

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 2013.

United States Supreme Court Cases on Criminal Justice Issues

Decisions

In *Peugh v. United States*, the Supreme Court held, in a 5–4 decision, that the Ex Post Facto Clause prohibits a court from sentencing a defendant pursuant to a guideline that produces a higher range than the guideline in effect at the time the defendant committed the offense, despite the fact that the guidelines themselves are advisory. Justice Sotomayor authored the opinion, in which Justices Ginsburg, Breyer, and Kagan joined, and Justice Kennedy joined in all but one part. Justice Thomas filed a dissenting opinion, in which Chief Justice Roberts, and Justices Scalia and Alito joined in part. Justice Alito also filed a brief dissent, joined by Justice Scalia.

Petitioner Marvin Peugh was convicted of five counts of bank fraud following a jury trial. At sentencing, Peugh argued that the Ex Post Facto Clause required the district court to sentence him under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his offenses, rather than under the 2009 version in effect at the time of sentencing. Under the 1998 *Guidelines Manual*, Peugh would face a guideline range of 30 to 37 months; the range increased to 70 to 87 months under the 2009 *Guidelines Manual*. The district court disagreed on the basis that Seventh Circuit precedent in *United States v. Demaree*, which focused on the advisory nature of the guidelines, precluded the court from

using the 1998 *Guidelines Manual*. The Seventh Circuit affirmed.

To determine whether an *ex post facto* violation occurred, the Supreme Court analyzed whether, post-*Booker*, an increased guideline range “presents a sufficient risk of increasing the measure of punishment attached to the covered crimes.” The Court identified three features of the sentencing system which together present sufficient “procedural hurdles” to imposing a sentence outside the guidelines to trigger the Ex Post Facto Clause: (1) the requirement that sentencing courts properly calculate the guidelines; (2) the possibility that appellate courts may apply a presumption of reasonableness when reviewing within guideline sentences; and (3) the fact that courts of appeal may review a sentence more closely the farther it varies from the guideline range.

Because the Court’s *ex post facto* jurisprudence has proceeded on a case-by-case basis, the Court compared the federal system to the Florida guideline system at issue in *Miller v. Florida*. In that case, the Court held that Florida’s rules created a sufficient risk of increased punishment. The Court concluded that the federal rules “impose a series of requirements on sentencing courts that cabin the exercise of [] discretion.” The Court noted that there was “considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges.” The Court also stated that the Ex Post Facto Clause does not simply protect a defendant’s “reliance interest” in a particular set punishment knowable by the defendant before commission of the offense; “[i]t also reflects principles of fundamental justice.”

The Court rejected the government’s argument that, after *Booker*, “the Guidelines are just one among many persuasive sources a sentencing court can consult, no different from a policy paper,” stating that “[i]t is simply not the case that the Sentencing Guidelines are merely a volume that the district court reads with academic interest in the course of sentencing.” Although courts may consider the

newer, higher version of the guidelines, the higher version “will have the status of one of many reasons a district court might give for deviating from the older Guidelines, a status that is simply not equivalent for *ex post facto* purposes.” Finally, the Court stated that its Ex Post Facto Clause holding did not undermine the Sixth Amendment remedial holding in its *Booker* line of cases, emphasizing the distinction between the Sixth Amendment and Ex Post Facto Clause inquiries and concluding that “[t]he *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: it is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation. In light of the statistics invoked by petitioner [regarding the rate of variances], it appears so far to be achieving this balance.”

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, dissented, contending that the advisory guidelines “merely influence[] the exercise of the sentencing judge’s discretion” within the broader statutory ranges. Justice Thomas alone also stated that application of the Ex Post Facto Clause should be limited to increases in statutory penalties.

In *Alleyne v. United States*, the Supreme Court, in a 5–4 decision, held that facts that increase a mandatory minimum penalty are elements that must be submitted to a jury and found beyond a reasonable doubt. The decision overrules *Harris v. United States*, in which the Court previously held that judicial factfinding which increases the mandatory minimum sentence but does not affect the maximum penalty is permissible under the Sixth Amendment. Justice Thomas authored the opinion of the Court, in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined, and a separate opinion joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Sotomayor also filed a concurring opinion, in which Justices Ginsburg and Kagan joined. Justice Breyer filed an opinion concurring in part and concurring in the judgment. Chief Justice Roberts authored a dissenting opinion, in which Justices Scalia and Kennedy joined. Justice Alito filed a separate dissenting opinion.

Following a jury trial, Petitioner Allen Alleyne was convicted of multiple federal crimes, including using or carrying a firearm in relation to a crime of

violence, in violation of 18 U.S.C. § 924(c)(1)(A), which provides that anyone who “uses or carries a firearm” in relation to a crime of violence shall face a mandatory minimum penalty of five years imprisonment. If, however, the firearm is “brandished” or “discharged” during commission of the crime, the applicable mandatory minimum penalty increases to seven or ten years, respectively. The jury indicated on the verdict form that the defendant had “[u]sed or carried a firearm during and in relation to a crime of violence,” but did not indicate a finding that the firearm was brandished.

At sentencing, the probation officer recommended a seven-year sentence for the 924(c) count, because the firearm was brandished. The defendant objected, arguing that, pursuant to the Sixth Amendment, he was subject only to the five-year mandatory minimum supported by the jury’s explicit finding. The district court overruled the objection. Relying on *Harris*, the district court found that the facts supported a finding of brandishing by the preponderance of the evidence and sentenced the defendant to seven years on the 924(c) count. The Fourth Circuit affirmed.

The Court previously held, in *Apprendi v. New Jersey*, that “any fact that increased the prescribed statutory maximum sentence must be an ‘element’ of the offense to be found by the jury.” The *Harris* majority, however, declined to apply *Apprendi* to facts that increased only the mandatory minimum sentence, and not the maximum penalty. *Harris* reasoned that such facts do not implicate the Sixth Amendment, because the verdict “authorized the judge to impose the minimum with or without the finding.” Such a finding was not “essential” to the defendant’s punishment and merely limited the sentencing judge’s “choices within the authorized range.”

In overruling *Harris*, the Court reasoned that the definition of “elements” necessarily includes not only facts that increase the maximum penalty, but also facts that increase the minimum, because both affect the sentencing range to which a defendant is exposed. This way, a defendant is able to predict the potential penalties from the face of the indictment, and the Court has preserved “the historic role of the jury as an intermediary between the State and criminal defendants.” However, this holding “does

not mean that any fact that influences judicial discretion must be found by a jury.” Such broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Justice Sotomayor, with whom Justices Ginsburg and Kagan joined, concurred in the judgment, but wrote separately to emphasize that a “special justification” led the Court to overrule *Harris*. Prior to *Harris*, the Court decided *McMillan*, which rejected a constitutional challenge to a state statute that increased a defendant’s minimum sentence based on judicial factfinding. *Apprendi* was decided after *McMillan*, and in *Harris* the court “squarely confronted the question whether ‘*McMillan* stands after *Apprendi*.’” Justice Sotomayor explained that Justice Breyer wrote the “controlling opinion,” in which he “nevertheless declined to apply *Apprendi* to mandatory minimums because, though he found no way to distinguish sentencing floors from sentencing ceilings, he could not ‘yet accept’ *Apprendi* itself.” More than a decade later, however, the Court has continued to rely on *Apprendi*, and the “underpinnings” of the *Harris* opinion “have been ‘eroded’ by subsequent developments in constitutional law.”

Justice Breyer also wrote a concurring opinion in *Alleyne*, in which he explained his continued disagreement with *Apprendi*, because of its basic failure to distinguish between elements of a crime and facts that affect sentencing. “But *Apprendi* has now defined the relevant legal regime for an additional decade. And, in my view, the law should no longer tolerate the anomaly that the *Apprendi/Harris* distinction creates.”

Chief Justice Roberts, with whom Justices Scalia and Kennedy joined, dissented. The Chief Justice argued that increasing the mandatory minimum penalty does not affect the defendant’s right to a jury trial under the Sixth Amendment, but rather affects the role of the sentencing judge by limiting discretion. The Chief Justice described the Sixth Amendment as a guard against judicial overreaching. Here, because the jury’s verdict authorized a sentence of anywhere between five years to life in prison, “[n]o additional finding of fact was ‘essential’ to any punishment within the range.” The resulting

sentence was therefore within the discretion of the judge, and consistent with *Apprendi*.

Justice Alito filed a separate dissenting opinion, urging the Court not to overrule “well-entrenched precedent” so easily. Justice Alito further suggested that *Apprendi*, rather than *Harris*, should be a “prime candidate” for reconsideration.

In *Descamps v. United States*,²⁷ an 8–1 decision, the Supreme Court held that, when evaluating whether a prior state conviction constitutes “burglary” within the meaning of the Armed Career Criminal Act (ACCA), a federal sentencing court may not apply the modified categorical approach to a non-divisible state statute of conviction. Justice Kagan authored the opinion, in which Chief Justice Roberts, and Justices Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor joined. Justice Kennedy filed a concurring opinion. Justice Thomas filed a separate opinion concurring in the judgment. Justice Alito filed a dissenting opinion.

Petitioner Matthew Descamps was convicted of being a felon in possession of a firearm.²⁸ The government sought to enhance his sentence pursuant to ACCA, based in part on a prior conviction for violating California’s burglary statute, which the government claimed qualified as generic “burglary,” as that term is used by ACCA. Descamps argued that his burglary conviction did not so qualify because the California statute of conviction did not contain all the elements of generic burglary, as required by the “categorical approach” adopted by the Court in *Taylor v. United States*.²⁹ Specifically, California’s burglary statute does not require that a defendant’s initial entry into a building be unlawful.

The district court and court of appeals accepted the government’s argument that Descamps’ prior conviction nonetheless qualified under ACCA, because the “modified-categorical approach” allowed the court to examine certain documents, including the original state-court plea colloquy, in order to determine that Descamps had in fact committed

²⁷ 133 S.Ct. 2276 (2013).

²⁸ 18 U.S.C. § 924(e).

²⁹ 495 U.S. 575 (1990).

conduct that would constitute generic ACCA burglary. The Ninth Circuit's holding deepened a circuit split over whether the modified categorical approach, in which such documents may be consulted, applies only to statutes that are "divisible" into multiple, alternative possible elements, any of which suffice for commission of the offense, or also, as here, to a statute that is "indivisible" but overbroad, encompassing a broader array of conduct than the generic offense.

The Supreme Court reversed, noting that *Taylor* endorsed the modified categorical approach only in a "narrow range of cases." The Court held that the modified categorical approach was inappropriately applied because Descamps was not convicted under a burglary statute containing a "list of alternative elements." The Court found that its precedents permitted an inquiry into the plea colloquy and similar documents only when doing so established which of several alternative *elements* of the statute was violated by the defendant, but not when those documents simply recounted additional facts irrelevant to the elements of the offense of conviction.

The Court specifically rejected the Ninth Circuit's "modified factual" approach to evaluating prior offenses, in which the court of appeals focused not on what statutory definitions require, but on what facts were demonstrated to an adjudicator at trial or at a plea hearing. Such an approach would unacceptably lead to looking through to underlying facts in every case, rather than in a "narrow universe" of them. In addition to conflicting with the Court's precedents, the Ninth Circuit's approach was fundamentally at odds with the theoretical underpinnings of those decisions – ACCA's text and history, Sixth Amendment concerns, and practical difficulties combined with potential unfairness. First, ACCA's text made a "deliberate decision to treat every conviction in the same manner," and not to base the enhancement on the facts of each case. Second, the Court's Sixth Amendment case law generally requires that, "other than the fact of a prior conviction," any fact increasing the penalty for a crime beyond a statutory maximum be proven to a jury beyond a reasonable doubt.³⁰ Because ACCA

enhancements fall within the narrow prior conviction exception to this rule, forays into the underlying conduct giving rise to those convictions inappropriately place the sentencing court into the shoes of a jury in discerning facts. Third, the Ninth Circuit's approach creates "daunting difficulties and inequities," as the applicability of enhancements will depend on the availability and interpretation of documents from prior cases. Such documents may contain facts a defendant had no reason to dispute at the time of the original sentencing. Further, reliance on such documents might impinge on the plea agreement that led a defendant to plead guilty to a lesser offense in the first place.

In addition, the Court disagreed with the Ninth Circuit's determination that there is no conceptual difference between a "divisible" and "non-divisible" statute, because every statute creates a list of possible means of commission; the list is explicit in a divisible statute and implied in a non-divisible statute. The Court found this "imaginative reconstruction" approach inappropriate. The Court also rejected the government's "purportedly narrower" theory, in which the government acknowledged that a statute "truly missing" a generic offense element could not be an ACCA predicate, but nonetheless argued that a statute that contained a "broader version" of the generic element could qualify under ACCA.

Justice Kennedy wrote a separate concurring opinion, emphasizing his concern that a defendant pleading guilty to a state criminal offense will not typically be thinking of the possibility of "later consequences under ACCA," and finding "troubling" the possibility that inadvertent admissions might later lead to significant sentencing enhancements.

Justice Thomas concurred in the judgment only, and wrote separately to reaffirm his view that ACCA violates the Sixth Amendment, because it permits courts to find facts increasing the defendant's sentence. Justice Thomas would overrule *Almendarez-Torres v. United States*³¹, which created the "prior conviction" exception to this rule.

³⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

³¹ 523 U.S. 224 (1998).

In his dissenting opinion, Justice Alito argued for “a more practical reading” of ACCA, stating that “nothing in the text of ACCA mandates the Court’s exclusive focus on the elements of an offense,” and noting that the statutory term “conviction,” “in ordinary speech,” may include conduct beyond the “bare elements of the relevant criminal offense.” Examining a number of state statutes, Justice Alito argued that the Ninth Circuit was correct to find that there is no real distinction between statutes explicitly listing alternative elements, and statutes providing for “alternative means of satisfying an element.” In his view, many of the statutes where the Court had previously permitted application of the modified categorical approach in fact involved such “alternative means” statutes, and were not, as the Court claimed, cases involving only alternative elements. Justice Alito also suggested that the Court’s concerns about the Sixth Amendment and practical difficulties of applying the modified categorical approach to non-divisible statutes are unfounded.

Finally, Justice Alito suggested that the Court’s holding will create a number of problems, including difficulties in determining when a statute qualifies as “divisible,” and will “frustrate fundamental ACCA objectives” by failing to punish offenders who engage in serious violent conduct. Justice Alito noted that in this case, it was undisputed – based on Descamps’ original plea colloquy – that Descamps forcibly broke and entered into a grocery store for the purpose of burglarizing it. As that admitted conduct fit with the elements of generic burglary, Justice Alito would have sustained the ACCA enhancement.

In *Henderson v. United States*, a 6–3 decision, the Supreme Court held that, regardless of whether a legal question was settled or unsettled at the time of trial, an error is “plain” within the meaning of Federal Rule of Criminal Procedure 52(b) so long as the error was plain at the time of appellate review.³² Justice Breyer wrote the opinion of the Court, in which Chief Justice Roberts and Justices Kennedy, Ginsburg, Sotomayor, and Kagan joined. Justice

Scalia filed a dissenting opinion, in which Justices Thomas and Alito joined.

In early 2010, Petitioner Armarcion Henderson pled guilty to being a felon in possession of a firearm. At sentencing, the district court increased his sentence so that he would qualify for an in-prison drug treatment program. Henderson appealed, arguing that the district court had plainly erred in sentencing him to an above-guidelines term of incarceration solely for the purpose of rehabilitation. The following year, while Henderson’s appeal was pending, the Supreme Court decided, in *Tapia v. United States*, that a court may not “impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.”³³

Nevertheless, the Fifth Circuit determined that the district court was not authorized to correct petitioner’s sentence under Rule 52(b). According to the Fifth Circuit, the district court’s error was not “plain” under Rule 52(b), because at the time the error was committed, the law was not clear, and remained unsettled until *Tapia* was decided. The Supreme Court disagreed, holding that Rule 52(b)’s plain error standard applies at the time of review. Justice Scalia, with whom Justices Thomas and Alito joined, dissented, arguing that the Court’s interpretation of Rule 52(b) undermined the rule’s purpose of inducing the parties to object at trial rather than waiting to raise arguments on appeal.

Petitions for *Certiorari* Granted

The Supreme Court granted certiorari in *Paroline v. United States*³⁴ to resolve a circuit split on the issue of whether a child pornography defendant can be held responsible for a restitution amount that covers all losses suffered by a victim, regardless of whether the defendant’s criminal acts proximately caused the loss and the victim’s losses occurred prior to the defendant’s indictment and arrest. The case presents the following question:

³² 133 S.Ct. 1121 (2013).

³³ 131 S.Ct. 2382, 2393 (2011).

³⁴ 133 S.Ct. 2886 (2013).

What, if any, causal relationship or nexus between the defendant's conduct and the victim's harm or damages must the government or the victim establish in order to recover restitution under 18 U.S.C. § 2259?

The Court heard arguments in the case on January 22, 2014.

Decisions of the United States Courts of Appeals

As in past years, many of the major sentencing decisions of the courts of appeals dealt with the substantive reasonableness of sentences, particularly in the areas of child pornography and fraud. Courts of appeals reviewed sentences below, within, and above the relevant guideline ranges, and assessed the propriety of supervised release conditions and the career offender guidelines. Issues of procedural reasonableness and constitutional questions about the sentencing process also arose in a number of decisions. Courts also dealt with the categorical approach in both the guidelines and statutory contexts on a regular basis, including a number of cases decided in response to the Supreme Court's May 2013 decision in *Descamps v. United States*.³⁵ In fiscal year 2013, the courts of appeals also decided a number of questions arising from the resentencing of crack cocaine defendants pursuant to the Commission's retroactive 2011 amendments. Finally, the courts of appeals continued to decide a number of cases of substantive guideline interpretation, particularly in the areas of child pornography and with respect to the "safety valve" provision applicable to drug defendants.

Reasonableness and Constitutional Issues

Courts found several below-guidelines sentences to be unreasonably low. For example, the Eleventh Circuit reversed a probationary sentence given to a healthcare fraud defendant who had illegally obtained nearly \$3 million.³⁶ That court also reversed a 90 percent downward variance granted to prison guards who had been convicted of criminal civil

rights violations.³⁷ Similarly, the Sixth Circuit held that a one-day sentence for possession of child pornography was substantively unreasonable, finding that the district judge's policy disagreements with the guidelines were insufficient to justify such a sentence.³⁸ The Second Circuit affirmed a significant upward variance in a case involving possession of drugs in a federal prison, finding that the facts of the case warranted the variance.³⁹ Courts also weighed in on whether sentences based on the career offender guideline were reasonable. Both the Second and Seventh Circuits concluded that they were in particular cases, but not without significant analysis.⁴⁰

The Second Circuit decided two cases related to the constitutionality of sentences for child pornography offenses. It concluded that the five-year mandatory minimum term of imprisonment for distribution of child pornography was not unconstitutional cruel or unusual punishment as applied to the defendant, reversing the judgment of the district court.⁴¹ The district court had found that the defendant's relative youth and delayed emotional development made the sentence unconstitutional, but the court of appeals disagreed, finding that there was no "gross disproportionality" between the offense and the sentence, as required by governing precedent.⁴² In another case, the court reversed the imposition of penile plethysmograph testing as a condition of supervised release, holding that, because such testing implicates a fundamental liberty interest, it may only be ordered when factual findings show

³⁷ *United States v. McQueen*, 727 F.3d 1144 (11th Cir. 2013).

³⁸ *United States v. Bistline*, 720 F.3d 631 (6th Cir. 2013).

³⁹ *United States v. Douglas*, 713 F.3d 694 (2d Cir. 2013).

⁴⁰ *United States v. Ingram*, 721 F.3d 35 (2d Cir. 2013) (below-guideline sentence of 144 months for distribution of less than one gram of cocaine was reasonable); *id.* at 37 (Calabresi, J., concurring) (concluding that the sentence was "headed toward unreasonableness"); *id.* at 45 (Raggi, J., concurring) (concurring without "any such reservations"); *United States v. Smith*, 721 F.3d 904 (7th Cir. 2013) (the Seventh Circuit's presumption of reasonableness for within-guidelines sentences was not rebutted because the career offender guideline was based on a Congressional mandate).

⁴¹ *United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013).

⁴² *Id.* at 222.

³⁵ 133 S.Ct. 2276 (2013).

³⁶ *United States v. Kuhlman*, 711 F.3d 1321 (11th Cir. 2013).

that it is narrowly tailored to serve a compelling government interest.⁴³ The court found, as a matter of substantive due process, that such testing was not adequately related to the statutory sentencing goals of 18 U.S.C. § 3553(a).⁴⁴

On the procedural front, courts dealt with several aspects of the sentencing process. The Second Circuit vacated sentences in a mail and wire fraud case when it found that the district court had failed to sufficiently weigh the 18 U.S.C. § 3553(a) factors before sentencing defendants to the statutory maximum of 240 months.⁴⁵ The court of appeals found that the district court may have been overly influenced by the guidelines range alone, which would have been life absent the statutory maximum, and also expressed concern that the district court had not addressed defendants' argument that the high intended loss amount overstated the seriousness of the case, given "the low risk that any actual loss would result."⁴⁶

The Ninth Circuit clarified the procedure for judicial fact-finding at sentencing, addressing the meaning of Federal Rule of Criminal Procedure 32(i)(3). The court held that the rule requires that a district court resolve only specific disputes raised by the parties about unresolved objections to the presentence report; it does not require the court to resolve other factual matters raised for the first time in a sentencing memorandum or at the sentencing hearing.⁴⁷

Several decisions involved the procedures required for imposing supervised release conditions. For example, the Fifth Circuit held that a district court may not rely on "bare arrest records" in fashioning special conditions of supervised release.⁴⁸ While it may be appropriate to consider an arrest record in concert with a factual description of the alleged underlying conduct and the disposition of the charges, a record indicating only that the defendant

was arrested for a particular offense, without more, lacked sufficient indicia of reliability to be considered at sentencing.⁴⁹ The Second Circuit also held that a district court had not departed from the guidelines by sentencing an alien subject to deportation to a term of supervised release, despite the statement in §5D1.1(c) that a court "ordinarily should not impose a term of supervised release" in such cases.⁵⁰ Because the district court had made specific findings that a term of supervised release was appropriate for the defendant, the supervised release term was procedurally reasonable.⁵¹

Addressing a related constitutional question, the Ninth Circuit held that an incriminating statement made as a condition of probation in a prior case may not be considered at sentencing for the instant federal offense.⁵² The defendant had revealed otherwise unknown facts about his sexual contacts with minors in statements made as a condition of his probation for a state offense, but such statements could not, consistent with the Fifth Amendment's protections against self-incrimination, be considered by the federal court sentencing the defendant on child pornography charges.⁵³ And the Sixth Circuit resolved a constitutional issue arising from the Supreme Court's decision in *Alleyne v. United States*,⁵⁴ finding that Alleyne's prohibition against judicial fact-finding leading to a mandatory minimum sentence did not apply when a defendant explicitly admitted, as part of a guilty plea, that he had engaged in conduct justifying the mandatory minimum.⁵⁵ Thus, the defendant properly received a statutory sentencing enhancement for brandishing a firearm.⁵⁶

Categorical Approach

The courts of appeals continued to decide numerous cases applying the "categorical approach"

⁴³ *United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013).

⁴⁴ *Id.* at 262.

⁴⁵ *United States v. Corsey*, 723 F.3d 366 (2d Cir. 2013).

⁴⁶ *Id.* at 376-77; *see also id.* at 377 (Underhill, J., concurring).

⁴⁷ *United States v. Petri*, 731 F.3d 833 (9th Cir. 2013).

⁴⁸ *United States v. Windless*, 719 F.3d 415 (5th Cir. 2013).

⁴⁹ *Id.* at 420.

⁵⁰ *United States v. Alvarado*, 720 F.3d 153 (2d Cir. 2013).

⁵¹ *Id.* at 158-59.

⁵² *United States v. Bahr*, 730 F.3d 963 (9th Cir.2013).

⁵³ *Id.* at 967.

⁵⁴ 133 S.Ct. 2151 (2013).

⁵⁵ *United States v. Yancy*, 725 F.3d 596 (6th Cir. 2013).

⁵⁶ *See* 18 U.S.C. § 924(c).

to determine whether prior convictions qualified as “crimes of violence,” “violent felonies,” “aggravated felonies,” or some other category of offense defined in the guidelines or statute. The Fifth Circuit issued a significant *en banc* ruling clarifying its approach to determining the generic, contemporary meaning of enumerated categories of offenses, such as those found in §2L1.2.⁵⁷ That court determined that it will now use an easier-to-apply “plain-meaning approach” to defining non-common law offenses, while a subsequent opinion clarified that the court continues to use the “common sense approach” – requiring the consultation of a broader range of sources – for enumerated offenses that existed at common law.⁵⁸

Several courts of appeals also addressed the fine distinctions between apparently similar definitions of terms in different parts of the guidelines, or between the guidelines and statutes. A Fifth Circuit case emphasized that the same predicate offense may be a “crime of violence” for purposes of the career offender enhancement at §4B1.2, even though it is not for purposes of the illegal reentry guideline at §2L1.2.⁵⁹ This difference exists because only §4B1.2 contains a “residual clause,” sweeping in a broader array of offenses that, while not specifically enumerated, nonetheless involve “conduct that presents a serious potential risk of physical injury to another.”⁶⁰ Two other circuits addressed the status of offenses involving the possession of short-barreled shotguns. While such offenses are typically not considered “violent felonies” under the definition found in the Armed Career Criminal Act, because they are not “roughly similar in kind” to the enumerated offenses listed in that statute,⁶¹ they do qualify as “crimes of violence” under §4B1.2.⁶² This is so even though the two definitions are largely identical and often treated as interchangeable by

courts. Guidelines commentary, however, explicitly includes possession of a short-barreled shotgun as a crime of violence, which overcomes the general similarity in definitions.⁶³

A number of courts of appeals grappled with the implications of the Supreme Court’s decision in *Descamps v. United States*. The Fourth Circuit issued several opinions discussing various aspects of the decision, repeatedly emphasizing that *Descamps*’ emphasis on “the elements, rather than the facts, of a crime” required a reassessment of precedent that had permitted a broader use of the modified categorical approach.⁶⁴ The Ninth Circuit similarly noted that *Descamps* compelled a significant shift in its precedent, which had permitted application of the modified categorical approach to even non-divisible statutes, such as the California burglary statute at issue in *Descamps* itself.⁶⁵ The Second Circuit found that *Descamps* reaffirmed its precedent that the modified categorical approach could not be applied to a statute that was “merely broad, not divisible.”⁶⁶ And at least one court, the Sixth Circuit, concluded that, even after *Descamps*, a statute may be “divisible” even if it does not enumerate various means of violating it in separate subsections.⁶⁷

Crack Cocaine Resentencing

In *United States v. Blewett*, the Sixth Circuit, in a divided *en banc* opinion, held that the Fair Sentencing Act of 2010 (FSA) did not retroactively reduce the sentences of crack cocaine offenders who were

⁵⁷ *United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013) (*en banc*).

⁵⁸ *Rodriguez*, 711 F.3d at 557; *United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013).

⁵⁹ *United States v. Nieto*, 721 F.3d 357 (5th Cir. 2013).

⁶⁰ *Id.* at 371-72.

⁶¹ *United States v. Miller*, 721 F.3d 435 (7th Cir. 2013); see 18 U.S.C. § 924(e).

⁶² *United States v. Hall*, 714 F.3d 1270 (11th Cir. 2013).

⁶³ *Hall*, 714 F.3d at 1274; see §4B1.2 (comment.) n.1.

⁶⁴ *United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013) (*Descamps* prohibited application of the modified categorical approach to a Maryland child abuse statute that was not “divisible”); *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013) (in light of *Descamps*, Virginia assault and battery on a police officer is not a crime of violence, adding to an apparent split with pre-*Descamps* decisions of other circuits).

⁶⁵ *United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013); *United States v. Acosta-Chavez*, 727 F.3d 903, 908 (9th Cir. 2013) (after *Descamps*, the “age element” of a statutory rape statute is no longer divisible).

⁶⁶ *United States v. Barker*, 723 F.3d 315, 320 (2d Cir. 2013).

⁶⁷ *United States v. Hockenberry*, 730 F.3d 645, 669 (6th Cir. 2013).

originally sentenced prior to its effective date.⁶⁸ In 2005, the defendants were each sentenced to a ten-year statutory mandatory minimum penalty under existing law that based sentences on a 100:1 ratio of crack to powder cocaine. The defendants sought resentencing pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), arguing that the FSA, as implemented by new sentencing guidelines, had substantially reduced crack cocaine penalties, including the statutory mandatory minimum sentences imposed in their cases. If sentenced under the revised crack law, defendants would not be subject to a statutory minimum penalty because the quantity of crack involved fell below the threshold for any such penalty.

The district court denied the defendants' motions, but in May 2013 a panel of the Sixth Circuit reversed, holding that defendants were entitled to resentencing because the pre-FSA penalties were racially discriminatory, and violated the defendants' constitutional right to equal protection of the laws.⁶⁹ On rehearing *en banc*, the full Sixth Circuit reached the opposite conclusion, and affirmed the denial of defendants' motions for resentencing. The court held that: "(1) the Fair Sentencing Act's new mandatory minimums do not apply to defendants sentenced before it took effect; (2) § 3582(c)(2) does not provide a vehicle for circumventing that interpretation; and (3) the Constitution does not provide a basis for blocking it." The Sixth Circuit based its ruling on *Dorsey v. United States*, in which the Supreme Court held that the more lenient penalties of the FSA applied to offenders who committed crimes before the FSA's effective date, but who were sentenced after that date.⁷⁰

Several circuit courts also addressed the procedure a district court must follow when resentencing a defendant pursuant to USSG §1B1.10. For example, in *United States v. Boyd*, the Tenth Circuit considered "whether [a] district court's decision at the original sentencing to grant a

downward departure of the defendant's criminal history category is an 'application decision' that remains 'unaffected,' or is to be disregarded in calculating the defendant's amended guideline range" under §1B1.10.⁷¹ The Tenth Circuit held that it is to be disregarded, and in so holding agreed with the Second and the Eleventh Circuits that on resentencing a district court does not apply any departure previously granted at the original sentencing.⁷²

The appellate courts also weighed in on two related circuit conflicts regarding the application of §1B1.10 to crack cocaine resentencings under 18 U.S.C. § 3582(c)(2), in cases where a mandatory minimum applied to the statute of conviction, and the defendant received a downward departure at the original sentencing based on the government's motion for substantial assistance.

The first circuit split concerns the proper application of §1B1.10 when the defendant's original guideline range, before the substantial assistance departure, was above the presumptive floor of the mandatory minimum penalty, but the defendant received an original sentence below the mandatory minimum as a result of substantial assistance. In *United States v. Wren*, the Seventh Circuit held that, under those circumstances, §1B1.10's admonition that the court at resentencing must "leave all other guideline application decisions unaffected" does not prevent a district judge from sentencing the defendant below the mandatory minimum penalty.⁷³ "[W]hen a district court is authorized (by the prosecutor's substantial-assistance motion or a safety-valve reduction) to give a sentence below the presumptive statutory floor, that authority is equally applicable to a sentence-reduction motion after a change in the Guideline range."⁷⁴ The Eighth Circuit reached the opposite conclusion in *United States v. Golden*.⁷⁵ Because "the existence of a statutory

⁶⁸ ___ F.3d ___, No. 12-5226, 2013 WL 6231727 (6th Cir. Dec. 3, 2013) (en banc).

⁶⁹ *United States v. Blewett*, 719 F.3d 482 (6th Cir. 2013).

⁷⁰ 132 S.Ct. 2321 (2012).

⁷¹ 721 F.3d 1259 (10th Cir. 2013).

⁷² *United States v. Montanez*, 717 F.3d 287 (2d Cir. 2013); *United States v. Hippolyte*, 712 F.3d 535 (11th Cir. 2013).

⁷³ 706 F.3d 861 (7th Cir. 2013).

⁷⁴ *Id.* at 864.

⁷⁵ 709 F.3d 1229 (8th Cir. 2013).

minimum always imposes a boundary on the bottom of an offender's guideline range," the Eighth Circuit reasoned that the defendant's "applicable guideline range" had not been lowered by amendments made to the sentencing guidelines, and the defendant therefore was ineligible for a sentence reduction.⁷⁶

The other circuit split relating to §1B1.10 involves cases in which the defendant's original guideline range was, at least in part, below the applicable mandatory minimum but the bottom of the range was increased to the mandatory minimum penalty, pursuant to USSG §5G1.1(b). These defendants also received sentences below the mandatory minimum due to a substantial assistance departure. In *United States v. Joiner*, the Sixth Circuit concluded that in such cases the mandatory minimum remains the applicable guideline range, and the defendants are therefore ineligible for a sentencing reduction under §1B1.10.⁷⁷ In *United States v. Savani*, however, the Third Circuit found the phrase "applicable guideline range" in §1B1.10 to be "grievously ambiguous and hopelessly imprecise" and invoked the rule of lenity to determine that such defendants are not barred from seeking sentencing reductions pursuant to § 3582(c)(2).⁷⁸

Child Pornography

The Fifth and Eighth Circuits addressed restitution for child pornography victims whose images are discovered on a defendant's computer. In *re Amy Unknown*, the Fifth Circuit, in an *en banc* opinion, held that 18 U.S.C. § 2259 imposes a proximate cause requirement only for restitution claims that fall into the nondescript category of "any other losses suffered by the victim as a proximate result of the offense," in section 2259(b)(3)(F).⁷⁹ The Fifth Circuit noted that section 2259 directs district courts to order restitution equaling "the full amount of the victim's losses." Therefore, under a plain reading of the statute, a proximate cause requirement

does not extend to those categories of losses in sections 2259(b)(3)(A)-(E), which include: medical services related to physical, psychiatric, or psychological care; physical and occupational therapy or rehabilitation; necessary transportation, temporary housing, and child care expenses; lost income; and attorney's fees and costs.

In *United States v. Fast*, however, the Eighth Circuit held that the government must prove a defendant proximately caused each of the harms for which a child pornography victim seeks restitution under section 2259.⁸⁰ In so ruling, the circuit court relied on holdings by the First and Second Circuits, in which both courts analyzed statutory language similar to that of section 2259(b)(3) and found that the proximate cause standard applied to all of the elements of the statute.⁸¹ The Eighth Circuit also determined that child pornography victims, as non-parties, lack standing under the Crime Victims' Rights Act to bring a direct appeal on the restitution question. Although victims can proceed on appeal by *writ of mandamus*, the Eighth Circuit denied the victim's petition because it failed to meet the requirements of traditional *mandamus* review.

Two circuit courts issued opinions concerning the level of knowledge required for a defendant to be sentenced for distributing child pornography. In *United States v. Ray*, the Tenth Circuit held that the district court properly applied the 2-level enhancement for distribution of child pornography at USSG §2G2.2(b)(3)(F), regardless of whether the defendant knew that he was sharing files as a member of a peer-to-peer network.⁸² The record indicated that Ray used the file sharing network, and that the sharing function was enabled. The Tenth Circuit stated that the evidence was therefore sufficient to support the distribution enhancement, because knowledge is not a necessary element of the enhancement.

In *United States v. Robinson*, the Seventh Circuit explicitly disagreed with the Tenth Circuit's decision in *Ray* and held that, in order for the 2-level

⁷⁶ *Id.* at 1233.

⁷⁷ 727 F.3d 601 (6th Cir. 2013). See also *United States v. Glover*, 686 F.3d 1203 (11th Cir. 2012).

⁷⁸ 733 F.3d 56 (3d Cir. 2013).

⁷⁹ 701 F.3d 749 (5th Cir. 2012). As noted above, the Supreme Court has granted certiorari in this case. *Paroline v. United States*, 133 S.Ct. 2886 (2013).

⁸⁰ 709 F.3d 712 (8th Cir. 2013).

⁸¹ *United States v. Hayes*, 135 F.3d 133 (2d Cir. 1998); *United States v. Kearney*, 672 F.3d 81 (1st Cir. 2012).

⁸² 704 F.3d 1307 (10th Cir. 2013).

distribution enhancement to apply, the district judge must find the defendant had knowledge that the computer files he was downloading from a file-sharing network could be viewed by other people.⁸³ Robinson admitted to downloading child pornography but argued he did not know he was distributing the files when he participated in a file-sharing network. The government, on the other hand, argued that knowledge is not a necessary element of the guideline, and that certain technical aspects of the file-sharing network put the defendant on notice that he was distributing child pornography. The court disagreed with the government, noting that the 61-year old defendant was “barely computer literate,” and that the program required “some computer savvy.”⁸⁴

Safety Valve

The Eleventh Circuit determined when a drug defendant’s possession of a firearm disqualifies him from safety valve relief under USSG §5C1.2 in *United States v. Carillo-Ayala*.⁸⁵ The Eleventh Circuit held that the application of a 2-point enhancement under §2D1.1(b)(1) because a firearm “was possessed” by a drug defendant does not always preclude the defendant’s safety valve eligibility. Rather, the district court must determine that the defendant possessed the firearm “in connection with the offense” as required under §5C1.2(a)(2). The court held that a firearm is possessed “in connection with” a drug offense if it is possessed in proximity to the drugs, or if the firearm facilitated or had the potential to facilitate the offense. The Eleventh Circuit explained that the burden of proof lies with the defendant to negate an apparent connection.⁸⁶

⁸³ 714 F.3d 466 (7th Cir. 2013). The Seventh Circuit’s ruling is consistent with the holding of the Eighth Circuit in *United States v. Durham*, 618 F.3d 921 (8th Cir. 2010).

⁸⁴ *Id.* at 470.

⁸⁵ 713 F.3d 82 (11th Cir. 2013).

⁸⁶ *Id.* at 98.

