

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 1999.

United States Supreme Court Decisions on Sentencing Issues

Privilege Against Self-Incrimination Applies at Sentencing Hearing

In *United States v. Mitchell*,⁵ the Supreme Court held that a defendant's guilty plea does not constitute a waiver of his Fifth Amendment privilege against self-incrimination.

In *Mitchell*, the defendant had pled guilty, without a plea agreement, to one count of engaging in a cocaine distribution conspiracy (21 U.S.C. § 846) and three counts of distributing cocaine within 1,000 feet of a school or playground (21 U.S.C. § 860(a)) but had reserved the right to contest the drug quantity attributable to herself under the conspiracy count. The defendant presented no evidence at the sentencing hearing. The district court ruled that as a consequence of her guilty plea, the defendant had no right to remain silent with respect to the details of the crimes. The court stated, "I held it against you that you didn't come forward today and tell me that you really only did this a couple of times. . . . I'm taking the position that you should come forward and explain your side of this issue."⁶

In holding that by pleading guilty the defendant did not waive the privilege against self-incrimination, the Supreme Court differentiated between a statement a defendant makes at a plea hearing and one a defendant makes on the stand at trial. In the latter situation, the defendant waives the privilege against self-incrimination because the defendant has put matters into dispute. In contrast, a defendant at a plea hearing is not disputing matters, but rather is agreeing to stipulate to the factual basis for the government's charge. The Supreme Court recognized that Federal Rule of Criminal Procedure 11(c) contemplates that a district court may discharge its duty of ensuring a factual basis for the plea by questioning the defendant about the offense to which he has pled. It cautioned that "a defendant who withholds information by invoking the privilege against self-incrimination at a plea colloquy runs the risk that the district court will find the factual basis inadequate."⁷ It also noted that, after the plea is accepted by the court, the plea and any statements

⁵ 526 U.S. 314, 119 S.Ct. 1307, 1309 (1999).

⁶ *Id.* at 1311 (ellipsis in original).

⁷ *Id.* at 1313.

or admissions made during the preceding plea colloquy are later admissible against the defendant, but emphasized that the defendant may still invoke the privilege against self-incrimination at the sentencing hearing.

The Court also held that the sentencing court may not draw an adverse inference from the defendant's silence at the sentencing hearing when the defendant is questioned about the facts of the crime. The Court reasoned that the "normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted"⁸ and declined to adopt an exception to that rule for the sentencing phase. It specifically noted, however, that "[w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines, was a separate question" that was not before the Court.⁹

Justice Scalia wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, agreeing that the defendant had the right to invoke the Fifth Amendment at the sentencing phase, but did not have the right to have the sentencing court abstain from making the adverse inferences that reasonably flow from the defendant's failure to testify. Justice Thomas wrote a separate dissenting opinion recommending that *Griffin* and its progeny should be reexamined.

Carjacking Statute Penalty Provisions Constitute Elements of Offense (not Sentencing Considerations)

In *Jones v. United States*,¹⁰ the Supreme Court held that the provisions of the carjacking statute, 18 U.S.C. § 2119 (that established higher penalties to be imposed when the offense results in serious bodily injury or death), set forth additional elements of the offense, not mere sentencing enhancements. According to the Court, the federal carjacking statute, established three separate offenses, each of which must be charged in the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

The Supreme Court noted that when a statute is unclear about whether it treats a fact as an element or a penalty aggravator, it makes sense to look at what other statutes have done because Congress is unlikely to intend any radical departures from past practice without making a point of saying so. The Court concluded, after a search for comparable examples, that Congress had separate and aggravated offenses in mind when it employed numbered subsections in section 2119. For example, Congress unmistakably identified serious bodily injury or related facts of violence as an offense element in several other federal statutes, including two of the three robbery statutes on which it modeled the carjacking statute. Furthermore, the Court reasoned that if a potential penalty might rise from 15 years to life on a nonjury determination, then the jury role would correspondingly shrink from the significant role of determining guilt to the relatively low-level role

⁸ *Id.* at 1314-15 (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)).

⁹ *Id.* at 1316.

¹⁰ 526 U.S. 227, 119 S.Ct. 1215 (1999).

of “gatekeeping.”¹¹ In some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.

The Court rejected the government’s argument that *Almendarez-Torres*¹² controlled this case. In *Almendarez-Torres*, the Supreme Court examined an immigration statute that increased the available maximum punishment for a deported alien who returns to the United States from two to 20 years if his deportation was due to a conviction for an aggravated felony. In *Almendarez-Torres*, the Court concluded that whether or not a defendant is a recidivist was a determination to be made by the sentencing court, and need not be charged. The Court in *Jones* concluded that *Almendarez-Torres* is not dispositive of the question in the case at bar because it was not concerned with the Sixth Amendment right to jury trial and the right to notice. The Court noted that *Almendarez-Torres* rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment. The concept is that a prior conviction itself must have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees. These constitutional safeguards are not established in the statute at issue in *Jones*. The Court concluded that any doubt on the issue of statutory construction is to be resolved in favor of avoiding the constitutional questions, which the Court does by construing section 2119 as establishing three separate offenses, each of which must be charged by indictment and determined by a jury.

Commencement of Supervised Release

On September 10, 1999, the Supreme Court granted a writ of certiorari to the U.S. Court of Appeals for the Sixth Circuit in *United States v. Johnson*¹³ to determine whether a federal criminal defendant’s term of supervised release commences on the date of his actual release from prison or on the earlier date on which he should have been released in accordance with a retroactively applied change in the law. On March 1, 2000, the Supreme Court ruled that the supervised release term remains unaltered by the fact that the defendant should have been released earlier.¹⁴

The defendant was charged with two counts under 21 U.S.C. § 841(a) for possession with intent to distribute cocaine and possession with intent to distribute dilaudid, two counts under 18 U.S.C. § 924(c) for unlawful possession of a firearm during the commission of another offense, and one count under 18 U.S.C. § 922(g) for unlawful possession of a firearm. A jury convicted the defendant, and he was later sentenced by the district court to 171 months’ imprisonment, a sentence that included two consecutive five-year terms for the section 924(c) offenses.¹⁵ The court also imposed a three-year term of supervised release on the drug charges. The Sixth Circuit affirmed the convictions, but on rehearing, held that the district court erred in sentencing the defendant to consecutive terms of imprisonment for the two section 924(c) convictions. On remand, the district

¹¹ *Id.* at 1224.

¹² *Almandarez-Torres v. United States*, 523 U.S. 224 (1998).

¹³ 120 S.Ct. 33 (1999) (lower court opinion published at 154 F.3d 569 (6th Cir. 1998)).

¹⁴ *United States v. Johnson*, __U.S.__, 2000 WL 227953 (U.S.).

¹⁵ *Johnson v. United States*, 154 F.3d 569, 570 (6th Cir. 1998).

court resentenced the defendant to concurrent five-year terms for the section 924(c) convictions after which the defendant filed a section 2255 motion in light of the *Bailey* decision.¹⁶ Because the defendant had already served more time in prison than called for under the revised sentence, the district court ordered the defendant's immediate release. The district court refused, however, to credit the extra time the defendant served in prison toward his three-year term of supervised release.¹⁷

On appeal, the defendant argued that, in light of *Bailey*, the term of supervised release should be deemed to have commenced on the date he was entitled to be released. The Sixth Circuit reasoned that 18 U.S.C. § 3624(a), which requires that a prisoner "be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment," embodies Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term.¹⁸ In light of subsection (a), the circuit court held that the defendant was not "imprisoned in connection with a conviction for a Federal . . . crime" during those two and a half years because the conviction for which he was being held was invalid. The court concluded that the date of the defendant's "release" for purposes of section 3624(a) was the date he was entitled to be released, at the end of the defendant's valid 51-month portion of the prison term, rather than the day he walked out the prison door.¹⁹

The Supreme Court held that the controlling statute, 18 U.S.C. § 3624(e) does not allow the reduction in the length of a supervised release term by reason of excess time served in prison. According to the express language of section 3624(e), a supervised release term does not commence until an individual "is released from imprisonment." Section 3624(e) also provides that a supervised release term comes "after imprisonment," once a prisoner is "released by the Bureau of Prisons to the supervision of a probation officer." The Court contended that the ordinary, commonsense meaning of the term "release" is to be freed from confinement. To say that the respondent was released while still imprisoned diminishes the concept the word intends to convey. Furthermore, the phrase "on the day the person is released" suggests a strict temporal interpretation, rather than a constructive earlier time. Section 3624(e) even admonishes that "supervised release does not run during any period in which the person is imprisoned." Thus, supervised release cannot commence while an individual remains in the custody of the Bureau of Prisons.

The statute does provide for concurrent running of supervised release in specific, identified cases. A term of supervised release may run concurrent to prison terms of less than 30 days in length, probation, parole, or to other, separate terms of supervised released. The Court inferred that Congress limited section 3624(e) to the exceptions set forth. The Court addressed the objectives of supervised release as well. The Court argued that granting the respondent credit would undermine Congress's aim of using supervised release to assist convicted felons in their transition to community life. Supervised release fulfills rehabilitative ends distinct from those served by incarceration.

¹⁶ *Id.* (In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court held that the "use" provision of 18 U.S.C. § 924(c) requires "active employment" of the firearm by the defendant).

¹⁷ *Id.*

¹⁸ *Id.* at 571.

¹⁹ *Id.* at 572.

Consequently, the court of appeals erred in treating the respondent's time in prison as interchangeable with his term of supervised release.

Finally, the Court observed that the statutory structure provides other remedies to address the equitable concerns when an individual is incarcerated beyond his or her proper prison term. The trial court may modify the individual's supervised release conditions pursuant to section 3583(e) or it may terminate the supervised release obligations after one year of completed service per section 3583(e)(1).

Decisions of the United States Courts of Appeals

The "Safety Valve"

The appellate courts have continued to refine issues regarding the application of the "safety valve" (as 18 U.S.C. § 3553(f) and guideline 5C1.2 collectively are known). The safety valve provides relief to certain non-violent, first-time offenders who have been convicted of specific drug offenses. Guideline 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) states that for an offense under any of five specified statutes,²⁰ the court "shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the defendant meets five listed criteria. Much of the litigation on the safety valve issue in the last year focused on the requirement that the defendant truthfully provide to the government all information and evidence the defendant has concerning the offense.

Criminal History

The District of Columbia in *United States v. Robinson*²¹ held that a court may not sentence a defendant under the safety valve if the defendant has more than one criminal history point – regardless of any downward departure a court may grant under policy statement 4A1.3 (Adequacy of Criminal History Category). The district court, pursuant to section 4A1.3, adjusted the defendant's criminal history downward from Category II to Category I. The district court then found that the change in the criminal history category allowed for a concomitant reduction in the defendant's criminal history points from three to one point, making the defendant eligible for the safety valve. The appellate court reversed, holding that the plain language of the statute and relevant guideline prohibit a defendant who has more than one criminal history point from being sentenced under the safety valve.²²

Possession of a Firearm

²⁰ 21 U.S.C. §§ 841, 844, 846, 960, 963.

²¹ 158 F.3d 1291 (D.C. Cir. 1999), *cert. denied*, 119 S. Ct. 1155 (1999).

²² See *United States v. Orozco*, 121 F.3d 628 (11th Cir 1997); *United States v. Resto*, 74 F.3d 22 (2d Cir. 1996); *United States v. Valencia-Andrade*, 72 F.3d 770 (9th Cir. 1995).

The Eleventh Circuit in *United States v. Clavijo*,²³ joining with the Fourth, Fifth, and D.C. Circuits,²⁴ held that mere possession of a firearm by a codefendant does not bar application of the safety valve under guideline 5C1.2. The defendant worked in two marijuana grow houses, and a shotgun belonging to a co-conspirator was found in a third marijuana grow house. The district court concluded that although the defendant had no knowledge of the firearm, he nonetheless possessed a firearm under the broad language of guideline 2D1.1(b)(1) in the drug trafficking guideline. The district court held that the defendant did not meet the safety valve criteria because the possession of a firearm was attributed to him. The appellate court, however, concluded that “possession” of a firearm does not include reasonably foreseeable possession of a firearm by co-conspirators. The appellate court noted that the plain language of section 5C1.2 requires that the defendant “possess a firearm . . . or induce another participant to do so” The appellate court concluded that for the purposes of section 5C1.2(2), the defendant neither possessed a weapon nor induced another participant to do so. Therefore, it found that the district court erred in its assumption that, because the codefendant’s firearm was attributed to the defendant under section 2D1.1(b)(1), it necessarily follows that the same firearm would be attributed to the defendant under section 5C1.2(2).

However, the Ninth Circuit in *United States v. Smith*²⁵ held that a defendant does not qualify for the safety valve under section 5C1.2 if he possessed a gun “in connection with” the present offense. The district court refused to apply the safety valve to the defendant’s case because it found that it was “not clearly improbable” that the defendant’s semi-automatic pistol in his bag was connected to the offense. The appellate court held that conduct that warrants an increase in sentencing under section 2D1.1(b)(1) necessarily defeats application of the safety valve. The defendant argued that the gun was used to shoot snakes in his marijuana garden. The appellate court concluded that section 5C1.2(2) incorporates the same “connected with” phraseology as does the commentary to section 2D1.1. The appellate court noted that every circuit that has considered the issue has held that conduct that warrants an increase in sentence under section 2D1.1(b)(1) necessarily defeats application of the safety valve.²⁶ The appellate court also stated that it saw no reason to disturb the district court’s findings that it was not clearly improbable that the weapon was connected with the offense.

Truthfully Provide Information to the Government

The Seventh Circuit in *United States v. Brack*²⁷ examined the issue of whether or not a defendant can be eligible for the safety valve if the government refuses to meet with the defendant.

²³ 165 F.3d 1341 (11th Cir. 1999).

²⁴ See *United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997); *In re Sealed Case*, 105 F.3d 1460 (D.C. Cir. 1997); *United States v. Wilson*, 105 F.3d 219 (5th Cir.), cert. denied 522 U.S. 847 (1997).

²⁵ 75 F.3d 1147 (9th Cir. 1999).

²⁶ See *United States v. Vasquez*, 161 F.3d 209 (5th Cir. 1999); *United States v. Hallum*, 103 F.3d 87 (10th Cir. 1998); *United States v. Burke*, 91 F.3d 1052 (8th Cir. 1996).

²⁷ 188 F.3d 748 (7th Cir. 1999).

The defendant had submitted a written statement to the government and had offered to submit to a safety valve interview. The government did not believe the statement was truthful and believed it was under no obligation to follow up with an interview. At sentencing, the district court agreed with the government's contention that the defendant did not meet the information requirement of section 5C1.2(5) and refused to apply the safety valve. The appellate court stated that a defendant cannot satisfy the disclosure requirement simply by notifying the court of his willingness to submit to a safety valve interview. However, in this case, the defendant acted affirmatively by inviting the government in writing to interview him. The appellate court held that the defendant's written statement (if truthful) combined with his offer to meet with the government satisfied the safety valve disclosure requirement. The appellate court noted that the government was not required to give the defendant a second chance to tell the truth, but it could not complain of incompleteness when it refused to allow him to finish telling his story.

The Eighth Circuit in *United States v. Morones*²⁸ held that a defendant who originally told the government the whole truth, but later recanted, was not eligible for the safety valve. The defendant argued that he was entitled to safety valve relief because, in an initial interview, he told the full truth about his involvement, regardless of his later recantation. The appellate court concluded that it serves the purpose of the safety valve to grant relief if the sentencing court is persuaded that the last story is complete and truthful. If the sentencing court finds that the initial recanted story was truthful, or that in recanting the defendant has been untruthful, the court's finding that the defendant has not "truthfully provided to the Government all information and evidence he has concerning the offense" is not clearly erroneous. Here, because the district court found the initial recanted story truthful, the defendant is precluded from safety valve relief.²⁹

The Fifth Circuit in *United States v. Miller*³⁰ held that lying about irrelevant prior activities does not impact a section 5C1.2 determination. The district court refused to grant safety valve relief to the defendant, concluding that the defendant lied about his role in a prior drug transaction. The defendant appealed, contending that he was not required to divulge information about two previous drug-related incidents because they were not "part of the same course of conduct or of a common scheme or plan" as required by the guidelines. The defendant argued that his offense of conviction, which involved cocaine trafficking, bore no relationship to a marijuana arrest that occurred four years earlier or to prior cocaine-related activity that pre-dated the present offense of conviction by two years. The appellate court agreed with the defendant, holding that the defendant was eligible for the safety valve because the prior activities were not part of the same course of conduct or scheme. After examining the offenses in question, the appellate court concluded that the defendant's prior drug activities were not substantially connected or sufficiently similar to the offense of conviction and did not constitute a common scheme or plan or the same course of conduct within the meaning of section 5C1.2(5). Therefore, because the defendant had provided all information about his current offense of conviction, he was entitled to safety valve relief.

Two cases examined the issue of whether or not a defendant who has consistently lied to the government, but eventually provides truthful information, still satisfies section 5C1.2(5).

²⁸ 181 F.3d 888 (8th Cir. 1999).

²⁹ See *United States v. Lopez*, 163 F.3d 1142 (9th Cir. 1998).

³⁰ 179 F.3d 961 (5th Cir. 1999).

The Eighth Circuit in *United States v. Tournier*³¹ held that the defendant's lack of cooperation prior to the sentencing hearing did not preclude application of safety valve relief. The defendant had submitted to four government interviews at which she lied and failed to provide complete information until just before the sentencing hearing. The district court concluded that the defendant had provided complete and truthful information and granted safety valve relief. The government appealed, arguing that while she eventually provided complete and truthful information prior to the hearing, her previous lies and omissions made her ineligible for safety valve relief. The government argued that 18 U.S.C. § 3553(f)(5) should be denied to those whose tardy or grudging cooperation burdens the government with a need for additional investigation. The appellate court noted that these factors are expressly relevant to other sentencing determinations, such as the third level of reduction for acceptance of responsibility under section 3E1.1(b) of the guidelines and substantial assistance motions under guideline section 5K1.1. The appellate court concluded that the defendant's full and truthful cooperation, though grudging and fitful, was completed before the sentencing hearing. The appellate court added that the safety valve is even available to defendants who put the government to the expense and burden of a trial.

The Second Circuit in *United States v. Schreiber*³² held that lies and omissions do not disqualify a defendant from safety valve relief so long as the defendant makes a complete and truthful proffer no later than the commencement of the sentencing hearing. The appellate court concluded that the plain words of section 3553(f)(5) provide only one deadline for compliance – “not later than the time of the sentencing.” The appellate court added that the statute provides no basis for distinguishing between defendants who disclose piecemeal as the proceedings unfold and defendants who wait for the statutory deadline by disclosing “not later than sentencing.” The appellate court did note that an untruthful defendant risks the possibility that his or her lies will be exposed at the sentencing hearing itself, thus disqualifying the defendant from relief. Furthermore, the fact that an appellant repeatedly lies and obstructs justice prior to allegedly telling the complete truth will be useful in evaluating whether the final proffers were complete and truthful.

Acceptance of Responsibility and the Safety Valve

Two cases examined the relationship between guidelines 3E1.1 (Acceptance of Responsibility) and 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

The Second Circuit in *United States v. Conde*³³ held that the disclosure obligation imposed by section 5C1.2(5) requires more than accepting responsibility for one's own acts. The appellate court noted that section 5C1.2 requires the defendant to “disclose all he knows concerning both his involvement and that of any co-conspirators.” The appellate court cited cases in which the defendant was properly denied the safety valve because the defendant failed to provide names of his or her

³¹ 171 F.3d 645 (8th Cir. 1999).

³² 191 F.3d 103 (2d Cir. 1999).

³³ 178 F.3d 616 (2d Cir. 1999).

sources.³⁴ The court added that while section 3E1.1 focuses on the defendant's acceptance of responsibility, 18 U.S.C. § 3553(f) requires the defendant to reveal a broader scope of information about the relevant conduct.³⁵ Therefore, satisfying the truthfulness element of one of these two guidelines does not mean that the other guideline's truthfulness element has been satisfied.

The Eleventh Circuit in *United States v. Yate*³⁶ held that section 5C1.2(5) is a "tell all" provision demanding disclosure that is different from mere acceptance of responsibility. In this case, the defendant received an acceptance of responsibility adjustment under section 3E1.1, but the district court refused to grant safety valve relief because the defendant did not truthfully disclose to the government all information and evidence he had about the offense. The appellate court held that a sentencing court's conclusion that a defendant accepted responsibility under section 3E1.1 does not preclude a finding that the defendant has failed to meet the affirmative disclosure requirement of section 5C1.2(5).

Post-Koon Appellate Departure Decisions

Under section 5K2.0 (Grounds for Departure), the Commission granted broad departure authority to district courts by adopting the language of 18 U.S.C. § 3553(b), which provides that a court is permitted to depart from a guideline sentence only when it finds "an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The discretionary power of district courts was broadened by the 1996 decision in *Koon v. United States*.³⁷ Although *Koon* established a new standard of review to be applied in assessing district court departure decisions, *Koon* permitted certain key issues to remain intact: (1) whether or not the Sentencing Commission has already taken into account the factors the sentencing court identified as a basis for departure and (2) whether or not the district court abused its discretion.

As the appellate courts continue to apply the *Koon* analysis, district court departure decisions have been reversed and affirmed for refusing to depart upward or downward based on various factors. Descriptions of these cases appear below.

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

C *Sentencing Disparity.* The Tenth Circuit reversed a downward departure that was based on a sentencing disparity between codefendants. Disparity in sentencing is considered an impermissible departure factor when defendants, being compared,

³⁴ See *United States v. Gambino*, 106 F.3d 1105 (2d Cir. 1997) and *United States v. Rodriguez*, 69 F.3d 136 (7th Cir. 1995).

³⁵ See *United States v. Sabir*, 117 F.3d 750 (3d Cir. 1997); *United States v. Adu*, 82 F.3d 119 (6th Cir. 1996); *United States v. Arrington*, 73 F.3d 144 (7th Cir. 1996).

³⁶ 176 F.3d 1309 (11th Cir. 1999).

³⁷ *Koon v. United States*, 116 S. Ct. 2035 (1996).

either (1) pled to or were convicted of different offenses or (2) played significantly different roles in the commission of the same offense. The appellate court noted that the guidelines were not designed to eliminate all sentencing disparities, but only to eliminate “unwarranted” disparities.³⁸

- C *Combination of Factors When Each Factor Independently Would Not Justify a Departure.* The Fourth Circuit reversed a downward departure that was based on a combination of factors such as defendant’s unique psychological condition and unusual susceptibility to abuse in prison, defendant’s alien status and employment consequences, defendant’s exposure to negative publicity, the victimless nature of defendant’s offense, and the fact that defendant was not a pedophile. The court found that the circumstances, characteristics, or consequences of this case were neither individually, nor in combination, so unique or extraordinary so as to bring it outside the heartland of cases sentenced under the guidelines.³⁹
- C *Defendant’s Susceptibility to Abuse in Prison.* The Fifth Circuit reversed a downward departure that was based on the defendant’s susceptibility to abuse in prison because he was a corrections officer. The court noted that the defendant’s status as an officer does not justify a departure and that to allow such a departure would thwart the purpose and intent of the guidelines. The court opined that the Sentencing Commission surely considered the possibility that some defendants convicted of violating a person’s civil rights under color of law would be law enforcement officers.⁴⁰
- C *Armed Career Criminal Status Overrepresents Seriousness of Criminal History.* The Eleventh Circuit reversed a downward departure that had been granted on the grounds that although the defendant’s prior convictions fell within the statutory definition of serious drug offenses, they involved only small amounts of drugs and therefore were “very minor.” The court of appeals noted that defendant’s prior state convictions for possession with intent to distribute cocaine constituted serious drug offenses within the meaning of 18 U.S.C. § 924(e)(2)(A)(ii) and therefore the defendant fell within the Armed Career Offender guideline (§4B1.4). The court of appeals rejected the downward departure, reasoning that a sentencing court may not look behind the facts of a prior conviction to conclude that a downward departure is warranted on the grounds that the prior offense involved only a small amount of drugs and therefore was not serious.⁴¹ The court argued that it would make no sense to conclude that while a sentencing court is prohibited from looking behind the fact of an unambiguous judgment in determining whether a prior conviction serves as a predicate offense placing a defendant within the Armed Career Criminal guideline, it may do so to conclude that a downward departure is warranted based on the

³⁸ *United States v. Contreras*, 180 F.3d 1204 (10th Cir. 1999).

³⁹ *United States v. Debeir*, 186 F.3d 561 (4th Cir. 1999).

⁴⁰ *United States v. Winters*, 174 F.3d 478 (5th Cir. 1999).

⁴¹ *United States v. Ruckers*, 171 F.3d 1359 (11th Cir. 1999).

particular facts of each prior conviction. Permitting departures based on the comparison of facts underlying a defendant's prior convictions would result in radically disparate sentencing, thereby impermissibly overriding the Sentencing Commission's efforts to uniformly subject career offenders to enhanced penalties.

- C *Extreme Childhood Abuse.* The Second Circuit reversed a downward departure that was based on extreme abuse suffered during childhood. The court noted that a downward departure may be granted only if the abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense.⁴²
- C *Substantial Assistance without Government Motion.* The Fifth Circuit reversed a downward departure that had been based on defendant's substantial assistance and that had been granted in the absence of a motion from the government. The court held that section 5K2.0 (Grounds for Departure) of the guidelines does not afford district courts any additional authority to consider substantial assistance departures without a government motion.⁴³

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

- C *Post-Sentence Rehabilitation.* The Sixth Circuit held that the district court had the legal authority, on resentencing, to depart downward on the basis of a defendant's post-sentence rehabilitation, provided that the rehabilitation was extraordinary or exceptional.⁴⁴

Appellate courts **upheld refusals to depart downward** in the following cases:

- C *Aberrant Behavior.* The Second Circuit upheld the district court's refusal to depart downward for aberrant behavior. The Second Circuit joined the First, Ninth, and Tenth Circuits in concluding that aberrant behavior is conduct that constitutes "a short-lived departure from an otherwise law-abiding life" and that the best test by which to judge whether conduct is truly aberrant is the totality of the circumstances test. The circuit court stated that for purpose of determining eligibility for an aberrant behavior departure, courts may consider the following nonexclusive, nondispositive factors: (1) the singular nature of the criminal act, (2) the defendant's criminal record, (3) the degree of spontaneity and planning inherent in the conduct, (4) extreme pressures acting on the defendant, including any psychological disorders from which the defendant may have been suffering, at the time of the offense, (5) the defendant's motivations for committing the crime, including any pecuniary gain the defendant derived therefrom, and (6) the defendant's efforts to mitigate the effects of the crime.⁴⁵

⁴² *United States v. Rivera*, 192 F.3d 81 (2d Cir. 1999).

⁴³ *United States v. Solis*, 169 F.3d 224 (5th Cir. 1999).

⁴⁴ *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999).

⁴⁵ *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998).

- C *Adverse Judgment in a Civil Case.* The Eighth Circuit upheld the district court's refusal to depart downward on the basis of the fraud victim's receipt of a \$6,000,000 judgment in a civil fraud action against the defendant for the conduct at issue in the criminal case. The appellate court concluded that an adverse judgment in a prior civil case involving the same fraudulent conduct is not a permissible basis to reduce the prison sentence for the criminal fraud.⁴⁶
- C *First Degree Murder.* The Tenth Circuit upheld the district court's refusal to depart downward on the basis of the defendant's contention that he did not cause death intentionally or knowingly pursuant to guideline 2A1.1 (First Degree Murder). The defendant argued that the district court was required to make findings regarding the defendant's mental state before determining whether or not a downward departure is appropriate. The court of appeals held that nothing in the guideline requires the district court to make any such findings before deciding whether to depart.⁴⁷
- C *Defendant's Mistake of Fact.* The Eighth Circuit upheld the district court's refusal to depart downward on the basis of the defendant's mistake of fact. The defendant had contended that she believed she was transporting a different type of drug. The court of appeals held that the guidelines explicitly consider the effect of a drug defendant's mistake of fact on his or her sentencing accountability in section 1B1.3 (Relevant Conduct) and that the district court could not depart downward on that basis.⁴⁸

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

- C *Large Quantities of Drugs.* The Third Circuit reversed an upward departure that was based on the large quantities of drugs involved in a simple possession case. In departing upward, the district court had relied in part on Application Note 1 to guideline 2D2.1 (Unlawful Possession; Attempt or Conspiracy), which states "where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted." The appellate court noted that large quantities of drugs are relevant to sentencing determinations in possession cases only to the extent that they indicate the high probability that the drugs were intended not for mere possession, but for distribution to others. Based on the evidence in the record, the court found that the defendant did not intend that anyone consume the large quantities of drugs but only intended to turn those drugs over to government agents and did so. The court concluded that the district court abused its discretion in utilizing Application Note 1 of section 2D2.1 or section 5K2.0 (Grounds for Departure) as a basis for an upward departure based on quantity of drugs.⁴⁹

⁴⁶ *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999).

⁴⁷ *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999).

⁴⁸ *United States v. Rodriguez-Ochoa*, 169 F.3d 529 (8th Cir. 1999).

⁴⁹ *United States v. Warren*, 186 F.3d 358 (3rd Cir. 1999).

- C *Unusually High Purity Level of Heroin.* The Seventh Circuit reversed a six-level upward departure for the unusually high purity level of the heroin smuggled. The defendant argued that this six-level upward departure was unauthorized. The district court held that Application Note 9 under section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy) encouraged upward departures for trafficking controlled substances of unusually high purity levels and that the high purity level of the heroin smuggled by the defendant accounted for the six-level increase in the defendant's offense level. The extra six levels were based on the conversion of the defendant's 250 grams of 70 percent pure heroin to 2.5 to 5.8 kilograms of heroin at street-level purities. The court of appeals held that a district judge should not increase the effective quantity of drugs at the prosecutor's behest on the ground that street-level purity is the superior measure. The court further noted that the only function of Application Note 9 under section 2D1.1 is to establish whether or not a higher sentence is warranted when the purity is probative of the defendant's role or position in the chain of distribution. Because the record of evidence did not indicate any association between the defendant's role in the criminal enterprise and the higher purity level of the heroin smuggled, an upward departure was not warranted in this case based upon the high purity level of the heroin alone.⁵⁰
- C *Threat to National Security.* The Third Circuit reversed an upward departure that was based on the defendant's actions as a threat to national security. The court noted that the district court's evaluation of the defendant's actions as a current or future threat to national security rested (1) on the fact that the defendant shared with the Ukraine information that was not generally known and (2) on its determination that this harm was not adequately captured by the monetary duties evaded by the defendant. There was no evidence in the record to show that confidential information was disclosed to Russia or the Ukraine by the defendant. The sentencing memorandum noted that the defendant had taken affirmative action to prevent classified material from being disclosed. The circuit court found that the district court clearly erred in finding that the defendant's conduct created a national security risk and concluded that the district court had abused its discretion in departing upward on that ground.⁵¹

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

- C *Extreme Psychological Injury.* The Eleventh Circuit upheld a two-level upward departure for extreme psychological injury (§5K2.3) to bank tellers who were employed at the bank the defendant robbed. The court of appeals noted that a departure for extreme psychological injury is warranted if it is "much more serious than that normally resulting from commission of the offense." More than two and one-half years after the robbery, the victims still did not feel safe at work, were especially cautious entering and leaving the bank, and had restricted their daily activities. Upon extensive review of the record, the circuit court found that the

⁵⁰ *United States v. Cones*, 195 F.3d 941 (7th Cir. 1999).

⁵¹ *United States v. Nathan*, 188 F.3d 190 (3rd Cir. 1999).

district court did not abuse its discretion in departing two levels upward for extreme psychological injury.⁵²

- C *Extreme Conduct.* The Ninth Circuit held that the district court did not abuse its discretion by imposing a seven-level upward departure under the “extreme conduct” provision of the sentencing guidelines (§5K2.8). The circuit court noted that evidence presented at the sentencing hearing showed that defendant severely beat and strangled his wife before throwing her body overboard on the final night of their honeymoon cruise. In light of the severity of the crime and the unusually cruel circumstances of the death of defendant’s wife, the circuit court found that an upward departure of seven levels was appropriate.⁵³
- C *Offenses Charged in Indictment without Jury Verdict Being Reached.* The Second Circuit upheld an upward departure that was based on the district court’s finding, by clear and convincing evidence, that the defendant participated in three robberies. The defendant had been charged with the robberies in the indictment, but the jury had been unable to reach a verdict on these counts.⁵⁴
- C *Extent of Harm Posed by Defendant’s Conduct.* The Seventh Circuit approved the district court’s departure upward from the offense levels specified in guideline 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) because that guideline was being used only as the most analogous guideline for the instant offense and, therefore, did not consider the type or extent of harm posed by the defendant’s conduct. The defendant was convicted under 18 U.S.C. § 175 for possession of ricin, a highly toxic substance for which there is no guideline. The court of appeals expressed doubt that a case in which a district court is required to apply the most analogous guideline pursuant to sentencing guideline 2X5.1 (Other Offenses) can ever be found to fall within the heartland of that guideline. It was noted by the court that this case is, by definition, an unusual case and is a suitable candidate for an upward or downward departure.⁵⁵

Appellate courts **remanded for reconsideration of departures** in the following cases:

- C *Voluntary Deportation.* The Second Circuit ordered a remand to consider whether or not the defendant has presented a colorable, non-frivolous defense to deportation that would substantially assist in the administration of justice enough to warrant a downward departure. The circuit court noted that the record was ambiguous on the question of whether or not the district court was aware of its authority to grant a

⁵² *United States v. Sawyer*, 180 F.3d 1319 (11th Cir. 1999).

⁵³ *United States v. Roston*, 168 F.3d 377 (9th Cir. 1999).

⁵⁴ *United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999).

⁵⁵ *United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999).

downward departure on the basis of the defendant's consent to deportation in the absence of the government's consent.⁵⁶

C *Harmfulness of Defendant's Conduct.* The Second Circuit vacated a sentence imposed by the district court in which it erroneously based its calculation of loss on the gain to the defendant. The court of appeals noted that, on remand, the district court may wish to depart under the provision in the fraud guideline that states that if the loss determined does not fully capture the harmfulness of the conduct, an upward departure may be warranted. The defendant stole misprinted postal stamps from the Postal Service and sold them to collectors, after misrepresenting that they had been issued by the Postal Service. The Postal Service was the victim of the theft but suffered no "direct" loss as a result, because the stamps had no value to the agency, which wished to destroy them. According to the circuit court, the theft of the misprints could incur an appropriate application of the departure provision because of the real but intangible loss suffered by the Postal Service in the form of embarrassment and the appearance of incompetence.⁵⁷

C *Extreme Psychological Injury.* The Third Circuit remanded a five-level upward departure under section 5K2.3 of the guidelines for "extreme psychological injury" because the district court did not find that the victim's psychological injury was "much more serious than that normally resulting from the commission" of the crime of aggravated assault, a finding that is a prerequisite for a departure under section 5K2.3.⁵⁸

⁵⁶ *United States v. Galvez-Falconi*, 174 F.3d 255 (2nd Cir. 1999).

⁵⁷ *United States v. Robie*, 166 F.3d 444 (2d Cir. 1999).

⁵⁸ *United States v. Jacobs*, 167 F.3d 792 (3d Cir. 1999).