**MEMORANDUM**

**TO:** FPD Staff Attorneys & CJA Panel Attorneys

**FROM:** Tony Axam, Jr. and Sharon R. Rice-Hicks

**RE:** April-May 2012 Case Summaries

## SUPREME COURT

*Wood v. Milyard*, 132 S. Ct. 1826 (Apr. 24, 2012). A federal court reviewing a habeas corpus petition has authority to raise a statute of limitations defense that the state forfeited, but it is an abuse of discretion for a court to raise the defense when state prosecutors affirmatively waived it. **9 to 0 decision.**

## NOTEWORTHY CERTIORARI GRANTS AND REVIEW DENIALS

*Moncrieffe v. Holder*, No. 11-702 (Apr. 2, 2012). In a case from the Fifth Circuit, the Supreme Court granted certiorari to decide whether a conviction under a provision of state law that encompasses, but is not limited to, the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony under immigration laws, even if the record of conviction does not establish that the person was convicted of conduct that would constitute a federal felony. **Cert. granted.**

*Vasquez v. United States*, No. 11-199 (Apr. 2, 2012). The Supreme Court dismissed a case that presented issues relating to the standard for harmless-error review in federal criminal cases. After hearing oral argument, the Court decided the writ of certiorari was improvidently granted.

The defendant was found guilty after a trial of participating in a conspiracy to possess cocaine with intent to distribute it. At trial, the government was allowed to present evidence of recordings of pretrial telephone calls a co-defendant made from jail. The recordings contained the co-defendant's repetition of hearsay statements by the defendant's attorney to the effect that they would lose if the case went to trial. The Seventh Circuit held that the erroneous admission of the hearsay was harmless error under Fed. R. Crim. P. 52(a). The circuit court decided that, in light of the other evidence of the defendant's guilt, the result of the proceeding would not have been different in the absence of the error. The Supreme Court granted certiorari to address whether the Seventh Circuit misapplied the harmless-error test by examining the other, untainted evidence without more specifically addressing the likely effect of the erroneously admitted evidence on the jury. **Writ of certiorari dismissed.**

*Chaidez v. United States*, No. 11-820 (Apr. 30, 2012). The Supreme Court granted certiorari to address whether its decision in *Padilla v. Kentucky*, 87 CrL 3 (2010), is retroactive on collateral review. The case is potentially important because of the high number of cases involving immigrants that are resolved by guilty plea and the divergent plea practices across the country. *Padilla* held that the Sixth Amendment right to counsel includes a right of noncitizen defendants to have their attorney give them accurate information about the potential immigration consequences of a guilty plea.

New rules of criminal procedure generally are not available on collateral review of convictions that had already been upheld on direct appeal on the date the court handed down the case that announced the new rule. A rule is not considered "new"–that is, it applies retroactively–when it was "dictated" by precedent or was "susceptible to debate among reasonable minds." This standard has proved difficult to apply under *Padilla*. Some federal and state appellate courts have held that the *Padilla* rule is retroactive because it merely applied settled ineffective-assistance jurisprudence in a new context. *See, e.g.*, *United States v. Orocio*, 645 F. 3d 630 (3d Cir. 2011). Other federal and state courts, including the Seventh Circuit in *Chaidez v. United States*, 655 F. 3d 684 (7th Cir. 2011), have decided that the split on the Supreme Court in *Padilla* and the continuing debate shows that reasonable minds would have disagreed about the appropriateness of extending *Strickland* to immigration advice. The case will be argued during the term that begins in October. **Cert. granted.**

*Virginia v. Banks*, No. 11-1071 (Apr. 30, 2012). Arresting officers' desire to provide an arrestee with appropriate clothing as they removed him from his home did not present an exigency under the Fourth Amendment justifying the warrantless seizure of his jacket. Once the arrestee was outside and fully clothed, officers were not justified in remaining in the home to seize the arrestee's jacket without his request or consent. Firearm found in the jacket must be suppressed. Ruling below: Va. Ct. App., Apr. 26, 2011. **Cert. denied.**

## D.C. CIRCUIT

*In re Antoine Jones*, 670 F. 3d 265 (D.C. Cir. Mar. 6, 2012). In 2007, a jury acquitted petitioner on a number of drug-related charges, but failed to reach a verdict on conspiracy to distribute and possession with intent to distribute cocaine and cocaine base. The government retried petitioner on the unresolved conspiracy count, was convicted in 2008, and received a life sentence. Petitioner filed a pro se complaint alleging federal officials violated the Fourth Amendment by conducting warrantless searches of his apartment and a warehouse leased in his name. Petitioner sought $1 million dollars in damages and an investigation of the I.C.E. officials that performed the searches. The district court dismissed petitioner's civil case *sua sponte* on May 28, 2008. On January 31, 2009, petitioner filed a pro se Motion for Leave to File Notice of Appeal in district court arguing that he never received a notice of dismissal until he requested a copy of the docket and opinion on January 13, 2009. He also argued that district court's dismissal was improper under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), because his claims, if proven, would not

necessarily imply that his criminal conviction was invalid. The district court denied petitioner's leave to file motion. The petitioner filed a Notice of Appeal which the Circuit treated as a petition for writ of mandamus. Petitioner argued on appeal that his motion was timely because Fed. R. App. P 4(a)(1)(B)'s 60-day filing period started on the date when he learned of the dismissal, or the date he received a copy of the dismissal opinion, rather than the date the district court entered its dismissal. The Circuit denied relief because petitioner's leave to file motion was more than eight months after the district court entered its dismissal, well past the statutory inflexible 60-day deadline imposed by Rule 4(a)(1)(B), and past the 180-day deadline imposed by Rule 4(a)(6)(B) for reopening the period to file an appeal even where a part claims they did not receive notice.

*United States v. Rubio*, No. 10-3059, 2012 WL 1560392 (D.C. Cir. May 4, 2012). Defendant pled guilty pursuant to Fed. R. Crim. P. 11(c)(1)(c) to conspiracy to provide material support to a foreign terrorist organization (F.A.R.C.), in violation of 18 U.S.C. § 2339B(a)(1). The agreed-upon sentencing range was 132-144 months. The court sentenced defendant to 138 months. On appeal defendant challenged her guilty plea as not knowing and intelligent, in part because she was not provided all court documents in her native Spanish language. The Circuit found no error reaffirmed prior Circuit precedent holding that a defendant does not have a Constitutional right to written translations of all court documents; rather a district court has discretion to order translation based on the defendant's need to understand the charges and to assist in her defense. The district court met this standard here.

## OTHER CIRCUITS

*United States v. Stefanik*, 674 F. 3d 71 (1st Cir. Mar. 22, 2012). Defendant was convicted of threatening a United States official, a supervisor at the court of appeals who discussed the status of defendant's case with defendant over the phone. The First Circuit upheld the denial of an acceptance of responsibility reduction. First, defendant proceeded to trial, and while this hurdle was not insurmountable, putting the government to its burden of proof at trial creates a rebuttal presumption that a downward adjustment is not available. The district court found that even though defendant admitted to making the threatening remarks, his claim that he was just "blowing off steam" and was never actually going to act on his threats, showed he had not accepted full responsibility for his words.

*United States v. Henzel*, 668 F. 3d 972 (2d Cir. Feb. 17, 2012). The circuit court affirms upward variance. The defendant pled guilty to traveling across state lines to engage in illicit sexual conduct. The applicable sentencing guideline, U.S.S.G. § 2G1.3, includes a cross-reference to §2A3.1 "[i]f the offense involved conduct described in 18 U.S.C. §2241 or §2242." The district court found insufficient evidence to support the cross-reference, but found that the circumstances of the offense justified an above-guidelines sentence of 135 months. The Seventh Circuit held that the sentence was reasonable, especially since the district court actually understated

defendant's guidelines range by not applying the cross-reference to §2A3.1. The district court erroneously assumed that the cross-reference required the government to prove that defendant used physical force or threats of extreme harm, whereas §2242 only requires the defendant to threaten or place the victim in fear.

*United States v. Hsu*, 669 F. 3d 112 (2d Cir. Feb. 17, 2012). Defendant operated a Ponzi scheme that defrauded victims of tens of millions of dollars. Under Application Note 3(A)(ii) to U.S.S.G. §2B1.1, the pecuniary harm from a fraud case should not include interest or amounts based on an agreed-upon rate of return. Defendant argued that the district court violated Note 3(A)(ii) by including in its loss calculation the "earnings" that the victims reinvested in the Ponzi scheme, even though those "earnings" were invested as part of the scheme itself. The Second Circuit disagreed. When an investor puts money into a fraudster's hands, and receives nothing of value in return, his loss is measured by the amount of principal invested, not by the principal amount plus the promised interest that was never received.

*United States v. Kearney*, 672 F. 3d 81 (2d Cir. Feb. 29, 2012). The circuit court held that subject of child porn was "victim" for restitution purposes. Defendant pled guilty to 17 counts of transportation, distribution, and possession of child pornography. The government requested restitution under 18 U.S.C. §2259 for "Vicky," the child subject of one of the pornographic videos. Section 2259 requires restitution for "the full amount of the victim's losses" for "any offense" under Title 18, Chapter 110 of the United States code, which includes the child pornography offenses in 18 U.S.C. §2252. The First Circuit held that Vicky was a "victim" of defendant's crimes. The panel agreed that in order to require restitution, the defendant's actions must have proximately cause the victim's injuries, but found that standard was met in this case.

*United States v. Roccisano*, 673 F. 3d 153 (2d Cir. Mar. 14, 2012). The circuit court affirms supervised release for illegal alien as mandatory for drug trafficking. A recent amendment to §5D1.1(c) says sentencing courts "ordinarily should not impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment." The Second Circuit found this provision inapplicable because defendant's term of supervised release was a required component of his sentence for drug trafficking. Moreover, the amendment did not go into effect until November 1, 2011, well after defendant was sentenced.

*United States v. Scott*, No. 10-3978, 2012 WL 1143579 (2d Cir. Apr. 6, 2012). Police officers who arrested a defendant after it appeared that he retrieved drugs from a hiding place and sold them to a third person should not have been allowed to testify that they recognized the defendant from many previous encounters they had had with him. The testimony improperly bolstered the officers' conclusion that they had witnessed a drug transaction. Reversed and remanded.

*United States v. Aleynikov*, 676 F. 3d 71 (2d Cir. Apr. 11, 2012). A defendant's theft of computer source code to create a competing program did not violate the federal Economic Espionage Act. The securities trading software at issue in this case was used internally by its owner, Goldman Sachs, and was not itself intended to be sold or licensed. Accordingly, it was not "related to or included in a product that is produced for or placed in interstate or foreign commerce" within the meaning of the EEA.

*United States v. Zangari*, No. 10-4546, 2012 WL 1323189 (2d Cir. Apr. 18, 2012). The Second Circuit ruled that an estimate of a victim's "loss" for purposes of federal restitution under the mandatory Victims Restitution Act cannot be based solely on the defendant's gain.

*United States v. Richards*, 674 F. 3d 215 (3d Cir. Mar. 16, 2012). The circuit court says county human resources director held "high-level decision-making or sensitive position." Defendant, the former director of human resources for a county government, pled guilty to accepting a bribe to assist a consulting firm obtain a contract. The Third Circuit upheld a §2C1.2(b)(3) enhancement for being a government official in a high-level decision-making or sensitive position.

*United States v. Williams*, 675 F. 3d 275 (3d Cir. Apr. 3, 2012). The circuit court determined that when a defendant has his supervised release revoked for a second or successive time, the length of any prior terms of imprisonment served following those earlier revocations does not affect the maximum length of the new term of revocation imprisonment that the judge may impose. The defendant before the Third Circuit argued that the first sentence of subsection (e)(3) still establishes an aggregate limit on revocation imprisonment. The Third Circuit agreed with the Fifth Circuit in *United States v. Hampton*, 633 F. 3d 334 (5th Cir. 2011), that the plain language of the statute makes clear that the maximum spelled out in subsection (e)(3) is not an aggregate of the previous terms.

*United States v. Turner*, No. 10-4573, 2012 WL 1353697 (3d Cir. Apr. 19, 2012). A litigant who is represented by counsel has no right to file a separate pro se appellate brief unless his lawyer has asked for permission to withdraw on the ground that the appeal is frivolous. The circuit court announced that any briefs it receives from a "putative pro se litigant" will be passed on to the litigant's lawyer. If those briefs raise meritorious claims, the arguments may be included in counsel's filings or, 'in the appropriate and unusual case," as grist for a supplemental brief.

*United States v. DeMuro*, No. 11-1887, 2012 WL 1382985 (3d Cir. Apr. 23, 2012). Defendants who placed their employees' payroll taxes into a trust fund account set up by the Internal Revenue Service but who ended up spending some of that money on other expenses should not have had their sentences adjusted upward for abusing a "position of trust." The Third Circuit decided payroll tax trust accounts like the ones used by the defendants actually make it harder to evade taxes.

*United States v. Boykin*, 669 F. 3d 467 (4th Cir. Feb. 28, 2012). The circuit court finds plain error in using PSR to decide that prior offenses occurred separately. In defendant's PSR, the probation officer determined that defendant qualified as an armed career criminal under 18 U.S.C. §924(e) based in part on two 1980 violent felony convictions, one for second-degree murder and the other for assault. The district court relied on factual details in the PSR to conclude that the offenses leading to his two 1980 convictions, although arising out of the same altercation, were committed on "occasions different from one another" for ACCA purposes. The Fourth Circuit held that it was plain error for the district court to use the PSR to determine that these offenses occurred on separate occasions.

*United States v. White*, 670 F. 3d 498 (4th Cir. Mar. 1, 2012). The circuit court remands for resentencing where court applied outdated "targeting" criteria for vulnerable victim enhancement. Defendant, the head of a white supremacist organization, was convicted of making threats to injure or intimidate individuals. The government requested a vulnerable victim increase, noting that defendant had sent packages to the minor children of Reddick, a victim who had filed a HUD complaint against her landlord. The district court rejected the increase on the ground that defendant did not target the victim because of the victim's unusual vulnerability. The Fourth Circuit held that the district court erred by adopting the outdated "targeting test" instead of whether defendant knew or should have known of vulnerability of victim.

*United States v. Thornsbury*, 670 F. 3d 532 (4th Cir. Mar. 2, 2012). The circuit court finds defendant waived right to appeal denial of government's Rule 35(b) motion. As part of his plea agreement, defendant waived his right to appeal "any sentence." During his incarceration, the government filed a motion under Rule 35(b), seeking to reduce his sentence based on his assistance to the government in an unrelated case. The district court denied this motion, and defendant appealed. The Fourth Circuit ruled that defendant's appeal of the court's denial of the government's Rule 35(b) motion was within the scope of defendant's appellate waiver, and dismissed the appeal. The panel rejected defendant's argument that because the possibility of a Rule 35(b) proceeding was not discussed at his allocution, he "could not have knowingly and intelligently agreed to waive any rights related" to such a proceeding; rather, the appeal was within the scope of the appellate waiver.

*United States v. King*, 673 F. 3d 274 (4th Cir. Mar. 8, 2012). The circuit court approves upward variance based on pattern of increasing violence. Defendant pled guilty to being a felon in possession of a firearm. His guideline range was 46-57 months, but the district court sentenced him to 96 months. The Fourth Circuit affirmed the upward variance, which was based on defendant's criminal history at the age of 26, and his pattern of increasing violence. Defendant had two juvenile convictions, and 10 adult convictions, four of which were violent. The court also referred to multiple instances in which defendant disregarded the terms of his bond and his probation.

*Lisenby v. Lear*, 674 F. 3d 259 (4th Cir. Mar. 16, 2012). A federal district court had no justification for remanding to state court a prisoner's civil rights lawsuit just because the prisoner was ineligible to proceed in forma pauperis under the Prison Litigation Reform Act's "three strikes" provision. Although the PLRA generally allows prisoners to proceed in forma pauperis, the"three strikes" provision, 28 U.S.C. § 1915(g), precludes that status "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted. The circuit court said remand is not the proper course in this situation. The requirements of the three-strikes provision– that the prisoner prepay in full all filing fees or make a showing of imminent danger of serious physical injury– are procedural rather than jurisdictional in nature.

*United States v. Susi*, 674 F. 3d 278 (4th Cir. Mar. 21, 2012). The circuit court held that district court properly limited resentencing. Defendant worked at one of 16 call centers operating as part of a telemarketing sweepstakes scheme. The loss attributable to defendant's call center was about $760,000, but the total loss from all 16 call centers was $4.2 million. On defendant's first appeal, the Fourth Circuit held that the district court erred in basing defendant's restitution on $4.2 million in losses. On remand, defendant argued that he was entitled to a *de novo* sentencing, but the district court ruled that it could not recalculate the guidelines range because the Fourth Circuit's opinion stated that the guidelines range was proper, and resentencing was based on an error in the §3553(a) and restitution analysis. The Fourth Circuit upheld the district court's interpretation.

*United States v. Oceanpro Industries Ltd.*, 674 F. 3d 323 (4th Cir. Mar. 23, 2012). Defendants convicted of illegally harvesting rockfish in Maryland and Virginia were properly ordered to pay restitution to those states under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, and the Victim and Witness Protection Act, 18 U.S.C. § 3663. Maryland and Virginia are eligible for restitution because they have a legitimate and substantial interest in protecting the fish in their waters as part of the natural resources of the state and those interests were directly harmed by the illegal harvesting.

*United States v. Jefferson*, 674 F. 3d 332 (4th Cir. Mar. 26, 2012). The Fourth circuit upheld former Rep. William Jefferson's (D-La.) convictions for violating a federal anti-bribery statute even though the prosecution did not prove that the former lawmaker compromised any formal legislative duties specifically proscribed by law in return for the bribes.

*United States v. Shrader*, 675 F. 3d 300 (4th Cir. Apr. 4, 2012). A defendant may be prosecuted twice for just one sequence of harassing conduct under the federal anti-stalking statute, 18 U.S.C. § 2261A(2), so long as the course of conduct harmed two different victims. The circuit court affirmed the defendant's convictions of two counts of stalking through the use of a facility of interstate commerce, rejecting his argument that the indictment was multiplicitous because there

was only one course of conduct. Accordingly, the law "unambiguously makes the victim, rather than the course of conduct, the unit of prosecution."

*United States v. Nicholson*, No. 11-4531, 2012 WL 1330884 (4th Cir. Apr. 18, 2012). The loss of government benefits is a collateral consequence of guilty plea and, therefore, Fed. R. Crim. P. 11 does not require a district court to advise a defendant at the guilty plea colloquy that his plea will result in the loss of his benefits. At the time the defendant in this case pleaded guilty, he was receiving benefits under the Federal Employees Compensation Act, which provides workers' compensation to federal employees injured on the job. He was convicted on the basis of his falsification of documents intended to establish his continued eligibility for the benefits. He claimed on appeal that the district court violated Rule 11 when it failed to advise him of the possible termination of his FECA benefits.

*United States v. Gilbert*, No. 10-4848, 2012 WL 1372147; and United *States v. Lawson*, No. 10-4831, 2012 WL 1372172 (4th Cir. Apr. 20, 2012). The Fourth Circuit ruled that when a juror consults extrajudicial information, such as an online database, prosecutors can save a conviction only if they can overcome the presumption that the juror's misconduct was prejudicial to the accused's right to a fair trial. The circuit court also turned back constitutional challenges to a new federal law that prohibits staging animal fights.

*United States v. Goluba*, 672 F. 3d 304 (5th Cir. Feb. 22, 2012). The Fifth Circuit considers uncharged conduct in denying reduction under U.S.S.G. §2G2.2(b)(1). Defendant sent a graphic photo of himself to a 10-year-old girl he had met on a social networking site. Police found over 30,000 images and at least 987 videos of child pornography on defendant's computer. Defendant pled guilty to receipt of child pornography. He argued that he was entitled to a two-level reduction under §2G2.2(b)(1) because the material he sent to the minor did not visually depict a child. The Fifth Circuit disagreed, finding this argument disregarded the totality of defendant's conduct. Subsection (b)(1) applies only when the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor that the defendant did not intend to distribute.

*United States v. Claiborne*, No. 10-51189, 2012 WL 1021274 (5th Cir. Mar. 28, 2012). The circuit court says obstruction of justice is factual finding not subject to plain error review and a factual finding is not clearly erroneous if it is plausible in light of the record read as a whole. The district court applied an obstruction of justice increase, finding defendant attempted to escape from custody after being put in a police car. He argued for the first time on appeal that the PSR demonstrated that his co-defendant, not defendant, attempted to escape. However, defendant failed to object to the obstruction of justice enhancement at sentencing in the district court. The Fifth Circuit held that this failure to object foreclosed its review because record not devoid of evidence defendant tried to escape.

*United States v. Espinoza*, No. 11-50369, 2012 WL 1292513 (5th Cir. Apr. 17, 2012). A pawn shop to which a defendant sold stolen guns was not entitled to restitution after the defendant was convicted only of illegal possession of a firearm. Under both the Victim and Witness Protection Act and the Mandatory Victims Restitution Act, a "victim" is defined in relevant part as "a person directly and proximately harmed as a result of" the defendant's offense.

*United States v. Abrahem*, No. 11-50166, 2012 WL 1371419 (5th Cir. Apr. 20, 2012). A mentally disturbed defendant who unsuccessfully tried to talk his way past security personnel in an Army hospital by claiming he was a patient's lawyer was properly convicted of making a material false statement even though none of the personnel took him seriously. The circuit court explained that a declaration satisfies the false-statement statute's materiality element so long as the statement has a natural tendency to influence or is capable of influencing a government decision. "Actual influence is not required," and the speaker need not be persuasive, the court said. A statement can be ignored, disbelieved, or never even read and still be material, the court observed.

*United States v. Cunningham*, 669 F. 3d 723 (6th Cir. Feb. 24, 2012). The circuit court upholds consideration of studies of recidivism of child sex offenders. Defendant pled guilty to three child pornography offenses, and was sentenced to 121 months. He argued that the district court erred by considering studies measuring the recidivism rate of child sex offenders, including individuals convicted of "hands-on" sex offenses. Defendant asked the court to consider data collected by the Sentencing Commission, which suggested that he had a 6.2 percent chance of re-offending. The Sixth Circuit found that the court's reliance on the recidivism studies was not excessive, "especially...consider[ing] the manner in which the court comprehensively weighed and balanced a multiplicity of sentencing factors."

*United States v. Robinson*, 669 F. 3d 767 (6th Cir. Feb. 27, 2012). The circuit court reverses sentence of one day's imprisonment for child porn offense. Defendant pled guilty to possessing over 7100 images of child pornography. Some of the images involved the bondage, torture, and rape of prepubescent children. Defendant's advisory guideline range was 78-97 months, but the district court sentenced him to one day in custody. The Sixth Circuit rejected the sentence as substantively unreasonable. The district court placed substantial weight on defendant's psychological evaluation, concluding that defendant was not dangerous. Thus, the sentence was based, in large part, on a prediction of future conduct concerning a particular type of crime (sexual abuse of a child) that was not at issue.

*United States v. Felts*, 674 F. 3d 599 (6th Cir. Mar. 12, 2012). A defendant can be convicted under the federal Sex Offender Registration and Notification Act for failing to register even if the state where the offender resides has not yet implemented the federal statute. SORNA makes it a federal crime for sex offenders to fail to comply with their residence state's registration obligation after traveling in interstate or foreign commerce. SORNA also gave states three years to achieve certain minimum standards with their schemes as a condition of receiving federal

funds. Only a dozen or so states have substantially complied with SORNA's minimum requirements for state registration schemes. The circuit court agreed with other circuits that have held that a duty to register is independent of a state's implementation of the SORNA minimum standards.

*United States v. McFalls*, 675 F. 3d 599 (6th Cir. Mar. 30, 2012). An appellate mandate overturning a sentence enhancement and ordering resentencing did not prevent the resentencing judge from changing a concurrent sentence into a consecutive one. The issue turned on whether the appellate mandate was a general remand or a limited remand under 18 U.S.C. § 2106. A general remand from an appellate court allows a resentencing judge to conduct a "do-over" of the entire sentencing. A limited remand, in contrast, restricts the district court's authority to the issue or issues adjudicated.

*Rashad v. Lafler*, 675 F. 3d 564 (6th Cir. Apr. 5, 2012). A state court judgment became final for purposes of federal habeas corpus review only after direct review of a resentencing that was ordered at the same time the conviction was affirmed. A state court affirmed the petitioner's conviction but reversed his sentence. The state did not resentence him for 10 years. Once it did, the petitioner appealed that sentence, and it was affirmed. He then sought federal habeas relief on grounds other than the sentence. The state argued that the one-year limitations period established by the Antiterrorism and Effective Death Penalty Act for seeking habeas relief had long since expired. However, it was not yet one year since the state's highest court had denied direct review of the new sentence, so the Sixth Circuit allowed the defendant to proceed.

*United States v. Kearney*, 675 F. 3d 571 (6th Cir. Apr. 5, 2012). A prior state conviction can qualify as a predicate "violent felony" triggering an enhanced sentence under the federal Armed Career Criminal Act even though the state offense did not meet the criteria of a violent felony until it was enhanced under a state recidivism provision. This approach is not only consistent with the plain text of the law, but also is in harmony with Congress's clear intent to discourage recidivists.

*United States v. Conrad*, 673 F. 3d 728 (7th Cir. Mar. 14, 2012). Law enforcement officers' illegal entry of a home where a defendant was staying did not taint the defendant's ensuing consent to search his own apartment shortly thereafter. Federal agents obtained a warrant to search business premises belonging to the defendant's father. Agents went to the father's home in Geneva, IL, and knocked on the door, but they received no response. They then unconstitutionally entered the father's backyard and climbed onto a deck. Upon peering into a window, the agents saw the defendant asleep on the couch. The agents entered the home, roused the defendant, and questioned him about child pornography. He admitted to having child pornography in his apartment in Chicago. He consented to allowing the officers to drive him to Chicago and to giving them the child pornography he had there.

*United States v. Smith*, 674 F. 3d 722 (7th Cir. Mar. 21, 2012). Federal prosecutors' surprise mid-trial disclosure of the name of the government's confidential informer did not render a trial fundamentally unfair where there was overwhelming evidence of guilt and the defense could not show how the outcome would have been different absent the disclosure. The district court denied a motion to reveal the identity of the government's confidential informers, ruling the defense failed to show a need that outweighed the public's interest in protecting informers.

*United States v. Bradley*, 675 F. 3d 1021 (7th Cir. Apr. 5, 2012). The circuit court ruled that a federal district judge failed to adequately explain a 20-year prison sentence imposed upon a child molester for whom the U.S. Sentencing Guidelines recommended a six-year term. This was the second time the circuit overturned the defendant's sentence for traveling across state lines to have sex with a 15-year-old in violation of 18 U.S.C. § 2423(b). In a previous appeal, the Seventh Circuit held that the sentencing judge failed to provide any support for his finding that the defendant had committed prior crimes and was likely to do so again. On remand, a second district judge imposed the same 20-year term and increased the period of supervised release from 10 years to life. The judge made clear that he was not relying on any prediction about recidivism and that he considered the sentencing factors set out in 18 U.S.C. § 3553(a), but did not specify how he considered those factors. Case remanded for resentencing.

*United States v. Mount*, 675 F. 3d 1052 (7th Cir. Apr. 12, 2012). Once a federal sentencing judge has determined that a defendant deserves a two-level adjustment to offense level under U.S.S.G. § 3E1.1(a) for acceptance of responsibility, and prosecutors move for the extra third-level reduction authorized by Section 3E1.1(b), the judge lacks authority to deny the government's motion.

*United States v. Mosley*, 672 F. 3d 586 (8th Cir. Mar. 6, 2012). The circuit court finds sufficient evidence that defendant carried gun with intent to use it. Defendant pled guilty to unlawful possession of a firearm, and received a four-level increase under § 2K2.1(b)(6) on the ground that she possessed the gun in connection with the state felony offense of "going armed with intent." Iowa Code § 708.8. The Eighth Circuit upheld the enhancement, ruling that the district court had sufficient grounds to find that defendant carried a handgun with specific intent to use the weapon against her daughter.

*United States v. Black*, 670 F. 3d 877 (8th Cir. Mar. 12, 2012). The circuit court rejects claim that downward variance in child porn case should have been even lower. Defendant pled guilty to possessing child pornography. His guideline range was 78-97 months' imprisonment. After discussing defendant's sentencing memo, his mental health, and lack of criminal history, the court varied downward to a sentence of 60 months. The Eighth Circuit upheld the sentence, rejecting defendant's argument that the court failed to consider or adequately respond to his argument that the child porn sentencing guidelines are overinflated. Defendant raised his argument regarding the child porn guidelines in his sentencing memorandum, but he did not reiterate it at sentencing, nor did he ask the district court to address it.

*United States v. Woods*, 670 F. 3d 883 (8th Cir. Mar. 12, 2012). The circuit court says court adequately explained upward variance. Defendant pled guilty to six counts of assaulting a federal employee, and one count of possessing an unregistered firearm. His guideline range was 57-71 months, but the district court sentenced him to 102 months. Defendant asserted that his 102-month sentence was substantively unreasonable, arguing that the court gave too much weight to his misdemeanor arrest history, while not giving enough consideration to his acceptance of responsibility and the fact that he did not possess the firearm in conjunction with the offense. The Eighth Circuit affirmed the upward variance. The court considered defendant's past problems and multiple encounters with law enforcement "with no meaningful consequences," his prior assaultive behavior, poor educational background, failure to support his children, the danger he posed to the community, his need for vocational training, substance abuse and anger management counseling, and the need to promote respect for the law and deter future conduct. Because the court adequately explained its reasoning and properly weighed the § 3553(a) factors, there was no abuse of discretion.

*United States v. Morais*, 670 F. 3d 889 (8th Cir. Mar. 13, 2012). The circuit court approves guideline sentence for autistic defendant who "collected" child porn. Defendant pled guilty to receiving child pornography, and was sentenced to a 97-month term, which fell at the bottom of his advisory guideline range. He had requested a sentence of 60 months due to the "relatively tame" nature of the child porn that he collected, and due to his diagnosis of autism. A neuropsychologist testified that autistic individuals tend to collect things, and that defendant did not understand the "social basis" for the prohibition on child pornography. He also opined that defendant's autism placed him at risk of being victimized or manipulated in prison. The Eighth Circuit held that the 97-month sentence was not unreasonable.

*United States v. Bordeaux*, 674 F. 3d 1006 (8th Cir. Mar. 27, 2012). The circuit court finds court adequately considered possible grounds for reduced sentence. Defendant pled guilty to one count of structuring financial transactions and was sentenced to 30 months, the bottom of his 30-37 month guideline range. The district court had rejected defendant's request for a downward departure based on his age, health, military service, and service to his tribe. The Eighth Circuit found no procedural error. The court adequately considered defendant's military service and PTSD. The district court did not fail to distinguish between a departure and a variance. Rather, it correctly identified possible bases for a departure, age and health, but did not find that they warranted a reduced sentence.

*United States v. Baker,* 674 F. 3d 1066 (8th Cir. Mar. 28, 2012). The circuit court finds government's unenthusiastic comments at sentencing did not breach plea agreement. In defendant's plea agreement, the government agreed to recommend a sentence at the low end of the advisory sentencing range. At sentencing, the government acknowledged that it was bound under the plea agreement to recommend a sentence at the low end of the guideline range., i.e., 360 months. It then commented that "They don't get much worse than this, Your Honor. They don't. And the defendant has made it abundantly clear by his own actions that he has a sexual preference for young children, and he's never going to stop. Presumably 30 years will be enough to prevent him from ever doing this again." The district court sentenced defendant to 480

months. The Eighth Circuit rejected defendant's argument that the government breached the plea agreement to recommend a sentence at the bottom of the guideline range. The government made the recommendation it was obligated to make. The fact that the recommendation was made in other than the most enthusiastic terms did not breach the agreement.

*United States v. Schmidt*, 675 F. 3d 1164 (8th Cir. Mar. 29, 2012). State agencies that covered the medical expenses of an assault victim are entitled to mandatory restitution regardless of the defendant's ability to pay. The defendant was convicted of assaulting a victim whose medical expenses were covered by South Dakota's Medicaid program and its State Crime Victim Compensation program. The district court ordered the defendant to pay restitution to those entities under the Mandatory Victim's Restitution Act, 18 U.S.C. § 3663A. The circuit court agreed that the agencies did not qualify as victims but were entitled to restitution under 18 U.S.C. § 3664.

*United States v. Lomeli*, No. 11-1549, 2012 WL 1319533 (8th Cir. Apr. 18, 2012). Investigators' failure to attach to their wiretap application the names of the officer who made the application and the Department of Justice official who approved it was enough to trigger Title III's exclusionary rule. The circuit court ruled that without evidence that the issuing judge knew the identities of the investigating officer and the authorizing official, the omission is more than a technical error and violates one of the "core components" of the federal statutory requirements for wiretaps. This decision creates a circuit split.

*United States v. Major*, No. 10-10147, 2012 WL 1001188 (9th Cir. Mar. 27, 2012). The circuit court says multiple §924(c) gun counts totaling 746-year sentence did not violate Eighth Amendment. Defendant was convicted on 30 counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §924(c). As a result of those convictions, at sentencing, the district court imposed a sentence of 746 years. Defendant argued that application of §924(c) to him violated the Eighth Amendment ban on cruel and unusual punishment. A divided panel of the Ninth Circuit noted that defendant's sentence was "harsh" but held that it did not violate the Eighth Amendment.

*Wentzell v. Neven*, 674 F. 3d 1124 (9th Cir. Apr. 2, 2012). A petition for habeas corpus is not "second or successive" for purposes of the strict gatekeeping provisions of the Antiterrorism and Effective Death Penalty Act so long as a new judgment was imposed between the two petitions, even if the new petition challenges only aspects of the judgment that were unaltered. Other circuits that have addressed the issue are divided.

*Schneider v. McDaniel*, 674 F. 3d 1144 (9th Cir. Apr. 4, 2012). A federal habeas corpus petitioner's mental illness did not establish "cause" for failing to present a constitutional claim in the state courts. The circuit court upheld a district court's determination that the petitioner's mental health conditions did not create a greater obstacle to filing a state petition than the illiteracy of a prisoner in a prior case. An established habeas doctrine based largely on comity

precludes the federal courts from entertaining constitutional claims that a petitioner failed to properly present in the state courts. A recognized exception to this rule applies in cases in which the petitioner is able to demonstrate "cause" for the procedural default and "prejudice" resulting from it.

*United States v. Onyesoh*, 674 F. 3d 1157 (9th Cir. Apr. 4, 2012). A federal sentencing judge calculating the loss from "unauthorized access device" fraud involving stolen credit card numbers may not count the value of any expired card number unless the government has proved that the number remained usable. The circuit court concluded that access devices must be capable of obtaining money, goods, services, or something else of value.

*United States v. Manzo*, 675 F. 3d 1204 (9th Cir. Apr. 5, 2012). The government breached a plea agreement when it agreed to recommend one U.S. Sentencing Guidelines range at sentencing but switched to a harsher recommendation after the trial court ruled that the original deal mistakenly understated the applicable ranges. The circuit court also ruled that the defense lawyer rendered ineffective assistance by failing to anticipate that the district court would use a different sentencing range and then failing to move to withdraw the plea once it became clear the range would be harsher than originally expected.

*United States v. Nosal*, No. 10-10038, 2012 WL 1176119 (9th Cir. Apr. 10, 2012). The statute that makes it a federal crime to "exceed authorized access" to a computer connected to the internet "is limited to violations of restrictions on *access* to information, and not restrictions on its *use*." The circuit court decided that a hacker-based approach to construing the Computer Fraud and Abuse Act is more in line with its text and Congress's presumed intent.

*United States v. Swank*, No. 11-30072, 2012 WL 1255046 (9th Cir. Apr. 16, 2012). The circuit court affirms increase where sexual abuse victim was in defendant's "care and control." Defendant sexually abused his wife's seven-year-old niece, after the girl had been left in the care of defendant and his wife by the girl's mother for a few days. At sentencing, the district court found that defendant was equally responsible with his wife for the girl's care, and therefore increased the sentence by two levels under §2A3.1(b)(3) because the girl was in defendant's "custody, care, and supervisory control." On appeal, the Ninth Circuit affirmed, noting that defendant shared caretaking responsibilities with his wife for the other two children in the house, and prepared food for all of them. Thus the girl was under his care and supervisory control.

*United States v. Milovanovic*, No. 08-30381, 2012 WL 1398647 (9th Cir. Apr. 24, 2012) (en banc), on *reh'g*, 627 F. 3d 405. Independent contractors who do not have a formal fiduciary relationship with a government can still be prosecuted for "honest services" fraud, the en banc panel held. The circuit court also rejected other circuits' requirement that prosecutors prove a foreseeable economic harm.

*United States v. Damato*, 672 F. 3d 832 (10th Cir. Feb. 22, 2012). The circuit court finds 13-year

old transaction was part of common scheme or plan. The defendant was convicted of a marijuana conspiracy that ran from December 2003 through March 2006. The district court included in its drug quantity calculation a January 1990 incident in which two co-conspirators were arrested for attempting to purchase 1200 pounds of marijuana from an undercover DEA agent. After ruling that the transaction was not part of the same course of conduct, the Tenth Circuit ruled this was one of the rare instances in which acts that were not part of the same course of conduct as the offense of conviction nonetheless qualified as part of a common scheme or plan for sentencing.

*United States v. McGehee*, 672 F. 3d 860 (10th Cir. Feb. 22, 2012). Defendant argued that the district court should have granted him a two-level acceptance of responsibility reduction under U.S.S.G. § 3E1.1(a). The Tenth Circuit ruled that defendant waived this argument. Before sentencing, defendant expressly indicated that he had no objections to the PSR, and the PSR recommended that he not be given the acceptance reduction.

*United States v. Hunt*, 673 F. 3d 1289 (10th Cir. Mar. 21, 2012). The federal supervised release statute, 18 U.S.C. § 3583, does not require a court to credit a defendant with time he already served following two prior breaches of his supervised release terms when it calculates a new sentence for yet a third revocation of release. On appeal, the defendant argued that the aggregate jail time he got for his various revocations exceeded the three-year ceiling allowed by Section 3583(b), which sets a maximum supervised release period of three years for Class C felonies like his firearms conviction. The circuit court disagreed, concluding, "§ 3583(e)(3) does not require courts to reduce a defendant's sentence for violating the terms of a supervised release." The defendant's argument ignores the fact that Congress amended subsection (e)(3) in 2003 in a way that overrode any suggestion that courts must aggregate prior revocation imprisonment sentences when calculating a new sentence for violation of supervised release conditions.

*United States v. Lewis*, 674 F. 3d 1298 (11th Cir. Mar. 23, 2012). A pedestrian's admission during an encounter with the police that he had a concealed weapon, which was not necessarily illegal, gave police sufficient cause to briefly detain both him and his companions while investigating the matter. The circuit court focused on the significance of securing the officer's safety. When faced with the substantial and immediate danger of concealed firearms, police are allowed to control the scene during their investigation by detaining not only the man carrying the firearm but his associates as well.

*House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816 (D. Mass. Mar. 28, 2012). A lawsuit challenging the Department of Homeland Security's policies on suspicionless boarder searches of computers and digital storage media survived a motion to dismiss in the U.S. District Court for the District of Massachusetts.