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 2001.

United States Supreme Court Decisions on Sentencing Issues

Standard of Review for Determining Consolidation of Prior Convictions for Sentencing Purposes

In *United States v. Buford*,[2] the Supreme Court held that deferential review is appropriate when an appeals court reviews a trial court's sentencing guideline determination as to whether an offender's prior convictions were consolidated for sentencing.

In *Buford*, the defendant pled guilty to armed bank robbery, a crime of violence, but also had five prior state convictions, four of which were robberies. The four bank robberies were considered related because the court found that the robberies were the subject of a single criminal indictment and the defendant pled guilty to all four at the same time in the same court.[3] The fifth conviction was for a drug crime. The defendant argued that all five priors, including the drug crime, were related because they were "functionally consolidated," without entry of a formal order of consolidation, in that the sentencing judge was the same, and all five cases were sentenced at the same time in a single proceeding.[4] The government disagreed, asserting that the drug offense was handled by a different judge, a different state prosecutor, and had a separate judgment. The district court ruled against the defendant and held that the drug case was unrelated to the robbery cases and had not been consolidated for sentencing, either formally or functionally.[5] The Seventh Circuit stated that in this case "the standard of appellate review may be dispositive" and elected to review the district court's decision "deferentially" rather than "de novo." The appellate court affirmed and the defendant appealed.[6] The Court concluded that the appellate court properly reviewed the district's court's "functional consolidation" decision deferentially in light of the fact-bound nature of the

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[2] 121 S. Ct. 1276 (2001).

[3] *Id.* at 1277.

[4] *Id.* at 1279.

[5] *Id.*

[6] *Id.*

decision, the comparatively greater expertise of the district court, and the limited value of uniform court of appeals precedent.[7]

***Certiorari* Granted**

In *United States v. Harris*,[8] the Court granted *certiorari* to a Fourth Circuit decision in order to decide "whether 'brandishing' a weapon, an enhancement under 18 U.S.C. § 924(c)(1)(A) that results in an increased mandatory minimum sentence, is a factor that must be alleged in the indictment and proven beyond a reasonable doubt." In *Harris*, the defendant pled guilty to distributing marijuana, and after a bench trial was found guilty of violating 18 U.S.C. § 924(c)(1)(A)(ii) (carrying a firearm in relation to a drug trafficking offense).[9] At sentencing, the judge determined that the defendant had "brandished" the gun within the meaning of section 924(c)(1)(A)(ii) and (c)(4) and consequently sentenced the defendant to the mandatory minimum sentence of seven years as prescribed by the statute.[10] On appeal to the Fourth Circuit, the defendant argued that the court erred by imposing the mandatory minimum sentence for "brandishing" a firearm because it constituted an element of the offense that must be charged and proven beyond a reasonable doubt.[11] Relying on the language of *Apprendi v. New Jersey*,[12] the circuit court found that because the factor of "brandishing" under subsection (ii) of 924(c)(1)(A) triggered a mandatory minimum sentence that did not increase the penalty beyond the statutory maximum, *Apprendi* was not violated.[13]

In *Cotton v. United States*,[14] the Court granted *certiorari* to another Fourth Circuit decision in order to decide whether a factual element of a drug trafficking offense, which had been omitted from the indictment but for which there allegedly was overwhelming evidence, requires the court of appeals automatically to vacate the sentence. The Fourth Circuit ruled that regardless of the quantum of evidence, the district court lacked jurisdiction to sentence the defendant based on

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[7] *Id.* at 1281.

[8] 243 F.3d 806 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 663 (Dec. 10, 2001).

[9] *Id.* at 807.

[10] *Id.*

[11] *Id.* at 808.

[12] 530 U.S. 466, 490 (2000) (holding 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").

[13] *Id.* at 812.

[14] 261 F.3d 397 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 803 (Jan. 4, 2002).

uncharged and unconvicted drug amounts, and therefore it exercised its discretion under plain error review to vacate and remand the case for resentencing.[15]

In *United States v. Ruiz*,[16] the Court granted *certiorari* to a Ninth Circuit decision in order to decide whether the right to receive undisclosed *Brady*[17] material can validly be waived through a plea agreement and whether a prosecutor's refusal to recommend a downward departure in a "fast track" jurisdiction[18] (because of defendant's refusal to waive receipt of *Brady* materials) violated constitutional due process. In *Ruiz*, a divided panel of the Ninth Circuit ruled that "plea agreements, and any waiver of *Brady* rights contained therein, cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution."[19] Consequently, the panel held that the government acted with an unconstitutional motive when it refused to recommend a downward departure when the defendant refused to waive receipt of *Brady* materials, but nevertheless pleaded guilty.[20]

Finally, in *Ring v. Arizona*,[21] the Court granted *certiorari* to an Arizona Supreme Court decision in order to determine the constitutionality of Arizona's capital sentencing scheme. Unlike most jurisdictions, including the federal level, applicable Arizona law provides that only the judge may make a determination as to whether an offender convicted of a capital offense receives a sentence of death or a life term of imprisonment based on the presence or absence of certain aggravating and mitigating factors.[22] The issue presented is whether, in light of *Apprendi*, the finding of the necessary aggravating factors should be treated as an element of a capital offense and therefore found by a jury beyond a reasonable doubt, or remain a sentencing enhancement. Although not facially germane to federal sentencing issues, the case theoretically could impact to some degree the constitutionality of certain sentencing factors outside the scope of capital sentencing schemes.

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[15] *Id.* at 406.

[16] 241 F.3d 1157 (9th Cir. 2001), *cert. granted*, 122 S. Ct. 803 (Jan. 4, 2002).

[17] In *Brady v. Maryland*, 373 U.S. 83 (1963), the United States Supreme Court established the right of defendants to receive exculpatory evidence from the government.

[18] The United States Attorney's Office for the Southern District of California adopted the "fast track" program to minimize the expenditure of government resources and expedite the processing of more routine cases. Plea bargains offered under this program require defendants to plead guilty, as well as waive their rights to an indictment, to an appeal, and to present motions. Defendants must also waive their rights to receive certain information pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In exchange, the government promises to recommend a two-level downward departure to the sentencing judge. *Ruiz*, 241 F.3d at 1160-61.

[19] *Id.* at 1165 (internal quotation marks omitted).

[20] *See id.* at 1168.

[21] 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 122 S. Ct. 865 (Jan. 11, 2002).

[22] *See Ring*, 25 P.3d at 1150-51.

Decisions of the United States Courts of Appeals

Post-Apprendi Appellate Decisions

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), 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."[23] Since *Apprendi*, most circuit courts have held that the *Apprendi* standard "only applies to sentences beyond the prescribed statutory maximum" and not to factors that trigger mandatory minimum sentences.[24]

Mandatory Minimum Sentences

With the exception of the Sixth and Second Circuits, all other circuit courts to have confronted the issue have ruled that *Apprendi* does not apply to factors that trigger mandatory minimum sentences because *Apprendi* explicitly did not overrule *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986). In *McMillan*, the United States Supreme Court upheld the constitutionality of a state sentencing scheme that permitted a judge to make a factual finding by a preponderance of the evidence, which had the effect of triggering a mandatory minimum five-year sentence.[25]

The Sixth Circuit, in *United States v. Ramirez*,[26] however, held that "aggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." The defendant was charged with conspiring to distribute cocaine and attempting to possess cocaine with the intent to distribute. Neither count specified drug quantity, and quantity was not an issue submitted to the jury.[27] At sentencing, the district judge found that the conspiracy involved more than five kilograms of cocaine and therefore sentenced the defendant (a prior drug felon) to a mandatory minimum sentence of 240 months' imprisonment

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[23] *Id.* at 490.

[24] *United States v. Pratt*, 239 F.3d 640, 648 (4th Cir. 2001). *See also United States v. Carlson*, 217 F.3d 986, 987 (8th Cir. 2000) (holding that § 924(c)(1)(A)(ii) is a mandatory minimum sentencing factor not affected by *Apprendi* because the sentence did not exceed statutory maximum); *United States v. Pounds*, 230 F.3d 1317, 1319 (11th Cir. 2000) (same).

[25] *See United States v. Houle*, 237 F.3d 71, 79-80 (1st Cir. 2001); *United States v. Keith*, 230 F. 3d 784, 787 (5th Cir. 2000); *United States v. Pounds*, 230 F.3d 1317, 1319-20 (11th Cir. 2000); *United States v. Rodgers*, 245 F.3d 961, 965-68 (7th Cir. 2001); *United States v. Harris*, 243 F.3d 806, 809 (4th Cir. 2001).

[26] 242 F.3d 348, 351-52 (6th Cir. 2001).

[27] *Id.* at 350.

under 21 U.S.C. § 841(b)(1)(A).[28] The relevant statutory maximum under section 841(b)(1)(C) was 360 months, and the defendant's actual sentence fell within that range. On appeal, the Sixth Circuit ruled that under *Apprendi*, the district judge's finding of drug quantity and imposition of a 240-month mandatory sentence was impermissible and the defendant must be sentenced under 21 U.S.C. § 841(b)(1)(C) for violating 21 U.S.C. § 841(a)(1), unless the jury has found beyond a reasonable doubt that the defendant possessed the minimum amounts required by section 841(b)(1)(A) and section 841(b)(1)(B).[29]

The Second Circuit in *United States v. Guevara*,[30] following *Ramirez*, "conclude[d] that, by virtue of *Apprendi*, a statutory mandatory minimum sentence specified in either § 841(b)(1)(A) or § 841(b)(1)(B) cannot mandate a prison sentence that exceeds the highest sentence to which the defendant would otherwise have been exposed (*i.e.*, the top of the federal Guideline range, based on district court findings under the Guidelines, with or without a departure) if the applicability of subsections (A) or (B) depends on a finding of drug quantity not made by the jury."[31] Thus, in the Second Circuit, mandatory minimum penalties no longer "trump" the federal sentencing guidelines where (1) the guideline sentence is lower than the statutory mandatory minimum term and (2) the factor otherwise triggering the mandatory minimum term was not found by a jury beyond a reasonable doubt.

Constitutionality of 21 U.S.C. § 841

The Seventh Circuit, in *United States v. Brough*,[32] held that the federal drug statute, 21 U.S.C. § 841, does not violate due process by failing (1) to mention the burden of persuasion, (2) to allocate fact-finding either to the judge or the jury, and (3) to identify whether drug amount is an element of the offense or a sentencing factor. After a bench trial, the defendant was convicted of conspiring to distribute both heroin and crack cocaine and was sentenced to life imprisonment.[33] The court concluded that "there is no constitutional defect in the design of section 841, and that there is no impediment to convictions under the statute as written."[34] It further concluded that the

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[28] *Id.*

[29] *See also United States v. Strayhorn*, 250 F.3d 462, 471 (6th Cir. 2001) (because the district court's factual finding of drug quantity by a preponderance of the evidence transformed the crime to which the defendant pleaded guilty (conspiracy to possess less than 50 kilograms of marijuana punishable by a *maximum* ten-year sentence) into a greater crime for the purposes of sentencing (conspiracy to possess more than 100 kilograms of marijuana punishable by a mandatory *minimum* of ten-year sentence), the district court violated *Apprendi* by not requiring those determinations to be made by a jury).

[30] 277 F.3d 111 (2d Cir. 2001).

[31] *Id.* at 118.

[32] 243 F.3d 1078, 1079 (7th Cir. 2001).

[33] *Id.*

[34] *Id*. at 1079-80.

defendant "cannot take advantage of that lower maximum, however, because the indictment charged him with distributing not only more than 50 grams of crack cocaine but also more than one kilogram of heroin, each enough to authorize life in prison if proved beyond a reasonable doubt."[35]

The Ninth Circuit, in *United States v. Buckland*,[36] held, en banc, that section 841 likewise was not facially unconstitutional. The en banc panel distinguished *Apprendi* by noting that the New Jersey hate crimes statute at issue in *Apprendi* explicitly stated that the judge was to make the finding of racial animosity by a preponderance of the evidence.[37] In contrast, the en banc panel noted that 21 U.S.C. § 841 is silent as to whom makes the finding of drug amount, and by what evidentiary standard.[38]

Sentencing Guidelines Enhancements

The D.C. Circuit, in *United States v. Fields (Fields II)*,[39] held that *Apprendi* does not apply to enhancements based on role-in-offense findings under the guidelines because it is not a "fact that increases the penalty for a crime beyond the prescribed statutory maximum."[40] Defendants were convicted of narcotics conspiracy, RICO conspiracy, kidnaping, gang rape, and attempted murder. Defendants were sentenced to life based on drug quantities that were never proven to a jury beyond a reasonable doubt but instead were determined by a judge based upon a preponderance of the evidence.[41] Additionally, the district court applied the leadership-role enhancement to the defendant based upon the preponderance standard.[42] The court concluded that the role in the offense enhancements would not be subject to *Apprendi* because they are not likely to trigger a sentence beyond the statutory maximum.[43]

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[35] *Id*. at 1080.

[36] 265 F.3d 1085 (9th Cir. 2001), *rev'd reh'g en banc*, __ F.3d __, 2002 WL 63718 at *1 (January 18, 2002).

[37] __ F.3d __, 2002 WL 63718 at *3.

[38] *Id.*

[39] 51 F.3d 1041 (D.C. Cir. 2001).

[40] *Id*. at 1046. *See also United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001); *United States v. Jackson*, 240 F.3d 1245, 1249 (10th Cir. 2001); *United States v. Garcia*, 240 F.3d 180, 182-84 (2d Cir. 2001); *United States v. Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), *cert. denied*, 121 S.Ct. 1152 (2001); *Talbott v. Indiana*, 226 F.3d 866, 869-70 (7th Cir. 2000).

[41] *Id*. at 1043.

[42] *Id*.

[43] *Id*. at 1046.

In *United States v. Jordan*,[44] a panel of the Ninth Circuit also declined to apply *Apprendi* to sentencing enhancements under the guidelines inasmuch as the nine-level enhancement "did not increase [the defendant's] penalty beyond the statutory maximum."[45] However, following the Third Circuit's 1990 decision in *United States v. Kikumura*,[46] and the recently remanded Ninth Circuit decision in *United States v. Valensia*,[47] the panel of the Ninth Circuit held that a nine-level enhancement "had an extremely disproportionate effect on [the defendant's] sentence relative to the offense of conviction," and therefore it constituted plain error for the district court not to "apply the clear and convincing evidence standard."[48]

Length of Sentence

In *United States v. Spiller*, 261 F.3d 683 (7th Cir. 2001), the defendant argued that the district court erroneously denied his motion for downward departure and sentenced him to 352 months (29.33 years), a sentence exceeding his life expectancy of 16.96 years. The defendant did not make an age-based downward departure request under section 5H1.1, but rather argued that the sentence was imposed in violation of 21 U.S.C. § 841(b)(1)(C), which states that a person shall be sentenced to a term of not . . . *more than life.*" *Id.* at 693 (emphasis in original). In support of its position, the defendant relied on *United States v. Martin*, 63 F.3d 1422, 1434 (7th Cir. 1995) ("where a legislatively enacted sentencing scheme has expressly deprived a court of the possibility of imposing a life sentence, a sentence for a term of years exceeding the defendant's approximate life expectancy would ordinarily constitute an abuse of discretion."). The court distinguished *Martin* because that case involved 18 U.S.C. § 34, which provided that imposing a sentence of life imprisonment (or the death penalty) must be left to the discretion of the jury. *Martin* held that where the jury has declined to sentence the defendant to life imprisonment under section 34, the district court could not circumvent the jury decision by sentencing a 45-year old defendant to 50 years' imprisonment. *Spiller*, 261 F.3d at 693. As the *Spiller* court made clear, *Martin* and its progeny only apply to section 34 cases.

Section 1B1.4 (Information to be Used in Imposing Sentence)

Spousal Privileges

In *United States v. Burgos*, __ F.3d ___, 2001 WL 1643533 (11th Cir. Dec. 21, 2001), the Eleventh Circuit reversed the district court which had imposed a sentence at the top of the guideline

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[44] 256 F.3d 922 (9th Cir. 2001).

[45] *Id.* at 934.

[46] 918 F.2d 1084 (3d Cir. 1990).

[47] United States v. Valensia, 222 F.3d 1173 (9th Cir.2000), *cert. granted, judgment vacated, and remanded by* 121 S. Ct. 1222 (2001).

[48] *Valensia*, 222 F.3d at 929.

range because of the defendant's refusal to cooperate with the government's investigation of her husband's unrelated offense. The defendant had objected to inclusion of information in the presentence investigation report that her husband had been indicted on an unrelated offense.

At the sentencing hearing, the prosecutor asked that the defendant be sentenced to the high end of the range because of the indictment recently filed against her husband even though he admitted that he "was not in a position" to show that the cases were related. The district court asked whether the defendant had cooperated with the government in the investigation of her husband. The government had not sought her cooperation, so the district court postponed sentencing to give her an opportunity to cooperate, explicitly stating that if she refused, she would be sentenced to the top of the guideline range. She refused to cooperate, asserting her Fifth Amendment and spousal privileges. The district court sentenced her to the top of the guideline range.

On appeal, the Eleventh Circuit first recognized the district court's broad authority to consider, "without limitation, any information concerning the background, character, and conduct of the defendant, unless otherwise prohibited by law." Section 1B1.4. The court noted, however, that the district court's discretion is limited by 18 U.S.C. § 3553, which governs what a court may consider in imposing a sentence. It determined that penalizing the defendant for refusing to cooperate in the case against her husband does not achieve any of the penological goals set forth in section 3553(a)(2). Refusing to inform the government of her husband's unrelated criminal conduct in no way "reflects the seriousness" of her own offense, nor does it "promote respect for the law," or "provide just punishment for the offense" to which she pled guilty. Likewise, increasing the defendant's sentence does not deter her from any further illegal activity, does not "protect the public from further crimes" she might commit, and does not "provide [her] with needed educational or vocational training, medical care, or other correctional treatment." *Burgos*, 2001 WL 1643533, at *5 (citing 18 U.S.C. § 3553(a)(2)).

Section 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)

Statutory and Guideline Definitions of "Cocaine Base"

In *United States v. Barbosa*, 271 F.3d 438 (3d Cir. 2001), the Third Circuit weighed in on a circuit conflict concerning the appropriate statutory definition of "cocaine base." Although Congress did not define "cocaine base" when it enacted 21 U.S.C. § 841, the Sentencing Commission specifically limited its definition of "cocaine base" to crack cocaine only. USSG §2D1.1(c), Note (D) to the Drug Quantity Table. The defendant in this case was convicted of possession with intent to distribute cocaine base (but the government admitted that the substance was not crack cocaine). The court, relying on *United States v. Palacio*, 4 F.3d 150, 154-55 (2d Cir. 1993), held that "while the term 'cocaine base' means only crack when a sentence is imposed under the Sentencing Guidelines, 'cocaine base' encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated." *Barbosa*, 271 F.3d at 463-67. In declining to follow the reasoning of the Eleventh Circuit in *United States v. Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994), the court concluded that Congress's silent approval of a proposed amendment to the sentencing guidelines is insufficient to support a finding that Congress intended to implicitly adopt the Commission's definition of "cocaine base" for purposes of section 841. *Barbosa*, 271 F.3d at 466. The court reasoned that the Sentencing Commission's organic statute lists the purposes of the agency, but did not include a

delegation of the power to promulgate amendments to the statutory code itself. It further reasoned that nothing in the plain language of section 841 or its legislative history reveals that Congress limited the term "cocaine base" to crack. Thus, it must have intended the term "cocaine base" to encompass all forms of cocaine base. *Barbosa,* 271 F.3d at 466.

Estimation of Methamphetamine Quantity

In *United States v. Blaylock*, 249 F.3d 1298 (11th Cir. 2001), the Eleventh Circuit held that a district court may estimate the yield from a methamphetamine laboratory based upon a 100-percent theoretical yield. The defendants were convicted of possessing pseudoephedrine, acetone, and ethyl ether with the intent to manufacture methamphetamine, in violation of 21 U.S.C. § 841(d)(1). At the sentencing hearing, the government expert testified that the precursor chemicals and other items found at the defendant's lab were consistent with the Birch Reduction method of manufacturing methamphetamine, which has reported yields in excess of 95 percent. *Id.* at 1300. He further stated that, assuming a 100-percent theoretical yield, the lab could have produced up to 25.6 grams of methamphetamine. The expert admitted that as conditions change from day to day, a methamphetamine lab will not produce the same actual yield, and agreed that such variations could vary greatly from one percent up to 100 percent. *Id.* The defendant's expert, who was not a forensic chemist, agreed with the government expert's estimation of a 100-percent yield of 25.6 grams of methamphetamine. When asked if he had any opinion as to the likely yield based upon the equipment and chemicals used at the defendant's methamphetamine lab, the defendant's expert responded, "No." *Id.* at 1301.

The Eleventh Circuit upheld that use of the 100-percent theoretical yield to estimate that the defendant's lab could have produced 25.6 grams of methamphetamine. A district court may base its estimate of actual yield upon an expert's calculation of the 100-percent theoretical yield, at least where there is no evidence presented by the defendants to rebut such an estimate. The court rejected the defendant's argument that the district court erroneously shifted the burden of proof with respect to drug quantity. It confirmed that the burden of proof rests with the government to prove drug quantity by a preponderance of the evidence. In this case, however, defendants had failed to fulfill their burden of coming forward with rebuttal evidence concerning the circumstances of the operation and relative skill of the operators. Therefore, the district court did not commit clear error by basing its estimation of drug quantity solely on the government's evidence. *Id.* at 1303.

Section 3A1.4 (Terrorism)

The Sixth Circuit, in *United States v. Graham*,[49] held that section 3A1.4 could be applied to the defendant's sentence because the relevant conduct of the offense of 18 U.S.C. § 371 conspiracy conviction was intended to promote a federal crime of terrorism even though the defendant was not convicted of any statutorily-enumerated predicate offenses for a federal crime of terrorism under 18 U.S.C. § 2332b(g). He was convicted of conspiracy to commit offenses against the United States and several weapons possession and drug-related counts.[50] Defendant was a member of a

[49] 275 F.3d. 490, 516 (6th Cir. 2001).

[50] *Id*.

militia group known as the "North American Militia." As a member, defendant planned and discussed attacks on various federal facilities and instrumentalities of interstate commerce and threatened to assault and murder federal officers and employees.[51] Defendant specifically held a meeting with militia members to discuss the following targets: the destruction of communications facilities and the takeover of a communication facility to get his message out, the destruction of power facilities, the destruction of fuel depots/gas stations, and the raiding of the National Guard armories for equipment.[52] The court determined that the defendant's relevant conduct was intended to promote a "federal crime of terrorism" and warranted the application of section 3A1.4. The court further noted that the district court must identify which enumerated "federal crimes of terrorism" the defendant intended to promote, satisfy the elements of section 2332b(g)(5)(A), and support its conclusions by a preponderance of the evidence with the facts from the record.[53]

Section 5K2.0 (Grounds for Departures)

In *United States v. Carty*, 264 F.3d 191 (2d Cir. 2001), the Second Circuit held that presentence confinement conditions could be a basis for downward departure. The district court held that, "[U]nder no circumstance is Mr. Carty, who went voluntarily to his own country, entitled to a downward departure because the prison conditions were such that Mr. Carty was affected adversely." *Id.* at 196. The district court's use of the phrase "under no circumstance" suggested to the court of appeals that the district court may have believed that presentence conditions of confinement – at least when such confinement occurs in a defendant's "own" country – can never serve as the basis for a downward departure. *Id.* In reversing the district court, the Second Circuit reasoned that nothing in the sentencing guidelines prohibits consideration of presentence confinement conditions as a basis for downward departures. *Id.* It remanded the case to the district court to reconsider the defendant's request for a downward departure in light of the court's holding.

In *United States v. Rodriguez-Montelongo*, 263 F.3d 429 (5th Cir. 2001), the Fifth Circuit held that cultural assimilation was a permissible basis for downward departure. The defendant, a Mexican citizen, was three years old when he was brought to the United States in 1978. He later obtained legal resident status, received his education, married, and settled with his wife and four children in Colorado. In April 2000, the defendant was convicted of a felony drug charge and deported. Approximately a week later, Rodriguez-Montelongo attempted to re-enter the United States without obtaining permission from the Attorney General to apply for readmission. The district court denied a departure for cultural assimilation because "to this point the Fifth Circuit has not recognized cultural assimilation as a basis for departure, and until they do, I'm not going to depart on that basis." *Id.* at 431 (brackets and internal quotation marks omitted). The Fifth Circuit adopted the reasoning of *United States v. Lipman*, 133 F.3d 726, 730 (9th Cir. 1998), and *United States v. Sanchez-Valencia*, 148 F.3d 1273, 1274 (11th Cir. 1998) (per curiam), that because "the Sentencing Commission has never addressed or proscribed 'cultural assimilation' per se as a factor that may justify departure, we hold that a sentencing court has authority under U.S.S.G. § 5K2.0 to consider evidence of cultural assimilation." *Rodriguez-Montelongo*, 263 F.3d at 433 (internal

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[51] *Id.* at 497.

[52] *Id*.

[53] *Id*. at 517.

quotation marks omitted). The Fifth Circuit also appears to have adopted the Ninth Circuit's conclusion that insofar as "cultural assimilation" is akin to the "family and community ties," which is a discouraged factor for departure under the guidelines, the district court has the authority to depart in only "extraordinary circumstances." *Rodriguez-Montelongo,* 263 F.3d at 433 n.4 & 434.

In *United States v. Buckendahl,* 251 F.3d 753 (8th Cir.), *cert. denied,* 122 S. Ct. 633 (2001), a splintered court held that a district court does not have authority to depart based upon an interdistrict sentencing disparity arising from the practice of the U.S. Attorney for the Northern District of Iowa to rarely agree to grant use immunity under section 1B1.8 of the guidelines. The court found that "the most natural reading of §1B1.8 is that the Commission intended a decision about entering into agreements to be left to the prosecutor's discretion" and that the government's discretion under this provision is "extremely broad." *Id.* at 761. The court determined that departure is appropriate only if "the prosecution engages in some misconduct, abuses its discretion, or otherwise acts improperly." *Id.* at 760. The court rejected the defendant's argument that interdistrict disparity undermines the guidelines' main purpose in promoting greater uniformity in criminal sentences. It found that "departures based on the perceived disparity in individual cases would more likely serve to undermine the overall goal of uniformity rather than further it."

Circuit Conflicts

The Commission resolved 19 circuit conflicts this year. Thirteen conflicts were resolved by the Economic Crime Package. For example, by consolidating the theft, fraud, and property destruction guidelines into a single guideline, the Commission eliminated a circuit conflict concerning whether to apply the theft or fraud guideline in cases in which both apply factually.

Nine of the 13 conflicts related to the definition of "loss." The Commission's new definition of loss

- adopted the view of a minority of circuits that interest and similar costs shall be excluded from loss. *United States v. Guthrie,* 144 F.3d 1006 (6th Cir. 1998); *United States v. Hoyle,* 33 F.3d 415 (4th Cir. 1994).

- adopted the view of a majority of circuits that intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender. *United States v. Geevers,* 226 F.3d 186 (3d Cir. 2000); *United States v. Klisser,* 190 F.3d 34 (2d Cir. 1999); *United States v. Blitz,* 151 F.3d 1002 (9th Cir. 1998); *United States v. Studevent,* 116 F. 3d 1559 (D.C. Cir. 1997); *United States v. Wai-Keung,* 115 F.3d 874 (11th Cir. 1997); *United States v. Coffman,* 94 F.3d 330 (7th Cir. 1996). Accordingly, concepts such as "economic reality" or "amounts put at risk" will no longer be considerations in the determination of intended loss. *See United States v. Bonanno,* 146 F.3d 502 (7th Cir. 1998); *United States v. Wells,* 127 F.3d 739 (8th Cir. 1997).

- retained the rule providing for the use of gain when loss cannot reasonably be determined. It clarified that there must be a loss for gain to be considered. *See United States v. Robie,* 166 F.3d 444 (2d Cir. 1999). The Commission decided not to expand the use of gain to situations in which loss can be determined but the gain is greater than the loss because such instances should occur infrequently, the efficiency

of the criminal operation as reflected in the amount of gain ordinarily should not determine the penalty level, and the traditional use of loss is generally adequate.

- deleted the previous rule that, by negative implication, excludes consequential damages (except in specified cases) from the calculation of loss. The Commission decided, however, not to use the term "consequential damages," or any similar civil law distinction between direct and indirect harms. Rather, the Commission determined that the reasonable foreseeability standard provides sufficient guidance to courts as to what type of harms are included in loss.

- reversed case law that allowed crediting (or exclusion from loss) in cases in which services were provided by persons posing as attorneys and medical personnel. *See United States v. Maurello*, 76 F.3d 1304 (3d Cir. 1996) (calculating loss by subtracting the value of satisfactory legal services from amount of fees paid to a person posing as a lawyer); and *United States v. Reddeck*, 22 F.3d 1504 (10th Cir. 1994) (reducing loss by the value of education received from a sham university). The Commission determined that the seriousness of these offenses and the culpability of these offenders is best reflected by a loss determination that does not credit the value of the unlicenced benefits provided. In addition, this provision eliminates the additional burden that would be imposed on courts if required to determine the value of these benefits.

- excluded the gain to any individual investor in an investment scheme from being used to offset the loss to other individual investors because any gain realized by an individual investor is designed to lure others into the fraudulent scheme. *See United States v. Orton*, 73 F.3d 331 (11th Cir. 1996) (only payments made to losing investors should be credited, not payments to investors who made a profit).

- revised the special rule on determining loss in cases involving diversion of government program benefits to clarify that loss in such cases only includes amounts that were diverted from intended recipients or uses, not benefits received or used by authorized persons. In other words, even if such benefits flowed through an unauthorized intermediary, as long as they went to intended recipients for intended uses, the amount of those benefits should not be included in loss.

- resolved differing circuit interpretations of the standard of causation applicable to actual loss. The amendment defined "actual loss" as the "reasonably foreseeable pecuniary harm" that resulted from the offense. The amendment incorporated this causation standard that, at a minimum, requires factual causation (often called "but for" causation) and provided a rule for legal causation (*i.e.*, guidance to courts regarding how to draw the line as to what losses should be included and excluded from the loss determination).

- resolved a circuit conflict regarding how tax loss under section 2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. The amendment thereby resolved a circuit conflict as to the methodology used to calculate tax loss in cases involving a corporate diversion. The Commission adopted the method used in *United States v. Cseplo*, 42 F.3d 360 (6th Cir. 1994), in which the court determined the corporate

federal income tax due on the diverted amount, and added that amount to the personal federal income tax due on the total amount diverted.

The Economic Crime Package also resolved a circuit conflict regarding the scope of the enhancement in the consolidated guideline for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. (Prior to this amendment, the enhancement was at section 2F1.1(b)(4)(A)). The conflict concerned whether the misrepresentation enhancement applied only in cases in which the defendant did not have any authority to act on behalf of the covered organization or government agency or if it applied more broadly to cases in which the defendant had a legitimate connection to the covered organization or government agency, but misrepresented that the defendant was acting solely on behalf of that organization or agency. The Commission adopted the view expressed in *United States v. Marcum*, 16 F.3d 599 (4th Cir. 1994) (enhancement appropriate even though defendant did not misrepresent his authority to act on behalf of the organization but rather only misrepresented that he was conducting an activity wholly on behalf of the organization).

Moreover, the Economic Crime Package clarified that courts should use the "totality of the circumstances" test to determine if a defendant was "in the business of receiving and selling stolen property" under section 2B1.1(b)(4)(B). *United States v. St. Cyr*, 997 F.2d 698 (1st Cir. 1992). The Commission rejected the "fence test," under which the court must consider (1) if the stolen property was bought and sold and (2) to what extent the stolen property transactions encouraged others to commit property crimes (*e.g.*, *United States v. Esquivel*, 919 F.2d 957 (5th Cir. 1990)).

In addition, the Commission resolved two circuit conflicts concerning grouping of multiple counts of conviction. One conflict involved grouping a count of money laundering with a conviction for the underlying offense. The circuits disagreed about whether to group the offenses and, if grouping was appropriate, which subsection of section 3D1.2 to apply. The Commission added a new application note expressly instructing that counts of money laundering and the underlying offense shall be grouped pursuant to section 3D1.2(c). Subsection (c) provides that counts involve substantially the same harm "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."

The second conflict resolved whether multiple counts of possession, receipt, or transportation of images containing child pornography should be grouped together. The Commission adopted a position that provides for grouping of multiple counts of child pornography distribution, receipt, and possession pursuant to section 3D1.2(d) because these offenses typically are continuous and ongoing enterprises. This grouping provision does not require the determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction which, particularly in these kinds of cases, could be complex and time consuming. Consistent with the provisions of subsection (a)(2) of section 1B1.3 (Relevant Conduct), this approach provides that additional images of child pornography (often involved in the case, but outside of the offense of conviction) shall be considered by the court in determining the appropriate sentence for the defendant if the conduct related to those images is part of the same course of conduct or common scheme or plan.

Another significant Chapter Three circuit conflict involved the determination of "mitigating role." The Commission adopted the approach articulated in *United States v. Rodriguez De Varon*, 175 F.3d 930 (11th Cir. 1999), that section 3B1.2 does not automatically preclude a defendant from

being considered for a mitigating role adjustment in a case in which the defendant is held accountable under section 1B1.3 solely for the amount of drugs the defendant personally handled. In considering a section 3B1.2 adjustment, a court must measure the defendant's role against the relevant conduct for which the defendant is held accountable at sentencing, whether or not other defendants are charged. The substantive impact of this amendment, in the context of a drug courier, for example, is that the court is not precluded from considering a section 3B1.2 adjustment simply because the defendant's role in the offense was limited to transporting or storing drugs, and the defendant was accountable under section 1B1.3 only for the quantity of drugs the defendant personally transported or stored. The amendment does not require that such a defendant receive a reduction under section 3B1.2 or suggest that such a defendant can receive a reduction based only on those facts; rather, the amendment provides only that such a defendant is not precluded from consideration for such a reduction if the defendant otherwise qualifies for the reduction pursuant to the terms of section 3B1.2.

The Commission also addressed a circuit conflict regarding whether admissions made by a defendant during a guilty plea hearing, without more, can be considered "stipulations" for purposes of subsection (a) of section 1B1.2 (Application Instructions). This amendment represents a narrow approach to the majority view that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of section 1B1.2(a) (*e.g., United States v. Nathan,* 188 F.3d 190 (3d Cir. 1999)) (statements made by defendants during the factual-basis hearing for a plea agreement do not constitute stipulations for the purpose of this enhancement; a statement is a stipulation only if it is part of a defendant's written plea agreement or if both the government and the defendant explicitly agree at a factual-basis hearing that the facts being placed on the record are stipulations that might subject the defendant to section 1B1.2(a)); *United States v. Gardner,* 940 F.2d 587 (10th Cir. 1991) (requiring a "knowing agreement by the defendant, as part of a plea bargain, that facts supporting a more serious offense occurred and could be presented to the court"). The application note instructs that, "A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes. However, a factual statement or stipulation made after the plea agreement has been entered, or after any modification to the plea agreement has been made, is not a stipulation for purposes of subsection (a)." USSG §1B1.2(a), comment. (n.1). This approach lessens the possibility that the plea agreement will be modified during the course of the plea proceeding without providing the parties, especially the defendant, with notice of the defendant's potential sentencing range.

The remaining amendments provided that (1) the base offense level of 15 and the weapon use enhancement in section 2A2.2(b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (2) an offense committed after the commission of any part of the instant offense cannot be counted as a prior felony conviction under section 2K1.3(a)(1) and (a)(2) (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials). Lastly, the Commission amended section 2L1.2 to provide a more graduated sentencing enhancement between 8 and 16 levels, depending on the seriousness of the prior aggravated felony and the dangerousness of the defendant. This amendment rendered moot a circuit conflict concerning whether the three criteria found in Application Note 5 to section 2L1.2 were the exclusive basis for a downward departure from the 16-level upward adjustment for an aggravated felony conviction.