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## New Guideline Amendments Effective November 1, 2012

On November 1, 2012, the following amendments to the Sentencing Guidelines became effective. They make the following changes:

* Clarify loss in **security fraud** and commodity fraud cases.
* Add penalties for organized insider trading.
* Amend the mortgage and **financial institution fraud** guidelines.
* Make 1 gram of BZP equivalent to 100 grams of marijuana.
* Extend the **"safety valve"** to precursor chemical offenses.
* Clarify "sentence imposed" for **priors in immigration** cases.
* Create a new Chapter Three adjustment for serious **human rights offenses.**
* Increase the penalties for using **immigration fraud** to conceal a serious human rights offense.
* Clarify that **driving while intoxicated** is always counted in criminal history.
* Require **mandatory minimum** for all counts in multiple count cases.
* Repeal the guideline barring consideration of **post-sentencing rehabilitation.**

## Commission Changes

**OFFENSE CONDUCT**

**Commission creates Chapter Three adjustment for serious human rights offenses.** In the Human Rights Enforcement Act of 2009, Pub. L. 11-112 (Dec. 22, 2009), Congress defined "serious human rights offenses" as "violations of Federal criminal laws relating to genocide, torture, war crimes, and the use of recruitment of child soldiers under sections 1091, 2340, 2340A, 2441, and 2442 of title 18, United States Code." In response the Commission established a new Chapter Three adjustment at §3A1.5 if the defendant was convicted of a serious human rights offense. The adjustment generally provides a four-level increase if the defendant was convicted of a serious human rights offense, and a minimum offense level of 37 if death resulted. If the defendant was convicted of an offense under 18 U.S.C. § 1091(c) for inciting genocide, however, the adjustment provides a two-level increase in light of the lesser statutory maximum penalty such offenses carry compared to the other offenses covered by this adjustment. *Amendment 765, effective Nov. 1, 2012.*

**Commission adds penalties for organized insider trading.** Responding to a directive in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, the Commission amended guideline §2B1.4 to provide a minimum offense level of 14 if the offense involved an "organized scheme to engage in insider trading." The amendment reflects the Commission's view that a defendant who engages in considered, calculated, systematic, or repeated efforts to obtain and trade on inside information (as opposed to fortuitous or opportunistic instances of insider trading) warrants, at minimum, a short but definite period of incarceration. The amendment ensures that the guidelines require a period of incarceration even in such a case involving relatively little gain. The Commission also amended the commentary to §2B1.4 to provide more guidance on the applicability of the adjustment for abuse of trust and special skill (§3B1.3) in insider trading cases. *Amendment 761, effective, Nov. 1, 2012.*

**Commission amends guidelines for mortgage and financial institution fraud.** Responding to a directive in Section 1079A(a)(2)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, the Commission added a new Application Note 3(E)(iii) to the credits against loss rule in §2B1.1, for mortgage loan fraud cases where the collateral has not been disposed of by the time of sentencing. First, the amendment changes the date on which guilt is established. Second, there is a rebuttable presumption that the most recent tax assessment is a reasonable estimate of fair market value. The Commission also amended Commentary Note 12 to address the effect of

a government "bailout" on §2B1.1(b)(15)(B), which provides an enhancement of 4 levels if the offense involved jeopardizing a financial institution or organization. Application Note 19(A)(iv) was amended to provide for an upward departure if the offense created a "risk of a significant disruption of a national financial market," and Application Note 19(C) was amended to provide a downward departure example. *Amendment 761, effective Nov. 1, 2012.*

**Commission clarifies loss in security fraud and commodity fraud cases.** In response to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, the Commission amended the guideline §2B1.1 to add a new Application Note 3(F)(ix), which establishes a rebuttable presumption that "the actual loss attributable to the change in value of the security or commodity is the amount determined by (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed the market, and (II) multiplying the difference between the average price by the number of shares outstanding." The special rule further provides that, "[i]n determining whether the amount so determined is a reasonable estimate of the actual loss attributable to the change in value of the security or commodity, the court may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense (e.g., changes caused by external market forces, such as changed economic circumstances, changed investor expectations, and new industry-specific or firm-specific facts, conditions, or events)." *Amendment 761, effective Nov. 1, 2012.*

**Commission extends "safety valve" to precursor chemical offenses.** The Commission added a new specific offense characteristic at subsection (b)(6) of §2D1.11 (precursor chemicals) to provide a two-level decrease if the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (the "safety valve"). The new specific provision parallels the existing two-level decrease for drug offenses in subsection (b)(16) of §2D1.1. The amendment also adds new commentary relating to the "safety valve" reduction in §2D1.1 that is consistent with the commentary relating to the "safety valve" reduction in §2D1.1 See USSG §2D1.1, comment (n. 21). *Amendment 763, effective Nov. 1, 2012.*

**Commission makes 1 gram of BZP equivalent to 100 grams of marijuana.** Responding to concerns raised by the Second Circuit and others regarding offenses involving BZP (N- Benzylpiperazine), a Schedule I stimulant, the Commission concluded that BZP is a stimulant with pharmacologic properties similar to that of amphetamine, but is only one-tenth to one-twentieth as potent as amphetamine, depending on the particular user's history of drug abuse. Accordingly, the Commission specified that 1 gram of BZP equals 100 grams of marijuana. This corresponds to one-twentieth of the marijuana equivalency for amphetamine, which is 1 gram of amphetamine equals 2 kilograms (or 2,000 grams) of marijuana. *Amendment 762, effective Nov. 1, 2012.*

**Commission clarifies "sentence imposed" for priors in immigration cases.** There is a circuit conflict over the application of the enhancements in §2L1.2(b)(1)(A) and (B) to a defendant who was sentenced on two or more occasions for the same drug trafficking conviction (e.g., because of a revocation of probation, parole, or supervised release), such that there was a sentence imposed before the defendant's deportation, then an additional sentence imposed after the deportation. Resolving the conflict, the Commission amended the definition of "sentence imposed" in Application Note 1(B)(vii) to §2L1.2 to state that the length of the sentence imposed includes terms of imprisonment given upon revocation of probation, parole, or supervised release, but "only if the revocation occurred before the defendant was deported or unlawfully remained in the United States." The amendment rejects the Second Circuit's contrary conclusion in *U.S. v. Compres-Paulino,* 393 F.3d 116 (2d Cir. 2004). *Amendment 764, effective Nov. 1, 2012.*

**Commission increases penalties for using immigration fraud to conceal a serious human rights offense.** The Commission added a new specific offense characteristic to §2L2.2 at subsection (b)(4), Subparagraph (A) provides a two-level increase and a minimum level of 13 if the defendant committed the offense to conceal membership in a military, paramilitary, or police organization that was involved in a serious human rights offense. Subparagraph (B) provides a six-level increase if the offense was incitement to genocide, or a 10-level increase and a minimum offense level of 25 if the offense was any other serious human rights offense. The amendment also adds an application note defining the terms "serious human rights offense" and the offense of "incitement to genocide." *Amendment 765, effective Nov. 1, 2012.*

## CRIMINAL HISTORY

**Commission requires mandatory minimum for all counts in multiple count cases.** Adopting the view of the Fifth Circuit in *U.S. v. Salter,* 241 F.3d 392, 395-96 (5th Cir. 2001), the Commission amended §5G1.2(b) to clarify what occurs, where the defendant has been convicted of multiple counts, and at least one of the counts requires a mandatory minimum sentence that is greater than the minimum of the otherwise applicable guideline range. The court must impose the total punishment on *each* count, except to the extent otherwise required by law. The amendment rejects the Ninth Circuit's contrary opinion in

*U.S. v. Evans-Martinez,* 611 F.3d 635, 637 (9th Cir. 2010), which interpreted the guidelines to mean that, apart from the count with the mandatory minimum, the other counts must be sentenced based on the guideline range. *Accord, U.S. v. Kennedy,* 133 F.3d 53, 60-61 (D.C. Cir. 1998). *Amendment 767, effective Nov. 1, 2012.*

**Commission clarifies that DWI is always counted in criminal history.** Application Note 5 to §4A1.2 provides that convictions for driving while intoxicated (DWI) or under the influence (and similar offenses by whatever name they are known) are counted in criminal history, and are not minor traffic infractions within the meaning of §4A1.2(c). Accordingly, most circuits have held that DWI convictions, including misdemeanors and petty offenses, always cont toward criminal history. Nevertheless, in *U.S. v. Potes-Castillo,* 638 F.3d 106, 110-11 (2d Cir. 2011), the Second Circuit held that despite Application Note 5, DUI offenses could be exempted as "careless or reckless driving" even though they could not be exempted under §4A1.2(c)(2). In response, the Commission amended Application Note 5 to clarify that convictions for driving while intoxicated and similar offenses are always counted, without regard to how the offenses are classified. Further, the amendment states that paragraphs (1) and (2) of §4A1.2(c) do not apply. *Amendment 766, effective Nov. 1, 2012.*

**DEPARTURES**

**Commission repeals guideline barring consideration of post-sentencing rehabilitation.** In *Pepper v. U.S.,* 131 S.Ct. 1229 (2011), the Supreme Court (relying in part on 18 U.S.C. § 3661) held that "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation." In response, the Commission repealed the policy statement at §5K2.19 that prohibits the consideration of post-sentencing rehabilitative efforts as a basis for downward departure when resentencing a defendant. *Amendment 768, effective Nov. 1, 2012.*

## SENTENCING AND PUNISHMENT:

## TWO CASES THAT DISCUSS THE RETROACTIVE AMENDMENT TO SENTENCE GUIDELINES REDUCING BASE OFFENSE LEVELS FOR PARTICULAR CRACK COCAINE QUANTITIES

*United States v. Lawson,* __ F.3d __, Case No. 11-15912 (July 13, 2012) and *United States v. Liberse,* __ F.3d __, Case No. 12-10243 (July 30, 2012). Both of these cases involve issues of whether the Appellant's sentences should be reduced because of the Guidelines retroactive Amendment 705 regarding quantities of crack cocaine. These two cases should be read to understand the different manner in which the 11th Circuit discusses whether a guideline range was lowered by the amendment. It also addresses how a motion to reduce sentencing for substantial assistance to the government can be used with the amendment for a reduction. In *Lawson,* the sentence was not reduced; and, in *Liberse* it was reduced. We strongly suggest a reading of both of these cases.

## DOG SEARCHES

Under *United States v. Caballes,* 543 U.S. 405, 409 (2005), a dog sniff conducted during the course of a routine traffic stop is constitutionally permissible and does not require anything beyond the probable cause required to justify the traffic stop itself. In this case, however, the dog sniff was undisputedly conducted after the purpose for the traffic stop—the issuance of the warning---had been completed.[1] Once the purpose of a traffic stop has been fulfilled, an officer may detain the driver only if he has reasonable suspicion of other criminal activity. *See United State v. Brugal,* 209 F.3d 353, 358 (6th Cir. 2000) ("The *Terry* reasonable suspicion standard requires an officer to have a reasonable suspicion that criminal activity is afoot before he may … continue to seize a person following the conclusion of the purposes of a valid stop.").

The reasonable suspicion standard "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow,* 528 U.S. 119, 123 (2000). Under the reasonable suspicion standard, however, "a minimal level of objective justification" for the police action is required. *Id.*

Reasonable suspicion is traditionally supported by the factors articulated by the officer involved. The factors are

[1] The following excerpt of the time line set forth in the government's brief opposing defendant's motion makes clear that the traffic stop was completed prior to the dog sniff:

| | |
|---|---|
| 12:02:10-12:04:46 | Deputy Colegrove completes ticket for following too closely. |
| 12:04:46-12:05:16 | Deputy Colegrove seeks Caldwell's consent to search car. Caldwell refuses. Deputy Colegrove indicates that he is going to use his dog. (The dog's name is Xeno). |
| 12:06:24 | Xeno begins "sniff" of car. |

Government's resp. to Def.'s Mot. To suppress at 4.

not viewed individually, rather the reasonable suspicion determination is made on the "totality of the circumstances." *Brugal*, 209 F.3d at 359. "The articulated factors together must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied." *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004). Because reasonable suspicion is an objective test, the court must examine the facts within the knowledge of the officer to determine the presence or nonexistence of reasonable suspicion. *Id.* The court is not allowed to examine the subjective beliefs of the officer to determine whether he thought that the facts constituted reasonable suspicion. *Id.*

The cases in which the courts held that reasonable suspicion existed consistently included at least one factor that was significantly more incriminating that any of the factors articulated in the present case including unusual travel plans, *see, United States v. Sokolow*, 490 U.S. 1, 9 (1989) (defendant traveled from Honolulu to Miami, a source city for illicit drugs, and stayed less than 48 hours); *Foreman*, 369 F.3d at 784 (defendant traveled from Norfolk, Virginia to New York City and back in a single day); inconsistent travel stories, *see, United States v. McLenon*, 106 Fed. Appx. 527, 527 (8th Cir. 2004) (driver and two passengers provided inconsistent travel stories); and rented vehicles, *see Brugal*, 209 F.3d at 359 (defendant flew from New York to Miami and rented a car to drive back to Virginia Beach); *United States v. McNeill*, 136 Fed. Appx. 153, 155 (10th Cir. 2005) (car had been rented by someone who was not an occupant of the vehicle).

## Case Law from the Circuits

### DEPARTURES [§ 5K] AND *BOOKER* VARIANCES

**1st Circuit says court may consider defendant's cooperation under § 3553(a) even without a government motion.** Defendant argued that the court erred in determining that it could not consider the extent of his cooperation with the government as a basis for a downward variance, in the absence of a § 5K1.1 motion from the government. The Fifth Circuit agreed that, in varying from the guidelines, a sentencing court has discretion to consider the defendant's cooperation with the government as a § 3553(a) factor, even if the government has not made a § 5K1.1 motion. Nonetheless, the court did not err in its assessment of the § 3553(a) factors. When defendant identified cases from other circuits permitting the consideration of a defendant's cooperation, the court stated that it "understood the argument," and went on to hear extensive argument from defendant about his cooperation. Accordingly, the record indicated that the court understood that it had the discretion to consider the extent of appellant's cooperation in fashioning the appropriate sentence. *U.S. v. Landorn-Class*, __ F.3d __ (1st Cir. Aug. 29, 2012) No. 10-2462.

**7th Circuit remands to ensure that defendant's Cuban heritage was not sentencing factor.** At sentencing, the government pointed to defendant's admission that he viewed fraud differently than violent crimes, arguing that his attitude might be because of his Cuban heritage. The court said that defendant's "lifestyle" could not "be blamed on Cuba," but said his record was reminiscent of "when the Mariel people came over here and created crime waves all over the place;" "when [Fidel] Castro emptied his prisons, and his psychiatric wards, and Jimmy Carter took them all in." The court continued that, unlike in Cuba, "in America, private property is sacrosanct. It's not the Government's property…And that's the way we live in America. And that's why it's a serious offense when you do this." Defendant argued for the first time on appeal that his Cuban heritage negatively affected his sentence. The Seventh Circuit agreed this was possible, finding the court's statements crossed the "very fine line of demarcation separating presentencing statements regarding a defendant's relationship with a country … and the statements concerning the race or national origin of the defendant which would violate his due process guarantees." The government should not have discussed defendant's national origin. By lumping the defendant in with the Mariel people, the court arguably made defendant's national origin a factor at sentencing. *U.S. v. Trujllo-Castillon*, __ F.3d __ (7th Cir. Aug. 14, 2012) No. 11-2646.

### GUIDELINES SENTENCING, GENERALLY

**Supreme Court to decide if case upholding mandatory minimum sentences should be overturned.** In *Harris v. U.S.*, 536 U.S. 545 (2002), the Supreme Court held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) – that facts that increase a defendant's sentence must be alleged in the indictment and proved to the jury – does not preclude a judge from finding facts to impose a mandatory minimum sentence. On October 5, 2012, the Supreme Court granted certiorari to determine whether *Harris* should be overruled. Like *Harris*, the case granted by the Court involved a finding that defendant brandished a firearm and therefore was subject to an increased sentence under 18 U.S.C. § 924(c). *Alleyne v. U.S.*, __, 133 S.Ct. __ (Oct. 5, 2012) (granting certiorari).

**6th Circuit says *Begay* is new substantive rule that applies retroactively.** Defendant was sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e). He later brought a motion under 18 U.S.C. § 2255, arguing that under *Begay v. U.S.*, 553 U.S. 137 (2008), his Kentucky

conviction for reckless homicide was not a violent felony. *Begay* held that the "otherwise" clause in the ACCA includes only convictions resembling the enumerated offenses, *i.e.*, only convictions involving purposeful, violent, and aggressive conduct. The Sixth Circuit agreed that defendant was entitled to relief, holding that *Begay* announced a new substantive rule that applied retroactively. Under Kentucky law, reckless homicide occurs when a person causes the death of another "with recklessness." But a mens rea of recklessness does not qualify under the "use of physical force" subsection of the ACCA. Nor did defendant's conviction qualify under the second subsection of § 924(e)(2)(B) in light of *Begay*, because it involved only reckless conduct. *Jones v. U.S.*, 689 F.3d 621 (6th Cir. 2012).

**APPLICATION PRINCIPLES**

**3rd Circuit holds that § 1B1.10 commentary defining "applicable guideline range" is binding on district court.** Defendants, both serving crack cocaine sentences, moved for sentence reductions based on the retroactive crack amendments. Both were career offenders who had originally received below-guideline sentences, based on either a variance or a departure. Guideline § 1B1.10(a)(2) says a reduction is not authorized under 18 U.S.C. § 3553(c)(2) if the amendment does not have the effect of lowering the defendant's applicable guideline range. The commentary to § 1B1.10 provides that the guideline range is the range "determined before consideration of any departure provision in the Guidelines Manual or any variance." The Third Circuit held that the commentary to § 1B1.10 was binding on the district court, and thus, the crack amendments did not apply to defendants. The recent opinions in *U.S. v. Barney*, 672 F.3d 228 (3rd Cir. 2012), and *U.S. v. Berberena*, __ F.3d __ (3rd Cir. Sept. 11, 2012) No. 11-4540 were consistent with this conclusion. *U.S. v. Ware*, __ F.3d __ (3rd Cir. Sept. 21, 2012) No. 12-1330.

**4th Circuit rejects use of murder cross-reference where neither conviction nor cross-referenced offense was groupable.** Defendant was convicted of being a felon in possession of a firearm based on an incident with his girlfriend. However, the bulk of his sentencing hearing was devoted to testimony about a home invasion robbery and murder that occurred one week after the offense of conviction. The district court found that the murder was relevant conduct to the firearm offense, and applied the cross-reference in § 2K2.1(c)(1) to the murder guideline, § 2A1.1. The Fourth Circuit found sufficient evidence that defendant committed the murder. However, the murder was not relevant conduct under § 1B1.3(a)(2), and thus did not support application of the 2K2.1(c)(1) cross-reference. The relevant conduct guideline applies where the offenses would require grouping of multiple counts under § 3D1.2. Although there is a circuit split on this issue, the panel held that subsection (a)(2) is applicable only when *both* the offense of conviction *and* the relevant conduct offense are capable of grouping, *U.S. v. Horton*, __ F.3d __ (4th Cir. Aug. 30, 2012) No. 11-4052.

**8th Circuit applies FSA to crack defendants sentenced after its enactment.** A jury convicted defendants of various drug-related offenses. They were sentenced on August 31, 2010, soon after the enactment of the Fair Sentencing Act (FSA), which increased the quantities of crack cocaine needed to trigger statutory minimum sentences. The district court found that the FSA was not applicable, and sentenced one defendant to a statutory minimum sentence of 120 months for a crack conspiracy, and sentenced the other to a mandatory minimum sentence of life imprisonment because he was a career offender, and his conviction involved more than 50 grams of crack. The Eighth Circuit reversed, following *Dorsey v. U.S.*, 132 S.CT. 2321 (2012). *Dorsey* held that "the new, more lenient mandatory minimum provisions" of the FSA "apply to offenders who committed a crack cocaine crime before August 3, 2010, but were not sentenced until after August 3, 2010." The drug quantity range found by the jury no longer required imposition of the same statutory mandatory sentences. *U.S. v. Lee*, __F.3d __ (8th Cir. Aug. 2, 2012) No. 10-2989.

**11th Circuit applies crack amendment to defendant regardless of whether FSA also applied.** In 2006, defendant was convicted of crack cocaine charges. He was subject to a 120-month mandatory minimum, but the court sentenced him to 121 months, and later reduced it to 97 months on the government's Rule 35(b) motion. Thereafter, Amendment 750 reduced the crack guidelines in response to the Fair Sentencing Act of 2010 (FSA). Defendant moved for a sentence reduction under § 3582(c)(2), arguing that Amendment 750 had lowered his guidelines range to 70-87 months. The district court denied the motion, finding that the crack amendments did not apply, because he was still subject to the 120-month mandatory minimum. The Eleventh Circuit found it unnecessary to decide whether the FSA applied because defendant was not sentenced to the mandatory minimum but was sentenced under the guidelines. So Amendment 750 *did* lower defendant's guideline range, and the district court had authority to reduce his sentence under § 3582(c)(2). Moreover, because defendant received a Rule 35(b) substantial assistance departure, "a reduction comparably less than the amended guideline range … may be appropriate." *U.S. v. Liberse*, __ F.3d __ (11th Cir. July 30, 2012) No. 12-10243.

**9th Circuit says failure to hold competency hearing required remand to new judge.** The Ninth Circuit held that the district court committed plain error in failing, *sua sponte*, to hold competency hearing before sentencing defendant. The court also held that on remand the case should be assigned to a different district judge because the

judge who imposed sentence would have a difficult time setting aside previously expressed views and because reassignment was advisable to preserve the appearance of justice. *U.S. v. Dreyer,* __ F.3d __ (9th Cir. Aug 21, 2012) No. 10-50631.

**OFFENSE CONDUCT**

**3rd Circuit reverses where court failed to address disparity argument.** Defendant was convicted of charges related to sexual messages he sent a minor in order to persuade her to have sex with him. He was sentenced to 240 months, which represented a 30-month upward departure. On appeal, defendant argued that his sentence was unreasonable because the district court failed to consider his request for a downward variance based on the disparity between his sentence for attempted statutory rape, and the lower state and federal maximum sentences for actually committing statutory rape. The Third Circuit found that the disparity argument based on Pennsylvania's 10-year maximum sentence for statutory rape lacked colorable legal merit. Section 3553(a)(6) addresses unwarranted sentence disparities among federal defendant's who are similarly situated, not disparate federal and state sentences. However, the panel agreed that the court committed procedural error by failing to address defendant's argument based on disparity between his sentence and the 15-year maximum penalty under federal law for actually committing statutory rape. *U.S. v. Begin,* __ F.3d __ (3d Cir. Oct. 9, 2012).

**1st Circuit reverses where court refused to make actual loss determination.** Defendants devised and executed a mortgage fraud scheme that netted them illegal profits of nearly two million dollars. Most of the mortgages at issue were sold by the original lenders to successor lenders prior to foreclosure. The district court assumed that it was precluded from making an actual loss determination due to its inability to ascertain which entities had suffered losses. Instead, the court relied on intended loss, arriving at an amount in excess of $2,500,000. The First Circuit found that the court was wrong to assume that it was incapable of making an actual loss determination merely because it could not tell which entities had lost what amounts of money. The relevant metric was total actual loss, not loss to any particular victim. For each property, the court should have calculated actual loss by subtracting from the outstanding balance on the mortgage either the sum recouped via foreclosure or, if there was no foreclosure, the property's fair market value at the time of sentencing. However, this error was not prejudicial. If actual loss was less than intended loss, it was correct for the court to rely on intended loss. If intended loss was lower, the court's error benefitted defendants. *U.S. v. Appolon,* __ F.3d __ (1st Cir. Sept. 19, 2012) No. 10-2243.

**6th Circuit approves downward variances in terrorism case.** Defendant was part of a group of men convicted of conspiracy to kill and maim persons outside the United States, and related charges. The advisory guideline sentence for each was life in prison. The district court varied downward, sentencing one defendant to 240 months, the second to 144 months, and the third to 100 months. The government argued that the sentences were both procedurally and substantively unreasonable. The Sixth Circuit disagreed. There was more than enough evidence that would reflect positively on the nature and characteristics of the defendants' history to counsel a downward variance. As for the need to avoid sentencing disparities, the terrorism case cited by the government had significant factual dissimilarities from the instant case. While defendants conspired to obtain explosives, they never manage to obtain them. There was no evidence that defendants were affiliated with Al-Qaeda or any other terrorist group, or that they actually killed anyone. *U.S. v. Amawi,* __ F.3d __ (6th Cir. Aug. 23, 2012) No. 09-4339.

**7th Circuit affirms below-guideline sentence for threats as not unreasonably high.** Defendant met a woman while working as a serviceman in her home, pursued her, and eventually left threatening telephone messages for her, her divorce attorney, and several others. His guideline range was 33-41 months, and the district court imposed a below-guidelines sentence of 24 months. Nonetheless, defendant appealed, arguing that the 24-month sentence was substantively unreasonable. The 7th Circuit upheld the sentence. The district court properly considered the sentencing factors in 18 U.S.C. § 3553(a) and adequately explained their application to defendant's case. The sentence was entitled to a presumption of reasonableness, and it was not unreasonably high. Defendant's actions were "disturbing and frightening," particularly because he continued to scare his victims even after being warned by the FBI; investigators found maps of his victims' locations in defendant's house; and he resisted arrest. The district court considered these arguments and gave defendant a below-guidelines sentence. The sentence was neither excessive nor unreasonable. *U.S. v. Lemke,* __ F.3d __ (7th Cir. Aug. 17, 2012) No. 11-2662.

**6th Circuit finds defendant's conduct was too non-threatening for threat of death increase.** During a bank robbery, defendant casually approached a teller, placed his hands on the counter, and twice quietly stated, "I am going to rob you." When the teller was slow to respond, defendant finally said, "I have a gun. Give me your money." The Sixth Circuit reversed a threat of death increase under § 2B3.1(b)(2)(F). The statement "I have a gun" does not always constitute a threat of death. A court must evaluate the overall circumstances of the robbery to determine whether a reasonable teller would have perceived a threat of death. Facts to consider include the robber's statements,

body language and overall demeanor, tone of voice, and mode of communication. Here, the objective circumstances of the robbery did not warrant the enhancement. First, the teller's description of defendant's nonaggressive demeanor suggested that he would not have appeared threatening to a reasonable observer. Second, the robbery did not contain any hallmarks of experienced bank robbers, such as demand notes. Defendant wore no mask or disguise and appeared no different from an ordinary customer. Finally, the teller testified both at sentencing and in an affidavit that he never felt threatened by defendant. The teller explained that he handed over the money because he had been trained to do so if he were ever presented with a robbery demand, not because of any perceived danger. *U.S. v. Wooten,* __ F.3d __ (6th Cir. Aug. 20, 2012) No. 11-5348.

**2nd Circuit finds sexual misconduct with children was not relevant conduct to abusing them.** Defendant pled guilty to four child pornography counts. He also pled guilty to a fifth count of inducing minors to engage in sexual activity, in violation of 18 U.S.C. § 2442(b). He argued that the district court erred by considering his efforts to molest the young children, which was related to the child porn counts, as relevant conduct with respect to the fifth count, which involved the abuse of several teen boys. The Second Circuit agreed, ruling that defendant's conduct with the young children did not "occur[] during the commission of" or "in preparation for" the crimes against the teenagers. Defendant bragged about his exploits with the teens in an effort to entice the father of one child to give him access to her. However, even if the acts with the teenagers were in preparation for crimes committed against this man's daughter, that did not make the converse true, because the offense against the girl played no role in the offense against the teens. The acts against the young children were not "relevant conduct" to the acts against the teenagers in the sense contemplated by the guidelines. *U.S. v. Wernick,* __ F.3d __ (2d Cir. Aug. 8, 2012) No. 10-2974-cr.

**9th Circuit says 12-year-old victim of sexual abuse was not vulnerable victim.** Defendant lured a 12-year-old girl from Wyoming to Montana to obtain drugs and have sex with him. Before the girl left Wyoming, she told defendant her age, and defendant told the girl that he was a registered sex offender. In Montana, defendant had sex, including sadomasochistic sex, with the girl over four days. Defendant pleaded guilty to coercion and enticement of a minor, in violation of 18 U.S.C. § 2422 (b). At sentencing, the district court found that the girl was a vulnerable victim within the meaning of § 3A1.1 and increased defendant's offense level by two because the girl came from a broken home, was sexually active, and was interested in marijuana. The Ninth Circuit reversed, holding that the girl was not a vulnerable victim because she was not "unusually vulnerable due to age" or "physical or mental condition." *U.S. v. Nielsen,* __ F. 3d __ (9th Cir. Sept. 12, 2012) No. 11-30189.

**9th Circuit says juvenile adjudication is not a conviction for sex offender increase.** Under § 4B1.5(a), a defendant is subject to an enhancement if he commits a sex crime "subsequent to sustaining at least one sex offense conviction." Defendant, who pleaded guilty to coercion and enticement of a minor in violation of 18 U.S.C. § 2422 (b), had a prior juvenile adjudication for sexual assault. The Ninth Circuit held that a juvenile adjudication is not a "conviction" within the meaning of § 4B1.5(a). *U.S. v. Nielsen,* __ F.3d __ (9th Cir. Sept. 12, 2012) No. 11-30189.

**9th Circuit holds prior guilty plea to conjunctive charge does not necessarily admit every possible version of the crime.** In 2005, petitioner pleaded guilty to "Sale/Transportation/Offer to Sell" cocaine base in violation of Cal. H. & S. Code § 11352(a). That statute criminalizes the sale of cocaine, which is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). However, it also covers mere offering to sell a controlled substance, which is not an aggravated felony. *Levya-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999). Using the "modified categorical approach," the immigration judge reviewed the charging document and guilty plea, and found that the conviction was for an aggravated felony. The en banc Ninth Circuit, Graber, J., held that, under the modified categorical approach, a guilty plea to a conjunctive count does not necessarily admit every possible version of the crime. This affirmed the opinion in *Malta-Espinoza v. Gonzales,* 478 F.3d 1080, 1082 n.3 (9th Cir. 2007), and overruled the opinions in *U.S. v. Snellenberger,* 548 F.3d 699, 701 (9th Cir. 2008) (en banc): *U.S. v. Aguila-Montes de Oca,* 655 F.3d 915, 920 (9th Cir. 2011) (en banc); *U.S. v. Williams,* 47 F.3d 993, 995 (9th Cir. 1995); and *U.S. v. Mathews,* 833 F.2d 161, 163 (9th Cir. 1987). Thus, a defendant who pleads guilty to "A and B" should not be held to have necessarily admitted either allegation, unless other documents, such as the defendant's statements at the plea colloquy, establish a narrower basis for the conviction. The court noted that this was consistent with the opinions in the Third and Fourth Circuits, but contrary to the Eighth and Tenth Circuits. *Young v. Holder,* __ F.3d __ (9th Cir. Sept. 17, 2012) (en banc) No. 07-70949.

**9th Circuit says alien seeking cancellation of removal has burden to show that prior conviction was <u>not</u> for an aggravated felony.** Judge Graber, writing for the en banc Ninth Circuit, held that under the REAL ID Act, 8 U.S.C. § 1229a(c)(4), 8 C.F.R. § 1240.8(d), the noncitizen bears the burden of demonstrating eligibility for cancellation of removal. Accordingly, the petitioner must show that he or she "has not been convicted of any aggravated felony." 8 U.S.C. § 1229(a)(3). In this case, it was unclear whether the petitioner's prior California conviction for "Sale/Transportation/Offer to Sell" cocaine base in violation of Cal. H. & S. Code § 11352(a) was an aggravated felony. The majority overruled *Sandoval-Lua v. Gonzales,* 499 F.3d

1121, 1130-31 (9th Cir. 2007), and *Rosas-Castandeda v. Holder*, 655 F.3d 875, 883-884 (9th Cir. 2011), and held that *petitioner* failed to meet his burden to show that the prior conviction was not for an aggravated felony, so he was not eligible for cancellation of removal. Judge Ikuta dissented, joined by Judges Kleinfeld, Clifton, and Bea. *Young v. Holder*, __ F.3d __ (9th Cir. Sept. 17, 2012) (en banc) No. 07-70949.

**1st Circuit approves home monitoring and probation for fraud defendants.** Defendants were employees of a subcontractor that provided concrete for Boston's tunnel project. They were convicted of fraud in connection with their employer's scheme to provide concrete that failed to meet project specifications and to conceal that failure with false documentation. Their guideline range was 87-108 months, but the district court sentenced them to six months of home monitoring and three years probation. The First Circuit affirmed. The district court found the 18-level increase for loss did not fairly reflect defendants' culpability, and without it, the guideline range would have been 8-14 months. The court also found insufficient evidence that defendants' conduct made the tunnel unsafe, because the concrete met or exceeded test standards. In addition, defendants were not like other white-collar criminals because they were not motivated by personal enrichment, and did not intend to harm the project or taxpaying public. *U.S. v. Prosperi*, __ F.3d __ (1st Cir. July 13, 2012) No. 10-1739.

**9th Circuit finds false statements did not obstruct justice with regard to later extortion.** Defendant was convicted of sending extortionate letters to victims of a financial fraud demanding money in return for information about the fraud. Before sending those letters, defendant used a pipe bomb to destroy his own mailbox in an effort to show the investors that others were trying to prevent him from sharing the information. Defendant lied to Postal Service officers investigating the pipe bombing. At sentencing on his conviction for sending extortionate letters in violation of 18 U.S.C. § 875(b), the district court found that his lies to the Postal inspectors constituted obstruction of justice and increased his sentence under § 3C1.1. The Ninth Circuit held that the pipe bombing was not relevant conduct to the extortionate letters and that the district court erred in finding that defendant's lies about the pipe bombing constituted obstruction of justice on the violation of § 875(b). *U.S. v. Williams*, __ F.3d __ (9th Cir. Sept. 7, 2012) No. 11-30188.

**7th Circuit reverses for failure to consider application note in sentencing for identity theft.** Defendant pled guilty to three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, and six other fraud counts. Every conviction under 1028A carries a two-year sentence that must run consecutively to every sentence for a different crime, although sentences for multiple aggravated identity theft convictions may run concurrently with each other. Note 2(B) to § 5G1.2 specifies three factors that judges should consider in determining whether § 1028A counts should run concurrently or consecutively, including the nature and seriousness of the underlying offenses, whether the underlying offenses are groupable, and whether the purposes of sentencing are better served by concurrent or consecutive sentences. The Seventh Circuit held that the district court plainly erred by failing to consider 2(B). The judge spent a good deal of timing comparing defendant's situation to that of another defendant convicted of similar charges. While that was "an admirable attempt to reduce unwarranted disparity in sentencing, "judges are not supposed to start with § 3553(a). They must start with a correct understanding of the Sentencing Commission's advice. *U.S. v. Dooley*, __ F.3d __ (7th Cir. July 27, 2012) No. 11-2256.

**5th Circuit reverses increase for number of child porn images, because other images were not relevant conduct.** Defendant sent nine images of child pornography to an undercover officer posing as a teenage girl. Officers found 277 other images of child pornography on defendant's computer. The Fifth Circuit rejected a three-level enhancement under § 2G2.2(b)(7)(B) for an offense involving at least 150 but fewer than 300 images. There was no evidence that defendant possessed the additional 277 images in preparation for the offense, during the offense, or to avoid detection. The offense occurred in May 2010, and defendant's computer was not searched until July 2010. The government offered no evidence about whether these images were obtained in the interim, so it failed to show by a preponderance that the additional images were relevant conduct under § 1B1.3(a)(1)(A). The panel also rejected the theory that defendant's possession of the images was part of a common scheme or plan under § 1B1.3(a)(2). There was no evidence that defendant had an ongoing scheme to entice other girls to engage in sexual activity. *U.S. v. Teuschler*, __ F.3d __ (5th Cir. July 24, 2012) No. 11-50362.

**ADJUSTMENTS**

**11th Circuit reverses reckless endangerment increase for lack of specific findings.** Defendant was a passenger in a getaway car whose driver led a dangerous police chase from a robbery. Defendant challenged a § 3C1.2 enhancement for recklessly creating a substantial risk of death or serious bodily injury during flight. The Eleventh Circuit reversed, ruling that two of the facts relied on by the government were insufficient to prove that defendant actively encouraged the driver's dangerous conduct, and the court did not make the requisite finding on the third fact. First, the extent of premeditation behind the robbery did not prove that defendant must have been involved in planning how they would escape if the police arrived during the robbery. Planning a crime does not "relate at all" to a defendant's responsibility for the driver's recklessness during a getaway.

Second, the fact that defendant fled on foot after the driver crashed the getaway car did not show that defendant played any active supporting role in the recklessness of the car-flight. Finally, the district court did not make a finding on whether defendant was aware that police were on the scene when he decided to get in the getaway car. *U.S. v. Johnson*, __ F.3d __ (11th Cir. Sept. 10, 2012) No. 11-13621.

**5th Circuit reverses one-level multi-count sentencing increase.** Defendant argued for the first time on appeal, and the government conceded, that the district court erroneously applied the one-level multi-count adjustment in § 3D1.4. The Fifth Circuit found that the error warranted reversal under the plain error. In *U.S. v. Mudekiunye*, 646 F.3d 281 (5th Cir. 2011), the court held that where the correct and incorrect guidelines ranges overlap and the court imposes a sentence significantly above the top of the correct guidelines range, the sentence affects the defendant's substantial rights "where it is not apparent from the record that [the defendant] would have received an above-Guidelines sentence." Here, the error increased defendant's guideline range from 87-108 months to 97-121 months, and the court sentenced him to 120 moths, 12 months higher than the top of the correct guidelines range. There was no evidence that the district court would have imposed a 120-month sentence if it had used the correct 87-108-month guideline range. *U.S. v. Herandez*, __ F.3d __ (5th Cir. Aug. 8, 2012) No. 11-51136.

**8th Circuit reverses obstruction increase where plot to kill informant after guilty plea did not affect "instant offense."** Defendant pled guilty to drug and firearms charges. At sentencing, the district court applied a two-level increase for obstruction of justice based on its finding that after pleading guilty, defendant conspired to murder Lopez, a confidential informant in the case. The district court found that defendant's motive was to retaliate against Lopez for his cooperation with the government. The Eighth Circuit reversed the obstruction enhancement because, after pleading guilty, defendant could not have intended to obstruct justice "with respect to the instant offense" unless he thought that Lopez was going to testify against him at sentencing. However, defendant had no reason to think that Lopez would be a witness at sentencing. Defendant could be prosecuted for plotting to kill Lopez, but the sentencing enhancement did not apply because there was no showing that the plot was intended to obstruct justice for the current offense. *U.S. Galaviz*, __ F.3d __ (8th Cir. Aug. 6, 2012) No. 11-2396.

**CRIMINAL HISTORY**

**9th Circuit strikes supervised release condition barring contact with own children.** Defendant pleaded guilty to attempted sexual abuse, in violation of 18 U.S.C. §§ 1153(a) and 2242(2)(B). At sentencing, the district court, without making any supporting findings, imposed a condition of supervised release that barred defendant, without prior approval from Probation, from residing in any home of any person under 18, or date or socialize with any person who has children under the age of 18. The Ninth Circuit held that barring defendant from residing with or being in the company of his own children or socializing with his fiancée, who had minor children, violated defendant's fundamental right to familial association. *U.S. V. Wolf Child*, __ F.3d __ (9th Cir. Oct. 23, 2012).

**6th Circuit says prior convictions are not element of the offense under ACCA.** Defendant was convicted of being a felon in possession of a firearm, and was sentenced under 18 U.S.C. § 942(e) and guideline § 4B1.3 (a) as an armed career criminal. He argued that his previous convictions should be treated as an element of the current felon in possession offense, rather than a sentencing enhancement, and thus had to be proven beyond a reasonable doubt. The Sixth Circuit found this claim foreclosed by precedent. While judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury, a judge is permitted to find, based on the preponderance of the evidence, the fact of a prior conviction. *U.S. v. Anderson*, __ F.3d __ (6th Cir. Sept. 13, 2012) No. 11-2828.

**10th Circuit says prior Kansas convictions were not violent felonies where firearms rights had been restored.** Defendant challenged his classification as an armed career criminal under the ACCA, 18 U.S.C. § 924(e), arguing that two prior state convictions did not qualify as violent felonies because Kansas law restored to him the civil rights that he lost as a result of the convictions. A prior conviction is not a violent felony under the ACCA if a defendant has civil rights restored to him upon or after his release from imprisonment. 18 U.S.C. § 921(a)(20). However, the ACCA's civil rights restoration exception does not apply if the defendant does not have his right to firearms restored. 18 U.S.C. § 921(a)(20). The Tenth Circuit ruled that the district court erred in ruling that the firearms ban from defendant's Kansas convictions would not begin to run until 2004, when he was released from federal custody. Rather, the ban began to operate in 1998, upon defendant's release from state prison for both of his state felonies. Under Kansas law, defendant was subject to a 10-year firearms ban, not a lifetime firearms ban. *U.S. v. Hoyle*, __ F.3d __ (10th Cir. Aug. 28, 2012) No. 11-3255.

**7th Circuit rules armed violence was not violent felony where underlying offense was drug possession.** Defendant was sentenced as an armed career criminal based in part on a 1993 conviction for "armed violence" under Illinois law, defined as "committing any felony defined by Illinois law while armed, Ill. Rev. Stat. 1978, ch. 38, § 33A-2. In defendant's case the felony was possession of illegal drugs. The Seventh Circuit held that the armed violence conviction

was not a violent felony. If defendant's offense had involved the *sale* of drugs, it would have been a violent felony. However, the underlying offense involved mere drug possession. Mere possession of a gun by a drug user cannot be described as purposeful, violent, or aggressive conduct within *Begay's* meaning. *Brown v. Rios*, __ F.3d __ (7th Cir. Aug. 20, 2012) No. 11-1695.

**7th Circuit says government has burden to show prior offenses were committed on different occasions.** Defendant argued that his 1985 convictions for burglary and robbery were not "committed on occasions different from one another" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). As a preliminary matter, the Seventh Circuit held that courts may only consider *Shepard*-approved sources in determining whether prior offenses occurred on separate occasions. The "factually sparse" record here shed insufficient light on whether the 1985 offenses occurred on the same occasion. The district court had ruled that it was defendant's burden to prove that the offenses occurred on the same occasion, and because he did not do that, he could be sentence under the ACCA. The Seventh Circuit ruled that this burden-shifting scheme, as set forth in *U.S. v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (en banc), was no longer tenable because it essentially required an ACCA enhancement even if the available *Shepard*-approved documents were inconclusive. The more appropriate burden allocation requires the government to establish, using *Shepard*-approved documents before a district court are equivocal as to whether the offenses occurred on the same occasion, the ACCA does not apply. *U.S. v. Kirkland*, __ F.3d __ (7th Cir. July 27, 2012) No. 11-1990.

**DETERMINING THE SENTENCE**

**8th Circuit reverses order of restitution that did not give defendant opportunity to object.** Defendant was convicted of various fraud charges. His PSR noted that there were about 100 separate victims, and listed eight victims making claims for restitution of over $6 million. The court instructed that restitution would be "deferred 90 days." See 18 U.S.C. § 3664(d)(5). Six weeks later, without prior notice and without scheduling a hearing or inviting written comments or objections by the parties, the court entered an Order of Restitution making defendant and a co-defendant jointly and severally liable for restitution of $7,430,858.30. The Eighth Circuit reversed. First, review of the restitution order was not limited to plain error. The PSR did not recommend the award of any restitution; thus, defendant did not need to "object" to its recitation to preserve restitution issues. Second, although the district court properly deferred restitution issues for 90 days pursuant to § 3664(d)(5), it committed reversible error by entering a final restitution order without giving defendant an opportunity to object to restitution claims being awarded. *U.S. v. Chaika*, __ F.3d __ (8th Cir. Oct. 1, 2012).

**SENTENCING HEARING**

**9th Circuit says competency hearing should have been ordered before sentencing.** Ten years before participating in a conspiracy to distribute controlled substances, defendant, a practicing psychiatrist, experienced the onset of frontotemporal dementia, a degenerative brain disorder that may impair judgment. At sentencing, the district court received three expert reports stating that defendant had frontotemporal dementia. Defendant did not allocute at sentencing because, his counsel stated Defendant's dementia had an impact on his behavior. The district court imposed a 10-year sentence. The Ninth Circuit held that the district court committed plain error by failing, *sua sponte*, to hold a competency hearing before sentencing defendant. *U.S. v. Dreyer*, __ F.3d __ (9th Cir. Aug. 21, 2012) No. 10-50631.

**PLEA AGREEMENTS**

**8th Circuit reverses for allowing evidence of drug quantity that exceeded stipulated amount.** Defendant pled guilty to methamphetamine charges pursuant to a plea agreement that stipulated that he was accountable for between 20 and 35 grams of methamphetamine. The PSR, however, indicated that defendant was responsible for a much larger quantity. The district court found defendant responsible for the PSR's quantity, resulting in an increased offense level and sentencing range. The Eighth Circuit held that the court plainly erred in allowing the government to introduce evidence to raise the stipulated drug quantity. The government's presentation of evidence to support the PSR's drug quantity breached the plea agreement. Defendant's substantial rights were affected because his top/bottom guidelines range was increased by 30/37 months, his 130-month sentence was outside the plea agreement's guideline range, and defendant likely received a longer prison sentence because of the error. *U.S. v. Lara*, 690 F.3d 1079 (8th Cir. Aug. 31, 2012) No. 11-3850.

*From the Federal Sentencing Guide*