CIRCUIT CONFLICTS and the SENTENCING GUIDELINES

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Introduction

The Sentencing Commission has amended its guidelines a number of times over the years to address circuit conflicts in the interpretation and application of guideline language. For example, in the last two years the Commission addressed 11 issues on which the appellate courts had differed—6 in 1997 and another 5 in 1998. Yet, whether the resolution of circuit conflicts should be a priority for the Commission and the criteria that should guide commissioners in deciding whether and how to resolve a particular conflict are questions that continue to be debated.

The following issues are a few of the unresolved conflicts in guideline application. Should the Commission address these issues in its amendment process? If so, how should the underlying policy questions be decided?

ISSUE 1: Aberrant behavior departures. Whether for purposes of downward departure from the guideline range a "single act of aberrant behavior" (USSG Chapter 1, Part A, §4(d)) includes multiple acts occurring over a period of time.

Compare: United States v. Grandmaison, 77 F.3d 555 (**1st Cir.** 1996) (Sentencing Commission intended the word "single" to refer to the crime committed; therefore, "single acts of aberrant behavior" include multiple acts leading up to the commission of the crime; the district court should review the totality of circumstances); Zecevic v. U.S. Parole Comm'n, 163 F.3d 731 **(2d Cir.** 1998) (adopts view that aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances); United States v. Takai, 941 F.2d 738 (**9th Cir.** 1991) ("single act" refers to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime); *cf.* United States v. Pena, 930 F.2d 1486 (**10th Cir.** 1991) (aberrational nature of the defendant's conduct and other circumstances justified departure).

With: United States v. Marcello, 13 F.3d 752 (**3d Cir.** 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); United States v. Glick, 946 F.2d 335 (**4th Cir.** 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not "single act of aberrant behavior"); United States v. Williams, 974 F.2d 25 (**5th Cir.** 1992) (a single act of aberrant behavior is generally spontaneous or thoughtless; a demand note dated several days before the robbery is neither); United States v. Carey, 895 F.2d 318 (**7th Cir.** 1990) (single act of aberrant behavior contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning); United States v. Garlich, 951 F.2d 161 (**8th Cir.** 1991) (fraud spanning one year and several transactions was not a "single act of aberrant behavior"); United States v. Withrow, 85 F.3d 527 (**11th Cir.** 1996) (a single act of aberrant behavior is not established

unless the defendant is a first-time offender and the crime was a thoughtless act rather than one which was the result of substantial planning); United States v. Dyce, 78 F.3d 610 (**D.C. Cir.**), *amd on reh.* 91 F.3d 1462 (**D.C. Cir.** 1996) (same).

ISSUE 2: Marijuana plants. Whether harvested marijuana plants are to be counted as plants or the quantity of consumable marijuana is to be weighed in applying the drug trafficking guideline, §2D1.1, in a marijuana manufacturing case.

Compare: United States v. Layman, 116 F.3d 105, 109 (**4th Cir.** 1997), *cert. denied,* 118 S. Ct. 1034 (1998) (when defendant has been involved in growing of marijuana for subsequent distribution, offense is one "involving marijuana plants," and thus, sentencing guidelines' equivalency ratio applies, regardless of whether plants are seized or have already been harvested and resulting marijuana distributed); United States v. Fitch, 137 F.3d 277, 281-82 (**5th Cir.** 1998) (marijuana stalks, representing remains of harvested marijuana plants, were "plants" within meaning of statute imposing ten-year minimum for conviction involving 1,000 or more marijuana plants); Oliver v. United States, 90 F.3d 177, 179 (**6th Cir.** 1996) (distinguishing earlier case, United States v. Stevens, noted below, on the basis that petitioner here was convicted of manufacturing marijuana. Plants had been cut from field and were being dried when they were confiscated. One reason behind the equivalency ratio in marijuana sentencing is to punish marijuana growers more harshly than mere marijuana possessors); United States v. Haynes, 969 F.2d 569, 571-72 (**7th Cir.** 1992) (defendants who succeeded in harvesting marijuana plants and processing marijuana therefrom are still considered to have committed offenses "involving marijuana plants" so that relevant drug quantity is calculated by number of plants grown rather than consumable marijuana produced); United States v. Young, 34 F.3d 500, 506 (**7th Cir.** 1994) (when the offense is one of growing or manufacturing marijuana plants, the sentence may be based on the number of plants involved, which is then converted into a weight pursuant to the equivalency provision); United States v. Wilson, 49 F.3d 406, 409-10 (**8th Cir.** 1995) (where defendant was convicted of manufacturing and distributing marijuana, plant count, rather than harvested drug weight, applied to determination of base offense level, even though marijuana attributed to defendant was harvested, shucked, packaged and sold before law enforcement personnel intervened); United States v. Wegner, 46 F.3d 924, 925-28 (**9th Cir.** 1995) (defendant's sentence for manufacturing was properly based on the number of plants grown over a period of time but not seized by the government); United States v. Silvers, 84 F.3d 1317, 1325 (**10th Cir.** 1996) ("plant" need not be alive to qualify under one plant/one kilogram equivalency);

United States v. Shields, 87 F.3d 1194, 1195-97 (**11th Cir.** 1996) (*en banc*) (defendant was sentenced based on dead, harvested root systems, which were properly counted as plants).

With: United States v. Blume, 967 F.2d 45, 49-50 (**2d Cir.** 1992) (error for district court to add the number of marijuana plants seized and the number of plants grown previously and then to treat each plant as the equivalent of one kilogram of marijuana; the intent of the guidelines is to measure live marijuana by the number of plants and dry leaf marijuana by weight). *See also* United States v. Stevens, 25 F.3d 318, 321-23 (**6th Cir.** 1994) (where a defendant is charged with conspiracy to possess with intent to distribute marijuana, the equivalency provision of the sentencing guidelines assigning each marijuana plant an equivalent weight applies only to possessing live marijuana plants, while the actual weight of the controlled substance applies to marijuana plants that have been harvested. The district court wrongly sentenced the defendant based upon the number of marijuana plants his supplier grew. This case was later distinguished by the court of appeals based on the offense of conviction, *see* Oliver v. United States, noted above).

ISSUE 3: Drug sales in protected locations. Whether the enhanced penalties in guideline 2D1.2 covering Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals apply only when the defendant is convicted of an offense referenced to that guideline or, alternatively, whenever the defendant's Relevant Conduct included drug sales in a protected location or to a protected individual.

Compare: United States v. Chandler, 125 F.3d 892, 897-98 (**5th Cir.** 1997) ("First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section 'most applicable to the offense of conviction.'" Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that guideline); United States v. Locklear, 24 F.3d 641 (**4th Cir.** 1994) (In finding that §2D1.2 does not apply to convictions under 21 U.S.C. § 841, the court relied on the fact that the commentary to §2D1.2 lists as the "Statutory Provisions" to which it is applicable 21 U.S.C. §§ 859, 860, and 861, but not § 841. "[S]ection 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by §2D1.1, but rather to define the base offense level for violations of 21 U.S.C.§§ 859, 860 and 861."); United States v. Saavedra, 148 F.3d 1311 (**11th Cir.** 1998) (defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to his offense; such conduct is properly considered only after the applicable guideline has been selected when the court

is analyzing the various sentencing considerations within the guideline chosen, such as the base offense level, specific offense characteristics, and any cross-references).

With: United States v. Clay, 117 F.3d 317 (**6th Cir.**), *cert. denied*, 118 S. Ct. 395 (1997) (applying §2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. § 841 (but not convicted of any statute referenced to §2D1.2) based on underlying facts indicating defendant involved a juvenile in drug sales); United States v. Oppedahl, 998 F.2d 584 (**8th Cir.** 1993) (applying §2D1.2 to defendant convicted of conspiracy to distribute and possess with intent to distribute based on fact that defendant's relevant conduct involved distribution within 1,000 feet of school); United States v. Robles, 814 F. Supp. 1249 (E.D. Pa), *aff'd* (unpub.), 8 F.3d 814 (**3d Cir.** 1993) (court looks to relevant conduct to determine appropriate guideline).

ISSUE 4: Fraudulent representations. Whether the fraud guideline enhancement for an offense that involved a misrepresentation that the defendant was acting on behalf of a charitable . . . or government agency (§2F1.1(b)(3)(A)) applies to a defendant who in fact represents the agency but misapplies or embezzles agency funds.

Compare: United States v. Marcum, 16 F.3d 599 (**4th Cir.** 1994) (enhancement applies to agency representative who embezzled funds).

With: United States v. Frazier, 53 F.3d 1105 (**10th Cir.** 1995) (enhancement does not apply to agency representative who illegally misapplied funds where he did not misrepresent his authority to act on behalf of the organization).

ISSUE 5: **Bankruptcy frauds**. Whether the fraud guideline enhancement for "violation of any judicial or administrative order, injunction, decree, or process" (§2F1.1(b)(4)(B)) applies to falsely completing bankruptcy schedules and forms.

Compare: United States v. Saacks, 131 F.3d 540 (**5th Cir.** 1997) (bankruptcy fraud implicates the violation of a judicial or administrative order or process within the meaning of §2F1.1(b)(3)(B)); United States v. Michalek, 54 F.3d 325 (**7th Cir.** 1995) (bankruptcy fraud a "special procedure"; it is a violation of a specific adjudicatory process); United States v. Lloyd, 947 F.2d 339 (**8th Cir.** 1991) (knowing concealment of assets in bankruptcy fraud violates "judicial process"); United States v. Welch, 103 F.3d 906 (**9th Cir.** 1996) (same); United States v. Messner, 107 F.3d 1448 (**10th Cir.** 1997) (same); United States v. Bellew, 35 F.3d 518 (**11th Cir.** 1994) (knowing concealment of assets during bankruptcy proceedings qualifies as a violation of a "judicial

order").

With: United States v. Shadduck, 112 F.3d 523 (**1st Cir.** 1997) (falsely filling out bankruptcy forms does not violate judicial process since the debtor is not accorded a position of trust).

ISSUE 6 §5K2.0 - Post-conviction rehabilitation departure. Whether sentencing courts may consider post-conviction rehabilitation, while in prison or on probation, as a basis for downward departure at resentencing following an appeal.

Compare: United States v. Rhodes, 145 F.3d 1375, 1379 (**D.C. Cir.** 1998) (post-conviction rehabilitation is not a prohibited factor and, therefore, sentencing courts may consider it as a possible ground for downward departure at resentencing); United States v. Core, 125 F.3d 74, 75 (**2d Cir.**1997) ("We find nothing in the pertinent statutes or the Sentencing Guidelines that prevents a sentencing judge from considering post-conviction rehabilitation in prison as a basis for departure if resentencing becomes necessary.") *cert. denied*, 118 S. Ct. 735 (1998); United States v. Sally, 116 F.3d 76, 80 (**3d Cir.** 1997) (holding that "post-offense rehabilitations efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure."); United States v. Rudolph, 190 F.3d 720, 723 (**6th Cir.** 1999); United States v. Green, 152 F.3d 1202, 1207 (**9th Cir.** 1998) (same). *See, also,* United States v. Brock, 108 F.3d 31 (**4th Cir.** 1997) (recognizing extraordinary post-offense rehabilitation as a basis for a downward departure.)

With: United States v. Sims, 174 F.3d 911(**8th Cir**. 1999) (district court lacks authority at resentencing following an appeal to depart on ground of post-conviction rehabilitation which occurred after the original sentencing; refuses to extend holding regarding departures for post-offense rehabilitation to conduct that occurs in prison; departure based on post-conviction conduct infringes on statutory authority of the Bureau of Prisons to grant good-time credits.)

ISSUE 7: Dismissed/uncharged conduct. Whether a court can base an upward departure on dismissed or uncharged conduct.

Compare: United States v. Figaro, 935 F.2d 4 (**1st Cir.** 1991) (allowing upward departure based on uncharged conduct); United States v. Kim, 896 F.2d 678 (**2d Cir.** 1990) (allowing upward departure based on related conduct that formed the basis of dismissed counts and based on prior similar misconduct not resulting in conviction); United States v. Baird, 109 F.3d 856 (**3d Cir.**), *cert. denied,* 118 S. Ct. 243 (1997) (allowing upward departure based on

dismissed counts if the conduct underlying the dismissed counts is related to the offense of conviction conduct; cites United States v. Watts, 519 U.S. 148 (1997)); United States v. Cross, 121 F.3d 234 (**6th Cir.** 1997) (allowing upward departure based on dismissed conduct; citing Watts); United States v. Ashburn, 38 F.3d 803 (**5th Cir.** 1994) (allowing upward departure based on dismissed conduct); United States v. Big Medicine, 73 F.3d 994 (**10th Cir.** 1995) (allowing departure based on uncharged conduct).

With: United States v. Ruffin, 997 F.2d 343 (**7th Cir.** 1993) (error to depart based on counts dismissed as part of plea agreement); United States v. Harris, 70 F.3d 1001 (**8th Cir.** 1995) (same); United States v. Faulkner, 952 F.2d 1066 (**9th Cir.** 1991) (court may not accept plea bargain and later consider dismissed charges for upward departure in sentencing); United States v. Castro-Cervantes, 927 F.2d 1079, 1081 (**9th Cir.** 1990) (same).

ISSUE 8: Possession/use of a firearm in another felony. Whether the firearms guideline enhancement for using or possessing a firearm in connection with another felony offense (§2K2.1(b)(5)) is applicable to a defendant convicted of a firearms possession or trafficking offense (*e.g.*, 18 U.S.C. § 922(g) (felon-in-possession)) who stole the firearm at issue in a burglary.

Compare: United States v. Armstead, 114 F.3d 504, 507 (**5th Cir.**), *cert. denied*, 118 S. Ct. 315 (1997) (holding that a contemporaneous robbery of the firearms in question could be treated as two separate offenses under the guidelines—a federal stealing-of-firearms, 18 U.S.C. § 922(u), and a state burglary offense—and that the state burglary offense could comprise the requisite "another felony" offense under §2K2.1(b)(5)). *See also* United States v. Luna, 165 F.3d 316 (**5th Cir.**), *cert. denied,* 119 S. Ct. 1783 (1999) (defendant convicted of 18 U.S.C. § 922(g) not subjected to impermissible double-counting when court enhanced offense level under §2K2.1(b)(5) for possessing firearms in connection with burglary in which he stole them and also under §2K2.1(b)(4)).

With: United States v. Sanders, 162 F.3d 396 (**6th Cir.** 1998) (erroneous for district court to have enhanced offense level under §2K2.1(b)(5) for defendant convicted of 18 U.S.C. § 922(g) in connection with burglary in which he stole the firearms because a logical reading of §2K2.1(b)(5) would at least require a finding of a separation of time between the offense of conviction and the other felony offense or a distinction of conduct between that occurring in the offense of conviction and the other felony offense).