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 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.

Departure Based on Public Confession and Sale of Entireties Property

Contact: Stephen La Cheen (215) 735-5900

United States v. Innerarity, 01-CR-12 (E.D.Pa.)
United States District Judge Stewart Dalzell

The government alleged that the defendant was involved in a kick-back scheme to extort contractors. The indictment charged mail fraud, tax evasion, and interstate transportation of stolen property. The defendant had committed the offenses while an official at the University of the Sciences (then Philadelphia College of Pharmacy and Science). The defendant pled guilty to the mail fraud and tax evasion counts.

In order to demonstrate extraordinary acceptance of responsibility and post-offense rehabilitation, the defendant wrote a two-page letter addressed to eighty-eight college and university officials warning of the repercussions of accepting gratuities and using himself as the example. As further demonstration of his extraordinary acceptance of responsibility, the defendant sold a marital property jointly held with his wife, which was not subject to seizure by the government. The proceeds from the sale of the home were to be applied to restitution as directed by the Court.

Judge Dalzell applauded the unique post-offense remedial actions taken by the defendant. The Court granted a four level departure pursuant to §3B1.1 on two bases, the letter and the marshaling of the marital property for restitution purposes. The Court denied departure for extraordinary family responsibility, which the defendant had argued based upon his large family with many children ranging in age from three to seventeen. The Court also denied departure on the basis of the defendant's age of 64.

Continued on page 2

Continued from page 1

The defendant was sentenced to 12 months and one day incarceration with $95,000 in restitution to be paid jointly and severally with his codefendant, who had already pled guilty and was sentenced to probation. Judge Dalzell agreed to recommend that the defendant be incarcerated in the Community Corrections Center closest to his home and granted him 92 days to arrange his affairs before surrendering into custody. ❖

Departure Granted for Foreign Defendant in Price Fixing Conspiracy

Contact: Jack Riley (215) 751-2700

*United States v. Takagi***,** 01-CR-75 (E.D.Pa.)
United States District Judge William Yohn

The defendant, a Japanese citizen, pled guilty to one count of violating the Sherman Antitrust Act, 15 U.S.C. §1. The guideline called for a base offense level of 10. Five levels were added pursuant to §2R1.1(b)(2)(E), because the volume of commerce attributable to the defendant was within the $15,000,000 to $37,500,000 range. One additional level was added pursuant to §2R1.1(b)(1), because the conduct involved participation in an agreement to submit noncompetitive bids. After a three level deduction for acceptance of responsibility, the final offense level was calculated at 13. Judge Yohn granted a downward departure from guideline level 13 to probation and a $10,000 fine.

Since the defendant is a Japanese national and not specifically subject to U.S. jurisdiction, he entered into a plea agreement pursuant to Rule 11(e)(1)(C), allowing for withdrawal of the plea if the sentence were unacceptable. In the agreement, the government proposed a $10,000 fine and a 0-3 month period of confinement, but made no specific recommendation as to the length of confinement. The government also filed a motion for a 5K1 departure.

The defense submitted a motion for downward departure and requested a non-custodial sentence on the basis of six factors:

1. Significant extraordinary family ties and responsibilities: Defendant was responsible for the daily care of his wife, who suffers from chronic renal failure and was diagnosed by a medical expert as extensively physically and emotionally dependent on the defendant. The defendant's daughter is mentally handicapped and is also physically and emotionally dependent on the defendant for daily care;
2. Significant personal medical conditions and extraordinary physical impairment;
3. Extraordinary acceptance of responsibility: As a Japanese citizen, defendant was not subject to extradition for the charged antitrust crimes;
4. Substantial assistance to authorities: Defendant further demonstrated his extraordinary acceptance of responsibility by rendering substantial assistance to authorities in the prosecution of the case and other related investigations;
5. Absence of any personal profit motive to engage in the subject antitrust offense; and
6. Inappropriate severity of sentence: Under Bureau of Prison policy, aliens are not eligible for community confinement or minimum security institutions, thus the defendant would have been subjected to a substantially more punitive environment due solely to his alienage.

The Court granted the motion for a non-custodial sentence with a term of supervision of 36 months and a fine of $10,000. As a Japanese national, the defendant was permitted to serve his sentence in Japan and submit regular reports to the probation officer. ❖

Downward Departure for Withholding Meritorious Suppression Motion

Contact: Arthur Donato (610) 565-4747

United States v. Watkins, 00-CR-243 (E.D.Pa.)
United States District Judge Marvin Katz

The defendant was charged with possession of a firearm by a convicted felon, pursuant to 18 U.S.C. 922(g)(1) and 924(e), after officers conducting a code inspection entered a bar and observed him bend down, place an unspecified object on a bucket and walk away. The arresting officers then stopped the defendant and discovered that the object was a gun. Defense counsel advised the defendant that the police did not have a reasonable articulable suspicion of criminal activity, thereby constituting a meritorious suppression issue on which the defense would likely prevail. The defendant chose not to assert this defense and, to demonstrate acceptance of responsibility, pled guilty to one count of felon in possession.

The offense level was calculated at 33 and carried a 15-year mandatory minimum sentence because of the defendant's extensive prior record. A three level downward adjustment for acceptance of responsibility was recommended in the PSI, bringing the offense level to 30.

The Court granted a 5K1 motion filed by the government for substantial assistance. The defense filed a

Continued on page 3

Continued from page 2

5K2 motion on the grounds of extraordinary acceptance of responsibility for foregoing the suppression issue. The Court granted a downward departure, despite government objections that the suppression issue was not meritorious. Judge Katz found that, given the limited and inconclusive information available, the suppression defense was clearly arguable and, thus, meritorious as required under *U.S. v. Faulks*, 143 F.3d 133 (3rd Cir. 1998). The defense also argued for an additional departure based upon the firearm's never having been used criminally. The Court denied departure on those grounds, finding that the Guidelines under § 922(g) already consider a firearm's relation to another felony offense and that this case did not present other circumstances so extraordinary as to warrant departure.

Judge Katz departed downward three levels, sentencing the defendant to seven years imprisonment, eight years below the defendant's mandatory minimum term of imprisonment. ❖

Two Level Departure for Extraordinary Family Responsibilities

Contact: Jack Meyerson (215) 972-1376

United States v. Perkins, 01-CR-81 (E.D.Pa.)
United States District Judge John Padova

The defendant pled guilty to one count of false statements to the Environmental Protection Agency, 18 U.S.C. §1001, and two counts of violating the Clean Water Act/Pre-treatment Standards, 33 U.S.C. §§1317 and 1319(c)(2)(A). Pursuant to §2Q1.3(a), the base offense level was 6. Upward adjustments were made for the following factors: 2 levels for offense involving the discharge, release, or emission of a pollutant pursuant to §2Q1.3(b)(1)(B); 4 levels for offense involving a discharge without a permit or in violation of a permit pursuant to §2Q1.3(b)(4); and 2 levels for manager and supervisor of criminal activity pursuant to §3B1.1(c). The total offense level was calculated at 14 with the application of a 2 level deduction for acceptance of responsibility. The sentencing guideline range for this offense level calls for 10 to 16 months imprisonment.

In its sentencing memorandum, the government recommended that the Court sentence the defendant to an unspecified period of imprisonment, 3 years supervised release, a fine to be determined by the Court, 200 hours of community service, and a $300 special assessment.

The defense submitted a downward departure motion based upon extraordinary family circumstances. The defendant's wife suffered from a history of chronic severe depression and alcohol abuse which had resulted in required hospitalizations on two occasions and at least one serious suicide attempt. The defense submitted that imprisoning the defendant would have a "disastrous effect on his wife's fragile mental health." The defense expert found that if the defendant were incarcerated his wife would significantly increase her alcohol consumption which, coupled with her depression, would likely result in further deterioration, hospitalizations, and "seriously increase the risk of suicidal behavior."

Judge Padova granted a 2 level downward departure and sentenced the defendant to 10 months house arrest with electronic monitoring and 5 years probation.

Similar grounds for departure have previously been successfully argued in the Eastern District. In *United States v. Bechtel*, 99-CR-306 (1999), Vaira & Riley presented an argument for downward departure based on a combination of factors, including extraordinary family circumstances. Judge Fullam granted a downward departure in part due to the defendant's extraordinary family circumstances where his wife suffered from Alzheimer's dementia in combination with several other illnesses and was heavily dependent on the defendant. ❖

PRACTICE POINTS

Indictment Dismissed Due to Regulation's Ambiguity

Contact: Norman Greespan (215) 569-5635

United States v. Ward, 00-CR-81 (E.D.Pa.)
United States District Judge R. Barclay Surrick

The president of a chemical manufacturing company in Allentown, Pennsylvania was charged with 12 counts of violating 29 U.S.C. §666(e) of the Occupational Safety and Health Act (OSHA). Section 666(e) imposes criminal liability on an employee who willfully violates a safety regulation promulgated under the Act which results in the death of an employee. On February 19, 1995, an explosion at the manufacturer's Allentown plant killed four employees and one non-employee. The government contended that the defendant had violated the Process Safety Management of Highly Hazardous Chemicals regulation promulgated in 29 CFR §1910.119.

Judge Surrick granted a pre-trial motion to dismiss pursuant to Federal Rule of Criminal Procedure 12(a)(1) and (2). The Court found that the regulation was so ambiguous that a reasonable person in the defendant's position could not have determined that the regulation pertained to the process used by the chemical manufacturer.

Continued on page 4

Continued from page 3

The Court found that the Interpretation and Compliance letters issued by OSHA to clarify the regulation were themselves confusing, misleading, and ambiguous. The Court further found that the OSHA procedural requirements and the Administrative Procedures Act, 5 U.S.C. §1553, prohibited the application of OSHA's informal interpretations against the defendant.

This case provides a good example of judicial examination of penal statutes for ambiguity, as well as the problems that arise when regulations are applied as penal offenses. It also demonstrates the prosecutorial trend towards using violations of civil regulations as predicates for criminal prosecution, despite the lack of established regulatory requirements.

The Criminal Procedural Committee of the Administrative Law and Regulation Section of the ABA is holding a CLE program on this subject on November 1, 2001, in Washington, DC. For information on how to obtain written material, e-mail Christopher Dyer at dyerc@staff.abanet.org. ❖

Third Circuit Vacates Gag Order Against Attorney and Sets Guidelines for Public Statements

Contact: Donald F. Manno (856) 665-6464

United States v. Scarfo, 263 F.3d 80
(3rd Cir. (N.J.) Aug. 27, 2001)

Due to a potential conflict of interest, Donald Manno was disqualified from representing Nicodemo Scarfo in the Federal bookmaking indictment pending against him in U.S. District Court in Newark, New Jersey. After the disqualification and during the pre-trial motion stage of the proceedings, both Manno and the U.S. Attorney gave interviews to the *Philadelphia Inquirer*. In the resultant article, Manno was quoted describing a keystroke logger device surreptitiously installed on the defendant's computer. Manno criticized the device as dangerous to privacy rights because it permitted the government to intercept and copy all of the defendant's typing, including any Internet communication and/or correspondence with his attorney.

Presiding U.S. District Court Judge Politan learned about the newspaper article and issued an oral gag order against all attorneys involved in the case, banning any discussion of the issue. Manno immediately appealed the oral gag order to the Third Circuit. The gag order was not issued in writing until weeks after Manno had filed his Third Circuit brief.

The Third Circuit Court held that the District Court's oral order was final and, therefore, appealable. The Circuit Court then vacated the gag order, holding that there was no danger that Manno's statements could influence either a fair trial or the lower Court's ruling on the legal issues presented by the keystroke logger. The Court also set forth specific standards for evaluating this type of gag order in the future, as well as guidelines for attorneys making public statements regarding ongoing litigation.

The Third Circuit assessed costs against the government. The government objected, claiming that it could not be subject to the assessment of costs. The issue was rendered moot because Manno declined to submit any costs, indicating that he felt is was his duty as an officer of the court to bring the appeal. ❖

GUIDELINE UPDATE

Sentencing Commission Revises Money Laundering Guidelines

Contributed by: William J. Murray, Jr.

In April 2001, the U.S. Sentencing Commission adopted an amendment to U.S.S.G §2S1.1 that will dramatically alter the federal sentencing guidelines for defendants convicted of money laundering. This amendment will take effect November 1, 2001.

The amendment consolidates the money laundering guidelines, §§2S1.1 and 2S1.2, into one guideline §2S1.1, that applies to convictions under 18 U.S.C. §1956, §1957, or 21 U.S.C. §854. The amendment divides defendants convicted of money laundering into two categories: direct or first-party money launderers (those who launder funds derived from their own criminal activity) and indirect or third-party money launderers (those who launder funds derived from the criminal acts of others).

The base offense level pursuant to the new §2S1.1(a)(1) for direct money launderers is the same as the underlying offense level, including all specific offense characteristics, cross references, and special instructions. The base offense level under the new §2S1.1(a)(2) for indirect money launderers is eight, plus an increase based on the value of the laundered funds from the new economic crimes table in §2B1.1(b)(1). Note that §2S1.1(a)(2) also applies to direct money launderers if the offense level for the underlying offense if difficult or impossible to determine, or if the launderer is accountable for the underlying offense solely on the basis of jointly undertaken criminal activity. *See* Application Note No. 3.

The amendment also includes several enhancements based on specific offense characteristics. First, the new §2S1.1(b)(1) imposes a six level enhancement on indirect

Continued on page 5

Continued from page 4

money launderers who know or believe that the laundered funds were proceeds of, or were intended to promote, drug trafficking offenses; crimes of violence; firearms, explosives, national security, or terrorism activities; or the sexual exploitation of a minor. Second, the new §2S1.1(b)(2) provides three alternative enhancements, the greatest of which applies. Defendants convicted under §1957 receive a one-level increase under (b)(2)(A); defendants convicted under §1956 receive a two-level increase under (b)(2)(B); and a four-level increase applies under (b)(2)(C) if the defendant is "in the business of laundering funds." Finally, under the new §2S1.1(b)(3), an additional two-level increase applies for §1956 offenses deemed to involve "sophisticated" laundering. Sophisticated laundering is defined as "'complex or intricate' offense conduct pertaining to the execution or concealment of the §1956 offense." *See* Application Note No. 5. Additionally, the application notes suggest that sophisticated laundering may be evidenced by the use of fictitious entities, the use of shell corporations, creating two or more levels of transactions (layering), or the use of offshore bank accounts. *See* Application Note No. 5.

Finally, Application Note 6 expressly provides instructions regarding the grouping of money laundering with a conviction for the underlying offense that generated the laundered funds. Such counts shall be grouped pursuant to §3D1.2(c). The grouping of the direct money laundering offense and the underlying offense is appropriate because the money laundering guidelines will be largely determined by conduct that has already been considered in calculating the defendant's offense level for the predicate crime. ❖

Economic Crime Package

Contributed by: William J. Murray, Jr.

The United States Sentencing Commission's Office of Education & Sentencing Practice (OESP) has issued a summary highlighting key points of the Amendments to the Federal Sentencing Guidelines which become effective November 1, 2001. Among the amendments is the "Economic Crime Package," a six-part amendment that resulted from a U.S.S.C. study of economic crime issues over a number of years. The major economic crime revisions highlighted by the OESP include: (1) consolidation of the theft, property destruction, and fraud guidelines; (2) a revised loss table for the consolidated guidelines and a similar table for tax offenses; (3) a revised common definition of loss for the consolidated guideline; (4) revisions to the guidelines that refer to the loss table in the consolidated guideline; and (5) conforming the "sophisticated concealment" enhancement in §§ 2T1.1 and 2T4.1 to the "sophisticated means" enhancement in the consolidated guideline. In addition, the amendment addresses several circuit conflicts including tax loss in §2T1.1.

Consolidation of the Theft, Property Destruction, and Fraud Guidelines

- The amendment consolidates the guidelines for theft (§2B1.1), property destruction (§2B1.3), and fraud (§2F1.1), into one guideline, §2B1.1.
- The two-level enhancement for more than minimal planning previously contained in §§2B1.1(b)(4)(A) and 2F1.1(b)(2)(A) has been deleted.

Loss Tables

- The amendment provides revised loss tables for the consolidated guidelines and tax offense guidelines.
- The new loss table provides the following notable changes:
  - Expands the previous one-level increments in the table into two-level increments, and increases the range of losses for each increment.
  - Compresses the table, thus reducing the necessity to particularize the loss amount.
  - Provides substantial increases in penalties for moderate and high loss amounts.

Definition of Loss

- Clarifying and substantive revisions were made to definitions of loss previously contained in the commentary to §§2B1.1 and 2F1.1.
- The amendments retain the rule that loss is the greater of actual or intended loss.
- "Actual Loss" is defined as the "reasonably foreseeable pecuniary harm" that resulted from the offense.
- "Reasonably foreseeable pecuniary harm" is defined to include pecuniary harms the defendant knew, or, under the circumstances, reasonably should have known, were a potential result of the offense.
- The revisions resolve a circuit conflict regarding how tax loss is computed for cases wherein a defendant under-reports income on both individual and corporate tax returns.
  - The total of the tax loss is the sum of the federal income tax due from the corporation and the amount of federal income tax due from the individual. ❖

The Federal Bar Criminal Law Committee is considering offering a seminar on the Amendments to the Federal Sentencing Guidelines if enough members express an interest in attending. If you would be interested in attending such a seminar, please contact Felicia Sarner at (215) 928-1100