CHAPTER THREE

Legal Issues

Introduction

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 chapter addresses some of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during fiscal year 2002.

United States Supreme Court Decisions on Sentencing Issues

This year, the Supreme Court decided four cases addressing issues affecting criminal sentencing. Three of the cases involved clarification or application of the Supreme Court's opinion in *Apprendi v. New Jersey*,[1] which was decided last term. The fourth case involved a defendant's waiver of criminal discovery if the government would recommend downward departure as part of the plea bargain.

In *Harris v. United States*,[2] the Supreme Court, in a 5-4 decision, held that the provision in 18 U.S.C. § 924(c)(1)(A) that provides for an increased mandatory *minimum* penalty if the defendant "brandished" a firearm does not require proof beyond a reasonable doubt under *Apprendi.* In *Apprendi*, the Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond that prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.[3] Thus, according to *Apprendi*, if a fact is an "element of the offense" that increases the statutory *maximum* penalty, then it must be alleged in the indictment and proved beyond a reasonable doubt. However, 14 years before *Apprendi*, in *McMillan v. Pennsylvania*,[4] the Supreme Court had held that "statutory provisions" that subjected defendants to increased mandatory *minimum* penalties were sentencing factors that may be

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1 530 U.S. 466 (2000).

2 122 S. Ct. 2406 (2002).

3 *Apprendi*, 530 U.S. at 490.

4 477 U.S. 79 (1986).

determined by a preponderance of the evidence.[5] The question presented to the Court in *Harris* was whether *McMillan* stands after *Apprendi.*[6]

Harris was arrested for selling illegal narcotics out of his pawnshop with an unconcealed semiautomatic pistol at his side. He was charged with violating federal drug and firearm laws, including 18 U.S.C. § 924(c). In drafting the indictment, the government proceeded on the assumption that section 924(c)(1)(A) sets forth a single crime and that brandishing is a sentencing factor to be determined by the judge. Thus, brandishing was not charged in the indictment.[7] The defendant was found guilty after a bench trial. The presentence report recommended a seven-year minimum sentence because he had brandished the firearm. The district court agreed and sentenced defendant accordingly, and the Fourth Circuit affirmed.[8]

In determining whether a fact is an "element of a crime" or a "sentencing factor," the Court first looked at the structure of the statute. It noted that Congress usually lists all offense elements "in a single sentence" and separates the sentencing factors in subsections, which is what it did in 18 U.S.C. § 924(c). Moreover, tradition and past congressional practice supported this textual reading of the statute. The term "brandished" had never appeared in any federal offense-defining provision prior to the enactment of 18 U.S.C. § 924(c)(1)(A). Rather, the term "brandished" had only been used in the U.S. sentencing guidelines, giving further support that it was intended as a sentencing factor.[9] Accordingly, the government need only prove that a defendant "brandished" a firearm by a preponderance of the evidence. Thus, the Supreme Court reaffirmed *McMillan,* notwithstanding its subsequent opinion in *Apprendi.*

In *Cotton v. United States,*[10] the Supreme Court, in a unanimous decision, held that *Apprendi* defects in an indictment are not jurisdictional in nature and thus do not automatically require reversal of a conviction or sentence. Defendants were charged with conspiring to distribute and to possess with intent to distribute a "detectable" (but unspecified) amount of powder and cocaine base. They were convicted and were sentenced based on the district court's drug quantity finding of at least 50 grams of cocaine base that implicated the enhanced penalties of 21 U.S.C. § 841(b).[11] The district court did not sentence the defendants under 21 U.S.C. § 841(b)(1)(c)), which would have provided a statutory maximum penalty of 20 years, but instead implicated the enhanced penalties of 21 U.S.C. § 841(b), which provided a sentence of up

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5 *Id.* at 91.

6 *Harris,* 122 S. Ct. at 2410.

7 *Id.* at 2410-11.

8 *Id.*

9 *Id.* at 2411-12.

10 122 S. Ct. 1781 (2002).

11 *Id.* at 1782.

to life imprisonment. Two of the defendants were sentenced to 30 years' imprisonment, while those remaining received life imprisonment.[12] Neither defendant objected in the trial court.

While the appeal was pending in the Fourth Circuit, the Supreme Court decided *Apprendi.* On appeal, the defendants argued that the court was deprived of jurisdiction because the indictment was defective due to the omission of a fact that enhanced the statutory maximum. They further argued that their sentences were invalid under *Apprendi* because the issue of drug quantity was neither alleged in the indictment nor before the jury.[13] The Fourth Circuit reviewed for plain error and held that the district court had no jurisdiction to sentence based on information not contained in the indictment.[14] The Supreme Court reversed the Fourth Circuit and held that a defective indictment does not by its nature deprive a court of jurisdiction. In doing so, the Court reversed that portion of *Ex parte Bain*[15] that held to the contrary. The Court also determined that plain error analysis could be applied to *Apprendi* violations and that reversal of the convictions were not required here. Although the error was plain, it did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[16]

In *Ring v. Arizona*,[17] the Supreme Court, in a 7-2 decision, held that, in light of *Apprendi*, juries, and not judges, must decide the aggravating factors leading to a sentence of death. The defendant was convicted of felony murder occurring in the course of armed robbery.[18] Under Arizona law, the defendant could not be sentenced to death, the statutory maximum penalty for first degree murder, unless further findings were made by a judge conducting a separate sentencing hearing. The judge at that stage must determine the existence or non-existence of statutorily enumerated "aggravating circumstances" or any "mitigating circumstances."[19] The death sentence may be imposed only if the judge finds at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. Because the jury convicted the defendant of felony murder, not premeditated murder, the defendant would be eligible for the death penalty only if he was, *inter alia*, the victim's actual killer.[20] Citing accomplice testimony at the sentencing hearing, the judge found that the defendant was the killer. The judge then found two aggravating factors (one of them, that the offense was committed for pecuniary

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[12] *Id.* at 1784.

[13] *Id.*

[14] 261 F.3d 397 (2001).

[15] 121 U.S. 1 (1887).

[16] *Cotton,* 122 S. Ct. at 1785-86.

[17] 122 S. Ct. 2428 (2002).

[18] *Id*. at 2432.

[19] *Id*. at 2434.

[20] *Id*. at 2435.

gain) as well as one mitigating factor (the defendant's minimal criminal record) and ruled that the latter did not call for leniency. The defendant was sentenced to death.[21] On appeal, the defendant argued that Arizona's sentencing scheme violated the Sixth Amendment's jury trial guarantee by entrusting to a judge the finding of a fact raising the defendant's maximum penalty. The Arizona Supreme Court, recognizing that it was bound by the Supremacy Clause to apply *Walton v. Arizona*,[22] rejected the defendant's constitutional attack.[23] It upheld the trial court's finding on the pecuniary gain aggravating factor, reweighed that factor against the defendant's lack of a serious criminal record, and affirmed the death sentence.[24] The Supreme Court granted the defendant's writ of certiorari to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*.[25]

The defendant raised before the U.S. Supreme Court the issue whether, in light of *Apprendi*, the finding of the necessary aggravating factors should be treated as elements of a capital offense and therefore found by a jury beyond a reasonable doubt, or remain a sentencing enhancement. The Supreme Court stated that *Walton* and *Apprendi* were irreconcilable and overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.[26] It held that because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury beyond a reasonable doubt.[27]

In *United States v. Ruiz*,[28] the Supreme Court, in a unanimous decision, held that the Constitution does not require a prosecutor to disclose material impeachment information prior to entering a plea agreement with a criminal defendant.[29] After immigration agents found marijuana in the defendant's luggage, federal prosecutors offered the defendant a "fast track" plea bargain wherein defendant, in exchange for a reduced sentence recommendation, waived indictment, trial, and an appeal, and also waived the right to receive impeachment information

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[21] *Id.* at 2435-36.

[22] 497 U.S. 639 (1990)(the Supreme Court upheld Arizona's sentencing scheme against a charge that it violated the Sixth Amendment and ruled that aggravating factors were not "elements of the offense"; they were "sentencing considerations" guiding the choice between life and death).

[23] 200 Ariz. 267, 280, 25 P.3d 1139, 1152 (2001).

[24] 122 S. Ct. at 2436.

[25] *Id.*

[26] *Id.* at 2443.

[27] *Id*. at 2437-43.

[28] 122 S. Ct. 2450 (2002).

[29] *Id.* at 2451.

relating to any informants or other witnesses and information supporting any affirmative defense she could raise if she went to trial (*i.e., Brady* and *Giglio* material).[30] The prosecutors withdrew their offer because the defendant would not agree to waive criminal discovery. The defendant ultimately pled guilty without a plea agreement and, at sentencing, asked the judge to grant her the same downward departure that the government would have recommended had she accepted the plea bargain. The government opposed her request, and the district court denied it.[31] On appeal, the Ninth Circuit vacated the district court's sentencing determination, concluding that the defendant was entitled to criminal discovery before entering into a plea agreement."[32] Upon remand to the district court, the government sought certiorari due to the serious adverse practical implications of the Ninth Circuit's constitutional holding.[33] The question presented was whether the Fifth and Sixth Amendments require the government to disclose criminal discovery prior to entering into a binding plea agreement with a defendant.

At the outset, the Court recognized that a defendant gives up several constitutional guarantees when he or she pleads guilty, including the right to a fair trial. Given the seriousness of this waiver, the Constitution, among other things requires that the waiver be "voluntary." Impeachment evidence and information regarding affirmative defenses, however, relate to the fairness of a trial, rather than whether a plea is voluntary.[34] Moreover, such information may be of limited value to a defendant since its significance may well depend upon the defendant's own independent knowledge of the prosecution's potential case, a matter that the Constitution does not require prosecutors to disclose.[35] Yet, the added burden of providing such information during plea bargaining could seriously interfere with the government's interest in securing those guilty pleas that are factually justified, desired by defendants, and that help secure the efficient administration of justice.[36] The Court could not "say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit."[37] Thus, the Court concluded that the Constitution does not require the government to disclose material impeachment evidence or information

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[30] *Id.* See *Brady v. Maryland*, 373 U.S. 83, 87 (1963)(due process requires prosecutors to "avoid . . . an unfair trial" by making available "upon request" evidence "favorable to an accused . . . where the evidence is material either to guilt or to punishment"); *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("exculpatory evidence includes 'evidence affecting' witness credibility," where the "witness' 'reliability' is likely determinative of guilt or innocence.").

[31] *Ruiz*, 122 S. Ct. at 2451.

[32] *Id.* at 2453 (citing *United States v. Ruiz*, 241 F.3d 1165-66 (9th Cir. 2001)).

[33] *Id.* at 2454.

[34] *Id.* at 2455, 2457.

[35] *Id.* at 2455-56.

[36] *Id.* at 2456.

[37] *Id.* at 2457.

regarding any "affirmative defense" prior to entering a plea agreement with a criminal defendant.[38]

Decisions of the United States Courts of Appeals

Post-Apprendi Appellate Decisions

In *Apprendi v. New Jersey*,[39] the Supreme Court held that the Due Process Clause of the U.S. Constitution requires that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury (or a judge in the case of a bench trial) and proved beyond a reasonable doubt."[40] In applying *Apprendi,* the courts of appeal have focused this year on the constitutionality of 21 U.S.C. § 841 and various sentencing guideline enhancements.

Constitutionality of 21 U.S.C. § 841

The Second Circuit, in *United States v. Outen*,[41] held that the federal drug statute was not unconstitutional on its face. The court agreed with the Seventh Circuit in *United States v. Brough*[42] that "it makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as section 841 does), or even whether they are scattered across multiple statutes."[43] The court concluded that "there is nothing in § 841—nor is there usually anything in the federal criminal statutes—which specifies a division of responsibility between judge and jury as to drug quantity."[44] The court therefore rejected the defendant's constitutional challenge.[45]

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38 *Id.*

39 530 U.S. 466 (2000).

40 *Id.* at 490.

41 286 F.3d 622 (2d Cir. 2002).

42 243 F.3d 1078 (7th Cir. 2001).

43 286 F.3d 622 (2d Cir. 2002) (citing *United States v. Brough*, 243 F.3d 1078, 1079 (7th Cir. 2001)).

44 *Id.* at 636.

45 *Id.*

Sentencing Guidelines Enhancements

The Second Circuit, in *United States v. Norris*,[46] held that requirements of *Apprendi* do not apply to sentencing guidelines enhancements that determine a sentence that is within the applicable statutory maximum and that would otherwise be above the applicable statutory minimum. The defendant pled guilty to a count charging him with conspiring with others to distribute, and possess with intent to distribute, five or more kilograms of cocaine in violation of 21 U.S.C. §§ 846, 841 (b)(1)(A). The presentence report recommended three enhancements above the base offense level of 32, two additional levels for drug quantity determined, two levels for possession of a firearm, and two more levels because the defendant had supervised the criminal activity of one of his partners.[47] With the three-level reduction for acceptance of responsibility, the PSR's adjusted offense level was 35, with a criminal history category of II, which resulted in a sentencing range of 188-235 months.[48] Reasoning that *Apprendi* applied to guideline enhancements, the district court concluded at sentencing that the applicable guideline range for the defendant was 97-121 months, based on the unenhanced offense level, and adjusted only for the acceptance of responsibility reduction.[49] Recognizing that the statutory minimum for the defendant was ten years, a sentence of ten years was imposed.[50]

On appeal, the government contended that the decisions of *United States v. Garcia* [51] and *United States v. White*[52] establish that "*Apprendi* has no application to the guideline enhancements" that the court declined to apply. Citing *United States v. Guevera*,[53] the case upon which the defendant made his argument, the court concluded that "nothing in *Guevera* applies *Apprendi* to all findings that increase a sentence above an otherwise applicable guideline range."[54] *Apprendi* itself governs if a factual determination triggers a mandatory minimum sentence that is higher than the top of the guidelines range that would have been used in the absence of such

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46 281 F.3d 357 (2d Cir. 2002).

47 *Id*. at 359.

48 *Id.*

49 *Id.* at 360.

50 *Id.*

51 240 F.3d 180, 183 (2d Cir. 2001).

52 240 F.3d 127, 136 (2d Cir. 2001).

53 277 F.3d 111 (2d Cir. 2001) (held that if drug quantity is used to trigger a mandatory minimum sentence that exceeds the top of the guideline range that the district court would otherwise have calculated (based on the court's factual findings, with or without departures), that quantity must be charged in the indictment and submitted to the jury).

54 281 F.3d 357, 360 (2d Cir. 2002).

determination.[55] The court noted that, by contrast, the applicable guidelines range for the defendant, without any of the enhancements recommended by the PSR, was 97-121 months and that the top of that applicable range was above the mandatory minimum sentence of 120 months. The court ruled that *Guevera* does not require applying *Apprendi* to the defendant's sentencing because the enhancements that the court declined to adopt would not have triggered a mandatory minimum sentence, which was already applicable without any of the enhancements.[56]

Section 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years)

In *United States v. Root*,[57] the defendant was convicted of one count of attempting to persuade a minor to engage in sexual activity for which he could be charged with a criminal offense, in violation of 18 U.S.C. § 2422(b) and one count of traveling in interstate commerce for the purpose of engaging in a sexual act with a minor in violation of 18 U.S.C. § 2423(b).[58] The defendant was a 47-year-old male who contacted "Jenny" (an undercover agent purporting to be a 13-year-old girl) in an Internet chat group, sent her sexually explicit instant messages over a three-day period, and set up a rendezvous meeting. He was sentenced to concurrent terms of 40 months' imprisonment. On appeal, the defendant challenged an enhancement under USSG §2A3.2(b)(2)(B) of two levels for unduly influencing a minor to engage in prohibited sexual conduct. The application of this guideline provision presented an issue of first impression in any appellate court.[59] First, the court determined that "victim" included an undercover officer who represented that she was under the age of 16.[60] It explained that, in determining if an offender exercised "undue influence" over a minor (and the victim is not an actual minor), the court must focus on the *offender's* conduct. The district court may look at a variety of factors, including whether the defendant displayed an abuse of superior knowledge, influence and resources. In addition, a court may also employ the rebuttable presumption provided in Application Note 5, *to wit*, that a victim has been unduly influenced for the purposes of section 2A3.2(b)(2)(B) when "a participant is at least ten years older than the victim."[61] In applying this provision, the court looks to the age of the hypothetical victim (age 13) rather than the actual age of the undercover officer.[62] The court affirmed the district court's finding that the defendant did not present sufficient evidence to rebut the presumption. In fact, the defendant's conduct provided sufficient

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55 *Id.*

56 *Id.* at 361.

57 296 F.3d 1222 (11th Cir. 2002).

58 *Id.* at 1226-27.

59 *Id.* at 1232.

60 *Id.* (quoting USSG §2A3.2, comment. (n.1) and App. C, amend. 592).

61 *Id.* at 1233 (citing USSG §2A3.2, comment. (n.5)).

62 *Id.* at 1235.

evidence to support the district court's finding of undue influence. In dissent, Judge Kennedy stated that he thought the section 2A3.2(b)(2)(B) enhancement should only apply if criminal sexual activity had taken place.[63]

Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)

Calculation of Loss

In *United States v. Piggie,*[64] the Eighth Circuit held that, in calculating the amount of loss resulting from defendant's scheme to deprive universities of their rights to the "honest services" of college basketball players, the sentencing court properly included full losses of the universities, including forfeited scholarships, investigation costs, and fines. Between 1995 and 1999, Myron Piggie devised a scheme to assemble elite high school basketball players and compensate them for their participation on his traveling Amateur Athletic Union basketball team, known first as the Children's Mercy Hospital 76ers and later as the KC Rebels. The payments were designed to retain top athletes on his team, gain access to sports agents, obtain profitable sponsorship contracts, and forge ongoing relationships with players to his benefit when the athletes joined the NBA. Athletes participating in this scheme included Jaron Rush, Korleone Young, Corey Maggette, Kareem Rush, and Andre Williams. The defendant pled guilty to one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371.[65] In calculating loss under USSG §2F1.1,[66] the court explained that a district court uses either the amount of the *actual* loss suffered by the victims or the amount of loss the defendant *intended* to cause the victims, whichever is greater. The court rejected the defendant's argument that he did not intend any loss to the universities because if the scheme had gone as planned the payments to the players would never have been discovered and the universities would have incurred no loss. According to the court, the defendant *intended* to deprive the universities, their athletic conferences, and the NCAA of the intangible right to award scholarships to *amateur* players and maintain a system of *amateur* athletic competition.[67]

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[63] *Id.* at 1236-37.

[64] 303 F.3d 923 (8th Cir. 2002).

[65] *Id.* at 924.

[66] This guideline was consolidated with USSG §2B1.1 on November 1, 2001. USSG App. C, amend. 617.

[67] 303 F.3d at 927.

In *United States v. Holliman*,[68] the Eighth Circuit held that the district court correctly based its loss calculation on all vehicles, proven by a preponderance of the evidence, to have been stolen as part of the conspiracy, and not only the 13 vehicles listed in the overt acts of the indictment. The defendant was convicted of aiding and abetting and conspiracy to transport stolen vehicles in interstate commerce. The defendant objected to the loss calculation, arguing that it should have been based only upon the 13 stolen vehicles listed in the indictment. The court, applying USSG §1B1.3 (a)(1)(A) & (B), concluded that the defendant's sentence must take into account "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." The court cited USSG §2B1.1, comment. (n.3), which only requires the court to make a reasonable estimate of the loss, given the available information. The court concluded that, given the information available to the district court, the determination that the loss was between $70,000 and $120,000 was reasonable.[69]

Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking Drugs)

In *United States v. Morgan*,[70] the defendant pled guilty to conspiracy to possess and possession with intent to distribute ten grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD) in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(v), 846, and 18 U.S.C. § 2.[71] The Fifth Circuit held that, in determining the quantity of liquid LSD for purposes of USSG §2D1.1, a district court should include only that portion of the liquid that contains pure LSD and not the entire solution.[72] The court rejected the government's contention that the total amount of LSD solution should be counted because it falls under the definition of "mixture and substance." The guidelines explain that "mixture or substance" does not include materials that must be separated from the controlled substance before the controlled substance can be used.[73] Here, the solution does not need to be separated from the LSD before the LSD can be used.[74] Instead, the court focused on application note 16 to section 2D.1.1, which presumes a court will count only pure liquid LSD because it provides for an upward departure when, "[i]n the case of liquid LSD (LSD that has not been placed on a carrier

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[68] 291 F.3d 498 (8th Cir. 2002).

[69] *Id*. at 502.

[70] 292 F.2d 460 (5th Cir. 2002).

[71] *Id.* at 461.

[72] *Id.* at 463-64.

[73] USSG §2D1.1, comment. (n.1).

[74] 292 F.3d at 463-64.

medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense."[75] The court limited its holding, however, to application of the guidelines. For purposes of determining the applicability of a *statutory* mandatory minimum sentence, the entire liquid solution should be considered.[76]

Section 4B1.2 (Definition of Terms Used in Section 4B1.1, Career Offender Guideline)

In *United States v. Sun Bear*,[77] the district court concluded that the defendant's prior conviction for attempted theft of an operable vehicle was a "crime of violence" because it presents a serious potential risk of physical injury to another.[78] On appeal, the Eighth Circuit affirmed. First, it noted Eighth Circuit precedent that burglary of a commercial building is a "crime of violence" under the sentencing guidelines.[79] It then reasoned that although simple theft of a motor vehicle does not have injury or potential injury to others as one of its essential elements, the likely consequences of the offense do present serious potential risks. It determined that theft of a vehicle presents a likelihood of confrontation as great, if not greater, than burglary of commercial property, and it adds many of the dangerous elements of escape. It explained that the crime begins when a thief enters and appropriates a vehicle, a time when he is likely to encounter a returning driver or passenger, a passerby, or a police officer, any of whom may be intent on stopping the crime in progress. An encounter between the thief and such a person carries a serious risk of violent confrontation. Once the thief drives away with the vehicle, he is unlawfully in possession of a potentially deadly or dangerous weapon. While he is absconding in the vehicle, with which he will probably be unfamiliar, the thief may be pursued or perceive a threat of pursuit. Under the stress and urgency which will naturally attend his situation, the thief will likely drive recklessly and turn any pursuit into a high-speed chase with the potential for serious harm to police or innocent bystanders. These serious potential risks compel a holding that the theft or attempted theft of an operable vehicle is a crime of violence under section 4B1.2 of the guidelines.[80]

In dissent, Judge Melloy distinguished vehicular theft from commercial burglary. In a commercial burglary, there is always a risk that, unknown to the burglar, the building is occupied. Such surprise is unlikely in an attempted auto theft and, if present, would typically result in a more serious charge. He stated that all felons fear apprehension in the midst of and following their criminal conduct and all may act recklessly when attempting to evade capture. Thus, this

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[75] USSG §2D1.1, comment. (n.16).

[76] 292 F.3d at 465.

[77] 307 F.3d 747 (8th Cir. 2002).

[78] *Id.* at 749-50.

[79] *Id.* at 752.

[80] *Id.* at 752-53.

alone is insufficient to constitute the"serious potential risk" necessary to justify treating vehicular theft as a "crime of violence."[81]

Section 5D1.3 (Conditions of Supervised Release)

In *United States v. Sofsky*,[82] the Second Circuit vacated a condition of supervised release that prohibited a defendant, who had been convicted of receiving child pornography, from accessing a computer or the Internet without the approval of his probation officer. The court reasoned that although the condition of supervised release was "reasonably related" to several of the statutory factors governing the selection of sentences, it involved a "greater deprivation of liberty than was reasonably necessary" to achieve those purposes because computers and Internet access have become virtually indispensable in the modern world of communications and information gathering.[83] It noted, however, that other circuits have disagreed on this issue.[84]

In *United States v. Allen*,[85] the defendant pled guilty to tax evasion, *to wit*, making a false claim on a financial statement. On appeal, he challenged several conditions of supervised release as being overbroad. The First Circuit rejected all of his contentions. The court noted that the conditions that the defendant "provide the probation officer with access to any requested financial information" and limiting his ability to obtain credit are specifically recommended by the Sentencing Commission.[86] The court also upheld the condition prohibiting the defendant's possession of alcohol and his presence at establishments primarily serving alcohol because the record contained ample evidence of the defendant's alcohol abuse, including a conviction for driving under the influence of alcohol.[87] Lastly, the sentencing court did not impermissibly delegate judicial authority when it ordered the defendant to "participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer." The court noted that the sentencing court did not delegate to the probation officer the discretion of whether to require the defendant to participate

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81 *Id.* at 755-56.

82 287 F.3d 122 (2d Cir. 2002).

83 *Id.* at 126 (quoting 18 U.S.C. § 3583(d)).

84 *Id. Compare United States v. White*, 244 F.3d 1199, 1205-07 (10th Cir. 2001) (invalidating and requiring modification of restriction imposed on defendant who used Internet to receive child pornography), *with United States v. Paul*, 274 F.3d 155, 169 (5th Cir. 2001) (upholding restriction imposed on defendant who produced child pornography and used Internet to distribute it), and *United States v. Crandon*, 173 F.3d 122, 127-28 (3d Cir. 1999) (upholding restriction imposed on defendant who used Internet to contact 14-year-old girl with whom he had sexual relations and photographed such content).

85 312 F.3d 512 (1st Cir. 2002).

86 *Id.* at 514-15 (citing USSG §5D1.3(d)(2)-(3)).

87 *Id.* at 515.

in a mental health program, which would constitute an impermissible delegation. Rather, it merely delegated to the probation officer details with respect to the selection and schedule of the program.[88]

Section 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment)

Ruggiano v. Reish[89] was a habeas appeal against the Bureau of Prisons concerning the amount of time credited to the defendant on his concurrent state sentence. The district court had determined that the defendant's sentence for the current federal offense would run concurrently with an undischarged term of imprisonment on a state sentence under USSG §5G1.3. The question presented was whether section 5G1.3 required the court to credit the defendant for all the "time served" on the state sentence (even if the state sentence began prior to the indictment of the federal case) or for only that time served after the date of sentencing in the federal case. The Third Circuit held the former (*i.e.*, that the sentences should be "fully" or "retroactively" concurrent). It reasoned that Application Note 2 clarified the meaning of the word "concurrent" as used in section 5G1.3(b) and stated that "the court should adjust the sentence for any period of imprisonment already served as a result of the conduct taken into account in determining the guideline range for the instant offense."[90] The court determined that Application Note 2 applied also to section 5G1.3(c) because "it would be most anomalous if 'concurrent' were to mean retroactively concurrent in subsection (b) but could not mean the same in [section 5G1.3(c)]."[91] The court also recognized that its holding was contrary to that of the Second Circuit, thereby creating a circuit conflict.[92]

Section 5K2.0 (Grounds for Departures)

In *United States v. Roach,*[93] the defendant (an associate partner at Andersen Consulting, earning an annual salary of $150,000) submitted false expense reports over a three-year period, totaling more than $240,000. Notwithstanding the fact that the defendant and her husband had a combined family income of more than $300,000 annually, the defendant carried tens of thousands of dollars in credit card debt resulting from her shopping purchases at such upscale stores as Neiman Marcus and Barney's New York. She embezzled the money in an attempt to hide her

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88 *Id.* at 515-16.

89 308 F.3d 121 (3d Cir. 2002).

90 *Id.* at 128 (quoting USSG §5G1.3, comment. (n.2)).

91 *Id.* at 130.

92 *Id.* (citing *United States v. Fermin,* 252 F.3d 102 (2d Cir. 2001)).

93 296 F.3d 565 (7th Cir. 2002).

debts from her husband.[94] She pled guilty to knowingly executing a scheme to defraud Andersen Consulting by use of a wire transmission in interstate commerce (at least one of the false reports was sent by e-mail from Philadelphia to Chicago) in violation of 18 U.S.C. § 1343. Her total offense level was 13 and her criminal history category was I. The prescribed sentencing range was 12-18 months' imprisonment, which must be satisfied by imprisonment, without the use of alternatives such as community confinement or home detention.[95] At sentencing, the district court departed downward pursuant to USSG §5K2.13 because she committed the offense while suffering from a significantly reduced mental capacity, *to wit*, chronic depression and compulsive shopping (*i.e.*, the defendant turned to unnecessary and excessive shopping to relieve the pain of depression). The court sentenced her to five years of probation, including six weeks of work release at the Salvation Army Center, six months of home confinement with weekend electronic monitoring, and a prohibition against her obtaining any new credit cards without the court's permission.[96] The government appealed, and the Seventh Circuit reversed. The court held that, for volitional impairments, the compulsive behavior must be the behavior constituting the offense, and not some other behavior that explains the motive. Relying upon *United States v. Miller*,[97] the court emphasized that the critical issue is not the defendant's motive for committing the offense but her mental capacity at the time of the offense.[98] The court specifically disagreed with the reasoning of *United States v. Sadolsky*,[99] a Sixth Circuit case upholding a downward departure for diminished capacity based on the defendant's claim that he committed the fraud in order to pay off his gambling debts.[100]

In *United States v. Truman*,[101] the defendant, a machinist at Roxanne Laboratories, removed controlled substances from the lab and sold some of these tablets to an undercover officer. He pled guilty to possession with intent to distribute hydromorphone, morphine and methadone in violation of 21 U.S.C. § 841(a)(1).[102] The government did not move for a downward departure for substantial assistance pursuant to USSG §5K1.1. The defendant, however, moved for downward departure pursuant to USSG §5K2.0, which permits departures for, *inter alia*, circumstances not contemplated by the Sentencing Commission in formulating the guidelines. The defendant highlighted his significant cooperation with the Drug Enforcement

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94 *Id.* at 566-67.

95 *Id.* at 567.

96 *Id.* at 568.

97 146 F.3d at 1281, 1286 (11th Cir. 1998).

98 296 F.3d at 569.

99 234 F.3d 938, 943 (6th Cir. 2000).

100 296 F.3d at 569-70.

101 304 F.3d 586 (6th Cir. 2002).

102 *Id.* at 587-88.

Agency investigators to uncover security lapses and upgrade security at the lab.[103] The district judge stated that he believed that he did not have the authority to reduce the defendant's sentence under section 5K2.0.[104] The Sixth Circuit reversed and remanded for resentencing. Looking at the text of section 5K1.1, the court noted it applies only "in the investigation or prosecution of another person who has committed a crime." USSG §5K1.1, *see also id.*, comment. (n.2). It held that "[w]here the 'substantial assistance' is directed other than toward the prosecution of another person, the limitation of §5K1.1—*i.e.*, the requirement of a government motion as a triggering mechanism—does not apply."[105] The court reasoned that the rationales for requiring a government motion under section 5K1.1 (*e.g.*, government is in the best position to evaluate the defendant's cooperation, government's need to retain coercive power over defendant to achieve goal of prosecuting another, government in the best position to determine timing of such a motion) are not applicable where the defendant's cooperation is not related to a criminal investigation or prosecution. *Accord United States v. Khan*, 920 F.2d 1100, 1107 (2d Cir. 1990); *United States v. Sanchez*, 927 F.3d 1092, 1094 (9th Cir. 1991).[106]

In *United States v. Parish*,[107] the defendant pled guilty to two counts of possession of child pornography. The district court departed downward on two bases: (1) that the defendant's conduct was "outside the heartland" of USSG §2G2.4 because the content was "pretty minor" compared to the content of images possessed by other offenders and because unlike typical offenders, the defendant did not download or index the pornographic files and (2) that the combination of the defendant's stature, demeanor, naivete, and the nature of the offense created a high susceptibility of abuse in prison.[108] He was sentenced to 16 months on each count to be served concurrently. Eight months were to be served in prison and the remaining eight months would be served by home detention with electronic monitoring.[109] The Ninth Circuit held that the district court did not abuse its discretion in relying upon the expert testimony from a psychologist at the sentencing hearing that the defendant had a minimal likelihood of recidivism and that his conduct was less culpable than the eight or nine other child pornography offenders in the federal system with which the psychologist was familiar. The psychologist testified that the defendant was less culpable because he had not affirmatively downloaded the pornographic files, indexed the files, arranged them into a filing system, or created a search mechanism on his computer for ease of reference or retrieval. In addition, the content of the files was "pretty

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[103] *Id.* at 588.

[104] *Id.* at 588-89.

[105] *Id.* at 590.

[106] *Id.* at 590-91.

[107] 308 F.3d 1025 (9th Cir. 2002).

[108] *Id.* at 1028-29.

[109] *Id.*

minor" as compared to the content of images possessed by other offenders.[110] With respect to the second basis for departure, the court noted that it was unclear why the defendant's stature made him susceptible to abuse when he was 5'11" and weighed 190 pounds, but deferred to the district court as it was in a better position to evaluate his stature.[111] It also found no error in the district court's consideration of the nature of the offense in conjunction with other factors increasing the susceptibility to abuse.[112] In doing so, the court noted that it was disagreeing with some sister circuits.[113]

In dissent, Judge Graber noted that the record did not support a departure based upon the defendant's physical, mental or emotional state, which is explicitly discouraged by the Commission in USSG §§5H1.3 and 5H1.4 absent extraordinary circumstances.[114] Similarly, the defendant's "lack of experience with criminals" was insufficient to support a finding of extraordinary naivete.[115] Lastly, Judge Graber opined that the nature of the offense of child pornography, which might routinely subject a defendant to abuse in prison, was not "outside the heartland" of that offense. Accordingly, he would agree with the Fourth, Seventh and Eighth Circuits that the nature of the offense may not be considered at all in examining the nature of the offender, such as the factors that may make a particular offender extraordinarily vulnerable.[116]

Circuit Conflicts

This year, the Commission resolved one circuit conflict involving the imposition of a sentence on a defendant subject to a discharged term of imprisonment. It added commentary to USSG §5G1.3 to permit a downward departure. The new Application Note 7 provides as follows:

> In the case of a discharged term of imprisonment, a downward departure is not prohibited if subsection (b) would have applied to that term of imprisonment had the term been undischarged. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

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[110] *Id.* at 1030-31.

[111] *Id.* at 1031.

[112] *Id.* at 1032 & n.5.

[113] *E.g., United States v. DeBier,* 186 F.3d 561, 567-68 (4th Cir. 1999); *United States v. Wilke,* 156 F.3d 749, 753-54 (7th Cir. 1998); *United States v. Kapitzke,* 130 F.3d 820, 822 (8th Cir. 1997).

[114] *Id.* at 1033-34.

[115] *Id.* at 1034-35.

[116] *Id.* at 1035-36.

The application note resolved a conflict regarding the propriety of a downward departure under such circumstances. *Compare, e.g., United States v. Hagan,* 139 F.3d 641, 657 (8th Cir. 1998) (holding that a sentencing court could downwardly depart to adjust for time served on a discharged state sentence); *United States v. Blackwell,* 49 F.3d 1232, 1241-42 (7th Cir. 1995) (same), *with United States v. McHan,* 101 F.3d 1027, 1040 (4th Cir. 1996) (holding that downward departure to allow an adjustment for a discharged term was based on an error of law and therefore an abuse of discretion).[117]

[117] USSG App. C, amend. 645 (2002).