Chapter Three

Legal Issues

Introduction

The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This chapter addresses some of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during fiscal year 2011.

United States Supreme Court Cases on Sentencing Issues

Decisions

In *Freeman v. United States*,[12] the Supreme Court, in a 5-4 opinion, held that defendants entering into plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C) may be eligible for sentence reductions under 18 U.S.C. § 3582(c)(2) when the guidelines are amended and given retroactive application. Justice Kennedy authored the Court's opinion, joined by Justices Ginsburg, Breyer, and Kagan; Justice Sotomayor issued a concurring opinion as to the judgment; and Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito.

In 2005, the defendant was indicted for various crimes, including possessing with the intent to distribute cocaine base. He pleaded guilty to all charges under Rule 11(c)(1)(C), whereby the parties agreed to 106 months' imprisonment, the bottom of the applicable guideline range, and the district court accepted the plea. Three years later, the Commission amended the guidelines to lower the base offense level for drug-trafficking offenses involving crack cocaine and made those amendments retroactive. The defendant filed a motion for a sentence reduction under 18 U.S.C. § 3582(c)(2), which allows for a reduction if a defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The district court denied the motion. Consistent with existing circuit precedent, the district court held the defendant was ineligible for a sentence reduction because 11(c)(1)(C) pleas, barring a miscarriage of justice or mutual mistake, are not covered by the language of section 3582(c)(2). The Sixth Circuit affirmed.

A plurality of the Court concluded that the defendant was eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) despite the binding nature of his plea. The Court framed the issue as whether a defendant who enters into an 11(c)(1)(C) plea "that specif[ies] a particular sentence may be said to have been sentenced 'based on' a Guidelines sentencing range, making [him] eligible for relief under section 3582(c)(2)." In holding the statute's "based on" language does apply to 11(c)(1)(C) pleas, the Court relied on a guidelines policy statement that requires judges to consider the relevant sentencing ranges even when the imposition of a specific sentence is a condition of the plea. The Court found that a district court has an "independent obligation to exercise its discretion" in imposing a sentence, and part of that exercise requires consideration of the guidelines. As a result, the defendant's sentence was "based on" the amended crack cocaine guideline, permitting the sentence to be reduced under section 3582(c)(2). The Court rejected the government's argument that 11(c)(1)(C) pleas are based solely on the parties' agreement and not the guidelines, discounting the government's concern that subjecting such pleas to section 3582(c)(2) would disrupt the bargains struck between prosecutors and defendants.

Justice Sotomayor concurred in the judgment but "differ[ed] as to the reason why." Like the government, Justice Sotomayor believed the defendant's plea was based on his agreement with the prosecutor, not the guidelines. However, because the defendant's plea agreement "expressly use[d] a Guidelines sentencing range applicable to the charged offense to establish the term of

[12] 131 S. Ct. 2685 (2011).

imprisonment," the sentence was "based on" the crack cocaine guideline and could be reduced under 18 U.S.C. § 3582(c)(2). As such, Justice Sotomayor would create an "intermediate position" that holds 11(c)(1)(C) plea defendants generally ineligible for section 3582(c)(2) relief, but would allow relief if the plea agreement "expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered" by the Commission.

The dissent, authored by Chief Justice Roberts, stated that a sentence imposed pursuant to an 11(c)(1)(C) plea is not based on the guidelines in any way, but instead is based on the parties' agreed sentence. As a result, no defendant sentenced pursuant to such a plea is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). The dissent criticized Justice Sotomayor's intermediate approach, because it would be difficult for lower courts to apply, thereby lessening certainty in sentencing, the "whole point of Rule 11(c)(1)(C) agreements."

In *Tapia v. United States*,[13] the Supreme Court, in a unanimous decision authored by Justice Kagan, held that the Sentencing Reform Act (SRA) precludes a sentencing court from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation.

The defendant was convicted of alien smuggling and sentenced to a term of 51 months of imprisonment, which was imposed in part because the district court wanted to ensure that she qualified for a Bureau of Prison's (BOP) residential drug abuse program. On appeal, after the BOP failed to enroll the defendant in the program, she argued that 18 U.S.C. § 3582(a), which instructs courts to "recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation," precluded her sentence. The Ninth Circuit affirmed.

The Court began its analysis by reviewing the background of the SRA and its rejection of the rehabilitation model of sentencing. According to the Court, the clear text of 18 U.S.C. § 3582(a) tells courts that when determining whether to impose a term of imprisonment and the length of the term, they are to "consider the specified rationales of punishment *except for* rehabilitation, which [courts] should acknowledge as an unsuitable justification for a prison term." The Court found that the "context of § 3582(a) puts an exclamation point on this textual conclusion." Because other provisions of the SRA direct the Commission to ensure the guidelines reflect the inappropriateness of imposing a sentence for rehabilitation purposes, "Congress ensured that all sentencing officials would work in tandem to implement the statutory determination" to preclude courts from considering rehabilitation in imposing or lengthening prison terms. "Equally illuminating" to the Court was "the absence of any provision granting courts the power to ensure that offenders participate in prison rehabilitation programs." Finally, the Court found the legislative history supported its textual interpretation.

The Court also mentioned that a sentencing judge commits no error by discussing options for prison rehabilitation or urging the BOP to place an offender in a prison treatment program; however, "impos[ing] or lengthen[ing] a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation" violates section 3582(a).

In a brief concurrence, Justice Sotomayor, joined by Justice Alito, agreed that section 3582(a) precludes sentencing courts from considering rehabilitation when imposing or lengthening a prison sentence, but was skeptical that the district court did so in the defendant's case.

In *DePierre v. United States*,[14] the Supreme Court, in a unanimous decision written by Justice Sotomayor, held that the term "cocaine base" in 21 U.S.C. § 841(b)(1)(A)(iii) applies to all forms of cocaine base and is not limited exclusively to crack cocaine.

The Court began by analyzing the text of 21 U.S.C. § 841(b)(1)(A), finding that the most natural reading of the statute defines cocaine base "more broadly that just crack cocaine." Instead, cocaine

[13] 131 S. Ct. 2382 (2011).

[14] 131 S. Ct. 2225 (2011).

base is cocaine in its "chemically basic" form, which includes crack cocaine, freebase, and coca paste. Although the Court agreed with the defendant that the term "cocaine base" was technically redundant in parts of the statute because all cocaine is a base chemical, Congress had "good reason" to use this language: it intended to penalize powder cocaine and cocaine base differently.

The Court also was not persuaded by four additional arguments put forth by the defendant. First, the Court found that records of the congressional hearings did not show that Congress was only concerned with crack cocaine. Second, reading "cocaine base" to mean chemically basic cocaine does not lead to absurd results. Third, the guidelines' definition of cocaine base as limited to crack cocaine did not require the statutory term to be interpreted the same way. Fourth, because normal rules of statutory construction made clear what Congress intended, the rule of lenity did not apply.

Justice Scalia issued a short concurring opinion agreeing with the judgment but objecting to the Court's "needless detour into legislative history."

In *Sykes v. United States*,[15] the Supreme Court, in a 6-3 decision, held that an Indiana state crime of felony vehicle flight qualifies as a violent felony under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Justice Kennedy authored the opinion in which Chief Justice Roberts and Justices Breyer, Alito, and Sotomayor joined; Justice Thomas filed an opinion concurring in the judgment; Justice Scalia filed a dissent; and Justice Kagan also dissented, joined by Justice Ginsburg.

The defendant pleaded guilty to felony possession of a firearm in connection with an attempted armed robbery. Pursuant to 18 U.S.C. § 924(e), he faced a 15-year minimum term of imprisonment if he had three previous violent felony convictions. The defendant had been convicted of two prior violent armed robbery felonies and one felony under Indiana law for "vehicle flight." The basis of the vehicle flight conviction was that the defendant fled a traffic stop by driving on the wrong side of the road and through yards containing bystanders, ultimately passing through a fence and striking the rear of a house. The district court found all three prior felonies were violent for purposes of section 924(e) and sentenced the defendant to 188 months in prison. The Seventh Circuit affirmed.

The Court began its analysis by reviewing the statutory framework. Title 18, U.S. Code, section 924(e)(2)(B), defines a "violent felony" as an offense punishable by more than one year of imprisonment that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The Court stated that defendant's conduct could only "fit[] within the so-called residual provision of clause (ii)." The Court explained that it interprets the residual clause under a "categorical approach" that looks only to the facts of conviction and the statutory definition of the prior offense, not the facts disclosed by the record of conviction. Put another way, the Court considers "whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." Accordingly, the Court framed the question presented as "whether Indiana's prohibition on flight from an officer by driving a vehicle . . . [fell] within the residual clause because, as a categorical matter, it present[ed] a serious potential risk of physical injury to another."

The Court held that vehicle flight was indeed a violent felony under 18 U.S.C. § 924(e). The Court described at great length the dangers inherent in vehicular flight from law enforcement and the risk of violence associated with such conduct, citing statistics to build the argument that the risk of physical danger from fleeing in a vehicle was greater than burglary and arson, two of section 924(e)'s enumerated offenses. The Court dismissed the defendant's argument that vehicle flight is different than other felonies qualifying under earlier ACCA cases because it is not "purposeful, violent, and aggressive." Although not relying specifically on such a test, the Court cited the extreme level of risk inherent in the offense conduct and the statute's

[15] 131 S. Ct. 2267 (2011).

"knowingly or intentionally" *mens rea* requirement. Finally, the Court observed that Congress chose to frame the ACCA in general and qualitative terms requiring courts to evaluate the risks posed by different offenses. "Although this approach may at times be more difficult for courts to implement, it is within congressional power to enact."

Justice Thomas concurred in the judgment but would have applied a test determining whether an offense involved conduct presenting a "serious potential risk of physical injury to another." Following the logic of Justice Kennedy's opinion, and "[l]ooking to the elements, statistics, common experience, and cases," Justice Thomas would find that vehicle flight meets that standard. Justice Scalia dissented with a broad criticism of the Court's residual clause jurisprudence, suggesting that the vagueness of the ACCA, as exemplified by the Court's difficulty applying the provision in a "series" of recent cases, required voiding the statute or, at the least, limiting the statute to the enumerated violent crimes. According to Justice Scalia, the field of criminal law does not allow Congress to take credit for addressing a national problem without "grappl[ing] with the nitty-gritty." Justice Kagan, joined by Justice Ginsburg, also dissented, questioning the majority's interpretation of the Indiana statute and arguing that simple vehicular flight was not a violent felony under the ACCA.

The Supreme Court, in *McNeill v. United States*,[16] unanimously held that when determining whether the Armed Career Criminal Act's (ACCA) sentencing enhancements apply based on a prior "serious drug offense", courts must look to the "maximum term of imprisonment" applicable to the defendant's offense at the time of the state conviction. Justice Thomas authored Court's opinion.

Pursuant to 18 U.S.C. § 924(e), the ACCA mandates that a felon unlawfully in possession of a firearm is subject to a 15-year minimum prison sentence if he has three prior convictions for a "violent felony or a serious drug offense." A "serious drug offense" is defined as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." The district court found that the ACCA's sentencing enhancement applied to the defendant based in part on six prior state drug trafficking convictions that carried a maximum ten-year prison term, even though the state legislature had reduced the maximum terms after defendant's convictions. The Fourth Circuit affirmed.

The Court held the ACCA's sentencing enhancements applied for three reasons. First, it held that "the plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense." The Court noted that the ACCA requires courts to determine whether a previous conviction was for a serious drug offense; the only way to answer this "backward-looking question" is to consult the law at the time of the conviction. Second, the Court discussed the "broader context of the statute as a whole," determining that the statute's use of present tense language to refer to past convictions was consistent with the Court's interpretation of the "violent felony" prong of the sentencing enhancement. Third, the Court pointed out that absurd results would follow from adopting the defendant's position, including that a prior conviction could "'disappear' entirely for ACCA purposes" if a state revised its definition of an offense after it was committed. The Court stated that the ACCA's applicability should not depend on the timing of the defendant's federal sentencing.

In *Pepper v. United States*,[17] the Supreme Court, in a 7-1 decision, held that when a defendant's sentence is set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and grant a downward variance from the guidelines. Justice Sotomayor delivered the opinion of the Court in which Chief Justice Roberts and Justices Scalia, Kennedy, and Ginsburg joined in full, and in which Justices Breyer and Alito joined in part. Justice Breyer filed a separate opinion concurring in the judgment; Justice Alito filed an opinion dissenting in part; Justice Thomas filed a dissent; and Justice Kagan took no part in the case.

[16] 131 S. Ct. 2218 (2011).

[17] 131 S. Ct. 1229 (2011).

The defendant had pleaded guilty to conspiracy to distribute methamphetamine and was sentenced to 24 months of imprisonment, well below the applicable 97-to-121-month guideline range. The government appealed, and on remand the district court imposed the same 24-month sentence based on evidence of the defendant's significant postsentencing rehabilitation, including his recovery from drug addiction, enrollment in college, and full-time employment. The government appealed again, and the Eighth Circuit reversed and remanded, concluding that postsentencing rehabilitation was an impermissible factor to consider in granting a downward variance. The defendant's resentencing was assigned to another judge, who after another intervening appeal imposed a 65-month prison term. The Eighth Circuit affirmed. The Supreme Court granted certiorari to decide whether "a district court, after a defendant's sentence has been set aside on appeal, may consider evidence of a defendant's postsentencing rehabilitation to support a downward variance when resentencing the defendant, a question that has divided the Courts of Appeals."

The Court explained that "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual." The Court emphasized that the selection of an appropriate individual sentence depends on the fullest information possible concerning the defendant's life and characteristics. The Court traced the evolution of this principle through the federal sentencing reform movement, where it was codified in the Sentencing Reform Act (SRA) at 18 U.S.C. § 3661 and incorporated into the guidelines. Accordingly, Congress and the Commission preserved the traditional discretion allowed sentencing courts to consider "*without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." Based on this statutory framework and *United States v. Booker*, the Court found "it clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing," and that evidence may support a downward variance.

The Court noted that the SRA plainly directed that no limitation be placed on the information concerning the background, character, and conduct of a defendant. Further, no distinction is made between an initial sentencing and any subsequent resentencing on remand; indeed, postsentencing rehabilitation is relevant to many of the SRA's statutory sentencing factors at 18 U.S.C. § 3553(a), which apply at resentencing. The Court reviewed the extensive evidence of defendant's rehabilitation, concluding that the Eighth Circuit's rule prohibiting a sentencing court from considering postsentencing rehabilitation "conflicts with longstanding principles of federal sentencing law and contravenes Congress' directives in §§ 3661 and 3553(a)." Because this conclusion conflicted with 18 U.S.C. § 3742(g)(2), which precludes a court on resentencing from imposing a sentence outside the guidelines range except upon a "'ground of departure' that was expressly relied upon in the prior sentencing," the Court invalidated it as inconsistent with *Booker*. Similarly, even though the guidelines expressly preclude a district court from considering postsentencing rehabilitation, the majority opinion made clear that a district court "may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views," especially "where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."

Finally, the Court also held that district courts are not bound by the law of the case to apply the same departure percentage at resentencing as used at the initial sentencing.

Justice Breyer and Justice Alito concurred as to the judgment and parts of the majority opinion, but each cautioned that sentencing courts were not free to wholly disregard the guidelines. Justice Alito also dissented in part, arguing that sentencing judges must still give significant weight to guidelines provisions and policy statements. Justice Thomas filed a dissent based on his ongoing belief that *Booker*'s remedy of making the guidelines advisory cannot be meaningfully applied; therefore, he would apply the guidelines as written and hold that

evidence of postsentencing rehabilitation may not be considered at resentencing.

In *Abbott v. United States*,[18] the Supreme Court, in an 8-0 decision, resolved a circuit split by holding that 18 U.S.C. § 924(c)'s "except" clause means that "a defendant is subject to a mandatory, consecutive sentence for a section 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction." Justice Ginsburg delivered the Court's opinion.

Title 18, U.S. Code, section 924(c), requires imposition of at least five years' imprisonment to be served consecutively for using or carrying a firearm in furtherance of a crime of violence or drug trafficking crime. The section contains a provision, commonly referred to as the "except" clause, that limits the imposition of the section "to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law." In a consolidated case, two defendants who were sentenced to five-year terms of imprisonment to run consecutive to the sentences for their underlying drug and firearm offenses, argued section 924(c) did not apply because their underlying offenses carried higher mandatory minimums than five years. The Third and Fifth Circuits affirmed their sentences; however, the Second and Sixth Circuits had adopted a contrary interpretation of the "except" clause.

The Court held that a defendant is subject to consecutive mandatory minimum sentences for both the predicate offense and the offense under 18 U.S.C. § 924(c), even if the predicate offense carries a greater mandatory minimum than the section 924(c) offense. Although the defendants argued that the "except" clause meant that they could not be sentenced to consecutive mandatory minimum terms under section 924(c) because they were also subject to other, higher mandatory minimums, the Court determined this interpretation would "undercut" the congressional purpose of imposing additional punishments for possessing a firearm, as many defendants subject to section 924(c)'s five-year mandatory minimum are also subject to lengthier mandatory minimums for their predicate offenses. The Court also noted other sentencing "anomalies" that would result under the defendants' interpretation of the statute, including not punishing 924(c) offenders at all if they sold enough drugs or had extensive enough criminal histories to trigger high mandatory minimums, and allowing more culpable defendants to serve shorter sentences by "wip[ing] out" the section 924(c) penalty in some circumstances. Additionally, the Court found contextual support for concluding that "Congress intended the 'except' clause to serve simply as a clarification of section 924(c), not as a major restraint on the statute's operation." Finally, the Court noted in a footnote that the rule of lenity was inapplicable, because "[a]lthough the clause might have been more meticulously drafted," the defendant's interpretation of the statute reflected an implausible reading of congressional purpose.

Petitions for *Certiorari* Granted

The Supreme Court granted *certiorari* in *Setser v. United States*[19] to resolve a circuit split on the issue of whether 18 U.S.C. § 3584(a) grants federal district courts authority to direct that a criminal defendant's sentence run consecutively with a yet-to-be-imposed sentence that the defendant is expected to receive for a state crime. The case presents the following questions:

> (1) Does a district court have authority to order a federal sentence to run consecutive to an anticipated, but not-yet-imposed, state sentence?
>
> (2) Is it reasonable for a district court to provide inconsistent instructions about how a federal sentence should interact with state sentences?

The case was heard by the Court on November 30, 2011.

Decisions of the United States Courts of Appeals

Many of the significant sentencing cases decided by the courts of appeals during the year involved the application of the Fair Sentencing Act of 2010's amended penalties for crack cocaine offenses. The

[18] 131 S. Ct. 18 (2010).

[19] 131 S. Ct. 2988 (2011).

courts of appeals agree that the Act's reduced penalties do not apply to defendants who committed their offenses *and* were sentenced before its effective date, August 3, 2010.[20] The circuits have split, however, on the question of whether the Act's reduced penalties apply in "pipeline" cases involving defendants who committed their offenses before August 3, 2010, but who were sentenced after that date. Some circuits have concluded that defendants in pipeline cases benefit from the Act's reduced penalties,[21] while others have concluded that they do not.[22] The Supreme Court has agreed to hear a pair of consolidated cases raising this issue.[23]

The courts of appeals continued to review sentences for procedural and substantive reasonableness. Concerning procedural reasonableness (*i.e.*, whether the district court took the proper steps during imposition of the defendant's sentence), the courts of appeals primarily reviewed sentences to ensure that the district court correctly calculated the guideline range[24] and explained its application of the 18 U.S.C. § 3553(a) factors.[25] In a notable decision, the Seventh Circuit held that a life sentence for committing crack cocaine offenses was procedurally unreasonable because the district court did not determine that the sentence satisfied § 3553(a)'s parsimony clause, which requires that the sentence be "sufficient, but not greater than necessary," to satisfy the applicable § 3553(a) factors.[26] The Fifth Circuit also addressed the operation of harmless error review to sentences that involved an incorrect application of guidelines.[27]

Concerning substantive reasonableness (*i.e.*, whether the district court reasonably applied the relevant sentencing factors set forth at 18 U.S.C. § 3553(a)), the courts of appeals in the past year occasionally overturned below-range sentences as substantively unreasonable.[28] However, the courts of appeals rejected substantive unreasonableness arguments for within- and above-range sentences in the vast majority of cases. A few circuits directly considered the Second Circuit's earlier decision in *United States v. Dorvee*,[29] in which the court held that *Kimbrough* "applies with full force" to the child pornography guidelines. Some circuits found within-range sentences for child pornography offenses to be substantively reasonable despite the defendants' references to *Dorvee*,[30] and other circuits agreed with the Second Circuit and held that a

---

[20] *See* United States v. Goncalves, 642 F.3d 245, 253-54 & n.8 (1st Cir. 2011) (collecting cases).

[21] *See* United States v. Dixon, 648 F.3d 195 (3d Cir. 2011). The First Circuit has held that the Act applies to defendants in pipeline cases, at least with respect to sentencing occurring on or after November 1, 2010, the effective date of the temporary, emergency guideline amendments directed promulgated by the Commission. *See* United States v. Douglas, 644 F.3d 39, 44-46 (1st Cir. 2011). A panel of the Eleventh Circuit had concluded that the Act applies to all defendants sentenced after its effective date, regardless of when the offenses occurred, but the full court subsequently agreed to rehear the case *en banc*. *See* United States v. Rojas, 645 F.3d 1234, 1236 (11th Cir.), *vacated, reh'g en banc granted*, 659 F.3d 1055 (11th Cir. 2011).

[22] *See* United States v. Tickles, 661 F.3d 212 (5th Cir. 2011); United States v. Fisher, 662 F.3d 457 (7th Cir. 2011); United States v. Sidney, 648 F.3d 904 (8th Cir. 2011).

[23] *See* Dorsey v. United States, 80 U.S.L.W. 3311 (U.S. Nov. 28, 2011); Hill v. United States, 80 U.S.L.W. 3317 (U.S. Nov. 28, 2011).

[24] *See, e.g.*, United States v. Ruiz-Apolonio, 657 F.3d 907, 910-16 (9th Cir. 2011); United States v. Holcomb, 625 F.3d 287, 291-93 (6th Cir. 2010).

[25] *See, e.g.*, United States v. Akhigbe, 642 F.3d 1078, 1086 (D.C. Cir. 2011) (concluding the district court failed to adequately explain its consideration of the § 3553(a) factors when varying above the guideline range); United States v. Negroni, 638 F.3d 434, 444-45 (3d Cir. 2011) (concluding the district court failed to adequately explain its consideration of the § 3553(a) factors when varying below the guideline range).

[26] *See* United States v. Johnson, 635 F.3d 983, 988-90 (7th Cir. 2011).

[27] *See* United States v. Mudekunye, 646 F.3d 281 (5th Cir. 2011) (applying the harmless error standard to a sentence that fell within both the correct and incorrect guideline ranges); United States v. Ibarra-Luna, 628 F.3d 712 (5th Cir. 2010) (applying the harmless error standard to a sentence that was above both the correct and incorrect guideline ranges).

[28] *See* United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011); United States v. Kane, 639 F.3d 1121 (8th Cir. 2011).

[29] 616 F.3d 174 (2d Cir. 2010).

[30] *See* United States v. Mantanes, 632 F.3d 372, 376-77; United States v. Maulding, 627 F.3d 285, 287-88 (7th Cir. 2010) United States v. Miller, No. 10-50522, __ F.3d __ (5th Cir. Dec. 5, 2011), *available at* 2011 WL 6160220.

district court may vary from the child pornography guidelines on policy grounds.[31]

The circuits also addressed, as they have in previous years, whether a district court may account for the disparities created by the existence of fast-track programs in some jurisdictions, but not in others, in fashioning the appropriate sentence. The Seventh and Eighth Circuits widened the existing circuit split on this issue by joining the First, Third, and Sixth Circuits in holding that district courts may consider these disparities when deciding whether to vary from the advisory guidelines range.[32] The Fifth, Ninth, and Eleventh Circuits have reached the opposite conclusion, holding that district courts may not consider those disparities.[33]

Finally, the courts of appeals considered the effect of the Supreme Court's decision in *Tapia v. United States*, which held that district courts are statutorily barred from imposing or lengthening a prison term on account of the defendant's need for rehabilitation.[34] The Sixth Circuit held, based on *Tapia*, that the district court erroneously used rehabilitation in imposing an above-guidelines sentence in a § 3582(c) resentencing proceeding.[35] The Seventh Circuit also noted that *Tapia* seemingly permits the district court to lengthen a sentence for reasons related to rehabilitation, such as a "concern — whether based on mental illness, addiction, or anything else that may weaken a person's inhibitions against committing crimes — that the defendant is likely to commit further crimes upon release, so that a longer sentence is required for the protection of the public."[36]

[31] *See* United States v. Grober, 624 F.3d 592, 608-09 (3d Cir. 2010); United States v. Henderson, 649 F.3d 955, 962-63 & n.4 (9th Cir. 2011). Both courts emphasized, however, that the sentencing court is not required to vary from the child pornography guidelines. *See Henderson*, 649 F.3d at 964; *Grober*, 624 F.3d at 609.

[32] *See* United States v. Reyes-Hernandez, 624 F.3d 405, 417 (7th Cir. 2010); United States v. Jiminez-Perez, 659 F.3d 704, 708 (8th Cir. 2011); *see also* United States v. Rodriquez, 527 F.3d 221, 229 (1st Cir. 2008); United States v. Arrelucea-Zamudio, 581 F.3d 142, 157 (3d Cir. 2009); United States v. Camacho-Arellano, 614 F.3d 244, 247-50 (6th Cir. 2010).

[33] *See* United States v. Gomez-Herrera, 523 F.3d 554, 562-63 (5th Cir. 2008); United States v. Vega-Castillo, 540 F.3d 1235, 1239 (11th Cir. 2008); United States v. Gonzalez-Zotelo, 556 F.3d 736, 739-41 (9th Cir. 2009).

[34] 131 S. Ct. 2382, 2391 (2011).

[35] *See* United States v. Walker, 649 F.3d 511, 513 (6th Cir. 2011).

[36] United States v. Kubeczko, 660 F.3d 260, 262 (7th Cir. 2011).