2016 Annual National Seminar

Case Law Update

Recent Supreme Court and Circuit Courts of Appeals Decisions

This document addresses some of the most frequently appealed issues, including issues related to Johnson v. United States, the meaning of "crime of violence" and "violent felony", the categorical approach, supervised release conditions, and restitution, among others. It also contains cases addressing plain error and harmless error in cases involving an incorrect determination of the guideline range in the wake of the Supreme Court's recent decision in Molina-Martinez v. United States.

Johnson v. U.S.

The Supreme Court held that the Armed Career Criminal Act's "residual clause" is unconstitutionally vague.

~

Career Offender (§4B1.2) residual clause

Unconstitutionally vague in light of Johnson
U.S. v. Madrid, 805 F.3d 1204 (10th Cir. 2015)
U.S. v. Pawlak, 822 F.3d 902 (6th Cir. 2016)
U.S. v. Calabretta, _F.3d_, 2016 WL 3997215 (3d Cir. 2016)
U.S. v. Sheffield, --F.3d--, 2016 WL 4254995 (D.C. Cir. 2016)

Not unconstitutionally vague in light of Johnson
U.S. v. Matchett, 802 F.3d 1185 (11th Cir. 2015)

~

18 U.S.C. § 16(b)

Unconstitutionally vague in light of Johnson.
Shuti v. Lynch, _F.3d_, 2016 WL 3632539 (6th Cir. 2016)
U.S. v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015)
Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2016)

Not unconstitutional in light of Johnson
U.S. v. Gonzalez-Longoria, --F.3d--, 2016 WL 4169127 (5th Cir. 2016)

Johnson v. U.S.

18 U.S.C. § 924(c)(3)

Not unconstitutionally vague in light of Johnson
U.S. v. Hill, _F.3d_, 2016 WL 4120667 (2d Cir. 2016)
U.S. v. Prickett, _F.3d_, 2016 WL 4010515 (8th Cir. 2016)
U.S. v. Taylor, 814 F.3d 340 (6th Cir. 2016)

~

Habeas and Johnson

Welch v. U.S., 136 S. Ct. 1257 (2016)
Johnson announced a new substantive rule that has retroactive effect in cases on collateral review.
U.S. v. Beckles v. U.S., 616 F. App'x 415 (11th Cir. 2015), cert granted, 136 S.Ct. 2510 (S. Ct. 2016)
(1) Whether Johnson v. United States applies retroactively to collateral cases challenging federal sentences enhanced under the residual clause in United States Sentencing Guidelines (U.S.S.G.) § 4B1.2(a)(2) (defining "crime of violence");
(2) whether Johnson's constitutional holding applies to the residual clause in U.S.S.G. § 4B1.2(a)(2), thereby rendering challenges to sentences enhanced under it cognizable on collateral review; and
(3) whether mere possession of a sawed-off shotgun, an offense listed as a "crime of violence" only in commentary to U.S.S.G. § 4B1.2, remains a "crime of violence" after Johnson.

Case Law Update
Recent Supreme Court and Circuit Courts of Appeals Decisions

2016 Annual National Seminar

Categorical Approach/Crime of Violence

U.S. v. Mathis, 136 S.Ct. 2243 (2016)
"A prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element."

"Distinguishing between elements and facts is therefore central to ACCA's operation. "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see Richardson v. United States, 526 U.S. 813 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty."

"Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements. Richardson, 526 U.S., at 817). They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant. Black's Law Dictionary 709. And ACCA, as we have always understood it, cares not a whit about them."

~

Violent Felony/Crime of Violence

U.S. v. Fields, 823 F.3d 20 (1st Cir. 2016)
Massachusetts assault with a deadly weapon is a crime of violence under §4B1.2. The offense has an element of force capable of causing physical pain (See also, U.S. v. Hudson, 823 F.3d 11 (1st Cir. 2016) (same offense is violent felony under ACCA)).

U.S. v Collins, 811 F.3d 63 (1st Cir. 2016)
Maine conviction for threatening with a dangerous weapon qualifies as a crime of violence under §4B1.2 as it involves use of force.

"It is clear that threatening someone with an item "capable of producing death or serious bodily injury," 17–A M.R.S. § 2(9)(A)—whether that item is designed as a weapon or not—constitutes threatening physical force."

Crime of Violence/Violent Felony

U.S. v. Hill, --F.3d--, 2016 WL 4120667 (2d Cir. 2016)
Hobbs Act robbery is a crime of violence for purposes of 924(c) (3)(A)

Hill contends that an individual can commit a Hobbs Act robbery without using or threatening the use of physical force by putting the victim in fear of injury through such means as threatening to withhold vital medicine from the victim or to poison him.

These hypotheticals are insufficient because a defendant is required to "point to his own case or other cases in which the ... courts in fact did apply the statute" in such a manner to show that there is a "realistic probability" that the Hobbs Act would reach the conduct Hill describes.

U.S. v. Jones, --F.3d--, 2016 WL 3923838 (2d Cir. 2016)
New York first degree robbery is not categorically a crime of violence at §4B1.2 as conviction does not require the use of violent force. While this statute is divisible, the court did not have any documents showing which of the four subparts formed the basis of the robbery conviction. Because the least culpable conduct did not necessarily involve force, the government could not show that the prior conviction was for a crime of violence.

U.S. v. Gardner, 823 F.3d 793 (4th Cir. 2016)
North Carolina common law robbery is not a violent felony under the ACCA as a person can be convicted under the statute by using minimal contact. For example, the North Carolina Court of Appeals has held that a defendant's act of pushing the victim's hand off of a carton of cigarettes was sufficient "actual force" to uphold a common law robbery conviction.

U.S. v. McNeal, 818 F.3d 141 (4th Cir. 2016)
Bank robbery under 18 U.S.C. § 2113(a), which "has as an element the use, attempted use, or threatened use of physical force"—specifically, the taking or attempted taking of property "by force and violence, or by intimidation," is a "crime of violence" within the meaning of the force clause of 18 U.S.C. § 924(c)(3). "Intimidation" entails a threat to use physical force and not merely a threat to cause bodily injury.

U.S. v. Puga-Yanez, _F.3d_, 2016 WL 3708243 (5th Cir. 2016)
Georgia child molestation qualified as enumerated offense of "sexual abuse of a minor" and therefore was "crime of violence" under §2L1.2.

Case Law Update
Recent Supreme Court and Circuit Courts of Appeals Decisions

2016 Annual National Seminar

Violent Felony/Crime of Violence

U.S. v. Martinez-Romero, 817 F.3d 917 (5th Cir. 2016)
Florida kidnapping does not meet the generic definition of kidnapping and is therefore not a crime of violence at 2L1.2. The statute only contains two of the four requirements of the generic definition of kidnapping, and, a person could be convicted by secretly abducting the victim without the use of force.

U.S. v. McBride, _F.3d_, 2016 WL 3209496 (6th Cir. 2016)
18 U.S.C. § 2113(a) is a crime of violence because even robbery by intimidation involves a threat to do immediate bodily harm.

"Section 2113(a) seems to contain a divisible set of elements, only some of which constitute violent felonies—taking property from a bank by force and violence, or intimidation, or extortion on one hand and entering a bank intending to commit any felony affecting it (such as mortgage fraud) on the other."

U.S. v. Waters, 823 F.3d 1062 (7th Cir. 2016)
Illinois enhanced domestic violence is a crime of violence under §4B1.2(a) as it necessarily involves the use of force.

U.S. v. Duncan, _F.3d_, 2016 WL 4254936 (7th Cir. 2016)
Indiana robbery is a violent felony under the elements section of the ACCA. "A person can commit robbery under Indiana Code § 35-42-5-1 by taking property by 'putting any person in fear.'" The statute itself does not tell us what the person must fear. Indiana case law teaches that the answer is fear of bodily injury."

U.S. v. Maxwell, 823 F.3d 1057 (7th Cir. 2016)
Minnesota simple robbery is a crime of violence under §4B1.2 as it involves force capable of causing physical injury to another.

U.S. v. Scott, 818 F.3d 424 (8th Cir. 2016)
Missouri 2nd degree assault (MO 565.073.1(1)) is a crime of violence under force section of §4B1.2 because the offense involves intentionally or knowingly causing physical injury (See U.S. v. Rice, 813 F.3d 704 (8th Cir. 2016)).

U.S. v. Boots, 816 F.3d 971 (8th Cir. 2016)
Iowa intentionally pointing a firearm toward another is a crime of violence at §4B1.2 . The statute requires intentionally pointing any firearm toward another and displaying it in threatening manner.

Violent Felony/Crime of Violence

U.S. v. Eason, _F.3d_, 2016 WL 3769477 (8th Cir. 2016)
Arkansas robbery (§ 5-12-102) does require physical force sufficient to cause physical pain or injury.

U.S. v. House, _F.3d_, 2016 WL 3144735 (8th Cir. 2016)
Hobbs Act robbery is a serious violent felony under 18 U.S.C. § 3559(c)(2)(F)(ii)(three strikes). Illinois aggravated robbery is generic robbery, and is a prior serious violent felony under § 3559(c)(2)(F)(ii).

U.S. v. Cisneros, _F.3d_2016 WL 3435389 (9th Cir. 2016)
Oregon first degree burglary (§164.205) does not match generic burglary and is not a violent felony. The statute is indivisible, and the modified categorical approach does not apply.

U.S. v. Garcia-Jimenez, 807 F.3d 1079 (9th Cir. 2015)
New Jersey aggravated assault does not meet the generic definition of aggravated assault at §2L1.2. It includes extreme indifference recklessness, whereas the Ninth Circuit defines aggravated assault to require wilfulness.

U.S. v. Parnell, 818 F.3d 974 (9th Cir. 2016)
Massachusetts armed robbery is not a violent felony as a person can be convicted by using slight force (minimal non-violent force). As such, it does not satisfy the requirement of force capable of causing physical pain or injury to another.

U.S. v. Benally, _F.3d_, 2016 WL 4073316 (9th Cir. 2016)
Involuntary manslaughter (18 U.S.C. § 1112) is not a crime of violence under § 924(c) as § 1112 requires a mental state of gross negligence, and, after Leocal v. Ashcroft, a crime of violence requires a mental state of intentional conduct, which is higher than recklessness.

U.S. v. Werle, 815 F.3d 614 (9th Cir. 2016)
Washington riot is not a violent felony under the ACCA. It does not require the use of force capable of causing physical pain or injury to another as required by Johnson.

U.S. v. Castillo, 811 F.3d 342 (10th Cir. 2015)
California second degree robbery is a crime of violence under §2L1.2. The defendant must [direct] the court to "other cases in which the states courts in fact did apply the statute in the special (non-generic) manner for which he argues.

U.S. v. Sheffield, _F.3d_, 2016 WL 4254995 (D.C. Cir. 2016)
D.C. attempted robbery is not a crime of violence under §4B1.2, and the statute is not divisible.

Case Law Update
Recent Supreme Court and Circuit Courts of Appeals Decisions

2016 Annual National Seminar

Drug Trafficking/Prior Sex Offense

U.S. v. Hinkle, _F.3d_, 2016 WL 4254372 (5th Cir. 2016)
Texas delivery of heroin is a controlled substance offense under §4B1.2. The statute contains means, not elements, and therefore is not divisible.

"Though our court had held, prior to Descamps and Mathis, that sentencing courts could reference record documents to determine the method of delivery under section 481.002(8) on which a defendant's conviction was based, Mathis makes clear that sentencing courts may no longer do so."

U.S. v. Vega-Ortiz, 822 F.3d 1031 (9th Cir. 2016)
The court correctly concluded that although California's drug offense (§ 11378) was not categorically an aggravated felony, application of the modified categorical approach resulted in a determination that Vega–Ortiz was indeed convicted of an aggravated felony. Vega–Ortiz's reliance on the federal regulation excluding a particular product containing L-meth from inclusion in the federal schedules is not persuasive, because Vega–Ortiz failed to show "realistic probability" of prosecution for possession of the excluded product.

U.S. v. Villanueva, 821 F.3d 1226 (10th Cir. 2016)
Oklahoma distribution of marijuana is a serious drug offense under the ACCA as it carries a maximum term of imprisonment of ten years or more. Court rejected the defendant's argument that because marijuana is legal in Colorado and Washington for recreational and personal use and legal for medicinal purpose in 20 states and D.C., it should not be a serious drug offense under the ACCA.

~

Prior Sex Offense

Lockhart v. U.S., 136 S. Ct. 958 (2016)
Interpreting the placement of the modifier "involving a minor or ward" in section 2252(b)(2), the Court held the section "applies to prior state convictions for 'sexual abuse' and 'aggravated sexual abuse,' whether or not the convictions involved a minor or ward."

U.S. v. Miller, 819 F.3d 1314 (11th Cir. 2016)
Lockhart applies to 18 U.S.C. § 2251(e) (production of child pornography).

Supervised Release Conditions

U.S. v. Fey, _F.3d_, 2016 WL 4363131 (1st Cir. 2016)
The First Circuit vacated a supervised release condition restricting the defendant's contact with children only upon approval of the probation office. The defendant was convicted of failure to register as a sex offender based on a rape conviction 17 years prior, where the victim was 16 years old. The rape conviction was too broad as it applied to contact with all minor children. There was no evidence the defendant was a danger to young children.

The First Circuit affirmed a condition requiring prior approval of any employment or volunteer duty that might put the defendant in direct contact with children. This condition was reasonably related to his past criminal history as his prior sex offense involved raping an underage co-worker after providing her with alcohol at a party he hosted.

U.S. v. Gall, _F.3d_, 2016 WL 3854217 (1st Cir. 2016)
Condition prohibiting defendant from possessing adult pornography and from entering any location where such pornography is available was remanded because the court did not explain why the special condition was necessary.

U.S. v. de Jesus, _F.3d_, 2016 WL 4056033 (1st Cir. 2016)
Court's financial disclosure condition was proper. It allowed the probation officer to monitor the defendant's earnings and expenditures, promoting the his rehabilitation (including his compliance with his support and employment obligations).

U.S. v. Webster, 819 F.3d 35 (1st Cir. 2016)
Supervised release conditions related to use of a computer and requiring sex offender treatment and were reasonable for defendant convicted of failure to register as a sex offender. While his prior sex offense conviction occurred in 2007, his refusal to accept responsibility for his prior sex offense, his lack of candor towards the court, and continued self-medication illustrate the need for the conditions.

U.S. v. Medina, 779 F.3d 55 (1st Cir. 2015)
"Medina's failure-to-register offense did not itself, quite obviously, involve the use of pornographic or other sexually stimulating materials. And, revolting as the actions that led to Medina's 2008 conviction are, the record here… fails to reveal a link between Medina's commission of that offense and the prohibited adult materials. There may well be a reason to impose a pornography ban in this case. But if so, the District Court has not yet provided it."

Case Law Update
Recent Supreme Court and Circuit Courts of Appeals Decisions

Supervise Release Conditions

U.S. v. Scott, 821 F.3d 562 (5th Cir. 2016)
Court vacated the lifetime ban on accessing any computer with internet capability and ban on unsupervised contact with minors. See also, U.S. v. Duke, 788 F.3d 392 (5th Cir. 2015) (same).

U.S. v. Fernandez, 776 F.3d 344 (5th Cir. 2015)
Supervised release condition requiring software installation improper because it was not related to defendant's "Failure to Register" conviction when his only prior sex offense conviction, for sexual assault of 14 year old, did not involve a computer.

U.S. v. Zamora, --F.3d--, 2016 WL 4488003 (7th Cir. 2016)
Supervised release conditions remanded for court's failure to give advance notice of special conditions as required.

U.S. v. Woodall, 782 F.3d 383 (8th Cir. 2015)
Condition prohibiting contact with minors without probation officer approval affirmed based on defendant's past sex offenses (including abusing his 15 year old stepsister) and fact that defendant had never completed a sex-offender treatment program.

U.S. v. Bertucci, 794 F.3d 925 (8th Cir. 2015)
"Bertucci's participation in assorted behavior-related classes five years ago, without more, fails to show that anger-management counseling is now reasonably necessary, or even appropriate. [] The district court neither heard evidence nor made findings with respect to either the content of the classes or why Bertucci attended them."

U.S. v. Campos, 816 F.3d 1050 (8th Cir. 2016)
Condition requiring defendant not get any tattoos was not reasonably related to the defendant's education, vocation, medicinal, or other correctional needs and has no connection to the other § 3553(a) sentencing factors."

U.S. v. Brown, 789 F.3d 932 (8th Cir. 2015)
Court abused its discretion in imposing supervised release condition prohibiting defendant from consuming alcohol and entering establishments that derived their primary source of income from alcohol sales. The record evidence of defendant's drug use did not support condition. See U.S. v. Woodall, 782 F.3d 383 (8th Cir. 2015)

U.S. v. LaCoste, 821 F.3d 1187 (9th Cir. 2016)
In a securities fraud case, a supervised release condition banning the defendant from any use of a computer without the permission of the probation officer was too broad. In addition, restricting defendant from living in four specific counties was not supported by the facts.

Supervised Release Conditions

U.S. v. West, _F.3d_, 2016 WL 3947815 (9th Cir. 2016)
Supervised release condition prohibiting the defendant from creating websites was improper. Potential topics and purposes for a website are limitless, but topics that could be prohibited were few. Defendant used websites to promote is tax avoidance to a limited extent, and the relationship between the websites mentioned in the PSR and the offense was attenuated.

U.S. v. Von Behren, 822 F.3d 1139 (10th Cir. 2016)
Condition of supervised release requiring participation in sex offender treatment, including a mandatory polygraph, violated the defendant's Fifth Amendment right against self-incrimination. The polygraph would force the defendant to admit to illegal sexual contact with minors, or else face revocation of supervised release.

U.S. v. Martinez-Torres, 795 F.3d 1233 (10th Cir. 2015)
The district court abused its discretion in imposing a special condition barring the defendant from viewing or possessing sexually explicit materials.

"When neither the Sentencing Commission nor Congress has required or recommended a condition, we expect the sentencing court to provide a reasoned basis for applying the condition to the specific defendant before the court."

U.S. v. Llantada, 815 F.3d 679 (10th Cir. 2015)
Interpreting various conditions imposed on the defendant, the Court held that many of the terms were common words and were not vague because commonsense would guide probation officers and judges in interpreting them. For instance, the condition to report being questioned by law enforcement would not include "if a parking meter attendant asks the defendant for the time."

U.S. v. LeCompte, 800 F.3d 1209 (10th Cir. 2015)
Supervised release condition restricting contact with minors in a failure to register case was improper because court did not explain or make an individualized finding about how the condition would achieve the purposes of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation.

U.S. v. Dunn, 777 F.3d 1171 (10th Cir. 2015)
Condition requiring a defendant convicted of possessing child pornography to submit to computer monitoring and to obtain permission to engage in other computer-related activities was plain error because the district court failed to make necessary findings to impose such a harsh restriction, which would materially affect the defendant's ability to obtain gainful employment for 25 years.

Case Law Update
Recent Supreme Court and Circuit Courts of Appeals Decisions

2016 Annual National Seminar

Restitution

U.S. v. Foley, 783 F.3d 7 (1st Cir. 2015)
Restitution order remanded because the court "stretched the underlying scheme" too far to transactions not listed in the offense of conviction.

U.S. v. Moran-Calderon, 780 F.3d 50 (1st Cir. 2015)
Restitution order remanded because court delegated authority over the payment schedule to the probation office or the government. The judge must have final authority to determine the payment schedule.

U.S. v. Garcia-Ortiz, 792 F.3d 184 (1st Cir. 2015)
"While a 'detailed explication of the court's reasoning' in imposing a restitution order is not necessary, the court here provided none. Particularly, the court did not at all address whether a payment schedule is appropriate."

U.S. v. Zhang, 789 F.3d 214 (1st Cir. 2015)
The United States may be a "victim" for purposes of the Mandatory Victim Restitution Act. The district court did not err in ordering restitution to the IRS.

No offset by forfeiture is appropriate, at least where, as here, the victim had not received any of the forfeiture proceeds.

U.S. v. Bengis, 783 F.3d 407 (2d Cir. 2015)
Restitution amount remanded so district court could determine whether a defendant knew or should have known of the scope and impact of the past activities of the conspiracy prior to joining.

U.S. v. Mahmood, 820 F.3d 177 (5th Cir. 2016)
Restitution order remanded in health care fraud offense because under the Mandatory Victims Restitution Act (MVRA), restitution must be offset by the value of services defendant's hospitals rendered to patients.

U.S. v. Fowler, 819 F.3d 298 (6th Cir. 2016)
"[T]he evidence also indicates that Fowler was held responsible for prescriptions written before he became involved in the conspiracy." The district court abused its discretions because "the restitution order was based on clearly erroneous findings."

U.S. v. Sawyer, 825 F.3d 287 (6th Cir. 2016)
Restitution was mandatory under § 3663A because the defendant's offense of conviction was a qualifying "offense against property" and the EPA is an identifiable victim of that offense.

Restitution

United States v. Kilpatrick, 798 F.3d 365 (6th Cir. 2015)
The federal restitution statutes do not authorize restitution for tax crimes under Title 26. However, a court can order restitution as a condition of supervised release.

U.S. v. Titus, 821 F.3d 930 (7th Cir. 2016)
Restitution order remanded because the district court did not provide any factual support for the restitution amount. (See also, U.S. v. Yihao Pu, 814 F.3d 818 (7th Cir. 2016)).

U.S. v. Thomsen, --F.3d--, 2016 WL 4039711 (9th Cir. 2016) Restitution order remanded because the court erred in holding that the conduct at issue in the second case was sufficiently "related" to the conduct at issue in the first case to warrant inclusion of losses.

"The time frame and the dates of the overt acts in furtherance of the original conspiracy charged in the second case (and, indeed, the overt acts in furtherance of the additional wire fraud conspiracy added later) do not involve any temporal overlap at all with the dates of the offenses charged in the first case."

U.S. v. Nosal, --F.3d--, 2016 WL 3608752 (9th Cir. 2016)
While investigation costs and attorney fees can be awarded to a victim as part of restitution, in this case, the court needed to make additional findings before awarding all the costs sought by the victim.

U.S. v. Eyraud, 809 F.3d 462 (9th Cir. 2015)
Court affirmed restitution order that included investigative costs and attorneys' fees incurred by the victim. Those costs were a direct and foreseeable result of the defendant's wrongful conduct.

U.S. v. Galan, 804 F.3d 1287 (9th Cir. 2015)
In calculating the amount of restitution to be imposed upon a defendant who was convicted of distribution or possession of child pornography, the losses, including ongoing losses, caused by the original abuse of the victim should be disaggregated from the losses caused by the ongoing distribution and possession of images of that original abuse, to the extent possible. The district court erred when it declined to limit the restitution imposed upon the defendant in that manner.

Case Law Update
Recent Supreme Court and Circuit Courts of Appeals Decisions

2016 Annual National Seminar

Restitution

U.S. v. Zander, 794 F.3d 1220 (10th Cir. 2015)
Restitution order remanded because the government presented no evidence or argument to show that the defendant's crimes of conviction proximately caused an unrelated fraud.

U.S. v. Camick, 796 F.3d 1206 (10th Cir. 2015)
Restitution order remanded. It included costs not caused by the conduct underlying the defendant's conviction.

U.S. v. Alisuretove, 788 F.3d 1247 (10th Cir. 2015)
The Guidelines' loss calculation incorporates all of the conduct involved in a conspiracy or scheme, and is different from the amount of restitution that can be awarded under the MVRA. "On remand, the district court must be careful to take into account not only the objects of the charged conspiracy, but also its temporal limits."

U.S. v. Howard, 784 F.3d 745 (10th Cir. 2015)
Restitution order remanded. The Court failed to take into account the sales of mortgage notes to downstream lenders.

U.S. v. Burns, 800 F.3d 1258 (10th Cir. 2015)
Because there is no statutory maximum amount of restitution that a sentencing court can exceed in a given case, Apprendi has no application to restitution.

U.S. v. Puentes, 803 F.3d 597 (11th Cir. 2015)
Court incorrectly eliminated the restitution order because the defendant received a Rule 35(b) motion. A district court may not reduce a restitution order on this basis.

U.S. v. Udo, 795 F.3d 24 (D.C. Cir. 2015)
Court incorrectly included in restitution award not just the loss resulting from false tax returns defendant was convicted of helping prepare, but also the losses generated from more than a dozen other returns the defendant was not convicted of helping prepare.

Plain Error/Harmless Error

Molina-Martinez v. U.S., 136 S. Ct. 1338 (2016)
A defendant is not required to provide additional evidence to show that an unpreserved error in calculating the Guideline range affected his or her substantial rights.

"A district court that 'improperly calculat[es]' a defendant's Guidelines range [] has committed a 'significant procedural error.'" The Government "remains free to point to parts of the record—including relevant statements by the judge—to counter any ostensible showing of prejudice the defendant may make.

U.S. v. Magee, _F.3d_, 2016 WL 4376421 (1st Cir. 2016)
"Because the district court made clear that it would have sentenced Magee to 70 months regardless of Magee's criminal history category I, II, III, any error in the calculation of Magee's criminal history was harmless."

U.S. v. Dahl, _F.3d_, 2016 WL 4394538 (3d Cir. 2016)
"Nor can we conclude that the sentencing court would have imposed the same sentence regardless of the [sex] offender designation because [t]o assume so—particularly when the record suggests that [the offender designation] played a role in the ultimate sentence imposed—would place us in the zone of speculation and conjecture."

U.S. v. Calabretta, _F.3d_, 2016 WL 3997215 (3d Cir. 2016)
The record in this case does not "show [] that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range.

U.S. v. Hentges, 817 F.3d 1067 (8th Cir. 2016)
The court's decision to vary upward from the advisory guideline range was sufficient to justify the sentence, even if the career offender designation was erroneous.

U.S. v. Davis, 825 F.3d 359 (8th Cir. 2016)
"Since the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range is sufficient to show that the error affected Davis' substantial rights."