VAIRA & RILEY, P.C.

THE RELIABLE SOURCE

A NEWSLETTER OF FEDERAL CRIMINAL PRACTICE IN THE EASTERN DISTRICT

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The firm of VAIRA & RILEY takes pride in announcing that ***Jack L. Gruenstein*** *has joined the firm as a shareholder. Mr. Gruenstein graduated from Temple University in 1973 and from Temple School of Law, cum laude, in 1976. He also served for four years in the United States Air Force and attained the rank of Sergeant. Mr. Gruenstein had been in private practice in his own office since 1982. He has tried over 40 jury trials and at least that number of non-jury trials in both the civil and criminal area. Mr. Gruenstein will handle both civil and criminal matters for VAIRA & RILEY.*

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SENTENCING REPORTS

The Reliable Source follows Eastern District sentencing proceedings which are generally not reported in published opinions. The departures and adjustments information is derived from personal contacts with practitioners and is offered as a guide for formulating arguments in similar situations.

Obstruction of Justice Allegation Defeated and Departures Granted

Contact: Gilbert J. Scutti (215) 568-5300

United States v . Haefele, 00-CR-595
Judges Anita B. Brody and Harvey Bartle, III

The defendant was arrested in 1999 on charges that he had distributed two gallons of P2P. He was released on bail, entered into a plea agreement, and began to cooperate. His cooperation was not subject to either immunity or an agreement that the information provided would not be used against him (pursuant to 1B1.8(a)). As a result, the information provided by the defendant increased his offense level by four to a 38. The Government then took the position that the defendant had not been entirely truthful in his debriefings and was in violation of his plea agreement. He was rearrested and detained. A second indictment was issued charging him with two counts of Money Laundering, pursuant to 18 U.S.C. 1956(h) and 1956(a)(1)(B)(i), and two counts of Distribution of Methamphetamine, pursuant to 21 U.S.C. 841(a)(1) and 841(b)(1)(A). After the defendant pled guilty in the first case, his attorney passed away and Mr. Scutti was retained.

The PSI in the first case placed the defendant at a level 40, after a two-point enhancement for obstruction of justice. The defense successfully argued for a two-point safety valve reduction, but the probation officer refused to recommend the usual three-point reduction for acceptance of responsibility or reverse his decision on the two-point enhancement for obstruction of justice. The defense

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argued against the five-point swing on several grounds. First, the defendant did not obstruct justice because the Government already had the information he supposedly withheld and the alleged obstruction did not take place in the investigation or prosecution at issue. The defense also asserted that an alleged obstruction during a proffer was markedly different from the obstructive efforts denounced in cases where a defendant lied under oath at trial or grand jury proceeding. *See United States v. Powell*, 113 F.3d 464 (3d Cir. 1997).

Eventually, the Government stipulated that the defendant's case presented "extraordinary circumstances" and moved for departure pursuant to § 3E1.1, Application Note 4, even though he had allegedly obstructed justice. The adjusted offense level for sentencing was calculated at 35 with a guideline range of 168 to 268 months. The government filed a 5K1 motion (which listed both his cooperation and alleged obstruction). Judge Brody departed and sentenced the defendant to 102 months.

The second case was reassigned to Judge Bartle for the guilty plea and sentencing. The PSI calculated his base offense level at 34 and added two points for obstruction of justice. This time, credit for acceptance of responsibility was given. The defense argued, pursuant to 5K2.0, that the obstruction adjustment should not be applied because the Government's determination that the defendant had breached his plea agreement had already harmed him in at least the following ways:

> It led to his re-arrest and detention;
>
> It resulted in a second indictment with new charges;
>
> It lead to a proposed five-point upward adjustment in the PSI in the first case;
>
> It resulted in a less than enthusiastic 5K motion in the first case;
>
> It most likely resulted in a longer sentence than what would have otherwise been imposed.

The Court ruled that the obstruction had already been assessed in the first case and refused to add it in the second case. The defendant faced a maximum sentence of life imprisonment with a ten year minimum term of imprisonment. Pursuant to a 5K1 motion, which again detailed both the cooperation and obstruction allegations, Judge Bartle departed and sentenced the defendant to 60 months to run concurrently with the first sentence.

This case clearly demonstrates the importance of securing protection pursuant to U.S.S.G. 1B1.8(a) for cooperative efforts. It is also an example of the coexistence of an upward adjustment for obstruction and a downward departure for acceptance of responsibility in the same case. In addition, the Court recognized that the obstruction of justice adjustment in the first case should not be re-factored into the second. v

Departure Granted at Third Sentencing After Two Reversals

Contact: Eric Sitarchuk (215) 864-8220

United States v. Morley, 97-CR-430-2
Judge R. Barclay Surrick

The defendant and his co-conspirators, several cousins and an attorney, were involved in a scheme to falsify a will. The fraudulent proceeds were divided among the defendants. The defendant was charged with Conspiracy, 18 U.S.C. 371; Mail Fraud, 18 U.S.C. 1341; Wire Fraud, 18 U.S.C. 1343; and Aiding and Abetting, 18 U.S.C. 2.

The case went to trial in 1998, before Judge Robert F. Kelly. The defendant was convicted in September 1998 and sentenced to 42 months imprisonment. After filing a notice of appeal in October 1998, the defendant was released on bail. In December 1999, the Third Circuit vacated the conviction due to an evidentiary error and remanded the case to the District Court for a new trial. The defendant pled guilty in April 2000 and was sentenced by Judge Kelly to 38 months imprisonment. However, in the plea agreement, the Government had stipulated to a 24 to 30 month sentence. The defense appealed the judgment on the grounds of a breach of the plea agreement. The defendant was released on bail in July 2000 pending his appeal. The Third Circuit again reversed the judgment and remanded the case for resentencing. The case was reassigned to Judge Surrick.

The defense filed a motion for downward departure based on two grounds. First, the defense argued that another sentence of imprisonment would result in extraordinary circumstances of reincarceration. Since the defendant had already been sentenced twice, and had been incarcerated and released twice due to the Government's mistakes and the subsequent reversals by the Circuit Court, the impact of reincarceration on the defendant and his family would be extraordinary. The second ground for departure requested was based on an extraordinary combination of circumstances: the extraordinary impact of his reincarceration and his charitable works in the community, especially with programs for alcoholics.

The Government strongly opposed all of the departures. Judge Surrick granted the defense's motion for departure and sentenced the defendant to time served, a total of approximately 12_ months, and $1,899,838 in restitution to be paid joint and severally with the codefendants. v

Departure for Voluntary Disclosure and Post Offense Rehabilitation

Contact: Robert J. Donatoni (610) 719-0500

United States v . O'Brien, 01-CR-584
Judge William H. Yohn, Jr.

The defendant submitted in excess of sixty false loan applications to several banks totaling $1.6 million for office equipment leasing agreements where no such agreements existed and the defendant was pocketing the proceeds. The defendant used information from former clients to obtain the fraudulent loans. The defendant made installment payments on the leases until January 2001, when one of the banks discovered that one of the leases submitted by the defendant was fraudulent. The bank contacted the defendant concerning the situation. After meeting with his counsel, the defendant made the decision to voluntarily disclose his conduct to federal authorities.

Before any government investigation, the defendant contacted the U. S. Attorney's Office and voluntarily disclosed his offenses. At the time of his disclosure, there was no indication that the other fraudulent leases would have been discovered or that the discovery of the offenses was imminent. A one-count information was filed, charging the defendant with Bank Fraud in violation of 18 U.S.C. 1344.

The defendant entered a guilty plea. The defendant's base offense was calculated at 6, with an eleven-level enhancement for the total loss calculation, a two-level enhancement for more than minimal planning, and a four-level enhancement because the defendant derived more than $1 million in gross receipts from financial institutions. The adjusted offense level of 23 was increased one level pursuant to § 2F1.1(b)(8)(B) for the amount of the loss (this section was deleted in the November 2001 guideline revisions). After a three-level reduction for acceptance of responsibility, the final offense level was 21. The defendant had a criminal history category of 1, resulting in a guideline range of 37 to 46 months.

The defense moved for departure on several grounds. A 5K2.16 (Voluntary Disclosure of Offense) departure was requested because the defendant voluntarily disclosed all of the fraudulent leases to the federal authorities after he was contacted by the bank concerning the one forged lease. There had been no suggestion by bank officials that any internal audit of other leases would be conducted or that any report or disclosure would be made to any law enforcement agency. The defendant was only told that the forged lease would not be approved or honored. The defense also moved for a departure pursuant to *United States v . Sally*, 116 F.3d 76 (3d Cir. 1997) for post disclosure and post conviction rehabilitation efforts. The defense asserted that, following his disclosure, the defendant had demonstrated his work ethic and desire to rehabilitate himself by obtaining a position at a mortgage company in Charlotte, North Carolina. The defendant had moved to North Carolina because his chances of finding employment were better. The defendant also paid back almost $650,000 in principal and approximately $500,000 in interest to the victim banks. The defense also presented grounds for departure based on all of the separate factors considered in the aggregate, even if the separate factors supporting a downward departure were legally insufficient standing alone.

The Government took the position in its sentencing memorandum that while the defendant might have qualified for a departure pursuant to either 5K2.16 or 5K2.0, only a one level departure was warranted. The Court departed four levels and sentenced the defendant to 24 months incarceration, restitution of $1,025,107, and 5 years probation. v

Unattributable Gun Saves Safety Valve, Sally Departure Denied

Contact: David M. Kozlow (215) 928-1100

United States v . Hernandez, 00-CR-729-2
Judge Marvin Katz

The defendant was indicted in December 2000 for his involvement in a drug ring. Several years prior to the indictment, an investigation had been conducted, including executed search warrants and a cooperating individual who had recorded the defendant's conversations. As a result, drugs were found at the defendant's house, at the business of a codefendant, and at a "stash" house. The defendant pled guilty to one count of Conspiracy to Distribute and Possess with Intent to Distribute More than 500 Grams of Cocaine, pursuant to 21 U.S.C. 846.

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During the execution of the search warrant, a gun was uncovered at the stash house, while the box for the gun was found at the defendant's house. After the defendant's guilty plea, the issue of whether the gun was attributable to the defendant was litigated. Had the gun been attributable to the defendant, he would have been ineligible for a safety valve reduction. The defense asserted that the gun belonged to a deceased coconspirator who had lived at the stash house and had tried to sell the gun to the defendant. The Court accepted the defense's argument and ruled that there was insufficient evidence to attribute the gun to the defendant and granted the safety valve reduction, pursuant to § 5C1.2

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As the codefendant in the case had already cooperated against the defendant, there was no possibility of a 5K1 departure for cooperation assistance. The defense filed a motion for downward departure pursuant to *United States v . Sally*, 116 F.3d 76 (3d Cir. 1997) for post offense rehabilitation and the Government opposed the motion. Judge Katz denied the motion for departure and sentenced the defendant to 37 months imprisonment and 4 years probation. v

First Time /3553(e) Filed With 5K1 in a Financial Case

Contact: David Poplar (856) 227-5575

United States v . Feliz, 99-CR-679
Judge Ronald L. Buckwalter

The defendant was involved in passing an $80,000 bad check. The government seized $21,838 preserved in a bank and tracked the rest of the $80,000 through other transactions. The defendant pled guilty to one count of Bank Fraud pursuant to 18 U.S.C. 1344 and one count of Uttering and Possessing a Counterfeit Security pursuant to 18 U.S.C. 513(a). The base offense level was 6, with a six-level enhancement for the amount of the fraud, a two-level enhancement for more than minimal planning, and a two-level reduction for acceptance of responsibility. The final offense level of 12, combined with a criminal history category of 1, resulted in a guideline range of 10 to 16 months imprisonment.

The offense to which the defendant pled guilty is a Class B felony. Probation is not available for a Class B felony pursuant to 18 U.S.C 3561 and U.S.S.G. 5B1.1(b)(1), which set a statutory minimum sentence by precluding probation.

The government initially only filed a 5K1 motion for substantial assistance, the details of which are under seal. The defense argued that the government could move for an additional departure below the statutory minimum pursuant to 18 U.S.C. 3553(e). The defense cited *United States v . Daiagi 892 F.2d 31 (4th Cir. 1989)*, wherein the court of appeals held that § 3553(e) could empower the district judge to grant probation for a Class A or Class B felony despite the prohibition of § 3561(a)(1). The Fourth Circuit ruled that preclusion of probation for Class A and B felonies constituted a statutory minimum sentence.

Although the § 3553(e) departure was not stipulated to in the plea agreement, the government filed a motion pursuant to § 3553(e) in addition to the 5K1 motion. While this type of departure has frequently been used in drug related crimes, this is the first time that such a motion has been filed by the U.S. Attorney's Office in the Eastern District in a financial crime case. The Court departed below the statutory minimum, sentencing the defendant to 5 years probation and payment in restitution of the remaining $58,161 which had not been seized in the bank. v

Departure Granted to Rehabilitated Defendant in Chop Shop Conspiracy

Contact: Jack L. Gruenstein (215) 751-2700

United States v . Parkinson, 99-CR-524-25
Judge Robert F. Kelly

In March 1997, while working at a chop shop, the defendant was arrested on a state charge of car theft. He was released on bail. The defendant then voluntarily disassociated himself from the chop shop and pled guilty to the car theft. He was sentenced in August 1998 to 11_ to 23 months incarceration. The defendant served his state sentence without incident and was released in late summer 1999. The defendant held legitimate jobs after his release.

Subsequently, in September 1999, the defendant was federally indicted in this case for his role in the chop shop conspiracy. The defendant learned of the federal indictment from family members who had seen his picture on a television news program when the indictments were returned. The defendant immediately called the FBI and arranged his own surrender on September 3, 1999. He was released on bail and placed on house arrest ten days later.

The defendant was charged with Conspiracy to Operate and Conduct Operations in a Chop Shop, Removal of Vehicle Identification Numbers, and Possession of Vehicles with Altered Identification Numbers With Intent to Sell, pursuant to 18 U.S.C. 371; Operating and Conducting a Chop Shop, pursuant to 18 U.S.C. 2322(a); and Aiding and Abetting, pursuant to 18 U.S.C. 2. Thirty-one individuals were indicted for participating during varying periods of time in the chop shop conspiracy. The defendant pled guilty to the conspiracy and aiding and abetting counts.

Due to his prior record, the defendant's criminal history category was calculated at 4. The offense level was calculated at 15, with 30 to 37 months imprisonment. The government filed a 5K1 motion for downward departure. The defense did not file a separate motion for departure, but argued for further downward departure in its sentencing memorandum based on assertions that the defendant had voluntarily left the conspiracy, cooperated with authorities, and turned around his life.

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The conspiracy had begun in January 1991 and ended in August 1999. The defendant had participated in the conspiracy from 1996 until the fall of 1997. The defense also argued that the defendant played a minor role in the conspiracy. The Government assessed his culpability at a level 2 out of a possible 10, lower than all but three of the thirty other coconspirators. The defense asserted that because the defendant played a minor role in the offense, a two-level reduction pursuant to U.S.S.G. § 3B1.2 was appropriate.

In addition to the 5K1, the defense requested a departure from the guidelines to a sentence of probation, or in the alternative, house arrest. The request was based upon a combination of factors:

> The defendant posed little risk, if any, of future criminal conduct;
>
> The defendant had changed his lifestyle and had maintained law abiding conduct since March 1997;
>
> The defendant voluntarily disassociated himself from the conspiracy; and
>
> The defendant demonstrated his acceptance of responsibility with his self-surrender and willingness to cooperate.

The Court departed based on the Government's 5K1 motion and the defense's argument that the defendant played a minor role. Judge Kelly sentenced the defendant to 6 months community confinement and 6 months house arrest, both with work release, followed by 5 years probation and 150 hours of community service. v

5K1 Departure Still Granted After Defendant Left Country for Five Year

Contact: Lisa Chanow Dykstra (215) 988-2614

United States v. Lantigua, 94-CR-218-29
Judge Anita B. Brody

The defendant was indicted in 1994 as part of a thirty-plus person drug conspiracy and charged with Conspiracy to Distribute in Excess of Five Kilograms of Cocaine, pursuant to 21 U.S.C. 846. The defendant cooperated with the government and pled guilty in January 1995. The government split the coconspirators into varying levels of culpability, with the defendant falling in the lowest range. The defendant had no prior background and his guideline range for the offense was 6 to 7 years imprisonment. The government agreed to file a 5K1 motion on the defendant's behalf.

Shortly after his plea, while on bail, the defendant left the country and traveled to the Dominican Republic because his mother was dying. He did not receive permission from pretrial services prior to leaving and only later contacted pretrial services from the Dominican Republic to inform them that he had left. The defendant remained out of the country for more than 5 years. He reentered the country in the summer of 2001 and immediately surrendered at his point of entry in Arizona.

The government requested a two-point enhancement in the PSI for obstruction of justice because he had left the country, but still filed the 5K1 motion, which had been promised to the defendant 5 years earlier. Judge Brody granted both the upward enhancement and the downward departure, sentencing the defendant to 13 months imprisonment. v

Departure Granted for Extraordinary Family Ties and Responsibilities

Contact: Gerald A. Stein (215) 665-1130

United States v . Simon, 01-CR-356
Judge Patrese B. Tucker

The defendant submitted fraudulent claims to an insurance company for payment of medical expenses that were not rendered. The false claims were filed on behalf of her husband, who is severely afflicted with Muscular Sclerosis (MS). The defendant was charged with one count of Mail Fraud, pursuant to 18 U.S.C. 1341. The defendant pled guilty to the offense. Her offense level was calculated at 13 and her criminal history category at 1, resulting in a guideline range of 12 to 18 months imprisonment.

The defendant is responsible for the care of her infirm husband who was diagnosed with MS in 1982. The husband is totally incapacitated and requires assistance nearly 24 hours per day. While attendants assist with the husband's care, the defendant is responsible for all attendant arrangements and, if an attendant is not available, the defendant must perform the extensive daily care routine for her husband on her own. There are no alternate caregivers that can both provide and supervise the level of care provided by the defendant. The defendant is employed as a real estate salesperson and must work up to seven days per week on an irregular hourly schedule to maintain her income level. The cost of the in-home attendant services is only partially reimbursed through charitable sources, and the defendant's income is absolutely necessary to fill the gap in paying for her husband's essential care. The defendant's income is also necessary to cover uninsured medication expenses.

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The defense filed a motion for downward departure, pursuant to §§ 5K2.0 and 5H1.6, for extraordinary family ties and responsibilities. The defense argued that incarceration of the defendant would make it impossible for her husband to remain at home and be adequately cared for. The loss of the defendant's income would result in loss of the home and no one would be available to replace the defendant's functions as caregiver, supervisor, and administrator. Judge Tucker granted the motion and departed to 5 years probation and $180,093 in restitution, to be paid in approximately $50 monthly installments. v

Guideline Reduction and Substantial 5K1 Due to Cooperation

Contacts: Christopher D. Warren (215) 546-2604
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United States v . Hudicek, 00-CR-516
Judge Edmund V. Ludwig

The defendant acted as a fence for stolen weapons, prescription drugs, vehicles, and vehicle parts. He was charged with Possession of Firearms by a Convicted Felon, 18 U.S.C. 922(g)(1); Conspiracy to Possess with Intent to Distribute Controlled Substances, 21 U.S.C. 846; Operating a Chop Shop, 18 U.S.C. 2322(a)(1); Interstate Transportation of Stolen Vehicles, 18 U.S.C. 2312; and Aiding and Abetting, 18 U.S.C. 2. The defendant pled guilty and cooperated with the Government. He had a criminal history category of 6 and a stipulated offense level of 28, resulting in a guideline range of 140 to 175 months.

The AUSA recognized the defendant as an intelligent individual and selected him as one of the most significant cooperators from the group of more than 30 other codefendants from the related crime ring and offered him a 5K1 departure. After the plea, the defendant became concerned about his guideline range and wanted a guarantee on his post-departure sentence, which raised issues between the defendant and his counsel at that time, Mr. Warren. Counsel withdrew from the case due to concerns that the defendant could jeopardize his 5K1 by demanding a guarantee of his ultimate sentence and the conflict that had been raised between counsel and the defendant.

Mr. Scuderi was ultimately retained for sentencing. At sentencing, counsel expressed the defendant's concerns about his potential guideline range to the Judge and the AUSA. The defendant had previously been incarcerated and was concerned that too long of a sentence would jeopardize his familial relationships. The AUSA took the defendant's concerns into consideration in light of his significant cooperative efforts. The Government stipulated to an acceptable lower range in conjunction with a substantial 5K1 departure recommendation. Judge Ludwig departed and sentenced the defendant to 60 months imprisonment, 3 years probation, and restitution in the sum of $35,900. v

Charges Split and Departure Granted in Tax Case

Contact: Creed C. Black, Jr. (215) 564-4060

United States v . Galperin, 01-CR-495-2
Judge R. Barclay Surrick

The defendant was one of five shareholders of a corporation which owned a market in Roebling, New Jersey. Charges stemmed from an IRS investigation of $400,000 worth of manufacturer's coupons wrongfully submitted by the market. The defendant, as a shareholder, received cash compensation from the redemption of the coupons. He failed to report the compensation on his federal income tax reports. The actual tax loss to the government during the years 1994-1998 was calculated at $17,537 based on IRS audit forms and amended returns.

The defendant was charged with two counts of Tax Evasion, pursuant to 26 U.S.C. 7201. The defendant stipulated in the plea agreement to a combined tax loss to the government of more than $13,500, but less than $23,500. The offense level under the tax table, U.S.S.G. § 2T4.1, was calculated at 11. A two-level enhancement, pursuant to U.S.S.C. § 2T1.1(b)(1), was added because some portion of the omitted income represented cash. A two-level reduction for acceptance of responsibility resulted in a final adjusted offense level of 11. The offense falls within Zone C, with 8 to 14 months imprisonment.

Prior to pleading guilty, the defendant admitted his wrongdoing, admitted the amounts of his unreported income, proffered his cooperation in the investigation, and provided the government with information on several unrelated matters. The defendant entered into a plea agreement on May 3, 2001. On May 19, 2001, before the filing of the Information and the entry of a guilty plea, the defendant paid a total of $46,583 in back taxes, interest, and penalties in full to the IRS. The defendant also agreed to file amended tax returns with the IRS prior to sentencing.

The defense moved for downward departure on several grounds: extraordinary acceptance of responsibility pursuant to *United States. v . Lieberman*, 971 F.2d 989 (3d Cir. 1992); § 5H1.5 for atypical employment record; and a combination of both of those factors, which removed the case from the heartland pursuant to § 5K2.0. The acceptance of responsibility departure argument was based on the defendant's full repayment of all taxes before he was charged and the disclosure that he had received $60,000 in cash compensation, for which the government only had indirect proof. The defense also argued atypical employment circumstances as grounds for departure because any guidelines sentence would jeopardize the company he managed, the jobs of its thirty-five employees, and the financial well-being of his family. The Court granted the defense's motion for departure and sentenced the defendant to 36 months probation with 6 months home detention with monitoring, in conjunction with his payment of the back taxes and penalties.

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The defendant's father was charged with mail fraud for his role in the falsely submitted coupon activities. The government decided to divide the charges of tax evasion and mail fraud between the defendant and his father, as opposed to grouping the charges against both defendants, which would have carried significantly higher guidelines. The defendant's father was granted a 5K2.0 departure on the basis of health and age, 85. The Court departed from a maximum of 10 years imprisonment and sentenced him to 48 months probation with 6 months home detention monitoring and $400,000 in restitution. v

Brothers Charged with Bankruptcy Fraud

Contacts: Howard Bruce Klein (215) 972-1411
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United States v . Freedman, 01-CR-301
Judge Patrese B. Tucker

Two of three brothers charged were named the debtors in possession of a collapsed phone company and the third was an employee of the company. The company's carrier shut off their service and customers were no longer able to get a dial tone and stopped paying their bills.

One of the brothers, represented by Mr. Klein, had been named as a debtor in possession of the collapsed company. He was charged with Bankruptcy Fraud pursuant to 18 U.S.C. 157(3) for taking money from the defunct company for his own personal use. He pled guilty and both the defense and the government stipulated in the plea agreement to make no motions for departure, upward or downward. The plea agreements for all three defendants mirrored each other, including the stipulation to not move for departure. The defendant was in Zone C and the guidelines dictate that confinement in a halfway house is not available for offenders in Zone C. While the probation office cannot take the position to recommend a halfway house, *see United States v . Serafini*, 233 F3.d 758 (3d Cir. 2000), a judge can recommend halfway house confinement for defendants in Zone C. The defense presented this information to the Court. Judge Tucker made the recommendation and the defendant was placed in a halfway house for 5 months and then 5 months home detention with work leave.

Another brother, represented by Mr. Bennedetti, was an employee of the bankrupt company. After customers stopped paying their bills, the defendant attempted to negotiate with customers for some money for the unpaid bills. The defendant directed one customer to send in a $1,000 check payable directly to himself, instead of remitting it to the company. He was charged with Unlawful Retention and Conversion of Bankruptcy Estate Funds pursuant to 18 U.S.C. 645. The defendant pled guilty and his offense level was calculated at 8 with a criminal history category at 1, placing him in Zone A with 0 to 5 years imprisonment and a maximum fine of $5,000. Judge Tucker sentenced the defendant to 2 years probation and the maximum fine. v

Severe Vision Impairment Not Grounds for Departure

Contact: Douglas P. Earl (215) 627-5970

United States v . Forster, 95-CR-322
Judge Anita B. Brody

The defendant pled guilty to one count of Wire Fraud, pursuant to 18 U.S.C. 1343, and one count of Aiding and Abetting, pursuant to 18 U.S.C. 2, for his involvement in fraudulent loan activities. The defense filed a 5H1.4 motion for departure due to extraordinary physical impairment. The departure motion was based on the grounds that the defendant, aged 73, had severely impaired vision which was not fully correctable and had undergone quadruple bypass surgery within the previous two years. The Government argued that there are blind individuals in prison and the defendant's health problems did not warrant a downward departure. The motion was denied and the defendant was sentenced to the statutory minimum of 15 months, to be served in a medical detention facility and restitution of $75,000. v

Departure Granted in Counterfeit Merchandise Case

Contact: Peter C. Bowers (215) 440-0300

United States v . Bang, 01-CR-350-2
Judge Jay C. Waldman

The defendant was charged with Conspiracy to Traffic in Counterfeit Trademarked Merchandise, 18 U.S.C. 371; Attempted Trafficking in Counterfeit Trademarked Merchandise, 18 U.S.C. 2320; and Aiding and Abetting, 18 U.S.C. 2. The defendant owned an embroidering business and received counterfeit materials (clothing, etc.) from New York. He was given a computer disk with a Nike™ logo stored on it for his electronic embroidering machines to replicate the trademark.

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During a search and seizure of his business, the defendant immediately cooperated and described who had brought him the materials from out of state and identified a codefendant who had given him the logo on disk. The information provided by the defendant about his suppliers from New York led to an apprehension and guilty plea in that district. The defendant further cooperated against his codefendant by testifying before a grand jury.

The defendant pled guilty to the conspiracy charge and the Government agreed to file a 5K1. The defense filed a sentencing memo wherein additional departures were requested due to the length of time between the defendant's initial involvement in the crime and the indictment (5 years) and for other positive aspects of his background. Judge Waldman departed from a maximum of 5 years and a $250,000 fine and sentenced the defendant to 5 years probation and a $6,000 fine. v

5K1 Departure Granted in Counterfeit Check Case

Contact: Samuel C. Stretton (610) 696-4243

United States v . Brown, 00-CR-351-1
Judge Stewart Dalzell

The defendant was the alleged ringleader of counterfeit check rings in the Eastern and Middle Districts of Pennsylvania. Two indictments were issued in the Eastern District and another in the Middle District. Approximately nine other individuals were involved in the scheme in this district. The defendant was charged with Conspiracy, pursuant to 18 U.S.C. 371, and Bank Fraud, pursuant to 18 U.S.C. 1344. The defendant pled guilty and stipulated to a loss figure of $471,895.25 in the plea agreement. At the request of the defense, the two indictments in the Eastern District were consolidated. However, the defense was unable to combine the case from the Middle District.

The sentencing was continued five times because the defendant was cooperating with the Government. Early in the case, the defendant's information led to the apprehension of a coconspirator. The defendant further cooperated with the Government regarding unrelated matters after the entry of the guilty plea.

Despite their initial reluctance, the Government agreed to file a 5K1 motion, after negotiations with the defense and the defendant's cooperative efforts. The Government filed the 5K1 motion on the day of sentencing. Judge Dalzell granted the motion and departed one year below the guidelines to 24 months. The defendant was sentenced to 47 months in the Middle District by Judge Caldwell. The sentences are to be served consecutively. v

5K1 Departure in Largest Cocaine Seizure Ever in the Region

Contact: Mark Refowich (610) 253-6155

United States v . Smith, 99-CR-469-2
Judge J. Franklin S. Van Antwerpen

The defendant was a truck driver who had hauled one ton of cocaine on an open flatbed tractor-trailer from the Texas-Mexico border to New York City. The defendant was instructed in Texas to transport the drugs to New York. He was also given a mobile phone number to contact for the drop-off which, unbeknownst to him, had been arranged by the FBI. Two trucks were used in the transportation, one driven by the defendant and another by a codefendant. The first truck was loaded with the cocaine stacked on palettes and covered with a tarp. The second truck was empty and served as a decoy by travelling with several running lights out. In the event of a traffic stop, police would detain the empty truck for the faulty lights while permitting the cocaine truck to continue on.

The defendants continually contacted the mobile phone number while they transported the drugs on interstate highways to New York. The FBI tracked the defendants via the mobile phone calls. When the defendants reached Pennsylvania, they left the second truck at a truck stop and continued together to New York. At 2:00 a.m., they arrived at a large parking lot which served as the designated drop-off point. The defendants carried a forklift on the truck to unload the drugs upon delivery. When they arrived, a van was waiting to receive the cargo. The defendants became suspicious because the ton of cocaine could not possibly be carried in the van, which would collapse under the weight. They also saw two NYPD cars at the other end of the parking lot, which were actually unrelated to the sting. The defendants decided the situation was too risky and left with the drug shipment.

The FBI called the defendants from the mobile phone and demanded that they return and deliver the drugs as arranged. The defendants refused and proceeded into Pennsylvania. The defendants had decided to return to the truck stop and dispose of the drugs with the forklift into a dumpster. Ironically, the Pennsylvania State Police pulled the defendants over on a traffic stop before they could dispose of the cargo. The defendants consented to a search and the drugs were discovered. This was the largest quantity of cocaine ever recovered in this region.

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The defendant had a criminal history category of 6, because he had so many DUI's in Texas that they had become felonies. The offense level was calculated at 38, with a guideline range of 360 months to life. The defendant cooperated at significant personal risk to himself. The defendant was given a 5K1 departure for his extensive cooperation. Judge Van Antwerpen cut his guideline range in half, and sentenced him to 151 months.v

Promised Departures Revoked Due to Post Plea Conduct

Contact: Robert W. Muench (215) 969-1540

United States v . Reutt, 00-CR-476
Judge Bruce W. Kauffman

The defendant was charged with two counts of Mail Fraud, pursuant to 18 U.S.C. 1341, for the theft of hundreds of thousands of dollars through the U.S. Mail. In the plea agreement, the fraud loss was resolved on the guideline range of up to $200,000. The statutory maximum for the offense is 5 years imprisonment, a $25,000 fine, and 3 years probation per count. In the plea agreement, the Government agreed to two acceptance of responsibility reductions: two levels pursuant to 3E1.1(a), and one level pursuant to 3E1.1(b). The defendant's offense level was calculated at 14, with his criminal history category at 1. The Government stipulated to a 15 to 21 month sentence recommendation.

In between his guilty plea and sentencing, the defendant committed bank fraud by falsifying information for a loan. The probation office investigated his post-plea conduct. The Government then withdrew its offer for departures. The defense filed a pre-sentence memorandum and asserted that the defendant should still receive his original promised departures. The defense also argued for the right to review the probation office's post-plea investigation materials, which are not normally available. Judge Kauffman ruled that they be turned over, but the probation office was untimely in providing the defense with the materials.

The U.S. Attorney's Office had information sufficient for indictment on the defendant's post-plea conduct, but only withdrew the motions for departure and did not indict the defendant on additional charges of bank fraud.

Judge Kauffman split the defendant's original guideline range of 24 to 31 months, and sentenced the defendant to 27 months imprisonment and the maximum fine of $50,000. v

PRACTICE POINT

5G1.3(b) Allows for Credit for Stat Time Served

Contact: Guillermo Bosch (610) 489-0569

United States v . Santiago, 99-CR-711-17
Judge Bruce W. Kauffman

Philadelphia Police arrested the defendant in July 1998 for a drug-related offense. In April 1999, the defendant was sentenced to 1 to 2 years. He served one year and was granted parole in April 2000. At the same time the defendant became eligible for state parole, a federal indictment was issued for a large drug conspiracy and the defendant was charged with Conspiracy to Distribute Cocaine Base, Heroin, and Cocaine, pursuant to 21 U.S.C. 846. This was for the same offense for which he had been incarcerated by the state. Due to the federal detainer, the defendant was never released on state parole, instead he stayed in Grateford Prison for a short period of time before the Marshals took him into federal custody.

The defendant pled guilty and proffered information about his involvement in the conspiracy. The defendant contended that he was only involved in the conspiracy for three days. Due to his limited involvement the Government did not offer a cooperation plea. The government's witnesses provided conflicting information about the defendant, but said that his involvement spanned more than three days but no more than one month. Due to a pending further investigation into the defendant's role, the Government did not immediately agree to a safety valve reduction. No further specific information about the defendant's exact involvement was discovered. The Government eventually consented to the safety reduction.

In a letter to the Judge, the defense requested that the defendant be given credit for time served for the state charge, pursuant to 5G1.3(b), Application Note 2. *See United States v . Dorsey,* 166 F.3d 558 (3d Cir. 1999). The Court's approval was needed because the Bureau of Prisons (BOP) cannot credit a defendant for time served in state prison for a related offense. When the BOP calculates the period of incarceration to be served, only time from the point when a defendant is taken into federal custody is credited. A defendant can only be given credit for state time with a judge's recommendation. This is not a departure; rather, the defendant is simply credited for state time served for guidelines purposes.

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The defendant had a criminal history category of 1, and an offense level of 19, resulting in a guideline range of 30 to 37 months. The combination of the state time served and

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the federal time would have the defendant with little time remaining to serve under the guidelines. Judge Kauffman granted the defense's request and gave the defendant credit for the state time and sentenced him to 32 months, which, with the time served, ended fourteen days after the date of sentencing. The probation office requested that the defendant not be released directly into the community because of his previous history of drug usage. As a result, the Court had the defendant placed in a halfway house for the first 6 months of his 5-year probation. v

The Reliable Source is a service of the law firm of Vaira & Riley for federal criminal practitioners in the Eastern District of Pennsylvania. The newsletter provides a periodic review of current developments and trends in federal courts, the United States Attorney's Office, and federal agencies, with a substantial effort devoted to the sentencing process.

The Reliable Source welcomes reports and advice from fellow practitioners who have tips they would like to share with the federal criminal defense bar. Please address all questions or comments to:

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