

# CHAPTER THREE

## Legal Issues

### Introduction

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The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This section addresses a number of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during 1997.

### United States Supreme Court Decisions

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In 1997, the United States Supreme Court decided three cases involving guideline sentencing issues. The Court also granted a petition for *certiorari* in a case that turns on a sentencing issue.

#### ***Decisions on Guideline Sentencing Issues***

##### Acquitted Conduct

In *United States v. Watts*,<sup>4</sup> the Supreme Court ruled that “a jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.”<sup>5</sup> The Court issued this *per curiam* opinion resolving a split in the circuit courts of appeals by reversing the Ninth Circuit, which, in *United States v. Watts*<sup>6</sup> and *United States v. Putra*,<sup>7</sup> was the only court of appeals refusing to consider acquitted conduct at sentencing. The Court held that the guidelines did not alter the sentencing court’s discretion granted by statute under 18 U.S.C. § 3661, which provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”<sup>8</sup> The Court noted that guideline 1B1.4 “reflects the policy set forth in 18 U.S.C. § 3661,” that the commentary to guideline 1B1.3 also provides that

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<sup>4</sup> 117 S. Ct. 633 (1997).

<sup>5</sup> 117 S. Ct. at 638.

<sup>6</sup> 67 F.3d 790 (9th Cir. 1995).

<sup>7</sup> 78 F.3d 1386 (9th Cir. 1996).

<sup>8</sup> 117 S. Ct. at 635, citing *Witte v. United States*, 515 U.S. 389, 402 (1995) (quoting *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.) (“very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the guidelines’ enactment.”)).

“[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range,” and that all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction (relevant conduct) must be considered whether or not the defendant had been convicted of multiple counts.

The Court stated that the Ninth Circuit’s opinions also seemed to be based “on erroneous views of our double jeopardy jurisprudence,” in asserting that a jury verdict of acquittal “rejects” facts.<sup>9</sup> “Acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.”<sup>10</sup> “An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt.”<sup>11</sup>

#### Consecutive Sentence Requirement Under 18 U.S.C. § 924(c)

In an opinion by Justice O’Connor in *United States v. Gonzales*,<sup>12</sup> the Supreme Court addressed the prohibition on concurrent sentences for convictions under 18 U.S.C. § 924(c), the statute for the offense of using or carrying a firearm in connection with a violent offense or a drug crime. The majority held that the statutory provisions mandating an additional five-year term of imprisonment that “shall [not] . . . run concurrently with any other term of imprisonment” means any other term of imprisonment, whether it be state or federal. The Court reversed the decision of the Tenth Circuit, which, in a split from the other circuits that addressed the issue, concluded that the statute must have been limited to cases involving prior federal sentences.<sup>13</sup> The Supreme Court held that there was no ambiguity in the text of the statute and “no basis in the text for limiting section 924(c) to federal sentences.”

#### Career Offender Guideline

In *United States v. LaBonte*, Justice Thomas authored an opinion resolving a circuit conflict about the validity of guideline Amendment 506.<sup>14</sup> The Court ruled that the amendment, which added commentary to the career offender guideline (§4B1.1), is “at odds with the plain language of [28 U.S.C.] § 994(h).” In that statutory provision, Congress directed the Commission to “assure” that prison terms for categories of offenders who commit a third felony drug offense or crime of violence be “at or near the maximum term authorized” by statute.

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<sup>9</sup> 117 S. Ct. at 636.

<sup>10</sup> 117 S. Ct. at 637.

<sup>11</sup> *Id.*

<sup>12</sup> 117 S. Ct. 1032 (1997).

<sup>13</sup> *United States v. Gonzales*, 65 F.3d 814 (10th Cir. 1995), *judgment vacated*, 117 S. Ct. 1032 (1997).

<sup>14</sup> 117 S. Ct. 1673 (1997).

The Court held that in using the phrase “maximum term authorized,” Congress meant the maximum term available for the offense of conviction, including any applicable statutory sentencing enhancements.<sup>15</sup> The enhanced penalty, which in this instance included an increase from 20 to 30 years’ imprisonment, is brought before the court by the prosecutor’s filing of a notice under 21 U.S.C. § 851(a)(1). The amendment to guideline 4B1.1’s commentary at note 2 had provided that the unenhanced statutory maximum should be used, in part because the unenhanced statutory maximum “represents the highest possible sentence applicable to all defendants in the category,” as section 851(a)(1) notices are not filed in every applicable case. The Supreme Court responded that “Congress surely did not establish enhanced penalties for repeat offenders only to have the Commission render them a virtual nullity.”<sup>16</sup> “[T]he phrase ‘at or near the maximum term authorized’ is unambiguous and requires a court to sentence a career offender ‘at or near’ the ‘maximum’ prison term available once all relevant statutory sentencing enhancements are taken into account.”<sup>17</sup> The Commission’s amended commentary is at odds with the plain language of the statute at 28 U.S.C. § 994(h), and therefore “must give way.”<sup>18</sup>

Justice Breyer, in a dissent joined by Justice Stevens and Justice Ginsberg, defended Amendment 506 as an appropriate implementation of the statutory scheme.

### **Certiorari Granted**

In *Almendez-Torres v. United States*,<sup>19</sup> the Court granted *certiorari* to decide whether subsection (b) of 8 U.S.C. § 1326 is a separate criminal offense or a sentence enhancement provision. In *Almendez-Torres*, the defendant pleaded guilty to reentry by an alien after deportation in violation of 8 U.S.C. § 1326. He was sentenced pursuant to section 1326(b)(2) as if he had pleaded guilty to reentry following a conviction of an aggravated felony, which provides a much more serious penalty – up to 20 years of imprisonment. The petition asks whether the sentencing court violated due process by applying the statute as a sentence enhancement rather than a separate offense requiring a separate charge.

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<sup>15</sup> 117 S. Ct. at 1679.

<sup>16</sup> 117 S. Ct. at 1678.

<sup>17</sup> 117 S. Ct. at 1679.

<sup>18</sup> 117 S. Ct. at 1677, citing *Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary “is authoritative unless it violates the Constitution or a federal statute”).

<sup>19</sup> 96 F.3d 1443 (5th Cir. 1996) (Table), published in full at 113 F.3d 515 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1333 (1997).

## Decisions of the United States Courts of Appeals

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### ***Post-Koon Appellate Departure Decisions***

In *Koon v. United States*,<sup>20</sup> the Supreme Court examined the standard of review to be applied by appellate courts in reviewing district court guideline departure decisions. In *Koon*, the Court unanimously joined in Justice Kennedy's opinion that an appellate court should not review the district court's departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion. The Court recognized that the district court occasionally would be confronted with questions of law when deciding whether to depart. It concluded that labeling parts of the review as *de novo* would not be necessary even in those scenarios because "the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."<sup>21</sup>

When the Supreme Court issued its decision in *Koon v. United States*, it seemed that the case had the potential to alter dramatically court practices for departures. More than a year later, it is still too early to accurately gauge its effect (see Chapter Five for further discussion). There have been no dramatic changes in the number or types of departures.<sup>22</sup> While no conflicts have emerged in the manner in which *Koon* is interpreted, the departure rates of various circuits are still not converging.<sup>23</sup>

In the sampling of departure cases discussed below, appellate courts, applying the *Koon* framework, have reversed or affirmed departure sentences based on numerous factors.

Appellate courts **reversed downward departures** in the following cases:

- *Single Act of Aberrant Behavior*. The Eighth Circuit found a departure for aberrant behavior unwarranted because the sentencing court failed to consider the structure and theory of the relevant guidelines and did not adequately analyze how and why specific conduct by the defendant was allegedly aberrant.<sup>24</sup>
- *Single Act of Aberrant Behavior*. The Eleventh Circuit reversed a downward departure in which the district court believed that the defendant's embezzlement was a single act of aberrant behavior and that "society has no interest in seeing defendant incarcerated." The appellate court noted that the district court did not apply its analysis to the "aberrant behavior" finding, and stated that whether society has an interest in incarcerating a particular defendant is a matter addressed by the guidelines

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<sup>20</sup> 116 S. Ct. 2035 (1996).

<sup>21</sup> 116 S. Ct. 2035 at 2048.

<sup>22</sup> P. Hofer, W. Martin, and P. Montgomery, "Departure Rates and Reasons After *Koon v. U.S.*," 9 *Federal Sentencing Reporter* 284 (1997).

<sup>23</sup> *Id.*

<sup>24</sup> *United States v. Kalb*, 105 F.3d 426 (8th Cir. 1997).

generally and is irrelevant to the question of whether a particular defendant's conduct was aberrant.<sup>25</sup>

- *Mitigating Role.* The Third Circuit reversed a downward departure that was based on a finding that the defendant's conduct (possession of child pornography) was analogous to a situation qualifying for a mitigating role reduction. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise.<sup>26</sup>
- *Similarly Situated Codefendants.* The Fourth Circuit reversed a downward departure that was based on the comparatively lenient treatment given the defendant's similarly situated White codefendants. The district court had stated that the decreased sentence more accurately reflected the defendant's culpability in the conspiracy. According to the appellate court, the disparity cited by the district court resulted from a proper exercise of prosecutorial discretion in selecting the charges to bring against each codefendant.<sup>27</sup>
- *Threat to Public Safety.* According to the District of Columbia Circuit, the district court, in departing from the guidelines, had abused its discretion in concluding that the defendant was not a threat to public safety on the basis that the defendant had not actually injured law enforcement officers despite numerous opportunities. The appellate court found that the defendant had a pattern of violently resisting arrest, taking hostages, and making armed threats against law enforcement.<sup>28</sup>
- *Family Ties.* The Fourth Circuit concluded that the defendant's involvement with his children, including his decision to keep the baby he fathered out of wedlock, was not "sufficiently extraordinary" to support a family ties downward departure.<sup>29</sup>
- *Family Ties.* The Tenth Circuit reversed a departure from a range of 97 to 121 months down to the statutory minimum of 60 months. The district court had based the departure on the fact that the defendant's wife had been killed in an automobile accident, leaving behind three children, ages six, eight, and eleven. The appellate court held that defendant had not shown that these circumstances were substantially different than those facing the minor children of any single parent about to be incarcerated.<sup>30</sup>

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<sup>25</sup> *United States v. Bush*, 126 F.3d 1298 (11th Cir. 1997).

<sup>26</sup> *United States v. Romualdi*, 101 F.3d 971 (3d Cir. 1996).

<sup>27</sup> *United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997).

<sup>28</sup> *United States v. Atkins*, 116 F.3d 1566 (D.C. Cir.), *cert. denied*, 118 S. Ct. 430 (1997).

<sup>29</sup> *United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997).

<sup>30</sup> *United States v. Rodriguez-Velarde*, 127 F.3d 966 (10th Cir. 1997).

Appellate courts **remanded downward departures** in the following cases:

- *Diminished Mental Capacity.* According to the Fourth Circuit, because the defendant failed to demonstrate that her emotional problems were causally related to the crime or that she had an inability to process information, there was no support for a seven-level downward departure for diminished capacity.<sup>31</sup>
- *Time Served for the Defendant's Expired Sentence.* According to the Fourth Circuit, a sentencing court cannot depart downward and reduce a defendant's sentence for drug conspiracy based on the time served for a prior drug conspiracy conviction despite the fact that the prior conviction served as predicate conduct for the subsequent conviction.<sup>32</sup>
- *Seriousness of Conviction.* The Ninth Circuit remanded a downward departure that was based on the finding that the defendant's aggravated felony conviction was not serious enough to warrant a 16-level increase. According to the court, a sentencing court does not have the legal authority to consider the underlying facts of the defendant's aggravated felony conviction as a basis for departure. The court concluded that the Sentencing Commission adequately considered the nature of the underlying convictions when it formulated guideline 2L1.2 and determined which type of prior offenses warranted a 16-level adjustment.<sup>33</sup>
- *Significant Physical or Psychological Harm to the Victim.* According to the Tenth Circuit, the sentencing court erred in finding no harm to the victim. The child in this case required numerous therapy sessions and the harm suffered appeared to be typical of offenses involving molestation of children under the age of 12. Further, lack of physical harm is clearly within the heartland of the offense. The court concluded that penetration by any means would have been a sexual act that would constitute criminal sexual abuse and would be covered by guideline 2A3.1.<sup>34</sup>
- *Aberrant Behavior.* The Eleventh Circuit found that, in sentencing a defendant convicted of importing heroin, the district court made insufficient factual findings to support a downward departure; the defendant had presented no evidence at the sentencing hearing and there had been no trial because defendant had entered into a plea agreement. The appellate court explained that the sentencing court cannot depart from the guidelines because it believes the mandated sentence is excessive. The district court was instructed to: (1) hold a new hearing, (2) make explicit findings of fact with regard to the circumstances meriting the departure, (3) state

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<sup>31</sup> *United States v. Withers*, 100 F.3d 1142 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1282 (1997).

<sup>32</sup> *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 2468 (1997).

<sup>33</sup> *United States v. Rios-Favela*, 118 F. 3d 653 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998).

<sup>34</sup> *United States v. Meacham*, 115 F.3d 1488 (10th Cir. 1997).

whether departure under such circumstances is consistent with the guidelines' goals, and (4) justify the extent of the departure.<sup>35</sup>

Appellate courts **affirmed downward departures** in the following cases:

- *Prejudicial Government Conduct.* The Ninth Circuit found that the prejudice the defendant encountered during plea negotiations was significant enough to take the case out of the heartland of the guidelines.<sup>36</sup>
- *Guideline Sentence Exaggerated Defendant's Conduct and Culpability.* According to the Tenth Circuit, the evidence revealed that the defendant had been building fires to keep warm and had not possessed a clear intent to commit arson.<sup>37</sup>
- *Family Ties.* The Second Circuit affirmed a downward departure that was based on a finding that the hardship on the defendant's family caused by his incarceration would be exceptional. According to the appellate court, though the facts could have been construed differently, "we may not simply substitute our judgment for [that of the district] court."<sup>38</sup>
- *Defendant's Infirmities.* The Tenth Circuit affirmed a downward departure from the career offender enhancement based on the defendant's age, ill health, and the fact that one of the career offender predicate convictions (for possession of marijuana with intent to distribute) was almost ten years old and had resulted in a relatively lenient sentence. According to the court, the sentencing court did not rely on any impermissible departure factors. The defendant was 64 at the time of sentencing on the instant offense (distribution of cocaine) and when released would be nearly 70 years old. The appellate court concluded that in light of the defendant's age and well-documented infirmities, the district court was within its discretion in concluding that the defendant was less likely to commit future crimes than the ordinary defendant categorized as a career offender.<sup>39</sup>

Appellate courts **affirmed upward departures** in the following cases:

- *Adequacy of Criminal History.* The Tenth Circuit affirmed an upward departure that was based on a finding that the defendant's status as a career offender did not adequately represent the defendant's criminal past. According to the appellate court,

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<sup>35</sup> *United States v. Onofre-Segarra*, 126 F.3d 1308 (11th Cir. 1997).

<sup>36</sup> *United States v. Lopez*, 106 F.3d 309 (9th Cir. 1997).

<sup>37</sup> *United States v. Goodluck*, 103 F.3d 145 (Table, text in WL, No. 95-2099) (10th Cir. 1996) (unpublished).

<sup>38</sup> *United States v. Galante*, 111 F.3d 1029 (2d Cir. 1997).

<sup>39</sup> *United States v. Collins*, 122 F.3d 1297 (10th Cir. 1997).

although the defendant's criminal history score was relatively low (16), the sentencing court properly added three points for offenses not used for career offender status and not counted in the criminal history score because they occurred outside the applicable time period. The sentencing court also did not err by adding four points for prior violent offenses not counted because they were consolidated for sentencing, and defendant's juvenile and adult records of robberies and burglaries were similar to current offenses involving series of robberies.<sup>40</sup>

- *Adequacy of Criminal History.* The Eighth Circuit affirmed an upward departure that was based on a finding that the defendant's criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct. The defendant participated in approximately 16 burglaries for which neither state nor federal charges were ever brought.<sup>41</sup>
- *Extreme Psychological Injury.* The Fifth Circuit affirmed an upward departure that was based on a finding that the defendant's credit card scheme caused substantial harm to the victims, including years of harassment by creditors, forced court appearances, forgery charges, and constant fear of arrest.<sup>42</sup>
- *Use of Computer to Seduce Minor.* The Second Circuit affirmed an upward departure that was based on a finding that the defendant's use of a computer to transmit child pornography over the Internet "to seduce a minor to engage in sexual activity" was outside the heartland of cases covered by the sentencing guidelines.<sup>43</sup>
- *Public Welfare.* The First Circuit affirmed an upward departure that was based on the defendant's persistent ten-year history of violent antisocial behavior and dangerous gang-related conduct underlying the offense. The court concluded that shooting indiscriminately into crowded areas and discarding weapons in residential neighborhoods threatened public safety and warranted an upward departure.<sup>44</sup>
- *Disruption of Governmental Functions.* The Third Circuit affirmed an upward departure that was based on underlying counts dismissed pursuant to a plea agreement. The district court found that the defendant's involvement in a large police corruption scandal caused a significant disruption of governmental functions within the meaning of policy statement 5K2.7 and warranted an upward departure.<sup>45</sup>

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<sup>40</sup> *United States v. Lowe*, 106 F.3d 1498 (10th Cir.), *cert. denied*, 117 S. Ct. 2494 (1997).

<sup>41</sup> *United States v. Collins*, 104 F.3d 143 (8th Cir. 1997).

<sup>42</sup> *United States v. Wells*, 101 F.3d 370 (5th Cir. 1996).

<sup>43</sup> *United States v. Delmarle*, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1097 (1997).

<sup>44</sup> *United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996).

<sup>45</sup> *United States v. Baird*, 109 F.3d 856 (3d Cir.), *cert. denied*, 118 S. Ct. 243 (1997).



- *Affirmative Steps to Conceal.* The Fifth Circuit affirmed an upward departure that was based on the conduct of a defendant who pleaded guilty to charges involving possession, transfer, and manufacture of illegal weapons. The court found that the upward departure was not an abuse of discretion in that the defendant took affirmative steps to conceal illegal activity and ownership of illegal firearms and made a videotape to teach others how to make silencers outside of the government's regulatory scheme.<sup>46</sup>
- *Torturing the Victim.* The Sixth Circuit concluded that the defendant's conduct, which formed part of a count dismissed pursuant to a plea agreement, could still be considered as a basis for an upward departure.<sup>47</sup>
- *Degrading Nature of Sexual Assaults.* According to the Eleventh Circuit, the frequency and viciousness of the assaults were degrading and insulting and justified a departure from the guidelines.<sup>48</sup>
- *Significant Personal Injury and Property Damage.* The Ninth Circuit concluded that the extent of the district court's departure was not an abuse of discretion if the court had expressly relied on such approved grounds for departure as the nature of the injuries to the victims and significant property damage to a United States Post Office.<sup>49</sup>

Appellate courts **remanded** to permit district courts to consider departure in the following cases:

- *Post-Offense Rehabilitation.* The district court, prior to *Koon*, revealed that its refusal to consider a downward departure for post-offense rehabilitation was because it believed that the law of the circuit prohibited it from doing so. According to the Fourth Circuit, the *Koon* decision effectively overruled the circuit's prior decision that post-offense rehabilitation can never form a proper basis for departure. Because post-offense rehabilitation is taken into account in the acceptance of responsibility guideline, a departure based on post-offense rehabilitation is permitted "only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility is granted."<sup>50</sup>
- *Diminished Capacity.* The district court failed to make a factual finding regarding the possibility that the defendant suffered from a volitional impairment which prevented him from controlling his behavior or conforming to the law. The Third Circuit

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<sup>46</sup> *United States v. Arce*, 118 F.3d 335 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 705 (1998).

<sup>47</sup> *United States v. Cross*, 121 F.3d 234 (6th Cir. 1997) (No. 96-5218).

<sup>48</sup> *United States v. Lewis*, 115 F.3d 1531 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 733 (1998).

<sup>49</sup> *United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 851 (1998).

<sup>50</sup> *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997).

agreed with the defendant that the definition of “significantly reduced mental capacity” contained a volitional component not adequately considered by the district court when determining the defendant’s eligibility for a downward departure.<sup>51</sup>

### ***The “Safety Valve”***

The courts of appeals have continued to refine issues surrounding application of the “safety valve” (as 18 U.S.C. § 3553(f) and guideline 5C1.2 are collectively known). The safety valve provides relief from mandatory minimum sentences for certain non-violent, first-time offenders convicted of specific drug offenses. To qualify for the safety valve, defendants must meet listed criteria; much of the litigation on safety valve issues was focused on the interpretation of these criteria.

The Fifth Circuit in *United States v. Wilson* examined the requirement that the defendant not use violence or possess a firearm in connection with the offense.<sup>52</sup> The court held that in determining a defendant’s eligibility for the safety valve, guideline 5C1.2(2) allows for consideration of only the defendant’s conduct, not the conduct of his co-conspirators. The court stated that the commentary limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused. The court noted that this language omits the concept of “relevant conduct” that includes acts and omissions undertaken in a “jointly undertaken criminal activity.” Therefore, as it was the defendant’s co-conspirator, and not the defendant himself, who possessed the gun during the conspiracy, the defendant was eligible to receive the benefit of the safety valve.<sup>53</sup>

The Third Circuit in *United States v. Wilson*<sup>54</sup> held that as long as firearm possession by the defendant was part of the same course of conduct as the offense of conviction, the defendant need not be in possession of a firearm at the time of arrest in order to be disqualified under guideline 5C1.2(2). The defendant had argued that his drug dealing prior to the current arrest was not part of the same course of conduct, and because he did not possess a firearm during the offense of conviction, the district court should have applied the safety valve provision. The court disagreed and concluded that the record showed that the defendant’s drug dealing activities in the year preceding his arrest were within the definition of “same course of conduct.” The court also found that the defendant’s involvement with firearms furthered his drug enterprise, and concluded that the defendant’s involvement with firearms was “connected” to his prior drug dealing. These findings of fact supported the district court’s conclusion that the defendant possessed a firearm in connection with his prior drug dealing, and thus was conduct relevant to the offense of conviction for purposes of the safety valve provision. Therefore, the district court correctly concluded that the defendant failed to meet the second requirement of the safety valve provision.

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<sup>51</sup> *United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997).

<sup>52</sup> 105 F.3d 219 (5th Cir. 1997).

<sup>53</sup> *See also In Re Sealed Case*, 105 F.3d 1460 (D.C. Cir. 1997) (co-conspirator liability cannot establish possession under the safety valve).

<sup>54</sup> 106 F.3d 1140 (3d Cir. 1997).

Another safety valve requirement, that the defendant truthfully provide to the government all information and evidence he has concerning the offense, was addressed in *United States v. Maduka*.<sup>55</sup> The court held that for purposes of this requirement, a defendant convicted of drug distribution must provide information about “the immediate chain of distribution,” even if he was not convicted of conspiracy to distribute. The court added that to receive the benefit of the safety valve, the defendant must provide names and information regarding other active participants.

Similarly, in *United States v. Myers*<sup>56</sup> the court held that this provision requires disclosure of everything the defendant knows about his own actions and those participating with him. The defendant argued that he qualified because he disclosed all he knew about his own actions. The circuit court found that this information was not sufficient because the defendant refused to provide other information such as the names of his buyers or others connected to his operation. Because he failed to show that he disclosed all information known to him, regardless of whether or not it was relevant or useful to the government’s investigation, the defendant failed to meet his burden of proving his eligibility for the safety valve.

In another “truthful information” case,<sup>57</sup> the court held that the safety valve can apply even after a jury finds the defendant guilty. The district court had applied the safety valve, and the government appealed, contending that the guilty verdict precluded a finding of truthfulness. The court of appeals concluded that the safety valve could still apply even if the defendant had professed all along that he did not “know” there were drugs hidden in his suitcase. The court stated that the sentencing court had access to more information than the jury and found that the defendant did indeed truthfully tell all he “knew” to the government “at the time.”

In *United States v. Cruz*,<sup>58</sup> the Eleventh Circuit held that, although a district court decision not to depart from the guideline range ordinarily is not reviewable on appeal, a decision denying the benefits of the safety valve is reviewable. The *Cruz* court explained that the application of the safety valve does not result in a departure from the guideline range. Rather, its application allows a defendant to be sentenced within the guideline range by granting relief from the minimum sentence mandated by statute. Additionally, because 18 U.S.C. § 3553(f) directs the court to apply the sentencing guidelines without regard to the statutory minimum if the same five criteria are met, a sentence that wrongly failed to apply the safety valve would be imposed in violation of law. Thus, the court held that it had the jurisdiction to review the defendant’s claim that the district court erred in denying relief under the safety valve.

Similarly, the Tenth Circuit held that district courts must make a determination as to whether or not defendants meet the requirements under section 3553(f).<sup>59</sup> The district court had declined to address whether the defendant met the five criteria listed in section 3553(f) and held that whether the safety valve provision should apply is a matter within its discretion. The circuit court

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<sup>55</sup> 104 F.3d 891 (6th Cir. 1997).

<sup>56</sup> 106 F.3d 936 (10th Cir.), *cert. denied*, 117 S. Ct. 2446 (1997).

<sup>57</sup> *United States v. Sherpa*, 97 F.3d 1239 (9th Cir. 1996).

<sup>58</sup> 106 F.3d 1553 (11th Cir. 1997).

<sup>59</sup> *United States v. Myers*, 106 F.3d 936 (10th Cir.), *cert. denied*, 117 S. Ct. 2446 (1997).

disagreed, stating that the district court's holding was at odds with the plain language of the statute, which directs the court to disregard the statutory minimum if the defendant meets the five criteria. The circuit court reasoned that the use of "shall" in the statute indicates mandatory intent; therefore, district courts must determine whether or not defendants meet the requirements under section 3553(f).