

## Chapter Three

# Legal Issues

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### Introduction

Since the Supreme Court's 1989 decision in Mistretta v. United States<sup>2</sup> effected nationwide implementation of the sentencing guidelines, the Commission has included in each year's annual report an overview of some of the more significant case law issues affecting guideline application. In responding to its congressional mandate to monitor guideline application, the Commission closely follows the sentencing decisions of the federal district courts and courts of appeals to identify areas where guideline amendments, research, or legislative action may be needed to advance the goal of reasonable uniformity in sentencing.<sup>3</sup> This chapter discusses a number of the more significant sentencing-related legal issues decided by the United States Supreme Court and the federal courts of appeals in 1995.

### Supreme Court

In 1995, the Supreme Court decided one case and granted *certiorari* in two other cases directly addressing issues in guideline sentencing. In Witte v. United States,<sup>4</sup> the Supreme Court considered a challenge involving the use of relevant conduct under guideline 1B1.3 and the Double Jeopardy Clause of the Constitution. In an 8-1 decision authored by Justice O'Connor, the court upheld the Fifth Circuit's decision that no double jeopardy violation occurred when the defendant was prosecuted for cocaine offenses that had been consid-

ered as relevant conduct under the sentencing guidelines in determining punishment for a previously sentenced marijuana offense. In doing so, it resolved a conflict among the circuits.<sup>5</sup> The court relied on its decision in Williams v. Oklahoma, 358 U.S. 576 (1959), that "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause."<sup>6</sup> The Court rejected the petitioner's suggestion that "the sentencing guidelines somehow change the constitutional analysis," noting that the practice under the guidelines does not differ from "when a pre-Guidelines court, in its discretion, took similar uncharged conduct into account."<sup>7</sup> Finally, the Court stated that "the Guidelines take into account the potential unfairness with which petitioner is concerned"<sup>8</sup> through guideline 5G1.3, which provides for concurrent sentences and other safeguards.

The Supreme Court granted *certiorari* in two other cases addressing issues in guideline sentencing. In

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<sup>2</sup> 488 U.S. 361 (1989).

<sup>3</sup> See generally 28 U.S.C. § 991(b); S. Rep. No. 225, 98th Cong., 2d Sess. 39-56, 159-81 (1993), reprinted in 1984 U.S.C.C.A.N. 3182, 3222-339, 3342-64).

<sup>4</sup> 115 S. Ct. 2199 (1995).

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<sup>5</sup> Compare United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991) (defendant's actions included in relevant conduct to determine the punishment under the sentencing guidelines for one offense may not be subject to a later indictment without violating double jeopardy), *cert. denied*, 503 U.S. 994 (1992); United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) (same) with United States v. Witte, 25 F.3d 250 (5th Cir. 1994) ("use of relevant conduct to increase the punishment of a charged offense does not punish the offender for the relevant conduct").

<sup>6</sup> 115 S. Ct. 2199 at 2206.

<sup>7</sup> 115 S. Ct. 2199 at 2207.

<sup>8</sup> 115 S. Ct. 2199 at 2208.

United States v. Neal,<sup>9</sup> the Court is confronted with the question of whether the weight assigned to a dosage unit of LSD to calculate a defendant's offense level under the sentencing guidelines also governs the weight of the "mixture or substance" containing LSD under the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b). In Koon v. United States,<sup>10</sup> the Court will consider whether the court of appeals, in reviewing the district court's determination that several factors formed a valid basis for a departure from the sentencing range, correctly applied a *de novo* standard of review, and correctly concluded as a matter of law that the district court in this case departed downward on the basis of invalid factors.

### Courts of Appeals

During 1995, the 12 courts of appeals with criminal jurisdiction considered a variety of important guideline issues. This review focuses on decisions addressing the application of relevant conduct to mandatory minimum sentences, the determination of loss in fraud cases, the validity of waivers of appeal, the "safety valve" provision of guideline 5C1.2, downward departures in drug "reverse sting" operations, and departures in general.

### Relevant Conduct and Mandatory Minimum Sentences

In United States v. Ruiz,<sup>11</sup> the Fifth Circuit joined five other circuits<sup>12</sup> in holding that the quantity of

drugs attributable to a conspiracy defendant in determining whether to impose the statutory mandatory minimums is not set by the indictment or jury verdict, but is determined by the court under "the standards for determining the quantity of drugs involved in a conspiracy for guidelines sentencing purposes...." According to one commentator, this approach "harmonizes the guideline and statutory sentence determinations, and it generates sentences more directly related to each defendant's culpability."<sup>13</sup> However, although the factors used to determine relevant conduct are substantially the same as those used to determine the applicable statutory penalty in drug conspiracy cases, they are not necessarily identical in the case of multiple offenses of conviction. In United States v. Winston,<sup>14</sup> the Sixth Circuit's decision illustrated that while the drug amounts of substantive counts aggregate to form relevant conduct, they do not aggregate for the purpose of the statutory penalty.<sup>15</sup>

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United States v. Jones, 965 F.2d 1507 (8th Cir.), cert. denied, 113 S. Ct. 346 (1992); United States v. Castaneda, 9 F.3d 761 (9th Cir. 1993).

<sup>9</sup> 46 F.3d 1405 (7th Cir. 1995), cert. granted, 115 S. Ct. 2576 (U.S. June 19, 1995) (94-9088).

<sup>10</sup> 34 F.3d 1416 (9th Cir. 1994), cert. granted, 64 U.S.L.W. (U.S. Sept. 27, 1995) (94-1664, 94-8842).

<sup>11</sup> 43 F.3d 985, 992 (5th Cir. 1995).

<sup>12</sup> United States v. Martinez, 987 F.2d 920 (2d Cir. 1993); United States v. Irvin, 2 F.3d 72 (4th Cir. 1993); cert. denied, 114 S. Ct. 1086 (1994); United States v. Young, 997 F.2d 1204 (7th Cir. 1993);

<sup>13</sup> Goodwin, *Determining Mandatory Minimum Penalties in Drug Conspiracy Cases*, 59 Fed. Probation, March 1995, at 74.

<sup>14</sup> 37 F.3d 235 (6th Cir. 1994).

<sup>15</sup> Citing United States v. Mergerson, 4 F.3d 337, 346 (5th Cir. 1993) (when applying the guidelines, the sentencing court may include amounts of drugs discussed in defendant's negotiations, but in applying 21 U.S.C. § 841(b)(1)(A), "mere proof of the amounts 'negotiated' . . . would not count toward the quantity of heroin applicable to the conspiracy count"); cf. United States v. Reyes, 40 F.3d 1148, 1151 (10th Cir. 1994) (the district court may consider in sentencing a defendant pursuant to 21 U.S.C. § 841(b)(1)(A) quantities of drugs outside the substantive count that are part of the guidelines determination of relevant conduct).

## *Sentencing Entrapment in Drug Trafficking Cases*

In November 1993, the Commission amended the Commentary to guideline 2D1.1 to provide that: “[i]f in a reverse sting (operation), . . . the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure maybe warranted.”<sup>16</sup>

While several circuits have recognized the appropriateness of a downward departure based on the concept of “sentencing entrapment,” they have rejected its application based on the facts in the specific cases before them.<sup>17</sup>

In United States v. Stauffer,<sup>18</sup> the Ninth Circuit expanded the “reverse sting” scenario to include a departure for “sentence factor manipulation,” where the same basic concerns were at issue. In Stauffer, the district court expressed its desire to make a downward departure but felt it lacked authority. The appellate court held that a downward departure was warranted and authorized where a defendant, who used LSD himself but only rarely sold it on a small scale to friends, was badgered by a confidential informant to sell 10,000 doses of LSD. At trial the defendant maintained that he had wanted to sell only 5,000 doses, but the

confidential informant and undercover agent insisted on the larger amount and immediately offered to pay more money. The Seventh Circuit also considered an assertion of governmental sentencing manipulation, but rejected the claim in that case, declining “to extend the application of this doctrine any further than for the most outrageous governmental conduct.”<sup>19</sup>

## *Fraud and Deceit*

Two courts of appeals considered the issue of whether “gain” is an appropriate substitute for “loss” under §2F1.1 when fraud is committed against a regulatory agency – in these cases, the Food and Drug Administration (FDA) – and there is no measurable economic loss. Both courts held that it was not. In United States v. Chatterji,<sup>20</sup> and United States v. Andersen,<sup>21</sup> the Fourth and Seventh Circuits held that where no quantifiable loss can be applied to the offense, the defendants’ profits or “gain” cannot be used to calculate loss. In Chatterji, the defendant, a co-owner of a pharmaceutical company, submitted a deficient application for drug approval. There was no dispute that the safety and therapeutic value of the drugs was not affected by the deficiencies in meeting FDA requirements. The government was unable to establish any economic loss, and offered the defendant’s “gain” as an alternative estimate of the loss. Using this approach, the gross sales of approximately \$13.4 million resulted in an 11-level increase in the defendant’s base offense level. On appeal, the court rejected the government’s argument that loss for purposes of §2F1.1 was properly measured by the defendant’s gain from the sale of the drugs, and remanded the case for resentencing.

<sup>16</sup> USSG App. C, amend. 486.

<sup>17</sup> See, e.g., United States v. Washington, 44 F.3d 1271 (5th Cir.), cert. denied, 115 S. Ct. 2011 (1995); United States v. Raven, 39 F.3d 428 (3d Cir. 1994); United States v. Jones, 18 F.3d 1145 (4th Cir. 1994); United States v. Rose, 17 F.3d 1531, (2d Cir.), cert. denied, 115 S. Ct. 211 (1994).

<sup>18</sup> 38 F.3d 1103 (9th Cir. 1994).

<sup>19</sup> United States v. Messino, 55 F.3d 1241, 1256 (7th Cir. 1995).

<sup>20</sup> 46 F.3d 1336 (4th Cir. 1995).

<sup>21</sup> 45 F.3d 217 (7th Cir. 1995).

In Andersen, the defendants failed to register their basement manufacturing site with the FDA. The Seventh Circuit held that it was error to increase the defendants' base offense levels nine levels based on their profits. The circuit court agreed with the district court that under §2F1.1, gain is usually an appropriate means of estimating loss, but only if it results in a "reasonable estimate of the loss." In this case, there was no evidence that consumers of the drugs suffered any loss. The Seventh Circuit noted, however, that an upward departure could be warranted if the offenses posed a non-monetary risk to human and animal health.

### *Safety Valve*

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The "safety valve" provision of section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994, codified at 18 U.S.C. § 3553(f) and promulgated as guideline 5C1.2, became available to certain defendants sentenced on or after September 23, 1994.<sup>22</sup> The appellate courts issued several opinions this year delimiting the application of this guideline, focusing primarily on the requirement at §5C1.2(5) that "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan."

In United States v. Rodriguez,<sup>23</sup> the Fifth Circuit considered whether statements to a probation officer satisfied the requirement of §5C1.2 that a defendant provide information "to the Government," and held that they did not. For the pur-

poses of §5C1.2, the probation officer is not the Government. The purpose of the provision is "to allow less culpable defendants who fully assisted the Government to avoid the application of the statutory mandatory minimum sentences . . . . A defendant's statements to a probation officer do not assist the Government."<sup>24</sup>

In United States v. Edwards,<sup>25</sup> the Fifth Circuit also disagreed with a defendant's assertion that his reduction of offense level under §3E1.1 for acceptance of responsibility "suggests that he qualifies" for the reduction under §5C1.2. The appellate court upheld the district court's factual determination that the defendant's sentencing testimony, which contradicted government information and provided conflicting statements on drug amounts, did not satisfy the requirement at §5C1.2(5) to truthfully provide to the government all relevant information.

The First Circuit also addressed the requirement at §5C1.2(5) to truthfully provide information and evidence to the government in United States v. Wrenn,<sup>26</sup> holding that the defendant did not "provide" such information, where the sole manner of disclosure was the defendant's unwittingly taped conversation in furtherance of his criminal conduct, recorded as part of the government's investigation. "Section 3553(f)(5) contemplates an affirmative act of cooperation with the government . . . ," the Wrenn court held.

### *Waivers of Appeal*

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The circuit courts have held that a defendant may validly waive the right to appeal a guideline sentence, and waivers made knowingly and volun-

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<sup>22</sup> See United States v. Polanco, 53 F.3d 893, 898-99 (8th Cir. 1995) (although defendant was originally sentenced before that date, the district court should on remand consider whether the defendant qualifies for the lower sentence under 18 U.S.C. § 3553(f) and guideline §5C1.2).

<sup>23</sup> 60 F.3d 193 (5th Cir. 1995).

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<sup>24</sup> *Id.* at 195-96.

<sup>25</sup> 65 F.3d 430 (5th Cir. 1995).

<sup>26</sup> 66 F.3d 1 (1st Cir. 1995).

tarily will be enforced.<sup>27</sup> However, the appellate courts have made it clear that a waiver is not enforceable if an illegal factor is employed at sentencing. A defendant may appeal despite a waiver if the sentence is above the statutory maximum, or a court considers an unconstitutional factor, such as defendant's race,<sup>28</sup> or where the proceedings following the guilty plea were conducted in violation of a defendant's Sixth Amendment right to counsel.<sup>29</sup> The Ninth Circuit held that should one aspect of the sentence contravene the plea agreement, the waiver of appeal is invalidated and the defendant may appeal the entire sentence.<sup>30</sup>

### Departures Based on Offense Characteristics

The general departure guideline and its underlying statute provide that a district court may impose a sentence outside the applicable range if the court finds an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."<sup>31</sup>

In 1995, appellate courts continued to affirm upward departures in cases in which district courts found that the defendant's conduct was not ade-

quately covered by the applicable guideline range. Examples include the defendant's abusive treatment of a carjacking victim,<sup>32</sup> the extreme psychological injury to the young victim of repeated acts of sexual abuse,<sup>33</sup> and a case in which the defendant's conduct caused a loss of public confidence in an important institution.<sup>34</sup>

During the same period, appellate courts reversed upward departures because the conduct or circumstance was included in the base offense level or guideline adjustment, or was otherwise considered by the Commission in formulating the guidelines. An example of an upward departure that was reversed is one based on consequential damages suffered by fraud victims.<sup>35</sup> Another upward departure, based on unrelated, uncharged foreign criminal conduct was also rejected by an appellate court.<sup>36</sup>

Appellate courts addressed a limited number of government appeals of downward departures based on mitigating circumstances. Examples of downward departures affirmed by appellate courts include one predicated on the collateral consequences of the defendant's conviction (*i.e.*, harm to the employees of defendant's company)<sup>37</sup> and a departure based on the overstatement of the defen-

<sup>27</sup> See United States v. Ashe, 47 F.3d 770 (6th Cir.), *cert. denied*, 116 S. Ct. 166 (1995); United States v. Schmidt, 47 F.3d 188 (7th Cir. 1995).

<sup>28</sup> See United States v. Schmidt, *supra* at 190.

<sup>29</sup> See United States v. Attar, 38 F.3d 727 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1957 (1995).

<sup>30</sup> See United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994) (where the defendant waived appeal of a sentence within the guideline range, but the district court departed upward, defendant could appeal factors used in calculating the guideline range as well as the departure).

<sup>31</sup> USSG §5K2.0; 18 U.S.C. § 3553(b).

<sup>32</sup> United States v. Clark, 45 F.3d 1247(8th Cir. 1995).

<sup>33</sup> United States v. Chatlin, 51 F.3d 869 (9th Cir. 1995).

<sup>34</sup> United States v. Hogan, 54 F.3d 336 (7th Cir. 1995).

<sup>35</sup> United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995).

<sup>36</sup> United States v. Chunza-Plazas, 45 F.3d 51 (2d Cir. 1995).

<sup>37</sup> United States v. Milkowsky, 65 F.3d 41 (2d. Cir. 1995).

dant's culpability as measured by monetary loss.<sup>38</sup>

Examples of downward departures reversed by appellate courts include one based on the defendant's payment of restitution prior to sentencing and participation in an alcohol rehabilitation program,<sup>39</sup> another based on the defendant's cooperation in a related civil proceeding,<sup>40</sup> and a third based on the defendant's role as sole caretaker of his child, and his use of a homemade, unsophisticated silencer.<sup>41</sup>

### *Departures Based on Offender Characteristics*

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Policy statements in the Guidelines Manual provide that offender characteristics and personal circumstances such as age, education and vocational skills, mental and emotional conditions, physical condition, family ties and responsibilities, and military, civic, charitable, or public service are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.<sup>42</sup> In 1995, the Second Circuit affirmed a downward departure from the minimum guideline sentence of 130 months to the mandatory minimum of 60 months imprisonment to permit the defendant to participate in a "special and selective" drug treatment program, based on the defendant's demeanor, resolve, and the "limited window of opportunity for rehabilitation." The court did require, however, that the district court add two special conditions to the defendant's ten-year term

of supervised release to ensure that the defendant's progress was monitored.<sup>43</sup>

Examples of district court downward departures that were reversed on appeal include departures based on the defendant's physical impairment due to obesity and asthma,<sup>44</sup> and the defendant's status as HIV-positive.<sup>45</sup>

An overview of selected departure cases (departure factors approved and disapproved by appellate courts) is provided in Tables 3-6.

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<sup>38</sup> United States v. Rostoff, 53 F.3d 398 (1st Cir. 1995).

<sup>39</sup> United States v. Akin, 62 F.3d 700 (5th Cir. 1995).

<sup>40</sup> United States v. Haversat, 22 F.3d 790 (8th Cir. 1994).

<sup>41</sup> United States v. Webb, 49 F.3d 636 (10th Cir. 1995).

<sup>42</sup> USSG §5H.

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<sup>43</sup> United States v. Williams, 65 F.3d 301 (2d Cir. 1995).

<sup>44</sup> United States v. Sherman, 53 F.3d 782 (7th Cir. 1995).

<sup>45</sup> United States v. Thomas, 49 F.3d 253 (6th Cir. 1995); United States v. Woody, 55 F.3d 1257 (7th Cir. 1995).

**Table 3**

**DOWNWARD DEPARTURE FACTORS APPROVED BY APPELLATE COURTS  
(October 1, 1994, through September 30, 1995)**

DEPARTURE FACTORS	CASES
Voluntary disclosure of defendant's true identity resulted in higher sentence.	<u>United States v. Evans</u> , 49 F.3d 109 (3d Cir. 1995)
Monetary loss overstated the seriousness of defendant's fraud offense where defendant sought only to benefit employer and did not personally profit.	<u>United States v. Broderson</u> , 67 F.3d 452 (2d Cir. 1995)
Defendant's admission into limited availability pilot drug treatment program.	<u>United States v. Williams</u> , 65 F.3d 301 (2d Cir. 1995)
Sentencing entrapment where government informant induced defendant to buy 5 kilograms of cocaine by promising to buy back 4 kilograms.	<u>United States v. Naranjo</u> , 52 F.3d 245 (9th Cir. 1995)(case remanded for more specific factual findings)
Extraordinary collateral consequences of defendant's imprisonment on employees of defendant's company.	<u>United States v. Milikowsky</u> , 65 F.3d 41 (2d Cir. 1995)
Quantity/time factor: guideline focus on total quantity of drugs overrepresents culpability of defendants who distribute small amounts over a long period of time.	<u>United States v. Lara</u> , 47 F.3d 60 (2d Cir. 1995)
Operation of guidelines and statutory penalty had effect of negating defendant's adjustment for acceptance of responsibility.	<u>United States v. Rodriguez</u> , 64 F.3d 638 (11th Cir. 1995)
Fraud losses caused by factors beyond defendant's control.	<u>United States v. Rostoff</u> , 53 F.3d 398 (1st Cir. 1995)

**Table 4**

**DOWNWARD DEPARTURE FACTORS DISAPPROVED BY APPELLATE COURTS  
(October 1, 1994, through September 30, 1995)**

DEPARTURE FACTORS	CASES
Defendant's HIV-positive status.	<u>United States v. Thomas</u> , 49 F.3d 253 (6th Cir. 1995); <u>United States v. Woody</u> , 55 F.3d 1257 (7th Cir. 1995)
Defendant's motive for offense was his subjective belief that the criminal action furthered a greater political good.	<u>United States v. Rojas</u> , 47 F.3d 1078 (11th Cir. 1995)
Defendant's psychiatric condition not resulting in "significantly reduced mental capacity," his role as sole caretaker for his child, and his use of homemade, unsophisticated silencer.	<u>United States v. Webb</u> , 49 F.3d 636 (10th Cir. 1995)
Nature of defendant's prior conviction only technically qualified as an aggravated felony.	<u>United States v. Abreu-Cabrera</u> , 64 F.3d 67 (2d Cir. 1995)
Defendant's extreme vulnerability to victimization in prison because he was meek, cautious, and easily influenced.	<u>United States v. Maddox</u> , 48 F.3d 791(4th Cir. 1995)
Physical impairment: obesity and asthma.	<u>United States v. Sherman</u> , 53 F.3d 782 (7th Cir. 1995)
Exposure to danger during unsuccessful attempt to provide substantial assistance.	<u>United States v. Watson</u> , 57 F.3d 1093 (D.C. Cir. 1995)
Defendants had no information to offer the government to obtain a 5K1.1 departure and did not occupy positions of public trust.	<u>United States v. De Riggi</u> , 45 F.3d 713 (2nd Cir. 1995)
Early payment of restitution and participation in alcohol rehabilitation program.	<u>United States v. Akin</u> , 62 F.3d 700 (5th Cir. 1995)
Government's alleged failure to provide the defendant an opportunity to provide substantial assistance.	<u>United States v. Williams</u> , 53 F.3d 769 (6th Cir. 1995)
Defendant committed unarmed bank robberies.	<u>United States v. Cook</u> , 53 F.3d 1029 (9th Cir. 1995)
Defendant's arrest was a result of a government sting and thus presented no actual risk of harm.	<u>United States v. Hendron</u> , 43 F.3d 24 (2d Cir. 1994)



**Table 5**

**UPWARD DEPARTURE FACTORS APPROVED BY APPELLATE COURTS  
(October 1, 1994, through September 30, 1995)**

DEPARTURE FACTORS	CASES
Perjury at supervised release violation hearing.	<u>United States v. Cawley</u> , 48 F.3d 90 (2d Cir. 1995)
Societal harm, sophistication, and long duration of drug conspiracy	<u>United States v. Ponce</u> , 51 F.3d 820 (9th Cir. 1995)
Participation in killing of victim in a robbery and carjacking conspiracy.	<u>United States v. Singleton</u> , 49 F.3d 129 (5th Cir. 1995)
Abuse, degradation, and terrorization of carjacking victim; repeated death threats.	<u>United States v. Clark</u> , 45 F.3d 1247 (8th Cir. 1995)
Underrepresentation of seriousness of defendant's criminal history due to consolidation of related prior sentences.	<u>United States v. Bauers</u> , 47 F.3d 535 (2d Cir. 1995)
Prior dissimilar misconduct continuing over a long period of time.	<u>United States v. Brown</u> , 51 F.3d 233 (11th Cir. 1995)
Multiple victims in attempted murder-for-hire.	<u>United States v. Pittman</u> , 55 F.3d 1136 (6th Cir. 1995)
Extreme psychological injury resulting from repeated sexual abuse of a minor.	<u>United States v. Chatlin</u> , 51 F.3d 869 (9th Cir. 1995)
Disruption of government function through large-scale Medicaid fraud.	<u>United States v. Khan</u> , 53 F.3d 507 (2d Cir. 1995)
Death of carjacking victim who was accidentally shot by other victim aiming at defendant.	<u>United States v. Williams</u> , 51 F.3d 1004 (11th Cir. 1995)
Depraved variety of crimes not addressed by the sentencing guidelines.	<u>United States v. Price</u> , 65 F.3d (11th Cir. 1995)
Management of criminal activities, not involving supervision of personnel.	<u>United States v. McFarlane</u> , 64 F.3d 1235 (8th Cir. 1995)
Relation of firearms offense to armed rape.	<u>United States v. Little</u> , 61 F.3d 450 (6th Cir. 1995)
Unusually heinous, cruel and brutal conduct toward victim.	<u>United States v. Johnson</u> , 56 F.3d 947 (8th Cir. 1995)
Extreme psychological injury to family of victim of extortion scheme.	<u>United States v. Alber</u> , 56 F.3d 1106 (9th Cir. 1995)
Loss of public confidence in important institution.	<u>United States v. Hogan</u> , 54 F.3d 336 (7th Cir. 1995)
Defendant's extensive criminal history as a juvenile.	<u>United States v. Connolly</u> , 51 F.3d 1 (1st Cir. 1995)

**UPWARD DEPARTURE FACTORS APPROVED BY APPELLATE COURTS  
(October 1, 1994, through September 30, 1995)**

Display of unusually violent propensities.	<u>United States v. Daughenbaugh</u> , 49 F.3d 171 (5th Cir. 1995)
Illegal profits greatly exceeded maximum of guideline fine range.	<u>United States v. Bertoli</u> , 40 F.3d 1384 (3d Cir. 1994)

**Table 6**

**UPWARD DEPARTURE FACTORS DISAPPROVED BY APPELLATE COURTS  
(October 1, 1994, through September 30, 1995)**

<b>DEPARTURE FACTORS</b>	<b>CASES</b>
Recidivism as an aggravating offense circumstance rather than as an indication of the inadequacy of the defendant's criminal history score.	<u>United States v. Tropiano</u> , 50 F.3d 157 (2d Cir. 1995)
Consequential damages of fraud victims.	<u>United States v. Thomas</u> , 62 F.3d 1332 (11th Cir. 1995)
Unrelated, uncharged foreign criminal conduct.	<u>United States v. Chunza-Plazas</u> , 45 F.3d 51 (2d Cir. 1995)