Guideline Sentencing Update

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Determining the Sentence

"Safety Valve" Provision

Fourth, Fifth, Sixth, and Eighth Circuits hold that defendant has burden of providing information to government to qualify for §3553(f) departure. The Fourth Circuit defendant was denied a downward departure under 18 U.S.C. §3553(f) and USSG §5C1.2 because he never "truthfully provided to the Government all information and evidence" he had about the marijuana conspiracy he pled guilty to. He argued on appeal that he was entitled to the departure because he was ready to provide information, but the government never asked for it.

The appellate court disagreed and affirmed. "Section 3553(f)(5) requires more than accepting responsibility for one's own acts; rather, satisfaction of §3553(f)(5) requires a defendant to disclose all he knows concerning both his involvement and that of any co-conspirators." Even if the information would be of no use to the government, "§3553(f)(5) requires a defendant to 'truthfully *provide to the Government* all information . . . concerning the offense.' 18 U.S.C. §3553(f)(5) (emphasis added). We believe this plain and unambiguous language obligates defendants to demonstrate, through affirmative conduct, that they have supplied truthful information to the Government." *Accord U.S. v. Arrington*, 73 F.3d 144, 148–50 (7th Cir. 1996) [8 *GSU* #5]. *See also U.S. v. Wrenn*, 66 F.3d 1, 3 (1st Cir. 1995) (§3553(f) "contemplates an affirmative act of cooperation with the government") [8 *GSU* #1].

The court rejected defendant's contention that the burden should be on the government, finding that "such a construction is not supported by §3553(f)(5)'s plain language, and it would lead to an absurd result. Under Ivester's proffered construction, those defendants facing statutorily-mandated minimum sentences for drug convictions who were not approached and debriefed by the Government could qualify for the reduction even though they *never* provided the Government with any information. Ivester's construction of §3553(f)(5) would essentially obviate the requirement that defendants 'provide' information."

The court also rejected the claim "that our construction of §3553(f)(5) is illogical because it requires defendants to become government informants and, as such, renders redundant substantial assistance departures under §3553(e) or its companion sentencing guidelines provision, U.S.S.G. §5K1.1," agreeing with the Tenth Circuit that the substantial assistance provisions have different requirements and procedures. *See U.S. v. Acosta-Olivas*, 71 F.3d 375, 379 (10th Cir. 1995) [8 *GSU* #5]. *Accord U.S. v. Thompson*, No. 95-50162 (9th Cir. Apr. 17, 1996) (Nelson, J.) (affirmed: two provisions differ).

U.S. v. Ivester, 75 F.3d 182, 184–85 (4th Cir. 1996) (Hall, J., dissenting). *Cf. U.S. v. Thompson*, 76 F.3d 166, 168–71 (7th Cir. 1996) (rejecting government claim that defendant did not truthfully provide all information: defendant "suffered from a diminished capacity to understand complex situations" and had "a low level of cognitive functioning," but she "provided the government all information and evidence she had concerning the offense" and "was forthright within the range of her ability," thus satisfying §5C1.2(5)'s requirements).

The Eighth Circuit rejected a defendant's claim that he had provided enough information to warrant departure, agreeing with the cases cited above that the burden is on defendant to truthfully provide all information about the offense. "To satisfy §3553(f)(5), Romo was required to disclose all the information he possessed about his involvement in the crime and his chain of distribution, including the identities and participation of others. . . . Romo had the burden to show, through affirmative conduct, that he gave the Government truthful information and evidence about the relevant crimes before sentencing. . . . Although Romo gave the Government some limited information about his crime, the presentence report indicated Romo did not tell the Government the whole story about his role in the distribution chain and his gang's involvement."

U.S. v. Romo, 81 F.3d 84, – (8th Cir. 1996). *See also U.S. v. Thompson*, No. 95-50162 (9th Cir. Apr. 17, 1996) (Nelson, J.) (affirmed: "we hold that a defendant must give the Government all the information he has concerning the offense, including the source of his drugs, to avail himself of the benefit of §5C1.2").

The Sixth Circuit, citing *Ivester* and *Wrenn*, held that "defendant did not carry his burden of proving that he was eligible for sentencing below the prescribed mandatory minimum. . . . The defendant's statement that he gave the government 'all they asked,' if true, does not satisfy his burden of proof under §3553(f)(5) and §5C1.2(5). These provisions clearly require an affirmative act by the defendant truthfully disclosing all the information he possesses that concerns his offense or related offenses."

U.S. v. Adu, No. 95-1488 (6th Cir. Apr. 15, 1996) (Lively, J.).

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The Fifth Circuit also followed *Ivester* in holding that it was error to give defendant a §5C1.2 departure when he had made no effort to provide any information to the government. "Likewise, we conclude that the language of the safety valve provision indicates that the burden is on the defendant to provide the Government with all information and evidence regarding the offense. There is no indication that the Government must solicit the information. Further, the provision explains that if the information is not useful to the Government or if the Government is already aware of the information, the court is not precluded from finding that the defendant has sufficiently complied with subsection five, thus illustrating that the focus of subsection five is on the defendant's providing information, rather than on the Government's need for information."

U.S. v. Flanagan, 80 F.3d 143, 146–47 (5th Cir. 1996).

Eighth Circuit holds that defendant may not lie to government in interview and then satisfy §3553(f)(5) by admitting truth under cross-examination at sentencing hearing. Defendant, convicted on a cocaine conspiracy charge, had been arrested at an airport with a coconspirator who was posing as her husband. In an interview with the government after she pled guilty, defendant said that the man had posed as her husband (who was an airline employee) because he wanted her to obtain airline tickets available to airline employees and their families, but she denied that she had done so. At the sentencing hearing, however, the government produced several such tickets purchased by defendant and she admitted on cross-examination that she had obtained tickets on four occasions for the coconspirator, and that she lied to the government because she feared retribution from her employer. Although she otherwise qualified for a "safety valve" departure under 18 U.S.C. §3553(f), the district court sentenced her to the mandatory minimum after concluding she did not satisfy the requirement to truthfully provide all information to the government.

The appellate court affirmed, rejecting defendant's claim that "she provided all truthful information 'not later than the time of the sentencing hearing' under §3553(f)(5) because she admitted she provided [the coconspirator] with [employee] tickets at the sentencing hearing. Under Long's reading, defendants could deliberately mislead the government about material facts, yet retain eligibility for relief under §3553(f) by 'curing' their misstatement at the sentencing hearing. Although this would serve a sentencing court's interest in full disclosure for purposes of sentencing, we think Long overlooks the government's interest in full truthful disclosure when it interviews defendants. This interest is reflected in the text of §3553(f)(5) in the clause requiring the defendant's information be 'truthfully provided to the Government.' Only if Long had provided truthful information could the government have avoided the further investigation required to discover the airline ticket receipts."

U.S. v. Long, 77 F.3d 1060, 1062 (8th Cir. 1996) (per curiam).

Third Circuit holds that the safety valve provision cannot be applied to 21 U.S.C. §860, the "schoolyard" statute. Defendant was convicted on several drug charges, including four counts of distribution within 1,000 feet of a school, 21 U.S.C. §860. Defendant qualified for a safety valve departure on some of the drug counts, but the district court ruled that 18 U.S.C. §3553(f) could not be applied to §860 and sentenced defendant to a five-year mandatory minimum sentence. Defendant appealed, arguing that §860 is not a substantive offense but merely an enhancement of the penalty for §841, to which the safety valve provision may be applied.

The appellate court rejected defendant's argument and affirmed the sentence. "By its terms, 18 U.S.C. §3553(f) applies only to convictions under 21 U.S.C. §§841, 844, 846, 961 and 963. Section 860 is not one of the enumerated sections. It is a canon of statutory construction that the inclusion of certain provisions implies the exclusion of others. . . . In clear and unambiguous language, . . . 18 U.S.C. §3553(f) does not apply to convictions under 21 U.S.C. §860, the 'schoolyard' statute." The court also held that "§860 is a separate substantive offense, not a sentence enhancement provision. . . . [T]he language of the statute specifies §860 is a separate offense. Although §860 refers to §841, . . . it requires a separate and distinct element—distribution within 1,000 feet of a school. Distribution within 1,000 feet of a school must be charged and proven beyond a reasonable doubt in order to obtain a conviction under §860."

U.S. v. McQuilkin, 78 F.3d 105, 108–09 (3d Cir. 1996).

See *Outline* generally at V.F for all cases above.

Criminal History

Career Offender Provision

Seventh and Tenth Circuits hold that amendment to definition of "Offense Statutory Maximum" conflicts with statute; Ninth Circuit upholds amendment. The Tenth Circuit defendant was sentenced in 1989 as a career offender to 262 months. The maximum sentence he could have received under 21 U.S.C. §841(b)(1)(C) was 30 years because he had a prior felony drug conviction; without that enhancement the maximum was 20 years. For defendant's Offense Statutory Maximum under §4B1.1, the court used the 30-year maximum sentence. Effective Nov. 1, 1994, Amendment 506 redefined Offense Statutory Maximum as "not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record," such as the one defendant received under

§841(b)(1)(C). *See* §4B1.1, comment. (n.2). Under the amendment, which was made retroactive, defendant's Offense Statutory Maximum would have been 20 years and his offense level reduced from 34 to 32. He filed a motion to be resentenced under the amendment, but the district court held that Amendment 506 "clearly conflicts" with 28 U.S.C. §994(h) and denied the motion.

The appellate court upheld the district court's conclusion. "We are compelled by the clear directive of §994(h) to hold that Amendment 506 is inconsistent with that statute, and is therefore invalid as beyond the scope of the Commission's authority delegated to it by Congress. . . . The statute directs the Commission to assure that the guidelines specify a sentence 'at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and [has been convicted of a crime of violence or enumerated drug offense and has two such prior convictions].' . . . Because the 'maximum term authorized' for categories of defendants in which the defendant has two prior qualifying felony convictions is necessarily the enhanced statutory maximum, we find no ambiguity in the statute. It would make no sense for the statute to require the 'maximum term authorized' to be considered in the context of defendants with two or more prior qualifying felony convictions unless it was intended that that phrase mean the enhanced sentence resulting from such a pattern of recidivism. . . . Under the reading urged by Novey, §994(h) would provide that qualifying recidivist violent felons or drug offenders would only receive sentences at or near the maximum term authorized for defendants without such prior criminal history—that is, the unenhanced maximum. This would negate those provisions in 21 U.S.C. §841(b)(1)(A)–(D) which clearly provide that qualifying recidivist criminals may receive penalties substantially above the maximum penalties authorized for first-time offenders of the same offense. We cannot agree that by expressing an intent to punish repeat drug offenders 'at or near the maximum term authorized,' Congress in fact intended that express statutory sentence enhancements for qualifying recidivist offenders be disregarded."

"In holding that Amendment 506 is invalid, we recognize that we stand in disagreement not only with the Commission, but with the only other appellate court to address the issue. *See U.S. v. LaBonte,* 70 F.3d 1396, 1400 (1st Cir. 1995) ("Although the call is close, we hold that Amendment 506 is a reasonable implementation of the statutory mandate.")" [8 *GSU* #4].

U.S. v. Novey, 78 F.3d 1483, 1487–91 (10th Cir. 1996).

A few days after *Novey* was decided, the Seventh Circuit also invalidated Amendment 506 and held that "Offense Statutory Maximum" includes enhancements. "A pragmatic reading of section 994(h) thus leads us to this conclusion: When Congress directed the Sentencing Commission to provide for sentences 'at or near the maximum term authorized' for persons who qualify as career offenders, it meant the highest penalty for which a given defendant is eligible. For a person who is subject to the enhanced statutory penalties due to her prior convictions and the filing of a section 851(a) notice, that is the enhanced maximum. . . . To treat the unenhanced statutory maximum as the maximum term authorized for purposes of section 994(h), even when the defendant is eligible for a higher penalty, ignores the common meaning of the word 'maximum,' abrogates the enhanced maximums Congress has provided for in statutes like section 841(b), and, we are convinced, underestimates the severity of the penalties Congress had in mind for these defendants."

U.S. v. Hernandez, 79 F.3d 584, 595–601 (7th Cir. 1996).

The defendant in the Ninth Circuit was sentenced under Amendment 506 and the government appealed. The appellate court affirmed and, agreeing with the conclusion of the First Circuit in *LaBonte,* held that Amendment 506 was valid. "Plainly the words 'at or near' create a range in which the Commission is free to act. If Congress intended all sentences to be at the maximum it could have said so. Congress specified that it was for the Commission to determine by the Guidelines whether the term of imprisonment should be at the maximum or near it and to do so in terms of categories of defendants, not in terms of enhancements for particular defendants. . . . The legislative history of [§994(h)] suggests that the phrase 'maximum term authorized' should be construed as the maximum term authorized by statute. . . . Application Note 2, added to §4B1.1 of the Guidelines, accurately carries out the intention of Congress. It is not for the Department of Justice nor for this court to deny the Commission's carrying out of its statutory function in this way."

U.S. v. Dunn, 80 F.3d 402, 404–05 (9th Cir. 1996) (Rymer, J., dissenting).

See *Outline* at IV.B.3.

Departures

Aggravating Circumstances

First Circuit holds that attempt to hide assets to avoid restitution may warrant departure. Defendant was convicted of interstate theft offenses and received a §3C1.1 enhancement for perjury. The district court also departed upward two levels because "after conviction but before sentence [defendant] created an irrevocable trust for his six year old daughter and transferred to it, without consideration, his real estate and business assets. The trial judge found after a hearing at which [defendant] testified that the purpose of the transfer was to frustrate collection of a likely fine or restitution and that [defendant] himself regarded the trust as 'a sham.'"

The appellate court affirmed. Although defendant argued that the purpose of the trust was simply to provide for his daughter, the evidence showed that he "created the trust shortly after his wife had been ordered to pay over $400,000 in restitution; that [he] had been warned by his lawyer that the trust might be viewed as an attempt to avoid payment of restitution or fines; and that [he] intended to return to operate his business after release and expected to be able to use the real estate as well. . . . [T]he attempt to frustrate a fine or restitution order is a permissible basis for a departure."

The court also concluded that, although an "attempt to frustrate the actual or anticipated judgment by secreting assets is closely akin to obstruction of justice," the fact that defendant had already received an obstruction enhancement did not make departure for additional obstructive conduct double counting. "Here, [defendant]'s attempt to frustrate restitution was not just additional perjury but a new and different act of misbehavior with a different victim; and the sum of the two is greater than either standing alone. Even if both are treated as forms of obstruction and are within section 3C1.1—a matter we need not decide—section 5K2.0 permits departure for an aggravating circumstance 'of a kind, *or to a degree*, not adequately' considered by the guidelines."

U.S. v. Black, 78 F.3d 1, 5–6 (1st Cir. 1996).

See *Outline* at VI.B.1.h.

Mitigating Circumstances

First Circuit holds that "lesser harms" provision, §5K2.11, may allow departure despite §5H1.4's prohibition on considering drug dependence or abuse. Defendant, a 50-year-old farmer, was sentenced to 70 months for manufacturing marijuana. The evidence showed that defendant had suffered from severe depression for 30 years, that the depression made him suicidal, that medication was either ineffective or made him ill, and that, on a doctor's advice, he tried marijuana and found that it helped his depression and kept him from feeling suicidal. When defendant was released from custody pending sentencing on the condition that he not use marijuana, he became depressed and suicidal. He was admitted to a medical center for treatment and therapy and was given medication that worked. He testified at sentencing that "the only reason I used marijuana was to keep from being suicidal, and that now that I have found a proper medication that really works . . . I don't believe that I would ever be tempted . . . in breaking the law to treat my depression." The district court found that defendant's story was credible and wanted to depart under §5K2.11, but concluded it could not because of §5H1.4's prohibition of departures for "[d]rug or alcohol dependence or abuse."

The appellate court disagreed and remanded. "We hold that a district court has authority to consider a downward departure under section 5K2.11, *provided there is an appropriate factual predicate*, even if that predicate subsumes particular facts that would be precluded by section 5H1.4 from forming a basis for departure. . . . Section 5K2.11 provides that '[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted.' U.S.S.G. §5K2.11, p.s. Here, where the record clearly demonstrates that the alternative to Carvell's marijuana use might well have been the taking of his own life, the interest in punishment or deterrence of drug 'manufacturing' could reasonably be thought to be reduced. In contrast, in the ordinary drug dependence case, it is difficult to see how that limitation in section 5K2.11 could be avoided. . . . This is not a case where the defendant's drug dependence is the very element driving the applicability of the 'lesser harms' provision. The risk of suicide for Carvell was not a byproduct of his drug dependence: the district court credited Carvell's testimony that fear he would take his own life led him to use drugs, not vice versa. The avoidance of suicide, not drug use, drives the 'lesser harms' analysis here."

U.S. v. Carvell, 74 F.3d 8, 9–12 (1st Cir. 1996).

See *Outline* at VI.C.2.a and 5.d.

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