

OCT 04 2011

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>KAREN JEAN FREYLING,</p> <p>Defendant - Appellant.</p>

No. 10-10268

D.C. No. 1:08-cr-00384-OWW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Submitted September 27, 2011**

Before: SILVERMAN, W. FLETCHER, and MURGUIA, Circuit Judges.

Karen Jean Freyling appeals from the 121-month sentence imposed following her jury-trial conviction for conspiracy, fraud, smuggling, and various other offenses related to the operation of a business that sold unauthorized DVDs over the Internet, as well as for Social Security fraud. We have jurisdiction under 28 U.S.C. § 1291, and we vacate and remand.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Freyling contends that when the district court modified her advisory Sentencing Guidelines range at the sentencing hearing of her co-defendant, she was denied: (1) her right under Fed. R. Crim. P. 43 to be present at sentencing, and (2) her Sixth Amendment right to counsel. We agree and conclude that remand is necessary. *See United States v. Berger*, 473 F.3d 1080, 1094 (9th Cir. 2007); *United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004).

The government does not oppose a remand but requests that we limit its scope to allow the district court merely to clarify which Guidelines range it relied upon in choosing the 121-month term of imprisonment. We reject such a limitation; however, remand shall be limited to consideration of the issues raised in this appeal.

Our resolution of these issues renders it unnecessary to resolve Freyling's remaining contentions.

VACATED AND REMANDED.