Federal Sentencing GUIDE

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Federal Sentencing Guidelines Cases From All Circuits

Vol. 26, No.12 June 15, 2015

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Guidelines Sentencing, Generally

D.C. Circuit remands for failure to consider sentencing manipulation argument. (135) Defendant traveled to another state to have sex with a fictitious 12-year old girl. At sentencing, the district court applied the cross-reference in §2G1.3(c)(1) based on defendant's possession of a camera to take pictures of the minor. Defendant requested a variance based on sentencing manipulation, claiming the undercover officer purposely introduced the camera into their conversations to increase defendant's sentence. The district court did not address defendant's sentencing manipulation argument. The D.C. Circuit held that the district court committed procedural error by failing to address defendant's non-frivolous sentencing manipulation argument. When a district court confronts a non-frivolous argument for a sentence below the relevant guideline range, it must consider it. The government's claim that sentencing manipulation can never be a basis for a reduced sentence was incompatible with the Supreme Court's *Booker* decision. *U.S. v. Bigley,* __ F.3d __ (D.C. Cir. May 15, 2015) No. 12-3022.

Application Principles, Generally (Chapter 1)

11th Circuit affirms relevant conduct findings based on "clearly identifiable evidence." (175) (230) Defendant, a former governor of Alabama, was convicted of bribery and related charges. The district court used defendant's bribery conviction as the offense of conviction, but considered conduct beyond the bribery in calculating defendant's sentence, i.e., a series of sham transactions carried out after the investigation into defendant had commenced. Defendant challenged for the first time on appeal the district court's failure to explicitly explain why these transactions qualified as relevant conduct. The Eleventh Circuit found no error. A district court's failure to make explicit relevant conduct findings does not preclude appellate review, and does not warrant reversal, "where the court's decisions are based on clearly identifiable evidence." Here, in rejecting defendant's objection to the PSR's value-of-the-bribe

calculation, the district court expressly listed the money involved in the sham transactions, making it clear that the district court treated the sham transactions as relevant conduct to the bribery offense. *U.S. v. Siegelman*, __ F.3d __ (11th Cir. May 20, 2015) No. 12-14373.

11th Circuit treats as relevant conduct, transactions with a common accomplice, victim, purpose, and method. (175)(230) Defendant, a former governor of Alabama, was convicted of bribery and related charges. In calculating defendant's sentence, the district court considered as relevant conduct a series of sham transactions carried out after the investigation into defendant had commenced. The Eleventh Circuit found no error. The sham transactions were substantially connected to the bribery by a common accomplice, Bailey, defendant's close associate. The sham transactions were also substantially connected to the bribery by a common victim, common purpose, and similar modus operandi. Both offenses deprived the citizens of Alabama of the honest services of their Governor and therefore harmed a common victim. Moreover, both offenses were committed for the common purpose of obtaining power and money for defendant and his associates. *U.S. v. Siegelman*, __ F.3d __ (11th Cir. May 20, 2015) No. 12-14373.

9th Circuit assigns case to new judge after finding structural error. (197) The district court heard allocution from a victim of defendant's fraud scheme outside the presence of counsel. The Ninth Circuit held that this was structural error, and remanded the case. Because the district court committed structural error and because the district court relied on the victim's statements in sentencing defendant, the Ninth Circuit ordered the case to be reassigned to a different judge on remand. *U.S. v. Yamashiro*, __ F.3d __ (9th Cir. June 12, 2015) No. 12-50608.

Offense Conduct, Generally (Chapter 2)

6th Circuit affirms increase in sex case for using force "as described in 18 U.S.C. §2241." (215)(310) Defendant was convicted of sexually abusing his own children in a foreign place. He objected to the district court's application of §2A3.1(b)(1), which instructs courts to increase the offense level by four if "the offense involved conduct described in 18 U.S.C. §2241(a) or (b)." Section 2241 includes the conduct of "using force" against another person, but defendant pointed out that §2241 is geographically limited to the "special maritime and territorial jurisdiction of the United States." The Sixth Circuit upheld the enhancement because defendant "did, in fact, use force against the victim," and the "conduct" described in §2241 is narrower than the "offense" described in §2241. Application Note 2(A) confirmed this plain reading by listing the conduct, including but not limited to using force, that qualifies for the enhancement. *U.S. v. Al-Maliki*, __ F.3d __ (6th Cir. May 27, 2015) No. 14-3386.

6th Circuit says sentence at bottom of guidelines for sexually abusing own children was not too high. (215)(310)(740) Defendant was convicted of sexually abusing his own children in a foreign place. The court sentenced him to concurrent terms of 292 months, which fell at the bottom of his guideline range. Defendant argued that the sentence was substantively unreasonable sentence because the court did not credit the positive conclusions in the psychology report. The Sixth Circuit disagreed. The report contained only one conclusion, and it was negative: "[B]ased on the overall results of this evaluation," the report concluded that defendant's "risk for future sex-

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ual acting out is considered to be moderate to high." To reach that conclusion, the report considered a four-factor test in addition to his personality disorder and antisocial traits, history of instability, lack of insight and poor judgment, and unwillingness to accept responsibility for his action. The district court did not need to explain its decision to accept the report's overall conclusion in any more detail than it did. The bottom-of-the-guidelines sentence was substantively reasonable. *U.S. v. Al-Maliki,* __ F.3d __ (6th Cir. May 27, 2015) No. 14-3386.

2nd Circuit affirms below-guidelines securities fraud sentence as not too high. (218)(740) Defendant and his partner in an investment firm were convicted of multiple counts of securities fraud and related counts for misusing investor funds. The Second Circuit held that defendant's 180-month fraud sentence was procedurally and substantively reasonable. The court adopted the PSR's loss calculations, and, consistent with those calculations, did not hold defendant accountable for total investor losses. Moreover, the district court appropriately took into account the fact that, for years, defendant had run the firm with little apparent regard for the legality of his conduct and that he continued to lack contrition. The 180-month sentence, which was significantly lower than his guideline range of 210-262 months, was substantively reasonable given the large number of investors who were defrauded, the large amounts of money that they lost, and the lengthy time the sophisticated criminal activity was ongoing. *U.S. v. McGinn,* __ F.3d __ (2d Cir. May 22, 2015) No. 13-3164-cr(L).

3rd Circuit relies on testimony from co-conspirators about loss in Medicare fraud scheme. (219) Defendant was convicted of Medicare fraud based on a scheme to submit reimbursement claims for patients who did not qualify for hospice care. The district court found a loss of $16.2 million based on the testimony of co-conspirators Pugman and Ganetsky that 90-99.5% of continuous care claims that were fraudulent, and the percentage of patients who did not qualify even for non-continuous hospice care, 30-33%. Using the lower estimates, the court multiplied those percentages by the respective dollar amounts of claims submitted between 2003 and 2008, resulting in a total loss of $16.2 million. The Third Circuit found no clear error. Pugman and Ganetsky testified extensively at trial regarding their intimate involvement in the management of the hospice company, and, together with defendant, their direction of the company's fraudulent activities. It was difficult to imagine who would have been more competent to testify based on personal knowledge as to the loss involved in the case. *U.S. v. Kolodesh,* __ F.3d __ (3d Cir. May 28, 2015) No. 14-2904.

1st Circuit upholds firearm increase for runner in large drug trafficking conspiracy. (284) Defendant participated in a far-reaching drug trafficking conspiracy in Puerto Rico. Although there was no direct evidence at trial or in the PSR that defendant firearms were used in connection with the conspiracy, the First Circuit upheld a §2D1.1(b)(1) firearm enhancement. The trial testimony showed that defendant was a runner of crack, cocaine, and marijuana, and that she helped stash all four types of drugs sold by the organization. She had contact with several other co-conspirators, including Delgado, who had a reputation for shooting his gun. Thus, the use of firearms during and in furtherance of the conspiracy was not "clearly improbable" from defendant's perspective. The district court did not clearly err in applying the firearm enhancement. *U.S. v. Flores-Rivera,* __ F.3d __ (1st Cir. May 22, 2015) No. 10-1434.

1st Circuit reverses extreme downward variance in child porn case for inadequate explanation. (310)(742) Defendant pled guilty to transferring obscene material to a minor and possessing child pornography. His guideline range was 70-87 months, but the district court sentenced him to time served, which amounted to 13 days, and 15 years of supervised release. The First Circuit found that the district court failed to provide an adequate explanation for this "extraordinary variance," and vacated the sentence. When explaining its decision, the district court focused exclusively on defendant's potential for rehabilitation and low risk of recidivism. The court did not explain how it had weighed the other §3553(a) factors, or why this particular sentence was appropriate in light of these factors. Given the extent of the variance, the panel was unwilling to infer that the court adequately considered the other §3553(a) sentencing factors. The district court's consideration of the neglected factors was not self-evident from the record. *U.S. v. Crespo-Rios,* __ F.3d __ (1st Cir. May 22, 2015) No. 13-2216.

6th Circuit affirms "pattern of activity" enhancement in child porn case. (310) Defendant pled guilty to child pornography charges. The district court applied a five-level "pattern of activity" increase under §2G2.2(b)(5), citing three prior incidents: defendant's prior conviction for sexual abuse of a child, and letters submitted by his now-adult daughters detailing his prior sexual abuse of them as minors. In both letters, the daughters reported

sleeping in twin beds next to one another, and defendant coming into their rooms at night to sexually abuse them. The Sixth Circuit upheld the enhancement. The letter from defendant's mother was mere speculation, and did not provide any factual basis to vitiate the accounts given by defendant's daughters. The daughters' letters corroborated one another, were consistent with the reports of defendant's ex-wife, and were arguably also consistent with the letter submitted by defendant's mother. The district court did not clearly err in finding sufficient evidence of past sexual abuse or exploitation. *U.S. v. Pirosko,* __ F.3d __ (6th Cir. May 21, 2015) No. 14-3402.

6th Circuit includes child porn images found on USB device. (310) Authorities seized a laptop and a USB drive from defendant's hotel room. Both devices contained numerous images and video files depicting child pornography. Defendant pled guilty to child pornography charges. The district court applied a five-level enhancement under §2G2.2(b)(7)(D) because it found that the offense conduct involved 600 or more images. The Sixth Circuit affirmed, rejecting defendant's claim that the court erred in counting the images found on the USB device. Contrary to defendant's claim that the government presented no evidence to prove the USB device's deleted files had ever been accessed or viewed by him, the government's sentencing memorandum contained an exhibit documenting when various files on the USB device had been created, modified, and accessed. The district court did not clearly err in awarding a five-level enhancement for images stored on defendant's USB device. *U.S. v. Pirosko,* __ F.3d __ (6th Cir. May 21, 2015) No. 14-3402.

6th Circuit approves statutory maximum sentence for child porn offense. (310)(742) Defendant pled guilty to child pornography charges, and was sentenced to the statutory maximum of 240 months. This fell below his guideline range of 262-327 months. Sentences within a defendant's guidelines range are presumptively reasonable, a presumption that extends to sentences below the guideline range. Nonetheless, defendant argued on appeal that his sentence was substantively unreasonable. The Sixth Circuit ruled that defendant failed to overcome this presumption of reasonableness. The record indicated that the district court sufficiently discussed the various 18 U.S.C. §3553(a) factors, including the nature and circumstances of his conduct, defendant's history and characteristics, the need for the sentence, sentencing disparities, and the need for restitution. The court did not abuse its discretion in imposing the statutory maximum sentence. Defendant's remaining arguments, regarding the harshness of the guidelines with respect to child pornography offenders, were likewise unavailing. *U.S. v. Pirosko,* __ F.3d __ (6th Cir. May 21, 2015) No. 14-3402.

8th Circuit approves restitution of $3,000 to each child porn victim. (310)(610) Defendant pled guilty to one count of possession of child pornography after having been previously sentenced for possession of child pornography in 2001. In addition to imprisonment and supervised release, the district court ordered defendant to pay $9,000 in restitution. The Eighth Circuit affirmed. Under 18 U.S.C. §2259(a), a district court must order restitution for convictions that involve sexual exploitation of children and child pornography. *Paroline v. U.S.*, __ U.S. __, 134 S. Ct. 1710 (2014). The district court found that the government met its burden to prove an appropriate and reasonable amount of restitution based on the victim impact statements, the restitution ordered in prior cases, the number of potential defendants involved, and defendant's relative culpability. The district court cited the appropriate law, considered appropriate factors, and properly ordered restitution in the amount of $3,000 per victim. *U.S. v. Beckmann,* __ F.3d __ (8th Cir. May 15, 2015) No. 14-3086.

4th Circuit says whether prior offense was a felony depends on statutory maximum, not guideline range. (340) Defendant pled guilty to reentering the U.S. after deportation, and his sentence was increased by 12 levels under §2L1.2(b)(1)(A)(vii) based on his 1997 conviction for unlawfully transporting aliens, which the district court found was "an offense punishable by imprisonment for a term exceeding one year" under Note 2 to §2L1.2. On appeal, defendant argued that *U.S. v. Simmons,* 649 F.3d 237 (4th Cir. 2011) (en banc), precluded the enhancement because the guidelines range for his 1997 conviction under the then-mandatory guidelines was 0-6 months. The Fourth Circuit rejected the argument, noting that the judge who sentenced defendant in 1997 had discretion to sentence him to five years. As the Supreme Court made clear in *U.S. v. Rodriquez,* 553 U.S. 377 (2008), the "maximum term of imprisonment . . . prescribed by law" for an offense is the statutory maximum, not "the top sentence in a guideline range." *U.S. v. Bercian-Flores,* __ F.3d __ (4th Cir. May 14, 2015) No. 13-4504.

Adjustments, Generally (Chapter 3)

3rd Circuit relies on co-conspirators' testimony that defendant was organizer or leader of fraud scheme. (431) Defendant was convicted of Medicare fraud based on a scheme to submit reimbursement claims for patients who did not qualify for hospice care. The Third Circuit held that the district court did not err in applying a four-level enhancement under §3B1.1(a) based on defendant's role as an organizer or leader of the fraudulent activity. Although defendant challenged the credibility of his co-conspirators, who gave "damning testimony," the panel declined defendant's invitation to reweigh the evidence or reassess the witnesses' credibility. Defendant's co-conspirators repeatedly testified at trial that defendant was intimately involved in directing the fraudulent scheme. Although the jury could have chosen to reject the co-conspirator's testimony and believe defendant's version of events, it did not. The district court's finding that defendant was an organizer or leader of the fraudulent activity was in line with the jury's verdict, and defendant pointed to nothing in the record that would make the court's finding clearly erroneous. *U.S. v. Kolodesh,* __ F.3d __ (3d Cir. May 28, 2015) No. 14-2904.

3rd Circuit upholds obstruction increase based on meeting with government witness prior to testimony. (461) Defendant was convicted of Medicare fraud. The district court applied an obstruction of justice enhancement based on the testimony of Drobot, a government witness who had contracted with defendant's company. Drobot testified that defendant came to his office shortly before Drobot was scheduled to testify. During a 15-minute meeting over coffee, the only thing they discussed was Drobot's upcoming testimony. Defendant mentioned that Drobot would probably be called as a witness the following week, and defendant said, "don't bury me." Drobot responded that he would not perjure himself but would "tell the truth and be done with this." Drobot acknowledged on cross-examination that defendant did not threaten him or ask him to lie or to change his testimony. The Third Circuit upheld the obstruction of justice enhancement. Defendant was simply rearguing the weight of the evidence, without pointing to anything that showed the district court clearly erred in finding he had attempted to obstruct justice. *U.S. v. Kolodesh,* __ F.3d __ (3d Cir. May 28, 2015) No. 14-2904.

Criminal History, Generally (Chapter 4)

5th Circuit reverses for failure to recognize discretion to vary from career offender guideline. (520)(740) Defendant, who qualified as a career offender, argued that a downward variance was appropriate. The district court stated that it was "troubled" by the significant increase the career offender enhancement caused. Nevertheless, it imposed a sentence at the bottom of the guideline range, refusing to vary downward because there was no "Fifth Circuit guidance" related to variances for career offenders. The district court said that if it had "Fifth Circuit authority" to vary, defendant's sentence likely "would have been different." The Fifth Circuit held that the district court's failure to recognize its discretion to vary from the guidelines was procedural error. After considering all of the §3553 factors, it is undisputable that a district court has discretion to vary from the advisory guidelines sentence. A district court's sentencing discretion is no more burdened when a defendant is characterized as a career offender under §4B1.1 than it would be in other sentencing decisions. The error was not harmless because it likely affected defendant's sentence. *U.S. v. Clay,* __ F.3d __ (5th Cir. May 22, 2015) No. 14-60283.

Determining the Sentence (Chapter 5)

2nd Circuit upholds restitution despite acquittal on substantive counts where defendant was convicted of conspiracy. (610) Defendant and his partner in an investment firm were convicted of multiple counts of securities fraud and related counts based on their misuse of investor funds. In one instance, the firm raised $3.2 million that investors were told would be invested in a company called Firstline Security. During the course of raising these funds, defendants learned that Firstline was threatened with and then had filed for bankruptcy, but failed to disclose this information to existing and new investors. Defendant argued for the first time on appeal that the district court improperly included in his restitution order $600,000 attributable to sales of Firstline following its bankruptcy since he was acquitted of counts relating to these sales. The Second Circuit upheld the restitution order, noting that defendant was also convicted of conspiracy, which encompassed fraud related to the post-bankruptcy Firstline sales, and of mail fraud, which

pertained to a particular Firstline post-bankruptcy memorandum. Defendant's acquittal on the substantive mail fraud charges was not inconsistent with a conclusion that he entered into a conspiracy involving these sales. *U.S. v. McGinn,* __ F.3d __ (2d Cir. May 22, 2015) No. 13-3164-cr(L).

2nd Circuit says restitution can only be offset by receiver's actual distribution of funds to victims. (610) Defendant and his partner in an investment firm were convicted of multiple counts of securities fraud and related counts. At sentencing, the district court found defendants jointly and severally liable for $5,748,722 in restitution to their 841 victims. The court further stated that any restitution "collected thus far by the receiver ... may be deducted from the total restitution amount and may be distributed to the victims by the receiver ... as such assets are available for distribution." The government moved to clarify the restitution order, arguing that it could be understood to provide that the restitution could be offset by the amount of money collected by the court-appointed receiver in the separate SEC action, rather than the amount that the receiver actually distributed to these victims. This reading would violate the MVRA. The Second Circuit remanded to the district court for the limited purpose of correcting the judgments to clarify that only the receiver's actual distribution of funds to the victims could offset the defendants' restitution obligations. *U.S. v. McGinn,* __ F.3d __ (2d Cir. May 22, 2015) No. 13-3164-cr(L).

3rd Circuit says *Paroline* did not affect joint and several liabilities in fraud case. (610) Defendant was convicted of Medicare fraud based on a scheme to submit reimbursement claims for patients who did not qualify for hospice care. He argued that the district court erred by holding him jointly and severally liable for the full amount of loss rather than for the portion he caused. The Third Circuit found no error, noting that the language of the statute authorizing restitution, 18 U.S.C. §3664(h), explicitly provides for joint and several liability in the full amount. The Supreme Court's recent decision in *Paroline v. U.S.,* __ U.S. __, 134 S. Ct. 1710 (2014) did not negate this. *Paroline* interpreted 18 U.S.C. §2259, a mandatory restitution statute specific to sexual exploitation and abuse of children. The present case, by contrast, involved money obtained by fraud. *Paroline* did not alter the long-standing availability of joint-and-several liability in circumstances such as this. *U.S. v. Kolodesh,* __ F.3d __ (3d Cir. May 28, 2015) No. 14-2904.

Departures (§5K) and *Booker* Variances

1st Circuit says court adequately explained upward variance in firearms case. (718)(741)(775) Defendant argued that the court did not adequately explain his 120-month sentence. The First Circuit disagreed, finding that the court based defendant's sentence "on a panoply of facts to which it alluded in open court immediately before imposing the sentence." The court emphasized that the offense was quite serious: the defendant carried a firearm equipped with an extended magazine, pointed it at a police officer, held for sale sizeable quantities of various types of drugs, fled when confronted, and tried to hide his identity. The sentencing court adequately stated its reasons for the upward variance. The sentence was substantively reasonable. The court properly consider the four drug-trafficking counts that were dismissed as part of his plea negotiation, since the conduct underlying the dismissed counts was relevant to the offense of conviction. A sentencing court may take into account relevant conduct underlying counts dismissed as part of a plea negotiation as long as that conduct was not used in calculating the defendant's guideline range. *U.S. v. Fernandez-Garay,* __ F.3d __ (1st Cir. May 20, 2015) No. 14-1367.

1st Circuit affirms court's statement that it considered all the §3553(a) factors. (740)(742) Defendant argued that the district court did not adequately consider all of the statutory sentencing factors under 18 U.S.C. §3553(a). The First Circuit disagreed, noting that it has "held with a regularity bordering on the monotonous that even though 'a sentencing court must consider all relevant section 3553(a) factors, it need not do so mechanically.'" Here, the sentencing court stated that it had considered the §3553(a) factors, and this was "entitled to some weight." Moreover, court referred to the defendant's personal history and characteristics, 18 U.S.C. §3553(a)(1), noting that he had two daughters and had worked to obtain a high-school equivalency diploma while in prison. The court also discussed the nature and seriousness of the offense, §§3553(a)(1), (a)(2)(A), commenting specifically on the large quantity of drugs and ammunition in defendant's custody, together with his possession of a high-firepower weapon. This sufficiently showed that the court considered the §3553(a) factors. *U.S. v. Fernandez-Garay,* __ F.3d __ (1st Cir. May 20, 2015) No. 14-1367.

8th Circuit says failure to robotically recite every argument raised by defendant was not error. (740) (742)(750) Defendant was convicted of illegal reentry into the U.S., and was sentenced to 70 months, which fell at the bottom of his 70-87 month guideline range. On appeal, he contended that the district court improperly failed to address the sentencing factors in 18 U.S.C. §3553(a). He also asserted that the court failed to address "the numerous positive aspects of [defendant's] life," the difficulty of "start[ing] his life anew in [Mexico]," and his lack of access to the "Fast-Track" program. The Eighth Circuit found no error. The court expressly advised him that it considered all of the §3553(a) factors, including the "nature and circumstances of this offense, the history and characteristics of this defendant, the need for the sentence ... to reflect the seriousness of the offense, to promote respect for the law, to afford adequate deterrence of criminal conduct, and to protect the public from further crimes of this defendant." The court's choice not to robotically recite every factor in §3553(a) was not reversible error. *U.S. v. Ruiz-Salazar*, __ F.3d __ (8th Cir. May 18, 2015) No. 14-2666.

7th Circuit finds court adequately considered defendant's mitigating arguments. (742) Defendant argued that the district court erred by failing to give meaningful consideration to his request for a sentence of time served with community-based drug treatment. In light of the court's explicit treatment of the points defendant raised, the Seventh Circuit found no procedural error. It was true that the court could have said more and offered a personalized evaluation of defendant's addiction, or reviewed on the record the evidence defendant provided which provided "strong support for the position that the national strategy of incarcerating drug addicts has been ineffective." The court's failure to address this well-supported argument was "troubling." Nonetheless, the judge told defendant that it had considered the "significant focus" of the hearing to be defendant's drug use as well as the supplemental briefing, and that this information had affected the final sentence. While more would have been helpful, the court said enough on the record to conclude that it had considered defendant's argument and that defendant's submission had contributed to the below-guidelines sentence. *U.S. v. Boatman*, __ F.3d __ (7th Cir. May 15, 2015) No. 14-2081.

Sentencing Hearing (§6A)

9th Circuit reverses where defense counsel was absent from victim allocution. (750) On the date set for defendant's sentencing on fraud charges, the district court granted defendant's request for a substitution of counsel and excused his prior counsel. Before new counsel could arrive, the court heard allocution from one of defendant's victims. The victim requested that the court impose the maximum penalty. Defendant's new counsel was present during the remaining victims' allocutions. The Ninth Circuit held that allowing a victim to allocute in the absence of counsel violated the Sixth Amendment right for counsel to be present at all critical stages of a criminal prosecution. The court also held that the error constituted plain error because it was structural error not subject to harmless error analysis that did not require a showing of prejudice. *U.S. v. Yamashiro*, __ F.3d __ (9th Cir. June 12, 2015) No. 12-50608.

1st Circuit says error in considering drug notebook was harmless. (765)(770) Defendant argued that the sentencing court erroneously considered two facts that lacked an adequate basis in the record—that defendant had pointed his gun at an officer, and that a notebook had a record of drug sales. The First Circuit found that the PSR contained a description of defendant pointing his gun at a police officer, and defendant did not file a timely objection, so there was no error as to the gun. With regard to the notebook, however, the sentencing court erred, because the notebook was not part of the record. Nonetheless, the error was harmless. The notebook was "little more than an afterthought in the court's explication of the sentence. And given the varieties and quantities of drugs contained in the defendant's backpack, any mention of drug sales in a notebook was obviously cumulative." Because the district court would have imposed the same sentence had it ignored the notebook, the error was harmless. *U.S. v. Fernandez-Garay*, __ F.3d __ (1st Cir. May 20, 2015) No. 14-1367.

Violations of Probation and Supervised Release (Chapter 7)

4th Circuit upholds consideration of prior offenses in grading supervised release violations. (800) During a supervised release revocation hearing, defendant admitted that he possessed marijuana on several occasions. The district court calculated an advisory sentencing range of 21-27 months, concluding that, based on defendant's prior drug convictions, his marijuana offenses were Grade B violations. Defendant argued that the marijuana offenses were Grade C violations because the court was prohibited by the policy statements from considering his

prior convictions. The Fourth Circuit found no error. The government was not required to file a notice under 21 U.S.C. §851(a)(1) of its intent to rely on defendant's prior convictions at his revocation hearing. By its plain terms, §851(a)(1) applies only to the sentencing of defendants who have been convicted of a crime following the "entry of a plea of guilty" or a "trial." The statute does refer to supervised release revocation proceedings. *U.S. v. Wynn,* __ F.3d __ (4th Cir. May 20, 2015) No. 14-4599.

Appeal of Sentence (18 U.S.C. §3742)

1st Circuit treats all claims of error as preserved where court cut defense counsel's objections short. (855) After the district court handed down the sentence, defense counsel began to object to the court's reliance on the fact that the defendant had pointed his weapon at an officer. The court cut off counsel's argument and then denied his request to "complete the record." Appellate courts generally review unpreserved claims for plain error. However, a party's failure to spell out a claim in the district court may be excused if he had no reasonable opportunity to do so. The First Circuit found that this exception was applicable here. At the conclusion of the disposition hearing, defense counsel attempted to object to the court's reliance on a particular fact. The court cut defense counsel's argument short, precluded further argument, and did not allow the lawyer to complete the record. As a result of the district court's action, the panel could not tell whether defense counsel would have sought to interpose further objections. The court's abrupt termination of the sentencing proceeding foreclosed defense counsel from doing so. Therefore the panel treated all the defendant's claims of error as preserved. *U.S. v. Fernandez-Garay,* __ F.3d __ (1st Cir. May 20, 2015) No. 14-1367.

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