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 2012.

United States Supreme Court Cases on Criminal Justice Issues

Decisions

In *Dorsey v. United States*,[27] the Supreme Court, in a 5-4 opinion, held that the reduced mandatory penalty provisions for crack cocaine offenses in the Fair Sentencing Act (FSA) apply to offenders who committed crack cocaine crimes before August 3, 2010 (the FSA's effective date), but who were not sentenced until after August 3, 2010. Justice Breyer authored the majority opinion, in which Justices Kennedy, Ginsburg, Sotomayor and Kagan joined. Justice Scalia authored the dissenting opinion, in which Chief Justice Roberts and Justices Thomas and Alito joined.

Petitioner Corey Hill unlawfully sold 53 grams of crack cocaine in March 2007. He was sentenced in December 2010 to 10 years of imprisonment, the statutory mandatory minimum sentence under the Anti-Drug Abuse Act of 1986 (1986 Drug Act).[28] Petitioner Edward Dorsey unlawfully sold 5.5 grams of crack cocaine in August 2008. He was sentenced in September 2010 to 10 years of imprisonment. Both sentencing judges concluded that the 1986 Drug Act's mandatory minimums applied to the defendants and that the FSA's more lenient provisions did not. The Seventh Circuit affirmed both sentences.

The question presented to the Supreme Court was "whether the [FSA's] more lenient penalty provisions apply to offenders who committed a crack cocaine crime before August 3, 2010, but were not sentenced until after August 3." The Court held that the more lenient penalty provisions apply. The Court first reviewed the history of the Sentencing Reform Act (SRA) and the creation of the sentencing guidelines, noting that base offense levels for drug offenses in the guidelines were keyed to the mandatory minimums provided for in the 1986 Drug Act. The Court also noted that the Commission had issued four separate reports informing Congress that the crack cocaine penalties were too high and disproportionate to powder cocaine penalties.

The Court framed the question as one of congressional intent and was convinced by the following six considerations that Congress intended the FSA's more lenient penalties to apply to offenders who committed crimes before August 3, 2010, but were sentenced after that date. First, the federal saving statute, 1 U.S.C. § 109, permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act, because the will of Congress may also be manifested by "necessary implication," gleaned from "the "fair implication" or "plain import" of the statute. Second, Congress must have been aware at the time of the FSA's passage that the Commission directs judges to use the *Guidelines Manual* in effect at the time of sentencing, and, third, language in the FSA, including the requirement that the Commission promulgate amendments as soon as practicable, implied that Congress intended to follow the guidelines' background principles. Fourth, applying the old mandatory minimums would create disparities of the kind that Congress enacted the SRA and the FSA to avoid. Fifth, not applying the FSA would do more than preserve a disproportionate status quo; it would make matters worse by occasioning various sentencing anomalies whereby two similarly situated defendants would be

[27] 132 S. Ct. 2321 (2012).

[28] Pub. L. No. 99–570 (1986).

sentenced using two different manuals. Finally, the Court found no strong countervailing considerations.

Justice Scalia, writing for the dissent, indicated that "what is required to override § 109's default rule is a clear demonstration of congressional intent." Noting that the Supreme Court had articulated three different tests for determining whether Congress clearly demonstrated an intent to override an earlier statute, the dissent argued that the proper test was whether the "plain import of the later statute directly conflicts" with the earlier one. The dissent asserted that the majority's considerations did not satisfy the "plain import" standard and questioned the majority's conclusion that Congress's instruction to the Commission meant that Congress understood that the new minimums would apply immediately. Finally, while recognizing that applying the prior mandatory minimums to some defendants while sentencing others under the new guideline provisions might create anomalies, the dissent argued that "there is no reason to take the Guidelines amendments ultimately promulgated by the Commission as a given when evaluating what Congress would have understood when the [FSA] was enacted."

In *Setser v. United States*,[29] the Supreme Court, in a 6-3 opinion, held that district courts have "authority to order that a federal sentence be consecutive [or concurrent] to an anticipated state sentence that has not yet been imposed." Justice Scalia authored the opinion, in which Chief Justice Roberts and Justices Thomas, Alito, Sotomayor, and Kagan joined. Justice Breyer filed a dissenting opinion, in which Justices Kennedy and Ginsburg joined.

The defendant had been serving a five-year term of state probation when he was arrested for possessing methamphetamine with intent to distribute. This new criminal conduct served as the basis for both a state and a federal indictment, as well as state revocation proceedings for violating the conditions of his probation. The defendant pled guilty to the federal charge and was sentenced to 151 months of imprisonment. At the time, the state court had not yet sentenced the defendant. At sentencing in federal court, the defendant argued that the district court lacked the authority to order his sentence to run concurrently or consecutively to the anticipated state sentences, and that the issue should ultimately be left for the Bureau of Prisons (BOP) to decide. The district court overruled the objection and ordered the federal sentence to run "consecutive to any state sentence imposed for probation violation [sic], but concurrent with any state sentence imposed on the new drug charge."[30] The Fifth Circuit affirmed.

The question before the Supreme Court was not whether the federal sentence should run concurrently with the state sentences; rather, the question was who had authority to make that decision. The Court looked to section 212(a) of the SRA, 18 U.S.C. § 3584, and concluded that section 212 did not directly address the situation presented by the case. The defendant and the government both argued that the decision must rest with the BOP, a power it derived from its authority to designate where a federal sentence will be served. The Supreme Court disagreed, ruling that the decision of whether sentences run concurrently or consecutively to each other was "a matter of discretion traditionally committed to the Judiciary," and finding "nothing in the Sentencing Reform Act, or in any other provision of law, to show that Congress foreclosed the exercise of district court's sentencing discretion in these circumstances."

The dissent framed this as "a difficult Guidelines-related problem: How should a federal judge sentence an offender where the offender has been convicted of having violated several different statutes?" According to the dissent, the statutes' silence on a judge's authority to order that a sentence run concurrently to a sentence that has yet to be imposed is explained by the fact that the "sentencing judge normally does not yet know enough about the behavior that underlies (or will underlie) a sentence that has not yet been imposed." The dissent argued that, in contrast, the BOP is best situated to take into account both the intent of the first sentencing judge

[29] 132 S. Ct. 1463 (2012).

[30] Although neither the Supreme Court nor the circuit court opinion explains the district court's reasoning, the sentence was imposed in accordance with the recommendations in USSG §5G1.3(c), p.s. (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).

and the specific facts developed at the second sentencing.

In *Southern Union Co. v. United States*,[31] the Supreme Court, in a 6-3 opinion, held that the proposition established in *Apprendi v. New Jersey*[32] – that the Sixth Amendment reserves to juries the determination of any fact (other than the fact of prior conviction) that increases a criminal defendant's maximum potential sentence – applies to criminal fines. Justice Sotomayor authored the opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, Ginsberg, and Kagan. Justice Breyer, joined by Justices Kennedy and Alito, wrote a dissenting opinion.

The United States charged Southern Union, a natural gas company, with crimes involving the handling and storage of liquid mercury. The indictment alleged that Southern Union knowingly stored mercury, which was later spread around the storage complex by vandals, without a permit "[f]rom on or about September 19, 2002 until on or about October 19, 2004" in violation of the Resource Conservation and Recovery Act (RCRA). The jury returned a general verdict convicting Southern Union of violating the RCRA during the entire period alleged in the indictment. RCRA violations are punishable by "a fine of not more than $50,000 for each day of violation."

At sentencing, the probation office calculated a maximum fine of $38.1 million based on Southern Union violating the RCRA for each of the 762 days between September 19, 2002 and October 19, 2004. Southern Union argued that this violated *Apprendi* because the jury was not asked to determine the exact duration of the violation and only returned a general verdict listing an approximate start date of the violation. According to the company, the jury instruction coupled with the general verdict form meant that the jury necessarily found only a single-day violation; anything more would require judicial fact-finding prohibited by *Apprendi*. The government took the position that *Apprendi* does not apply to criminal fines.

The district court held that *Apprendi* does apply to fines, but concluded that the "content and context of the verdict all together" demonstrated that the jury did in fact find that the duration of the violation was 762 days; thus, no judicial fact-finding was necessary to establish a maximum fine of $38.1 million. Ultimately, the district court imposed a $6 million fine and a $12 million "community service obligation." On appeal, the First Circuit rejected both of the district court's findings, holding that the jury did not find a violation for each day the mercury was stored and that *Apprendi* did not apply to criminal fines.

The Supreme Court began by reviewing the scope of the Sixth Amendment's jury trial right as construed in *Apprendi*. The Court asserted that *Apprendi*'s rule is "rooted in longstanding common-law practice" and explained that *Apprendi* has been applied to "a variety of sentencing schemes that increased a defendant's maximum authorized sentence," citing to *Cunningham v. California*,[33] *Blakely v. Washington*,[34] *United States v. Booker*,[35] and *Ring v. Arizona*.[36] The Court found "no principled basis" to treat the punishments at stake in those cases differently from criminal fines. "*Apprendi*'s 'core concern' is to reserve to the jury 'the determination of facts that warrant punishment for a specific statutory offense.' [] That concern applies whether the sentence is a criminal fine or imprisonment or death." In so holding, the Court rejected the government's argument that because fines are less onerous than incarceration, they do not trigger the Sixth Amendment. While a fine may be so insubstantial that the Sixth Amendment does not apply, many fines, particularly those against organizations, "engender a 'significant infringement of . . . freedom.'" Once a fine is substantial, as it clearly was in Southern Union's case, "*Apprendi* applies in full."

Finally, the Court dismissed the argument that judicially-found facts related to fines typically only involve quantifying the harm caused by the defendant's offense, rather than defining a separate

[31] 132 S. Ct. 2344 (2012).
[32] 530 U.S. 466 (2000).
[33] 549 U.S. 270 (2007).
[34] 542 U.S. 296 (2004).
[35] 543 U.S. 220 (2005).
[36] 536 U.S. 584 (2002).

set of acts for punishment (which would implicate *Apprendi* concerns). The Court found that this argument rests on assumptions that the *Apprendi* line of cases had rejected, namely that there is a constitutionally significant difference between an offense element and a sentencing factor. As to the government's argument that applying *Apprendi* to fines will cause significant administrative burdens that will reduce sentencing fairness, the majority explained that, even if this prediction were accurate, the rule advocated for by the government would be unconstitutional and therefore that "should be the end of the matter."

In dissent, Justice Breyer argued that the Sixth Amendment permits a sentencing judge to determine facts relevant to the amount of the fine to be imposed. Relying on the Supreme Court's opinion in *Oregon v. Ice*,[37] the dissent asserted that fines are sentencing facts, not elements of the offence, and therefore do not trigger the Sixth Amendment. Because a determination of the number of days Southern Union violated the RCRA does not require finding an additional offense element, the dissent would have left this determination to the sentencing judge.

In companion decisions in *Missouri v. Frye*[38] and *Lafler v. Cooper*,[39] the Supreme Court held that criminal defendants have a Sixth Amendment right to effective assistance of counsel during plea negotiations, including when they miss out on, or reject, plea bargains because of ineffective legal advice. In *Missouri v. Frye*, the Supreme Court, in a 5-4 opinion, established that defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Justice Kennedy authored the opinion, which was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, authored the dissent.

The State of Missouri charged respondent Frye with driving with a revoked license, an offense punishable by a statutory maximum term of imprisonment of four years because he had three prior convictions for the same offense. The prosecutor sent a letter to the respondent's counsel offering a choice of two plea bargains: first, an offer to recommend a three-year sentence if the respondent pleaded guilty to the felony charge, without a recommendation regarding probation but with a recommendation of 10 days in jail; and second, an offer to reduce the charge to a misdemeanor and, if the respondent pleaded guilty, to recommend a 90-day sentence. The respondent's attorney did not advice the respondent that the offers had been made and the offers expired. Subsequently the respondent pleaded guilty without the benefit of a plea agreement and was sentenced to three years in prison. The respondent filed for post-conviction relief in state court, alleging ineffective assistance of counsel and stating at an evidentiary hearing that he would have entered a guilty plea to the misdemeanor had he known about the offer. The lower state court denied the post-conviction motion, but the Missouri Court of Appeals reversed after it determined that the respondent met the requirements for showing a Sixth Amendment violation of the right to counsel under *Strickland v. Washington*.[40]

The Supreme Court began by observing that the Sixth Amendment right to the effective assistance of counsel applies to a variety of "critical stages" before trial, including arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. The Court explained that it had already held in *Hill v. Lockhart*[41] that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland* and in *Padilla v. Kentucky*[42] that plea negotiations are a critical phase of litigation for purposes of the constitutional right to effective assistance of counsel.

The Court then addressed the State's attempt to distinguish *Hill* and *Padilla* from this case. According to the State, the prisoners' guilty pleas in *Hill* and *Padilla* were invalid because counsel had provided

[37] 555 U.S. 160 (2009).
[38] 132 S. Ct. 1399 (2012).
[39] 132 S. Ct. 1376 (2012).
[40] 466 U.S. 668 (1984) (requiring that a defendant show that counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).
[41] 474 U. S. 52 (1985).
[42] 130 S. Ct. 1473 (2010).

incorrect advice pertinent to the plea, while in this case the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information; the challenge in this case, instead, was to the course of legal representation that preceded it with respect to other potential pleas and plea offers. In any event, argued the State, because there is no right to a plea offer or a plea bargain, the respondent had not been deprived of any legal benefit to which he was entitled.

While recognizing that the State's arguments were "neither illogical nor without some persuasive force," the Supreme Court determined that they failed to overcome "a simple reality" that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. Given this reality, the Court found "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Observing that plea bargaining benefits both the prosecutor and the defendant, the Court concluded that to ensure that such benefits are realized, criminal defendants require effective counsel during plea negotiations.

The Supreme Court next considered how to define the duties and responsibilities of defense counsel in the plea bargain process, noting that this was a difficult question because "[t]he alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." Addressing, therefore, only the more limited question related to formal offers made by the prosecution, the Court held that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.

The Supreme Court then turned to what a defendant must demonstrate to show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance. It held that defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel, and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law.

Applying these criteria to the case at hand, the Supreme Court found there to be a reasonable probability that the respondent would have accepted the prosecutor's original plea bargain if the offer had been communicated to him. However, the Missouri Court of Appeals had not addressed whether the first plea offer, if accepted, would have been adhered to by the prosecution and accepted by the trial court, since, in Missouri, a prosecutor is not required to honor a plea agreement even after a defendant accepts it. As a result, the Court remanded the case to the Missouri Court of Appeals to consider whether the plea agreement in this case would have been entered.

In dissent, Justice Scalia observed that counsel's mistake in this case did not deprive the respondent of any substantive or procedural right, but only of the opportunity to accept a plea agreement to which he had no entitlement in the first place. Justice Scalia noted the majority opinion's acknowledgement that the respondent's conviction itself was untainted by attorney error and argued that, because the Supreme Court's prior focus in its ineffective-assistance cases was on the fundamental fairness of proceedings, the analysis in this case should have ended there. Conceding that the plea-bargaining process is worthy of regulation because it accounts for the majority of criminal convictions, Justice Scalia asserted that it is not covered by the Sixth Amendment, which is not concerned with the fairness of bargaining but with the fairness of conviction.

In *Lafler v. Cooper*, the Supreme Court, in a 5-4 opinion, established that where counsel's ineffective advice led to a plea offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. Justice Kennedy authored the majority opinion, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

Justice Scalia authored a dissent joined by Justice Thomas in its entirety and by Chief Justice Roberts in all but one part. Justice Alito authored a separate dissent.

Respondent Cooper was charged under Michigan law with five crimes, including assault with intent to murder. The prosecution offered to dismiss two of the charges and recommend a sentence of 51 to 85 months in exchange for a guilty plea. Initially, respondent expressed a willingness to accept the offer, but later rejected the offer after his attorney convinced him that the prosecution would be unable to establish his intent to murder. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months of imprisonment.

The respondent appealed his sentence through the Michigan state courts, arguing that his attorney's advice to reject the plea deal constituted ineffective assistance. After the state courts rejected his appeal, respondent filed for federal habeas relief under 28 U.S.C. § 2254, renewing his ineffective assistance-of-counsel claim. After finding that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel laid out in *Strickland* and *Hill*, the federal district court granted a conditional writ that ordered specific performance of the original plea agreement for a minimum sentence in the range of 51 to 85 months. The Sixth Circuit Court of Appeals affirmed this ruling.

At the outset, the Supreme Court observed that all parties to the case agreed that the representation of respondent's counsel had been deficient. Given this concession, the question before the Supreme Court was how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. The Court held that, where a defendant rejects a plea offer and proceeds to trial, he must show that but for the ineffective advice of counsel there was a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction and/or sentence under the offer's terms would have been less severe than under the judgment and sentence that were imposed.

The Supreme Court found unpersuasive the arguments petitioner and the Solicitor General put forward, which amounted, in the Court's opinion, to one general contention: "A fair trial wipes clean any deficient performance by defense counsel during plea bargaining." According to the Court, *Frye* and other Supreme Court holdings had made clear that the Sixth Amendment's applies to critical stages of the pretrial process, including plea bargaining. Moreover, the Court rejected, as "fail[ing] to comprehend the full scope of the Sixth Amendment's protections," the contention that the Sixth Amendment's purpose is only to ensure the reliability of a conviction following trial: "The fact that respondent is guilty does not mean that he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." Finally, the Supreme Court found that the claims by the petitioner and Solicitor General ignored the reality that "criminal justice today is for the most part a system of pleas, not trials." Citing *Frye*, the Court concluded that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."

Next, the Court addressed the appropriate remedy when a defendant shows that ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence. According to the Court, if the sole advantage was that the defendant would have received a lesser sentence under the plea, a court should have an evidentiary hearing to determine whether the defendant would have accepted the plea, and if so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not suffice, for example, where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, and in this circumstance, the proper remedy may be to require the prosecution to reoffer the plea. In either situation, the Supreme Court explained, a court may take account of a

defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions.

Applying its analysis to this case, the Court vacated the Sixth Circuit's order and remanded the case, holding that while the respondent satisfied *Strickland*'s two-part test, the federal district court erred by ordering specific performance of the original plea agreement. Instead, the correct remedy was to order Michigan to reoffer the plea agreement and permit the trial court to exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.

In dissent, Justice Scalia asserted that the Supreme Court had never held that the rule articulated in *Padilla*, *Hill*, and other decisions extends to all aspects of plea negotiations. Doing so, he continued, was a departure from past cases and created a judicially invented right to effective plea bargaining. Justice Scalia also underscored that this case arose on federal habeas and was therefore governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which bars federal courts from granting habeas relief unless a state court's decision was contrary to federal law. Notwithstanding that the opinion by the Michigan Court of Appeals was not "a model of clarity," Justice Scalia would have upheld the Michigan Court of Appeals decision because it correctly articulated the *Strickland* test and then applied it to the respondent's case. Additionally, Justice Scalia commented that the Supreme Court's remedy in this case was "unheard-of in American jurisprudence—and, I would be willing to bet, in the jurisprudence of any other country." Finally, in a part not joined by Chief Justice Roberts, Justice Scalia observed that in many countries of the world, American-style plea bargaining is forbidden in cases as serious as this one. Explaining that plea bargaining in the United States has long been viewed as a necessary evil to sustain an otherwise overburdened system, Justice Scalia asserted that the Court's decision had elevated plea bargaining from a necessary evil to a constitutional entitlement.

Justice Alito authored his own dissent, in which he claimed that the majority misapplied its ineffective-assistance-of-counsel case law and violated the requirements of AEDPA. Justice Alito pointed to the Court's "opaque discussion" of the appropriate remedy when ineffective assistance of counsel has caused the rejection of a plea and claimed that this discussion highlighted the weakness of the Court's analysis. Asserting that in such a case, the only logical remedy would be to give the defendant the benefit of the favorable deal, Justice Alito concluded that such a remedy would cause serious injustice in many instances, a potential problem that Justice Alito believed the Court tacitly recognized, only to then leave up to the lower courts the proper exercise of sound discretion in this area.

Petitions for *Certiorari* Granted

The Supreme Court granted *certiorari* in *Henderson v. United States*[43] to resolve a circuit split on the issue of whether an error is plain where the case law is unsettled at the time of the district court proceeding but becomes clear during the appeal. The Supreme Court has previously held in *Johnson v. United States*[44] that, when the governing law on an issue is settled against the defendant at the time of trial but then changes in the defendant's favor by the time of appeal, "it is enough that an error be 'plain' at the time of appellate consideration." *Henderson* presents the following question:

Whether, when the governing law is unsettled at the time of trial but settled in the defendant's favor by the time of appeal, an appellate court reviewing for "plain error" should apply *Johnson*'s time-of-appeal standard, as the First, Second, Sixth, Tenth, and Eleventh Circuits do, or should apply the Ninth Circuit's time-of-trial standard, which the D.C. Circuit and the panel below have adopted. The case was heard by the Court on November 28, 2012.

The Supreme Court also granted *certiorari* in *Descamps v. United States*[45] to address a split in the circuit courts about whether a state conviction, where the statute is missing an element of the generic crime,

[43] 133 S. Ct. 27 (2012).
[44] 520 U.S. 461 (1997).
[45] 133 S. Ct. 90 (2012).

may be subject to the modified categorical approach. The case presents the following question:

Whether, in a case under the Armed Career Criminal Act, when a state crime does not require an element of the federal crime of burglary, the federal court may find the existence of that element by examining the record of the state proceedings under the "modified categorical approach."

The case was heard by the Court on January 7, 2013.

Decisions of the United States Courts of Appeals

Many of the significant sentencing cases decided by the courts of appeals during the year concerned the substantive reasonableness of sentences imposed both within and below the guidelines range in terrorism, fraud, and child pornography possession cases. In addition to the reasonableness of child pornography sentences involving little to no prison time, courts of appeals also addressed the relationship between file-sharing software and the various distribution enhancements in the child pornography guideline, and the proper calculation of restitution to child pornography victims. The courts of appeals continued to delineate which state crimes fit the definitions of crime of violence found both in the Armed Career Criminal Act (ACCA)[46] and the guidelines; which state statutes are appropriately subject to the modified categorical approach; and whether using the *Guidelines Manual* in effect at the time of sentencing, rather than the time of offense, violates the Ex Post Facto clause. Finally, courts of appeals have examined the effects of the Supreme Court's opinion in *Tapia v. United States*[47] at original sentencing and supervised release revocation proceedings.

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 Ninth Circuit, in a divided *en banc* opinion in *United States v. Ressam*, held that a sentence of 22 years, representing a downward variance from a guideline range of 65 years to life, was substantively unreasonable in the case of a defendant who engaged in a plot to detonate explosives at Los Angeles International Airport.[48] The majority opinion concluded that the district court had abused its discretion in giving the defendant the exact same credit for his cooperation with the government after the defendant had recanted his testimony against other suspected terrorists, as the district court had given him prior to his repudiation.[49] The majority found that the district court had "significantly overvalued" the defendant's cooperation and had "significantly understated the impact of his later repudiation of his cooperation agreement and recantations of his prior statements."[50] Moreover, the majority found clearly erroneous the district court's finding that the defendant was "a quiet, solitary, and devout man whose true character was manifest in his decision to cooperate," given the "many facts demonstrating the contrary," including, among others, his years spent attending Islamic terrorist training camps, his use of forged documents and false identities on multiple occasions, and his intention to rob a bank to finance his mission.[51]

In a special concurrence, three judges on the Ninth Circuit wrote to underscore what they believed to be the inappropriateness of using this case to establish general substantive reasonableness standards: "[n]o case could be more atypical and less suited for the development of general unreasonableness rules than the case of a foreign enemy terrorist who enters the United States to wage war on this nation."[52] In dissent, four judges asserted that the majority had failed to exercise the appropriate level of deference to the district court's findings and had instead reweighed the section 3553(a) factors and substituted its own view of the facts for that of the district court.[53]

In another terrorism-related case, the Second Circuit rejected a defendant's argument that the

[46] 18 U.S.C. § 924 (2011).

[47] 131 S. Ct. 2382 (2011).

[48] 679 F.3d 1069, 1071-72 (9th Cir. 2012).

[49] *Id.* at 1092-93.

[50] *Id.*

[51] *Id.* at 1093-94.

[52] *Id.* at 1097-98 (special concurrence by Reinhardt, J., joined by Kozinski, C.J., and Wardlaw, J.).

[53] *Id.* at 1100-02 (dissent by Schroeder, J., joined by Paez, J., Berzon, J., and Murguia, J.).

terrorism enhancement at USSG §3A1.4,[54] like the child pornography guidelines at issue in *United States v. Dorvee*,[55] is not entitled to the respect or deference of a sentencing judge because the enhancement is not a product of empirical research.[56] The Second Circuit explained that, while in *Dorvee* it had held that it is not an abuse of discretion for a judge to disagree with the child pornography guidelines, given their "irrationality" and questionable origins, it had never held that a district judge is required to reject an applicable guideline: "At most, the judge may give a non-Guidelines sentence where she disagrees with the weight the Guidelines assign to a factor."[57] Because there was no indication that the district court disagreed with the terrorism enhancement or thought that the enhancement compelled or established a presumption in favor of a sentence greater than necessary to accomplish the purposes of sentencing in section 3553(a), the Second Circuit held that the district court did not abuse its discretion.[58]

In *United States v. Prosperi*, the First Circuit reviewed the substantive reasonableness of a below range sentence in a fraud case in which "[t]he government charged that over the course of nine years [the defendants' company] knowingly provided concrete that failed to meet project specifications and concealed that failure by creating false documentation purporting to show that the concrete provided complied with the relevant specifications."[59] At sentencing, the district court adopted the government's $5.2 million loss figure, but determined that the loss amount should not drive the sentence because of the crimes did not fit the "usual white collar crime profile," the defendants had not intended to enrich themselves personally, and there was no evidence that they intended to do harm to the project or the taxpayers.[60] In upholding the sentence of probation, which was a downward variance from a range of 87 to 108 months, the First Circuit explained that the district court had fulfilled its duty to consider the statutory purposes of sentencing, including deterrence.[61] The court of appeals found "plausible" the district court's explanation of the sentence, including the lack of evidence that the substandard concrete created a safety issue, the court's belief that the defendants were not seeking to enrich themselves, and the individual circumstances of the defendants.[62]

The Sixth Circuit reviewed two below range sentences in child pornography possession cases for substantive reasonableness. In *United States v. Bistline*,[63] the district court sentenced a defendant convicted of possessing 305 images and 56 videos of child pornography to one night of confinement, where the defendant's guideline range was 63 to 78 months of imprisonment. On appeal, the Sixth Circuit vacated the sentence as substantively unreasonable based in part on the judge's rejection of USSG §2G2.2[64] as "seriously flawed" because of Congress's active role in crafting it. The circuit court explained that while a district court may disagree with USSG §2G2.2 on policy grounds, "the fact of Congress's role in amending a guideline is not itself a valid reason to disagree with the guideline," given that Congress chose to delegate some of its authority

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[54] (Terrorism).

[55] 616 F.3d 174 (2d Cir. 2010).

[56] *United States v. Salim*, 690 F.3d 115 (2d Cir. 2012), *cert. denied*, 2013 WL 57595 (U.S. Jan. 7, 2013). The defendant, whose original sentence had been vacated and remanded for the district court to apply the terrorism enhancement, also challenged the procedural reasonableness of his resentence (*i.e.*, whether the district court took the proper steps during imposition of the sentence), arguing that the district court should not have imposed a longer sentence at resentencing than it had imposed originally. *Id.* at 126. The Second Circuit rejected this argument, explaining that the guidelines recommendation, which is a § 3553(a) factor that a judge must consider, had changed at the resentencing: "If the Guidelines are a factor, then it must follow that in some cases they are the factor that tips the balance. After all, if a factor never makes a difference, it is a non-factor." *Id.*

[57] *Id.*

[58] *Id.* at 127.

[59] 686 F.3d 32, 34 (1st Cir. 2012).

[60] *Id.* at 38.

[61] *Id.* at 47-48.

[62] *Id.* at 50.

[63] 665 F.3d 758 (6th Cir. 2012).

[64] (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).

to the Commission but retained for itself the remainder.[65] Moreover, the circuit court indicated that, although the Commission did not act in its usual institutional role with respect to the guideline, Congress was the relevant actor, therefore putting §2G2.2 on stronger ground than the crack cocaine guideline at issue in *Kimbrough*.[66]

The Sixth Circuit also addressed the child pornography possession guideline in *United States v. Robinson*,[67] in which the district court sentenced a defendant convicted of possessing 7,100 child pornography images to one day in custody, where the defendant's guideline range was 78 to 97 months of imprisonment. The circuit court found that the district court had improperly based the sentence on a prediction of the likelihood that the defendant would engage in sexual abuse of a child in the future, a crime that was not at issue in the case.[68] Moreover, the district court failed to afford the proper weight to those section 3553(a) factors other than the defendant's history and characteristics, most importantly the seriousness of child pornography crimes, the need to provide adequate deterrence within the market for child pornography (not deterrence of the defendant from future sexual abuse of children), and the need to avoid unwarranted disparities.[69]

Several courts of appeals considered the relationship between file-sharing software and the various distribution of child pornography enhancements under USSG §2G2.2, specifically the 2-level enhancement under USSG §2G2.2(b)(3)(F) for "mere" distribution and the 5-level enhancement under USSG §2G2.2(b)(3)(B) for distribution in exchange for a thing of value. The Sixth and Tenth Circuits ruled that the 2-level enhancement for mere distribution of child pornography does not contain an "intent" requirement.[70] Both of these circuits also found that knowingly installing file-sharing software with the understanding that it would enable other users to access the child pornography in the defendant's computer justifies a finding of distribution under §2G2.2(b)(3)(F) because it denotes that the user knowingly made the files accessible.[71]

As for the 5-level "thing of value" enhancement, the Eleventh Circuit ruled that the use of free file-sharing software does not, by itself, establish that the defendant expected to receive a thing of value in exchange, because these programs permit a person to access shared files on peer computers regardless of whether the person in turn shares his files.[72] In a case involving a child pornography ring, however, the Eleventh Circuit found sufficient evidence that the members intended to receive something of value in exchange for sharing child pornography, namely other images of child pornography.[73] In a similar holding, the Eighth Circuit made clear that while the 5-level enhancement does not apply simply because a defendant uses a file-sharing program, it is properly applied where the evidence indicates that the defendant uploaded and downloaded files using the software.[74]

Three circuit courts addressed the proximate cause requirement for an award of restitution under 18 U.S.C. § 2259 to child sexual abuse victims whose images are among those possessed, transported, or redistributed by child pornography defendants. These decisions add to a growing list of child

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[65] *Id*. at 762.

[66] *Id*. at 763.

[67] 669 F.3d 767 (6th Cir. 2012).

[68] *Id.* at 775.

[69] *Id*.

[70] United States v. Bolton, 669 F.3d 780, 781 (6th Cir. 2012); United States v. Ramos, 695 F.3d 1035, 1040-1041 (10th Cir. 2012).

[71] United States v. Bolton, 669 F.3d 780, 782 (6th Cir. 2012); United States v. Ramos, 695 F.3d 1035, 1042 (10th Cir. 2012); *see also* United States v. Spriggs, 666 F.3d 1284, 1287 (11th Cir. 2012) (finding no error in the district court's "implicit finding" that the defendant distributed child pornography because he understood that the file sharing program enabled other users to access his files, but holding that more than mere distribution is required for the 5-level enhancement under §2G2.2(b)(3)(B)).

[72] United States v. Spriggs, 666 F.3d 1284, 1287-1288 (11th Cir. 2012). *See also* United States v. Vadnais, 667 F.3d 1206, 1209 (11th Cir. 2012) ("There must be some other evidence . . . that a defendant reasonably believed that he would receive something of value by making his child pornography files available for distribution through a peer-to-peer network.").

[73] United States v. McGarity, 669 F.3d 1218, 1261 (11th Cir. 2012).

[74] United States v. Dolehide, 663 F.3d 343, 348 (8th Cir. 2011). *See also* United States v. Burman, 666 F.3d 1113, 1118 (8th Cir. 2012).

pornography cases illustrating "the challenges presented by the calculations of loss to victims in the internet age."[75] In *United States v. McGarity*, the Eleventh Circuit vacated an award of more than $3 million to one victim, holding that the government had failed to demonstrate that the defendant proximately caused the harm suffered by the victim.[76] The Eleventh Circuit held that end-user defendants may proximately cause injuries to victims of child sexual abuse, but "for proximate cause to exist, there must be a causal connection between the actions of the end-user and the harm suffered by the victim."[77] Because not one of the witnesses called by the government at the restitution hearing testified about the actual harm caused by the defendant specifically, the circuit court remanded for consideration of proximate cause.[78] The circuit court left it to the district court to consider whether any award may be joint and several with any other defendant responsible for harm to the victim.[79]

In *United States v. Kearney*, the First Circuit held that the proximate cause requirement was satisfied because "it is clear that, taken as a whole, the viewers and distributors of the child pornography depicting [the victim] caused the losses she has suffered" and, given that proximate cause "exists at the aggregate level, [] there is no reason to find it lacking on the individual level."[80] As for the specific amount awarded, the First Circuit affirmed the $3,800 restitution award, which the district court had arrived at by averaging the awards the victim had received in 33 other restitution cases, after discarding the highest and lowest values awarded, and then considering this sum against the total losses.[81] The First Circuit recognized that restitution awards will involve some degree of approximation and underscored that the award in this case "was small, both in absolute terms and as a proportion of the total amount of the restitution request" and that, to date, the victim had not come close to receiving the total amount of restitution requested.[82]

Circuit courts have continued to analyze state crimes to determine whether they fit the definition of a crime of violence, particularly in light of *Sykes v. United States*.[83] Addressing ACCA's definition of crime of violence, the Sixth Circuit held that a prior state conviction qualifies "as a predicate 'violent felony' under ACCA if the offence was enhanced pursuant to a state recidivism provision,"[84] and the Eleventh Circuit held that "sudden snatching ordinarily involves substantial risk of physical injury to the victim" and therefore the Florida burglary

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[75] United States v. Burgess, 684 F.3d 445 (4th Cir. 2012). See, e.g., United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011) (reversing "nominal" award to victim that district court recognized was less than amount of loss caused by defendant, and ordering district court to recalculate restitution award to reflect actual harm suffered by victim that was proximately caused by defendant); United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2012) (holding that district court did not clearly err in finding proximate cause); United States v. Aumais, 656 F.3d 147 (2d Cir. 2011) (finding that proximate clause was not established); United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011) (same).

[76] 669 F.3d at 1269.

[77] *Id.* ("18 U.S.C. § 2259 was intended to compensate the victims of child pornography for harms caused by individual defendants and not to serve as strict liability against any defendant possessing such admittedly repugnant images[.]").

[78] *Id.*

[79] *Id.* at 1270.

[80] 672 F.3d 81, 97 (1st Cir. 2012). The First Circuit also concluded that an individual depicted in child pornography images is "plainly a victim" of a child pornography defendant's crimes, because "individuals depicted in child pornography are harmed by the continuing dissemination and possession of such pornography containing their image." *Id.* at 97.

[81] *Id.* at 100.

[82] *Id.* at 41.

[83] 131 S. Ct. 2267 (2011) (holding that prior conviction for knowing or intentional flight from law enforcement officer by vehicle was a violent felony under the ACCA because this crime presents a serious potential risk of physical injury to another).

[84] United States v. Kearney, 675 F.3d 571, 576-577 (6th Cir. 2012) (noting that the defendants' predicate convictions, absent the recidivism enhancement, would not have been punishable by imprisonment for a term exceeding one year, but holding that it was to appropriate to consider the penalty as enhanced by the recidivism statute).

statute that encompassed this conduct was properly considered a crime of violence.[85]

Regarding the definition of crime of violence found in the career offender guideline, USSG §4B1.2, the Seventh Circuit held that conspiracy to commit robbery fits the guidelines' definition, even though it might not meet the ACCA's definition, because the career offender guideline includes inchoate offenses as part of its definition.[86] In addition, the Eleventh Circuit held that "at least where the previous conviction required knowing or intentional conduct, it is enough if that conviction was for a crime that generally creates as much risk of physical injury as one of the enumerated ones,"[87] while the Eighth Circuit held that "sexual offenses involving persons incapable of giving consent or sexual offenses involving persons in positions of authority over minors" involve vulnerable victims and therefore are crimes of violence.[88] Finally, addressing the definition of a crime of violence found in the immigration guideline at USSG §2L1.2, the Sixth Circuit held that "not every crime becomes a crime of violence when committed with a deadly weapon," and an assault statute that encompasses verbal assault is not categorically a crime of violence, even if committed with a deadly weapon.[89]

Addressing the proper use of the modified categorical approach, the Second Circuit in *United States v. Beardsley* joined the First, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits in holding that only statutes of prior conviction that are divisible into qualifying and non-qualifying predicate offenses, listed in separate sections or a disjunctive list, may be subject to the modified categorical approach.[90] Because the prior state statute under which the defendant was convicted was "merely worded so broadly as to encompass *conduct* that might fall within the definition of the federal predicate offense . . . as well as other conduct that does not", but was not divisible into predicate and non-predicate offenses, the Second Circuit concluded that the district court was limited to the categorical approach when considering whether the defendant's prior state conviction qualified as an 18 U.S.C. § 2252A(b)(1) predicate offense.[91] The Second Circuit noted that only the Ninth Circuit, in sharply divided *en banc* panels, had clearly rejected the divisibility requirement.[92]

The Seventh Circuit addressed whether using a *Guidelines Manual* in effect at the time of sentencing, rather than at the time the defendant committed the offense, violates the Ex Post Facto clause, holding, in *United States v. Peugh*, that it does not.[93] The circuit court reaffirmed its prior reasoning that "the advisory nature of the guidelines vitiates any ex post facto problem."[94] Other circuits disagree,[95] and on

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[85] United States v. Welch, 683 F.3d 1304, 1313 (11th Cir. 2012).

[86] United States v. Raup, 677 F.3d 756, 759 (7th Cir. 2012). *See also* United States v. Mobley, 687 F.3d 625, 628-629 (4th Cir. 2012) (concluding that USSG §4B1.2 expands upon the roster of offenses enumerated in the ACCA.)

[87] United States v. Chitwood, 676 F.3d 971, 979 (11th Cir. 2012). *See also* United States v. Jonas, 689 F.3d 83, 89 (1st Cir. 2012) (reaffirming its holdings that an assault on a prison guard, by its very nature, presents serious risk of injury to another, and therefore qualifies as a crime of violence).

[88] United States v. Dawn, 685 F.3d 790, 797 (8th Cir. 2012).

[89] United States v. Rede-Mendez, 680 F.3d 552, 558 (6th Cir. 2012).

[90] 691 F.3d 252, 258 (2d Cir. 2012) (*citing* United States v. Giggey, 551 F.3d 27 (1st Cir. 2008); Jean-Louis v. Attorney Gen., 582 F.3d 462 (3d Cir. 2009); United States v. Rivers, 595 F.3d 558 (4th Cir. 2010); United States v. Gonzalez-Terrazas, 529 F.3d 293 (5th Cir. 2008); United States v. Goodpasture, 595 F.3d 670 (7th Cir. 2010); United States v. Woods, 576 F.3d 400 (7th Cir. 2009); United States v. Boaz, 558 F.3d 800 (8th Cir. 2009); United States v. Palomino Garcia, 606 F.3d 1317 (11th Cir. 2010)).

[91] *Id.* at 258 (emphasis in original).

[92] *Id.* at 266-67 (*citing* United States v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. 2011)).

[93] 675 F.3d 736, 741 (7th Cir. 2012).

[94] *Id.* (*declining to overrule* United States v. Demaree, 459 F.3d 791 (7th Cir. 2006)).

[95] The D.C., Second, Fourth, Sixth, and Eleventh Circuits have expressly disagreed with the Seventh Circuit's reasoning in *Demaree*, and concluded that the guidelines may implicate the Ex Post Facto clause even though they are advisory. *See* United States v. Turner, 548 F.3d 1094 (D.C. Cir. 2008), United States v. Ortiz, 621 F.3d 82 (2d Cir. 2010); United States v. Lewis, 606 F.3d 193 (4th Cir. 2010); United States v. Lanham, 617 F.3d 873 (6th Cir. 2010); United States v. Wetherald, 636 F.3d 1315 (11th Cir. 2010). The Third, Fifth, and Ninth Circuits have remanded for resentencing in cases where the district court applied a later version of the guidelines that imposed a harsher punishment than the version in effect when the offense was committed. *See* United States v. Wood, 486 F.3d 781 (3d

November 9, 2012, the Supreme Court granted *certiorari* to address the following issue: "Whether a sentencing court violates the Ex Post Facto clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence."[96]

Courts of appeals also addressed the effects of *Tapia v. United States*,[97] which held that district courts are barred from imposing or lengthening a prison term on account of the defendant's need for rehabilitation. The Eighth Circuit held that imposing a consecutive sentence to enable treatment and rehabilitation in a federal institution was directly proscribed by *Tapia*.[98] On the other hand, the Eighth Circuit ruled that "no plain *Tapia* error occurs" where a district court mentions rehabilitation in response to a defendant's arguments or in relation to the risk of recidivism, but "never expresses an intention to lengthen a defendant's sentence for rehabilitative purposes."[99] Similarly, the Seventh Circuit held there is no error in "the mere mention that [the defendant] would have the opportunity to take part in rehabilitative programs."[100] Finally, various circuits have held "that *Tapia* applies to imprisonment regardless of whether imprisonment is imposed at initial sentencing or on revocation" of supervised release.[101]

Cir. 2007); United States v. Reasor, 418 F.3d 466 (5th Cir. 2005); United States v. Forrester, 616 F.3d 929 (9th Cir. 2010).

[96] 133 S. Ct. 594 (2012). The case is scheduled for oral argument on February 26, 2013.

[97] 131 S. Ct. 2382 (2011).

[98] United States v. Olson, 667 F.3d 958, 961-962 (8th Cir. 2012).

[99] United States v. Werlein, 664 F.3d 1143, 1147 (8th Cir. 2011) (internal quotation omitted). *See also* United States v. Gilliard, 671 F.3d 255, 259 (2d Cir. 2012); United States v. Receskey, 699 F.3d 807, 810-811 (5th Cir. 2012); United States v Blackmun, 662 F.3d 981, 987 (8th Cir. 2011).

[100] United States v. Lucas, 670 F.3d 784, 795 (7th Cir. 2012).

[101] United States v. Grant, 664 F.3d 276, 280 (9th Cir. 2011). *See also* Receskey, 699 F.3d at 810; United States v. Taylor, 679 F.3d 1005, 1006-1007 (8th Cir. 2012).