The Rap Sheet

Issue No. 7 *September 2000*

NEWSLETTER TO THE CRIMINAL JUSTICE ACT PANEL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Shelley Stark, Federal Public Defender
960 Penn Avenue, Suite 415, Pittsburgh, PA 15222-3811
(412) 644-6565; (fax) 644-4594

I. STATUS OF INCREASE TO HOURLY RATE FOR PANEL LAWYERS

A letter from your fellow CJA lawyers:

Congress took a summer recess without deciding on the requested CJA rate increase. The Judiciary has mounted a major effort to bring the entire nation up to $75 per hour, both in and out of court. Resistance remains in Congress, particularly the Senate. The House Committee backed a 5$ per hour increase to both in and out-of-court rates. The Senate has not approved any increase. Over the next six weeks the committee staffers and legislatures will be hammering out the appropriations compromises. Panel attorneys need to act.

Last April, Leonidas Ralph Mecham, the Director of the Administrative Office (AO), issued a memorandum to All Federal Judges (excluding the Supreme Court Justices) as well as Federal Public and Community Defenders, who are under the jurisdiction of the Judiciary, to support Chief Justice Rehnquist's call to Congress to make the increase a high priority. We hope that the judges have been using whatever connections they have to urge the increase. NACDL is lobbying at the national level. We cannot rely on the efforts of others.

We call upon you, the CJA panel representatives, to mobilize your panel to the best of your ability, to do what the AO and the Federal Defenders, by law, may not do. Lobby!

Please contact your Congressional representatives. Tell them you are going broke subsidizing the country's Constitutional obligations. Tell your representatives how you spend the paltry money that you make. Explain the cost of overhead (rent, insurance, secretary, telephones, office supplies, being computerized, having law books). Tell them that even $75 per hour is still a *pro bono* level. The cost of increasing the CJA rate to 75/75 is 11.3 Million Dollars for the first half year (April 2001) and 27.2 Million annualized thereafter. It is a "drop in the bucket" to our National Budget.

If your representative has a local office, visit it individually or with a delegation. Ask your Chief Judge if he or she knows anyone on the funding committee and whether they would be willing to speak to them. We need to provide the local touch. Nothing can beat the communication from a voting constituent. Thanks.

David Beneman, Maine CJA Resource Counsel
Fred Cohn, NY(S) panel rep and Defender Services Advisory Group
Bill Matthewman, FL(S) panel rep and Defender Services Advisory Group

Here is a sample letter to fill in and sign:

Dear [ ],

I am an attorney who lives and practices in your District. As part of my work, I accept federal court appointments to represent indigent defendants in the United States District Court for the Western District of Pennsylvania. Our Constitution requires the provision of counsel for those defendants who cannot afford to hire a lawyer. The law is called the Criminal Justice Act (CJA) and is located at 18 U.S.C. section 3006A. I write to alert you of a pending budget issue.

Appointed lawyers such as myself are paid at greatly reduced hourly rates. My normal rate for federal criminal defense for a privately retained client is _____ an hour. The current CJA appointed rate is less than half that – $70 per hour in court and $50 out of court. Authorized by statute, but currently unfunded, is a $75 per hour rate for all work. It is my hope, echoed by my colleagues and the Judiciary, that Congress fully fund the $75 an hour amount, effective this year. This legislation is different at the House and Senate level and is awaiting Senate committee report.

[Idea 1]
Last year I worked on Criminal Justice Act cases as follows:
In Court __ hours @ -- totaling _____
Out of Court ____hours @ __ totaling ___
Grand total $_____

If I had been able to bill $75 per hour for each hour I would have increased my earnings from this part of my practice to $ ----------.

Or [Idea 2]
Last year I accepted ___ Criminal Justice Act cases. At the current rate, once I pay my overhead, I am losing money on these cases.

I want to do my part, but I cannot continue to subsidize the country's Constitutional obligation of providing effective defense counsel in federal criminal cases. While the difference between the current $50/70 rate and a flat $75 rate (taxable, by the way), might not seem like much, the cost of running my office (stationery, secretarial services and rent, not to mention access to research materials and the other costs of doing business) is a constant pressure. This small rate increase is the difference that will enable me to continue accepting CJA work. The courts need experienced and able members of the bar to take this work on. While the work is rewarding and providing assistance to the Court itself is professionally meaningful, unless the rate is increased, lawyers like myself will have to cut back or abandon CJA work entirely because feeding our families comes first.

I ask you to consider this matter and support full funding of the $75 hourly CJA rate. Please contact Senators Gregg (NH)(Chair) and Hollings (SC) and Congressman Rogers (KY)(Chair) and Serrano (NY) of the Appropriations Subcommittee on Commerce, Justice, State and the Judiciary to make your opinion known. Please be kind enough to reply so that I may know your position.

II. PANEL TRAINING SEMINAR ON *APPRENDI v. NEW JERSEY*

This Office is sponsoring a training seminar to be held Friday, November 3, 2000, at the Allegheny County Bar Association's Auditorium, 920 City-County Building, Pittsburgh. The Seminar, "*Apprendi v. New Jersey*: The Times they are a Changing," will feature David Beneman, Maine CJA Resource Counsel, and Assistant Federal Defender Thomas W. Patton.

A Seminar registration form is enclosed.

III. ***Apprendi v. New Jersey*** and ***Dickerson v. United States***

The Supreme Court of the United States recently issued two significant rulings for criminal defendants: Apprendi v. New Jersey, 2000 WL 807189 (2000) and Dickerson v. United States, 2000 WL 807223 (2000). Defense attorneys must read both decisions, as both could benefit many clients.

In Apprendi, the defendant was charged with numerous firearm offenses resulting from his firing of several .22-caliber bullets into the home of an African-American family who had recently moved into a previously all-white neighborhood. The defendant ultimately pled to two counts of second-degree possession of a firearm for an unlawful purpose, and one count of unlawful possession of an antipersonnel bomb. The statutory maximum penalty for the most serious offense was10 years.

At sentencing, the Government argued that Apprendi's offenses were "hate crimes," as defined by New Jersey law which required that the sentence be "enhanced" by increasing the statutory maximum penalty to 20 years. Following an evidentiary hearing, the judge found by a preponderance of the evidence that Apprendi's offenses were "hate crimes," and increased the statutory maximum penalty to 20 years.

The Supreme Court framed the issue as "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." The Court answered this question in the affirmative, setting out a very clear rule: "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, and proved beyond a reasonable doubt."

This opinion is significant. Defense counsel need to be alert for any "sentencing enhancement" that increases the maximum possible penalty. Any such enhancement will now have to be charged in an indictment or information, and proven to the jury beyond a reasonable doubt. Further, the fact that a particular enhancement is labeled a "sentencing enhancement" is irrelevant. The enhancement at issue in Apprendi was labeled a sentencing enhancement, and was contained in the sentencing provisions of New Jersey's criminal code. The Court found that fact to be immaterial. Labels don't matter, the crucial question is whether the "enhancement" increases the statutory maximum penalty. If it does, it has to be charged and proven to the jury beyond a reasonable doubt.

Although the holding expressly covers only enhancements that affect statutory maximums, the logic used to reach that holding creates a strong argument that any fact that establishes a mandatory-minimum sentence, also should have to be charged and proven to the jury. In a 5-4 decision, McMillan v. Pennsylvania, 477 U.S. 79 (1986), held that factors establishing a

mandatory-minimum sentence need not be treated as an element of the offense. Apprendi now renders the continuing validity of McMillan highly questionable. One concurring opinion specifically states that McMillan should be reversed. Defense counsel should use Apprendi to challenge mandatory minimums and to preserve the issue, in the hope that when the issue is presented to the Supreme Court, McMillan will be reversed.

Finally, although Apprendi's holding expressly exempts prior convictions from having to be charged and proven to a jury beyond a reasonable doubt even if the prior conviction is being used to increase the statutory maximum penalty, defense counsel should still argue that prior convictions that result in an increase in the statutory maximum penalty should be charged and submitted to the jury. The Court's exemption of prior convictions from its general rule in Apprendi is due to its holding two years ago in Almendarez-Torres v. United States, 523 U.S. 224 (1998). In Almendarez-Torres the Court found that prior convictions which were used to increase a statutory maximum penalty need not be charged in an indictment and proven to a jury because prior convictions had traditionally been treated as sentencing factors, and not elements of the offense. The Court in Apprendi questioned the correctness of Almendarez-Torres' holding, but found that it did not have to overrule Almendarez-Torres to reach its decision.

Almendarez-Torres was a 5-4 decision. Apprendi is a 5-4 decision, with the majority consisting of the four dissenters in Almendarez-Torres plus Justice Thomas, who had been in the majority in Almendarez-Torres. Justice Thomas filed a concurring opinion in Apprendi in which he states that he was wrong in Almendarez-Torres, and that the case ought to be overruled. Thus, if the issue of whether or not prior convictions that are used to increase the statutory maximum penalty must be charged in an indictment and proven to the jury beyond a reasonable doubt were considered by the Court in the future, it appears the votes now are present to overrule Almendarez-Torres, and require that such convictions be charged and submitted to the jury.

Apprendi raises more questions that it answered, i.e., will it be retroactive? Which statutes are affected? What is the remedy? Who is entitled to a 2255? Those and many more questions will be addressed at the Seminar on November 3. Please try to attend.

* * *

Dickerson broke no new ground, but preserved the Court's landmark decision in Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny. In Miranda, of course, the Court established the now familiar Miranda warnings that must be given to a suspect before the police subject the suspect to custodial interrogation. Following the Miranda decision, Congress passed what became 18 U.S.C. § 3501, a statute aimed at overruling Miranda by mandating that the admissibility of any confession in federal court would be governed by what amounted to a voluntariness test, and the fact that Miranda warnings were not given would not automatically result in the suppression of the confession.

In Dickerson, the Court had to determine if Miranda set forth a constitutional rule that could not be overruled by Congress, or if the Court in Miranda merely established judicially created rules of evidence under its rule making authority which could be superseded by Congress.

The Court concluded that Miranda announced a constitutional rule that Congress could not supersede legislatively. Thus, the Court basically preserved the *status quo* with regard to its body of case law involving Miranda.

IV. GOVERNMENT TRANSPORTATION ACCOUNT FOR PANEL LAWYERS

The Administrative Office of the United States Courts has created a Government Transportation Account (GTA) for Panel Attorneys and Experts. The GTA is designed to streamline the processing of payments and to allow panel attorneys and experts to use government rates for travel expenses incurred in Criminal Justice Act (CJA) cases. You and your experts may bill airline tickets directly to the GTA account, and you will no longer have to advance funds for travel expenses in CJA cases. However, you still must obtain travel authorization from the Judge before the expense is incurred.

To take advantage of the GTA, contact the Finance Section of the Clerk's office (Jeff Deglmann @ 412/ 208-7533) at least two weeks before the travel date.

V. PROCESSING CJA PANEL ATTORNEY VOUCHERS

Some of you may have experienced delays in the processing of your CJA Panel claims for various reasons. The following tips will assist in the processing of your claim and in timely payment to you:

Verify that you are billing at the correct rates:

Work performed before 1/1/2000:	$45/hr. out of court
	$65/hr. in court
Work performed after 1/1/2000:	$50/hr. out of court
	$70/hr. in court

Verify that you are using the correct mileage rate:

Travel performed before 1/14/2000:	31 cents per mile
Travel performed after 1/14/2000:	32.5 cents per mile

Check your math.
Double check your math.
Mail the voucher and supporting worksheets directly to:

Clerk's Office
Attention: Jeff Deglmann
U.S. District Court
P.O. Box 1805
Pittsburgh, PA 15230

Do not mail your voucher to the Judge's chambers. Jeff will forward the voucher to the Judge after verifying its accuracy and compliance with the guidelines for reimbursement. Mailing your voucher directly to the Judge will delay the verification and payment process.

VI. SYNOPSIS OF GUIDELINE AMENDMENTS EFFECTIVE NOVEMBER 1, 2000

Thomas W. Hutchison, Esq., of the Federal Defender Training Group, has provided a synopsis of guideline amendments. Amendment 590, an emergency amendment, took effect May 1, 2000; Amendments 591 through 605 are designated to take effect on November 1. A copy of the Synopsis is enclosed.

VII. REVOCATION OF PROBATION AND SUPERVISED RELEASE

Frances H. Pratt, Esq., of the Federal Defender Training Group, has written an outline addressing the revocation of probation and supervised release, current as of March 1999. A copy of that outline is enclosed.

VIII. RELEVANT COMMENTS ON RELEVANT CONDUCT

Fran Pratt also has summarized the "relevant conduct rules" of the Federal Sentencing Guidelines. A copy of that summary is enclosed.

IX. THE DEFENDER'S ADVOCATE, Winter 2000 Edition

Enclosed is the Winter 2000 issue of *The Defender's Advocate*, which is published by the Federal Defender Training Group, Washington, D.C., and distributed to Federal Defenders and Panel Members.

X. FEDERAL BUREAU OF PRISONS' PROGRAM STATEMENT

Last year, the U.S. Bureau of Prisons changed the eligibility criteria for the Intensive Confinement Centers (ICC) ("boot camps"). Already, that change is keeping many otherwise qualified candidates from being designated to a boot camp, even where the sentencing judge recommended an ICC. Policy Statement 5390.08, effective November 4, 1999, changed the criteria so that anyone with stable military, educational, or employment history is deemed not to need the programs offered by the ICCs, and therefore, will not be designated there. The theory is that space in the camps is limited and should be reserved for those inmates who most need the skills and discipline development that the ICC program offers.

For those inmates who have the disqualifying stable history, but still can demonstrate a need for the benefits of the program, one approach would be to encourage the sentencing judge to "strongly" recommend an ICC designation and address in that recommendation the circumstances that demonstrate the inmate's continued needs - e.g., since the military experience or stable employment, the client has suffered trauma such as injury, deaths, divorce, job loss, etc.; has developed a drug dependency, or that the military experience was so long ago that the discipline learned has worn off.

A copy of the Bureau of Prisons' Policy Statement 5390.08 is enclosed.

XI. CHEAT SHEET ON SENTENCE ENHANCEMENTS & SENTENCE REDUCERS

Enclosed with Rap Sheet Issue No. 1 was a cheat sheet created by an AFPD in East St. Louis, and which listed sentence enhancers on one side and sentence reducers on the other. The cheat sheet was recently amended and updated, and the prior issue is obsolete. A copy of the updated version is enclosed.

The "cheat sheet" can be folded and tucked into your Guideline book for easy reference.

XII. CASE NOTES

Recent Third Circuit Slip Opinions. Enclosed is a summary of recent Third Circuit Opinions on criminal law.

XIII. *UNITED STATES v. RONALD EDWARD SMITH*

Ronald Edward Smith filed a Motion to Vacate, Set Aside or Correct a Sentence pursuant to Title 28 U.S.C. §2255 at Civil Action No. 99-1688, challenging, among other things, the Court's failure to specify that his federal sentence be served concurrently with a yet to be imposed but anticipated state sentence. The Motion was granted in part and denied in part by Memorandum Order of Judge Donald J. Lee filed May 30, 2000. *United States v. Ronald Edward Smith*, 101 F.Supp.2d 332 (W.D.Pa. 2000).

XIV. "WINNING STRATEGIES" CD

The Federal Defender Training Group has provided each panel attorney a CD which contains the electronic version of materials distributed at the National Seminar for Federal Defenders in 1999, as well as the "Winning Strategies" Regional Panel Attorney Seminars held in 1999. One is enclosed for you.

XV. STAFF NEWS

Congratulations to Assistant Federal Public Defender Karen Sirianni Gerlach and her husband, Gregory Gerlach, on the birth of their first child, Margaret Elizabeth. Meg was born July 20, 2000, and weighed in at a healthy 8 lbs. 13 oz. ! Mother, Father and child are all thriving.

Enclosures:

Seminar Registration Form
Synopsis of Guideline Amendments effective November 1, 2000
Revocation of Probation and Supervised Release
Relevant Comments on Relevant Conduct
The Defender's Advocate, Winter 2000 issue
Federal Bureau of Prisons' Program Statement
Cheat Sheet on Sentence Enhancements & Sentence Reducers
Summary of Recent Third Circuit Opinions on Criminal Law
National Defender Seminar and "Winning Strategies" CD, 1999

Synopsis of Guideline Amendments Scheduled to Take Effect November 1

Thomas W. Hutchison
Federal Defender Training Group
Washington, D.C.
May 30, 2000

The Commission, on May 1, promulgated and sent to Congress 15 amendments to the *Guidelines Manual*.[1] In addition, the Commission promulgated an "emergency" amendment that took effect on May 1.[2] The 15 regular amendments are designated to take effect on November 1 and will be numbered amendments 591 through 605 – absent the enactment of legislation to the contrary.[3] The likelihood of Congress enacting such legislation appears nil at this time.

Amendment 590

Congress directed the Commission to "ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property . . . is sufficiently stringent to deter such a crime."[4] Congress also directed the Commission to "ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed."[5] The Commission was authorized to issue an emergency amendment to carry out the congressional directives.[6]

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[1]*See* 65 Fed. Reg. 26,880 (2000). The amendments as promulgated, as well as a reader-friendly version of those amendments, is available at the Commission's web site, www.ussc.gov.

[2]The Commission did not publish the emergency amendment in the Federal Register but instead published the amendment in a separate document. U.S. Sentencing Comm'n, Supplement to the 1998 Guidelines Manual (May 1, 2000).

[3]The regular amendments will be cited by the amendment number they are expected to receive in Appendix C. Thus, amendment 1 as submitted will be cited as amendment 591, amendment 2 as submitted as amendment 592, and so forth.

[4]No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2(g)(1), 111 Stat. 2678.

[5]*Id*. at § 2(g)(2).

[6]Under that authority, an emergency amendment remains in effect "until and during the pendency of the next report to Congress under section 994(p) of title 28, United States Code."

The guideline applicable to copyright- and trademark-infringement offenses is § 2B5.3. Until May 1, that guideline had a base offense level of six, which could be increased, using the loss table in the fraud guideline, based upon the "retail value" of the items that violated the copyright or trademark laws.

Amendment 590 increases the base offense level to eight, changes the formula for determining the amount to use with the loss table in the fraud guideline, and adds three new enhancements. The result is that penalty levels for many offenses covered by the guideline will be significantly greater under the revised guideline.

Subsection (b)(1) of the revised guideline enhances the offense level based upon the "infringement amount." The infringement amount is determined by using one of two formulas, with the applicable formula dependent upon the type of case. The principal formula is the retail value of the infringed-upon item multiplied by the number of infringing items.[7] The principal formula applies if (1) the infringing item (A) appears to a reasonably-informed purchaser to be substantially equivalent to the infringed item or (B) is a digital or electronic reproduction of the infringed item; (2) the retail price of the infringing item is at least 75% of the retail price of the infringed item; (3) the retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding; (4) the retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than the retail value of the infringing item; or (5) the offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511.

For a case that does not fall into one of those five categories, the infringement amount is determined by an alternate formula. The alternate formula is the retail value of the infringing item multiplied by the number of infringing items.[8]

The Commission also added three new enhancements to § 2B5.3. New subsection (b)(2) calls for a two-level enhancement (with a floor of 12) if the offense involved manufacturing, importing, or uploading infringing items. New subsection (b)(3) calls for a two-level reduction (but not below level eight) if the offense was not committed for

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[7]If, for example, the infringed-upon item has a retail value of $100 and 1,000 infringing items were involved, the infringement amount would be $100,000. New commentary to the guideline defines "retail value" to be the retail price of the item in the market in which the item is sold.

[8]For example, if the infringing item has a retail value of $10 and the offense involves 1,000 infringing items, the infringement amount is $10,000.

commercial advantage or private financial gain. New subsection (b)(4) calls for a two-level enhancement (with a floor of 13) if the offense involved a conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense.

New commentary indicates that an upward departure may be warranted if the offense level substantially understates the seriousness of the offense. Two examples of when that may occur are given – (1) the offense involved substantial harm to the reputation of the copyright or trademark owner, and (2) the offense was committed in connection with, or in furtherance of, the criminal activities of a national or international organized criminal enterprise.

Amendment 591

Section 1B1.2(a) directs the sentencing court to "[d]etermine the offense guideline in Chapter Two . . . most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." The statutory index in Appendix A is intended "to assist in this determination."[9] Appendix A, therefore, is not controlling. The legal standard does not require the sentencing court to determine the offense guideline listed in Appendix A, but rather to determine the offense guideline "most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."

A defendant's relevant conduct is not involved in determining the applicable offense guideline. The relevant conduct guideline, by its own terms, applies only to determinations under chapters two and three (§ 1B1.3(a)) and chapters four and five (§ 1B1.3(b)) of the *Guidelines Manual*.

The Commission currently has two drug-trafficking guidelines, § 2D1.1 and § 2D1.2, with the former applicable to "ordinary" drug trafficking and the latter applicable to drug trafficking in a protected location or using protected individuals[10] A circuit split

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[9]U.S.S.G. § 1B1.2, comment. (n.1). *See* U.S.S.G. § 1B1.1(a) (sentencing court to determine the applicable offense guideline section from Chapter Two. See § 1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.").

[10]There was a third drug-trafficking guideline, § 2D1.4, which applied to attempts and conspiracies. The Commission deleted that guideline effective November 1, 1992. *See* U.S.S.G. App. C, amend. 447.

developed about cases in which the defendant had been convicted of "ordinary" drug trafficking but a portion of the defendant's relevant conduct took place near a protected location or involved a protected individual. A straightforward application of § 1B1.2(a) would call for the use of § 2D1.1 in that circumstance. The location of the trafficking and the age of the participants is not an element of an "ordinary" drug-trafficking offense, so an indictment alleging "ordinary" drug trafficking will not contain that information. Without that information, the charging document contains nothing that would enable a sentencing court to conclude that § 2D1.2, rather than § 2D1.1, is "most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."

Nevertheless, two circuits expressly held that a district court could use § 2D1.2.[11] Four circuits held that the sentencing court must use § 2D1.1.[12] The Commission has sided with the latter circuits. Amendment 591 adds new commentary to § 2D1.2 stating that § 2D1.2 "applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation."

The Commission also responded to a request from the Department of Justice and changed the status of Appendix A. The Justice Department's concern about Appendix A

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[11]*See* United States v. Robles, 8 F.3d 814 (3d Cir. 1993) (unpub.), *affirming* 814 F. Supp. 1249 (E.D. Pa. 1993); United States v. Clay, 117 F.3d 317 (6th Cir. 1997).

Another circuit was characterized as taking that position as well, but the case upon which that characterization was based, United States v. Oppedahl, 998 F.2d 584 (8th Cir. 1993), really does not support that characterization. *Oppedahl* affirmed a district court's use of § 2D1.2 to sentence a defendant convicted of conspiracy to distribute a controlled substance (an "ordinary" drug-trafficking offense). At the time the defendant was sentenced, however, § 2D1.4 was in effect. That guideline directed the sentencing court to apply the offense guideline applicable to the object of the conspiracy. Because that direction was in a chapter two guideline, the relevant conduct rules of § 1B1.3(a) applied. The district court, therefore, was required by § 2D1.4 to select an offense guideline based upon the defendant's relevant conduct.

[12]*See* United States v. Locklear, 24 F.3d 641, 646-49 (4th Cir. 1994); United States v. Chandler, 125 F.3d 892 (5th Cir. 1997); United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999); United States v. Saavedra, 148 F.3d 1311, 1314-16 (11th Cir. 1998).

was triggered by a Third Circuit money-laundering case. Appendix A lists § 2S1.1 as the guideline for a money-laundering offense under 18 U.S.C. § 1956. Nevertheless, the Third Circuit held that, under the facts of the case before it, the fraud guideline (§ 2F1.1) rather than the money-laundering guideline (§ 2S1.1) should have been used to sentence a defendant convicted under section 1956.[13] The Third Circuit's result is justifiable based upon a finding that the charging document did not charge the type of conduct that constituted heartland money laundering but rather charged fraud.

Amendment 591 changes the status of Appendix A, from providing assistance in determining the applicable offense guideline to controlling that determination.[14] As revised, § 1B1.2(a) requires the sentencing court to "[r]efer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction." New commentary to § 1B1.2 states that the court is to use the offense guideline listed in Appendix A for the offense of conviction, with two exceptions. The first exception is if the defendant has stipulated to a more serious offense, in which case the court must use the offense guideline applicable to the more serious offense to which the defendant has stipulated. The second exception is that if there is no offense guideline listed in Appendix A, in which case the court is to use "the most analogous guideline." New commentary also provides that if Appendix A lists more than one offense guideline, the court must determine which of the list guidelines is "most appropriate for the offense conduct charged in the count of which the defendant was convicted." The Commission's changes do not limit the power of a sentencing court to depart from the guideline range determined under the money-laundering guideline by

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[13]United States v. Smith, 186 F.3d 290 (3d Cir. 1999).

The Justice Department also cited United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998), although that case does not seem to have been determined in the manner that *Smith* was. *Hemmingson* involves a conclusion by the Fifth Circuit that a downward departure was justified based upon the district court's determination that the offenses did not fall within the heartland of the money-laundering guideline, § 2S1.1 . . . ." Hemmingson, 157 F.3d at 360. The similarity to *Smith* is that the district court in *Hemmingson* used the fraud guideline to structure the departure. *Hemmingson*, however, simply affirms that the sentencing court can depart from the range determined under the money-laundering guideline if the case is outside of the heartland.

[14]*See* 65 Fed. Reg. 26,881-82 (2000) (amendment 591 is "intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls with the limited 'stipulation' exception . . . .").

sentencing within a range determined under another guideline.

Amendment 592

Congress gave the Commission a number of directives in the Protection of Children from Sexual Predators Act of 1998.[15] Amendment 592 responds to the Act with a number of amendments to guidelines in chapter two, parts A and G.[16]

§ 2A3.1. Amendment 592 adds subsection (b)(6), which calls for a two-level enhancement if, "to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an Internet-access device." New commentary defines the terms "minor" and "prohibited sexual conduct." The term "minor" means an individual less than 18 years old, and the term "prohibited sexual conduct" means "any sexual activity for which a person can be charged with a criminal offense" and includes production of child pornography and does not include trafficking in or possessing child pornography.

§ 2A3.2. Amendment 592 completely rewrites this guideline, which currently has a single base offense level of 15. The new guideline has alternative base offense levels – 18 (if the offense involved a violation of 18 U.S.C. ch. 117) or 15 (other cases). Subsection (b)(1) in the current guideline (the only enhancement in the current guideline) is carried forward without change, as is the cross reference in the current guideline. Amendment 592 adds to the guideline two new enhancements and an adjustment that reduces the offense level.

Subsection (b)(2) calls for a two-level enhancement if the victim was not in the care, custody, or supervisory control of the defendant and (A) the offense involved knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct or to facilitate transportation or travel by the victim to engage in prohibited sexual conduct; or (B) a participant unduly influenced the victim to engage in prohibited sexual conduct. New commentary defines the term "victim" to mean (A) an individual less than 16 years old, or (B) a law enforcement officer who represents that he or she is less than 16 years old. New commentary incorporates the definition of the term "prohibited sexual conduct" set forth

[15]Pub. L. No. 105-314, §§ 502-07, 112 Stat. 2974.

[16]The Commission did not respond to the directive in section 505 and plans to continue working on the matter during the next amendment cycle.

in the commentary to § 2A3.1. The Commission has not defined the term "unduly influenced," but new commentary states that in determining whether there was undue influence, "the court should closely consider the facts of the case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior." Further, new commentary establishes a rebuttable presumption of undue influence if the participant is at least 10 years older than the victim.

Subsection (b)(3) calls for a two-level enhancement if a computer or internet access device was used to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct or to facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct. Subsection (b)(4) calls for a three-level reduction if the base offense level is 18 and there is no enhancement under subsection (b)(1), (2), and (3).

§2A3.3. Amendment 592 adds two enhancements to this guideline, which currently has none. Subsection (b)(1) calls for a two-level enhancement if the offense involved the knowing misrepresentation of a participant's identity (A) to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. New commentary defines the term "minor" to be an individual who is less than 18 years old and incorporates the definition of "prohibited sexual conduct" contained in new commentary to § 2A3.1. Subsection (b)(2) calls for a two-level enhancement if a computer or internet-access device was used (A) to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct.

§ 2A3.4. Amendment 592 adds two enhancements that are identical to the enhancements added to § 2A3.3.

§ 2G1.1. Amendment 592 completely rewrites § 2G1.1. The current guideline has a single base offense level of 14. The revised guideline has alternative base offense levels – 19 (if the offense involved a minor) and 14 (otherwise). Amendment 592 carries forward the enhancements, cross references, and special instruction of the current guideline but adds two new enhancements. New subsection (b)(4) calls for a two-level enhancement if the care, custody, or supervision enhancement of subsection (b)(3) does not apply and (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the transportation of a minor to engage in prostitution, or (B) a participant otherwise unduly influenced a minor to engage

in prostitution.[17] New subsection (b)(5) calls for a two-level enhancement if a computer or internet-access device was used (A) to persuade, induce, entice, coerce, or facilitate the travel of a minor to engage in prostitution, or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. New commentary incorporates the definition of "prohibited sexual conduct" added to § 2A3.1.

The Protection of Children from Sexual Predators Act of 1998 enacted a new offense, 18 U.S.C. § 2425, which prohibits transmitting the name, address, telephone number, social security number, or electronic mail address of another individual who the transmitter knows has not attained the age of 16, with intent to entice, encourage, offer, or solicit any person to engage in any sexual activity for which any person can be charged with a criminal offense.[18] Amendment 592 amends the statutory provisions note to this guideline and Appendix A to designate this guideline as the guideline applicable to an offense under section 2425.

§ 2G2.1. Amendment 592 revises the computer enhancement of subsection (b)(3). The enhancement now applies if, for the purpose of producing sexually explicit material, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the transportation of a minor to engage in sexually explicit conduct, or (B) the use of a computer or internet-access device (i) persuade, induce, entice, coerce, or facilitate the travel of a minor to engage in sexually explicit conduct or otherwise to solicit participation by a minor in such conduct, or (ii) solicit participation with a minor in sexually explicit conduct. New commentary defines "minor" to be an individual less than 18 years old.

§ 2G2.2. Subsection (b)(2) of this guideline currently requires an enhancement if the offense involved distribution. The extent of the enhancement is determined by using the loss table in the fraud guideline based upon the retail value of the material, but cannot be less than five levels. Amendment 592 completely rewrites subsection (b)(2). The new provision has five bases for application, with different enhancements. The court is to use the basis that yields the greatest enhancement. Subsection (b)(2)(A) applies if the offense

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[17] New commentary defines "minor" to be an individual less than 18 years old. The Commission has not defined "unduly influenced," but new commentary states that "the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior." In addition, new commentary establishes a rebuttable presumption of undue influence if the participant is at least ten years older than the minor.

[18] Public Law No. 105-314, § 101, 112 Stat. 2975.

involved distribution for pecuniary gain. The extent of the enhancement is determined by using the loss table from the fraud guideline and the retail value of the material, but cannot be less than five levels. Subsection(b)(2)(B) calls for a five-level enhancement if the offense involved distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain. Subsection(b)(2)(C) calls for a five-level enhancement if the offense involved distribution to a minor. Subsection(b)(2)(D) calls for a seven-level enhancement if the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct. Subsection (b)(2)(E) calls for a two-level enhancement if the offense involved distribution other than distribution described in subsection (b)(2)(A) through (D). New commentary defines the terms "distribution," "distribution for pecuniary gain," "distribution for the receipt, or the expectation of receipt, of a thing of value, but not for pecuniary gain," and "distribution to a minor."

§ 2G2.4. Amendment 592 revised the commentary to include definitions of "minor" (an individual less than 18 years old) and "visual depiction" ("any visual depiction described in 18 U.S.C. § 2256(5) and (8)").

§ 2G3.1. Amendment 592 rewrites the current distribution enhancement of subsection (b)(1) in the same way that the distribution enhancement of § 2A2.2 has been rewritten. The Protection of Children from Sexual Predators Act of 1998 enacted a new offense, 18 U.S.C. § 1470, which prohibits the use of the mails or a facility or means of interstate or foreign commerce knowingly to transfer obscene matter to another individual whom the transferor knows has not attained the age of 16.[19] Amendment 592 amends the statutory provisions note to this guideline and Appendix A to designate this guideline as the guideline for an offense under section 1470.

Amendment 593

Amendment 593 makes the same changes in § 2B5.3 made by the emergency amendment (590). Amendment 593 is necessary to prevent the changes made by amendment 590 from lapsing.

Amendment 594

Congress in 1998 revised methamphetamine penalties by reducing the quantity of the drug that triggers mandatory-minimum penalties.[20] As revised, the quantities that

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[19]*Id*. at § 401, 112 Stat. 2979.

[20] Methamphetamine Trafficking Penalty Enhancement Act of 1998, Pub. L. No. 105-277, div. E, § 2, 112 Stat. 2681-759.

trigger a five-year mandatory minimum are 5 grams of pure methamphetamine and 50 grams of a mixture or substance containing methamphetamine. The quantities that trigger a ten-year mandatory minimum are 50 grams of pure methamphetamine and 500 grams of a mixture or substance containing methamphetamine.

The Commission ordinarily assigns to levels 26 and 32 in the drug quantity table the mandatory-minimum quantities triggering five-year and ten-year mandatory minimums, respectively. The drug quantity table, however, currently assigns level 26 to 10 grams of pure methamphetamine and level 32 to 100 grams of pure methamphetamine.[21] Amendment 594 revises the drug quantity table so that level 26 is assigned to 5 grams of pure methamphetamine and level 32 to 50 grams of pure methamphetamine.

Amendment 595

Section 6 of the Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520, directed the Commission to amend the fraud guideline to increase penalties for telemarketing offenses. In response to that directive, and utilizing emergency-amendment authority conferred by section 6(d) of that Act, the Commission promulgated amendment 587, which took effect November 1, 1998. Under that emergency-amendment authority, amendment 587 would "remain in effect until and during the pendency of the next report to Congress under section 994(p) of title 28, United States Code."

The Commission has repromulgated amendment 587 as a regular amendment. It can be argued, however, that the Commission's action was not timely and that amendment 587 ceased to have effect on November 1, 1999.[22]

Amendment 596

The Commission amended the fraud guideline, § 2F1.1, to carry out directives in

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[21]The statutory and guideline terminology can be confusing. For statutory purposes, the term "methamphetamine" refers to pure methamphetamine. (The guideline term for pure methamphetamine is "methamphetamine (actual).") For guideline purposes, the term "methamphetamine" refers to the entire mixture or substance that contains a detectable quantity of methamphetamine.

[22]A memorandum analyzing the matter was sent to every defender on January 20, 2000.

two congressional enactments.[23] Amendment 596 adds a new enhancement to the fraud guideline, designated as subsection (b)(5). Subsection (b)(5) calls for a two-level enhancement, with a floor of 12, in three circumstances. First, the enhancement applies if the offense involved possession or use of "device-making equipment." New commentary defines the term "device-making equipment" to have the meaning given that term by 18 U.S.C. § 1029(e)(6) and to include hardware or software configured as described in 18 U.S.C. § 1029(a)(9) and a scanning receiver as described in 18 U.S.C. § 1029(a)(8).[24]

Second, subsection (b)(5) applies if the offense involved the production of, or trafficking in, an unauthorized access device or counterfeit access device. New commentary defines the terms "unauthorized access device" and "counterfeit access device." The term "unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3) – an access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud. The term "counterfeit access device" has the meaning given that term in 18 U.S.C. § 1029(e)(2) – an access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or counterfeit access device – and includes a telecommunications instrument modified or altered to obtain unauthorized use of telecommunications services.

Finally, subsection (b)(5) applies if the offense involved (1) unauthorized transfer or use of any means of identification to produce or obtain unlawfully any other means of identification, or (2) possession of five or more means of identification that were produced unlawfully from another means of identification or obtained by the use of another means of identification. New commentary provides that the term "means of identification" has the meaning set forth in 18 U.S.C. § 1028(d)(3) – in essence, personal data about an individual, such as a name, social security number, or date of birth – except

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[23]Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, § 4, 112 Stat. 3007; Wireless Telephone Protection Act, Pub. L No. 105-172, § 2(e), 112 Stat. 53 (1998).

[24] "Device-making equipment" is "any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device." 18 U.S.C. § 1029(e)(6). An "access device" is a "card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instruments." 18 U.S.C. § 1029(e)(1).

that the means of identification must be of an actual individual other than the defendant or a participant in the jointly-undertaken criminal activity.

Amendment 596 added commentary to the fraud guideline providing that the loss in a case involving a counterfeit access device or unauthorized access device includes any unauthorized charges but cannot be less than $500. The minimum loss is $100 if the device is a "means of telecommunication access that identifies a specific telecommunications instrument or telecommunications account" and the means was possessed and not used. The minimum loss rule in application note 4 of the theft guideline, § 2B1.1, was revised to be consistent with the new commentary to the fraud guideline.

Amendment 597

There is a two-level enhancement under § 2F1.1(b)(4) if the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization or a government agency, or (B) "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines . . . ." The circuits split over whether subsection (b)(4)(B) applied to a case involving bankruptcy fraud. Several circuits held that the enhancement applied,[25] and two circuits held that the enhancement did not apply.[26] A third circuit, in dictum, indicated that the enhancement did not apply to filing false accounts in a state probate court.[27] The reasoning in that case indicates that the circuit would also have concluded that the enhancement did not apply to bankruptcy schedules and forms.

The Commission sided with the majority of circuits. Amendment 597 adds a third basis for applying § 2F1.1(b)(4) – "a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding." The Commission's rationale is that bankruptcy fraud needs to be treated more severely "because of its adverse impact on the bankruptcy judicial process and because of the additional harm and seriousness involved in such

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[25]*See* United States v. Saacks. 131 F.3d 540, 54346 (5th Cir. 1997); United States v. Guthrie, 144 F.3d 1006, 1010-11 (6th Cir. 1998); United States v. Michalek, 54 F.3d 325, 330-33 (7th Cir. 1995); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991); United States v. Welch, 103 F.3d 906, 907-08 (9th Cir. 1996); United States v. Messner, 107 F.3d 1448, 1457 (10th Cir. 1997); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994).

[26]*See* United States v. Shadduck, 112 F.3d 523, 528-30 (1st Cir. 1997); United States v. Thayer, 201 F.3d 214 (3d Cir. 1999).

[27]United States v. Carrozzella, 105 F.3d 796, 799-802 (2d Cir. 1997).

conduct."[28]

Amendment 598

Until November 13, 1998, 18 U.S.C. § 924(c) made it an offense to carry or use a firearm during and in relation to a crime of violence or drug trafficking crime. The penalty was a specified prison term that had to run consecutively to any other term of imprisonment imposed on the defendant. The penalty specified depended upon the type of firearm involved and whether the defendant had a prior conviction under section 924(c).

Congress revised section 924(c) in several ways, effective November 1, 12, 1998.[29] Congress expanded the offense to include possession of a firearm in furtherance of a crime of violence or a drug trafficking crime and also changed the penalty provisions. The punishment provisions of section 924(c) were revised to set forth a mandatory minimum with no stated maximum. In addition, the punishment was made dependent upon the nature of the involvement of the firearm as well as upon the type of firearm and a prior conviction under section 924(c).

The guideline applicable to a section 924(c) offense, § 2K2.4, is unique. Unlike nearly every other offense guidelines in chapter two, § 2K2.4 does not have a base offense level. The defendant's criminal history is not germane to determining a sentence under § 2K2.4. Under § 3D1.1(b), the grouping rules of chapter 3, part D do not apply to a section 924(c) offense. Rather, as provided in § 5G1.2(a), a sentence for a section 924(c) offense must be "imposed independently." In short, § 2K2.4 is a functional equivalent of an enhancement for possession or use of a firearm, although it technically does not operate in that manner.[30]

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[28]65 Fed. Reg. 26, 895 (2000).

[29]Public Law 105-386, § 1(a), 112 Stat. 3469.

[30]The other unique chapter two guideline is § 2J1.7, which applies to an offense under 18 U.S.C. § 3147, does function as if a specific offense characteristic in another offense guideline. Under 18 U.S.C. § 3147, a consecutive term of imprisonment (with no minimum term specified) is required if a defendant is convicted of an offense committed while released" on bail. Section 2J1.7 directs the sentencing court to add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release."

Section 2K2.4(a) currently provides that, for a defendant convicted under 18 U.S.C. § 924(c), "the term of imprisonment is that required by statute." Amendment 598 carries forward that language for offenses under 18 U.S.C. § 844(h). Amendment 598 revises § 2K2.4(a) to provide that for offenses under 18 U.S.C. § 924(c) or § 929(a), "the guideline sentence is the minimum term of imprisonment required by statute."[31] Amendment 598 also adds commentary to § 2K2.4 stating that a sentence in excess of the minimum required by section 924(c) or 929(a) is a departure and must be justified as such.

Amendment 599

Application note 2 to § 2K2.4 provides that the sentencing court is not to apply any weapon enhancement when calculating the offense level for the underlying offense if the defendant is being sentenced also for an offense under 18 U.S.C. § 924(c). Some courts, however, have applied a weapon enhancement to a defendant who was also being sentenced for a section 924(c) offense, on the ground that the defendant is accountable under the relevant-conduct rules for a weapon other than the weapon that is the basis for the section 924(c) conviction.[32] Amendment 599 adds new commentary to § 2K2.4 specifically precluding such a result.

Amendment 600

Application note 1 to § 4B1.2 (definition of terms used in section 4B1.1) has, since November 1, 1997, provided that a conviction under 18 U.S.C. § 924(c) is a crime of violence or a controlled substance offense for the purposes of the career offender guideline if the underlying offense was a crime of violence or a controlled substance offense.[33] Thus, at present, a section 924(c) conviction qualifies as an instant offense and a predicate offense for purposes of the career offender guideline.

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[31]18 U.S.C. § 929(a) provides a term of imprisonment of "not less than 5 years" for a person who, during and in relation to a crime of violence or drug trafficking crime, uses or carries a firearm and is in possession of armor piercing ammunition capable of being fired from the firearm. 18 U.S.C. 929(b) requires that the sentence run consecutively to any other term of imprisonment.

[32]*See, e.g.*, United States v. Washington, 44 F.3d 1271 (5th Cir. 1995) (sustaining application of the weapon enhancement of the drug-trafficking guideline on the basis that the weapon covered by the section 924(c) conviction was different from the weapon that was the basis for application of the weapon enhancement in the drug-trafficking guideline).

[33]*See* U.S.S.G. App. C, amend. 568.

Amendment 600 amends application note 1 to provide that a section 924(c) conviction can be a predicate, but not an instant, offense for career offender guideline purposes. The Commission's goal is to "preserve[] the status quo as it existed prior to the statutory changes to 18 U.S.C. § 924(c) . . . that established a statutory maximum of life for all violations of the statute."[34]

Amendment 601

The commentary to § 1B1.1 defines the term "brandish." Congress, in revising 18 U.S.C. § 924(c), added a specific punishment (a prison term of not less than 7 years) if the firearm was "brandished," and defined the term "brandished" for purposes of section 924(c).[35] The statutory definition is "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person." Amendment 601 revises the guideline definition of "brandish" to conform to the statutory definition. That change also necessitated a revision of the definition of "dangerous weapon" in the commentary to § 1B1.1.

Amendment 602

A defendant who successfully appealed a conviction or sentence and who had rehabilitated him- or herself while awaiting the outcome of the appeal had a basis for a downward departure in seven circuits.[36] Only one circuit held to the contrary, and the law

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[34]65 Fed. Reg. 26,898 (2000).

[35]Pub. L. No. 105-386, § 1(a), 112 Stat. 3469.

[36]*See* United States v. Core, 125 F.3d 74, 76-79 (2d Cir. 1997), *cert. denied* __ U.S. __, 118 S.Ct. 735 (1998); United States v. Sally, 116 F.3d 76, 79-81 (3d Cir. 1997); United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (involving postconviction rehabilitation) (overruling United States v. Van Dyke, 895 F.2d 984 (4th Cir. 1989), a decision written by the then-Chair of the Sentencing Commission, Judge William W. Wilkins, holding that postoffense rehabilitation was not a basis for departing) (per Wilkins, C.J.); United States v. Rudolph, 190 F.3d 720, 722-28 (6th Cir. 1999); United States v. Green, 152 F.3d 1202, 1206-08 (9th Cir. 1999); United States v. Roberts, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpub.) (relying on United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998), a postoffense rehabilitation case that held that "*Koon* allows exceptional efforts at drug rehabilitation to be considered as a basis for a downward departure from the applicable guideline sentence because these efforts were not expressly forbidden as a basis for departure by the Sentencing Commission"); United States v. Rhodes, 145 F.3d 1375, 1378-82 (D.C. Cir. 1998).

in that circuit was somewhat inconsistent.[37]

Amendment 602 rejects the position of the majority and adds a new policy statement, § 5K2.19, that makes postconviction rehabilitation a prohibited factor for departure. The rationale, set forth in the background commentary to the policy statement, is that such a departure would (1) be inconsistent with the policies established by Congress under the Sentencing Reform Act, including the provisions of 18 U.S.C. §3624(b) for reducing the time to be served by an imprisoned person, and (2) inequitably benefit only those few who gain the opportunity to be resentenced de novo, while others, whose rehabilitative efforts may have been more substantial, could not benefit simply because they chose not to appeal or appealed unsuccessfully.

Amendment 603

Chapter one, part A(4)(d) of the *Guidelines Manual* states that [t]he Commission, of course, has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures." The *Manual* nowhere elaborates on that statement, leaving its meaning somewhat ambiguous. Without guidance as to what the Commission contemplated as single acts of aberrant behavior," the circuits came up with differing interpretations of that phrase. Several circuits interpreted the phrase to require a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning . . . ."[38] Other circuits used a

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[37]In United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997), the Eighth Circuit, relying on *Koon*, held that postoffense rehabilitation was a basis for a downward departure. In United States v. Sims, 174 F.3d 911, 912 (8th Cir. 1999), the Eighth Circuit, stating that *Koon* did not control, held that postonviction rehabilitation was not a basis for a downward departure. Finally, in United States v. Hasan, 205 F.3d 1072 (8th Cir. 2000), the Eighth Circuit affirmed a district court's downward departure for postconviction rehabilitation. The defendant in *Hasan* had filed a motion for reduction in sentence under 18 U.S.C. § 3582(c)(2). The district court granted the motion, recomputed the guideline range, and then departed below that range because defendant's "efforts at rehabilitation in prison were indeed extraordinary." *Id*. at 1074. The Eighth Circuit held that *Sims* did not control. "*Sims* did not involve a § 3582(c)(2) motion, however, and the statutory language makes the difference." *Id*. at 1075.

[38]*See* United States v. Carey, 895 F.2d 318, 325 (7th Cir.1990). *Accord* United States v. Marcello, 13 F.3d 752, 760-61 (3d Cir.1994); United States v. Glick, 946 F.2d 335, 338-39 (4th Cir. 1991); United v. Williams, 974 F.2d 25, 26-27 (5th Cir. 1992); United States v. Garlich, 951 F.2d 161, 164 (8th Cir. 1991); United States v. Withrow, 85 F.3d 527 (11th Cir. 1996).

broader interpretation and looked to the totality of circumstances.[39]

The Commission has sought to develop a middle position between spontaneous and thoughtless act, on the one hand, and totality of the circumstances, on the other hand. Amendment 603 adds a new policy statement, § 5K2.20, that provides that a downward departure may be warranted "in an extraordinary case of the defendant's criminal conduct constituted aberrant behavior." New commentary defines the term "aberrant behavior" to be "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life."

The new policy statement, however, prohibits an aberrant-behavior departure in five circumstances – (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or dangerous weapon; (3) the instant offense of conviction is a "serious drug trafficking offense," which new commentary defines as an offense under title 21 of the United States Code (other than simple possession) that results in the imposition of a mandatory minimum term of imprisonment because the defendant does not meet the safety-valve criteria of § 5C1.2.; (4) the defendant has more than one criminal history point as determined under chapter four of the *Guidelines Manual*; and (5) the defendant has a prior federal or state felony conviction, regardless of whether the conviction is countable under chapter four. New commentary states that, in determining whether to depart, the court can consider the defendant's mental and emotional conditions, employment record, record of prior good works, motivation for committing the offense, and efforts to mitigate the effects of the offense.

Amendment 604

Under § 6B1.2(a), p.s., if there is a plea agreement that includes a commitment by the government to dismiss a charge or not to bring a charge, a sentencing court may accept the agreement if the court determines . . . that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." The policy statement and its commentary does not indicate if the sentencing court is to determine whether the remaining charges adequate reflect the seriousness of the actual offense behavior on the basis of (1) the guideline range applicable to the remaining

[39]*See* United States v. Grandmaison, 77 F.3d 555, 560-64 (1st Cir. 1996); Zecevic v. U.S. Parole Comm'n, 163 F.3d 731 (2d Cir. 1998); United States v. Takai, 941 F.2d 738 (9th Cir. 1991); United States v. Pena, 930 F.3d 1486, 1494-96 (10th Cir. 1991)

charges or (2) the maximum possible sentence available if the court were to depart upward from the applicable guideline range. Several circuits adopted the latter view, holding that the sentencing court can depart,[40] while others adopted the former view, holding that the sentencing court is limited to sentencing within the applicable guideline range.[41]

The Commission has sided with the majority. Amendment 604 adds a new policy statement, § 5K2.21, that states that the sentencing court can depart upward "to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason, and (2) that did not enter into the determination of the applicable guideline range."

Amendment 605

The Commission has made of number of technical and conforming changes to §§ 2B5.1, 2D1.1, 2D1.11, 2D1.12, 2K2.1, 5B1.3, and 5D1.3.

[40]*See* United States v. Figaro, 935 F.2d 4, 6-8 (1st Cir. 1991); United States v. Kim, 896 F.2d 678 (2d Cir. 1990); United States v. Baird, 109 F.3d 856 (3d Cir. 1997); United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994); United States v. Cross, 121 F.3d 234 (6th Cir. 1997); United States v. Big Medicine, 73 F.3d 994 (10th Cir. 1995). A close reading of two of these three cases indicates that they were of limited precedential value. The defendant in *Figaro* pleaded guilty, but the opinion does not state whether that plea was pursuant to a plea agreement. The defendant in *Big Medicine* did plead guilty pursuant to a plea agreement, but, for reasons spelled out in the opinion, the Tenth Circuit expressly concluded that, "We therefore need not address Big Medicine's argument that a court cannot consider in its sentencing decision charges dismissed as part of a plea agreement." Big Medicine, 73 F.3d at 997 n.5.

[41]*See* United States v. Harris, 70 F.3d 1001 (8th Cir. 1995); United States v. Faulkner, 952 F.2d 1066 (9th Cir. 1991); United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1991).

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RECENT THIRD CIRCUIT OPINIONS ON CRIMINAL LAW
(May 1999 through July 1999)
By Karen Sirianni Gerlach, AFPD

687. Baker v. Barbo, No. 97-5687 (D. N.J. 5/13/99) - This was an appeal from a denial of a petition for writ of habeas corpus which was filed pursuant to 28 U.S.C. § 2254. The underlying state court charges were for robbery and attempted abduction of a woman, and the abduction, kidnaping and aggravated sexual assault of a 15-year old girl.

At the time of Mr. Baker's offense, a new sentencing law was in effect which required a mandatory minimum term of incarceration of 25 years. Neither the defense attorney, nor the prosecutor, nor the trial judge was aware of this law when Mr. Baker elected to plead not guilty and go to trial. After his conviction at trial, Mr. Baker received a sentence which was less than the 25-year mandatory minimum required by the new law. Mr. Baker appealed his conviction, and the state, which had since become aware of the new law requiring a mandatory minimum sentence of 25-years, filed a cross-appeal arguing that Mr. Baker's sentence was illegal. The appellate court affirmed the conviction, but remanded for resentencing in light of the new law. Upon remand the trial court imposed the 25-year mandatory minimum sentence required by the new law.

In his habeas corpus petition, Mr. Baker argued that he received ineffective assistance of counsel in violation of the Sixth Amendment, because his attorney's ignorance of the new law caused him to forego a plea bargain which would have allowed him to avoid the 25-year mandatory minimum sentence. Mr. Baker also argued that his resentencing after his direct appeal to a greatly enhanced sentence violated his due process rights under the Fourteenth Amendment. The district court rejected both of these contentions, and on appeal, the Third Circuit AFFIRMED. The Third Circuit noted that if Mr. Baker's attorney had known of the new law, he could not have allowed Mr. Baker to accept the plea bargain to a lesser sentence, because there cannot be a plea bargain to an illegal sentence, and because a lawyer is bound to point adverse legal authority out to the court. (Greenberg and Roth, C.J., Pollak, D.J.; opinion by Greenberg; dissent by Pollak.) **177 F.3d 149.**

688. In re: Impounded, No. 98-6498 (D. N.J. 5/13/99) - The appellants in this case were employees of a corporation which was under criminal investigation. The appellants were subpoenaed to testify before the grand jury and granted immunity. The appellants agreed to answer questions regarding their company's business dealings in the United States, but refused to answer questions regarding its business dealings in foreign countries on the grounds that the district court's immunity order did not shield them from foreign prosecution. The district court ultimately held the appellants in contempt of court, and they appealed. Their specific contentions on appeal were (1) that the district court erred in not accepting their assertions of privilege; and (2) that the district court erred by determining that an evidentiary hearing was not required to determine the merit of their Fifth Amendment claims, and thus denied them their due process rights. AFFIRMED. (Rendell and Aldisert, C.J., Williams, D.J.; opinion by Rendell.) **178 F.3d 150.**

689. United States v. Williams, No. 97-5465 (D. N.J. 5/17/99) - The issue in this appeal was whether the district court erroneously sentenced the appellant as a career offender under § 4B1.1 of the sentencing guidelines. To be a career offender, a defendant must meet the following three criteria: (1) he must be at least 18 years old when he committed the instant offense; (2) the instant offense must have been a felony which was either a crime of violence or a "controlled substance offense"; and (3) he must have at least two prior felony convictions for "controlled substance offenses." The appellant conceded the first and third criteria, but argued that the second criteria was not satisfied. Specifically, he argued that his instant conviction for use of a telephone to commit, cause and facilitate the distribution of heroin in violation of 21 U.S.C. § 843(b) was not a "controlled substance offense" for purposes of determining career offender status. The Third Circuit rejected this argument and AFFIRMED. (Sloviter, Alito and Alarcon, C.J.; opinion by Alito.) **176 F.3d 714.**

690. United States v. Hernandez, No. 98-5266 (D. N.J. 5/17/99) - The was an appeal from a conviction for conspiring to obstruct interstate commerce by robbery in violation of 18 U.S.C. §§ 1951(a) and 2, and receiving or possessing goods stolen from commerce in violation of 18 U.S.C. § 659. The appeal raised the following three issues: (1) that the district court erred in defining reasonable doubt to the jury; (2) that the district court erred in sustaining objections to certain oral statements which defense counsel sought to admit into evidence; and (3) that the district court erred in allowing jurors to ask questions of witnesses.

The Third Circuit rejected the second and third issues. Specifically, the Court noted that the district court had properly screened the jurors' questions, and that the statements in question were not admissible under the state of mind exception established by Federal Rule of Evidence 803(3). However, the Court agreed with the third argument, and held that the district court's definition of "reasonable doubt" in its jury instructions amounted to reversible error.

Although the Court found that the district court's instruction to the jury before deliberations properly defined "reasonable doubt," it found that its preliminary jury instructions before opening statements were erroneous. Those instructions stated that there is no specific definition of "reasonable doubt," and that "reasonable doubt" is "what you in your own heart and your own soul and your own spirit and your own judgement determine is proof beyond a reasonable doubt." REVERSED and REMANDED. (Sloviter, McKee and Rendell, C.J.; opinion by McKee; concurrence by Rendell; dissent by Sloviter.) **176 F.3d 719.**

691. United States, Appellant v. Leese, No. 98-7513 (M.D. Pa. 5/18/99) - This was an appeal by the government from a district court order suppressing a confession made to two postal inspectors. The Third Circuit found that the postal inspectors did not conduct a custodial interrogation or its functional equivalent, and thus REVERSED the district court's order of suppression. The Court reasoned that the defendant was specifically told that she was not under arrest; she was also specifically informed that when the questioning was concluded, the inspectors would be returning to Harrisburg from Manchester, and that she would not be going with the them; and her requests to twice stop the questioning while she spoke to her union shop steward were honored. (Becker and McKee, C.J., Lee, D.J.; opinion by Lee.) **176 F.3d 740.**

692. United States v. Coates, No. 98-1173 (E.D. Pa. 5/21/99) - This was an appeal challenging an order of restitution. The Third Circuit VACATED the order of restitution and REMANDED for resentencing. The Court reasoned that the district court imposed the order of restitution without specifying a manner in which, or a schedule according to which, payment should be made, and also did not consider the defendant's financial resources or the other factors set forth in the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3664(f)(2). (Nygaard, Lewis and Alito, C.J.; opinion by Alito.) **178 F.3d 681.**

693. United States v. Huang, No. 98-5393 (D. N.J. 5/24/99) - The defendant entered into a cooperative plea agreement. Under the terms of the agreement, the government agreed that if the defendant provided substantial assistance to the government, that it would move the sentencing court for a downward departure under U.S.S.G. § 5K1.1. Prior to sentencing, the government informed the defendant that he had not honored his obligations under the plea agreement to provide substantial assistance, and that it would therefore not be moving for a downward departure at sentencing. The defendant appealed, arguing that the government had breached its obligation under the plea agreement. The Third Circuit remanded to the district court to allow the defendant an opportunity to establish a breach of the plea agreement. Upon remand, the district court denied relief, and the defendant appealed again. The Third Circuit reasoned that the government's decision not to move for a downward departure was reviewable only for bad faith or an unconstitutional motive, and noted that the defendant did not allege either. AFFIRMED. (Greenberg, Roth and Rosenn, C.J.; opinion by Rosenn.) **178 F.3d 184.**

***694. United States v. McGuire, No. 97-3542 (5/28/99) -** The defendant appealed his conviction for aiding and abetting the use of an explosive to destroy property used in an activity affecting interstate commerce, in violation of 18 U.S.C. §§ 2 and 844(i). The basis of the conviction was the destruction of the defendant's mother's car with a pipe bomb which had been planted beneath the driver's seat. The defendant's mother used the car for a catering business which she operated. The catering business was admittedly a purely local business.

An essential element of § 844(i) is that the property destroyed have been used in an activity affecting interstate or foreign commerce. The trunk of the destroyed car contained a carton of Tropicana orange juice, the raw materials for which were produced in Florida and then shipped to Pennsylvania. The district court ruled that this carton of orange juice was sufficient to satisfy the jurisdictional element, because it established that the catering business was an activity that affected interstate commerce.

On appeal, the Third Circuit found that the use of a single bottle of orange juice by a purely local business was not sufficient to establish a connection to interstate or foreign commerce under § 844(i). The Court thus held that the evidence was insufficient to prove all of the elements of the offense, and REVERSED. (McKee, Rendell and Weis, C.J.; opinion by McKee.) **178 F.3d 203. CONGRATULATIONS TO FPD SHELLEY STARK!**

695. United States v. Spinner, No. 98-7353 (M.D. Pa. 6/16/99) - The defendant was charged with one count of access device fraud in violation of 18 U.S.C. § 1029(1)(5), and one count of bank fraud in violation of 18 U.S.C. § 1344. He pled guilty to the access device fraud count, and was sentenced to two years imprisonment. This appeal followed.

On appeal, the defendant challenged the government's failure to allege in the indictment the interstate commerce element of the offense to which he pled guilty, violation of 18 U.S.C. § 1029(1)(5). The government admitted its failure to charge this element of the offense, but argued that it was harmless error because the other count of the indictment contained this federal jurisdictional element.

The Third Circuit disagreed with the government's argument, and held that the indictment was jurisdictionally defective. The Court thus REVERSED and VACATED the conviction so that the government could file a proper indictment. (Becker, Lewis and Wellford, C.J.; opinion by Lewis; concurrence by Wellford.) **180 F.3d 514.**

696. United States v. Iannone, Nos. 98-3373 and 98-3374 (W.D. Pa. 12/10/99) - Mr. Iannone pled guilty to six counts of interstate transportation of property taken by fraud; one count of mail fraud; and one count of wire fraud. On appeal, Mr. Iannone challenged the following three aspects of his sentence: (1) a two-level increase pursuant to § 3A1.1 for a vulnerable victim; (2) a two-level increase pursuant to § 3B1.3 for abuse of a position of private trust; and (3) a two-level upward departure pursuant to U.S.S.G. § 5K2.0 for conduct outside the "heartland" of the fraud guideline. The Third Circuit rejected all three of these arguments, and AFFIRMED.

With regard to the vulnerable victim enhancement, the Third Circuit found that for the enhancement to be upheld, the following three-part test had to be satisfied: (1) the victim was particularly susceptible or vulnerable to the criminal conduct; (2) the defendant knew or should have known of this susceptibility or vulnerability; and (3) this vulnerability or susceptibility facilitated the defendant's crime in some manner (i.e. there was a nexus between the victim's vulnerability and the crime's ultimate success). The Court held that all three prongs of the test were satisfied.

With regard to the abuse of a position of trust enhancement, the Third Circuit found that consideration of the following three factors must occur in order to determine whether a defendant occupies a position of trust: (1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in the defendant vis-a-vis the object of the wrongful act; and (3) whether there has been reliance on the integrity of the person occupying the position. The Third Circuit found that all three of these factors warranted the position of trust enhancement.

With regard to the district court's upward departure pursuant to U.S.S.G. § 5K2.0, the Third Circuit held that the combination of misrepresentations and psychological harm to the victims was sufficiently unusual to take the case out of the heartland of the Guidelines, and thus warrant a two-level departure.

AFFIRMED. (Becker and Stapleton, C.J., Harris, D.J.; opinion by Harris; concurrence by Becker.) **184 F.3d 214.**

697. United States v. Stewart, Nos. 98-1260, 98-1302, 98-1541, 98-1716, 98-1860 and 98-1968 (E.D. Pa. 7/16/99) - The jury convicted the defendant of 135 counts of mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; money laundering in violation of 18 U.S.C. § 1957; and racketeering in violation of 18 U.S.C. § 1962(c). The defendant appealed the judgment of conviction and sentence, arguing that he was entitled to a new trial or an acquittal. The specific issues which the defendant raised included the following:

(A) Did the district court violate the defendant's right to the counsel of his choice by disqualifying

his "expert" attorneys?
(B) Did the indictment omit an element of mail fraud?
(C) Was the defendant entitled to an "entrapment by estoppel" instruction?
(D) Did the district court err in giving a "willful blindness" instruction?
(E) Did the district court fail to give the jury a proper unanimity charge?

The defendant also challenged the district court's forfeiture of his personal savings account as substitute assets under 18 U.S.C. § 982(b)(1). The government cross-appealed the district court's ruling that the account was not directly forfeitable under 18 U.S.C. § 982(a)(1) as property "involved in" or "traceable to" the money laundering activities.

The Third Circuit AFFIRMED the conviction and sentence, but REVERSED on the government's cross-appeal, thus modifying the district court's forfeiture order so that the account would be forfeited directly rather than as a substitute asset.
(Greenberg and Alito, C.J., Dowd, D.J.; opinion by Greenberg.) **185 F.3d 112.**

698. United States v. Davis, No. 98-6251 (D. N.J. 7/19/99) - In this appeal, the Third Circuit held that the evidence adduced at trial was insufficient to convict the defendant of obstruction of justice, conspiracy to obstruct justice, or use of a telephone in aid of racketeering. However, the Third Circuit also held that the evidence was sufficient to sustain the defendant's convictions for witness tampering, but that the defendant was entitled to an intoxication instruction on that charge, and that the district court's refusal to give such an instruction required a new trial.
(Becker, Rendell and Rosenn, C.J.; opinion by Becker.) **183 F.3d 231.**

699. United States v. Warren, No. 98-6488 (D. N.J. 7/21/99) - The district court departed upward at sentencing based upon the quantity of drugs under U.S.S.G. § 2D2.1 or § 5K2.0, and based upon uncharged criminal conduct listed in the Presentence Report. On appeal the defendant challenged the upward departure on the grounds that the district court did not articulate its reasons for the departure; that the evidence before the district court did not provide a sufficient basis for either ground of the upward departure; and that he did not have adequate notice of the grounds for the upward departure.

The Third Circuit found that the district court did articulate its reasons for the departure, but that the upward departure itself was not supported by the record. Specifically, large quantities of drugs can take a case out of the heartland and justify an upward departure only to the extent that they indicate the high probability that the drugs were intended not for mere possession, but for distribution to others. Here, the evidence indicated that the defendant did not intend for anyone else to consume the drugs. Furthermore, the paragraph of the Presentence Report listing the uncharged criminal conduct did not contain sufficient detail or other indicia of reliability that would provide an adequate basis for the district court to rely upon in departing upward. Based upon its finding that the upward departure was not supported by the record, the Third Circuit did not reach the issue of whether the district court gave adequate notice of the departure.

REVERSED and REMANDED. (Becker, Rendell and Rosenn, C.J.; opinion by Rendell.)
186 F.3d 358.