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IDEAS AND INFORMATION

Forced Medication of Defendant.

In *Sell v. United States*, 123 S.Ct. 2174 the court created a four part test to weigh the intrusiveness of forced medication on an incompetent defendant against the importance of the governmental issues at stake in the charges. Under *Sell*, the court must consider four factors before ordering the involuntary treatment of a Defendant: (1) the court must find that "*important* governmental interests are at stake"; (2) the court must conclude that "involuntary medication will *significantly further* those concomitant state interests"; (3) the court must conclude that "involuntary medication is *necessary* to further those interests"; and, (4) the court must conclude that "administration of the drugs is *medically appropriate*." *Sell,* 123 S.Ct. at 2184 (emphasis in the original).

Applying a *Sell* analysis, Judge Woodcock recently denied a governmental request for forced medication in a prohibited person case, 18 U.S.C. § 924(a)(2). *U.S. v. Dumeny*, 03-CR-32-B-W, 1/6/04.

Attacking Uncounseled Convictions as Sentencing

There are three major cases on uncounseled convictions and attack at sentencing.

1. As to felonies, in *U.S. v. Custis,* 114 S.Ct. 1732 (1994), the Supreme Court said that lack of counsel was the **only** grounds upon which a federal defendant could attack the validity of a prior directly as part of the federal sentencing process.

2. In *Nichols v. U.S.*, 511 US 738, 746-47 (1994) the Court held that uncounseled misdemeanors may be included in criminal history *only* if they did not result in a jail sentence. However, *Nichols* does not apply where a defendant knowingly and intelligently waives his right to counsel in connection with a **misdemeanor,** even if the conviction results in a term of imprisonment. *United States v. Logan,* 250 F.3d 350, 377 (6th Cir. 2001). Additionally, a presumption of regularity attaches to state court proceedings, including the waiver of counsel preceding a guilty plea. *Cuppett v. Duckworth,* 8 F.3d 1132, 1136-37 (7th Cir. 1993) (citing *Parke v. Raley,* 506 U.S. 20, 29, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992)).

The First circuit in looking at the issue of uncounseled misdemeanors has said, "We need not definitively establish whether and to what extent uncounseled misdemeanors offenses may be counted, but instead assume for the sake of argument that, under the sentencing guidelines, a defendant would be entitled to exclude an uncounseled misdemeanor conviction resulting in prison time." *U.S. V. Gray*, 177 F.3d 86, 90 (1st Cir. 1999) However the defendant who bears the burden of proof. *Gray* at 90.

3. Under Maine law, see *State v. Cook*, 1998 ME 40, in which the Law Court, post *Nichols,* held, "The present incompatibility of these two standards compels us to clarify the law of Maine regarding right to counsel. In so doing, we overrule *Newell* and hold, consistent with the reasoning in *Scott*, that an indigent misdemeanor defendant has a right to counsel under article I, section 6-A of the Maine Constitution when imprisonment will actually be imposed. This "bright line" rule provides defendants, prosecutors, and criminal courts in Maine with the clarity they deserve, while adhering to the principle that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment." *Id.*

Cannot Depart Down to become Safety Valve Eligible

Sometimes we have that client looking at the minimum mandatory who is deserving of the safety valve but has 1 too many criminal history points. Arguing overstated criminal history (II rather than the required I) we seek the departure. Sounds good but uniformly rejected by the courts. Eight circuit courts of appeal have addressed the issue and each one has arrived at the same conclusion: the sentencing court does not have the authority. The commentary to § 5C1.2 limits the district court's authority to apply the safety valve in those cases where a defendant has only one criminal history point as calculated under § 4A1.1, "regardless of whether the district court determines that a downward departure in the defendant's sentence is warranted by § 4A1.3." *United States v. Penn,* 282 F.3d 879, 882 (6th Cir.2002). The "effect of a departure under § 4A1.3 is not to change the defendant's actual criminal history category or the calculation of a defendant's criminal history points." *United States v. Boddie*, 318 F.3d 491, 494-96 (3rd Cir. 2003) (citing *Penn,* 282 F.3d at 882). Under § 5C1.2(a)(1), the safety valve is available only when the defendant "does not have more than 1 criminal history point, *as determined under the sentencing guidelines*." U.S.S.G. § 5C1.2(a)(1) (emphasis added). The appellate courts that have considered the issue have relied on the language of both the statute and the sentencing guidelines. See ***U.S. v. Stevens***, Order on Defendant's Pre-Sentencing Memoranda, CR-03-48-B-W, Judge Woodcock, 2/4/04
http://www.med.uscourts.gov/opinions/Woodcock/2004/JAW_0242004_1-03cr48_USA_V_STEVENS.pdf

Pilot Project on Electronically Available Transcripts

Maine is participating in a pilot project regarding the electronic availability of transcripts. The pilot project will apply to all transcripts of **civil proceedings** ordered on or after January 5, 2003. The policy is located on our website at www.med.uscourts.gov. If the pilot goes well nationally, this may be extended to criminal cases in the future.

Policy establishes a procedure where counsel can (must ?) request the redaction from the transcript of specific personal data identifiers before the transcript is made electronically available to the

general public. A party must file a notice of intent to request redaction within five business days of the filing of the official transcript by the court reporter. If a party fails to request redaction within this time frame, the transcript will be made electronically available without redaction.

If a party files a redaction notice, the transcript is not to be made remotely electronically available to the general public until the redactions are performed. A paper copy of the officially filed transcript will be available from the clerk's office or the court reporter during this time. Within 21 calendar days from the filing of the transcript with the clerk, or longer if ordered by the court, the parties must submit to the court reporter or transcriber a statement indicating where the personal identifiers appear in the transcript by page and line and how they are to be redacted. For example, if a party wanted to redact the Social Security number 123-45-6789 appearing on page 12, line 9 of the transcript the statement would read: Social Security number 123-45-6789 on page 12, line 9 should be redacted to read xxx-xx-6789. Only the personal identifiers listed in the policy may be automatically redacted. If a party wants to redact other information, that party should move the court for further redaction by separate motion served on all parties and the court reporter or transcriber within the 21-day period.

Supreme Court

Deliberately Eliciting Incriminating Statements from Accused After Indictment Violates Sixth Amendment Right to Counsel.
Fellers v. United States
Decided: 01/26/04, No. 02-6320
Full text: http://laws.findlaw.com/us/000/02-6320.html

The United States Supreme Court unanimously held (opinion by O'Connor) that eliciting incriminating statements from an accused at his home, **after** he is indicted, violates the Sixth Amendment right to counsel. This is a very good opinion.

Fellers was indicted for conspiracy to distribute methamphetamine. Police went to his home to arrest him. Upon arriving, the police told Fellers that they had a warrant for his arrest and that he had been indicted for conspiracy. Fellers allowed the police into his home and made several incriminating statements without having received his Miranda warnings. The police then took Fellers to the police station, where he signed a form waiving his Miranda rights, reiterated what he said at home, and made several other incriminating statements.

Before trial Fellers moved to suppress the incriminating statements made before and after receiving his Miranda rights. The Magistrate Judge recommended that the statements made at Fellers' home be excluded, and that several of the statements at the police station also be excluded as fruits of the statements made at home. The United States District Court for the suppressed the statements made at home, but allowed the statements made after Fellers signed the waiver. The United States Court of Appeals for the Eighth Circuit affirmed, holding that because Fellers had not been interrogated at home, the police did not violate his Sixth Amendment right to counsel.

The United States Supreme Court reversed, holding that the police violated Fellers' Sixth Amendment right to counsel. The police need not actually interrogate an accused in order to violate that person's Sixth Amendment rights. Rather, the police violate those rights when they deliberately elicit incriminating statements from the accused **after judicial proceedings, including indictment, begin against that person**.

While this began as primarily a 4th Amendment case, the 6th Amendment outcome is of real value. The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U. S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U. S. 682, 689 (1972)). We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents ... deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U. S. 201, 206 (1964).

The Court applies a "deliberate-elicitation" standard in Sixth Amendment cases, expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard. The Sixth Amendment provides a right to counsel even when there is no interrogation and no Fifth Amendment applicability; *Rhode Island v. Innis*, 446 U. S. 291, 300, n. 4 (1980) ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable"). This is an important and often overlooked distinction. **When seeking suppression look not just at the 4th Amendment issue but the 5th and 6th Amendment implications as well.**

***Illinois v. Lidster*, **02-1060 (1/13/2004)
http://supct.law.cornell.edu/supct/html/02-1060.ZS.html

In another blow to personal freedom the high court held (6-3 opinion by Bryer) that the police may use random roadblocks to seek information regarding recent specific crimes. This could be new exception area. Watch out for court's trying to allow "Lidster" stops or roadblocks.

The police had set up a highway checkpoint (roadblock) to try and obtain information about a hit and run resulting in a death a week earlier. The checkpoint was in the same location and at about the same time as the earlier incident. Police stopped each approaching vehicle, asked if the occupants knew anything about the hit and run and passed out a flyer with contact information. Lister swerved while approaching and the officer smelled alcohol. Following filed sobriety tests Lister was arrested for driving under the influence.

Illinois state supreme court had affirmed suppression of the stop based on *Indianapolis* v. *Edmond.* US Supremes disagree and distinguish *Edwards*.

In *Edmond*, the Supreme Court held that, absent special circumstances, the Fourth Amendment forbids police to make stops without individualized suspicion at a checkpoint set up primarily for general "crime control" purposes. 531 U.S., at 41, 44. Specifically, the checkpoint in *Edmond* was designed to ferret out drug crimes committed by the motorists themselves. Here, the stop's primary

law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask the occupants, as members of the public, for help in providing information about a crime in all likelihood committed by others.

Perhaps of most concern is the "reasonableness factor" the court uses. In judging its reasonableness, hence, its constitutionality, this Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas,* 443 U.S. 47 , 51. The relevant public concern was grave, as the police were investigating a crime that had resulted in a human death, and the stop advanced this concern to a significant degree given its timing and location. Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line and contact with police for only a few seconds. Viewed subjectively, the systematic contact provided little reason for anxiety or alarm, and there is no allegation that the police acted in a discriminatory or otherwise unlawful manner.

Post 9/11 and the Patriot Act where does that leave us ? Do we live in a time of "grave concerns?" Is it now OK any time there is a loss of life for the "minimal intrusion" of being stopped, observed and potentially questioned ? Leave aside for a moment the potential for abuse. Are we as citizens required to participate in the State's investigations ? What happens when the police start asking for ID to "verify" who they have already spoken to ? This "minimal intrusion language [which I trace back to at least *Mendenhall* (1979)] is growing.

The United States Supreme Court held, in a per curiam decision, that the Sixth Amendment guarantees reasonable, not perfect, competence in counsel.
Yarborough v. Gentry
Decided: 10/20/03, No: 02-1597
http://laws.findlaw.com/us/000/02-1597.html
The United States Supreme Court says defense counsel's performance was reasonable as a tactical choice, especially in light of the "highly deferential lens" under which the Court views counsel's performance. No surprise. The "fog the mirror" *Strickland* test continues.

United States v. Banks
Decided: 12/02/03, No. 02-473
Full text: http://www.supremecourtus.gov/opinions/03pdf/02-473.pdf
Fourth Amendment, Totality of Circumstances, not Length of Time Determines Reasonableness of Forcible Entry in context of "knock and announce". 15-20 second wait was long enough.

Maryland v. Pringle
Decided: 12/15/03, No. 01-809
Full text: http://laws.findlaw.com/us/000/02-809.html

Fourth Amendment, Visualization of Large Amounts of Cash Creates Probable Cause that Permits Warrantless Search and Arrest
A police officer stopped a car for speeding and observed a large amount of money in the glove box

when the driver reached for registration. The officer proceeded to search the car, seizing cocaine from behind the back-seat armrest. He arrested the car's three occupants after they denied ownership of the drugs and money. The large amount of money visualized allowed a reasonable officer to conclude that probable cause to believe a passenger committed the crime of possessing cocaine existed because any of the car's occupants might have had knowledge of or exercised dominion and control over the cocaine. We knew passengers could have liability for drugs in a common area, but the addition of cash as a basis for PC is a new twist. Mastercard, don't leave home without it.

Supervised Release issues

The terms and conditions of Supervised Release continue to spawn litigation.

US v. MANSUR-RAMOS, No. 02-2704 (1st Cir. October 28, 2003)
http://laws.lp.findlaw.com/1st/022704.html
In robbery case the court may require defendant to produce evidence that he is filing income tax returns in compliance with law during his supervised release.

US v. MELENDEZ-SANTANA, No. 01-2386, 01-2397 (1st Cir. December 24, 2003)
http://laws.lp.findlaw.com/1st/012386.html
Supervised release conditions regarding drug treatment were impermissibly delegated to a probation officer by the sentencing court. Delegation to a probation officer of the drug testing condition was in violation of 18 U.S.C. section 3583(d).

US v. YORK, No. 02-2210 (1st Cir. January 27, 2004)
http://laws.lp.findlaw.com/1st/022210.html
Conditions of defendant's supervised release are affirmed. The requirement that he submit to periodic polygraph testing, as a means to ensure his participation in a sex offender treatment program, does not violate his right against self-incrimination, because supervised release will not be revoked based on his refusal to answer polygraph questions on valid Fifth Amendment grounds. This is going to be a BIG NEW battleground. The sex offender treatment folks are now claiming that the only way to effectively treat is by adding the use of polygraphs as part of the treatment protocol. In the *York* case, the court added the condition sua sponte. The merits of polygraph were not discussed and so there is no underlying finding. The court dodged this as no abuse of discretion but said the defendant could seek to have the condition deleted once he was on supervised release in 2006 IF he could show evidence undercutting validity of polygraph to this treatment.

The probation department in the District of Maine, for sex offender cases will be seeking language along the lines of :

"The defendant shall fully participate in sex offender treatment as directed by the supervising officer. He shall scrupulously abide by all policies and procedures of that program. During the course of sex offender treatment, the defendant shall if required by the therapeutic program, be subject to periodic and random polygraph examinations to insure compliance with the requirements of the therapeutic program. No violation proceedings will arise solely based on a defendant's failure to pass a polygraph examination or a on a defendant's refusal to answer polygraph questions on valid Fifth

amendment grounds. When submitting to a polygraph exam, the defendant does not give up his Fifth Amendment rights."

For additional insight into this polygraph minefield see:
Polygraph Testing Leads to Better Understanding Adult and Juvenile Sex Offenders, 12/ 2001
http://www.oregonsatf.org/Polygraph%20Article.pdf
Utah Polygraph Examination Protocol, August 2002
http://antipolygraph.org/documents/nojos-polygraphy-policy.pdf

US v. TAPIA-ESCALERA, No. 03-1028 (1st Cir. January 28, 2004)
http://laws.lp.findlaw.com/1st/031028.html
The imprisonment cap of 18 U.S.C. section 3583(e)(3), governing maximum penalties for violating conditions of release, should be reduced by revocation terms already served.

US v. SHEPARD, No. 02-1216 (1st Cir. November 03, 2003)
http://laws.lp.findlaw.com/1st/021216.html
ACCA and what is a "violent felony"
We all seem to struggle with burglaries and how they do or do not fit into the "violent felony" framework. "There is surely an air of make-believe about this case" says the Court as they review Shepards five priors and compare to the Supreme Court analysis. Taylor forbade a *de novo* inquiry by the sentencing court into what conduct the defendant actually engaged in incident to the predicate offense, and focused instead on whether the crime of conviction was necessarily a generic burglary (or some other crime of violence). *U.S. v. Taylor*, 495 U.S. at 599-602. The problem--which *Taylor* recognized and addressed--is that state burglary statutes are often drafted to embrace both conduct that does constitute generic burglary and conduct that does not (e.g., building versus vehicle). *Taylor*, 495 U.S. at 599-602. *Taylor* makes clear that where (as here) the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary and that is the crime of conviction in the particular case. Id. at 602.

But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime?
Taylor said that the sentencing court can still look at the charging papers and jury instructions, which together may well identify the crime of conviction. *Taylor*, 495 U.S. at 602. The Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed. Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents. The first circuit builds on *United States v. Harris*, 964 F.2d 1234 (1st Cir. 1992), *United States v. Dueno*, 171 F.3d 3 (1st Cir. 1999), *United States v. Sacko*, 178 F.3d 1, 7-8 (1st Cir. 1999) (en banc order, June 16, 1999). *Harris*, with the reliability qualification adopted by *Dueno* as to the PSR (a point not litigated in *Harris* and irrelevant here), is the law of this circuit until the Supreme Court or an en banc panel rules otherwise. In those cases challenging the

catagorization (not the conduct) of the conviction below, "we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.

US v. RODRIGUEZ-CASTILLO (11/17/03 - No. 02-1879)
http://laws.lp.findlaw.com/1st/021879.html
Defendant's guilty plea forecloses complaints about the government's lack of compliance with Rule 16(a)(1)(B). Defendant requested criminal history and what the government produced was unclear or incomplete. Defendant thought he would end up a history II and yet PSR put him at a III. A defendant who subscribes an unconditional guilty plea is deemed to have waived virtually all claims arising out of garden-variety errors that may have antedated the plea. See *United States v. Cordero*, 42 F.3d 697, 698-99 (1st Cir. 1994)

US v. BOVA (11/25/03 - No. 02-2276, 02-2311)
http://laws.lp.findlaw.com/1st/022276.html
You may represent yourself or have counsel but not both. See *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). Although courts often appoint standby counsel for a defendant who insists on self-representation--partly in the hope that proceedings will flow more smoothly– the Court finds no case suggesting that the defendant has a constitutional right to represent himself **and** enjoy appointed counsel One circuit has clearly stated that no right to standby counsel exists. *McQueen v. Blackburn*, 755 F.2d 1174, 1178 (5th Cir. 1985), cert. denied, 474 U.S. 852 (1985). Language from an earlier decision in this circuit points in the same direction. See *United States v. Betancourt-Arretuche*, 933 F.2d 89, 95 (1st Cir. 1991), cert. denied, 502 U.S. 959 (1991). "Although appellate courts have suggested that appointment of standby counsel is to be preferred, it is not constitutionally required." 3 Lafave, Criminal Procedure, §11.5(f), at 589 (2d ed. 1999).

US v. VENTURA, No. 01-2448 (1st Cir. December 02, 2003)
http://laws.lp.findlaw.com/1st/012448.html
Drug Weights for Guideline Sentencing. A common problem. Here is a refresher on First Circuit law. In determining drug quantity, the sentencing court's task is to make a reasonable approximation of the weight of the controlled substances for which a particular defendant should be held responsible. USSG 2D1.1, cmt. (n.12). The court of appeals reviews the sentencing court's factual findings of drug quantity only for clear error. *United States v. Huddleston*, 194 F.3d 214, 223 (1st Cir. 1999). In applying that standard to a drug-quantity determination made after a plea of guilty, the court takes the facts from the change-of-plea colloquy, the undisputed portions of the PSI Report, and the transcript of the disposition hearing (including any proffers accepted by the court). *United States v. Brewster*, 127 F.3d 22, 24 (1st Cir. 1997). Findings as to drug quantity need not be precise, findings may be based on approximations drawn from historical evidence as long as those approximations represent reasoned estimates of drug quantity. See *Huddleston*, 194 F.3d at 224; *United States v. Rodriguez*, 162 F.3d 135, 149 (1st Cir. 1998); *United States v. Morillo*, 8 F.3d 864, 871 (1st Cir. 1993). The estimates need not be proven beyond a reasonable doubt, but, rather, may

stand if they are supported by a fair preponderance of the evidence. See *United States v. Nieves*, 322 F.3d 51, 54 (1st Cir. 2003). But, ...

US v. PEREZ-RUIZ, No. 02-1466 (1st Cir. December 22, 2003)
http://laws.lp.findlaw.com/1st/021466.html
Because the issue of drug type and quantity was not properly submitted to the jury, the district court committed an ***Apprendi* error** when it sentenced the defendant to life imprisonment. Defendant's sentence for conspiracy to distribute narcotics is therefore vacated and remanded.

1. In order to preserve a claim of *Apprendi* error for appeal, it is enough that a defendant offer a timely objection at sentencing to the imposition or proposed imposition of a term that exceeds the applicable statutory maximum. See *United States v. Nelson-Rodriguez*, 319 F.3d 12, 47 (1st Cir. 2003).
2. Where, as here, a defendant is accused of distributing heroin, cocaine, and cocaine base in violation of 21 U.S.C. § 841(a), the default statutory maximum derives from 21 U.S.C. § 841(b)(1)(C). See United States v. LaFreniere, 236 F.3d 41, 49 (1st Cir. 2001) (explaining that the catchall provision of section 841(b)(1)(C) contains the correct statutory maximum for substances classified under Schedules I and II). That makes the default statutory maximum 20 years. See United States v. Robinson, 241 F.3d 115, 118 (1st Cir. 2001).
3. To trigger a higher statutory maximum, the jury has to have find, beyond a reasonable doubt, that the conspiracy was responsible for the distribution of drugs in amounts at least equal to the quantities described in 21 U.S.C. § 841(b)(1)(B), and a case to trigger a statutory maximum extending to life imprisonment, the jury must find, again beyond a reasonable doubt, that the conspiracy was responsible for the distribution of drugs in amounts at least equal to the quantities described in 21 U.S.C. § 841(b)(1)(A)
4. Jury findings are readily ascertainable if the court requires completion of a special verdict form. See, e.g., *United States v. Knight*, 342 F.3d 697, 709 (7th Cir. 2003)., and...

US v. COLON-SOLIS, No. 01-1773 (1st Cir. January 08, 2004)
http://laws.lp.findlaw.com/1st/011773.html
A mandatory minimum is made potentially available by a finding that the conspiracy as a whole handled (or at least contemplated) the necessary triggering drug quantity. **But to apply the mandatory minimum to a particular coconspirator, the sentencing court must make a specific finding, supportable by a preponderance of the evidence, ascribing the triggering amount to that coconspirator.** See *United States v. Swiney*, 203 F.3d 397, 401-06 (6th Cir. 2000); *United States v. Becerra*, 992 F.2d 960, 967 n.2 (9th Cir. 1993); *United States v. Gilliam*, 987 F.2d 1009, 1013-14 (4th Cir. 1993).
Where a defendant admits that the conspiracy to which he belonged handled drug quantities sufficient to trigger a mandatory minimum sentence, he becomes potentially eligible for the mandatory minimum -- **but that provision cannot be applied in his case without an individualized finding that the triggering amount was attributable to, or foreseeable by, him." (my emphasis added) Remanded for re-sentencing.**

US v. VENTURA-CRUEL, No. 02-1538 (1st Cir. December 22, 2003)
http://laws.lp.findlaw.com/1st/021538.html

District court erred by **unfairly admitting into evidence the defendant's letter of confession**, written pursuant to his plea agreement. Defendant's cocaine conspiracy convictions are vacated.

US v. SACCOCCIA, No. 01-2160, 01-2170, 01-2393 (1st Cir. December 22, 2003)
http://laws.lp.findlaw.com/1st/012160.html
Defendant was convicted of RICO and other violations and ordered to forfeit virtually all of his currency. The district court erred in ordering his two attorneys to surrender such legal fees as they received after defendant's conviction. **An important decision on the issue of attorney fees and forfeiture.**

US v. GONCZY, No. 02-2399 (1st Cir. February 02, 2004)
http://laws.lp.findlaw.com/1st/022399.html
The government breached the plea agreement by paying lip service to the agreed-upon recommendation of a 70-month prison term while substantively arguing for a sentence at the higher end of the guidelines. Remanded for re-sentencing relying on *U.S. v. Riggs*, 287 F.3d 221, 226 (1st Cir. 2002). Once again the government makes a deal but just can't help but argue for more.

US v. CRAVEN, No. 02-1706 (1st Cir. February 06, 2004)
http://laws.lp.findlaw.com/1st/021706.html
Reverses "extraordinary rehabilitation," downward departure. The Court reiterates that "[o]rdinarily, presentence rehabilitation is not a permissible ground for departure because it can be factored adequately into the sentencing equation by an acceptance-of-responsibility credit." *Craven I*, 239 F.2d at 99 (citing U.S. Sentencing Guidelines Manual § 3E1.1, cmt. n.1(g)). Even so, in extraordinary circumstances, such a departure may be appropriate. See id.

In determining whether these circumstances are present, the Court engages in a three-pronged analysis:

1. Evaluate whether the circumstances cited by the district court are sufficiently unusual to justify the departure.
2. If so, whether those circumstances are adequately documented in the record.
3. If the departure clears these two hurdles, then measure its reasonableness. *Id.*

The defendant bears the burden of proving that he is eligible for a downward departure. *United States v. Sachdev*, 279 F.3d 25, 28 (1st Cir. 2002). The parties dispute whether we should give some deference to the district court's findings in the wake of the PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003); see *United States v. Frazier*, 340 F.3d 5, 14 (1st Cir. 2003), but we need not resolve this issue because we find that the downward departure is not sustainable even under the more deferential tripartite standard. See *United States v. Sanchez*, --- F.3d ---, Nos. 02-2504, 02-2566, 2004 WL 32864, at *7 (1st Cir. Jan. 7, 2004)(reviewing a departure claim without determining which standard of review applies by using the more defendant-friendly of the standards).

US v. THURSTON, No. 02-1966, 02-1967 (1st Cir. February 04, 2004)
http://laws.findlaw.com/1st/021966v2.html
Aspects of original opinion withdrawn based on panel re-hearing but same essential outcome for defendant, conviction affirmed, downward departures, based on the disparity in sentences among co-defendants and on the defendant's good works, found were unwarranted and reversed.

It is the **Post-Protect Act analysis of the downward departures** that are of significance. Under *Koon v. United States*, 518 U.S. 81 (1996), the courts of appeals were not to review a departure decision de novo, but were to ask whether the sentencing court abused its discretion in granting the departure. Id. at 91, 96-100. In appeals from sentencing departures, before the PROTECT Act, the court engaged in a three-part review:

1. Determine whether the stated ground for departure was theoretically permissible under the guidelines;
2. if so, examine the record to assess whether there was adequate factual support; and
3. determine the appropriateness of the degree of departure. *United States v. Bogdan*, 302 F.3d 12, 16 (1st Cir. 2002).

Whether the stated ground for departure was theoretically permissible - the first part - was a question of law reviewed de novo. *United States v. Bradstreet*, 207 F.3d 76, 81 (1st Cir. 2000); *United States v. Diaz*, 285 F.3d 92, 97-98 (1st Cir. 2002). Under *Koon*, review under the remaining two parts was for abuse of discretion only. See *Koon*, 518 U.S. 96-100; *United States v. Lujan*, 324 F.3d 27, 31 n.5 (1st Cir. 2003); *United States v. Martin*, 221 F.3d 52, 55 (1st Cir. 2000).

After the PROTECT Act, the statute requires de novo review not merely of the ultimate decision to depart, but also of "the district court's application of the guidelines to the facts." § 3742(e). If this court agrees that the decision to depart was justified under the guidelines, however, the extent of the departure granted by the district court is reviewed deferentially, just as it was prior to the PROTECT Act. *Id.; United States v. Frazier*, 340 F.3d 5, 14 n.4 (1st Cir. 2003); see also *United States v. Mallon*, 345 F.3d 943, 946 (7th Cir. 2003); *United States v. Jones*, 332 F.3d 1294, 1300(10th Cir. 2003).

Retroactivity

Thurston argues that the PROTECT Act should not be interpreted to apply to this case and that, if it does apply, it is retroactive and invalid. He makes two statutory intent arguments: (1) that the internal structure of the statute means it should not be applied to cases already pending on appeal; and (2) that the presumption against retroactivity should apply.

Thurston argues, all provisions of the Act were meant to apply only to post-Act sentencing. The argument is plausible, but we are unpersuaded. Even before the PROTECT Act, a trial court was required to give some reasons, though not necessarily in writing, for a downward departure. See 18 U.S.C. § 3553(c)(pre-PROTECT Act version); *United States v. Sclamo*, 997 F.2d 970, 973 (1st Cir. 1993) (discussing discouraged ground for departure); *United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994) (same). A requirement that this statement of reasons be written, rather than oral, has no particular connection to the appellate standard of review.

Although the Act does not expressly say that its de novo review provision applies to pending appeals, it does give an effective date of April 30, 2003. The effective date of a statute does not by itself establish that it has any application to conduct that occurred at an earlier date. See *INS v. St. Cyr*, 533 U.S. 289, 317 (2001) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994)). **Still, we agree with the Eighth Circuit that the new statute applies to appeals pending as of the effective date of the statute.** See *United States v. Aguilar-Lopez*, 329 F.3d 960, 962-63 (8th Cir. 2003). Much of the conduct regulated by this part of the PROTECT Act is that of the courts of

appeals (and indirectly, the district courts now under closer scrutiny), and that involves conduct dating from April 30, 2003 forward. We see no unfairness to defendants in Congress's requiring a closer look by appellate courts at whether a district court committed an error in deciding that the guidelines permitted a departure. It is the substance of the sentencing rules, both in the Guidelines and in the underlying statutes, that affects defendants.

MACDL web site is up at www.mainemacdl.org. Content will be added as I find time. Cold but a lot warmer than it had been. Snowy but a lot dryer than most years. Pats pull off the win. Now can Kerry ?