a federal circuit split that likely will find its way to the Supreme Court to resolve this split that likely affects a large number of criminal defendants. Although I have tried to keep the language as non-graphic as possible, you have been so advised. Â Numerous circuits are split onÂ "whether a sex offense perpetrated in the absence of consent â€" and which does not have as an element the use, attempted use, or threatened use of physical force â€" constitutes a 'crime of violence' under the Guidelines," because the federal sentencing guidelines do not sufficiently define "forcible sex offense,"Â which is a crime of violenceÂ that increases a defendant's sentencing guidelines. U.S. v. Chacon, \_\_ F.3d \_\_ (4th Cir. July 14, 2008). This is a critical question, as Mr. Chacon -- whose instant case involved a conviction for unlawfully re-entering the United States -- full well knows, from having received an increase in hisÂ Sentencing Guidelines base offense level by sixteen levels due to his previous Maryland second degree rape conviction. Notably, Chacon does not say whether the second-degree rape for which he was convicted in Maryland was based on an allegation of non-consensual sex with an adult or so-called consensual sex with an underage person, which the law treats as non-consensual based on the age of the victim. Â What is a "sex offense" as to the above issue?Â Rape was Mr. Chacon's prior conviction, and the Fourth Circuit had no problem classifying rape as a sex offense, just as courts likely will have no problem classifying non-consensual oral sex and anal sex as sex offenses. However, my initial review of Chacon does not seem to define sex offense, thus leaving open the question of the extent to which the following commonly prosecuted crimes will receive sex offense classification by the federal courts for sentencing guidelines purposes: non-consensual feeling of the clothed or unclothed body parts of another for purposes of arousal; and non-consensual penetration by finger or other object of one's genitals or anus. Â How does it feel to defend sex crime cases, at least where it seems clear that the person committed the alleged crime? I answer that hereÂ in discussing my defense of a man accused of raping his grandmother. Jon Katz.

Posted by Jon Katz in Constitutional Law at 00:00