VAIRA & RILEY, P.C.

# THE RELIABLE SOURCE

A NEWSLETTER OF FEDERAL CRIMINAL PRACTICE IN THE EASTERN DISTRICT

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*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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This newsletter is meant as a practical aid to practitioners and is not intended to take the place of legal research.

## INSIDE THIS ISSUE



## Sentencing Reports

*The Reliable Source* follows significant Eastern District sentencing proceedings, providing decisions by judges on departures and adjustments, as well as positions taken by the United States Attorney's Office. The information is derived from personal contacts with practitioners. While the information would generally not be reported in published opinions, practitioners may use the cases as a guide for formulating arguments in similar situations.

### Numerous Departures Granted by Yohn

**Contact: Ted Simon (215) 563-5550**

*United States v. Eidson*, 99-CR-580 (E.D. Pa.)

The defendant in this case, a postal employee, was charged with tax evasion and embezzlement of over $700,000 in postal funds. The sentencing hearing spanned four days. After adjustments for role in the offense and a reduction for acceptance of responsibility, the guideline calculation was 17. The Court granted downward departures on numerous grounds to a sentence of probation. The Court specifically granted downward departures for:

- 5K2.13 - Diminished capacity. The Court found that the defendant suffered from a variety of mental disorders and experienced a reduced capacity of choice, which significantly contributed to the offense.
- 5H1.3 - Extraordinary mental and emotional conditions. The Court credited defendant's evidence of long-standing, extreme, and bizarre behaviors.
- Extraordinary post-offense therapeutic rehabilitation pursuant to *United States v. Sally*, 116 F.3d 76 (3rd Cir. 1997); and extraordinary acceptance of responsibility pursuant to *United States v. Lieberman*, 971 F.2d 989 (3rd Cir. 1992), for demonstrating to postal inspectors how he had been able to embezzle the money. The defendant also returned all of the funds.

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The Court acknowledged that the defendant had great potential for victimization in prison, but declined to specifically depart on that ground. However, the Court agreed to consider the defendant's vulnerability when determining the extent of other departures.

In addition to the departures, the Court also grouped the tax and embezzlement charges, an issue which the Third Circuit had left open in *United States v. Lieberman*, 971 F.2d 989 (3rd Cir. 1992), and *United States v. Vitale*, 159 F. 3rd 810 (3rd Cir. 1998).

The Court refused to grant an upward adjustment for obstruction for defendant's false statements to postal inspectors, reasoning that the statements had not substantially obstructed the investigation. ❖

### Extraordinary Acceptance of Responsibility

**Contact: Luther Weaver (215) 790-0600**

*United States v. Peña*, 00-CR-333 (E.D. Pa.)

Judge DuBois granted a downward departure from a guideline level 14 to probation in an income tax case. The Court found the defendant displayed extraordinary acceptance of responsibility by spending $20,000 of his own resources to hire a private accounting firm to determine the amount of loss. The scheme that generated the unreported tax income was very complicated and the IRS would have otherwise expended considerable resources to determine the final loss amount. The defendant also paid his outstanding state income tax arrearages. Judge DuBois departed on the basis of *United States v. Lieberman*, 971 F.2d 989 (3rd Cir. 1992), which permits a departure beyond the amount authorized by U.S.S.G. § 3E1.1 under certain circumstances. ❖

### Judge Dalzell Declines Loss Figure

**Contact: Todd Henry (215) 496-0220**

*United States v. Harrison*, 00-CR-325 (E.D. Pa.)

Judge Dalzell declined to accept the loss figure stipulated in a bank embezzlement plea agreement. After directing the probation officer to interview bank personnel, Judge Dalzell determined that the loss was approximately $3,000 less than specified. Additionally, Judge Dalzell granted a 5K.1 motion filed by the government. ❖

## Practice Points

### Government's Right to Appeal

**Contact: Thomas A. Bergstrom (610) 251-9260**

*United States v. Phares*, 99-CR-743 (E.D. Pa.)

Defendants in a mail fraud case made a pre-trial motion to exclude certain evidence pursuant to Federal Rule of Evidence 404(b), which Judge Hutton granted. The government proceeded to jury trial and examined three prosecution witnesses. The government then requested that the Court reconsider its ruling on the 404(b) motion, arguing that it could not proceed without the 404(b) evidence. The Court denied the motion. The government requested leave to appeal, the Court denied the request, and the government filed notice of appeal. The Court declined to delay the trial until the appeal was decided. Since the government maintained that it could not proceed without the 404(b) evidence, the Court dismissed the jury and jeopardy attached. The government appealed the dismissal. The appeal was scheduled to be argued in late May. ❖

### Determination of Actual Loss

*United States v. Hayes*, 242 F.3d 114 (3rd Cir. 2001)

Defendant had lied about her qualifications in order to obtain a job as social worker for New Jersey social service agencies, and was subsequently prosecuted for wire fraud. The government calculated her total salary as the monetary loss. The District Court accepted the loss calculation. The Third Circuit reversed, stating that the defendant had performed satisfactory service, had been promoted, and had been given a pay raise. The Circuit Court held that the District Court should have attempted to determine actual loss instead of applying a mechanical formula. The Circuit Court, relying upon *United States v. Maurello*, 76 F.3d 1304 (3rd. Cir. 1996), ordered the District Court to value the loss on what was taken and to give the defendant credit for good service. The Circuit Court's opinion was very critical of ". . . a sentencing regime that insists upon assessing penalties by mechanical quantification of harm rather than a qualitative, albeit subjective evaluation of the blame." The case indicates a growing trend towards the use of realistic determinations of loss. ❖

## Grand Jury Abuse

*United States v. Sigma International*, 244 F.3d 841 (11th Cir. 2001)

The Eleventh Circuit dismissed an indictment due to prosecutorial misconduct before a grand jury. The Circuit Court, on its own motion, reviewed the grand jury transcript and determined that the AUSA had improperly influenced the grand jury indictment. The most striking facet of this case is that the defendants were convicted at trial. The government argued that the conviction had rendered any grand jury misconduct moot, citing *United States v. Mechanik*, 475 US 66 (1986). The Circuit Court rejected the argument holding that *Mechanik* had been substantially overruled by *Bank of Nova Scotia v. United States*, 487 US 250 (1988). The Circuit Court noted that in *Bank of Nova Scotia* the Supreme Court had adopted Justice O'Connor's previous concurrence in *Mechanik*. Following that adoption, the Circuit Court stated that "the harmless error inquiry should not hinge upon what happened at trial but whether the error committed before the grand jury substantially influenced its decision to indict." 244 F.3d 852. Therefore, the Eleventh Circuit held that, where a defendant raises an objection to an indictment based on grand jury abuse prior to the conclusion of the trial, *Bank of Nova Scotia* authorizes an inquiry into whether grand jury error improperly influenced the grand jury indictment.

The Circuit Court stated that it was the lower court's duty to inquire whether the grand jury had acted independently. Upon review of the record, the Circuit Court found numerous examples of the AUSA having misled the grand jury. The Court went out of its way to identify the AUSA by name each time he had taken some action which the Court found objectionable.

The *Sigma International* opinion was written by Judge Tjoflot, a very respected jurist, and demonstrates many ways in which a grand jury can be influenced. *The Reliable Source* has determined the government will not seek a rehearing *en banc* nor *certiorari*. Our advice: use this case carefully. Improper prosecutorial influence over the grand jury should only be raised when the facts specifically indicate misconduct by the AUSA. As an example, see *United States v. Breslin*, 916 F.Supp. 438 (E.D. Pa. 1996), where Judge Shapiro reviewed the grand jury transcript based on overt indications of misconduct and dismissed the indictment. ❖

# Recommended Publications

### ACTL Monograph Calls for Guidelines Modification

The American College of Trial Lawyers (ACTL) has published a 38-page monograph calling for the modification of certain sentencing guidelines. The monograph, drafted by the Criminal Procedure Committee of the ACTL, urges modification of the guidelines as follows:

- Acquitted conduct should not be included as relevant conduct or actual conduct, and should not be considered in any manner at sentencing.
- The use of uncharged or dismissed aggregable offenses should be limited.
- The use of uncharged or dismissed conduct of others in jointly undertaken activity should be limited.
- The standard for resolving disputes regarding guidelines' application to factual issues should be no less than clear and convincing evidence.

The report also calls for a new federal rule requiring the prosecutor at a guilty plea or a *nolo* plea to disclose all relevant conduct that the government intends to rely upon at sentencing. In addition, if the court intends to rely upon any conduct not disclosed by the government prior to defendant's plea, the court shall notify the defendant and the defendant may withdraw the plea.

The monograph, mailed to all federal judges and the sentencing commission, will likely carry some weight. One district court has already relied upon the proposed modifications. Massachusetts District Court Judge William Young has held that, where a defendant is convicted at trial in which the co-defendant benefited from illegal fact bargaining, the defendant should be given a downward departure to take advantage of the co-defendant's fact bargain. Based upon the suggested modifications in the monograph, Judge Young certified the case to the First Circuit for review of its prior decision in *United States v. Rodriguez*, 162 F.3d 135 (1st Cir. 1998) which permitted fact bargaining. *Bertoff v. United States*, 2001 WL 396368 (D.Mass., Apr. 9, 2001). For more information on this case contact Thomas E. Dwyer, Jr. (617) 371-1001.

For a copy of the monograph contact Peter F. Vaira (215) 751-2700. ❖