

CHAPTER THREE

Legal Issues

Introduction

The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This section addresses some of the more significant sentencing-related issues decided by the United States Supreme Court and the courts of appeals during fiscal year 1998.

United States Supreme Court Decisions on Sentencing Issues

During its 1998 term, the United States Supreme Court decided four cases with federal sentencing implications. The following is a discussion of those cases.

Enhanced Penalty Under 8 U.S.C. § 1326(b)(2)

In *Almandarez-Torres v. United States*,⁴ the Supreme Court, in a 5-4 opinion, held that 8 U.S.C. § 1326(b)(2), which authorizes a sentence of up to 20 years for an alien who illegally returns to the United States after having been deported for an aggravated felony conviction, was a penalty provision and did not define a separate immigration-related offense. Subsection (a) of 8 U.S.C. § 1326 provides a maximum two-year sentence if a deported alien returns to the United States without special permission. Subsection (b)(2) authorizes a sentence of up to 20 years for a deported alien under subsection (a) if the initial “deportation was subsequent to a conviction for the commission of an aggravated felony.”

The defendant pled guilty to violating 8 U.S.C. § 1326, and the district court sentenced him to 85 months, rejecting the argument that because his indictment failed to mention his aggravated felony convictions, the court could not sentence him to more than the maximum two-years’ imprisonment authorized by section 1326(a). The Fifth Circuit also rejected this argument, holding that subsection (b)(2) is a penalty provision that simply permits the imposition of a higher sentence when the unlawfully returning alien also has a serious prior conviction.⁵

The Supreme Court, resolving a conflict among the courts of appeals, concluded that subsection (b)(2) simply authorizes an enhanced sentence and does not describe a separate offense;

⁴ 523 U.S. 224, 118 S. Ct. 1219 (1998).

⁵ *United States v. Almandarez-Torres*, 113 F.3d 515 (5th Cir. 1996).

hence the previous conviction need not be charged and proved again.⁶ Consequently, a defendant who at sentencing was found to have been previously deported after conviction of an aggravated felony is subject to the 20-year maximum sentence, even if the prior aggravated felony is not alleged or proved at trial.

Amount and Type of Drugs in a Conspiracy

In *Edwards v. United States*,⁷ the Supreme Court, in an unanimous opinion, held that the sentencing guidelines require the sentencing judge to determine both the amount and kind of drugs at issue in a drug conspiracy. The defendant had been charged under 21 U.S.C. §§ 841 and 846 with conspiracy to possess with intent to distribute mixtures containing powder cocaine and crack cocaine. The jury convicted the defendants, returning a general verdict which did not specify the object of the conspiracy. The judge then imposed a sentence based on his findings that each petitioner's illegal conduct had involved both powder cocaine and crack. The petitioners argued that the drug statutes and the Constitution require the judge to assume that the jury convicted them of the less severely punished object of the conspiracy, in this case powder cocaine. The Seventh Circuit⁸ rejected the defendant's argument and held that the sentencing guidelines require the sentencing judge, not the jury, to determine both the kind and the amount of the drugs at issue in a drug conspiracy. In so holding, the Seventh Circuit declined to follow the reasoning of the Fifth, Eighth, and Tenth Circuits which had held that the judge had to sentence to the lesser object of the conspiracy. The Supreme Court, agreeing with the Seventh Circuit, stated that it was of no consequence in this case whether the conviction may have been based solely on powder cocaine because the guidelines instruct the judge to sentence a drug conspiracy based on the offender's relevant conduct under guideline 1B1.3. According to the Court, "The Sentencing Guidelines instruct the judge in a case like this one to determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable – and then to impose a sentence that varies depending upon amount and kind."⁹

⁶ *United States v. Forbes*, 16 F.3d 1294, 1297-1300 (1st Cir. 1994); *United States v. DeLeon-Rodriguez*, 70 F.3d 764, 765-767 (3d Cir. 1995), *cert. denied*, 517 U.S. 1115 (1996); *United States v. Crawford*, 18 F.3d 1173, 1176-1178 (4th Cir.), *cert. denied*, 513 U.S. 860 (1994); *United States v. Munoz-Cerna*, 47 F.3d 207, 210, n. 6 (7th Cir. 1995); *United States v. Haggerty*, 85 F.3d 403, 404-405 (8th Cir. 1996); *United States v. Valdez*, 103 F.3d 95, 97-98 (10th Cir. 1996); *United States v. Palacios-Casquete*, 55 F.3d 557, 559-560 (11th Cir. 1995), *cert. denied*, 516 U.S. 1120 (1996); *cf. United States v. Cole*, 32 F.3d 16, 18-19 (2d Cir.) (reaching same result with respect to 8 U.S.C. § 1326(b)(1)), *cert. denied*, 513 U.S. 993 (1994). The Ninth Circuit, however, reached the opposite conclusion. *United States v. Gonzalez-Medina*, 976 F.2d 570, 572 (9th Cir. 1992) (subsection (b)(2) constitutes separate crime).

⁷ 523 U.S. 511, 118 S. Ct. 1475 (1998).

⁸ *United States v. Edwards*, 105 F.3d 1179 (1997).

⁹ 118 S. Ct. at 1477.

Carrying a Firearm

In *Muscarello v. United States*,¹⁰ the Supreme Court held that the phrase “carries a firearm” in 18 U.S.C. § 924(c) can apply to those who keep a gun locked in a car’s glove compartment or trunk if it is transported in relation to a drug trafficking offense.¹¹ In a 5-4 decision, the Supreme Court held that drug traffickers arrested while in or near their cars can be convicted of carrying a gun even if it was not immediately accessible. The Court consolidated two cases in which the Fifth and First Circuits¹² found that the defendants had “carried” guns during and in relation to a drug trafficking offense while guns were in a vehicle’s glove compartment and in a locked vehicle trunk, respectively. The petitioners argued that the term “carry” should apply only when a firearm is on the person. The Supreme Court examined the origins of the word “carry,” and Justice Breyer, writing for the majority, stated, “The generally accepted contemporary meaning of the word ‘carry’ includes the carrying of a firearm in a vehicle.” The Court concluded that “neither the statute’s basic purpose nor its legislative history support circumscribing the scope of the word ‘carry’ by applying an ‘on the person’ limitation.”¹³

Bailey’s Effects on Section 924(c) Convictions Already Adjudicated

In *United States v. Bousley*,¹⁴ the Supreme Court addressed aspects of the retroactive application of its earlier decision, *Bailey v. United States*.¹⁵ In *Bailey*, the Court had held that the “use” provision of 18 U.S.C. § 924(c)¹⁶ requires “active employment” of the firearm by the defendant. According to the Court, “use” connotes more than mere possession or storage of a firearm by a person who commits a drug offense. Defendant Bousley had pled guilty to drug charges and a section 924(c) count of using a firearm in connection with a drug trafficking offense.¹⁷ He appealed his sentence, but not his conviction, and his *habeas* appeal was pending at the time the

¹⁰ 524 U.S. 125, 118 S. Ct. 1911 (1998).

¹¹ 118 S. Ct. at 1914.

¹² *United States v. Muscarello*, 106 F.3d 636, 639 (5th Cir. 1997); *United States v. Cleveland*, 106 F.3d 1056, 1068 (1st Cir. 1997).

¹³ 118 S. Ct. at 1916.

¹⁴ 523 U.S. 614, 118 S. Ct. 1604 (1998).

¹⁵ 516 U.S. 137 (1995).

¹⁶ 18 U.S.C. § 924(c), as applied in these cases, provided for a fixed mandatory prison term of five years (in addition to the punishment provided for the crime of violence or drug trafficking crime) for anyone who used or carried a firearm during and in relation to any crime of violence or drug trafficking crime.

¹⁷ 118 S. Ct. at 1607.

Supreme Court decided *Bailey*.¹⁸ Bousley argued that *Bailey* should be applied retroactively. He further argued that his guilty plea was not knowing and intelligent because he was misinformed about the elements of a section 924(c) offense and that this claim was not waived by his guilty plea.¹⁹ The Eighth Circuit rejected Bousley's argument for retroactive application of *Bailey*, and its opinion created a circuit split over the permissibility of post-*Bailey* collateral attacks on section 924(c)(1) convictions obtained pursuant to guilty pleas.²⁰

In an opinion by Chief Justice Rehnquist addressing the conflict, the Supreme Court held that Bousley would be entitled to a hearing on the merits of his claim if he could overcome the procedural default of not having appealed his conviction.²¹ The case's procedural complexity is central to the opinion and to its potential ramifications for other *habeas* petitioners.

The Court observed that only a voluntary and intelligent guilty plea is constitutionally valid and that a plea is not intelligent unless a defendant first receives real notice of the nature of the charge against him.²² Bousley's plea would be constitutionally invalid if he proved that the district court misinformed him about the elements of a section 924(c)(1) offense.²³ The Court held that the rule of *Teague v. Lane* does not bar Bousley's claim.²⁴ The *Teague* rule – that new constitutional rules of criminal procedure are generally not applicable to cases that became final before the new rules were announced – is inapplicable to situations in which the Supreme Court decides the meaning of a criminal statute enacted by Congress.²⁵

The Court noted, however, the considerable procedural problems facing Bousley's claim. Because he appealed his sentence, but not his plea, he had procedurally defaulted the attack on his plea.²⁶ To pursue a defaulted claim in a *habeas* proceeding, he must first demonstrate either "cause and actual prejudice," or that he is "actually innocent."²⁷ The Court held that the supposed futility

¹⁸ *Id.*

¹⁹ *Bousley v. Brooks* 97 F.3d 284 (8th Cir. 1996).

²⁰ See *United States v. Carter*, 117 F.3d 262 (5th Cir. 1997); *Lee v. United States*, 113 F.3d 73 (7th Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996); *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) (all permitting post-*Bailey* collateral attacks on convictions obtained by guilty pleas).

²¹ 118 S. Ct. at 1607, 1612.

²² 118 S. Ct. at 1609.

²³ *Id.*

²⁴ 489 U.S. 288 (1989).

²⁵ 118 S. Ct. at 1609-1610.

²⁶ 118 S. Ct. at 1610-11.

²⁷ 118 S. Ct. at 1611, citing *Murray v. Carrier*, 477 U.S. 478 (1986).

of attacking the plea before the *Bailey* decision did not establish cause for the default.²⁸ However, Bousley could attempt to make an actual innocence showing.²⁹ “Actual innocence” means factual innocence, not mere legal insufficiency.³⁰ The Court stated, however, that Bousley need not prove actual innocence of both “using” and “carrying” a firearm in violation of section 924(c)(1); the indictment charged him only with “using” firearms, and there was no record evidence that the government had elected not to charge him with “carrying” a firearm in exchange for his guilty plea.³¹

Decisions of the United States Courts of Appeals

The “Safety Valve”

The appellate courts have continued to refine issues regarding the application of the “safety valve” (as 18 U.S.C. § 3553(f) and guideline 5C1.2 collectively are known). The safety valve provides relief to certain non-violent, first-time offenders who have been convicted of specific drug offenses. Guideline 5C1.2 states that for an offense under any of five specified statutes³² the court “shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence” if the defendant meets five listed criteria. Much of the litigation on the safety valve issue in the last year continued to focus on the requirement that the defendant truthfully provide to the government all information and evidence the defendant has concerning the offense.

Possession of a Firearm

The Second Circuit in *United States v. Chen*,³³ examined the safety valve requirement that the defendant not use violence or possess a firearm in connection with the offense. The court held that as long as the firearm possessed by the defendant was part of the same course of conduct as the offense of conviction, the defendant need not be in possession of a firearm during the offense to which he pled guilty in order to be disqualified under §5C1.2(2). The defendant argued that §5C1.2(2) applies only to possession of a firearm during the offense for which he stands convicted. The circuit court affirmed the district court’s denial of the safety valve, concluding that “offense” as used in §5C1.2(2) includes all relevant conduct and not just the particular offense to which a defendant pleads guilty. The circuit court stated that the record amply supported the district court’s finding that the defendant regularly stored weapons that were intended for use as part of the

²⁸ 118 S. Ct. at 1611.

²⁹ *Id.*

³⁰ *Id.*, citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992).

³¹ 118 S. Ct. at 1612.

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

³³ 127 F.3d 286 (2d Cir. 1997).

conspiracy. The appellate court added that the appellant's access to and possession of the guns for the benefit of the overall conspiracy to distribute heroin, of which the offense of conviction was a part, established that the firearms were held "in connection" with the particular heroin delivery – an offense to which he pled guilty.

Truthfully Provide Information to the Government

The Ninth Circuit in *United States v. Contreras*³⁴ concluded that the "safety valve" requires a defendant to talk to the prosecutor, rather than the probation officer. The defendant provided information to the probation officer concerning his offense, but refused to speak to a DEA agent. The district court refused to grant him the safety valve because 18 U.S.C. § 3553(f) requires the defendant to talk to the government. The court stated that speaking to a probation officer does not qualify as providing information to the government. The circuit court affirmed, holding that the "government" means the "government attorney," and not the probation officer. The First and Fifth Circuits reached the same conclusion.³⁵

The Seventh Circuit in *United States v. Marin*³⁶ held that, in order for a defendant to qualify for the safety valve, the defendant must disclose the pertinent information before the commencement of the sentencing hearing. The district court had recessed the sentencing hearing after suggesting to the defendant that he think about providing accurate information in order to qualify for the safety valve. After the recess, the defendant changed his story and "came clean." The district court concluded that the defendant qualified for the safety valve, rejecting the government's objection that the defendant had waited too long to disclose. The circuit court reversed, holding that the defendant must provide complete and truthful disclosure by the commencement of the sentencing hearing in order to qualify for the safety valve. The circuit court added that the safety valve does not allow a defendant who provides an untruthful version of his offense before sentencing to be given repeated opportunities to change his story and make a more complete disclosure. The defendant may not mislead the government and wait until the middle of the sentencing hearing to cure prior misstatements.

The Eighth Circuit in *United States v. Velasquez*³⁷ held that an affidavit provided by the defendant on the day of sentencing did not satisfy the safety valve information requirement. At his sentencing hearing, the defendant presented to the government an affidavit purporting to set forth his knowledge of the crime. The circuit court concluded that the affidavit did not satisfy the safety valve's information requirement because the defendant had not been interviewed by the government concerning the affidavit and the government did not believe that the affidavit was entirely truthful. The circuit court affirmed the district court's finding that, based upon information gleaned from a

³⁴ 136 F.3d 1245 (9th Cir. 1998).

³⁵ See *United States v. Martinez*, 83 F.3d 488 (1st Cir. 1996); *United States v. Rodriguez*, 60 F.3d 193 (5th Cir.), cert. denied, 516 U.S. 1000 (1995).

³⁶ 144 F.3d 1085 (7th Cir.), cert. denied, 119 S. Ct. 265 (1998).

³⁷ 141 F.3d 1280 (8th Cir.), cert. denied, 119 S. Ct. 223 (1998).

codefendant's trial, certain information in the affidavit was inconsistent with the court's understanding of the facts of the case.

The Second Circuit in *United States v. Ortiz*³⁸ held that the burden is on the defendant to provide information to the government to meet the information requirement of the safety valve.³⁹ The district court denied application of the safety valve because, despite the defendant's expressed "willingness" to provide information to the government, he made no real attempt to provide such information. The circuit court noted that the defendant had not provided the requisite information, had not made a proffer with regard to that information, and had not even sought a meeting with the government.

Similarly, the Ninth Circuit in *United States v. Miller*⁴⁰ held that to qualify for the safety valve, the defendant must provide all the information he has about his offense of conviction and about offenses that were part of the same course of conduct or common scheme. The defendant argued that the use of the term "offense or offenses" in 18 U.S.C. § 3553(f)(5) limits the required disclosure to the offense of conviction. The circuit court concluded that because section 3553(f)(5) on its face requires disclosure "concerning the offense or offenses that were part of the same course of conduct or common scheme or plan," the requirement plainly includes uncharged, related conduct.

The Sixth Circuit in *United States v. Carpenter*⁴¹ held that a defendant's refusal to testify against a co-conspirator did not preclude a determination that he had provided the government with "all information and evidence" that he was required to disclose to qualify for the safety valve. The defendant had refused to testify at a co-conspirator's trial, and the trial judge had refused to apply the safety valve. The sentencing judge had explicitly stated that because of the defendant's refusal to testify, the court was precluded as a matter of law from applying the safety valve. The circuit court reversed, concluding that 18 U.S.C. § 3553(f) requires the defendant to provide information to the government, not to a court. The circuit court stated that the evidence that the defendant must provide is limited to those things in the possession of the defendant prior to his sentencing. This excludes testimony in a future proceeding.

Two cases examined the relationship between the safety valve's information requirement and the Fifth Amendment's right against self-incrimination. The Second Circuit in *United States v. Cruz*⁴² held that the requirement that a defendant admit to relevant conduct beyond that included in the offense of conviction in order to gain a reduction in his sentence does not violate the right against self-incrimination. The circuit court concluded that the choice presented to a defendant

³⁸ 136 F.3d 882 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1104 (1998).

³⁹ See *United States v. Ivester*, 75 F.3d 182 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996); *United States v. Flanagan*, 80 F.3d 143 (5th Cir. 1996).

⁴⁰ 151 F.3d 957 (9th Cir. 1998), *cert. denied*, 1999 WL 24812 (U.S. Jan. 25, 1999).

⁴¹ 142 F.3d 333 (6th Cir. 1998).

⁴² 156 F.3d 366 (2d Cir. 1998).

under §5C1.2 between a sentence reduction with relief from a mandatory minimum sentence and a waiver of his Fifth Amendment privilege is analogous to the choice confronting defendants in plea bargain cases and gives rise to no more compulsion than is present in that situation. The Ninth Circuit in *United States v. Washman*⁴³ held that 18 U.S.C. § 3553(f)(5) does not raise a constitutional concern because it does not mete out additional punishment if a defendant decides not to disclose information under section 3553(f)(5).⁴⁴

Resentencing Pursuant to §1B1.10

Two circuits reached contrary conclusions about whether the safety valve can apply to a defendant who is resentenced based on an amendment made retroactive by guideline 1B1.10(c). The Eighth Circuit in *United States v. Mihm*,⁴⁵ joining with the Sixth Circuit,⁴⁶ held that the safety valve can apply at a resentencing, pursuant to 18 U.S.C. § 3582(c)(2). In 1993, the defendant was sentenced to 160 months for growing marijuana plants. The marijuana offenses subjected the defendant to a ten-year mandatory minimum sentence, but his guideline range was greater than the mandatory minimum. In November 1995, the Sentencing Commission adopted a retroactive amendment that reduced the equivalency ratios for marijuana, thereby potentially lowering affected defendants' sentences.⁴⁷ The defendant filed a motion to be resentenced under 18 U.S.C. § 3582(c)(2) and sought relief from the mandatory minimum under the safety valve. The district court concluded that the safety valve did not apply because §5C1.2 was not made retroactive. The circuit court reversed, holding that the safety valve can apply when resentencing pursuant to section 3582(c)(2) because it is a "distinct sentencing exercise" that results in a sentence "imposed on or after" the date the safety valve was enacted. The circuit court acknowledged that this leads to a troublesome anomaly because only extensive growers like the defendant were initially sentenced under the guidelines, rather than the mandatory minimum. However, the circuit court added that it would violate the rule of lenity to deny safety valve relief simply because there are others to whom it also should have been extended.

The Ninth Circuit in a similar case⁴⁸ reached a contrary conclusion, holding that a person resentenced pursuant to 18 U.S.C. § 3582(c)(2) is not entitled to retroactive application of the safety valve statute, whether his original sentence was pursuant to a guideline range or a statutory minimum. The circuit court added that 18 U.S.C. § 3553(f) does not apply to section 3582(c)(2)

⁴³ 128 F.3d 1305 (9th Cir. 1997)

⁴⁴ See *United States v. Arrington*, 73 F.3d 144 (7th Cir. 1996) (§5C1.2 constitutional because denial of the safety valve is not penalizing the defendant, but is denying him a benefit).

⁴⁵ 134 F.3d 1353 (8th Cir. 1998).

⁴⁶ See *United States v. Clark*, 110 F.3d 15 (6th Cir. 1997) (holding that safety valve applied because defendant was being resentenced after effective date of statute).

⁴⁷ Amendment 516

⁴⁸ *United States v. Stockdale*, 139 F.3d 767 (9th Cir.), *cert. denied*, 119 S. Ct. 377 (1998).

resentencings because a modification of a sentence pursuant to §1B1.10(c) does not amount to a new sentencing for the purposes of the safety valve. The court stated, “It makes no sense to impute a purpose to Congress to allow escape from the statutory minimum only to the criminal who grew five times as much marijuana, but not the smaller-scale grower.”

Post-Koon Appellate Departure Decisions

In *Koon v. United States*, the Supreme Court decided that district court departures from the guidelines are to be reviewed for abuse of discretion. The decision instructs courts of appeal first to determine if the reason cited by the district court for departure was a factor prohibited, encouraged, discouraged, or not considered by the Sentencing Commission in formulating the guidelines. The district court’s discretion in granting a departure is delimited by this determination. The circuit courts have continued to refine their respective applications of the *Koon* principles.

Applying the *Koon* analysis, the appellate courts have reversed or affirmed district court departure decisions based on various factors. Descriptions of these cases appear below.

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

- *Aberrant Behavior*. The First Circuit overturned an aberrant behavior departure in a case in which the defendant testified dishonestly at trial. The court noted that an aberrant behavior departure is not warranted unless the conduct at issue is both a marked departure from the past and is unlikely to recur. One who testifies dishonestly after engaging in felonious dishonesty cannot credibly make either claim.⁴⁹
- *State-Federal Sentencing Disparity; Prosecutorial Discretion*. The First Circuit looked at (1) the disparity between the sentence the defendant would have received if convicted under state law and the sentence mandated under the Armed Career Criminal guideline and (2) the unreviewable discretion of the U.S. attorney in prosecuting in federal court conduct proscribed by both state and federal law. The court held that neither was a mitigating circumstance that took the case out of the heartland of armed career criminal cases and justified a downward departure.⁵⁰
- *Family Ties*. The Second Circuit overturned a downward departure based on the unique responsibility the defendant, a Hasidic Jew, bore for his children’s marriages. The court noted that the circumstances of the defendant’s children (in which the stigma of their parents’ punishment lessened their desirability as marriage partners) were not very different from the circumstances of other defendants’ children. The

⁴⁹ *United States v. Bradstreet*, 135 F.3d 46 (1st Cir.), cert. denied, 118 S. Ct. 1805 (1998).

⁵⁰ *United States v. Snyder*, 136 F.3d 65 (1st Cir. 1998).

court also noted the impropriety of treating one religious sect differently from another.⁵¹

- *Career Offender Status Overstated Seriousness of Criminal History.* The Second Circuit rejected a departure made on the basis that the defendant's status as a career offender significantly overstated the seriousness of his criminal history. The court noted that the light sentences the defendant received for his predicate offenses more appropriately warranted an upward departure. The court found that codefendant disparity and quantity of drugs were improper bases for departure and that deportation alone does not constitute an extraordinary consequence that would justify departure.⁵²
- *Civil Forfeiture; Loss of Medical License.* The Eleventh Circuit reversed a departure that was based on the defendant's civil forfeiture and loss of his license to practice medicine. The court held that civil forfeiture of the proceeds of his illegal drug activities is a prohibited factor. A departure could not be based on the defendant's loss of his privilege to practice medicine because the defendant received a two-level sentence enhancement for using his special skills as a physician to facilitate commission of his crimes and for abusing the position of trust he held as a physician.⁵³
- *Cultural Differences.* The Eleventh Circuit held that the different attitude of the defendant's native country towards the endangered animals he was convicted of importing was insufficient to take the case out of the heartland. The guidelines that apply to illegal importation of wildlife necessarily contemplate that a portion of illegally imported wildlife will be imported by people from other countries, many of whom will have an imperfect understanding of United States customs law.⁵⁴
- *Sentencing Disparity.* The Eleventh Circuit noted that permitting a departure based on a codefendant's sentence in state court would create system-wide disparities among federal sentences.⁵⁵
- *Diminished Capacity; Defendant Not a Pedophile.* The Eleventh Circuit reversed a departure that was based on the defendant's impulse control disorder and on the defendant's claim that, despite his conviction, he was not a pedophile. The defendant argued that he used the images of children to barter for pornographic images and that his impulse control disorder contributed to his pornographic

⁵¹ *United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998).

⁵² *United States v. Tejada*, 146 F.3d 84 (2d Cir. 1998).

⁵³ *United States v. Hoffer*, 129 F.3d 1196 (11th Cir. 1997).

⁵⁴ *United States v. Tomono*, 143 F.3d 1401 (11th Cir. 1998).

⁵⁵ *United States v. Willis*, 139 F.3d 811 (11th Cir. 1998).

interest. The court of appeals rejected the departure on several grounds. First, whether or not the defendant was a pedophile, the harm caused by the offense is that it sustains a market for child pornography. Second, impulse control disorders are not unusual among those who collect child pornography, so this aspect of the defendant's personality did not separate him from other defendants. Finally, the court stated that because the testimony failed to link such a disorder to the offense, a §5K2.13 departure for diminished capacity was not appropriate.⁵⁶

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

- *Credit for State Sentence.* Although the applicable 1987 version of guideline 5G1.3 did not allow credit for expired state sentences that were based on the same conduct, the Eighth Circuit, applying *Koon*, found that a departure on this basis was not prohibited.⁵⁷
- *Post-Offense Rehabilitation.* The Ninth Circuit joined three other circuits that, following *Koon*, held that post-sentencing rehabilitation is a proper basis for departure.⁵⁸

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

- *Defendant's Consent to Deportation; Physical Ordeal of Offense.* The Third Circuit agreed that the district court had no authority to depart on the basis of the defendant's consent to deportation if the defendant had no valid defense. Nor was it permissible to depart on the basis of the deterrent effect of the defendant's hospitalization after he tried to smuggle heroin in his stomach because the physical ordeal of being hospitalized after ingesting heroin pellets is inherent in this manner of smuggling drugs.⁵⁹
- *Increase in Sentence Due to Cross-Reference.* The Fourth Circuit agreed that a departure that was based on the large increase in the sentencing range that resulted from application of a cross-reference was not permissible. The court of appeals held that the enhancement resulting from application of a cross-reference was an unmentioned departure factor, and therefore, under *Koon*, determined whether the enhancement was taken into account within the heartland of the applicable guidelines. The language of the cross-reference plainly indicates that the guidelines

⁵⁶ *United States v. Miller*, 146 F.3d 1281 (11th Cir. 1998).

⁵⁷ *United States v. O'Hagan*, 139 F.3d 641 (8th Cir. 1998).

⁵⁸ *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998). See *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998); *United States v. Core*, 125 F.3d 74, 77 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 735 (1998); *United States v. Sally*, 116 F.3d 76 (1997). The court of appeals rejected the other stated basis for departure, *i.e.*, California's policy view of marijuana.

⁵⁹ *United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), *cert. denied*, 118 S. Ct. 1855 (1998).

take into account that the application of the cross-reference will result in an enhanced guideline range.⁶⁰

- *State Sentencing Disparity.* The Eleventh Circuit held that a district court is without authority to depart to reflect the sentence the defendant might have received had prosecution occurred in state court. To do so would undermine Congress's goal of uniformity.⁶¹

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

- *Obstruction of Justice.* The Second Circuit held that, while submitting false birth documents to the court expressly falls under the obstruction guideline, the two-level obstruction increase was inadequate to account for all of the defendant's obstructive behavior. The defendant submitted documents that falsely established him as a juvenile, thus making him a candidate for more lenient sentencing. The court held that departure was proper because the defendant's atypical obstructive conduct took his case outside the heartland of the obstruction guideline.⁶²
- *Murder of Kidnapping Victim.* The Fourth Circuit noted that the kidnapping guideline provides an adjustment if the kidnapping was done to facilitate the commission of another offense. In this case, however, the victim was kidnapped for the purpose of sexual assault and only later did the defendant form the intent to murder her. The court found that because the guideline does not take into account these facts, an upward departure to life imprisonment that was based on the victim's death was not an abuse of discretion.⁶³
- *Threats to Family Member of Extortion Victim.* The Ninth Circuit upheld a two-level departure based on an application note in the extortion guideline (§2B3.2). This note (application note 8) states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The defendants were convicted of interference with interstate commerce by threats of violence after kidnapping the daughter of a hotel owner and demanding ransom. The victim of the extortion was the hotel owner, and the defendants explicitly threatened his daughter's life.⁶⁴

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

⁶⁰ *United States v. Fenner*, 147 F.3d 360 (4th Cir.), *cert. denied*, 119 S. Ct. 568 (1998).

⁶¹ *United States v. Searcy*, 132 F.3d 1421 (11th Cir. 1998).

⁶² *United States v. Ventura*, 146 F.3d 91 (2d Cir.), *cert. denied*, 119 S. Ct. 272 (1998).

⁶³ *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998).

⁶⁴ *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998).

- *Guidelines Provide Insufficient Punishment.* The Ninth Circuit found that, while three auto thefts were overshadowed by the defendant's conviction for involuntary manslaughter, the correct course is a sentence in the upper regions of the guideline range rather than a departure. Also, the appellate court found that the guidelines had taken into account the destruction of the vehicles because the calculation of loss in the theft guideline is the same whether or not the stolen property is recovered.⁶⁵
- *Psychological Injury to Victim's Family.* The Fourth Circuit held that the sentencing court abused its discretion in departing upward three levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" and can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim."⁶⁶

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

- *Uncharged Death of Participant.* The Fourth Circuit remanded for further findings in accordance with the guidelines in a case in which the district court departed upward four levels for the uncharged death of a participant in the aggressive driving that led to the defendant's conviction for involuntary manslaughter. The death of a victim who participated in the activity that resulted in his death can form the basis for departure, the appellate court held. The circuit court found, however, that the district court should have made findings to support the level of departure, including findings as to whether the defendant's recklessness was adequate to establish malice.⁶⁷
- *Reckless Conduct.* The Fourth Circuit also ordered a remand to consider whether the danger created by the defendant's reckless driving was outside the "heartland" of the typical reckless driving, involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. Under *Koon*, the sentencing court, therefore, must determine whether the defendant's reckless driving was "present to an exceptional degree" or was in some other way different from the ordinary case in which the factor is present.⁶⁸
- *Intent to Pay Taxes.* The First Circuit held that the defendant's intent to eventually pay the taxes evaded could take the case out of the heartland of the tax evasion guideline. Because a tax evader usually intends to deprive the government of the taxes owed, the defendant's apparent intent only to delay payment was not typical of

⁶⁵ *United States v. G.L.*, 143 F.3d 1249 (9th Cir. 1998).

⁶⁶ *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998).

⁶⁷ *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998).

⁶⁸ *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998).

the heartland case. However, that the tax loss to the government overstated the seriousness of the offense (because the losses were due to multiple causes) was deemed an improper basis for departure. The court remanded the case for better explanations of the decision to depart downward and of the extent of departure.⁶⁹

- *Government Misconduct.* The Third Circuit remanded to determine whether or not an undercover agent's sexual misconduct with the defendant during the investigation was sufficient to take the case outside the heartland and justify a downward departure. The court of appeals stated that, under *Koon*, government investigatory misconduct that is unrelated or only tangentially related to the guilt of the defendant is an unmentioned departure factor and is not categorically proscribed from consideration.⁷⁰

⁶⁹ *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998).

⁷⁰ *United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998).