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Firm update:

1. Victory! Court of Appeals of Georgia, *Holland v. State*, Case No. A11A0100, July 7, 2011.
2. Oral argument granted 11th Cir., *US v. House*, Case No. 10-15912, and 6th Cir., *US v. Williams*, Case No. 10-4326.

Commission Proposes Amendments Effective November, 2011

On April 28, the Sentencing Commission published amendments to the guidelines that will take effect on November 1, 2011, unless Congress disapproves them. They make the following changes:

1. Add enhancements for health care fraud.
2. Make permanent the emergency crack amendments.
3. Encourage abuse of trust increase for improper disposal of drugs.
4. Bar double-counting in child support cases.
5. Increase penalties for crossing border with firearms and straw purchasers.
6. Reduce guidelines for illegal entry where priors are old.
7. Delete language that may have discouraged role reductions.
8. Reduce supervised release for deportable aliens.
9. Amend standards for acceptance of plea agreements.

COMMISSION MAKES CRACK REDUCTIONS RETROACTIVE

After the Fair Sentencing Act of 2010 changed the crack-powder cocaine ratio from 100-to-1 to about 18-to-1, the Commission adopted Amendment 750, reducing the guidelines for crack offenses to conform to the statutory reductions. Although the Act itself does not address retroactivity, on June 30, 2011, the Commission made the *guideline* reductions retroactive, effective November 1, 2011, unless Congress disagrees. The Commission indicated that retroactivity would make approximately 12,000 offenders eligible to seek a reduced sentence and estimated that the average sentence reduction would be approximately 23 percent. The amendment retains the bar on reducing the

sentence below the minimum of the amended guideline range, absent a substantial assistance motion by the Government, and eliminates the distinction in § 1B1.10 between departures and *Booker* “variances,” in this regard. The Commission also amended Application Note 1 to adopt the view of the Sixth, Eighth, and Tenth Circuits that the guideline range referred to in § 1B1.10 is the range *before* any departure or variance. In addition, the Commission added a new Application Note to § 1B1.10 to require use of the version of § 1B1.10 in effect when the court reduces the defendant’s sentence under 18 U.S.C. § 3582(c)(2). The Commentary was also amended to refer to *Dillon v. U.S.*, 130 S.Ct. 2683 (2010), which held that retroactivity proceedings under § 3582(c)(2) are not governed by *Booker*, and that § 1B1.10 remains binding in such proceedings. The amendment does not take effect until November 1, 2011, and the Commission said that, until that date, courts should apply § 1B1.10 from the 2010 Guidelines Manual.

COMMISSION CHANGES GUIDELINE FOR REDUCING SENTENCE BASED ON AMENDED RANGE.

On June 30 (effective November 1, 2011), the Sentencing Commission amended Policy Statement § 1B1.10 to change the rules for reducing a term of imprisonment based on an amended guideline range. First, the amendment expands the listing in § 1B1.10(c) to implement the direction in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. Second, it amends § 1B1.10 to change the limitations that apply where the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Third, it amends the commentary to § 1B1.10 to address what constitutes the “applicable guideline range” for purposes of § 1B1.10. Fourth, it adds an application note to § 1B1.10 to require the court to use the version of § 1B1.10 that is in effect on the date on which the court reduces the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Commission bars double-counting in child support cases. Guideline § 2B1.1(b)(8)(C) provides an enhancement of two levels and a minimum offense level of level 10 if the offense involved “a violation of any prior, specific judicial or administrative order, injunction, decree, or process not

FEDERAL CRIMINAL LAW CENTER
2392 North Decatur Road • Decatur, GA 30033

(404) 633-3797 • (404) 633-7980 (Fax) • email: Marcia@MsheinLaw.com • www.federalcriminallawcenter.com • www.federalappealslawyer.com

addressed elsewhere in the guidelines.” Offenses under 18 U.S.C. § 228 are referenced in Appendix A to § 2J1.1 (Contempt), which provides in commentary Note 2 that, in a case involving a violation of § 228, the most analogous offense guideline is § 2B1.1. The Second and Eleventh Circuits have held that applying § 2B1.1(b)(8)(C) in a § 228 case is permissible because the failure to pay the child support and the violation of the order are distinct harms. *See U.S. v. Maloney*, 406 F.3d 149, 153-154 (2d Cir. 2005); *U.S. v. Phillips*, 363 F.3d 1167, 1169 (11th Cir. 2004). However, the Seventh Circuit has held that applying § 2B1.1(b)(8)(C) in a § 228 case is impermissible double counting. *See U.S. v. Bell*, 598 F.3d 366 (7th Cir. 2010). The amendment resolves the conflict by amending the commentary to § 2J1.1 to specify that, in a case involving a violation of § 228, § 2B1.1(b)(8)(C) does *not* apply. *Proposed Amendment 4, effective November 1, 2011.*

Commission adds enhancements for health care fraud.

In response to a Congressional directive, the Commission added a new tiered enhancement at subsection (b)(8) to § 2B1.1 for defendants convicted of offenses involving a Government health care program. The enhancement is 2 levels if the loss is more than \$1,000,000; 3 levels if the loss is more than \$7,000,000; and 4 levels if the loss is more than \$20,000,000. The Commission also created a new special rule in Application Note 3(F), stating that “the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss, i.e., is evidence sufficient to establish the amount of the intended loss, if not rebutted.” Finally, Application Note 3(A) to § 3B1.2 was amended to make it clear that a defendant who is accountable under § 1B1.3 (Relevant Conduct) for a loss amount under § 2B1.1 that greatly exceeds the defendant’s personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme, is not precluded from consideration for a mitigating role adjustment. *Amendment 1, effective April 28, 2011.*

Commission encourages abuse of trust increase for improper disposal of drugs.

In response to amendments to 21 U.S.C. § 822, the Commission amended Application Note 8 to § 2D1.1 to provide that an adjustment under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. The amendment reflects the likelihood that in such a case the offender abused a position of trust (i.e., the authority provided by 21 U.S.C. § 822 to receive controlled substances for the purpose of disposal) to facilitate the commission or concealment of the offense. *Proposed Amendment 3, effective November 1, 2011.*

Commission increases penalties for firearms crossing the border and straw purchasers. Subsection (b)(6) of the firearms guideline, § 2K2.1 provides a 4-level enhancement, and a minimum offense level of 18, if the defendant used or possessed any firearm or ammunition in connection with another felony offense. In a new amendment, the Commission established a new prong (A) in subsection (b)(6) that applies “if the defendant possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transferred out of the United States.” The existing provision is now prong (B). Under the amendment, a defendant receives the 4-level enhancement and minimum offense level 18 if either prong applies. With regard to straw purchasers, the Commission also amended § 2K2.1 to increase the penalties for a defendant who is convicted under 18 U.S.C. §§ 922(a)(6) or 924(a)(1)(A), and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person. The amendment increases the base offense level for subsections (a)(4)(B) and (a)(6) to level 14, or 20, if the offense involved either a semiautomatic firearm that is capable of accepting a large capacity magazine or a firearm described in 26 U.S.C. § 5845(a). In addition, the amendment provides a new Application Note 15 stating that, in a case in which the defendant is convicted under any of the three statutes, a downward departure may be warranted if (A) none of the enhancements in subsection (b) of § 2K2.1 apply; (B) the defendant was motivated by an intimate or familial relationship or threats or fear to commit the offense and was otherwise unlikely to commit such an offense; and (C) the defendant received no monetary compensation from the offense. Third, § 2M5.2 was amended to narrow the application of the alternative base offense level of 14 by reducing the threshold number of small arms in subsection (a)(2) from ten to two. *Proposed Amendment 5, effective November 1, 2011.*

Commission reduces guidelines for illegal reentry where priors are old.

Guideline § 2L1.2(b)(1) provides an enhancement up to 16 levels depending on the defendant’s prior convictions. The enhancement applies regardless of whether a prior conviction is too old to receive criminal history points. To remedy this, the Commission reduced the enhancement to 12 or 8 levels, respectively, if the prior conviction did not receive criminal history points. Compare *U.S. v. Amezcua-Vasquez*, 67 F.3d 1050, 1055 (9th Cir. 2009) (defendant had two convictions that were 25 years old; court stated that the 16-level enhancement in § 2L1.2(b)(1)(A) “addresses the seriousness of the offense” but “does not ... justify increasing a defendant’s sentence by the same magnitude irrespective of the age of the prior conviction at the time of reentry”); with *U.S. v. Chavez-*

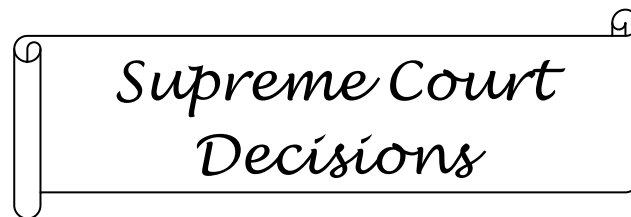
Suarez, 597 F.3d 1137, 1139 (10th Cir. 2010) (defendant had a conviction that was 11 years old; court discussed *Amezcu-Vasquez* but was “not convinced that this conviction was so stale” as to require the sentencing court to vary downward from the 16-level enhancement). The Commission also added an upward departure provision at Application Note 7 for cases in which the lower 12- or 8-level enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction. *Proposed Amendment 6, effective November 1, 2011.*

Commission deletes language that may have discouraged role reductions. At present, Application Note 3(C) to § 3B1.2 says that “[a]s with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment as warranted.” And Application Note 4 says that “It is intended that the downward adjustment for a minimal participant will be used infrequently.” The Commission deleted these two sentences as unnecessary and also because they may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances. *Proposed Amendment 7, effective November 1, 2011.*

Commission reduces supervised release for deportable aliens. In a new subsection (c) to § 5D1.1(a), the Commission created an exception to the general rule that supervised release should be imposed if the defendant is sentenced to more than one year in prison. The exception says that supervised release ordinarily should *not* be imposed if is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment. Non-citizens now are approximately half of the overall population of federal offenders, and supervised release is imposed in more than 91 percent of cases in which the defendant is a non-citizen. Second, the amendment lowers the minimum term of supervised release in § 5D1.2 from three years to two years for a defendant convicted of a Class A and B felony and one year for a defendant convicted of a Class C or D felony. The amendment adds commentary at new Application Note 5 encouraging courts to exercise their authority to terminate supervised release at any time after the expiration of one year of supervised release in appropriate cases. *Proposed Amendment 8, effective November 1, 2011.*

Commission amends standards for acceptance of plea agreements. The Commission amended § 6B1.2 to provide standards for acceptance of plea agreements when the sentence is outside the applicable guideline range, including when the sentence is a “variance” outside the guidelines framework. These changes are consistent with the changes to § 1B1.1 (Application Instructions) that the Commission promulgated last year. The amendment also responds to the Federal Judiciary Administrative Improvements Act of

2010, Pub.L. 111-174 (enacted May 27, 2010), which amended 18 U.S.C. § 3553(c)(2) to require that the reasons for a sentence be set forth in the statement of reasons form (rather than in the judgment and commitment order). *Proposed Amendment 9, effective November 1, 2011.*



Supreme Court says that “cocaine base” is not limited to crack. Under 21 U.S.C. § 841(b), a defendant must receive a mandatory minimum sentence if his offense involves a specified quantity of “cocaine base.” Defendant was charged with distributing cocaine base. At trial, defendant asked that the jury be instructed that it must find that his offense involved crack cocaine. The district court rejected this request and, when defendant was convicted, imposed the mandatory minimum sentence required for offenses involving “cocaine base.” The Supreme Court, in a decision by Justice Sotomayor, held that the term “cocaine base” means cocaine in its chemically basic form, not just crack cocaine. Justice Scalia concurred in part and wrote a concurring opinion. *Depierre v. U.S.*, 564 U.S. ___, 131 S.Ct. 2225 (June 9, 2011).

Supreme Court holds that fleeing from police officer is a “violent felony.” The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides that a defendant convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) who has three prior convictions for a “violent felony” is subject to a mandatory 15-year sentence. A “violent felony” is defined in part to mean an offense that involves “conduct that presents a serious potential risk of physical injury to another.” Defendant, convicted under § 922(g), had a prior felony conviction under Indiana Code § 35-44-3-3(b)(1)(A) for using a vehicle to knowingly and intentionally flee from a law enforcement officer after being ordered to stop. In an opinion joined by four other justices, Justice Kennedy held that felony vehicle flight is a “violent felony.” *Sykes v. U.S.*, 564 U.S. ___, 131 S.Ct. 2267 (June 9, 2011).

Supreme Court says ACCA predicate is determined by maximum sentence when offense was committed. Under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a defendant convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) is subject to a mandatory 15-year sentence if he has three prior convictions for a “violent felony” or a “serious drug offense.” The term “serious drug offense” is defined in part to mean an offense under state law carrying a maximum term of imprisonment

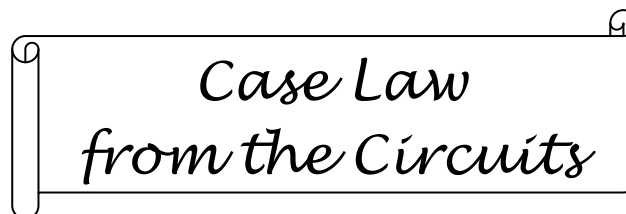
of ten years or more. Defendant, who was convicted under § 922(g), had prior convictions under North Carolina law. When defendant committed the North Carolina crimes, the offenses carried a maximum sentence of ten years or more. After defendant committed the offenses, North Carolina reduced the maximum term for defendant's offenses to under ten years. Writing for unanimous Supreme Court, Justice Thomas held that a court should determine whether a defendant's prior conviction is a "serious drug offense" by determining the maximum term of imprisonment applicable to the offense at the time the defendant was convicted. *McNeill v. U.S.*, 564 U.S. ___, 131 S.Ct. 2218 (June 6, 2011).

Supreme Court says sentence may not be lengthened to foster rehabilitation. At defendant's sentencing for smuggling illegal aliens into the U.S., the district court determined that she had a sentencing range of 41 to 51 months under the Guidelines. The district court imposed a sentence of 51 months because that sentence was long enough to allow defendant to take advantage of the Bureau of Prison's 500-hour Residential Drug Abuse Program (RDAP). On appeal and in the Supreme Court, defendant argued that the court could not lengthen her sentence in order to allow her to participate in RDAP because 18 U.S.C. § 3582(a) provides that a court may not use imprisonment to promote correction and rehabilitation. The Supreme Court held that § 3582(a) does not permit a sentencing court to impose or lengthen a prison term in order to foster a defendant's rehabilitation. *Tapia v. U.S.*, 564 U.S. ___, 131 S.Ct. 2382 (June 16, 2011).

Supreme Court to decide if sentence can be ordered to run consecutive to not-yet-imposed state sentence. A federal court ordered that defendant's federal sentence run consecutively to a state sentence that had not yet been imposed. On appeal, the Fifth Circuit upheld the sentence. In the Supreme Court, defendant argued that under 18 U.S.C. § 3584(a), a court may not impose a federal sentence to run consecutively to a not-yet-imposed state sentence. The government agreed with defendant but argued that the issue was not worthy of Supreme Court review. On June 13, 2011, the Supreme Court granted certiorari. *Setser v. U.S.*, 564 U.S. ___, 131 S.Ct. 2988 (June 13, 2011) (granting certiorari).

Supreme Court allows crack sentence reduction if Rule 11(c)(1)(C) plea was "based on" the Guidelines. Under 18 U.S.C. § 3582(c)(2), a defendant whose sentence is "based on" a Guidelines range that is subsequently lowered by the Sentencing Commission may move for a reduction in his sentence. Defendant pleaded guilty to possession with intent to distribute crack cocaine pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C) that stipulated to a specific sentence. The plea agreement stated that it was based on the applicable Guideline range. When the Commission later lowered the offense level for crack

offenses, the defendant sought a reduced sentence under § 3582(c)(2). The Supreme Court held that if an agreement under Rule 11(c)(1)(C) expressly uses a Guidelines sentencing range to establish the term of imprisonment and that range is subsequently lowered by the Commission, the prison term is "based on" that range and the defendant is eligible for a reduction under § 3582(c)(2). *Freeman v. U.S.*, ___U.S. ___, 131 S.Ct. 2685 (June 23, 2011).



GUIDELINES SENTENCING

9th Circuit says failure to prove type of drug limited sentence to lowest maximum for any drug. (120)(242) Defendant was charged with attempted possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. § 841(a), based on his possession of an unopened Federal Express box containing a kilogram of cocaine. At his guilty plea colloquy, neither the court nor the prosecutor expressly informed defendant that the government would be required to prove that he intended to possess cocaine. In response, defendant admitted only the elements of a violation of § 841(a); although he admitted that he intended to possess a controlled substance, he declined to admit that he knew that the controlled substance was cocaine. The Ninth Circuit held that because defendant did not admit that he attempted to possess cocaine, he was subject only to a one-year maximum sentence. *U.S. v. Hunt*, ___ F.3d ___ (9th Cir. Sept. 1, 2011) No. 09-30334.

9th Circuit says variance from child porn Guidelines may be based on policy disagreement. Since the Sentencing Commission first promulgated Guidelines for child pornography offenses, they have been revised nine times. Most of the revisions resulted from congressional directives to the Commission, and on one case Congress directly enacted amendments to the Guidelines. Because the child porn Guidelines are not the result of empirical study by the Commission and instead reflect congressional mandates, the Ninth Circuit held that district courts may vary from the child pornography Guidelines in § 2G2.2 based on a policy disagreement with them, and not simply based on an individualized determination that the Guidelines yield an excessive sentence in a particular case. *U.S. v. Henderson*, ___F.3d___ (9th Cir. Apr. 29, 2011) No. 09-50544.

OFFENSE CONDUCT

3rd Circuit applies Fair Sentencing Act to all crack sentences after August 3, 2010. (245)(250) Defendant, who committed his crimes before the Fair Sentencing Act (FSA) became law but was sentenced after the FSA became law, argued on appeal that the more favorable minimum prison sentences imposed by the FSA applied retroactively to him. The Third Circuit agreed, holding that the FSA's reduced sentences apply to all defendants sentenced on or after August 3, 2010, regardless of when the offense occurred. The Savings Statute, 1 U.S.C. § 109, at first appeared to doom defendant's position because the FSA does not mention retroactivity. However, the Savings Statute cannot control when preserving repealed penalties would plainly conflict with the intent of Congress. Here, the panel concluded that the FSA's grant of emergency authority to the Sentencing Commission and the desire to achieve "consistency" through "conforming" amendments, in conjunction with the directive in the Sentencing Reform Act of 1984 to apply the Guidelines in effect on the day of sentencing, led to the "inescapable conclusion" that Congress intended to apply the FSA to defendant. *U.S. v. Dixon*, __ F.3d__ (3d Cir. Aug. 9, 2011) No. 10-4300.

9th Circuit says retroactive termination of probation created eligibility for safety valve. Defendants pleaded guilty to federal controlled substance offenses carrying mandatory minimum sentences. At the time defendants committed the offenses, they were serving California state probationary sentences and therefore were not eligible for a "safety valve" reduction of sentence below the mandatory minimum. Before sentencing, each defendant obtained an order from the state court retroactively terminating the state probationary sentence of the day before defendant committed the federal crime. The Ninth Circuit held that the state courts' retroactive termination of probation rendered defendants eligible for a safety valve sentence below the mandatory minimum. *U.S. v. Yopez*, __F.3d__ (9th Cir. July 25, 2011) No. 09-50271.

6th Circuit rules Fair Sentencing Act is not retroactive to offenses committed before enactment. Defendant was convicted of crack cocaine charges, and sentenced as a career offender. He argued on appeal that he was entitled to the benefit of the Fair Sentencing Act of 2010. At the time of his sentencing and by reason of his prior convictions, his crack conviction carried a ten-year mandatory minimum sentence and a maximum sentence of life imprisonment. The FSA amended these penalties to a 30-year maximum sentence with no mandatory minimum. Thus, defendant's 360-month sentence did not exceed the maximum sentence assigned to his offense by the FSA. The Sixth Circuit ruled that the FSA had no bearing on defendant's case. In *U.S. v. Carradine*, 621 F.3d 575 (6th Cir. 2011), the circuit held

that the FSA does not apply to offenses committed before its enactment. *U.S. v. Marrero*, __F.3d__ (6th Cir. July 6, 2011) No. 09-3967.

11th Circuit holds Fair Sentencing Act applies to defendants sentenced after its enactment. Defendant pled guilty to crack cocaine charges. Although she was sentenced after the enactment of the Fair Sentencing Act of 2010 (FSA), the district court concluded that the FSA did not apply to her. The Eleventh Circuit, modifying its previous opinion to reflect recent developments, held that the FSA applies to defendants who had not yet been sentenced by the date of the FSA's enactment. The panel agreed with other circuits holding that the general savings statute prevents a defendant who was sentenced prior to the enactment of the FSA from benefitting from retroactive application. However, it agreed with the First Circuit's recent opinion in *U.S. v. Douglas*, __F.3d__ (1st Cir. May 31, 2011) No. 10-2341, that Congress intended the FSA to apply immediately. The FSA is silent as to whether the harsher mandatory minimums should be preserved for defendants whose cases were pending on the date of its enactment. However, the necessary and fair implication of the FSA is that Congress intended the Act to apply to all sentencing going forward, because a contrary conclusion would be logically inconsistent and would achieve absurd results. *U.S. v. Rojas*, __F.3d__ (11th Cir. July 6, 2011) No. 10-14662.

11th Circuit reverses for failure to address argument for 1:1 crack/powder ratio at sentencing. Defendant was convicted of conspiracy to possess and distribute crack cocaine and other related charges. He argued that the district court committed a procedural error at sentencing by not expressly responding to his repeated requests for a 1:1 crack-to-powder-cocaine sentencing ratio. The Seventh Circuit agreed that the district court erred. Although a sentencing court need not respond expressly to every argument a defendant makes, it must address "all of a defendant's principal arguments that are not so weak as to not merit discussion." Here, the court briefly discussed some of the factors in § 3553(a), but it never responded to defendant's repeated requests for a reduced ratio. *U.S. v. Johnson*, __F.3d__ (7th Cir. June 28, 2011) No. 10-2503.

3rd Circuit remands where district court did not adequately explain downward variance. Defendant participated in a fraud scheme, resulting in a guideline range of 70-87 months. He requested a downward variance, presenting evidence of a defendant personality disorder, which led him to bond with the conspiracy's leader. The district court sentenced defendant to five years' probation, with the first nine months in home detention. The Third Circuit held that the court committed procedural error in not adequately explaining defendant's sentence. The district court did not acknowledge that the sentence it chose properly identified the recommended range of 70-87

months, and thoroughly discussed some of the § 3553(a) factors, at no point did it describe how those factors justified a deviation from the recommended range down to probation and in-home confinement. In a case involving such a substantial variance, it is not enough to note mitigating factors and then impose sentence. *U.S. v. Negroni*, ___F.3d___ (3d Cir. Mar. 29, 2011) No. 10-1050.

10th Circuit rejects “in the business” enhancement for lack of evidence that defendant sold stolen property. Defendant was arrested after police pulled him over and found a vast cache of counterfeit identifications and other materials indicative of identity theft in his car. The Tenth Circuit rejected a two-level enhancement under § 2B1.1(b)(4) and for being “in the business of receiving and selling stolen property.” The enhancement is directed at professional fences – those that receive and sell stolen goods, not those that merely receive goods for their own use or sell goods that they themselves steal. Here, the court erred by applying the enhancement without making a factual finding that defendant actually sold stolen property. There was no evidence that defendant ever sold any stolen property, much less that he was “in the business” of selling stolen property. The error was not harmless. At no point did the court state that the sentence would be the same even if its calculation of the guideline range was in error. *U.S. v. Vigil*, ___F.3d___ (10th Cir. May 12, 2011) No. 10-4114.

3rd Circuit rejects increase where no evidence that gun in trunk of car facilitated possession of drugs. During a traffic stop, state troopers found \$9,000 in cash in the glove compartment of defendant’s car, a small amount of marijuana, and a handgun. They also found a revolver inside a backpack in the trunk. Defendant pled guilty to being a felon in possession of a gun, in this case the gun found in the backpack in the trunk, but not to the gun in the glove compartment. Defendant’s girlfriend testified that she was the owner of the gun in the glove compartment, and the court found that the gun did indeed belong to her. The Third Circuit rejected a § 2K2.1(b)(6) enhancement for possessing a firearm in connection with another felony offense. Other circuits have held that in a simple possession case, the sentencing court must make a specific finding that the firearm facilitated or had the potential of facilitating possession of the drugs. Here, the sparse facts of record did not support the conclusion that defendant’s possession of the revolver located in a backpack in the trunk of his car emboldened him to engage in the crime of marijuana possession, or served to protect the marijuana. *U.S. v. West*, ___F.3d___ (3rd Cir. Apr. 29, 2011) No. 09-2860.

9th Circuit says restitution to child porn victims requires finding that defendant harmed victims. At defendant’s sentencing for transportation of child pornography, two of the girls depicted in images that defendant possessed sought restitution from defendant. In support of their requests, the

victims averred that the dissemination on the Internet of images depicting them caused them ongoing psychological trauma. The district court ordered defendant to pay restitution to both girls. The Ninth Circuit held that although the two girls were victims of defendant’s offense, the government had failed to prove that defendant’s offense caused the harm suffered by the victims. The court added that the government had not provided any basis to calculate the amount of loss caused the victims by defendant’s conduct. *U.S. v. Kennedy*, ___F.3d___ (9th Cir. July 11, 2011) No. 10-30065.

7th Circuit affirms modified categorical approach to determine prior sodomy conviction. Defendant, previously convicted of forced sodomy, pled guilty to failing to register as a sex offender, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. To calculate the advisory guidelines range for a violation of SORNA, the judge must first determine the defendant’s tier classification. See U.S.S.G. § 2A3.5. The judge usually accomplishes this task by using a categorical approach to examine the elements of the statute under which the defendant was convicted. Because the statute of conviction prohibited all sodomy, whether consensual, forcible, or involving a child, the judge here used a modified categorical approach and examined the charging document to determine the type of sodomy to which defendant pleaded guilty. The Seventh Circuit upheld the district court’s use of the modified categorical approach. A judge may examine a limited set of additional materials – such as the charging instrument in this case – to determine the portion of 10 U.S.C. § 925 to which a defendant pled guilty. *U.S. v. Taylor*, ___F.3d___ (7th Cir. July 7, 2011) No. 10-3132.

7th Circuit affirms below-guidelines sentence for failing to register as sex offender. Defendant, previously convicted of forced sodomy, pled guilty to failing to register as a sex offender, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. The recommended sentencing range was 24-30 months in prison and five years to life of supervised release. Although the district court sentenced defendant to a below-guidelines sentence of 18 months’ imprisonment and a 20-year supervised release term that was within the guidelines, defendant challenged his sentence as unreasonable. The Seventh Circuit ruled that defendant did not overcome the presumptive reasonableness of his sentence. Although the district court found that defendant was not dangerous and that he maintained steady employment, the court also noted that defendant committed a very serious sex offense and intentionally refused to register as a sex offender for seven years. Then, while out on bond for failing to register as a sex offender, defendant again changed residences without

updating his registration. *U.S. v. Taylor*, ___F.3d___ (7th Cir. July 7, 2011) No. 10-3132.

11th Circuit says recipients of recycled blood-derivatives were not victims of fraud. Defendant and his father owned a pharmaceutical wholesaler that purchased and sold blood-derivatives. They were convicted of crimes related to multiple schemes to defraud the Florida and California Medicaid programs by causing them to pay for blood-derivative medications more than once. The Eleventh Circuit rejected a § 2B1.1(b)(2)(B) enhancement for 50 or more victims, finding that the government did not prove the recipients of the recycled blood-derivative products suffered a loss. Note 3 to § 2B1.1 says a person cannot be counted toward the 50-victim threshold unless that person suffered bodily injury or a discrete portion of the loss both imputed to the scheme and used to calculate the offense level increase under § 2B1.1(b)(1). The government's calculations only included the loss suffered by Medicaid programs, manufacturers, and distributors. *U.S. v. Bradley*, ___F.3d___ (11th Cir. June 29, 2011) No. 06-14934.

11th Circuit upholds loss estimate where defendant did not submit any proof that it was inaccurate. Defendant and his father owned a pharmaceutical wholesaler that purchased and sold blood-derivatives. They were convicted of crimes related to multiple schemes to defraud the Florida and California Medicaid programs by causing them to pay for blood-derivatives more than once. The Eleventh Circuit upheld the district court's loss calculations, holding that the court did not clearly err in accepting the government's "loss to the losing victims" calculations for the Florida schemes. Moreover, other than protesting the lack of certainty inherent in the government's tally, defendant did not submit any proof that the government's averages, estimates or results were so wildly inaccurate as to be unreasonable. *U.S. v. Bradley*, ___F.3d___ (11th Cir. June 29, 2011) No. 06-14934. *This case represents the importance of being prepared at sentencing on this issue with evidence and experts if needed.*

11th Circuit remands for failure to find which object offenses defendant conspired to commit. Defendant challenged his sentence on a money laundering conspiracy count, which alleged that he had conspired to commit five money laundering objects. Despite being instructed that it could not convict defendant without determining that he had conspired to commit one of those acts, the jury returned a general verdict of guilty. The court accepted the PSR's recommendation that defendant's money laundering sentence be based on the money laundering object with the highest possible offense level. However, under § 1B1.2(d), when a defendant is convicted of a conspiracy to commit multiple object offenses, he must be sentenced as if he had been convicted on a separate count of conspiracy for each. Courts have held that note 4 to § 1B1.2(d) requires the

district court to find beyond a reasonable doubt which offense(s) the defendant conspired to commit. The Eleventh Circuit held that the district court erred in failing to make this necessary finding. It vacated defendant's sentence and remanded for resentencing. *U.S. v. Bradley*, ___F.3d___ (11th Cir. June 29, 2011) No. 06-14934.

9th Circuit rejects grouping of two separate illegal reentry convictions. Defendant was convicted of two separate violations of illegal reentry after deportation, in violation of 8 U.S.C. § 1326. At sentencing, he argued that the two violations should be grouped under § 3D1.2(b) because they involved the same "victim." The Ninth Circuit held that the district court properly declined to group the two convictions because they were not "connected by a common criminal objective" or "part of a common scheme or plan," as required by § 3D1.2(b). *U.S. v. Espinoza-Baza*, ___F.3d___ (9th Cir. Aug. 4, 2011) No. 09-10398.

9th Circuit, en banc, finds California burglary is not a crime of violence. Defendant, convicted of illegal reentry after deportation, had a prior conviction under California Penal code § 459. That section punishes "[e]very person who enters [various structures] . . . with intent to commit grand or petit larceny or any felony." At defendant's sentencing, the district court found that defendant's prior conviction under §459 constituted a "crime of violence" and an "aggravated felony" under the applicable Guideline § 2L1.2. Sitting en banc, the Ninth Circuit held that a conviction under California Penal Code § 459 is categorically broader than generic burglary and therefore a conviction under that statute does not categorically constitute a "crime of violence." Because the documents produced by the government did not show that defendant committed a generic burglary by unlawfully entering the burglarized premises, defendant's offense did not qualify as a "crime of violence" under the modified categorical approach. *U.S. v. Aguila_Montes de Oca*, ___F.3d___ (9th Cir. Aug. 11, 2011) No. 05-50170.

8th Circuit says increase for "device-making equipment" does not apply to check-cashing scheme. Defendant recruited other individuals to cash counterfeit checks as part of a fraudulent check-cashing scheme. On appeal, the government conceded that the district court erred in applying a § 2B1.1(b)(10) enhancement for an offense involving a "device-making equipment." The Eighth Circuit agreed. Section 2B1.1(b)(10) cannot be applied to offenses that involve a transfer originated solely by paper instrument, *i.e.*, a scheme limited to fraudulent check-cashing. The definition of access devices excludes transfers "originated solely by paper instrument." *U.S. v. Butler*, ___F.3d___ (8th Cir. July 22, 2011) No. 10-2901.

6th Circuit remands where not clear if court knew it could reject 100:1 crack-to-powder ratio. Defendant pled

guilty to crack cocaine charges, and the district court sentenced him to a within-guidelines sentence of 180 months. Defendant argued that the district court failed to recognize that it had the authority to “vary categorically” from the crack-cocaine guidelines. The existence of that authority was made clear in *Spears v. U.S.*, 555 U.S. 261 (2009), decided after defendant was sentenced. The Sixth Circuit remanded, agreeing with defendant that the district court appeared unaware of the authority the Supreme Court expressly announced months later. The district court observed that the “most recent version of the guidelines” (the November 2007 amendments to the Guidelines’ crack provisions) resulted in a two-level reduction in defendant’s base offense level. The court also stated that the 100:1 ratio “is still largely in play in the guidelines[.]” Notably, the court did not say that it could take the ratio out of play. *U.S. v. Priestler*, ___F.3d___ (8th Cir. July 22, 2011) No. 08-2391.

9th Circuit upholds below-guidelines 36-month sentence for gun possession. Defendant, an officer in an outlaw motorcycle gang, was convicted of possession of a firearm by a convicted felon. Defendant possessed two firearms and hundreds of rounds of ammunition. At sentencing, the court calculated his guidelines range as 51-63 months, but then reduced defendant’s criminal history category from III to II, with a range of 46-57 months, and imposed a sentence of 36 months. The Ninth Circuit held that the court considered defendant’s arguments in favor of a lower sentence and the sentence was not substantively unreasonable. *U.S. v. Vasquez*, ___F.3d___ (9th Cir. Aug. 15, 2011) No. 10-50366.

3rd Circuit holds that counterfeiting increase cannot be based on intended loss. Defendant attempted to persuade a potential victim that a stack of black paper was U.S. currency that had been dyed black to keep it from being used by foreign rebels. He said the black dye could be removed by a special solvent, and proceeded to clean two of the papers, which were revealed to be two genuine \$100 bills. Defendant repeated the cleaning for an undercover Secret Service agent posing as a potential buyer. Other than the four genuine \$100 bills, the rest of the paper was black construction paper. Defendant pled guilty to possession of altered currency and conspiracy. Section 2B5.1(a) provides for enhancements based on the face value of the counterfeit items. The district court applied an eight-level increase for amounts between \$70,000 and \$100,000, ruling that the enhancement could be based on the loss defendant intended to cause. The Third Circuit reversed, holding that the §2B5.1 increase could not be based on intended loss – the guideline specifically refers to the face value of the counterfeit items. While the court might be able to achieve the same result by departing or varying upward, this was for the district court to determine in the first instance. *U.S. v. Wright*, ___F.3d___ (3d Cir. June 1, 2011) No. 10-2970.

8th Circuit says even after Booker, court cannot ignore criminal history points for safety valve relief. Defendant had three criminal history points – one for a prior criminal conviction for second-degree home invasion, and two points under § 4A1.1(d) because he committed the current offense while on probation for that offense. Because he had three criminal history points, defendant was not eligible for safety valve relief. Defendant argued that the district court erred in finding that it was required to assess criminal history points based on his probationary status at the time of his current offense. According to defendant, because the Guidelines are now advisory, a district court has discretion to determine whether to assess two points to a defendant’s criminal history. The Eighth Circuit rejected this argument. Title 18, Section 3553(f)(1) is a statutory directive requiring no more than one criminal history point for safety valve relief. The fact that the statute cross-references the Guidelines does not make the statute advisory. *U.S. v. Scott*, ___F.3d___ (8th Cir. May 27, 2011) No. 10-2432.

2nd Circuit requires evidentiary hearing to determine composition of pills. About 23,000 blue and white pills were found in defendant’s possession. A DEA lab found that the pills were comprised of NBenzylpiperazine (BZP), along with an “unmeasurable” amount of methamphetamine, MDMA (ecstasy), caffeine, procaine, and Trifluoromethylphenylpiperazine (TFMPP). At sentencing, the parties disputed whether the appropriate substitute under § 2D1.1 for the mixture was MDMA. The district court, however, concluded that no evidentiary hearing was necessary to credit the DEA lab reports. The Second Circuit remanded for an evidentiary hearing, holding that there was insufficient evidence in the record to conclude that the appropriate substitute under the Sentencing Guidelines for the mixture contained in the pills was MDMA. Unlike other cases, the record on appeal did not allow the appellate court to conclude that the pills found in defendant’s van were a mixture of BZP and TFMPP containing a similar chemical structure to MDMA, designed to mimic the effects of MDMA, or containing a similar potency to MDMA. The record appeared to indicate that the substance was almost exclusively composed of BZP, with “unmeasurable” amounts of other substances. *U.S. v. Figueroa*, ___F.3d___ (2d Cir. May 26, 2011) No. 10-2050-cr(L).

9th Circuit gives retroactive effect to case finding that burglary of “non-building” is not categorically a crime of violence. In *U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc), the Ninth Circuit held that a state burglary offense is not categorically a “crime of violence” under the Guidelines if it allows conviction based on an entry into a “non-building.” *Grisel* holds that a court must use the modified categorical approach to determine whether a “dwelling” in a burglary statute meets the Guidelines

definition of a “dwelling.” Under the Guidelines, a non-building adapted for accommodation may qualify as a “dwelling” under the Guidelines but does not do so categorically. The Ninth Circuit held that because *Grisel* was a non-constitutional, substantive decision concerning the reach of a federal statute, it applies retroactively. *U.S. v. Reina-Rodriguez*, ___F.3d___ (9th Cir. June 22, 2011) No. 08-16676.

CRIMINAL HISTORY

1st Circuit rules Massachusetts youthful offender adjudication is not career offender predicate. The district court sentenced defendant as a career offender, § 4B1.1, based in part on a prior Massachusetts youthful offender adjudication. On appeal, the First Circuit affirmed, noting that the career offender designation was compelled by *U.S. v. Torres*, 541 F.3d 48 (1st Cir. 2008). When defendant sought rehearing, the government conceded that *Torres*' holding was incorrect. *Torres* held that an offense committed before age 18 could be counted towards career offender status regardless of the state's classification of the offense. But for career offender purposes, a conviction for an offense committed before age 18 counts only if “it is classified as an adult conviction under the law of” that jurisdiction. § 4B1.2, Note 1. The First Circuit concluded that Massachusetts has “classified” “youthful offender” adjudications differently from “adult convictions,” and defendant's adjudication was not a career offender predicate. This was a judgment call, but Massachusetts clearly distinguishes between youthful offenders and adults, and to the extent that objective criteria apply, the treatment accorded under state law was significantly different than that given an adult offender. The district court erred in treating defendant as a career offender. *U.S. v. McGhee*, ___F.3d___ (1st Cir. June 22, 2011) No. 09-1322.

1st Circuit refuses to remand where court was aware of later amendment eliminating “recency” points. On April 7, 2010, the Sentencing Commission voted to eliminate the “recency” points assessed by U.S.S.G. § 4A1.1(e). That proposed amendment, Amendment 742, became effective on November 1, 2010. It is not listed as a retroactive amendment in §1B1.10(c). Defendant pled guilty to being a felon in possession of a firearm, and was sentenced one week after the Amendment was proposed, and before it became effective. Had Amendment 742 been in effect at defendant's sentencing, his criminal history category would have been V rather than VI, and his sentencing range would have 100-120 months, rather than 110-120 months. The first Circuit held that the district court did not abuse its discretion in refusing to eliminate the “recency” points from defendant's criminal history. The court was made aware at sentencing of the prospective amendment, but refused to vary downward. In rejecting defendant's request for a downward variance to 84 months, the court found that

defendant's criminal history was not overstated, citing defendant's demonstrated recidivism. *U.S. v. Adams*, ___F.3d___ (1st Cir. May 9, 2011) No. 10-1588.

6th Circuit refuses to count prior conviction outside 16-year window. A prior offense can be counted in a defendant's criminal history as long as it resulted in the defendant being incarcerated on the sentence anytime during the 15 years preceding the instant offense, including imprisonment for a violation of parole. See U.S.S.G. § 4A1.2(k)(2)(B). On March 30, 1987, defendant was convicted in state court of assault and sentenced to three to ten years. He was paroled on November 12, 1991. The current weapons offense occurred on December 27, 2006, about six weeks beyond the 15-year cutoff. However, on December 19, 1991, defendant was picked up for a parole violation based on a new firearms charge. He was returned to a Michigan facility, but was never convicted of the firearms charge, and was released on February 3, 1992, when his parole supervision was reinstated. The Sixth Circuit reversed the district court's finding that the 1987 conviction could be counted in defendant's criminal history category. Defendant was never found to have violated his parole. The language of the guideline requires a parolee to have been incarcerated due to a revocation of his parole, rather than merely have been incarcerated pending determination of whether a parole violation took place. *U.S. v. Galaviz*, ___F.3d___ (6th Cir. May 6, 2011) No. 07-2518.

11th Circuit reverses where government failed to serve notice of enhanced sentence before trial. Defendant was convicted of drug and firearms charges. He argued that the government did not file and serve an information containing notice of an enhanced sentence in accordance with § 851(a)(1). The government argued that the second information was properly filed because it was handed to the district court in open court, and it was properly served on defendant, because he had actual notice of the information and the district court had read a portion of the information to him in open court. The Eleventh Circuit held that the statutory language of § 851(a) requires the government to strictly comply with the service requirement before trial. The defendant's actual notice of the government's filing of an information does not obviate the government's statutory obligation under § 851(a) to serve a copy of the information on the defendant or his counsel before trial. Here, it was not apparent from the record whether the district court made a finding at defendant's sentencing that he or his trial counsel was served with a copy of the second information before trial. Moreover, the record would not have supported such a finding. The government did not produce any evidence or testimony at sentencing to prove that it had served the second information on defendant or his trial counsel before trial. *U.S. v. Ladson*, ___F.3d___ (11th Cir. June 24, 2011) No. 10-10151.

8th Circuit, en banc, rejects *Begay* collateral attack on career offender sentence. Defendant was originally sentenced as a career offender to 360 months in prison. He later filed a § 2255 motion to vacate his sentence, alleging that the career offender determination violated *Begay v. U.S.*, 533 U.S. 137 (2008) (which held that drunk driving is not a violent felony). The district court dismissed the motion as time-barred because, under § 2255(f)(3), *Begay* did not recognize a right “made retroactively applicable to cases on collateral review.” An Eighth Circuit panel reversed, concluding that *Begay* announced a new substantive rule that, under *Teague v. Lane*, 489 U.S. 288 (1989), applied retroactively to career offender decisions. *Sun Bear v. U.S.*, 611 F.3d 925 (8th Cir. 2010). On rehearing en banc, the Eighth Circuit vacated the panel decision, holding that defendant’s collateral attack to his sentence under the career offender guideline was not cognizable in a motion to vacate. Under § 2255, an error of law does not provide a basis for collateral attack unless the error was a fundamental defect that results in a complete miscarriage of justice. The panel had found the miscarriage-of-justice exception applied because defendant’s claim was based on a post-conviction change in the law that made the sentence unlawful. The en banc court disagreed. Defendant’s 360-month sentence was not unlawful. It was well-within the statutory maximum authorized for the offense of second-degree murder, and within the initial guidelines range of 292-365 months. *Sun Bear v. U.S.*, __F.3d__ (8th Cir. July 12, 2011) No. 09-2992 (en banc).

DETERMINING THE SENTENCE

7th Circuit reverses restitution to victims not harmed by conduct in counts of conviction. Defendant, a real estate agent, was convicted of five counts of wire fraud. The district court ordered her to pay restitution to 13 payees in the amount of \$2.3 million, while her five counts involved only seven victims and totaled \$1.3 million. On appeal, the Seventh Circuit reversed. The crime comprehended by the mail and wire fraud statutes is the scheme to defraud, not just the isolated wire transmissions or mailings, so restitution for victims of the overall scheme is required. To comply with the MVRA, the district court should have made specific findings regarding defendant’s scheme or schemes. The district court’s findings were insufficient to determine whether the counts of conviction comprised a unitary scheme. Therefore the court erred in ordering restitution to victims not clearly harmed by the conduct in the counts of conviction. *U.S. v. Locke*, __F.3d__ (7th Cir. June 21, 2011) No. 10-1351.

ADJUSTMENTS

4th Circuit bars government from refusing third-level reduction unless defendant waives appeal. Although the PSR recommended that defendant receive a two-level

reduction for acceptance of responsibility, the government refused to move for the additional one-point acceptance reduction because defendant refused to sign the plea agreement, which contained a waiver of appeal. Disagreeing with several other circuits, the Fourth Circuit held that § 3E1.1(b), the government has discretion to refuse to move for an additional one-level reduction, but only on the basis of an interest recognized by the guideline itself – not, as with § 5K1.1, on the basis of any conceivable legitimate interest. Section 3E1.1(b) does not require a defendant to provide the prosecution with the type of assistance that might reduce the “expense and uncertainty” attendant to an appeal. Moreover, when a defendant has unconditionally pled guilty, his refusal to sign an appellate waiver has no impact on his ability to challenge his conviction or on the government’s need to anticipate such a challenge. *U.S. v. Divens*, __F.3d__ (4th Cir. July 5, 2011) No. 09-4967.

11th Circuit rejects increase for reckless endangerment where defendant did not know officers were in pursuit.

During a supervised visit, defendant absconded with his four-year-old son and drove to St. Petersburg, Florida, where they boarded defendant’s sailboat and sailed into the Gulf of Mexico. The Coast Guard later located the sailboat in international waters heading to Mexico. The Coast Guard monitored the sailboat from a distance of eight nautical miles, and the following morning, boarded the boat. Defendant fully cooperated and the child was returned to his mother that evening. The Eleventh Circuit rejected a § 3C1.2 enhancement for recklessly creating a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. Defendant conceded that he recklessly created a substantial risk of death or serious bodily injury to his son by taking him aboard the sailboat. However, enhancement is applicable only where the defendant knows he is fleeing from a law enforcement officer who is in pursuit of the defendant. Defendant was not fleeing any particular law enforcement officer and was unaware of the pursuit by the Coast Guard until the pursuit was over. *U.S. v. Martikainen*, __F.3d__ (11th Cir. May 10, 2011) No. 10-13337.

6th Circuit rejects blanket policy denying one-level reduction for acceptance of responsibility.

The district court had a written policy stating that “[a] defendant who waits until the time set for the final pretrial conference to plead guilty may not receive the one-level reduction” for acceptance of responsibility in § 3E1.1(b). The Sixth Circuit remanded, ruling that the policy usurped the government’s discretion in deciding whether to move for a third-level reduction. Such a policy was inconsistent with Congress’ intent to permit the government to decide whether to move for the additional one-level reduction under § 3E1.1(b). Here, although the government did not move for a reduction, the error was not harmless. The government’s

prerogative and discretion was affected by the court's policy, which contravened § 3E1.1(b) which states that "the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial." *U.S. v. Mackerly*, ___F.3d___ (6th Cir. June 17, 2011) No. 09-2148.

APPEAL OF SENTENCE

9th Circuit finds that court's negotiation of appellate waiver rendered waiver invalid. Defendant pleaded guilty to illegal reentry after deportation, in violation of 8 U.S.C. § 1326. At sentencing, the court told defendant that he could appeal, but that defendant's agreement to forgo an appeal would help convince the court that defendant would not illegally return to the U.S. after deportation, show that defendant accepted responsibility for his offense, and result in a reduced sentence. After consulting with counsel, defendant agreed to waive his right to appeal, and the district court found the waiver knowing and voluntary. Defendant nevertheless appealed his sentence. The Ninth Circuit held that the appellate waiver negotiated by the district court was invalid and unenforceable. *U.S. v. Gonzalez-Melchor*, ___F.3d___ (9th Cir. July 8, 2011) No. 10-50111.

2nd Circuit says third-level acceptance credit cannot be denied on ground that government had to prepare for evidentiary sentencing hearing. Defendant pled guilty without a plea agreement to drug charges. He made certain objections to the PSR's findings. The night before a scheduled *Fatico* evidentiary hearing, defendant withdrew all but one of his objections. The *Fatico* hearing was rescheduled and limited to the one remaining objection. At sentencing, the government recommended a two-level reduction for acceptance of responsibility, but refused to move for the third-level reduction under § 3E1.1(b) because defendant required the government to undergo extensive preparation for a *Fatico* hearing on multiple sentencing issues. The Second Circuit held that the government's refusal to move for a third-point reduction under § 3E1.1(b) was based on an unlawful reason. The plain language of § 3E1.1(b) refers only to prosecution resources saved when the defendant's timely guilty plea allows the government to avoid preparing for trial. Here, it was undisputed that defendant's guilty plea was timely and spared the government from preparing for trial. A *Fatico* hearing is not a trial, and defendant's post-plea objections to the PSR did not require the government to prepare "for trial." *U.S. v. Lee*, ___F.3d___ (2d Cir. July 26, 2011) No. 10-493-cr.

DEPARTURES AND BOOKER VARIANCES

7th Circuit remands where court relied on clearly erroneous fact at sentencing. Defendant argued that the district court committed a significant procedural error in sentencing by relying on a clearly erroneous fact – that

defendant had prior involvement with guns. In fact, defendant had no prior convictions involving the use of firearms. In selecting defendant's sentence, the district court focused on the violent nature of the crime, the fact that defendant readily agreed to participate, despite having been paroled just nine months earlier, and defendant's significant criminal history, which the judge apparently believed included the use of firearms. While the court mentioned guns only once, based on its reading of the transcript, the panel concluded that it was "not improbable that the trial judge was influenced by improper factors in imposing sentence." *U.S. v. Durham*, ___F.3d___ (7th Cir. June 28, 2011) No. 10-1308.

D.C. Circuit reverses for failure to adequately explain reason for above-guidelines sentence. Defendant, a primary care physician who served Medicaid patients, was convicted of health care fraud and making false statements regarding health care matters. His advisory guideline range was 33-41 months, but the district court sentenced him to 53 months, an upward variance of 12 months. The court explained that health care fraud contributes to the rising cost of health care in the country, that a sentence above the Guidelines would promote respect for the law, and 12 months above the guidelines was reasonable. The D.C. Circuit ruled that the district court committed plain error by failing to adequately explain its reasons for imposing the upward variance. Although the court did recite sentencing factors that informed its decision making, it did not explain why those particular factors justified this particular sentence. The court's broad observations about the social costs of health care fraud were certainly related to sentencing, but they would apply to any defendant convicted of this offense and did not explain this individual sentence. The court's brief mention of two other § 3553(a) factors shed no additional light on the sentence. *U.S. v. Akhigbe*, ___F.3d___ (D.C. Cir. June 14, 2011) No. 10-3019.

APPLICATION PRINCIPLES

5th Circuit holds that courts erred by failing to reconsider statutory sentencing factors. In separate proceedings, defendants appealed from the district court's denial of their motions for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on the recent crack amendments. Defendants raised the same issue on appeal – should an appellate court assume that the district court reconsidered the § 3553(a) factors when a court implies that it did not reconsider the § 3553(a) factors because it previously considered them at the original sentencing. The Fifth Circuit reversed the district courts' denial of the defendants' motions for sentence reductions under § 3582(c)(2), finding that the courts erred in failing to reconsider the § 3553(a) factors. The district courts misunderstood their duty to reevaluate the § 3553(a) factors when considering whether a sentence reduction was warranted. The courts' use of the

word “accordingly” in their decisions indicated that they relied on their original evaluation of the § 3553(a) factors, declined to conduct a new evaluation of those factors. *U.S. v. Henderson*, __F.3d__ (5th Cir. Mar. 24, 2011) No. 08-30998.

7th Circuit reverses for lack of evidence that dismissed transactions were relevant conduct. Defendant, a real estate agent, was convicted of multiple counts of wire fraud for her role in several real estate transactions. The Seventh Circuit held that the district court erred in considering transactions underlying dismissed counts as relevant conduct. To constitute relevant conduct, those acts must have been both attributable to defendant and part of a common scheme with the counts of conviction. Here, none of the 14 counts were dismissed at trial before any evidence was presented and no evidence regarding defendant’s participation in these transactions was presented at sentencing. Given the lack of evidence and the lack of any explicit adoption of a PSR containing an adequate relevant conduct analysis, the district court erred in considering the transactions underlying the dismissed counts as relevant conduct. *U.S. v. Locke*, __F.3d__ (7th Cir. June 21, 2011) No. 10-1351.

3rd Circuit rules arrest five months later was not relevant conduct. In February 2007, state troopers found \$9,000 in cash in the glove compartment of defendant’s car, a small amount of marijuana, and a handgun. They also found a revolver inside a backpack in the trunk. In July 2007, during a fire-code inspection of defendant’s girlfriend’s apartment, a local fire marshal saw a handgun next to the bed where defendant was sleeping. Defendant pled guilty to being a felon in possession of a firearm. The Third Circuit held that the district court erred in finding that the July incident was relevant conduct for purposes of sentencing him for the February felon in possession incident. The five-month interval between the offenses was not of such duration as to render the events of July too remote from the events of February. However, where the time between offenses is not strongly supportive of finding relevant conduct, the offenses must show significant similarity and regularity. The February and July offenses were not sufficiently similar or regular to satisfy the relevant conduct standard. Although both incidents involved a stolen firearm in relatively close proximity to cash and a small quantity of marijuana, these facts alone were not sufficient to show more than a pair of similar but isolated and unrelated events. *U.S. v. West*, __F.3d__ (3d Cir. Apr. 29, 2011) No. 09-2860.

3rd Circuit remands where unclear if court knew it could consider post-incarceration rehabilitation. Defendant was convicted of drug charges, and two counts of possessing a firearm in furtherance of drug trafficking. One of the firearm charges was vacated on appeal, and defendant

was resentenced. After resentencing, the Supreme Court decided *Pepper v. U.S.*, 131 S.Ct. 1229 (2011), which held that at resentencing a district court may properly consider a defendant’s post-incarceration rehabilitation. Here, the district court permitted defendant to offer evidence at sentencing of his positive record since he had been incarcerated. Nonetheless, the court said that defendant’s rehabilitation was “fine as far as it goes, but doesn’t really figure much in my calculus at this point.” The Third Circuit found this comment ambiguous, and remanded so that the court could, if it chose, consider defendant’s post-incarceration rehabilitation as permitted by *Pepper*. The district court might conclude that no alteration of defendant’s sentence was necessary. *U.S. v. Diaz*, __F.3d__ (3rd Cir. May 5, 2011) No. 10-3337.

6th Circuit holds that defendant had right to be present and allocute at resentencing. In a previous opinion, the Sixth Circuit vacated defendant’s sentence as procedurally unreasonable and remanded for resentencing in a general remand order. On remand, over defendant’s objections, the district court resentenced defendant to the same sentence without holding a resentencing hearing. Defendant claimed that his sentencing was procedurally unreasonable because he was denied his right to be present and allocute. The Sixth Circuit agreed, holding that upon a general remand, when a sentence has been vacated on direct appeal, the defendant is entitled to a resentencing hearing at which he may present and allocute. Further, when a plenary resentencing hearing is held, the district court is required to state its reasons for the sentence “in open court.” Every circuit court to address the issue has agreed with this holding. *U.S. v. Garcia-Robles*, __F.3d__ (6th Cir. May 10, 2011) No. 09-1980.

6th Circuit remands for resentencing in light of *Pepper*. After the district court sentenced defendant to 120 months, the Sixth Circuit remanded for resentencing under the Armed Career Criminal Act. Defendant then persuaded a Michigan court to amend a 2002 judgment against him to indicate that the maximum sentence was five years, which meant that the Michigan offense no longer qualified as a serious drug offense. At resentencing, the district court resentenced defendant to the same 120-month sentence. Defendant argued that the district court erred by not considering amendments to the Guidelines adopted after his original sentencing. The Sixth Circuit ruled that the district court properly applied the May 2007 Guidelines in effect at the time of defendant’s original sentencing. However, the panel vacated defendant’s sentence and remanded for resentencing in light of the Supreme Court’s recent decision in *Pepper v. U.S.*, 131 S.Ct. 1229 (2011). Although *Pepper* did not affect which version of the Guidelines to apply at resentencing, it was relevant to whether the district court had discretion under § 3553(a) to consider post-sentencing

amendments to the guidelines. *U.S. v. Taylor*, ___F.3d___ (6th Cir. June 7, 2011) No. 09-1961.

9th Circuit, en banc, to rehear case prescribing sentencing procedures. In *U.S. v. Ressam*, 593 F.3d 1095 (9th Cir. 2010), the court explained the procedure that courts should employ in guidelines sentencing. Applying those procedures, the Ninth Circuit held that the district court had erred in imposing a 22-year sentence on a defendant who had been convicted of planning to detonate explosives at the Los Angeles airport in 1999. The court also ordered the case reassigned to a new district judge on remand. On August 2, 2011, the court granted rehearing en banc in that case. *U.S. v. Ressam*, __F.3d___ (9th Cir. Aug. 2, 2011) No. 09-30000 (granting en banc review).

8th Circuit finds use of information provided during proffer session violated § 1B1.8. Defendant argued that the district court violated § 1B1.8 when it calculated his advisory sentencing range using self-incriminating information he disclosed during a proffer session with the government. The Eighth Circuit agreed. First, the proffer agreement was included within § 1B1.8's coverage. Paragraph 6 of the agreement provided that statements or information obtained in defendant's proffer could not be used in the government's case-in-chief. The court rejected the government's position that the agreement permitted defendant's proffer statement to be used in determining the applicable guideline range. *U.S. v. Perry*, 640 F.3d 805 (8th Cir. 2011).

1st Circuit applies Fair Sentencing Act's reduced mandatory minimums to earlier crimes. Defendant's drug crimes occurred in 2009. The Fair Sentencing Act of 2010, which became effective on August 3, 2010, reduced the mandatory minimum prison terms for cocaine base offenses. The new minimums treat cocaine base more harshly than powder at a ratio of about 18:1, rather than the former ratio of 100:1. The FSA also directed the Sentencing Commission to adopt new guidelines conforming to the new statute. The Commission adjusted its Guidelines table to correspond to the 18:1 ratio, and these amendments took effect on November 1, 2010. The district court concluded that Congress intended the new Guidelines provisions to control from November 1, forward, but also, by implication, Congress intended the new mandatory minimums based on the same 18:1 ratio to supersede the higher mandatory minimums in effect in 2009 when defendant's crimes were committed. The First Circuit upheld the district court's decision. Congress intended that when the new Guidelines embodying the 18:1 ratio came into effect, defendants would be sentenced under the new Guidelines, and using the pre-FSA mandatory minimums with the 100:1 ratio would defeat this intention. *U.S. v. Douglas*, ___F.3d___ (1st Cir. May 31, 2011) No. 10-2341.

6th Circuit directs court to provide statement of reasons for new crack sentence. Defendant originally was sentenced to 97 months for his crack cocaine offense. He later filed a motion for a sentence reduction based on the crack amendments, and the parties stipulated that defendant met the criteria for a sentence reduction, and that his new sentencing range was 78-97 months. Without holding a hearing, the court resentenced defendant to 88 months. Defendant appealed, arguing that the district court abused its discretion by resentencing him under § 3582(c) without a hearing and by issuing a form order without any explanation for its ruling. The Sixth Circuit held that the district court did not abuse its discretion by not holding a hearing on defendant's motion. Sentence reductions under 18 U.S.C. § 3582(c) are not full sentencing proceedings. However, the panel agreed that a limited remand was required for the district court to provide a statement of reasons for its decision. The reasoning behind requiring a brief statement of reasons at sentencing also applies to a hearing on a motion to reduce. The court did not meet this minimal requirement. The court merely checked off two boxes on a form. *U.S. v. Howard*, ___F.3d___ (6th Cir. May 24, 2011) No. 09-2468.

1st Circuit rules defendant need not renew rejected claim to preserve it for appeal. Because of a problem with transportation from defendant's prison, defendant did not appear at his resentencing hearing. At the hearing, defendant's counsel stated that he was not in a position to waive any rights defendant might have involving his presence at the hearing. The district court reimposed the same sentence it originally imposed and defendant appealed, arguing that the court erred by holding the resentencing hearing in his absence. The government contended that defendant had forfeited the objection even though defendant's counsel made clear at the hearing that he was not waiving defendant's rights. The government's theory was that after the hearing, when the district court reserved decision, defendant should in the interval have made a motion for a new hearing. The First Circuit disagreed, ruling that defendant did not forfeit his objection to the court's resentencing him in his absence. When a party has asserted a position and the district judge has unambiguously rejected it, the party is not required to renew the request to preserve the claim for appeal. *U.S. v. Bryant*, ___F.3d___ (1st Cir. May 26, 2011) No. 09-2500.

1st Circuit requires defendant to be present at resentencing hearing. Defendant was initially sentenced as a career offender to 90 months. The first circuit remanded, holding that the government had not properly proven the fact of a prior conviction. Due to a problem with transportation from prison, defendant did not appear at his resentencing hearing. The district court ruled that defendant was not required to be present since it was not considering a

higher sentence. At the resentencing hearing, defense counsel argued that the government still had not proven the prior conviction. In addition, counsel argued for a lower sentence based on defendant's post-sentencing rehabilitation. The district court reimposed the original 90-month sentence. The First Circuit vacated the sentence again, holding that defendant's presence, and an opportunity to allocute, was required at the resentencing hearing. The appellate opinion directed the district court reexamine the reliability of the evidence offered to establish the prior conviction, it did not limit resentencing to this issue. Moreover, if a plausible argument for post-sentencing rehabilitation can be made, this would also require defendant's presence at the resentencing hearing. *U.S. v. Bryant*, __F.3d__ (1st Cir. May 26, 2011) No. 09-2500.

9th Circuit finds government's breach of plea agreement warranted resentencing before different judge. Pursuant to a plea agreement, defendant was debriefed by the government and gave immunized statements about his drug conspiracy. The PSR assigned defendant a guideline range based on 18 kilograms of cocaine base. Defendant objected, asserting it was not based on reliable evidence independent of his immunized statements. To support the calculation, the government told both the district court and the probation officer that defendant had admitted dealing 18 kilograms during the immunized debriefing. It further noted that the DEA agents who debriefed defendant would testify that defendant himself admitted the quantities involved in his drug trafficking. It argued that defendant should not be permitted to "perpetrate a fraud upon the Court by denying what he himself admitted." The Fifth Circuit held that the government's use of defendant's immunized statements breached the plea agreement, and remanded the case to a different judge. The government's direct and repeated use of defendant's immunized statements to advocate a higher guideline sentencing range was not consistent with any reasonable understanding of defendant's immunity agreement. Defendant was not perpetrating a fraud upon the court – he simply objected to the sufficiency, reliability, and independence of the evidence presented in the PSR. *U.S. v. Harper*, __F.3d__ (5th Cir. June 6, 2011) No. 10-30643.

SENTENCING HEARING

6th Circuit rejects sentencing hearing conducted by video conference. After trial, the district court held an initial hearing without defendant and decided to conduct his sentencing hearing by video conference. Defendant's elbow counsel was present during the hearing and did not object to this procedure. Three days later, the court conducted the sentencing hearing by video conference with defendant in prison and appearing on a video screen in the courtroom. On appeal, defendant argued that this procedure violated his right under Fed. Rule of Crim. Proc. 43(a) to be present at sentencing. The Sixth Circuit agreed, holding that electronic

"presence" by video conferencing at sentencing does not satisfy the requirements of Rule 43(a). The text of Rule 43(a) does not allow video conferencing, and the structure of the Rule does not support it. The fact that the video conferencing worked and the parties were able to see and hear each other was irrelevant. *U.S. v. Williams*, __F.3d__ (6th Cir. May 11, 2011) No. 09-5256.

From the Federal Sentencing Guide:

Vol. 22, No. 10, May 9, 2011
 Vol. 22, No. 13, June 20, 2011
 Vol. 22, No. 14, July 4, 2011
 Vol. 22, No. 15, July 18, 2011
 Vol. 22, No. 16, August 1, 2011
 Vol. 22, No. 17, August 15, 2011
 Vol. 22, No. 18, August 29, 2011
 Vol. 22, No. 19, September 12, 2011



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