RESOLVING CIRCUIT CONFLICTS

Part II

U.S. Sentencing Commission

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EXECUTIVE SUMMARY

Resolving Circuit Conflicts: Part II

I. Introduction

This report presents an analysis of five of the nine circuit conflicts that the Commission is considering resolving during the 1997-98 amendment cycle. The Commission received and reviewed a report on the first four circuit conflicts in October.

The presentation of each issue is as follows:

- Statement of Issue
- Significance of Conflict
- Recommended Amendment Action
  - Options
- Case Law
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II. Summary of Issues and Options

Staff recommends the following options for resolving Issues 5-9:

Issue 5

Obstruction of Justice Guideline: Does term "instant offense" refer only to the "offense of conviction?"

Options:

(1) Define scope of sentencing adjustment broadly to apply to apply to obstructions of justice in closely related cases. (majority view)

(2) Define scope of sentencing adjustment narrowly to apply only to obstructions of justice directly connected to the offense of conviction. (minority view)

Issue 6

Obstruction of Justice Guideline: Does lying to probation officer about drug use while on bail warrant the obstruction of justice adjustment?

Options:

(1) Define scope of obstruction sentencing adjustment to exclude denial of drug use while on bail. (majority view)

(2) Define scope of obstruction sentencing adjustment to include denial of drug use while on bail. (minority view)

Issue 7

Failure to Appear Guideline: Does the guideline procedure of grouping the failure to appear count of conviction with the underlying offense violate the statutory mandate of imposing a consecutive sentence?

Options:

(1) Maintain current grouping rules for failure to appear and obstruction of justice, but address internal inconsistencies in the Manual. (majority view)

(2) Amend the failure to appear guideline to require a separate and consecutive sentence, similar to the manner in which a firearm conviction under 18 U.S.C. § 924(c) is sentenced. (minority view)

Issue 8

Computing Criminal History Guideline: Does confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release qualify as "incarceration" in determining the defendant's subsequent criminal history score?

Options:

(1) Exclude confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation or supervised release from definition of incarceration in determining defendant's subsequent criminal history score. (Ninth Circuit)

(2) Include confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release from definition of incarceration in determining the defendant's subsequent criminal history score. (Sixth Circuit)

Issue 9

Diminished Capacity Departure: Does the departure apply to a "crime of violence?"

Options:

(1) Define scope of departure narrowly to include only offenses not termed as a crime of violence in §4B1.2. (majority view)

(2) Define scope of departure broadly to include consideration of the facts and circumstances surrounding the commission of the crime. (minority view)

(3) Define scope of departure to exclude departures that involve actual violence or serious threat of violence. (variation of minority view)

(4) Define scope of departure broadly by removing "non-violent offense" limitation.

ISSUE 5

OBSTRUCTION OF JUSTICE GUIDELINE: MEANING OF TERM "INSTANT OFFENSE"

Statement of Issue

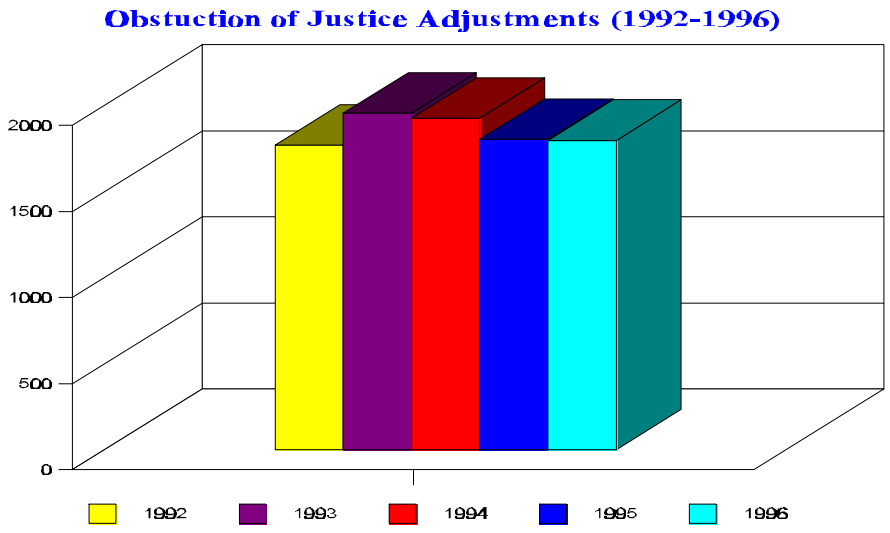
Whether the term "instant offense," as used in the obstruction of justice guideline, §3C1.1, includes obstructions closely related to the defendant's case or only those specifically related to the "offense of conviction." p. 264

Significance of Conflict

1. Involves a 4 to 2 conflict among the circuit courts that have addressed the issue.

2. Affects the application of a 2-level sentence increase for obstruction of justice.

3. Data show: No relevant information available about this specific issue. Overall frequency of application of the obstruction guideline is depicted in the bar graph below.



Recommended Amendment Action

- *Clarify the scope of the sentence adjustment for obstruction of justice.*

  The six appellate courts addressing the issue have adopted varying interpretations of the scope of the sentencing adjustment. Four appellate courts have interpreted the provision broadly and have held that the adjustment applies when a defendant attempts to impede the prosecution of another person in a case closely related to his own. In contrast, the other two appellate courts have interpreted the provision narrowly and have held otherwise. The jurisdictions holding the minority view interpret the word "instant" as limiting "offense" to the offense of conviction, and do not permit consideration of relevant conduct in determining whether the defendant obstructed justice.

Options
(1) Define scope of sentencing adjustment broadly to apply to obstructions of justice in closely related cases. (majority view)
(2) Define scope of sentencing adjustment narrowly to apply only to obstructions of justice directly connected to the offense of conviction. (minority view)

Case Law

Majority View

United States v. Powell, 113 F.3d 464 (3d Cir.), *petition for cert. filed* (Oct. 14, 1997) (No. 97-6381).

Facts: The defendant, Antonio Powell, pleaded guilty to six drug charges. His brother, James, was convicted by a jury of the same six drug charges. Antonio testified at his brother's trial that James was not involved in the drug distribution conspiracy. This testimony was contradicted by extensive government evidence that James accompanied Antonio on each of the charged drug deliveries and was involved in the sales. After James' trial, the district court increased Antonio's sentence for obstruction of justice.

Holding: The district court did not err in applying the obstruction of justice adjustment because the defendant attempted to impede the prosecution of a codefendant for the same offenses for which he was convicted.

Rationale:

- The Third Circuit read the obstruction guideline to apply only when a defendant has made efforts to obstruct the investigation, prosecution, or sentencing of "the offense of conviction." ***United States v. Kim***, 27 F.3d 947, 958 (3d. Cir. 1994); ***United States v. Woods***, 24 F.3d 514, 516 (3d Cir. 1994); ***United States v. Belletiere***, 971 F.2d 961, 967-68 (3d. Cir. 1992). The court added that the adjustment "does not apply if a defendant makes false statements about other crimes or events, so long as those statements do not impede the investigation, prosecution, or sentencing of the crime for which he was convicted and for which he is being sentenced." ***Powell,*** at p. 464

- The court reasoned, however, that the enhancement will apply if the false statements impede the investigation or prosecution of the charges for which the defendant is convicted. The court stated that Antonio and James Powell were indicted as co-conspirators for the same offenses described in the same counts of the same indictment. Therefore, when the defendant testified that his brother had not conspired with him to distribute cocaine, he was attempting to impede the prosecution of the same offenses for which he was convicted.

United States v. Walker, 119 F.3d 403 (6th Cir. 1997).

Facts: Defendant, Jeffrey Walker, pleaded guilty to conspiracy to possess with intent to distribute cocaine and a firearms offense. Prior to sentencing, the defendant testified at a codefendant's trial that the codefendant had nothing to do with the drug activity. The sentencing court increased the defendant's sentence for giving perjured testimony during the codefendant's trial.

Holding: The district court did not err in increasing the defendant's sentence for obstruction of justice.

Rationale:

- The defendant and his codefendant were charged in the same conspiracy with helping each other and in committing the substantive acts together. Therefore, the defendant and codefendant were "inextricably related in the criminal offenses charged against them."

- Based on precedent from other circuits, and the language in the obstruction of justice guideline, the district court properly increased the defendant's sentence for obstruction of justice.

Dissent:

- "Instant offense" does not encompass perjured testimony at a codefendant's trial where that testimony does not relate to the defendant's offense of conviction.

- Additionally, "mere joint participation in the offense of conviction does not, without more, serve to relate the defendant's perjured testimony and make it relevant to the defendant's trial."

United States v. Acuna, 9 F.3d 1442 (9th Cir. 1993).

Facts: The defendant pleaded guilty to eight drug charges, *inter alia* and testified falsely at his coconspirators' trial.

Holding: The district court did not err in increasing the defendant's sentence for obstruction of justice when the defendant testified falsely in a codefendant/coconspirator's trial.

Rationale:

- The Ninth Circuit stated that the obstruction of justice guideline applies when "a defendant attempts to obstruct justice in a case closely related to his own such as that of a codefendant." ***United States v. Bernaugh***, 969 F.2d 858, 861 (10th Cir. 1992); *cf.* ***United States v. Morales***, 977 F.2d 1330, 1331 (9th Cir. 1992) (refusal to testify at codefendant's trial after receiving immunity is obstruction of justice), *cert. denied*, 507 U.S. 966 (1993).

United States v. Bernaugh, 969 F.2d 858 (10th Cir. 1992).

Facts: The defendant and six codefendants were arrested for their roles in a reverse buy of 300 pounds of marijuana. The defendant pleaded guilty to three counts of the indictment. The district court increased the defendant's sentence for obstruction of justice after finding that the defendant testified falsely at his own change of plea hearing about the role of his codefendants.

Holding: The district court did not err in finding that the defendant obstructed justice.

Rationale:

- The Tenth Circuit concluded that the false testimony by the defendant about the roles of his codefendants was an attempt to impede the administration of justice during the investigation, prosecution, or sentencing of the instant offense. He attempted to impair the court's inquiry under Rule 11(f) and obfuscate his role.

Note: ***Bernaugh***, is procedurally different from the other three cases holding the majority view because the defendant's false statements about his codefendants were made in the context of his own trial. ***Bernaugh***, however, was cited favorably by the Third, Sixth, and Ninth Circuits.

Minority View

United States v. ***Perdomo***, 927 F.2d 111 (2d Cir. 1991).

Facts: The defendant pleaded guilty to conspiracy to distribute cocaine. The district court increased the defendant's sentence for obstruction of justice because he gave inaccurate information to the probation officer about events occurring on March 19 and July 22.

Holding: The district court erred in increasing the defendant's sentence for obstruction of justice because the term "instant offense" refers solely to the "offense of conviction."

Rationale:

- The Second Circuit noted that in considering the definition of "offense" for the purposes of a Chapter 3 adjustment it must refer to the relevant conduct guideline. The court noted that the relevant conduct guideline states that "unless otherwise specified," adjustments in Chapter 3 shall be determined on the basis of relevant conduct outside the offense of conviction.

- The court stated that for purposes of §3C1.1, the interpretation of the word "offense" is modified by "instant." Any interpretation other than that §3C1.1 refers to efforts to obstruct the prosecution of the conviction offense only would render this modifier meaningless. Therefore, the court held that conduct outside the charged offense should not have been considered under §3C1.1.

United States v. Partee, 31 F.3d 529 (7th Cir. 1994).

Facts: The defendant pleaded guilty to possession of cocaine with intent to distribute but refused to testify under a grant of immunity at a codefendant's trial. The district court increased the defendant's sentence for obstruction of justice.

Holding: The district court erred in increasing the defendant's sentence for obstruction of justice because the term "instant offense," as used in the obstruction of justice guideline, does not include relevant conduct, but is narrowly defined as the "offense of conviction."

Rationale:

- The Seventh Circuit noted that the defendant's refusal to testify at his codefendant's trial had no effect on his guilty plea and did not represent an attempt to avoid responsibility for the offense for which he was convicted. The Seventh Circuit has opted against defining "instant offense" broadly and has instead defined it narrowly as "offense of conviction."

- "Offense of conviction" refers only to the offense conduct charged in the count of the indictment or information of which the defendant was convicted.

- In the instant case, the offense of conviction was possession of cocaine, and the refusal to testify had no impact on the defendant's possession conviction. The appellate court stated that the defendant's disregard of a court order to testify under a grant of immunity should be punished by criminal contempt of court.

ISSUE 6

OBSTRUCTION OF JUSTICE GUIDELINE: FAILURE TO ADMIT DRUG USE WHILE ON PRETRIAL RELEASE

Statement of Issue

Whether the obstruction of justice adjustment, §3C1.1, applies to a defendant who fails to admit to use of a controlled substance while on pretrial release. p. 264

Significance of Conflict

1. Involves a 2 to 1 conflict among the circuit courts that have addressed the issue.

2. Affects the application of a 2-level adjustment for obstruction of justice.

3. Data show: No relevant information available.

Recommended Amendment Action

- *Clarify the scope of the sentence adjustment for obstruction of justice.*

  The three appellate courts addressing the issue have adopted varying interpretations of the scope of the sentencing adjustment. Two appellate courts have interpreted the provision narrowly and have held that the adjustment does not apply when a defendant failed to admit drug use while on bail. In contrast, the other appellate court has interpreted the provision broadly and has held otherwise.

Options

(1) Define scope of sentencing adjustment to exclude application to denial of drug use while on bail. (majority view)

(2) Define scope of sentencing adjustment to include application to denial of drug use while on bail. (minority view)

Case Law

Majority View

United States v. Belletiere, 971 F.2d 961 (3d Cir. 1992).

Facts: The defendant was convicted of drug-related offenses. The district court increased the defendant's sentence for obstruction of justice because the defendant lied to the probation officer about using cocaine while pending trial.

Holding: The defendant's failure to admit cocaine use, after testing positive for cocaine use did not justify an increase for obstruction of justice.

Rationale:

- The Third Circuit noted that the obstruction of justice guideline focuses on willful acts or statements intended to obstruct or impede the government's investigation of the offense at issue. The appellate court stated that it failed to see how the denial of drug use could have impeded the governments's sentencing investigation in this case. The defendant's lie had nothing to do with the "instant offense" because it did not affect the offenses for which he was convicted.

- The court added that the denial of drug use was not material to the probation officer's investigation in the case. The court noted that the defendant had already been sanctioned by his bail revocation.

United States v. Thompson, 944 F.2d 1331 (7th Cir. 1994), *cert. denied*, 502 U.S. 1097 (1992).

Facts: The defendant was released on bail while awaiting trial for conspiracy to possess and distribute cocaine. Subsequently, he falsely denied use of drugs while on pretrial release. The district court increased the defendant's sentence for obstruction of justice for his denial of drug use while on bail because of the false statement.

Holding: The district court erred in increasing the defendant's sentence for obstruction of justice because of his denial of drug use while out on bail.

Rationale:

- The Seventh Circuit, citing the obstruction of justice guideline, stated that a defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury) or refusal to admit guilt or provide information to a probation officer is not a basis for application of the obstruction of justice guideline.

- The court stated "[w]e see no basis for distinguishing between statements made to probation officers and those made to pretrial service officers and, therefore, the defendant did not merit an enhancement for obstruction of justice."

Minority View

United States v. Garcia, 20 F.3d 670 (6th Cir. 1993), *cert. denied*, 573 U.S. 1159 (1995).

Facts: The defendant was convicted and sentenced for conspiracy to possess with intent to distribute marijuana. The district court increased the defendant's sentence for obstruction of justice after finding that the defendant intentionally misled the probation officer by not revealing a prior conviction for assault and by falsely denying his use of cocaine while on a pretrial bond.

Holding: The district court did not err in finding that the defendant willfully and materially obstructed justice when he failed to admit his use of cocaine on pretrial release.

Rationale:

- The Sixth Circuit noted, that while the defendant's failure to admit his cocaine use was not outcome determinative, it was relevant to the choice of sentence within the guideline range. The majority added that the interpretations of ***United States v. Belletiere***, 971 F.2d 961 (3d Cir. 1992), and ***United States v. Thompson***, 944 F.2d 1331 (7th Cir. 1991), were too narrow.

- The appellate court stated that the defendant had the opportunity to refuse to answer the question or to have his attorney raise an objection during the sentencing interview. Instead, the defendant lied about the use of cocaine.

ISSUE 7

FAILURE TO APPEAR GUIDELINE: GROUPING WITH UNDERLYING OFFENSE

Statement of Issue

Whether a failure to appear count of conviction sentenced under §2J1.6 should be grouped with the underlying offense when the underlying offense has been enhanced under §3C1.1 for obstruction of justice. p. 173

Significance of Conflict

1. Involves a 2 to 1 conflict among the circuit courts that have addressed the issue. One other court, the Tenth Circuit, in ***United States v. Lacey***, 969 F.2d 926 (10th Cir. 1992), *judgment vacated on other grounds*, 113 S. Ct. 1233 (1993), agreed with the majority, but the decision has been vacated.

2. Affects numerous defendants convicted of failure to appear. The approach taken by the Fifth Circuit in requiring an independently calculated consecutive sentence results in double counting for the failure to appear count where the offense level for the underlying count has been enhanced for obstruction of justice.

3. The issue also raises concerns about the internal consistency of (1) the guidelines' multiple count grouping rules and (2) the guideline procedure for imposing a sentence in the case of offenses for which the statute requires a consecutive sentence but not a minimum consecutive sentence of imprisonment. *See, e.g.*, §§2J1.6, 2K2.5, 2P1.2.

4. Data show: In FY 1996, the district courts used §2J1.6 as the primary guideline in 86 cases.

Recommended Amendment Action

- *Clarify the procedure for imposing sentence for failure to appear conviction when the underlying offense has been enhanced for obstruction of justice.*

  The three appellate courts that have addressed the issue have adopted varying interpretations of the procedure. Two circuits follow the current procedure as outlined in the guidelines to group the failure to appear count with the underlying offense when the underlying offense has been increased for obstruction of justice. In contrast, the Fifth Circuit has held that the guidelines provisions conflict with the statutory requirements of 18 U.S.C. § 3146(b)(2) and are therefore invalid.

Options

(1) Maintain current grouping rules for failure to appear and obstruction of justice, but address internal inconsistencies. (majority view)

(2) Amend the failure to appear guideline to require a separate and consecutive sentence, similar to the manner in which a firearm conviction under 18 U.S.C. § 924(c) is sentenced. (minority view)

Case Law

Majority View

United States v. Agoro, 996 F.2d 1288 (1st Cir. 1993).

Facts: Agoro failed to appear as scheduled for sentencing following guilty plea on credit card fraud. A warrant was issued for his arrest; he was apprehended a year later and charged with the failure to appear and again pleaded guilty. When he was then sentenced on the original credit card offense, the court made a two-level adjustment for obstruction of justice resulting in a guideline range of two to eight months. Another court then sentenced him on the failure-to-appear offense. The court also made the two-level obstruction of justice adjustment and imposed the resulting 15-month sentence consecutive to the earlier sentence, for a combined total sentence of 23 months imprisonment and six years supervised release. On appeal, defendant contended that the second court erred in failing to follow the guideline grouping rules that apply to multiple-count convictions.

Holding: The maximum sentence the defendant could receive for the second conviction is determined by applying the grouping rules, pursuant to §5G1.3, then subtracting the sentence pronounced by the first court.

Rationale:

- Agoro is subject to §5G1.3 because a second sentence was imposed while the defendant was serving a guideline sentence for a prior crime and where the second crime occurred after conviction for the earlier crime but before the defendant began to serve the earlier sentence. If he had been sentenced for both crimes at the same time, the two offenses would have been grouped under §3D1.2(c) because they were closely related, and because the conduct in one constitutes an adjustment to the other.

United States v. Flores , 23 F.3d 408 (6th Cir. 1994) (unpublished).

Facts: Flores pleaded guilty to distributing marijuana and failing to appear for arraignment. He was sentenced to consecutive prison terms of 60 months on the drug charge and 12 months for failure to appear. Following a remand the court resentenced Flores on the drug charge, this time to 51 months, but left untouched the consecutive sentence for failure to appear.

Holding: The court erred in imposing a separate sentence for obstruction of justice (failure to appear) to run consecutively to Flores's sentence for the underlying drug trafficking offense, which had already been increased for obstruction of justice.

Rationale:

- Both counts should have been grouped together under §3D1.2. The court cited ***United States v. Lacey***, 969 F.2d 926 (10th Cir. 1992), *judgment vacated on other grounds*, 113 S. Ct. 1233 (1993) ("If the court enhances an offense level for an underlying offense because the behavior was included in the obstruction offense, the court must group the offenses; the court must then determine the appropriate sentence using the greater of either the enhanced offense level for the underlying offense or the obstruction offense.").

Minority View

United States v. Packer, 70 F.3d 357 (5th Cir. 1995), *cert. denied*, 117 S. Ct. 75 (1996).

Facts: Packer was indicted for his involvement in assisting his girlfriend with flight from prosecution for capital murder, behavior which included passport fraud and use of a fraudulent Social Security number. When released on bail, he fled the country and was re-arrested several years later. He pleaded guilty to several charges, including failure to appear. The court grouped all the counts of conviction except the failure to appear count, resulting in a guideline range of 21-27 months. In addition, the court found an offense level of 12 for the failure to appear offense, resulting in a guideline range of 10-16 months. The court sentenced Packer to 27 months on the grouped charges with a consecutive 16-month sentence on the failure to appear charge.

Holding: The district court did not err by declining to group the failure to appear count with the other counts and by imposing the failure to appear sentence consecutive to the other sentence.

Rationale:

- The guideline treatment of failure to appear offenses defeats the statutory purposes of 18 U.S.C. § 3146(b)(2), which requires a consecutive sentence for failure to appear that is separate and distinct from the underlying offense.

ISSUE 8

COMPUTING CRIMINAL HISTORY: MEANING OF TERM "INCARCERATION"

Statement of Issue

Whether confinement in a community confinement center, halfway house, or drug treatment center following revocation of parole, probation, or supervised release qualifies as "incarceration" under §4A1.2(e)(1). p. 287

Significance of Conflict

1. Involves a 1 to 1 conflict among the circuits that have addressed the issue.

2. Affects the criminal history calculations of defendants who are sentenced to community treatment centers or home detention following revocation of parole, probation, or supervised release, and subsequently convicted and sentenced in federal court. Could have increasing impact as the inmates sentenced under the guidelines are released from prison and begin serving the supervised release part their sentences.

3. Data show: No relevant information available.

Recommended Amendment Action

- *Clarify meaning of "incarceration."*

  This issue is narrower than whether confinement in a community treatment center or home detention is generally considered incarceration or imprisonment. *See, e.g.*, ***United States v. Urbizi***, 4 F.3d 636 (8th Cir. 1993). This particular issue arises in the context of determining the criminal history score of a defendant who served a sentence of imprisonment outside of the applicable 15-year time period, but was confined to a community treatment center, halfway house, or to home detention following revocation of parole, probation, or supervised release. The term of confinement in the community treatment center or home detention was within the applicable 15-year time period. The leading cases address the question of whether the confinement in a community treatment center following revocation of parole is "incarceration" within the meaning of §4A1.2(e)(1).

  The two appellate courts that have directly addressed the issue have adopted varying interpretations. The Ninth Circuit has held that confinement in a community treatment

center following revocation of parole does not constitute incarceration. The Sixth Circuit, in contrast, has held otherwise.

Options

(1) Exclude confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release. (Ninth Circuit)

(2) Include confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation or supervised release as incarceration. (Sixth Circuit)

Case Law

Ninth Circuit

United States v. Latimer, 991 F.2d 1509 (9th Cir. 1992).

Facts: The defendant was confined in a community treatment center for three months in 1979 for revocation of parole following a 1967 robbery conviction. If the confinement in a community treatment center constituted incarceration, the defendant qualified as a career offender and would receive a 27-year sentence; if not, his sentence was 12 years.

Holding: Confinement in a community treatment center does not constitute incarceration for purposes of §4A1.2(e)(1).

Rationale:

- According to the Ninth Circuit, the Commission has repeatedly drawn a distinction between confinement in a community treatment center or halfway house and confinement in a conventional prison facility. "Subdivisions (a), (b), and (c) of §4A1.1 distinguish confinement sentences longer than one year and one month, shorter confinement sentences of at least sixty days, and all other sentences, such as confinement sentences of less than sixty days, probation, fines, and residency in a halfway house."

- The court noted that the guidelines criminal history scoring system—which adds more points for imprisonment than for community confinement—quantifies culpability by measuring the extent and seriousness of the defendant's prior criminal record. Prior sentences serve as a proxy for the severity of those prior offenses. By adding fewer points for sentences to community confinement, the guidelines express a judgment that crimes that result in sentences to community confinement are generally less serious than those that result in prison sentences.

- Additionally, other provisions demonstrate that the guidelines regard confinement in a community treatment center or halfway house as qualitatively different from confinement in prison. For example, there are differences in the offense levels assigned for escape under §2P1.1, depending on whether the defendant escaped from community confinement (significant reduction in offense level possible). Also, in §5C1.1, the guidelines require that, when the sentencing range is six to ten months, a court can either impose a sentence of imprisonment or a sentence of confinement in a community treatment center, provided that half the term (a minimum of three months, then) be satisfied by imprisonment. The implication to be drawn is that a sentence of only community confinement is not sufficiently harsh, thus the two types of sentence are not considered interchangeable. Finally, §5C1.1(e)(2) sets forth the rate at which a court may substitute community confinement for imprisonment. It is significant that the rate of substitution was defined at all, for if the two sentences were equivalent, there would be no need to explain how the two modes of punishment could be substituted for each other.

Sixth Circuit

United States v. Rasco, 963 F.2d 132 (6th Cir.), *cert. denied*, 506 U.S. 883 (1992).

Facts: On facts similar to those in ***Latimer*** (although not involving career offender status), the Sixth Circuit rejected the focus on the place of detention.

Holding: The district court did not err in finding that detention in a halfway house upon revocation of parole within 15 years of the instant offense is a sentence of incarceration under the guidelines.

Rationale:

- The silence of the guidelines on the issue of whether detention in a halfway house or community treatment center constitutes imprisonment for purposes of determining a defendant's criminal history score means that the sentencing court should adopt a functional approach to resolving the issue rather than an approach that focuses exclusively on the place of detention.

- The provisions of §4A1.2(k) require that in the case of a prior revocation or probation, parole, supervised release, special parole, or mandatory release, the court must add the original term of imprisonment to any term of imprisonment imposed upon revocation, and use the resulting total to compute the criminal history points.

- The court noted that section §4A1.2(k) expresses the Commission's view that a sentence imposed upon revocation of parole, regardless of whether the sentence is served in prison, a halfway house, or a community treatment center, should be added to the original term of

imprisonment, requiring the court to count them as a single sentence for purposes of criminal history scoring.

- The Sixth Circuit acknowledged that this view might be seen as conflicting with the commentary to §4A1.1, but stated that to the extent there might be a conflict between the two provisions, §4A1.2(k) controls.

NOTE: The Sixth Circuit has explicitly limited ***Rasco*** in ***United States v. Jones***, 107 F.3d 1147, 1164 (6th Cir.), *cert. denied*, 117 S. Ct. 2527 (1997). ***Jones*** involved a determination of whether home detention was "a sentence of imprisonment." The court held that it was not, ***Jones,*** 107 F.3d at 1165, and found no conflict with ***Rasco***: "the court in that case made it clear that its decision rested on its interpretation of §4A1.2(k), namely that a sentence imposed upon a revocation of parole be added to the original sentence regardless of where that sentence is served." 107 F.3d at 1164 (internal quotation and citation omitted).

ISSUE 9

DIMINISHED CAPACITY DEPARTURE: DEFINITION OF "NONVIOLENT OFFENSE"

Statement of Issue

Whether "non-violent offense," as the term is used in §5K2.13 (Diminished Capacity), should be defined with reference to the term "crime of violence" as used in §4B1.2 (Career Offender). p. 354

Significance of Conflict

1. Involves a 6 to 2 conflict among the circuit courts that have addressed the issue.

2. Affects numerous defendants who do not receive the diminished capacity departure because of the narrow interpretation of its scope by the majority of circuit courts. May also produce unwarranted disparity and leniency in circuits that follow the broader interpretation.

3. Data show: In 1996, the district courts made 159 downward departures based on diminished capacity for defendants convicted of various offense types, such as: drug trafficking, assault, fraud, robbery, kidnaping, use of firearms, sexual assault.

Recommended Amendment Action

- *Clarify scope of the diminished capacity departure.*

  The Guidelines Manual does not describe or otherwise define the type of situations that warrant the diminished capacity departure. The eight appellate courts that have addressed the issue of the scope of the term "non-violent offense" have adopted varying interpretations. Six of the appellate courts have interpreted the provision narrowly and have held that the departure does not apply if the defendant is convicted of a "crime of violence" as defined in the career offender guideline. In contrast, the remaining two circuits take a broader view, encouraging the district court to look at the facts and circumstances surrounding the commission of the crime to determine whether there was an actual risk of violence.

  Some commentators in meetings with staff have also suggested that the Commission eliminate the "non-violent offense" limitation in recognition of the heat of passion in which many violent offenses occur. *See also "Note: A Square Meaning for a Round Phrase: Applying the Career Offender Provision's "Crime of Violence" to the Diminished*

Capacity Provision of the Federal Sentencing Guidelines" 79 Minnesota Law Review 1475 (suggesting that the Commission amend the diminished capacity departure so that the offender's actual likelihood of violence determines the definition of non-violent offense).

If the Commission elects to address this issue, it may also wish to consider the recent interpretation of the Third Circuit in ***United States v. McBroom***, No. 96-5719, 1997 WL 528657 (3d Cir. Aug. 28, 1997), that diminished capacity includes both inability to sufficiently distinguish right from wrong (cognitive impairment) and the inability to sufficiently control one's actions even when one can clearly distinguish right from wrong (volitional impairment). In ***McBroom***, an attorney was found to have a compulsion for viewing child pornography as a result of sexual abuse as a child and other factors. The Third Circuit reversed the district court's decision that a diminished capacity departure was unauthorized because the defendant admittedly could distinguish right from wrong. Nevertheless, the defendant argued that he suffered from diminished capacity because he could not control his behavior. The Third Circuit agreed that such conduct could be encompassed within the diminished capacity departure.

Other appellate courts have held, however, that the defendant's ability to reason and absorb information in the usual way make him ineligible for the diminished capacity departure. *See, e.g.* ***United States v. Withers***, 100 F.3d 1142, 1148 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1282 (1997); ***United States v. Edwards***, 98 F.3d 1364, 1367 (D.C. 1996), *cert. denied*, 117 S. Ct. 1437 (1997); ***United States v. Barajas-Nunez***, 91 F.3d 826, 831 (6th Cir. 1996); ***United States v. Johnson***, 979 F.2d 396, 401 (6th Cir. 1992).

Options

(1) Define scope of departure narrowly to include only offenses not termed as a crime of violence in §4B1.2. (majority view)

(2) Define scope of departure broadly to include consideration of the facts and circumstances surrounding the commission of the crime. (minority view)

(3) Define scope of departure to exclude departures that involve actual violence or a serious threat of violence. (variation of minority view)

(4) Define scope of departure broadly by removing "non-violent offense" limitation.

Case Law

Majority View

United States v. Poff, 926 F.2d 588 (7th Cir.) (*en banc*), *cert. denied*, 502 U.S. 827 (1991).

Facts: Defendant was convicted of six counts of threatening the life of the President. She had sent six threatening letters to President Reagan in 1988. Her father, now deceased, had sexually abused her until she was 20 years old, and defendant was in and out of psychiatric hospitals as an adult. She believed her dead father compelled her to write the letters threatening public officials. Her criminal history included convictions for two bomb threats, threatening the county prosecutor, setting a hotel room on fire, and threatening President Carter. It was conceded she had no intent to carry out the threats.

Holding: The definition of "non-violent offense," as the term is used in §5K2.13 cannot encompass a "crime of violence" as defined in career offender provision; terms are mutually exclusive.

Rationale:

- Threats are themselves a form of violence. Career offender provisions do not define a threat as a "crime of violence" only when uttered by a career offender; rather, they define "career offenders" as those who have a history of committing crimes of violence, among these, making threats.

- Same word "violence" is used in both definitions; same word should mean the same thing in related passages; the guidelines should be read as a whole. If the Commission wanted to distinguish between the two, it should have expanded its vocabulary or offered a technical definition for each term.

- Natural reading of terms suggests they are opposites; the omission of a separate definition or cross reference is only surprising if the Commission intended the terms to overlap.

- Most courts find the proposition of mutual exclusivity of the terms so obvious that little or no discussion is devoted to the proposition in decisions.

Dissent:

- Despite the fact that (1) defendant's crimes are motivated by mental illness; (2) it is acknowledged that defendant is not dangerous; and (3) the increasingly stiff penalties defendant has received have no deterrent effect, the majority's reading of the guidelines prevents the district court from taking the illness into account when sentencing defendant.
- If the Commission wanted the two provisions to mean the same thing, they would have used the same words; different words mean different things.

- The absence of a cross-reference is notable: it would have been easy to write §5K2.13 to say that the judge may depart unless the defendant committed a "crime of violence" as §4B1.2 defines it.

- The possibility of leniency makes sense for people suffering from diminished capacity short of legal insanity, if they are not dangerous; stiffer sentences may not deter them, because an illness may compel them to break the law, and there is no real need to incapacitate them if they are not dangerous. The criminal justice system has long meted out lower sentences for such offenders. If the judge credits testimony about such an impairment, leniency should be an option within the court's discretion.

United States v. Maddelena, 893 F.2d 815 (6th Cir. 1989), *cert. denied*, 502 U.S. 882 (1991).

Facts: Defendant robbed a bank of $3,622 by placing a knife on the counter and asking the teller for money.

Holding: District court properly refused to consider defendant's mental condition because robbery is not a non-violent offense.

Rationale: Career offender definition used as point of reference in opinion without comment.

United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996).

Facts: Defendant robbed a bank by handing a sack to the teller with a note that read, "Give me 100's, 50's, 20's, no tricks, you have ten seconds or I'll shoot everybody." The teller included a dye pack in the bag. Defendant suffers from bipolar disorder and post-traumatic stress syndrome and had stopped taking the lithium prescribed to him.

Holding: District court properly refused to consider defendant's mental condition because robbery is not a non-violent offense.

Rationale: Career offender definition used as point of reference in opinion without comment. Court stated that a "non-violent offense" necessarily excludes a "crime of violence."

United States v. Borrayo, 898 F.2d 91 (9th Cir. 1990).

Facts: Defendant robbed a bank by giving the teller a handwritten note stating that he was a suicide member of the "PLA," working with an accomplice. It stated that he and his accomplice would blow up a car filled with explosives parked in a garage under the bank if he didn't get $100,000 in 15 minutes. Borrayo claimed diminished capacity due to depression and alcohol abuse.

Holding: District court properly refused to consider defendant's mental condition because he threatened physical force.

Rationale: Because "non-violent offense" is not defined in the guidelines, the court stated it was deferring to the definition of "crime of violence" in the federal criminal statutes, which is used elsewhere in the guidelines. There is no basis for a conclusion that the Commission intended any other meaning.

United States v. Rosen, 896 F.2d 789 (3d Cir. 1990).

Facts: Defendant, a compulsive gambler, had difficulty making credit payments and sent letters to three acquaintances stating that, unless money was received, relatives would be harmed. He had no intention to carry out the threats.

Holding: District court properly refused to consider defendant's mental condition because offense involving threat of violence is a crime of violence.

Rationale: "Non-violent offense" means the opposite of "crime of violence."

United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994).

Facts: Defendant was convicted of interstate travel with intent to commit extortion. He told the victim by telephone that he would "make sure you never walk again" if the victim did not repay money he owed defendant. Defendant is a Vietnam War veteran suffering from posttraumatic stress disorder.

Holding: District court properly refused to consider defendant's mental condition because the crime was "crime of violence."

Rationale: Case came after intra-circuit conflict on the issue; earlier case prevails until en banc consideration. An earlier case, ***United States v. Russell***, 917 F.2d 512 (11th Cir. 1990), found that the terms "non-violent offense" and "crime of violence" were mutually exclusive. ***Russell*** involved a defendant who suffered from dependent personality disorder who was persuaded to rob a bank, albeit with an unloaded gun. In ***Russell***, the court had rejected, without discussion, the notion that robbery could be a nonviolent offense, noting the definition in §4B1.2.

Minority View

United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993).

Facts: Unarmed and alone, defendant handed the bank teller a note which read, "No one will get hurt, don't do anything foolish. People will get hurt if I don't walk out of this bank.

There are four of us." The teller gave him $1400 and a dye pack, which exploded as he left.

Holding: "Nonviolent offense" within the meaning of §5K2.13 is not mutually exclusive with "crime of violence" within the meaning of the career offender provision; the sentencing court must consider all the facts and circumstances of the case in determining whether a crime is a nonviolent offense.

Rationale:

- The court followed the reasoning of the dissent in ***Poff***. The guidelines were written as a unit; the definition of "crime of violence" is so detailed, and the use of cross-references is so prevalent in the guidelines generally, that the lack of a cross-reference to the "crime of violence" definition is significant.

- The sections should be interpreted independently because they address entirely different issues, a factor which is not addressed in most opinions construing §5K2.13. Section 4B1.2 is aimed at sentencing career offenders to higher sentences than others who have committed the same offense, guaranteeing incapacitation for repeat offenders whose records suggest a propensity to commit violent crimes. It makes sense that such offenders would not get the benefit of the doubt in determining whether a crime was violent.

- This policy is not applicable to §5K2.13, which confers discretion for downward departure where an individual suffers from a significantly reduced mental capacity that contributed to the commission of a non-violent offense. The purpose of that section is to treat with lenity those individuals whose reduced capacity contributed to the commission of a crime. The rationale is that those who cannot control their conduct do not deserve as much punishment as those who are motivated by gain or malice. If the crime reveals that such a defendant is not dangerous, defendant need not be incapacitated for the period of time the guidelines otherwise recommend. If defendant is not, in fact, dangerous, incapacitation serves little purpose.

United States v. Weddle, 30 F.3d 532 (4th Cir. 1994).

Facts: While on probation pending judgment on an assault charge, defendant threatened to assault his wife's lover, via mail: he mailed three .38-caliber bullets with the victim's name and address affixed to them to the victim's parents. The court found that defendant was suffering from a major depressive episode following news that he was terminally ill and the knowledge that his wife was having an affair.

Holding: Whether an offense is non-violent is to be determined by analysis of the actual facts of the case, not with reference to the definition of "crime of violence" found in the career offender statute.

Rationale:

- Followed ***Poff*** dissent and ***Chatman***. §5K2.13 is intended to create lenity for those who cannot control their actions but are not actually dangerous; §4B1.2 is intended to treat harshly the career criminal, whether or not their actual crime is in fact violent.

- The choice of different phrasing, the absence of a cross-reference, and the careful definitions attached to one section but not the other, all suggest that the Sentencing Commission did not intend to import its definition from one section into another.

Notes