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 2010.

United States Supreme Court Cases on Sentencing Issues

Decisions

In *Dillon v. United States*,[10] the Supreme Court, in a 7-1 opinion, held that the Court's *Booker* holdings[11] do not apply to sentence modification proceedings under 18 U.S.C. § 3582(c)(2) and therefore do not require that district courts treat USSG §1B1.10(b) as advisory. Justice Sotomayor authored the opinion; Justice Stevens filed a dissenting opinion; and Justice Alito took no part in the decision of the case.

The defendant was convicted of crack and powder cocaine offenses and sentenced under the then-mandatory guidelines system to the bottom of the applicable guidelines range. After the Commission amended the guidelines to reduce the base offense level for crack cocaine, the defendant moved for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). In addition, the defendant requested that the district court correct several mistakes that occurred at his original sentencing and sought a variance below the amended guidelines range.

Section 3582(c)(2) authorizes a district court to reduce a defendant's otherwise final sentence if the Sentencing Commission has subsequently lowered the sentencing range and "if such a reduction is consistent with applicable policy statements issued by the []Commission." The relevant policy statement, USSG §1B1.10, instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range except to the extent that the original term of imprisonment was below the guideline range then applicable. The district court imposed a sentence at the bottom of the amended range, but declined to correct the mistakes or vary below the revised range. The Third Circuit affirmed.

The Supreme Court began its analysis by addressing whether proceedings under section 3582(c)(2) are full "resentencing" proceedings or limited sentence modification hearings. The Court concluded that the plain language of the statute does not support characterizing the proceedings as resentencings and noted that the statute applies only to those prisoners whose guideline range was subsequently reduced by the Commission. These two factors, the Court concluded, demonstrated Congress's intent that such proceedings be limited. The Court further explained that "[t]he substantial role Congress gave the Commission with respect to sentence-modification proceedings," specifically in 28 U.S.C. §§ 994(o) and (u), also supported this conclusion.

The Court determined that, "[r]ead in this context," section 3582(c)(2) establishes a two-step inquiry. "At step one, § 3582(c)(2) requires the court to follow the Commission's instructions in §1B1.10 to determine the prisoner's eligibility for a sentence modification and the extent of the reduction authorized." Only at step two may the district court "consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case." The Court concluded that, because consideration of the section 3553(a) factors occurs only in step two, the reference to section 3553(a) in the statute "cannot serve to transform the proceedings under § 3582(c)(2) into plenary resentencing proceedings."

[10] 560 U.S. __, 130 S. Ct. 2683 (2010).

[11] 543 U.S. 220 (2005).

Next, the Court explained that section 3582(c)(2) proceedings do not implicate the Sixth Amendment rights at issue in *Booker* because such proceedings "represent[] a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." The Court also held that the remedial *Booker* opinion does not apply to section 3582(c)(2) proceedings, concluding that "requiring courts to honor §1B1.10(b)(2)'s instruction not to depart from the amended Guidelines range at [§ 3582(c)(2)] proceedings will create none of the confusion or unfairness that led us in *Booker* to reject the Government's argument for a partial fix."

Finally, the Court addressed the defendant's argument that the district court should have corrected the mistaken criminal history calculation from his initial sentencing. The Court held that, because USSG §1B1.10(b)(1) instructs a district court to leave other guideline application decisions unchanged, the district court correctly declined to correct any mistakes made at the first sentencing.

In dissent, Justice Stevens set forth his view that *Booker*'s remedial opinion should apply to section 3582(c)(2) proceedings. While conceding that "[a]s a matter of textual analysis, divorced from judicial precedent, it is certainly reasonable for the Court to find that the Commission can set mandatory limits on sentence reductions under § 3582(c)(2)," Justice Stevens disagreed that this analysis is sufficient to decide the case. Justice Stevens expressed his view that "[t]he only fair way to read the *Booker* majority's remedy is that it eliminated the mandatory features of the Guidelines — all of them." Additionally, Justice Stevens expressed his view that the majority's decision raises separation-of-powers and delegation concerns and that the Court should not be concerned with the possible impact of its decision on the Commission's future retroactivity considerations. Justice Stevens concluded —

> Neither the interests of justice nor common sense lends any support to the decision to preserve the single sliver of the Commission's lawmaking power that the Court resurrects today. I had thought *Booker* dismantled the mandatory Guidelines regime. The Court ought to finish the job.

In *Johnson v. United States*,[12] the Supreme court, in a 7-2 decision, held that the defendant's prior conviction for simple battery did not count as a "violent felony" for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because under Florida law, although a conviction for battery involves some physical contact, it does not require proof of the use of physical force. Justice Scalia wrote the opinion of the Court, in which Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, Breyer, and Sotomayor joined. Justice Alito filed a dissenting opinion, in which Justice Thomas joined.

Section 924(e)(1) of the ACCA authorizes an enhanced penalty for a person who is convicted of being a felon in possession of a firearm and who "has three previous convictions" for a "violent felony," defined at 18 U.S.C. § 924(e)(2)(B)(i) as an offense that "has as an element the use . . . of physical force against the person of another." The issue before the district court was whether the defendant's prior Florida conviction for simple battery qualified as a violent felony. While simple battery is a misdemeanor under Florida law, it was a felony conviction for the defendant because he had a previous battery conviction. The Florida battery statute states that a battery occurs when a person either "[a]ctually and intentionally touches or strikes another person against [his or her] will," or "intentionally causes bodily harm to another person."

The district court reviewed the record of the defendant's battery conviction and determined that nothing in the record permitted it to conclude that his conviction rested on anything more than the least serious of the statute's acts, in this case "[a]ctually and intentionally touch[ing]" another person. The defendant's conviction was therefore a predicate conviction for a violent felony under ACCA only if "[a]ctually and intentionally touch[ing]" another person constituted the use of "physical force" within the meaning of section 924(e)(2)(B)(i). The district court concluded that it did and accordingly

[12] 559 U.S. __, 130 S. Ct. 1265 (2010).

sentenced the defendant under section 924(e)(1). The Eleventh Circuit affirmed.

The Supreme Court first rejected the defendant's argument that the Court was bound by the holding of the Florida Supreme Court that unwanted touching does not constitute physical force. The Court held that the meaning of "physical force" in the provision of the ACCA at issue is a question of federal law. The Court concluded, however, that it was bound by the Florida Supreme Court's holding that the Florida battery statute's "actually and intentionally touching" requirement was satisfied by any intentional physical contact, "no matter how slight."

Turning next to the "physical force" requirement in the ACCA, the Court stated that, because section 924(e)(2)(B)(i) does not define "physical force," it would give the phrase its ordinary meaning. While acknowledging (as the dissent contended) that, under the common law of battery, physical force could be satisfied by even the slightest offensive touching, the Court explained that it was "interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies].'" The Court believed it clear that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent force* — that is, force capable of causing physical pain or injury to another person." The Court also found it significant that simple battery, whether involving mere touch or bodily injury, generally is punishable only as a misdemeanor in the states. "It is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor."

In dissent, Justice Alito, joined by Justice Thomas, argued that, because "physical force" can mean "the merest touching," a conviction under Florida's battery statute would constitute an ACCA predicate felony. Justice Alito noted that Congress had limited the term "force" in other sections of the ACCA, notably sections 924(a)(2)(B)(ii) (defining violent felony to include any conduct presenting "a serious potential risk of physical injury to another") and 922(g)(8)(C)(ii) (limiting physical force to that which "would reasonably be expected to cause bodily injury"). Justice Alito contended that Congress could have similarly limited "physical force" in this case but did not do so. Justice Alito argued, moreover, that the ACCA used the phrase "violent felony" as a term of art with wider meaning than the phrase may convey in ordinary usage, noting that the ACCA provides that burglary and extortion are "violent felon[ies]" in section 924(e)(2)(B)(ii) because they often lead to violence.

In *United States v. O'Brien and Burgess*,[13] the Supreme Court, in a 9-0 decision, held that the machine-gun provision of 18 U.S.C. § 924(c)(1)(B)(ii), which imposes a 30-year mandatory minimum sentence when the firearm used in certain crimes is a machine-gun, is an element to be proved to the jury beyond a reasonable doubt, and not a sentencing factor to be proved to the judge at sentencing. Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Stevens, Scalia, Ginsburg, Breyer, Alito and Sotomayor. Justice Stevens filed a concurring opinion, and Justice Thomas filed an opinion concurring in the judgment.

The Supreme Court began by observing that a fact that increases the prescribed range of penalties to which a criminal defendant is exposed is generally an element of the offense, which must be charged in an indictment and proved to a jury beyond a reasonable doubt. The Court explained that, in *Castillo v. United States*,[14] it had interpreted an earlier version of the machine-gun enhancement and concluded that it was an element of the offense. In *Castillo*, the Court had examined five factors directed at determining congressional intent: (1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history. That examination led the Court to unanimously conclude that the earlier version of the machine-gun provision was an element of the offense, finding that the first four factors favored treating it as such while legislative history did not favor either side. In the present case, the Court considered whether the analysis in *Castillo* must change in light of Congress's 1998 restructuring of section 924(c). The Court found that none of the changes made to section 924(c) were

[13] 560 U.S. __, 130 S. Ct. 2169 (2010).

[14] 530 U.S. 120 (2000).

intended to reclassify the machine-gun provision as a sentencing factor and concluded that the analysis and holding of *Castillo* controlled the case.

Justice Stevens wrote a concurring opinion, arguing that the principles of *Apprendi v. New Jersey*[15] should apply with equal force to statutes that trigger mandatory minimums, like the machine-gun enhancement at section 924(c)(1)(B)(ii). Justice Stevens contended that a preferable solution to the issue presented in the case "would be to recognize that any fact mandating the imposition of a sentence more severe than the judge would otherwise have discretion to impose should be treated as an element of the offense," thereby overruling the Supreme Court's prior opinions in *McMillan v. Pennsylvania*[16] and *Harris v. United States.*[17]

Justice Thomas concurred in the judgment only, citing his own dissent in *Harris* in which he argued that —

> it is ultimately beside the point whether as a matter of statutory interpretation [the machine-gun enhancement] is a sentencing factor. . . . [A]s a constitutional matter, because it establishes a harsher range of punishments, it must be treated as an element of a separate, aggravated offense that is submitted to a jury and proved beyond a reasonable doubt.

In *Barber v. Thomas*,[18] the Supreme Court, in a 6-3 decision, upheld the method used by the Federal Bureau of Prisons (BOP) for calculating inmates' "good-time" credits. Justice Breyer wrote for the Court, and Justice Kennedy filed a dissenting opinion, joined by Justices Stevens and Ginsburg.

Under 18 U.S.C. § 3624(b)(1), a federal inmate is entitled to a credit of up to 54 days for every year of the inmate's "term of imprisonment" if the prisoner exhibits exemplary behavior "during that year." Credit "for the last year or portion of a year of the term of imprisonment [is] prorated." The BOP interprets the phrase "term of imprisonment" to refer to the length of the sentence actually served by the prisoner. The petitioners challenged this interpretation, arguing that the phrase refers to the entire length of the prisoner's sentence as imposed by the district court and the BOP's method causes prisoners to lose significant good-time credit per year of imprisonment. The lower courts in each of the petitioners' cases rejected these arguments, and the Ninth Circuit affirmed.

The Supreme Court concluded that the BOP's method was the most natural reading of the statute. Focusing on the statute's specification that credit may be granted "at the end of each year" and that BOP assess the prisoner's conduct "during that year," the Court determined that the BOP's method "tracks the language of § 3624(b)." The Court explained that calculating good-time credits at the beginning of a prisoner's term, the approach advocated by the petitioners, could not be similarly "reconcile[d]" with this language.

The Court emphasized that this language did not "[find] its way into the statute by accident," but rather was in contrast to the previous good-time provision, in which the deduction for good-time was granted at the outset of a prisoner's sentence, and then made subject to forfeiture for bad behavior. The Court agreed with the government that the textual differences between the two statutes evidenced a move from a system of prospective entitlement to one of retrospective award.

Further, the Court concluded that the BOP's interpretation "better furthers the statute's basic purpose," in that 18 U.S.C. § 3624 was part of the Sentencing Reform Act of 1984, with which "Congress sought to achieve both increased sentencing uniformity and greater honesty" through determinate sentencing with the limited and narrowly tailored exception of good-time credits. The BOP's interpretation, the Court said, better served the purpose of "reward[ing] and reinforc[ing] a readily identifiable period of good behavior."

The Court also rejected the petitioners' argument that, because the Commission used the sentence-imposed method in creating the guidelines, this

[15] 530 U.S. 466 (2000).
[16] 477 U.S. 79 (1986).
[17] 536 U.S. 545 (2002).
[18] 560 U.S. __, 130 S. Ct. 2499 (2010).

interpretation is due *Chevron*[19] deference. The Court concluded that the Commission had not "considered or referred to the particular question" in this case, concluding that the various references to approximate good-time credit reductions in the Commission's 1987 *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* and in USSG §1A1.3 did not represent interpretations of the statute. The Court noted: "If it turns out that the calculation of good-time credit based on prison time served rather than the sentence imposed produces results that are more severe than the Commission finds appropriate, the Commission remains free to adjust sentencing levels accordingly." Finally, the Court rejected appeals for lenity and *Chevron* deference, reasoning that because the BOP's interpretation was the "most natural reading," the statute was not actually ambiguous.

Justice Kennedy's dissent, joined by Justices Stevens and Ginsburg, emphasized the impact of the majority's holding on federal prisoners and on society in terms of additional time served and taxpayer dollars spent on additional incarceration, and argued that the majority's interpretation undermined the purpose of the statute by reducing the effectiveness of the incentive for good behavior. According to the dissenters, the Court should have rejected both the BOP's and the petitioners' methods of calculating good-time credit. To the dissenters, the phrase "term of imprisonment" refers to "the span of time that a prisoner must account for in order to obtain release." Under this formulation, the "term" is initially set by the sentence imposed, but it can be satisfied by a combination of prison time and good-time credits. The dissenters also argued that the rule of lenity should apply and that no deference is due to the BOP's interpretation of the statute because the BOP's interpretation did not arise from proper rulemaking.

Petitions for *Certiorari* Granted

The Supreme Court granted *certiorari* in *Pepper v. United States*[20] in order to resolve a conflict among United States courts of appeals regarding whether a defendant's post-sentencing rehabilitation can support a downward sentencing variance under 18 U.S.C. § 3553(a). The three questions presented by the case are as follows:

> (1) Can a federal district court consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentencing variance under 18 U.S.C. § 3553(a) after *Gall v. United States*;
>
> (2) As a sentencing consideration under 18 U.S.C. § 3553(a), should post-sentencing rehabilitation be treated the same as post-offense rehabilitation; and
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> (3) When a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings by the original judge that had been previously affirmed on appeal?

The Supreme Court also granted *certiorari* and consolidated the cases of *Abbott v. United States* and *Gould v. United States*,[21] which concern the mandatory, consecutive sentences for firearm possession contained in 18 U.S.C. § 924(c). This statute provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or . . . in furtherance of any such crimes, possesses a firearm" unless "a greater minimum sentence is . . . provided . . . by any other provision of law." The two questions presented in *Abbott v. United States* are as follows:

> (1) Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence; and
>
> (2) If not, does it include another offense for possessing the same firearm in the same transaction?

The single question presented in *Gould v. United States* is as follows:

[19] Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984).

[20] 130 S. Ct. 3499 (2010).

[21] 130 S. Ct. 1284 (2010).

> Did the United States Court of Appeals for the Fifth Circuit correctly hold, in direct conflict with the Second Circuit (but in accordance with several other circuits), that a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A) applies to a count when another count already carries a greater mandatory minimum sentence?

The Supreme Court also granted *certiorari* in *Freeman v. United States*,[22] which concerns the impact of a Federal Rule of Criminal Procedure 11(c)(1)(C) agreement on a motion to reduce a term of imprisonment under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) provides that a district court may reduce a term of imprisonment after it has been imposed if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Under Rule 11(c)(1)(C), the government and the defendant may enter into a plea agreement in which they "agree that such a specific sentence or sentencing range is the appropriate disposition of the case" and "such a recommendation or request binds the court once the court accepts the plea agreement." The question presented by the case is as follows:

> Whether a defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) solely because the defendant accepted a Rule 11(c)(1)(C) agreement.

In addition, the Supreme Court granted *certiorari* in *Sykes v. United States*[23] to further detail the crimes that fall within the definition of "violent felony" in the ACCA. The single question presented by this case is the following: "Does using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitute a 'violent felony' under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?"

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 courts' continuing efforts to delineate the proper role of an appellate court within an advisory sentencing system. The courts of appeals also endeavored to define the limits, in light of the Court's decisions in *Kimbrough*[24] and *Spears*,[25] of district court disagreement with the guidelines on policy grounds. *Ex post facto* concerns factored into many circuit court opinions, as did concerns over whether certain defendants are entitled to resentencing following the crack cocaine amendments to the guidelines.

Procedural reasonableness (*i.e.*, whether the district court took the proper steps during imposition of the defendant's sentence) continued to animate many of the decisions of the appeals courts. Circuit courts have maintained the requirement that district courts properly calculate the guideline range, reversing in cases where district courts have failed to do so.[26] Courts also continue to review whether the district court adequately considered the relevant 18 U.S.C. § 3553(a) factors.[27]

A separate procedural issue raised in many cases this year concerned 18 U.S.C. § 3553(c)'s requirement that a district court state the reason for imposing a particular sentence on the record. Several courts of appeals reversed sentences as procedurally unreasonable where district courts failed to adequately explain the ultimate sentence in light of the parties' arguments and the 18 U.S.C. § 3553(a)

[22] 131 S. Ct. 61 (2010).

[23] 131 S. Ct. 63 (2010).

[24] Kimbrough v. United States, 552 U.S. 85 (2007) (holding that a district court, in making the determination that a within-guidelines sentence is greater than necessary to serve the objectives of sentencing, may consider the disparity between the guidelines' treatment of crack and powder cocaine offenses).

[25] Spears v. United States, 555 U.S. 261 (2008) (confirming that a district court may reject the sentencing guidelines range solely on the basis of a policy disagreement with the crack cocaine guideline).

[26] United States v. Vrdolyak, 593 F.3d 676, 683 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2000 (2010).

[27] *See, e.g.*, United States v. Dorvee, 616 F.3d 174, 180-82 (2d Cir. 2010); United States v. Tutty, 612 F.3d 128, 131 (2d Cir. 2010); United States v. Panice, 598 F.3d 426, 441-44 (7th Cir. 2010); United States v. Treadwell, 593 F.3d 990, 1009-15 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 488 (2010); United States v. Ressam, 593 F.3d 1095, 1098 (9th Cir. 2010); United States v. Bragg, 582 F.3d 965, 969-70 (9th Cir. 2009).

sentencing factors,[28] while other courts have concluded that a district court's brevity is not reversible error.[29]

Courts of appeals continued to review sentences for substantive reasonableness (*i.e.*, whether the district court reasonably applied the relevant sentencing factors as set forth in 18 U.S.C. § 3553(a)). This year saw several circuit courts overturning below-range sentences as substantively unreasonable.[30] Circuit courts also overturned sentences at or approaching the statutory maximum on substantive reasonableness grounds.[31] In contrast, other courts of appeals affirmed below-range sentences in the face of the same challenge.[32] Though less often, courts of appeals also reviewed above-range sentences for substantive reasonableness.[33]

Several courts of appeals considered whether to extend the reasoning of *Kimbrough* and *Spears* to other policies within the *Guideline Manual*. Both the Seventh and Third Circuits addressed policy disagreements with the career offender guideline at USSG §4B1.1. The Seventh Circuit overruled its prior precedent to hold that district courts are at liberty to reject any guideline, including the career offender guideline, on policy grounds, although "they must act reasonably when using that power."[34] The Seventh Circuit's decision eliminated a circuit split, because the First, Second, and Sixth Circuits had all concluded that a sentencing judge may disagree with USSG §4B1.1 for policy reasons.[35] The Third Circuit assumed, without deciding, that a district court could issue a sentence based on a policy disagreement with the career offender guideline, but held that a district court must provide a sufficiently compelling explanation, grounded in the 18 U.S.C. § 3553(a) factors, in support of any variance on this basis.[36]

Addressing fast-track sentencing programs, the Sixth Circuit joined the First and Third Circuits[37] in concluding that a district court may consider the disparity created by the existence of fast-track programs in some jurisdictions, but not others, when deciding whether to vary from the advisory guidelines range.[38] The Sixth Circuit's decision further widens a circuit split because the Fifth, Ninth, and Eleventh Circuits have all ruled to the contrary.[39]

The Second Circuit extended *Kimbrough*'s reasoning to policy disagreements with the child pornography guidelines. Noting its previous holding that a district court may vary from the advisory guidelines range based solely on a policy disagreement with the guidelines, "even where that disagreement applies to a wide class of offenders or offenses," the Second Circuit reasoned that this analysis applied "with full force" to the child pornography guidelines.[40]

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[28] *See, e.g.*, United States v. Wallace, 597 F.3d 794 , 805-07 (6th Cir. 2010); United States v. Marion, 590 F.3d 475, 476 (7th Cir. 2010); United States v. Hall, 610 F.3d 727, 745 (D.C. Cir. 2010).

[29] *See, e.g.*, United States v. Gunter, 620 F.3d 642, 646-47 (6th Cir. 2010); United States v. Petrus, 588 F.3d 347, 354-55 (6th Cir. 2009).

[30] *See, e.g.*, United States v. Lychock, 578 F.3d 214, 216 (3d Cir. 2009); United States v. Engle. 592 F.3d 495, 505 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 165 (2010); United States v. Christman, 607 F.3d 1110, 1112, 1117-23 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 488 (2010); United States v. Livesay, 587 F.3d 1274, 1279 (11th Cir. 2009).

[31] *See, e.g.*, United States v. Dorvee, 616 F.3d 174, 182-88 (2d Cir. 2010).

[32] *See, e.g.*, United States v. Pape, 601 F.3d 743, 748-49 (7th Cir. 2010); United States v. Edwards, 595 F.3d 1004, 1018, *rh'g denied*, 622 F.3d 1215 (9th Cir. 2010), United States v. Treadwell, 593 F.3d 990, 1009-15 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 488 (2010).

[33] *See, e.g.*, United States v. Tristan-Madrigal, 601 F.3d 629, 633-36 (6th Cir. 2010); United States v. Miller, 601 F. 3d 734, 739-40 (7th Cir. 2010).

[34] United States v. Corner, 598 F.3d 411, 415 (7th Cir. 2010).

[35] United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008); United States v. Sanchez, 517 F3d 651, 662-65 (2d Cir. 2009); United States v. Michael, 576 F.3d 323, 327 (6th Cir. 2008).

[36] United States v. Merced, 603 F.3d 203, 219-20 (3d Cir. 2010).

[37] United States v. Rodriquez, 527 F. 3d 221, 231 (1st Cir. 2008); United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009).

[38] United States v. Camacho-Arellano, 614 F.3d 244, 247-50 (6th Cir. 2010).

[39] United States v. Gomez-Herrera, 523 F.3d 554, 563 (5th Cir. 2008); United States v. Gonzalez-Zoleto, 556 F.3d 736, 740 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 83 (2009); United States v. Vega-Castillo, 540 F.3d 1235, 1238-39 (11th Cir. 2008).

[40] United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010).

Multiple appellate decisions addressed *ex post facto* concerns arising from the advisory nature of the guidelines, resulting in a widening circuit split over whether the Ex Post Facto Clause precludes application of more-onerous, but advisory guidelines. Previously, the Seventh Circuit had held that the Ex Post Facto Clause does not apply to the advisory guidelines because the clause applies only to laws and regulations that are binding.[41] The D.C. Circuit, in contrast, had concluded that the retroactive application of severity-enhancing guidelines amendments contravenes the Ex Post Facto Clause.[42] During the previous year, the Second, Fourth, and Sixth Circuits reached the same conclusion as the D.C. Circuit.[43]

A separate *ex post facto* issue arose concerning the *Guideline Manual*'s one-book rule,[44] with the Second Circuit concluding that this rule does not violate the Ex Post Facto Clause when applied to the sentencing of offenses committed both before and after the publication of a revised version of the guidelines.[45] In so holding, the Second Circuit joins the Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.[46] In contrast, the Third and Ninth Circuits have held that USSG §1B1.11(b)(3) violates the Ex Post Facto Clause.[47]

During this year, circuit courts decided several cases raising the very issue presented in the *Freeman* case currently before the Supreme Court.[48] Courts of appeals also have considered whether defendants sentenced as career offenders are eligible for sentence reductions pursuant to 18 U.S.C. § 3582(c) based on the 2007 amendment to the drug trafficking guideline for crack cocaine offenses. A divided panel of the Sixth Circuit, joining the Eighth and Tenth Circuits, concluded that a defendant sentenced as a career offender is ineligible for a sentencing reduction.[49] Joining the First and Second Circuits, as well as a divided panel of the Fourth Circuit, the Third Circuit held that such a defendant is eligible for a reduction.[50]

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[41] United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006).

[42] United States v. Turner, 548 F.3d 1094, 1099-1100 (D.C. Circuit 2008).

[43] United States v. Ortiz, 621 F.3d 82, 87 (2d Cir. 2010); United States v. Lewis, 606 F.3d 193, 199-200 (4th Cir. 2010); United States v. Lanham, 617 F.3d 873, 889-90 (6th Cir. 2010).

[44] The "one-book" rule at USSG §1B1.11(b)(3) provides that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the *Guidelines Manual* became effective, the revised edition of the *Guidelines Manual* is to be applied to both offenses."

[45] United States v. Kumar and Richards, 617 F.3d 612, 628 (2d Cir. 2010).

[46] United States v. Lewis, 235 F.3d 215, 218 (4th Cir. 2000); United States v. Kimler, 167 F.3d 889, 893-95 (5th Cir. 1999); United States v. Vivit, 214 F.3d 908, 919 (7th Cir. 2000); United States v. Cooper, 63 F.3d 761, 762 (8th Cir. 1995) (per curiam); United States v. Sullivan, 255 F.3d 1256, 1262-63 (10th Cir. 2001); United States v. Bailey, 123 F.3d 1381, 1404-05 (11th Cir. 1997).

[47] United States v. Bertoli, 40 F.3d 1384, 1404 n.17 (3d Cir. 1994); United States v. Ortland, 109 F.3d 539, 547 (9th Cir. 1997).

[48] *See, e.g.*, United States v. Rivera-Martinez, 607 F.3d 283, 284 (1st Cir. 2010); United States v. Garcia, 606 F.3d 209, 214 (5th Cir. 2010).

[49] United States v. Pembrook, 609 F.3d 381, 387 (6th Cir. 2010).

[50] United States v. Flemming, 617 F.3d 252, 254 (3d Cir. 2010).