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 2003.

United States Supreme Court Decisions on Sentencing Issues

Petition for Certiorari Filed

In *Blakely v. Washington*,[1] the defendant filed a petition for certiorari to challenge whether the state sentencing court's decision to depart upward from the standard sentencing range and impose an "exceptional sentence" would be subject to the rule in *Apprendi*[2] if the sentence did not exceed the statutory maximum. In *Blakely*, the defendant pled guilty to second degree kidnaping involving domestic violence and use of a firearm. In Washington, second-degree kidnaping was a class B felony with a ten-year statutory maximum. The trial court imposed an "exceptional sentence" of 90 months because the defendant had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic violence cases. The defendant's sentence exceeded, by 37 months, the standard range of 49 to 53 months for the defendant's offense.

On appeal, the defendant argued that *Apprendi* prohibited the trial court from imposing an "exceptional sentence" based on facts that had not been established by a jury beyond a reasonable doubt. The Washington Appellate Court, citing *State v. Gore*,[3] held that "because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not triggered and the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt."

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[1] 111 Wash. App. 851, 47 P.3d 149 (Wash. App. 2002), *petition for cert. filed*, 2003 WL 22427993 (U.S. May 5, 2003) (No. 02-1632).

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[3] 143 Wash.2d 288, 314, 21 P.3d 262 (Wash. 2001).

Decisions of the United States Courts of Appeals

Relevant Conduct

In *United States v. Hayes,*[4] the Fourth Circuit vacated a defendant's sentence on the grounds that the district court had improperly refused to consider evidence bearing on the loss amount properly attributable to the defendant. The defendant was charged with 24 counts of procuring the presentation of tax returns containing false information. The presentence report indicated that the crimes of conviction cost the United States government a total of $75,814. The presentence report then estimated that the government lost an additional $199,017 from 63 additional fraudulent tax returns prepared by the defendant that did not result in prosecution. The trial court refused to consider the government's proffered evidence regarding these losses, opining that a sentence based upon the tax loss for the counts of conviction resulted in a sentence sufficient to reflect the seriousness of the offense, provide just punishment, and protect the public. The government appealed, arguing that the trial court improperly failed to consider the relevant conduct. The Fourth Circuit agreed, holding that "while the guidelines preserve a broad range of discretion for district courts, a court has no discretion to disregard relevant conduct in order to achieve the sentence it considers appropriate."[5]

In *United States v. Hunter,*[6] the Eleventh Circuit considered a challenge to the trial court's application of guideline 1B1.3, where the trial court failed to make particularized findings as to the scope of criminal activity undertaken by each defendant. The defendants were convicted of a conspiracy to make, utter, and possess counterfeit checks. In fashioning a sentence for each defendant, the trial court held each accountable for the total amount of loss that resulted from the conspiracy. In so doing, the trial court neglected to "determine the scope of criminal activity [each defendant] agreed to jointly undertake."[7] The Eleventh Circuit held that awareness of a co-conspirator's involvement in a larger scheme, without more, is not enough to hold a conspirator accountable for the activities of the entire conspiracy.[8] The court vacated and remanded for re-sentencing, directing the trial court to make particularized findings regarding the scope of defendants' agreement to participate in the fraudulent scheme.[9]

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4 322 F.3d 792 (4th Cir. 2003).

5 *Id.* at 802.

6 323 F.3d 1314 (11th Cir. 2003).

7 *Id.* at 1320.

8 *Id.* at 1321.

9 *Id.* at 1323.

Murder Cross-Reference

In *United States v. Newton*,[10] the First Circuit considered an *Apprendi* challenge to the application of the murder cross-reference contained in section 2D1.1. The trial court sentenced defendant to life imprisonment after a jury convicted him of conspiracy to possess with intent to distribute in excess of five kilograms of cocaine, more than one kilogram of heroin, and multiple kilograms of marijuana. In arriving at the sentence, the trial court applied the murder cross-reference after considering evidence of defendant's involvement in the brutal torture and murder of four individuals who supposedly stole a large sum of money from the drug conspirators. The defendant was previously acquitted of the murder in a separate criminal prosecution. On appeal, the defendant challenged the use of the acquitted conduct, arguing that *Apprendi* requires the jury to find beyond a reasonable doubt that the defendant committed the murder before the trial court could apply the cross-reference.[11] The First Circuit disagreed, holding as it had in earlier cases, that sentence-enhancing facts may be found by a judge as long as those facts do not result in a sentence that exceeds the applicable statutory maximum.[12] In view of the fact that defendant's prescribed statutory maximum sentence was life, which was the sentence imposed, the First Circuit affirmed the lower court's application of the murder cross-reference.[13]

Terrorism Enhancement

In *United States v. Meskini,*[14] the Second Circuit considered a challenge to the terrorism enhancement embodied in section 3A1.4. A jury convicted the defendant of conspiring to provide material support to a terrorist act. The evidence at trial established that the defendant conspired with others to provide support for a plan to bomb the Los Angeles International Airport during millennium celebrations in December 1999. The trial court applied the terrorism enhancement, which had the effect of increasing defendant's offense level by 12 levels and increasing his criminal history category from I to VI. On appeal, the defendant contended that section 3A1.4 violated his right to due process by impermissibly double-counting the same criminal act, once for the offense level, and once for the criminal history category.[15] The Second Circuit found no error. The court reasoned that the enhancement does not violate due process because the Commission had a rational basis for concluding that an act of terrorism represents a particularly grave threat both because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal.[16]

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[10] 326 F.3d 253 (1st Cir. 2003).

[11] *Newton,* 326 F.3d at 266.

[12] *Id.*

[13] *Id.*

[14] 319 F.3d 88 (2d Cir.), *cert. denied sub. nom. Haouari v. United States,* 538 U.S. 1068 (2003).

[15] *Id.* at 91.

[16] *Id.* at 92.

Obstruction of Justice

In *United States v. Sanders,*[17] the Eighth Circuit considered the government's appeal of the trial court's refusal to apply the obstruction of justice enhancement pursuant to section 3C1.1. The defendant testified at a suppression hearing conducted by a magistrate judge that law enforcement entered his residence without his consent. His version of events was contradicted by the law enforcement officers who testified. The magistrate judge credited the law enforcement officers' version and recommended denial of the motion to suppress. At sentencing, the district court declined to apply the obstruction of justice enhancement on the basis of the testimony at the suppression hearing, reasoning that it could not find that "there was the type of willful testimony taken on the record under oath that would warrant an obstruction enhancement."[18] On appeal, the Eighth Circuit affirmed, holding that even though the district court did not believe the defendant's testimony, the court was not required to apply the enhancement because it did not make a finding that the defendant committed perjury.[19]

The Eighth Circuit affirmed the application of the enhancement in *United States v. Johnson.*[20] In that case, the defendant, charged with being a felon in possession of a weapon, wrote a letter to a witness while the witness was incarcerated in another correctional institution. In the letter, the defendant suggested that the witness read the letter over and over before he came to court to testify on the defendant's behalf. The letter then detailed the chronology of the defendant's and witness's purported activities prior to the defendant's arrest. The letter also directed the witness to say that the pistol that the defendant was charged with possessing was for target practice and asked the witness to testify that the defendant was mentally impaired. These last two statements were significant, because the defendant was planning to seek a sentence reduction, asserting that he possessed the firearm for sporting purposes, and on the basis of diminished capacity. Although the defendant did not ultimately seek the sentence reduction, the trial court found that the "context and syntax" of the letter reflected an attempt to suborn perjury.[21] On appeal, the defendant argued that the court should not have relied solely upon the letter as the factual predicate for the obstruction enhancement. Given the deferential standard of review, however, the court of appeals affirmed the sentence, concluding that the trial court committed no error.[22]

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[17] 341 F.3d 809 (8th Cir. 2003).

[18] *Id.* at 820.

[19] *Id.*

[20] 316 F.3d 818 (8th Cir. 2003).

[21] *Id.* at 819-20.

[22] *Id.* at 320.

Criminal History

In *United States v. Gordon,*[23] the Fifth Circuit considered a challenge to a criminal history computation. The specific challenge related to whether the trial court properly assessed two points for a sentence of house arrest. Because the defendant did not challenge the application of section 4A1.1 in the trial court, the court applied a plain error analysis.[24] Examining definitions used by the Commission in which the Commission distinguishes between incarceration and home detention, the Fifth Circuit concluded that a sentence to house arrest does not constitute a sentence of imprisonment. As a result, the trial court improperly assessed two criminal history points for the house arrest sentence.[25] Given that the inclusion of those points operated to increase the defendant's criminal history score from IV to V, the court concluded that the defendant's substantial rights were affected and that the trial court committed plain error.[26] Accordingly, the Fifth Circuit vacated the defendant's sentence and remanded for further proceedings.[27]

Departures

The Seventh Circuit, in *United States v. Sowemimo*,[28] affirmed the district court's refusal to compel the government to file a motion for a downward departure pursuant to section 5K1.1. On appeal, defendant Green argued that his sentence should be vacated because the government failed to move for a downward departure pursuant to section 5K1.1, as it had agreed to do in the parties' plea agreement. Defendant Green conceded, however, that his cooperation with the government stopped shortly after his codefendants' trial. The Seventh Circuit noted that defendant-Green could not prevail because he admitted to violating the terms of his plea agreement. This violation was enough to preclude him from entitlement to a government motion for a downward departure.

The Eighth Circuit, in *United States v. Aguilar-Portillo,*[29] reversed the district court's decision to depart downward based on "cultural assimilation" for a defendant convicted of conspiring to distribute and possession with intent to distribute methamphetamine. Relying on *United States v. Lipman,*[30] the district court granted the defendant a one-level departure for "cultural assimilation" because the defendant had lived in the United States since 1987 and had children in the United States. Reviewing the departure *de novo*, the Eighth Circuit reversed the downward departure. The court held that a "cultural assimilation" departure is "relevant to the character of a defendant . . .

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[23] 346 F.3d 135 (5th Cir. 2003).

[24] *Id.* at 137.

[25] *Id.* at 137-38.

[26] *Id.*

[27] *Id.* at 139.

[28] 335 F.3d 567 (7th Cir. 2003).

[29] 334 F.3d 744 (8th Cir. 2003).

[30] 133 F.3d 726, 729-731 (9th Cir. 1998).

insofar as his culpability might be lessened if his motives were familial or cultural rather than economic"[31] and such a departure was not appropriate in a drug case.

In *United States v. Guerrero,*[32] the government challenged the district court's downward departure based on aberrant behavior. The Ninth Circuit noted that prior to the enactment of section 5K2.20 (Aberrant Behavior), the court had adopted a "totality of the circumstances" approach to determine whether an aberrant behavior departure was warranted. The Commission rejected that approach when it enacted section 5K2.20. Accordingly, the Ninth Circuit held that the sentencing court must conduct two separate and independent inquiries, both of which the defendant must satisfy before obtaining a departure under section 5K2.20. First, the trial court must determine whether the defendant's case is extraordinary and whether the defendant's conduct constituted aberrant behavior. Then, the offense conduct to be considered as aberrant behavior must have been committed without significant planning, and be of limited duration, and must have represented a marked deviation by the defendant from an otherwise law-abiding life. In the instant case, the district court did not make these necessary determinations. Accordingly, the Ninth Circuit vacated the sentence and remanded for re-sentencing.

Circuit Conflicts Resolved By the Commission

The Commission resolved three circuit conflicts this year, each of which resulted from conflicting interpretations of various subsections of section 5G1.3. First, the Commission clarified the rule for application of subsection(b) (mandating a concurrent term of imprisonment) with respect to a prior term of imprisonment. The Commission stated that subsection (b) shall apply only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense. This amendment resolved conflicting interpretations of the meaning of "fully taken into account." *Compare*, *e.g., United States v. Garcia-Hernandez*, 237 F.3d 105, 109 (2d Cir. 2000) (determining that a prior offense is "fully taken into account" if and only if the guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding), *with United States v. Fuentes*, 107 F.3d 1515, 1524 (11th Cir. 1997) (finding that a prior offense has been "fully taken into account" when the prior offense is part of the same course of conduct, common scheme, or plan).

The Commission also addressed a circuit conflict concerning whether the imposition of a sentence imposed for an offense committed while the defendant is on federal or state probation, parole, or supervised release is required to be imposed consecutively to the undischarged term of imprisonment imposed upon revocation of the probation, parole, or supervised release. Although the Commission recommends a consecutive sentence, this amendment follows the holdings of the Second, Third, and Tenth Circuits, stating that imposition of sentence for the instant offense is not required to be consecutive to the sentence imposed upon revocation of probation, parole, or supervised release. *See United States v. Maria*, 186 F.3d 65, 70-73 (2d Cir. 1999); *United States v. Swan*, 275 F.3d 272, 279-83 (3d Cir. 2002); *United States v. Tisdale*, 248 F.3d 964, 977-79 (10th Cir. 2001).

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[31] *Aguilar-Portillo*, 334 F.3d at 749 (citation omitted).

[32] 333 F.3d 1078 (7th Cir. 2003).

Finally, the Commission amended section 5G1.3 to address a circuit conflict regarding whether the sentencing court may grant "credit" or adjust the instant sentence for time served on a prior undischarged term covered by subsection (c). *Compare Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002) (federal sentencing court may grant such credit), *with United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001) (court may not grant such credit). The Commission made clear that the court may not adjust or give "credit" for time served on an undischarged term of imprisonment covered under subsection (c). The Commission did, however, add commentary to provide that courts may consider a downward departure in an extraordinary case in order to achieve a reasonable punishment for the instant offense.

The PROTECT Act

Congress enacted the PROTECT Act, Pub. L. 108–21, on April 10, 2003. In the act, Congress directly amended several guidelines and policy statements in the 2002 *Guidelines Manual*. These amendments made by Congress became effective on April 30, 2003, when the President signed the act into law.

The guideline sections amended by the act include section 2G2.2 (Trafficking in Materials Involving Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), section 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), section 3E1.1 (Acceptance of Responsibility), section 4B1.5 (Repeat and Dangerous Sex Offender Against Minors), section 5H1.6 (Family Ties and Responsibilities, and Community Ties), section 5K2.0 (Grounds for Departure), section 5K2.13 (Diminished Capacity), and section 5K2.20 (Aberrant Behavior), as well as a new policy statement enacted by the act, section 5K2.22 (Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses).[33]

Congress also directed the Commission to respond within 180 days after the enactment of the act, or by October 27, 2003, to review the grounds of downward departure currently authorized by the guidelines and to develop amendments to ensure that the frequency of downward departures is "substantially reduced."[34] Finally, Congress directed the Commission to promulgate a policy statement authorizing a downward departure pursuant to an early disposition program authorized by the Attorney General.

Standard of Review for Departures

One significant change effected by the PROTECT Act was the standard of review applicable to departures. Since 1996, appellate courts have reviewed departures under the abuse of discretion standard enunciated by the Supreme Court in *Koon v. United States*, 518 U.S. 81, 98 (1996). The act amended 18 U.S.C. § 3742 to require *de novo* review of departures. With the exception of the Eighth and Tenth Circuits, most courts have not decided whether the *de novo* standard of review

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[33] *See* USSG App. C, Amendments 649 and 651.

[34] *See* PROTECT Act, Pub. L. 108-21, Sec. 401.

required by the act applies to cases pending when it was enacted. Rather, those courts concluded that under either standard of review, *de novo* or abuse of discretion, they would have affirmed or reversed the district courts' sentences.[35] Other appellate courts acknowledged that the act did not change the standard of review in instances in which the district court had denied a downward departure, but required district courts to make specific written findings of their reasons for departing.[36]

Section 3E1.1 (Acceptance of Responsibility)

The PROTECT Act effected a major change in section 3E1.1 (Acceptance of Responsibility). The revised version of this section provides that a defendant will qualify for the third-level reduction only upon the filing of a government motion stating that the "the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." The revised commentary to this section notes that the government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial. See USSG §3E1.1, comment. (n.6). Before the amendment, a defendant's entitlement to the third level was not conditioned upon the filing of a government motion. A defendant who either timely provided complete information to the government concerning his own involvement in the offense, or timely notified authorities of his intention to enter a plea of guilty could qualify for the third level, even over the government's objection.

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[35] *See United States v. Gendraw,* 337 F.3d 70 (1st Cir. 2003) (court noted in footnote that there was no need to address the issue of the PROTECT Act because under either standard, *de novo* or abuse of discretion, it would have affirmed the district court); *United States v. Camejo,* 333 F.3d 669 (6th Cir. 2003) (same); *United States v. Alfaro,* 336 F.3d 876 (9th Cir. 2003) (same); *United States v. Semsak,* 336 F.3d 1123 (9th Cir. 2003) (same); *United States v. Tarantola,* 332 F.3d 498 (8th Cir. 2003) (same); *United States v. Chesborough*, 333 F.3d 872 (8th Cir. 2003) (same); *United States v. Orchard,* 332 F.3d 1133 (8th Cir. 2003) (same); *United States v. Agee*, 333 F.3d 864 (8th Cir. 2003) (same); *United States v. Smith,* 331 F.3d 292 (2d Cir. 2003) (no need to decide whether the Act applied to sentences on appeal at the time of its enactment because the district court erred even under the more deferential standard); *United States v. Dyck*, 334 F.3d 736 (8th Cir. 2003) (court stated that it would have reversed the district court's sentence under either standard of review, *de novo* or abuse of discretion); *United States v. Swick*, 334 F.3d 784 (8th Cir. 2003) (same); *United States v. Guerrero*, 333 F.3d 1078 (9th Cir. 2003) (same).

[36] *United States v. Sowemimo,* 335 F.3d 567 (8th Cir. 2003) (same) (the PROTECT Act did not change the standard of review in instances where the district had denied a downward departure); *United States v. Aguilar-Lopez*, 329 F.3d 960 (8th Cir. 2003) (pursuant to the PROTECT Act district courts were now required to make specific written findings of their reasons for departing).