

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 2000.

United States Supreme Court Decisions on Sentencing Issues

Factors That Increase Statutory Maximums Must Be Determined By Jurors, Not Judges

In *Apprendi v. United States*,³ the Supreme Court held that the Due Process Clause of the U.S. Constitution requires that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury (or a judge in the case of a bench trial) and proved beyond a reasonable doubt.

In *Apprendi*, the defendant, a white male, fired several shots into the home of an African-American family that had recently moved into a previously all-white neighborhood. The defendant was arrested, and he subsequently admitted that he was the shooter. Later, after further questioning, the defendant told police that he had fired the shots because the family was “black in color” and he did not want them in the neighborhood.⁴ The defendant pled guilty to second degree possession of a firearm for an unlawful purpose. Under New Jersey law, the statutory penalty for this offense was a sentence of five to ten years. Additionally, the New Jersey law provided for an “extended term” of imprisonment if the judge found, by a preponderance of the evidence, that “the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.”⁵ The state government reserved the right to ask the judge to impose a greater sentence under the New Jersey hate crime law. Under the terms of the plea agreement, the defendant reserved the right to challenge the hate crime enhancement of this sentence as a violation of the U.S. Constitution.

The district court sentenced the defendant to ten years’ imprisonment for possession of a firearm for unlawful purposes. Although the defendant retracted his statement to the police about his reasons for the shooting, the district court found that the evidence supported a finding “that the

³ 530 U.S. 466 (2000).

⁴ *Id.* at 469.

⁵ N.J. STAT. ANN. §§ 2C-44-3(e) (West 2000).

crime was motivated by racial bias” and imposed an additional two years of imprisonment based on the enhancement penalty provision under the New Jersey hate crime law.⁶

On appeal, the defendant argued that the enhancement penalty should be regarded as an element of the offense that required proof to the fact finder beyond a reasonable doubt. The Supreme Court agreed, quoting from Justice Stevens’s concurring opinion in *Jones v. United States*,⁷ in which he stated, “It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established beyond a reasonable doubt.”⁸ The Court noted that the constitutional guarantees of due process under the Fourteenth Amendment and the Sixth Amendment’s right to trial by jury entitle criminal defendants to a jury determination that they are guilty beyond a reasonable doubt of *every* element of the crime for which they are convicted and sentenced.⁹

The Court determined that the New Jersey statutory scheme allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon.¹⁰ “After a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that which New Jersey provides for crimes of the first degree based upon the judge’s finding, by a preponderance of the evidence, that the defendant’s ‘purpose’ for unlawfully possessing the weapon was ‘to intimidate’ his victim on the basis of a particular characteristic the victim possessed.”¹¹ In light of the constitutional rules explained earlier, the Court concluded that such a practice cannot stand.

Justice Sandra Day O’Connor wrote a dissenting opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, stating that the Court’s decision would be “remembered as a watershed change in constitutional law.”¹² In a separate dissenting opinion Justice Breyer, joined by Chief Justice Rehnquist, argued that the majority’s holding was “impractical” and unsupported by the Constitution.¹³ He also expressed concern over what the Court’s holding would mean for the federal sentencing guidelines.¹⁴

⁶ *Apprendi*, 530 U.S. at 468-69.

⁷ 526 U.S. 227 (1999).

⁸ *Id.* at 252-253.

⁹ *Apprendi*, 530 U.S. at 476-77 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

¹⁰ *Id.* at 491.

¹¹ *Id.*

¹² *Id.* at 524.

¹³ *Id.* at 555.

¹⁴ *Id.* at 558.

Type of Firearm under Firearm Statute Penalty Provisions Considered an Element of Offense and Not a Sentencing Factor

In *Castillo v. United States*,¹⁵ the Supreme Court held that a statute prohibiting the use or carrying of a “firearm” in relation to a crime of violence that subsequently increased the penalty when the weapon used or carried was a “machinegun,” used the word “machinegun” and similar words to state an element of a separate, aggravated crime.

In *Castillo*, the defendants were indicted for conspiring to murder law enforcement officers and for violations of 18 U.S.C. § 924(c)(1) which read in part: “Whoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years, . . . and if the firearm is a machinegun, . . . to imprisonment of thirty years.” The jury determined that the defendants had violated this section by “knowingly us[ing], or carr[ying] a firearm during and in relation to the commission of a crime of violence.”¹⁶ At sentencing, the judge found that the firearms included machineguns (many equipped with silencers) and hand grenades that the defendants actually or constructively had possessed. The judge then imposed the statute’s mandatory 30-year prison sentence. The defendants appealed. While their appeal was pending, the Supreme Court decided in *Bailey v. United States*¹⁷ that the word “use” in section 924(c)(1) requires evidence of more than “mere possession.” The Fifth Circuit, citing *Bailey’s* stronger sense of “use,” concluded that statutory words such as “machinegun” create sentencing factors (*i.e.*, factors that enhance a sentence, not elements of a separate crime).¹⁸ As a result, the Fifth Circuit determined that “should the district court find on remand that members of the conspiracy actively employed machineguns, it was free to reimpose the 30-year sentence.”¹⁹ On remand, the district court resentenced the defendants to 30-year terms of imprisonment based on its weapons-related findings. The Fifth Circuit affirmed.²⁰

Against this background, the Supreme Court examined whether Congress intended the statutory references to particular firearm types in section 924(c)(1) to define a separate crime or simply to authorize an enhanced penalty. If the former, the indictment must identify the firearm type and a jury must find that element proved beyond a reasonable doubt. If the latter, the matter need not be tried before a jury but may be left for the sentencing judge to decide.²¹

First, the Court stated that the statute’s structure strongly favored the “new crime” interpretation. The first part of the opening sentence “clearly and indisputably establishes the

¹⁵ 530 U.S. 120 (2000).

¹⁶ *Id.* at 122.

¹⁷ 516 U.S. 137, 143 (1995).

¹⁸ *Castillo*, 530 U.S. at 123.

¹⁹ *United States v. Branch*, 91 F.3d 699, 740-741 (5th Cir. 1996).

²⁰ 179 F.3d 321 (5th Cir. 1999).

²¹ *Castillo*, 530 U.S. at 123.

elements of the basic federal offense of using or carrying a gun during and in relation to a crime of violence.”²² The next three sentences of section 924(c)(1) refer directly to sentencing: the first to recidivism, the second to concurrent sentences, and the third to parole. The Court determined that the purpose of the entire first sentence was to define the crimes and the role of the remaining three was to describe factors (such as recidivism) that ordinarily pertain only to sentencing.²³

The Court stated that courts have not traditionally used firearm types (such as “shotgun” or “machinegun”) as sentencing factors, at least not in respect to an underlying “use” or “carry” crime. The Court further stated that the statute at issue prescribes a mandatory penalty for using or carrying a machinegun that is six times more severe than the punishment for using or carrying a mere “firearm.” This seems to suggest that the difference between the act of using or carrying a “firearm” and the act of using or carrying a “machinegun” is both substantive and substantial—a conclusion that supports a “separate crime” interpretation.²⁴ The Court also noted that at least two appellate courts have interpreted section 924(c)(1) as setting forth a separate “machinegun” element in relevant cases.²⁵

The Court pointed out that having the jury (rather than the judge) decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness because the prosecution’s case under section 924(c) usually will involve presenting a certain weapon (or weapons) to the jury and arguing that the defendant used or carried that weapon during a crime of violence within the meaning of the statute.²⁶

The Court rejected the government’s argument that the legislative history of the statute favors interpreting section 924(c) as setting forth sentencing factors, not elements. The Court stated that the statute’s basic “uses or carries a firearm” provision “also dealt primarily with sentencing, its pre-eminent feature consisting of the creation of a new mandatory term of imprisonment additional to that for the underlying crime of violence.”²⁷ In this context, the Court noted that the absence of “separate offense” statements means little, and the “mandatory sentencing” statements to which the government points show only that Congress believed that the “machinegun” and “firearm” provisions would work similarly.²⁸

Finally, the Court determined that the length and severity of an added mandatory sentence that turns on the presence or absence of a “machinegun” (or any of the other listed firearm types)

²² *Id.* at 124.

²³ *Id.* at 125.

²⁴ *Id.* at 127.

²⁵ *Id.* (citing *United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996)); *United States v. Melvin*, 27 F.3d 710, 714 (1st Cir. 1994).

²⁶ *Castillo* at 127-128.

²⁷ *Id.*

²⁸ *Id.* at 130.

weighs in favor of treating such offense-related words as if they refer to an element of the offense.²⁹ The Court noted that these considerations make this a stronger “separate crime” case than either *United States v. Jones*³⁰ or *United States v. Almanderez-Torres*³¹—cases in which the Court was closely divided as to Congress’s likely intent. The Court concluded that Congress intended the firearm-type-related words used in section 924(c)(1) to refer to an element of a separate, aggravated crime.

Commencement of Supervised Release

In *United States v. Johnson*³² the Supreme Court granted certiorari, to decide whether the term of supervised release commenced upon the defendant’s actual release from prison or on the date the defendant should have been released. In an opinion written by Justice Kennedy, the Supreme Court reversed and remanded the decision of the Sixth Circuit which had concluded that the defendant’s date of release according to 18 U.S.C. § 3624(a) was the date he was entitled to be released rather than the date he walked out the prison door. The Supreme Court held that the term of the defendant’s supervised release commenced upon his actual release from prison, not the date he should have been released.

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,³³ 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.

Criminal History

²⁹ *Id.*

³⁰ 526 U.S. 227 (1999) (provisions of carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of the offense, not merely sentencing considerations).

³¹ 523 U.S. 224 (1998) (recidivism treated merely as a sentencing factor rather than as an element of the offense).

³² 529 U.S. 53 (2000).

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

The Eighth Circuit in *United States v. Webb*,³⁴ joining with four other circuits, held that a downward departure to Category I does not render a defendant eligible for the application of the safety valve.³⁵ The district court, pursuant to section 4A1.3, adjusted the defendant's criminal history downward from Category III to Category I. The defendant moved for application of the safety valve, arguing that he met the five-part test of section 5C1.2. The district court found that the defendant did not qualify for a reduction under the safety valve because he had four criminal history points. The defendant contended that because the district court moved him into Category I, he was eligible for the safety valve.

The appellate court noted that section 5C1.2 states that a defendant must not have more than one criminal history point as determined under section 4A1.1. The appellate court added that nothing in section 4A1.3, the provision under which the district court shifted the defendant into a lower criminal history category, indicates that a category change under this provision deletes previously assessed criminal history points for the purpose of the section 5C1.2 analysis.

Possession of a Firearm

The Second Circuit in *United States v. DeJesus*³⁶ held that section 5C1.2(2) is satisfied "when the government establishes, by a preponderance of the evidence, that the firearm 'served some purpose with respect to' the offense." During the course of drug transactions, the defendant received a gun as collateral for a drug debt. Nevertheless, the defendant argued that this did not constitute grounds for denying relief under section 5C1.2(2) because his possession of the weapon was merely incidental, as the gun was not used to further the conspiracy or to protect his drug business.

The appellate court concluded that the firearm in question served as a form of payment in the drug transaction, and thus, clearly facilitated the drug conspiracy offense because without the firearm, the deal might not have been consummated. Therefore, the appellate court concluded that defendant's possession of the firearm in question was "in connection with the offense" for purposes of section 5C1.2, thus making him ineligible for relief afforded by the safety valve provision.

³⁴ 218 F.3d 877 (8th Cir. 2000).

³⁵ 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).

³⁶ 219 F.3d 117, 122 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 502 (2000).

Truthfully Provide Information to the Government

The Eleventh Circuit in *United States v. Brownlee*³⁷ joining with the Second and Eighth Circuits,³⁸ held that a defendant's prior failure to truthfully disclose information related to his offenses did not preclude sentencing under the safety valve provision. The defendant, upon his arrest, gave a proffer admitting to his involvement in the sale of cocaine, but he did not truthfully disclose the source of the cocaine at this time, nor at later meetings with the government. The day before the defendant's sentencing hearing, the defendant's attorney contacted the prosecutor, telling him that the defendant would meet with him before the sentencing hearing to disclose information. On the morning of his sentencing hearing, the defendant met with the prosecutor and case agent and disclosed the source of the cocaine. The district court refused to apply the safety valve. The appellate court held that the plain language of 18 U.S.C. § 3553(f) and section 5C1.2 provides only one deadline for compliance, "not later than the time of the sentencing hearing." The court stated that nothing in the statute suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety valve relief. The court added that this does not mean that the defendant's prior lies are completely irrelevant. In making its determination, the evidence of his lies becomes part of the total mix of evidence for the district court to consider in evaluating the completeness and truthfulness of the defendant's proffer. Because the district court disqualified the defendant from safety valve relief at the threshold, the district court never considered the factual question of whether his final proffer was complete and truthful. Therefore, the appellate court vacated the defendant's sentence and remanded with instructions for the court to determine if the defendant met the qualifications under section 5C1.2.

The Eleventh Circuit in *United States v. Figueroa*³⁹ held that a defendant must provide a complete and truthful disclosure, even if the withheld or misrepresented information would not have aided further investigation. The district court granted safety valve relief to the defendant even though it found that some of the defendant's disclosures were incomplete and untruthful. The district court determined that the withheld information would not be of much use to the government because the defendant did not know who was in charge of the importation or where the drugs came from. The government appealed, arguing that the safety valve should not have applied. The appellate court held that section 5C1.2(5) does not permit a sentencing court to take into account the possible utility or lack of usefulness of any information possessed by the defendant. A defendant must provide all information regardless of its utility. Thus, the appellate court vacated the application of the safety valve.

The Second Circuit in *United States v. Tang*⁴⁰ held that there is no basis to create a fear-of-consequences exception to the safety valve provision. The defendant argued that he should be excused for refusing to give information about a particular co-conspirator in Hong Kong, based on his fear for the safety of his fiancée and family members in Hong Kong. The appellate court

³⁷ 204 F.3d 1302 (11th Cir. 2000).

³⁸ *United States v. Schreiber*, 191 F.3d 103 (2d Cir. 1999), and *United States v. Tournier*, 171 F.3d 645 (8th Cir. 1999).

³⁹ 199 F.3d 1281 (11th Cir. 2000).

⁴⁰ 214 F.3d 365 (2d Cir. 2000).

concluded that the Sentencing Commission evidently contemplated that the risk of injury to a defendant or his family will not excuse withholding information because such a risk is explicitly identified as a factor to be considered in determining the extent of a cooperation departure. Therefore, no fear-of-consequences exception should be carved out within the safety valve.

Eligibility for the Safety Valve

Three cases examined when the safety valve can apply to a defendant's sentence.

The Eleventh Circuit in *United States v. Anderson*⁴¹ joined the Third Circuit⁴² in holding that the safety valve provision does not apply to a conviction for violating 21 U.S.C. § 860, the schoolyard statute. The defendant was charged with possession with intent to distribute crack cocaine within 1000 feet of a public elementary school in violation of 21 U.S.C. §§ 841(a)(1) and 860. The defendant pled guilty to the charges, and the court determined that the defendant was subject to a five-year statutory minimum under 21 U.S.C. §§ 841(b)(1)(B) and 860. The defendant argued that even though section 860 does not itself trigger the application of the "safety valve" provision of section 5C1.2, he was also convicted under section 841 and was thus entitled to the safety valve. The district court rejected this argument and sentenced him to 60 months' imprisonment. The appellate court noted that the defendant was convicted of a violation of 21 U.S.C. § 860, the schoolyard statute. The appellate court added that the Eleventh Circuit has held that section 860 "is a substantive criminal statute, not a mere sentence enhancer for section 841(a)." ⁴³ Therefore, as the safety valve only applies to convictions under five specified offenses, 21 U.S.C. §§ 841, 844, 846, 960, and 963, a defendant convicted and sentenced for violating section 860 is not eligible for the safety valve.

The Tenth Circuit in *United States v. Saffo*⁴⁴ held that for a defendant to receive a two-level reduction from section 2D1.1(b)(6), the defendant must be sentenced under section 2D1.1. The defendant was found guilty of possessing and distributing pseudoephedrine in violation of 21 U.S.C. § 841(d)(2) and of engaging in money laundering transactions, 18 U.S.C. § 1956(h). These offenses reference guidelines sections 2D1.11 and 2S1.1. The defendant argued that she was entitled to the two-level reduction under section 2D1.1(b)(6) pursuant to meeting the safety valve criteria. The defendant argued that because her conduct falls within the cross-reference to section 2D1.1 (for manufacturing a controlled substance unlawfully) that appears in section 2D1.11, she should have been eligible for the two-level reduction under section 2D1.1(b)(6). The appellate court concluded that her offense did not fall within the cross-reference because her offense did not involve unlawfully manufacturing or attempting to unlawfully manufacture a controlled substance. Furthermore, the defendant was sentenced pursuant to section 2S1.1 because the money laundering conviction under 18 U.S.C. § 1956(h) provided the higher offense level. An offense under section 1956(h) is not

⁴¹ 200 F.3d 1344 (11th Cir. 2000).

⁴² See *United States v. McQuilkin*, 78 F.3d 105, 108 (3d Cir. 1996).

⁴³ See *United States v. Freyre-Lazaro*, 3 F.3d 1496, 1507 (11th Cir. 1993).

⁴⁴ 227 F.3d 1260 (10th Cir. 2000), *cert. denied*, 2001 WL 290195 (U.S. Apr. 16, 2001).

among those listed in section 5C1.2. The defendant was ineligible for the two-level reduction from section 2D1.1(b)(6) because she was not sentenced under section 2D1.1.

The First Circuit in *United States v. Ortiz-Santiago*⁴⁵ held that in a non-binding plea agreement the government cannot contract around the safety valve. The defendant pled guilty to conspiracy to distribute cocaine. The plea agreement stated that the government would seek to hold the appellant responsible for only 50-150 kilograms of cocaine, recommend an optimum three-level credit for acceptance of responsibility and recommend a sentence at the bottom of the applicable guideline range. The agreement further added that, aside from those adjustments that are expressly delineated in the agreement, “no further adjustments to the defendant’s offense level shall be made.”⁴⁶ At sentencing, the defendant asked the sentencing court to apply the safety valve. The government objected, asserting that the request contravened the agreement because no “further adjustments to the defendant’s total offense level should be made.”⁴⁷ The district court accepted the government’s argument and refused to apply the safety valve. The appellate court reversed, concluding that the term “adjustments” when used in the federal sentencing context simply does not encompass the safety valve provision. Chapter Three (entitled Adjustments) describes a variety of potential increases and decreases that may be made in the course of determining a defendant’s adjusted offense level. That chapter does not mention the safety valve—a provision located in Chapter Five. The provisions delineated in Chapter Five are not “adjustments.” The safety valve is not intended to affect the calculation of the defendant’s offense level *per se*, but rather, to operate as a limitation on the applicability of mandatory minimum sentences. Therefore, in a non-binding plea agreement, the government cannot contract around the safety valve; the most that it can do is attempt to persuade the sentencing court that the provision does not apply. Thus, the appellate court instructed the district court to determine if the defendant meets the criteria listed in section 5C1.2.

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 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*.⁴⁸ Although *Koon* established a new standard of review to be applied in assessing district court departure decisions, the key issues remain intact: (1) whether the Sentencing Commission has already taken into account the factors the sentencing court identified as a basis for departure and (2) whether the district court abused its discretion.

⁴⁵ 211 F.3d 146 (1st Cir. 2000).

⁴⁶ *Id.* at 151

⁴⁷ *Id.*

⁴⁸ *Koon v. United States*, 518 U.S. 81 (1996).

As the appellate courts continue to apply the *Koon* analysis, district court departure decisions have been reversed and affirmed based on various factors. Descriptions of some of this year's departure cases appear below.

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

- *Victim's Misconduct.* The Fourth Circuit reversed a district court's downward departure for victim misconduct, holding that the bank's delay in confronting the defendants about the handling of their accounts did not goad the defendants into launching a check-kiting scheme. The court noted that section 5K2.10 provides that, in cases of non-violent offenses, "provocation and harassment" of the defendant by the victim may warrant a departure for victim misconduct. The bank's conduct neither provoked nor led to the fraud and was not conduct that was contemplated by section 5K2.10.⁴⁹
- *Family Ties.* The Third Circuit reversed a 12-level downward departure that was based on defendant's single-parent status, the adverse effect the defendant's incarceration would have by disrupting the family unit, and its effect on the oldest child who was afflicted with a neurological disorder. Disruptions of the defendant's life and concomitant difficulties for those who depend on the defendant are inherent in the punishment of the incarceration. The court concluded that the defendant's status as a single parent does not meet the threshold of "extraordinary" when compared to innumerable cases in which single parents commit crimes.⁵⁰
- *History of Child Abuse.* The Fifth Circuit reversed a downward departure that was based on the defendant's history of not abusing any child; of not having an inclination, predisposition, or tendency to do so; the fact that the defendant had not produced or distributed child pornography; and had no inclination, predisposition, or tendency to do so. The court ruled that this factor did not suffice to take the defendant's case out of the "heartland" of section 2G2.4.⁵¹
- *Combination of Legally Impermissible and Factually Inappropriate Grounds Could Not Support a Downward Departure.* The Tenth Circuit reversed a downward departure that was based on the combination of a legally permissible factor pertaining to prior conduct and factually inappropriate factors pertaining to intoxication, post-arrest sobriety and rehabilitation, and cooperation and assistance. The court noted that occasionally there may be an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" but that such cases are extremely rare and this case is not one of them.⁵²

⁴⁹ *United States v. LeRose*, 219 F.3d 335 (4th Cir. 2000).

⁵⁰ *United States v. Sweeting*, 213 F.3d 95 (3d Cir.), *cert. denied*, 121 S. Ct. 249 (2000).

⁵¹ *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000).

⁵² *United States v. Benally*, 215 F.3d 1068 (10th Cir. 2000).

- *Defendant's Consent to Deportation.* The Second Circuit reversed a downward departure that was based on the defendant's consent to removal from the United States at the conclusion of his incarceration without undergoing formal deportation proceedings. The court of appeals stated that this factor was not a sufficient ground for departure in this case because the vast majority of illegal aliens expelled from the United States are deported without ever undergoing formal deportation proceedings.⁵³

Appellate courts **affirmed a downward departure** in the following case:

- *Substantial, Voluntary Restitution.* The Eighth Circuit affirmed a downward departure on the basis of the defendant's extraordinary efforts at restitution. The district court noted that upon the bank's discovery of the defendant's misrepresentation of assets claimed in order to secure a bank loan, the defendant began liquidating assets owned, pledged or unpledged, in order to repay the bank. Over a one-year period, the defendant repaid the bank most of the money owed while simultaneously and substantially reducing the bank's loss amount from more than \$800,000 to less than \$60,000. The court of appeals held that because the defendant voluntarily began making restitution almost a year before he was indicted, and the restitution paid nearly 94 percent of that owed to the bank, the defendant's substantial voluntary restitution was "extraordinary" and was an appropriate basis for a downward departure.⁵⁴

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

- *Sentencing Disparities.* The Ninth Circuit upheld the district court's refusal to depart downward on the basis of sentencing disparities arising from charging and plea bargaining decisions of different United States Attorneys. The government argued that it was appropriate for the district court to depart upward to equalize the sentences of the defendant and his co-defendant because they had engaged in similar underlying criminal conduct. The court of appeals held that the district court could not impose an upward departure to equalize the defendant's sentence with that of his co-defendant because the two defendants had not "pled guilty to essentially the same crime."⁵⁵
- *Community Service.* The Tenth Circuit upheld the district court's refusal to depart downward on the basis of the defendant's community service to groups and individuals in the black community. The district court stated that departing downward in this case for community service "might send the message that if you're active in the community that you can steal a couple of million dollars from your

⁵³ *United States v. Sentamu*, 212 F.3d 127 (2d Cir. 2000).

⁵⁴ *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999).

⁵⁵ *United States v. Banuelos*, 215 F.3d 969 (9th Cir. 2000). See also *United States v. Armenta-Castro*, 227 F.3d 1255 (10th Cir. 2000) (existence of sentencing disparities in illegal reentry cases due to varying charging and plea bargaining policies is not an appropriate basis for a downward departure).

employer and then come in and ask the judge to give you a break because you were active in the community.” The defendant argued that the district court’s reference to the “black community” constituted consideration of her race for sentencing purposes. The court of appeals determined that the district court did not base its sentencing decision on an illegal factor or an incorrect application of the guidelines and concluded that it therefore lacked jurisdiction to review the district court’s discretionary denial of the requested downward departure.⁵⁶

- *Alienage.* The Eighth Circuit upheld the district court’s refusal to depart downward on the basis of the defendant’s alienage. The district court found that the defendant’s ineligibility for confinement in a minimum-security prison based on his status as an alien subject to deportation did not outweigh the benefit to the defendant that he would not have to serve the supervised release portion of his sentence after deportation. The district court concluded that the defendant’s case did not fall outside the heartland of the sentencing guidelines and denied the defendant’s motion to depart. The court of appeals found that the defendant was not given a more onerous sentence solely on the basis of alienage and determined that the district court recognized its authority to depart downward and then chose, for permissible reasons, not to do so. The court concluded that this exercise of discretion in making this choice was not reviewable.⁵⁷
- *Extraordinary Physical Impairment.* The Tenth Circuit upheld the district court’s refusal to depart downward on the basis of the defendant’s extraordinary physical impairment. The district court heard testimony by two doctors and the defendant concerning the defendant’s back and leg pain and concluded that the defendant’s health and family situation were not sufficiently “extraordinary” enough to depart downward. The court of appeals determined that the district court knew of its authority to depart under section 5H1.4 (Physical Conditions) or section 5H1.6 (Family Ties) and concluded that the district court’s refusal was an exercise of its sentencing discretion that is unreviewable on appeal.⁵⁸

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

- *Inadequate Notice for Departure.* The Seventh Circuit reversed an upward departure that was based on the district court’s assessment that a presentence report that referred only to the guideline was sufficient notice to the defendant of departure from the guidelines range. The court held that unless the PSR refers not only to the guideline but also to the rationale for the departure and the facts that support this theory of departure, referring to a specific guideline alone is inadequate.⁵⁹

⁵⁶ *United States v. Guidry*, 199 F.3d 1150 (10th Cir. 1999).

⁵⁷ *United States v. Navarro*, 218 F.3d 895 (8th Cir. 2000).

⁵⁸ *United States v. Orozco-Rodriguez*, 220 F.3d 940 (8th Cir. 2000).

⁵⁹ *United States v. Morris*, 204 F.3d 776 (7th Cir. 2000).

- *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 a higher sentence is warranted; purity may be 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.⁶⁰

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

- *Abduction or Unlawful Restraint.* The First Circuit affirmed an upward departure based on the abduction of two minors in front of fellow prostitutes in order to intimidate them on two separate occasions during a conspiracy to transport women across state lines for the purpose of prostitution. The abductions occurred in November 1996 and February 1997. The record of evidence supported the conclusion that the defendant carried out these attacks in front of other prostitutes in order to send a message. Since the abductions occurred during the time period of the conspiracy and clearly "facilitated" the commission of the conspiracy, an upward departure under section 5K2.4 was warranted.⁶¹
- *Criminal History Category Inadequate.* The Seventh Circuit affirmed an upward departure from Criminal History Category V to VI based on findings that an arson defendant's criminal history category did not adequately reflect the defendant's commission of an uncharged murder and of other past uncharged crimes. The court agreed with the district court's findings that, based on a preponderance of the evidence, the defendant had multiple motives for committing the murder and was the only suspect with the opportunity to commit the crime. The evidence further supported the upward departure as more accurately reflecting the defendant's true criminal history.⁶²

⁶⁰ *United States v. Cones*, 195 F.3d 941 (7th Cir. 1999).

⁶¹ *United States v. Footman*, 215 F.3d 145 (1st Cir. 2000).

⁶² *United States v. Gallagher*, 223 F.3d 511 (7th Cir.), *cert. denied*, 121 S. Ct. 356 (2000).

- *Extreme Psychological Injury.* The Third Circuit held that the district court did not abuse its discretion in departing upward two levels for emotional and psychological injuries caused to victims in a fraud case involving embezzlement from a pension fund and wire fraud. The victims incurred (1) the humiliation of being forced to seek work at an advanced age and to rely on help from family members, (2) the trauma that comes with losing one's savings, and (3) the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from tax authorities.⁶³

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

- *Voluntary Disclosure to the IRS.* The Second Circuit ordered a remand for reconsideration by the district court to address whether it fully understood its authority to depart downward under the sentencing guidelines on the basis of the defendant's voluntary disclosure to the IRS. The district court's "sentencing colloquy and its two opinions⁶⁴ clearly indicate[d] that he thought certain elements present in the defendant's case were unusual." However, the court of appeals noted that even though the district court stated at sentencing that "courts in this Circuit have finally gained unlimited power to depart downwardly," it also stated that the matter of defendant's unfair treatment had already been "a matter of appellate review and so is not a proper basis for departure." The court of appeals determined that such comments made by the district court constituted "clear evidence of a substantial risk" that the judge may not have fully understood his authority to depart in this case. The court remanded for reconsideration of the defendant's voluntary disclosure to the IRS as a basis for a downward departure.⁶⁵
- *Status of the Sentencing Commission.* The First Circuit vacated a sentence imposed by the district court in which it erroneously granted a downward departure based on the perceived moribund status of the Sentencing Commission, together with the perceived disparity between the defendant's sentencing range and the national median sentence for persons convicted of federal drug trafficking. The court of appeals noted that neither element, singularly or in combination, could carry the weight of a downward departure. It further stated that sentencing guidelines, once promulgated, have the force of law and that stands even when the Commission is empty.⁶⁶

⁶³ *United States v. Helbling*, 209 F.3d 226 (3d Cir.), *cert. denied*, 121 S. Ct. 833 (2000).

⁶⁴ *United States v. Tenzer*, 950 F. Supp. 554, 563 (S.D.N.Y. 1996) (concluded that the defendant's rights under the voluntary disclosure policy had been violated); *United States v. Tenzer*, 4 F. Supp.3d 306, 309 (S.D.N.Y.1998) (court noted that the defendant was not provided with reasonable notification regarding the status of the negotiations).

⁶⁵ *United States v. Tenzer*, 213 F.3d 34 (2d Cir. 2000).

⁶⁶ *United States v. Martin*, 221 F.3d 52 (1st Cir. 2000).

