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 2004.

United States Supreme Court Decisions on Sentencing Issues

Decisions

In *Blakely v. Washington,*[1] the Supreme Court held that a state trial court's sentencing of the defendant to more than three years above the 53-month maximum of the standard state guideline range for his offense, on the basis of the trial judge's finding that the defendant had acted with deliberate cruelty, violated the defendant's Sixth Amendment right to trial by jury. In so holding, the Court stated that the term "statutory maximum" as used in *Apprendi*[2] means the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted to by the defendant. Although arising out of a state court proceeding, this case had a significant impact upon the federal criminal justice system because of uncertainty surrounding the applicability, if any, to the federal sentencing guidelines.

Petitions for Certiorari Granted

In *Leocal v. Ashcroft,*[3] the Supreme Court granted *certiorari* to consider whether a conviction for driving under the influence with serious bodily injury is a crime of violence under 18 U.S.C. § 16, which would constitute an aggravated felony under section 101 of the Immigration and Nationality Act and act as a basis for removal of a non-United States citizen from the United States. The state statute at issue requires proof of causing injury to another, but it does not require proof of, or involve a substantial risk of, the intentional (or even reckless) application of physical force against the person or property of another, and does not require proof of any active application of physical force by a defendant against the person or property of another.

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[1] 542 U.S. 296 (2004).

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

[3] 540 U.S. 1176 (2004).

In *Shepard v. United States,*[4] the Supreme Court granted the defendant's petition for *certiorari* to consider a challenge to the application of an Armed Career Criminal Act enhancement. In each of the cases sought to be used as predicate convictions, the defendant pled guilty to a nongeneric charge of burglary brought under a nongeneric statute. The government offered no contemporaneous record of the guilty plea proceedings, and the judgment of conviction reflected a general finding of guilty. The defendant presented two issues for the Court's consideration. The first was whether the sentencing court was still bound by *Taylor*'s[5] categorical method of application, given the foregoing facts, or could the court be required to conduct an inquiry–including an evidentiary hearing–into the facts underlying the conviction, to determine whether both the defendant and the government believed that generic burglary was at issue? The second question asked whether the sentencing court could be required to consider a version of the underlying facts found in any document in the court file, such as an investigative police report or a complaint application, and regard them as sufficiently reliable evidence that the defendant was convicted of a crime that included all of the elements of generic burglary.

On August 2, 2004, the Supreme Court granted *certiorari* in two cases, which the Court consolidated for review, to consider whether the rule announced in *Blakely* applied to the federal sentencing guidelines.[6] The first case originated in the Seventh Circuit. In *United States v. Booker*,[7] the jury determined that the defendant possessed with the intent to distribute at least 50 grams of cocaine base. At sentencing, the trial judge found by a preponderance of the evidence that the defendant had distributed 566 grams more than the amount found by the jury and that the defendant had obstructed justice. The defendant appealed his sentence. The Seventh Circuit reversed, holding that judicial fact-finding under the sentencing guidelines violated the Sixth Amendment.

In *United States v. Fanfan,*[8] the case consolidated with *Booker*, the sentencing judge found that it was unconstitutional to apply sentence enhancements based upon facts not found by the jury. Because the jury verdict found only that the defendant was guilty of a conspiracy involving at least 500 grams of cocaine powder, the court determined that the applicable base offense level corresponding to that quantity and type of drug was level 26. In setting the applicable offense level, the court declined to consider amounts of crack cocaine included in the defendant's relevant conduct, but not charged in the indictment, and refused to enhance the sentence for the defendant's managerial role. The government petitioned for *certiorari* before judgment to the Supreme Court. The government asserted that the case satisfied the strict criterion of Supreme Court Rule 11, presenting a matter of "such imperative public importance as to justify the deviation from normal

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[4] 542 U.S. 918 (2004).

[5] *Taylor v. United States,* 495 U.S. 575 (1990).

[6] *United States v. Booker,* 542 U.S. 956 (2004); *United States v. Fanfan*, 542 U.S. 956 (2004).

[7] 375 F.3d 508 (7th Cir. 2004).

[8] 2004 WL 1723114 (D. Me. June 28, 2004).

appellate practice and to require immediate settlement in this Court."[9] Moreover, the government argued that this case was the appropriate companion case to *Booker* because "th[e] case has the advantage of arising from a decision in which the sentencing court resolved both questions presented in the petition."[10]

In the consolidated cases, the government presented the Court with two questions for its consideration. First, whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. Second, the government requested that the Court consider the appropriate remedy in the event that the Court held that the Sixth Amendment applied to the sentencing guidelines. Specifically, the government asked whether, in a case in which the sentencing guidelines would require the court to find a sentence-enhancing fact, the sentencing guidelines as a whole would be inapplicable, with the sentencing court exercising its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

Decisions of the United States Courts of Appeals

Post-Blakely Sixth Amendment Decisions

In the wake of *Blakely*, two circuits immediately declared that the operation of the federal sentencing guidelines violated the Sixth Amendment. As noted above, in *United States v. Booker*,[11] the Seventh Circuit held that the Sixth Amendment, as interpreted in *Blakely,* was violated by the sentencing court's factual determinations regarding drug quantity and obstruction of justice.[12] Because the parties had neither briefed nor argued the question of severability, the Seventh Circuit declined to rule on that issue.[13] Instead, the court remanded the case for resentencing.[14]

The Ninth Circuit considered whether *Blakely*'s definition of statutory maximum applies to the determination of the base offense levels and any applicable upward enhancements imposed under the sentencing guidelines in *United States v. Ameline*.[15] The defendant challenged his sentence following a plea to knowingly conspiring to distribute methamphetamine. The plea agreement did

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[9] United States's Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit, 2004 WL 1638205, *8 (July 21, 2004).

[10] *Id.*

[11] 375 F.3d 508 (7th Cir. 2004).

[12] *Id.* at 513.

[13] *Id.* at 514-15.

[14] *Id.* at 515.

[15] 376 F.3d 967 (9th Cir. 2004).

not specify a drug quantity.[16] The defendant contested drug quantity at sentencing, but the court made a factual finding by a preponderance of the evidence that the defendant was responsible for 1,603.6 grams and sentenced him accordingly.[17] The Ninth Circuit held that the Sixth Amendment right announced in *Blakely* applies to sentences imposed under the federal sentencing guidelines.[18] The court declined to invalidate the sentencing guidelines entirely, holding that where the procedural aspects of applying the sentencing guidelines violated the Sixth Amendment, those portions could be severed and sentence imposed using the remaining guideline provisions.[19] The court remanded for resentencing, and authorized the district court to convene a sentencing jury to try any contested sentencing issues, using the standard of proof beyond a reasonable doubt.[20]

Five circuits held that *Blakely* did not impact the continued constitutionality of the sentencing guidelines. In *United States v. Pineiro*,[21] the Fifth Circuit became the first circuit to hold that *Blakely* does not extend to the federal sentencing guidelines. After examining circuit precedent and Supreme Court case law that had "consistently embraced and relied upon the distinction between guideline ranges and maximum sentences in rejecting various challenges to the Guidelines,"[22] the court concluded that this precedent supported the view that the sentencing guidelines were a tool for channeling judicial discretion and that *Blakely* did not compel a departure from the long-embraced distinction between guideline ranges and the maxima established in the United States Code for various offenses.[23]

Several circuits quickly followed the Fifth Circuit's lead and declared that *Blakely* did not invalidate the sentencing guidelines. The Fourth Circuit *en banc* heard oral argument in *United States v. Hammoud*[24] on August 2, 2004. Following the argument, the court took the unprecedented step of immediately issuing a one-page order with an abbreviated ruling on the case. The Fourth Circuit held that *Blakely* does not operate to invalidate the federal sentencing guidelines and directed the district courts within the circuit to continue sentencing defendants in accordance with the sentencing guidelines. The Fourth Circuit also recommended that the district courts announce, at the time of sentencing, an alternative sentence pursuant to 18 U.S.C. § 3553(a), treating the sentencing guidelines as advisory. The court made this recommendation in the interest of judicial economy and pending a definitive ruling by the Supreme Court on *Blakely*'s applicability to the

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[16] *Id.* at 970.

[17] *Id.* at 972.

[18] *Id.* at 978.

[19] *Id.* at 981.

[20] *Id.* at 984.

[21] 377 F.3d 464 (5th Cir. 2004).

[22] *Id.* at 471.

[23] *Id.* at 470-73.

[24] 378 F.3d 426 (4th Cir. 2004).

sentencing guidelines. The court's majority and dissenting opinions were issued on September 8, 2004.[25] The Fourth Circuit's analysis of the issue was similar to that of the Fifth Circuit.

The Sixth and Eleventh Circuits likewise ruled that *Blakely* did not apply to the sentencing guidelines.[26] The Second Circuit initially declined to rule on the issue of *Blakely*'s applicability to the guidelines, but rather took the unusual step of certifying the question to the Supreme Court in *United States v. Penaranda*.[27] The general question certified by the *en banc* court was whether the Sixth Amendment permits a federal district judge to find facts, not reflected by a jury's verdict or admitted by the defendant, that form the basis for determining the applicable adjusted offense level under the federal sentencing guidelines and any upward departure from that offense level. Shortly thereafter, however, the Second Circuit concluded that, pending the Supreme Court's answers to the question, it would be appropriate to give the district courts of the circuit guidance as to whether and how to employ the guidelines when sentencing defendants. Thus, in *United States v. Mincey,*[28] the Second Circuit held that, absent a Supreme Court ruling to the contrary, the Sixth Amendment did not require that every enhancement factor under the sentencing guidelines be pleaded and proved to a jury beyond a reasonable doubt.

In *United States v. Mooney*,[29] a panel of the Eighth Circuit held that *Blakely* applies to the guidelines and that the guidelines are unconstitutional in whole and not severable. That decision was vacated on the court's own motion by an order dated August 6, 2004, which also granted rehearing *en banc*.[30] The First and Tenth Circuits never issued substantive rulings on *Blakely*'s applicability to the sentencing guidelines, but discussed unpreserved *Blakely* claims by way of plain error review.[31]

Firearm Offenses

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[25] 381 F.3d 316 (4th Cir. 2004) (en banc).

[26] *United States v. Koch*, 383 F.3d 436 (6th Cir. 2004) (en banc) (ruling that *Blakely* does not invalidate the guidelines and the guidelines do not violate the Sixth Amendment); *United States v. Reese*, 382 F.3d 1308 (11th Cir. 2004).

[27] 375 F.3d 238 (2d Cir. 2004) (en banc).

[28] 380 F.3d 102 (2d Cir. 2004).

[29] 2004 U.S. App. LEXIS 15301 (8th Cir. July 23, 2004).

[30] 2004 U.S. App. LEXIS 16302 (8th Cir. Aug. 6, 2004).

[31] *United States v. Morgan*, 384 F.3d 1 (1st Cir. 2004) (declining to resolve whether plain error review was allowed because the defendant, who pled guilty to a conspiracy involving 100 kilograms of marijuana, was held responsible for between 80 and 100 kilograms and thus lacked a meritorious *Blakely* claim); *United States v. Badilla*, 383 F.3d 1137 (10th Cir. 2004) (reviewing for plain error the defendant's claim that imposition of the obstruction enhancement violated *Blakely*, the court concluded that because the evidence clearly established that the defendant lied on the stand, he could not satisfy the fourth prong of the plain error analysis).

In *United States v. Holbrook*,[32] the Fourth Circuit examined the lower court's decision to cross reference from the firearm guideline to the second degree murder guideline. The defendant was convicted of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence and making false statements in connection with the purchase of her pistol. The charges arose out of the shooting death of the defendant's husband, with whom she was embroiled in a bitter divorce. The evidence showed that the defendant had a motive to commit the crime, and that she doggedly sought to acquire a functioning weapon in the weeks prior to the shooting. The defendant attempted to make the shooting look like a suicide by moving the victim's body and wiping the weapon clean of her fingerprints. The defendant repeatedly changed her story about what happened on the date of the shooting.[33] Given these facts, the district court determined that the defendant acted with malice, applied the cross reference in section 2K2.1 to the homicide guidelines, and used the second-degree murder guideline at section 2A1.2 to sentence the defendant. Finding that the aforementioned facts justified the trial court's determination that the defendant acted with malice, the Fourth Circuit affirmed the sentence.[34]

Sex Offenses

In *United States v. Murrell*,[35] the Eleventh Circuit considered whether the lower court properly assessed an enhancement for an offense involving a victim between the ages of twelve and sixteen,[36] where the offense involved a fictitious victim. The defendant was convicted of using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. The relevant conduct involved communications between the defendant and an undercover officer posing as a 13-year-old girl's father, in which the defendant expressed an interest in having sex with the minor child. He agreed to meet with the child and father at a specific hotel and to pay $300.00 to have sex with the child. Authorities arrested the defendant after he went to the agreed upon hotel to meet with the father and the minor, carrying $300, a box of condoms and a teddy bear.[37] The lower court applied the enhancement, which the defendant challenged on appeal. The Eleventh Circuit reasoned that because the Sentencing Commission specifically provided that undercover officers are "victims" for the purposes of section 2G1.1, the enhancement was directed at the defendant's intent, rather than any actual harm caused to a genuine victim.[38] The court then concluded that, in terms of the defendant's intent, there is no

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[32] 368 F.3d 415 (4th Cir. 2004).

[33] *Id.* at 425.

[34] *Id.*

[35] 368 F.3d 1283 (11th Cir. 2004).

[36] *See* §2G1.1(b)(2)(B).

[37] 368 F.3d at 1284.

[38] *Id.* at 1289.

difference between an undercover officer victim and a fictitious victim and affirmed application of the enhancement.[39]

Immigration Offenses

In *United States v. Polar,*[40] the defendant was convicted of possessing a counterfeit United States Alien Documentation Identification Telecommunication (ADIT) stamp. He used the stamp to help aliens obtain Social Security cards. The district court applied section 2L2.1(b)(3), which provides for a four-level increase if the defendant knew, believed, or had reason to believe that the passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving the violation of the immigration laws.[41] The Eleventh Circuit affirmed application of the enhancement, holding that fraudulently obtaining a Social Security card, even if for the purpose of perpetuating immigration fraud, was not a violation of the immigration laws. The court concluded that the term "immigration laws" includes only those laws that "criminalize conduct necessarily committed in connection with the admission or exclusion of aliens."[42]

In *United States v. Vargas-Duran*,[43] the Fifth Circuit *en banc* considered whether a prior conviction for intoxication assault qualified as a crime of violence for sentence enhancement purposes under section 2L1.2. The district court had applied a 16-level enhancement under section 2L1.2, after deciding that this conviction was a crime of violence.[44] After examining the elements of the statute in question, the court determined that the intentional use of force was not an element of the state court conviction for intoxication assault. Concluding that to qualify as a crime of violence under subpart I of the commentary to section 2L1.2, the use of force must be intentional; the court held that this particular conviction did not qualify. Accordingly, the Fifth Circuit vacated the sentence and remanded for resentencing.[45]

Vulnerable Victim

The Ninth Circuit upheld application of the vulnerable victim adjustment at section 3A1.1 in *United States v. Miguel*.[46] The defendants were convicted of conspiring to transport illegal aliens,

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[39] *Id.*

[40] 369 F.3d 1248 (11th Cir. 2004).

[41] *Id.* at 1255.

[42] *Id.* at 1257.

[43] 356 F.3d 598 (5th Cir.)(en banc), *cert. denied,* 541 U.S. 965 (2004).

[44] *Id.* at 599.

[45] *Id.* at 606.

[46] 368 F.3d 1150 (9th Cir. 2004).

transporting illegal aliens for financial gain, and placing in jeopardy the lives of illegal aliens. Among the victims of the offense were minor children who, upon being directed to climb into the trunk of the defendants' car, did so obediently and without ever asking for a drink of water despite the high temperature in the trunk.[47] Dismissing the defendants' argument that the victims were not more vulnerable to the crime of smuggling than anyone else, the court concluded that these young children were more susceptible to the criminal conduct because they did not fully appreciate the danger involved in alien smuggling.[48] The court also rejected the contention that because the defendants were not preying upon little children, the adjustment should not apply. The plain language of section 3A1.1 requires only that the defendant should have known that the victim was vulnerable. The Ninth Circuit concluded that the defendants should have known of the victims' vulnerability given their age, physical condition and demeanor.[49]

Use of a Minor

In *United States v. Gaskin*,[50] the defendant challenged the application of the adjustment for use of a minor required by section 3B1.4. The defendant was convicted of conspiracy to traffic in, possession with intent to distribute, and distribution of 100 kilograms or more of marijuana. The evidence at trial established that the defendant drove his personal car to a parking lot where he intended to retrieve a motor home filled with marijuana. He brought his 17-year-old son with him. The trial court enhanced his sentence for use of a minor, finding that the defendant intended that his son drive the defendant's vehicle away from the parking lot while the defendant drove the motor home.[51] In deciding the matter, the Eleventh Circuit examined the language of the adjustment, which focuses not on the intent or actions of the minor, but rather on those of the defendant. Given the plain language of the guideline, the court concluded that in determining whether to apply the adjustment, it is irrelevant whether the minor engaged in criminal actions, intended to assist the adult, or even knew that the adult was engaged in criminal activity. The proper inquiry focuses upon the defendant's intent.[52] Because the evidence supported the conclusion that the defendant brought his minor son with him to help in some manner with his drug transfer plans, the Eleventh Circuit held that the lower court did not clearly err in finding the intended use of the minor and properly applied the enhancement.[53]

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[47] *Id.* at 1157.

[48] *Id.*

[49] *Id.*

[50] 364 F.3d 438 (2d Cir. 2004).

[51] *Id.* at 464.

[52] *Id.*

[53] *Id.* at 465.

Obstruction of Justice

The defendant in *United States v. Frasier*[54] was being held in the county jail as a pretrial detainee, having been charged by the State of Florida with the bank robberies that led to his federal conviction. An FBI agent came to the jail and informed the defendant that the federal government was investigating the robberies and that he was a target of the investigation. Following the agent's visit, the defendant attempted to escape from the jail. The district court applied a section 3C1.1 adjustment because it found that the defendant had attempted to escape from a county jail to avoid federal prosecution. The defendant argued that the obstruction adjustment was inapplicable to him because no federal charges were pending at the time of the attempted escape. The Eleventh Circuit held that the district court properly applied the adjustment because a federal agent had informed the defendant prior to his attempted escape that the federal government was going to prosecute him.[55]

Safety Valve

The Tenth Circuit considered whether application of the weapon enhancement under the drug guidelines automatically precludes an adjustment under the safety valve provision in *United States v. Zavalza-Rodriguez*.[56] While executing a warrant at the home of a recent murder victim, local police found the defendant occupying a room where a loaded pistol was found. The police also discovered narcotics, packaging materials, and a large amount of cash in the house. Although the defendant denied ownership of the gun, he admitted to dealing drugs. He subsequently entered into a plea agreement in which he stipulated to the two-level enhancement under section 2D1.1(b) for the presence of the firearm in the room where he was staying.[57] Notwithstanding the weapon enhancement, the district court concluded that the defendant qualified for the safety valve reduction pursuant to section 5C1.2 and sentenced him without regard to the mandatory minimum. The government appealed, arguing that if a gun is possessed for purposes of sentence enhancement, then it is necessarily possessed to preclude application of a safety valve sentence reduction.[58] The Tenth Circuit examined the language of the two provisions at issue and concluded that the term "possession" used in each provision was sufficiently distinct to foreclose the *per se* rule sought by the government. While section 2D1.1(b) required application of the enhancement merely upon constructive possession, the language of the safety valve required that the weapon in question be actively utilized by the defendant "in connection with the offense." Thus, the court affirmed the lower court's decision to award a safety valve reduction where the evidence established merely that

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[54] 381 F.3d 1097 (11th Cir. 2004).

[55] *Id.* at 1100.

[56] 379 F.3d 1182 (10th Cir. 2004).

[57] *Id.* at 1183.

[58] *Id.*

the defendant was in constructive possession of a weapon and not that he had actively used it in connection with the offense.[59]

Downward Departures

In *United States v. May*,[60] the Fourth Circuit examined a downward departure granted to a defendant convicted of offenses relating to a cross burning for racial intimidation. The departure was based, in part, upon victim conduct. The case arose after the victims, a biracial couple, moved into the defendant's neighborhood and the defendant and another person burned a cross in clear view of the victims' home. The evidence relied upon to support the departure consisted of testimony that the African-American male victim made rude gestures to the neighbors from his car, had trespassed on the defendant's cousin's property, and when run off, had made rude gestures. The victim also had a prior felony record, had been arrested with concealed weapons, and had discharged a firearm. One neighbor claimed to have had a generator stolen after the victim moved into the neighborhood, having had nothing stolen ever before. Finally, the neighbors generally claimed that the neighborhood changed in some unspecified way after the male victim's arrival.[61] After examining this conduct in light of the guideline requirement that the victim's conduct must have "contributed significantly to provoking the offense behavior,"[62] the Fourth Circuit concluded that the victim's conduct was not sufficient to provoke a response of the magnitude represented by a cross burning.[63] This crime of intimidation was not a proportional response to rude gestures or conduct not specifically directed at the defendant. Moreover, because the crime also victimized a woman who was innocent of any provocation, the court concluded that the alleged wrongful conduct on the part of the one victim was insufficient provocation for burning a cross.[64] Accordingly, the court vacated the sentence and remanded for resentencing.

United States v. Manfre[65] presented the Eighth Circuit with the question of whether a co-conspirator killed in an explosion could be considered the victim of the defendant's offense for the purposes of a downward departure for victim conduct under section 2K2.10. The defendant was convicted of arson, among other things, after a night club that he owned was burned down by his co-conspirator. Unfortunately, when the club exploded and burned, the co-conspirator was killed. The purpose of burning down the club was to collect the insurance proceeds. The defendant argued that he should have received a downward departure for victim conduct, because the

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[59] *Id.* at 1187. *See also United States v. Bolka*, 355 F.3d 909. 914 (6th Cir. 2004); *United States v. Nelson*, 222 F.3d 545, 551 (9th Cir. 2000).

[60] 359 F.3d 683 (4th Cir. 2004).

[61] *Id.* at 688-89.

[62] *See* §5K2.10.

[63] 359 F.3d at 691.

[64] *Id.* at 695.

[65] 368 F.3d 832 (8th Cir. 2004).

co-conspirator was the victim of the offense. He predicated this argument upon the fact that his sentence was calculated under the homicide guidelines because of the applicable cross reference in the arson guidelines.[66] The Eighth Circuit rejected this argument. Reasoning that the victim is determined by looking at the target of the crime, not the cross-referenced guideline, the court concluded that the insurance company and not the co-conspirator was the victim of the charged offense. Given those facts, the district court correctly denied the departure.[67]

Upward Departures

In *United States v. Cole*,[68] the Sixth Circuit affirmed an upward departure under section 5K2.8 for "extreme behavior." The defendants were convicted of kidnapping, assault, and use of a firearm during a crime of violence. The case involved the abduction of a postal employee who was held at gunpoint for hours and subjected to repeated threats upon her life and sexual assaults by more than one participant. The district court departed upward by three levels under section 2K2.8 which authorizes a departure for conduct that is unusually heinous, cruel, brutal, or degrading to the victim. The defendant contested the departure and its scope on appeal, arguing that his conduct did not constitute extreme behavior.[69] The Sixth Circuit disagreed, concluding that the district court's determination that the crime was an afternoon of terror for the victim, who endured more than the average rape victim has to endure, was not an abuse of discretion.[70] Moreover, the court noted that the fact of sexual assaults by more than one participant, standing alone, would warrant the departure.[71]

The Eleventh Circuit also affirmed an "extreme conduct" upward departure in *United States v. Blas*.[72] The defendant was convicted of traveling in interstate commerce for the purpose of engaging in a sexual act with a minor. The facts established that the defendant traveled from New York to Florida to meet with the 15-year-old victim and engaged in multiple sexual acts with her. At the time he did so, the defendant was aware that he was HIV positive.[73] Although the defendant claimed to have used condoms, the district court concluded that multiple sex acts increased the risk of transmission.[74] Moreover, because of the nature of the victim's conduct with the defendant, the

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[66] *Id.* at 845.

[67] *Id.* at 845-46.

[68] 359 F.3d 420 (6th Cir. 2004).

[69] *Id.* at 429.

[70] *Id.* at 429-30.

[71] *Id.* at 430, n.15.

[72] 360 F.3d 1268 (11th Cir. 2004).

[73] *Id.* at 1270.

[74] *Id.* at 1271.

victim would be subject to repeated HIV testing, fear of having contracted the disease, and other psychological trauma. Thus, the district court granted the government's motion for an upward departure on the grounds that the defendant's behavior constituted an unusually heinous, cruel, and degrading act toward the minor, meriting a departure under section 5K2.8. As an alternate basis for the upward departure, the court found that the conduct of exposing a victim to a potentially fatal disease took the case outside of the heartland of cases, thereby warranting an upward departure for an atypical case under section 5K2.0.[75] The Eleventh Circuit affirmed both grounds for departure and the amount of the departure, reasoning that "the departure in this instance advanced the objectives of federal policy, was authorized by statute, and was justified."[76]

Circuit Conflicts Resolved by the Commission

The Commission resolved three circuit conflicts this year. The first resulted from conflicting interpretations of the last sentence of Application Note 12 to section 2D1.1. This sentence discusses the approximation of drug quantity when no drugs are seized or when the amount seized does not accurately reflect the scale of the offense. Some courts had interpreted the note to permit only defendant-sellers to claim responsibility for a lesser quantity of drugs.[77] Others permitted buyers in a reverse sting operation to argue that they should be held responsible for a lesser amount of drugs than that for which they had negotiated.[78] The Commission clarified that Application Note 12 is intended to apply to sellers and also to buyers in a reverse sting operation.[79]

The Commission added an application note to section 2G2.2 to make clear that the specific offense characteristic for material portraying sadistic or masochistic conduct applies whether the defendant specifically intended to possess, receive, or distribute such material.[80] This amendment was prompted by a conflict between the circuits over whether the defendant must have specifically intended to receive sadistic or masochistic materials. The Fifth and Eleventh Circuits required evidence of the defendant's specific intent to receive the images in order to apply the specific offense

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[75] *Id.* at 1273.

[76] *Id.*

[77] *See, e.g., United States v. Gomez*, 103 F.3d 249, 252-53 (2d Cir. 1997) (holding that the last sentence of the note is intended to apply only to sellers); *United States v. Perez de Dios*, 237 F.3d 1192 (10th Cir. 2001) (same); *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (same).

[78] *United States v. Minore*, 40 Fed. Appx. 536, 537 (9th Cir. 2002) (mem.op.) (applying the final sentence of the new Note 12 to a buyer in reverse sting operation); *United States v. Estrada*, 256 F.3d 466, 476 (7th Cir. 2001) (same).

[79] Amendment 667.

[80] Amendment 664.

characteristic.[81] By contrast, the Seventh Circuit, whose view the Commission adopted, held that the enhancement applies based on a strict liability standard, requiring no proof of intent.[82]

The final conflict resolved by the Commission related to conditions of probation and supervised release for sex offenses. The circuit courts had disagreed over the imposition of restricted computer use and Internet access conditions. Some circuits refused to allow complete prohibitions on computer use and Internet access.[83] Others upheld restrictions on computer use and Internet access with probation officer permission.[84] One circuit upheld a complete ban on a convicted sex offender's Internet use while on supervised release.[85] The Commission added a condition to sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) permitting the court to limit use of a computer or interactive computer service for sex offenses in which the defendant used such items.[86]

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[81] *See United States v. Kimbrough,* 69 F.3d 723 (5th Cir. 1995); *United States v. Tucker*, 136 F.3d 763 (11th Cir. 1998).

[82] *See United States v. Richardson*, 238 F.3d 837 (7th Cir. 2001).

[83] *See United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002) (invalidating restrictions on computer and Internet use); *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003) (same).

[84] *See United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting the defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001) (prohibiting unrestricted Internet use but allowing Internet use with probation officer's permission); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (same).

[85] *See United States v. Paul*, 274 F.3d 155 (5th Cir. 2001) (upholding complete ban on Internet use).

[86] Amendment 664.