

CHAPTER THREE

Legal Issues

Introduction

The Commission closely follows the sentencing decisions of the federal courts to identify areas where guideline amendments, research, or legislative action may be needed. This section addresses a number of the more significant sentencing-related legal issues decided by the United States Supreme Court and the courts of appeals during 1996.

U.S. Supreme Court Decisions

During 1996, the United States Supreme Court interpreted guideline sentencing issues in three cases. Subsequently, the Court granted *certiorari* in another two cases to be decided in the coming year.

Certiorari Granted

The two cases granted *certiorari* involve interpretation of the guidelines and their relationship to the statutes to which they apply. In *United States v. Gonzalez*², the Court will consider whether the five-year consecutive sentence required by 18 U.S.C. § 924(c) should be served concurrently or consecutively to a state sentence imposed for an offense involving the same course of conduct. The Tenth Circuit Court of Appeals ruled that imposing a concurrent sentence was consistent with guideline §5G1.3.

In the other case, *United States v. LaBonte*,³ the Court granted *certiorari* to decide whether the Sentencing Commission exceeded its authority when it amended the career offender guideline (§4B1.1) to define the term “offense statutory maximum” as the maximum term of imprisonment authorized for the offense of conviction, rather than an enhanced maximum term due to a prior conviction. The validity of this amendment has been challenged by the government and is an issue that has divided the courts of appeals.⁴

² 65 F.3d 814 (10th Cir. 1995), *cert. granted*, 116 S. Ct. 2522 (1996).

³ 70 F.3d 1396 (1st Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996).

⁴ The Courts of Appeals for the First and Ninth Circuits have held that this amendment is a permissible exercise of the Commission’s authority in implementing Congress’s directive. The Courts of Appeals for the Seventh and Tenth Circuits have held that this amendment is inconsistent with the statute, and that the statutory maximum must be the higher or “enhanced” maximum term of imprisonment provided by statute for that category of career offender.

Decisions on Guideline Sentencing Issues

In *Neal v. United States*,⁵ the Supreme Court determined whether the 0.4 milligram per dose presumptive weight assigned to LSD by the amended sentencing guideline also governed the LSD weight calculation for the statutory minimum sentence mandated for certain drug trafficking offenses by 21 U.S.C. § 841. Justice Kennedy wrote for a unanimous court. It held that the principle of *stare decisis* required adherence to its holding in *Chapman v. United States*⁶ that the statute provides for mandatory minimum sentences based on the weight of “a mixture or substance containing a detectable amount” of the drug. Thus, the weight of the blotter paper carrier medium must be included when the statutory minimum sentence is determined. The Court noted that although the Commission is “entrusted within its sphere to make policy judgments” and “may abandon its old methods in favor of what it has deemed a more desirable ‘approach’ to calculating LSD quantities,” the Court does “not have the same latitude to forsake prior interpretations of a statute.”⁷

The Court again examined the application of a statute and its guideline counterpart in *Melendez v. United States*.⁸ Justice Thomas delivered the opinion of the court, which examined whether a government motion that specifies only a guideline departure based on the defendant’s substantial assistance to authorities could also serve as a motion for departure below the statutory minimum under 18 U.S.C. § 3553(e). The Court concluded that, where the guideline range was higher than the statutory minimum, one motion was not sufficient for both purposes. According to the Court, “nothing in 3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant’s cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable guidelines range.”⁹

In *Koon v. United States*,¹⁰ the Court examined the standard of review to be applied by appellate courts in reviewing district court guideline departure decisions. *Koon* involved two Los Angeles police officers who previously had been acquitted of state charges of assault and excessive use of force in the beating of a suspect during an arrest. The two officers subsequently were convicted in federal court of violating the victim’s constitutional rights under color of law. In sentencing the defendants, the district court departed below the indicated sentencing guideline range of 70 to 87 months, sentencing them to 30 months of imprisonment. The district court granted the departure based on: (1) victim misconduct; (2) defendants’ susceptibility to abuse in prison; (3) defendants’ loss of employment; (4) defendants’ successive state and federal prosecutions; and (5) their low risk of recidivism. The Court unanimously joined in Justice Kennedy’s opinion that an

⁵ 116 S. Ct. 763 (1996).

⁶ 500 U.S. 453 (1991).

⁷ 116 S. Ct. 763 at 769.

⁸ 116 S. Ct. 2057 (1996).

⁹ 116 S. Ct. 2057 at 2061.

¹⁰ 116 S. Ct. 2035 (1996).

appellate court should not review the district court's departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion. The Court recognized that the district court occasionally would be confronted with questions of law in deciding whether to depart. It concluded that labeling parts of the review as *de novo* would not be necessary even in those scenarios because "the abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."¹¹

In reaching its decision, the Court emphasized the role of the Sentencing Commission as a permanent body empowered to periodically review and amend the guidelines. The Commission, not the appellate courts, has the role of monitoring district court decisions on departures and refining the guidelines to specify precisely when departures are permitted. The Court further noted that sentencing courts are given "considerable guidance" in the *Guidelines Manual* about the factors that make a case atypical. A number of factors are "discouraged" in that they are to be used only in exceptional cases. Others are "encouraged" if the guideline has not taken that factor into account fully, or it has taken the factor into account but it is present to a degree far in excess of the ordinary. The Commission has categorically "forbidden" departure for only a few factors. Finally, the Court recognized that departure might occur for a factor "unmentioned" in the guidelines if, "after considering the structure and theory of both relevant individual guidelines and in the guidelines taken as a whole,"¹² the factor is sufficient to take the case out of the guidelines heartland. The Court further noted that the Commission expected that departures based on grounds not mentioned in the *Guidelines Manual* will be "highly infrequent."¹³

Against this background, the court reviewed the appellate review standard of the Sentencing Reform Act (SRA).¹⁴ The Court rejected the government's argument that the statute requires a *de novo* review of departure decisions to reduce unjustified disparities in sentencing. While the Court recognized that Congress was concerned about sentencing disparities, the Court was convinced that "Congress did not intend, by establishing limited appellate review, to vest in appellate courts' wide-ranging authority over district court sentencing decisions."¹⁵ Relying on its decision in *Williams v. United States*,¹⁶ the Court reiterated its holding that the establishment of limited appellate review in the SRA "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." A district court decision to depart from the guidelines, unlike a claim of mathematical error in applying the guidelines, is entitled to substantial deference as the traditional exercise of discretion by a sentencing court. The Supreme Court viewed the departure decision of a district court as primarily factual and judgmental. The opinion describes the departure decision as

¹¹ 116 S. Ct. 2035 at 2048.

¹² 116 S. Ct. 2035 at 2045 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1992)).

¹³ *Id.*

¹⁴ 18 U.S.C. § 3742.

¹⁵ 116 S. Ct. 2035 at 2046.

¹⁶ 503 U.S. 193 (1992).

making a “refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.”¹⁷

Applying this deferential standard, a divided Court held that the district court did not abuse its discretion in making a downward departure based on: (1) the victim’s misconduct in provoking the defendant’s offenses, (2) susceptibility to abuse in prison, and (3) successive prosecutions. However, downward departures could not be based on: (1) the defendant’s low likelihood of recidivism and (2) the defendant’s collateral employment consequences. The Court held that these factors were adequately considered by the Commission.

Post-*Koon* Appellate Decisions

The appellate courts have taken different approaches to interpreting *Koon*. For example, the First Circuit in *U.S. v. Cali*,¹⁸ in reviewing an upward departure based on defendant’s management of a large-scale criminal enterprise, adopted a two-part test of appellate review. In contrast, the Fourth Circuit in *U.S. v. Rybicki*,¹⁹ in reviewing a downward departure based on several different factors, prescribed a five-part analysis for sentencing courts to follow in deciding when to depart, and clarified the standards of review for each part.²⁰ A review of the few appellate court opinions since the *Koon* decision does not provide a clear picture on how departure jurisprudence and practice will develop.

While differing somewhat in their overall approaches, the appellate decisions since *Koon* have not created additional conflicts with respect to particular departure factors. The *Koon* decision does, however, raise doubt about numerous earlier appellate decisions that found, as a matter of law, that certain departure factors were prohibited. According to the Supreme Court, “for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission.”

In the post-*Koon* departure cases discussed below, appellate courts have reversed and affirmed departure sentences based on numerous factors.

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

- A downward departure based on the defendant’s alcohol problem, 20 years of military service, offense conduct not deemed a “serious fraud,” susceptibility to abuse in prison because the defendant was a law enforcement officer, and problems associated with the defendant’s status as a convicted felon. According to the

¹⁷ *Id.* at 194.

¹⁸ 87 F.3d 571 (1st Cir. 1996).

¹⁹ 96 F. 3d 754 (4th Cir. 1996).

²⁰ One of the five parts does not require appellate review. Another part of the analysis, the factual determination, requires a clearly erroneous standard of review. The remaining three parts require a *de novo* review to determine whether the district court abused its discretion.

appellate court, “none of the six factors underlying the district’s decision justified a departure from the applicable guideline range.”²¹

- A downward departure based on the defendant’s “extraordinary” restitution. According to the appellate court, restitution was a discouraged factor and the amount of restitution in the instant case was not “extraordinary.”²²
- A downward departure based on the defendant’s exposure to civil forfeiture. According to the appellate court, the mandate of §5E1.4 (Forfeiture) means “that the Commission viewed monetary forfeiture as entirely distinct from the issue of imprisonment.” Therefore, exposure to civil forfeiture was not a valid reason for departure under §5K2.0.²³

Appellate courts **remanded downward departures** in the following four cases:

- A downward departure that the district court attempted to put under the heading of diminished mental capacity (§5K2.13) based on the defendant’s lack of education and inability to speak English. According to the appellate court, these factors do not constitute diminished mental capacity as a matter of law, and are otherwise invalid or discouraged. The other ground for the departure, “lesser harms” (§5K2.11), based on the defendant’s belief that his girlfriend was in danger, was not plainly erroneous. On remand, the district court was directed to explain the magnitude of the departure.²⁴
- A case in which the defendant voluntarily disclosed the offense prior to its discovery but the district court did not make particularized findings that discovery was unlikely absent disclosure.²⁵
- A case in which the defendant’s conduct was not a “single act of aberrant behavior,” and the district court did not make a “refined assessment” of the difficulty of reservation life, steady employment, and stable family ties.²⁶
- A case in which the departure was based on the increased severity of the defendant’s sentence resulting from her status as a deportable alien. According to the appellate

²¹ *United States v. Rybicki*, 96 F.3d 754, 759 (4th Cir. 1996).

²² *United States v. Hairston*, 96 F.3d 102 (4th Cir.), *cert. denied*, 1996 WL 724041 (Feb. 18, 1997) (No. 96-944).

²³ *United States v. Weinberger*, 91 F.3d 642 (4th Cir. 1996).

²⁴ *United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996).

²⁵ *United States v. Besler*, 86 F.3d 745 (7th Cir. 1996).

²⁶ *United States v. Weise*, 89 F.3d 502 (8th Cir. 1996).

court, because this was not a factor mentioned in the guidelines, the district court must make a “refined assessment” of the facts.²⁷

In the following two cases, appellate courts **reversed in part upward departures and remanded** to the district court:

- A determination of the extent of the departure “in view of scant grounds” articulated. The basis for the upward departure, that the defendant’s conduct resulted in a significant disruption of a governmental function, was affirmed.²⁸
- An upward departure based in part on the unusually close relationship between the kidnapped victim and her father. According to the appellate court, a departure pursuant to §3A1.1 was not warranted on that basis. However, a departure based on “extreme conduct” was valid. The case was remanded for further consideration.²⁹

Appellate courts **affirmed downward departures** made in the following two cases:

- A downward departure where the defendant received no personal benefit from money laundering. According to the appellate court, because the money laundering guideline makes no mention of failure to receive personal benefit as a mitigating factor, the district court did not abuse its discretion in making the departure.³⁰
- A downward departure because the defendant’s conduct did not threaten the harm sought to be prevented by the statutes of conviction. According to the appellate court, the “special factor” in this case was an encouraged departure factor.³¹

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

- An upward departure based on a finding that the defendant’s management of a large-scale criminal enterprise’s assets is outside the heartland of the aggravated role adjustment.³²
- An upward departure based on a finding of “extreme conduct,” an encouraged factor under §5K2.0. The specific circumstances involved prolonged (20 years) harassing and humiliating conduct directed towards the defendant’s former high school

²⁷ *United States v. Charry Cubillos*, 91 F.3d 1342 (9th Cir. 1996).

²⁸ *United States v. Horton*, 98 F.3d 313 (7th Cir. 1996).

²⁹ *United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996).

³⁰ *United States v. Walters*, 87 F.3d 663 (5th Cir.), *cert. denied*, 117 S. Ct. 498 (1996).

³¹ *United States v. Bernal*, 90 F.3d 465 (11th Cir. 1996).

³² *United States v. Cali*, 87 F.3d 571 (1st Cir. 1996).

girlfriend and her family. The defendant had also violated state and federal court orders to leave the victim's family alone.³³

- An upward departure based on a finding that the defendant's conduct was part of a systematic corruption of a governmental function, causing loss of public confidence in government.³⁴

The "Safety Valve"

During 1996, the appellate courts also issued a number of important decisions interpreting the statutory and guideline provisions known as the "safety valve" (18 U.S.C. § 3553(f), USSG §5C1.2). This provision allows district courts to sentence using the guidelines without regard to mandatory minimum penalties for certain non-violent, first-time offenders convicted of specified drug offenses. The most frequently litigated safety valve criterion provides 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." This section discusses the cases interpreting that provision and other legal issues surrounding the safety valve.

In *United States v. Ivester*,³⁵ the Fourth Circuit considered whether the defendant has the burden of ensuring that he or she has provided to the government all the information regarding the offense. In *Ivester*, the government sought no information from the defendant, and the defendant did not volunteer any. The appellate court held that "defendants seeking to avail themselves of downward departures under 18 U.S.C. § 3553(f) bear the burden of affirmatively acting, no later than sentencing, to ensure that the Government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes."³⁶

In *United States v. Montanez*,³⁷ the First Circuit also addressed the actions required by a defendant to satisfy a similar requirement under the guidelines. The appellate court determined that defendants were not required to offer themselves for debriefing in order to comply with the guideline. However, the appellate court noted that because it is up to the defendant to persuade the district court that he or she has "truthfully provided" the required information and evidence to the

³³ *United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996).

³⁴ *United States v. Shenberg*, 89 F.3d 1461 (11th Cir.), cert. denied, 1996 WL 745172 (Feb. 18, 1997) (No. 96-1003).

³⁵ 75 F.3d 182 (4th Cir.), cert. denied, 116 S. Ct. 2537 (1996).

³⁶ See also *United States v. Flanagan*, 80 F.3d 143 (5th Cir. 1996) (holding that defendant has the burden of ensuring that he has provided all information regarding the offense to the government).

³⁷ 82 F.3d 520 (1st Cir. 1996).

government, “a defendant who declines to offer himself for a debriefing takes a very dangerous course.”³⁸

The Ninth Circuit addressed the scope of §5C1.2(5) in *United States v. Real Hernandez*,³⁹ holding that eligibility for the safety valve does not require the defendant to give information to a specific government agent. According to the appellate court, “the prosecutor’s office is an entity, and knowledge attributed to one prosecutor is attributable to others as well.”⁴⁰

In *United States v. Stewart*,⁴¹ the Fifth Circuit upheld the constitutionality of the information requirement of the safety valve, concluding that it did not impose cruel and unusual punishment. According to the appellate court, “a more lenient sentence imposed on a defendant who gives authorities all of the information possessed by the defendant does not compel a defendant to risk his family’s lives.” A defendant can refuse the option and receive the statutory sentence under the regular sentencing scheme.⁴²

The appellate courts also have addressed the issue of the similarity between guideline §3E1.1, relating to Acceptance of Responsibility, and guideline §5C1.2. In *United States v. Arrington*,⁴³ the Seventh Circuit concluded that satisfying the criteria for an acceptance of responsibility reduction is not necessarily sufficient for the safety valve requirement. Relief under the safety valve requires “the defendant to provide all information concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” In contrast, acceptance of responsibility limits the defendant’s admission to the conduct comprising the offense of conviction.⁴⁴

The Ninth Circuit similarly analyzed the differing requirements for these guideline provisions. In *United States v. Shrestha*,⁴⁵ the government contended that the defendant’s recantation at trial cast doubt on his original confession. It further argued that perjury at trial should automatically defeat a claim for sentence reduction under the safety valve provision. The appellate court rejected this argument, stating, “The safety valve is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is [guideline] §3E1.1.”⁴⁶ The

³⁸ *Id.* at 524.

³⁹ 90 F.3d 356 (9th Cir. 1996).

⁴⁰ *Id.* at 361.

⁴¹ 93 F.3d 189 (5th Cir. 1996).

⁴² *Id.* at 196.

⁴³ 73 F.3d 144 (7th Cir. 1996).

⁴⁴ *Id.* at 149.

⁴⁵ 86 F.3d 935 (9th Cir. 1996).

⁴⁶ *Id.* at 940.

appellate court added, “We see no reason to require a defendant to meet the requirement for acceptance of responsibility in order to qualify for relief under the safety valve provision.”⁴⁷ Because the defendant provided the government with complete information by the time of sentencing, the defendant had satisfied the basis for the reduction.

Appellate courts have also addressed the requirement under guideline 5C1.2(1) that the safety valve apply only to defendants with no more than a single criminal history point. The Second⁴⁸ and Ninth⁴⁹ Circuits concluded that when a court departs to Criminal History Category I from Category II, the defendant does not satisfy this safety valve provision.

To qualify for a safety valve reduction, the defendant – in addition to: (1) providing full and truthful information and (2) not having more than one criminal history point – cannot possess a firearm or other dangerous weapon “in connection with the offense.” The Eighth Circuit,⁵⁰ in addressing this issue, rejected the defendant’s contention that his gun possession was not “in connection with” the offense. The appellate court concluded that the term “in connection with” should be interpreted consistently with the firearms guideline, which gives a defendant an enhancement if he or she used or possessed a firearm “in connection with” another felony offense.

Significant Case Law on Organizational Defendants

In the first reported appellate case addressing a specific Chapter Eight guideline, the Ninth Circuit ruled that §8C3.3 permits a court to impose a criminal fine of such magnitude that it effectively jeopardizes an organization’s continued viability.⁵¹ Noting that the \$1.5 million fine for falsifying analytical data under government contracts was properly calculated under the Chapter Eight fine table, the court stressed that reduction of a fine which would effectively put the company out of business is purely within the discretion of the sentencing court. In contrast, the court emphasized that §8C3.3(a) of the sentencing guidelines mandates a fine reduction only in situations in which the imposition of the fine would impair the organization’s ability to make restitution.

Another significant judicial decision in 1996 relating to the organizational guidelines arose in the context of a shareholder derivative action. In assessing whether the board of directors was negligent in its duty to monitor and supervise the corporation’s operations (which formed the basis of a criminal conviction resulting in a multimillion dollar fine), the Delaware Chancery Court found the existence of the Chapter Eight guidelines to be a fundamental factor in defining the parameters of the directors’ personal liability. Observing that “[a]ny rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions through

⁴⁷ *Id.* at 939.

⁴⁸ *United States v. Resto*, 74 F.3d 22 (2d Cir.1996).

⁴⁹ *United States v. Valencia-Andrade*, 72 F.3d 770 (9th Cir. 1995).

⁵⁰ *United States v. Burke*, 91 F.3d 1052 (8th Cir. 1996).

⁵¹ *United States v. Eureka Laboratories, Inc.*, 103 F.3d 908 (9th Cir. 1996).

compliance programs that [the enactment of the guidelines] offers,” the court acknowledged that the organizational sentencing guidelines “offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial actions.”⁵²

Data Analyses for the Courts

In 1996, detailed information on sentencing activities was compiled for each federal district and circuit and was distributed to the courts. In addition, this information was made available to the general public via the Commission’s Internet web site. These data present the distribution of cases, mode of conviction, type of sentence imposed, incarceration rate, length of imprisonment, and departure rate by primary offense type. The data are organized by circuit and district and provide comparisons to national figures. These informational packets are also used in the guidelines orientation of new chief circuit and district court judges by Commission staff.

Commission staff continued to respond to numerous data requests from the courts in 1996. Responses included providing information for district- or circuit-based annual reports, supplying the courts with Commission data on specific types of offenses or guideline applications (*e.g.*, drug offenses, departure rates), and examining relationships between guideline application characteristics and defendant demographic characteristics (*e.g.*, gender and role in the offense). Commission staff involvement on the various requests ranged from serving as a consultant about a particular data analysis to performing substantial, sophisticated data analyses.

⁵² *In Re Caremark International Inc. Derivative Litigation*, 1996 Del. Ch. LEXIS 125 (September 25, 1996) at 34.