



Federal Criminal Law News

PRE & POST CONVICTION LAW PUBLICATION

Vol. 23 No. 9

◆ Federal Criminal Law Center ◆

December 2006/ January 2007

Traps for the Unwary Cross References and Guideline Sentencing

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(reprinted with permission from September/October
2006 issue of *Champion Magazine*)

To laypersons and attorneys alike, it sounds like an illogical and grossly unfair idea: defendants pleading guilty to one crime and then being sentenced severely for a completely different act. Unfortunately, this travesty is reality in federal court, as implemented by a series of “cross references” within the United States Sentencing Guidelines. Aimed at capturing real offense conduct and preventing charge bargaining, cross references have long been identified as a trap for the unwary. In *Blakely v. Washington*,¹ Justice Scalia expressed dismay at sentencing guidelines’ tendency to punish defendants based upon uncharged, even acquitted, conduct. He noted that under such a system “a judge could sentence a man for committing murder, even if the jury convicted him only of possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene.”² Justice Scalia called such a sentence an “absurd result.”³ Soon thereafter, in *United States v. Booker*,⁴ the Court declared the Sentencing Guidelines to be in violation of the Sixth Amendment, then remedied that little inconvenience by simply declaring them “advisory.”

Many of us hoped that *Booker* would mark the end of cross references, or at least significantly reduce their application. To the contrary, federal sentencing has changed very little going on two years later, with district courts largely imposing guideline-driven sentences. One commentator’s analysis of *Booker*, made soon after the ruling, now seems almost prophetic: “The Federal Sentencing Guidelines are dead. Long live the Federal Sentencing Guidelines.”⁵ As such, the cross references still found within the now ostensibly advisory Sentencing Guidelines still embody Justice Scalia’s proverbial “absurd result,” and the government still too often utilizes this mechanism to prosecute defendants for non-violent crimes,

and then punish them for uncharged violent ones.⁶ Counsel must, therefore, remain ever-vigilant in this area of sentencing law and procedure.

This article describes some of the cross references that apply in the most common of federal criminal cases – those applying to defendants charged with offenses related to drugs, firearms, and child sex crimes. It assumes that the guideline system is operating as one of the many § 3553(a) factors, and as such does not discuss variances or statutory penalties (except as the latter relates to strategically capping defendants’ sentencing exposure). The article also assumes, quite safely we think, that the sentence given, despite your best efforts, will be a guideline sentence. Finally, and most important, we suggest strategies for avoiding the draconian sting of many of these commonly imposed cross references.

I. Historical Overview of Cross References in the Guidelines

In formulating the Sentencing Guidelines, the United States Sentencing Commission aimed to base sentences upon a defendant’s actual conduct, labeled “real offense” sentencing, rather than only upon the crime of conviction, regardless of actual conduct, labeled “charge offense” sentencing.⁷ Charge offense sentencing was deemed inconsistent with the goals of the Sentencing Reform Act, as it gave prosecutors nearly unfettered discretion over the defendant’s sentence, allowed for charge bargaining, and did not necessarily take into account the defendant’s actual behavior.⁸

However, when the Commission attempted to form a pure real offense system based upon a countless number of different harms, the system proved to be too complex.⁹ Therefore, the Commission took the middle road with a modified charge offense system with real offense elements.¹⁰ Under this system, calculation of a defendant’s sentence begins with the charged offense(s).¹¹ From that point, three mechanisms largely come into play: grouping of multiple counts, relevant conduct, and cross references among the guidelines.¹²

Cross references direct the sentencing court to a guideline other than that which applies to the offense of conviction, if such guideline is more applicable to the defendant’s actual conduct.¹³ As long as the sentence is within the statutory range proscribed for the offense of

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conviction, the court may find that the cross reference applies by a preponderance of the evidence standard, even if the defendant has been acquitted of the same conduct.¹⁴ As disheartening as this may be for defendants and counsel, the system is not unbeatable. A federal practitioner must, however, recognize the applicable cross references and successfully avoid their painful effects.

II. Common Cross References to Watch Out For

The original United States Sentencing Commission Guidelines Manual contained fewer than 10 cross references.¹⁵ The latest manual contains nearly 100.¹⁶ However, the Justice Department's focus on drugs, guns, and child sex offenses makes clear that defense counsel is well-served by focusing on the cross references applicable to such cases.

A. Drug Offenses

Ever since President Nixon declared a "War on Drugs," the criminal enforcement of drug laws has been greatly federalized. Drug offenses have made up the vast majority of federal prosecutions for the last three decades,¹⁷ with a steep increase in such cases beginning soon after President Reagan took office. In 1984, there were fewer than 5,000 drug offenders prosecuted in federal court.¹⁸ By 2002, that figure had risen by more than 500 percent to 25,376 individuals.¹⁹ Drug prosecutions make up approximately 40 percent of the federal criminal docket.²⁰

In passing the Anti-Drug Abuse Act of 1986,²¹ Congress codified a quantity-based approach to drug offense sentencing.²² Under this scheme, certain threshold quantities of particular controlled substances result in five and 10-year statutory mandatory minimum sentences.²³ The Sentencing Commission has over time ensured that guideline ranges coincide with these statutory mandatory minimums, generally by adjusting the ranges higher.²⁴ The Commission also adopted the same quantity-based approach within the drug guidelines.²⁵

The drug guidelines escaped neither the concept of real offense sentencing nor cross references aimed to achieve that end. The guideline section that applies to most federal drug offenses – USSG § 2D1.1 – contains several cross references. We focus on the two that will most dramatically increase a defendant's sentence.

USSG §§ 2D1.1(a)(1) and (2) – Where Death Results

Your new client sells crack cocaine. Unfortunately for him, one of his most recent customers was an undercover federal agent. As federal agents are apt to do, she did not arrest your client until he had sold her just over 50 grams of crack – the statutory quantity threshold necessary to ensure maximum punishment in federal court.²⁶ Assuming that your new client has one prior drug trafficking conviction, he faces a statutory penalty range of 10 years to life,²⁷ and an advisory guideline range of 121-151 months' imprisonment.²⁸ The government has the crack transactions on video and audio, and threatens to double the mandatory

minimum sentence based upon the federal drug recidivist statute.²⁹ As such, you advise, and your client agrees, to plead guilty and hope for a sentence at the 120-month mandatory minimum.

Six weeks after your client's guilty plea, you receive the draft presentence report (PSR), which applies USSG § 2D1.1(a)(1) and calculates an advisory sentencing range of 292-365 months' imprisonment.³⁰ Based upon information provided by law enforcement, the PSR finds that one of the defendant's drug clients died after smoking crack cocaine provided to him by the defendant. This fact, combined with your client's prior drug conviction, has nearly tripled the guideline sentence. After regaining consciousness, you pour over the PSR and begin to ponder why anyone would want to practice criminal law in federal court. How did this happen? What could you have done to prevent it?

The "Cross References"

Although technically enhancements, not cross references,³¹ USSG §§ 2D1.1(a)(1) and (a)(2) have the same effect, dramatically increasing a defendant's base offense level based upon uncharged, and perhaps difficult to prove, conduct. In drug distribution cases, USSG § 2D1.1(a)(2) imposes a base offense level of 38 where "death or serious bodily injury resulted from the use of the substance." Where the defendant has a prior conviction for a "similar offense," USSG § 2D1.1(a)(1) mandates a base offense level of 43, which corresponds to life imprisonment. In a drug conspiracy case, only the drug distribution – not the death – need be foreseeable to the conspirators.³² As with other offense conduct enhancements, the death or serious bodily injury need not be pled in the indictment.³³

Avoiding the Enhancements

1. *Plead to the drug offense with the lowest statutory maximum sentence.* As always, minimize the client's sentencing exposure by negotiating a guilty plea to the drug offense that carries the lowest statutory maximum possible. Obviously, pleading to a lower statutory drug quantity will work. Otherwise, be creative. For example, if your client used the telephone during the commission of the drug offense (whose client *hasn't* used the phone?), negotiate a plea to the use of a communication facility to facilitate a drug crime, commonly known as a "phone count."³⁴ A phone count carries a maximum sentence of four years in prison, or eight years where the defendant has a prior drug conviction.³⁵ Also consider a guilty plea to misprision of a felony, which is just a fancy term for failure to report a felony and carries a maximum penalty of three years in prison.³⁶

2. *Tie "death results" enhancements to the "offense of conviction" and demand a heightened standard of proof.* Unlike the murder cross reference (see below), the "death results" enhancements only apply where the relevant death-related facts pertain to the "offense of conviction."³⁷ Neither the guideline section nor the commentary thereto defines the

term. The Third Circuit has recognized that the enhancements are unclear as to what is the “offense of conviction,” and in turn, what standard of proof is required.³⁸ Other federal courts have held that the “offense of conviction” bears no relation to the drug statute itself, but rather includes relevant conduct, and that the “death results” sentencing enhancement may therefore be proven by a preponderance of the evidence.³⁹

The Sixth Circuit is, however, an exception to this rule, requiring that the enhancement be proven beyond all reasonable doubt. In *United States v. Rebmann*,⁴⁰ the defendant pled guilty to the distribution of 1/1000 of an ounce of heroin. She had distributed the heroin to her husband, who had allegedly then died from an overdose.⁴¹ The government urged the district court to find the “death resulted” guideline enhancement by a preponderance of the evidence, and to sentence Rebmann to the statutory maximum sentence of 20 years in prison.⁴² The district court refused, finding that the government had not proven the “death results” enhancement beyond all reasonable doubt, and sentenced the defendant to 30 months in prison.⁴³

The Sixth Circuit affirmed, holding that “the death-resulting sentencing enhancement set forth [at USSG § 2D1.1(a)] is not based on relevant offense conduct to be determined by a preponderance of the evidence, but rather is tied expressly to the substantive offense of conviction under the statute.”⁴⁴ Because the drug offenses found at 21 U.S.C. §§ 841, *et seq.*, call for increased penalties where “death results,” the death is an element of a separate, more serious, criminal offense.⁴⁵ Therefore, the court reasoned, the enhancement only applies “when the elemental facts supporting the ‘offense of conviction’ establish beyond a reasonable doubt that death resulted from the use of the controlled substance.”⁴⁶ Relevant conduct, the court held, cannot drive the enhancement.⁴⁷

Admittedly, being in the Sixth Circuit takes more luck than skill. That said, those practicing in other circuits should advance this very persuasive argument.

3. *Argue that the defendant’s prior drug conviction is not a “similar offense.”* USSG § 2D1.1(a)(1) enhances a drug offender’s sentence to life imprisonment, but only if he has a prior conviction for a “similar offense.” Neither the guideline nor the commentary thereto defines the term. As such, carefully consider the nature of your client’s prior drug conviction. Counsel should argue that prior convictions for mere possession or other drug-related offenses that fall short of the seriousness of a federal drug distribution offense of conviction are not “similar” to the latter.

USSG § 2D1.1(d) – Cross Reference to Murder

Your client showed up for a drug deal armed with 2 kilograms of heroin and a handgun. After taking possession of the drugs, the buyer refuses to pay for them and attempts to flee. Your client shoots him dead. The feds have indicted your guy for possession with the intent to deliver 2

kilograms of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(i), and the use of a firearm during the commission of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The indictment mentions nothing of the victim’s death. In order to avoid the consecutive penalties mandated by the gun-related charge,⁴⁸ your client pleads guilty to the heroin charge and the government agrees to drop the § 924(c) count. The heroin charge itself still carries a statutory sentencing range of 10 years to life.⁴⁹ Based upon the offense of conviction, the client would be subject to an advisory guideline sentence of 120 months’ imprisonment (the mandatory minimum term).⁵⁰ But, as you know by now, it’s never that simple in federal court.

The Cross Reference

USSG § 2D1.1(d) directs that “[i]f a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder).” USSG § 2A1.1 directs that the base offense level is 43, life imprisonment.⁵¹ And federal courts in fact impose such sentences where the cross reference applies.⁵² A federal court may cross-reference to the murder guideline even where the jury actually acquitted the defendant of the murder.⁵³

Avoiding the Cross Reference

1. *Plead to the lowest statutory maximum.* As with the “death results” enhancements, where you see the murder cross reference as a potential issue, plead the defendant to the drug offense that carries the lowest statutory maximum possible.

2. *Argue that the death does not fit the definition of the federal murder statute.* The murder cross reference does not apply in every case in which death results from the defendant’s actions. Rather, the defendant’s actions must constitute first or second degree murder, as defined by 18 U.S.C. § 1111.⁵⁴ As such, counsel must carefully examine the elements of the federal murder statute and effectively turn the sentencing hearing into a mini murder trial.

3. *Urge the court to grant a downward departure.* At least one district court, expressing doubts about a defendant’s actual involvement in the murder triggering this enhancement, has downwardly departed from the § 2A1.1 (murder) sentencing range. In *United States v. Murgas*,⁵⁵ the district court, by a preponderance standard, found that the murder cross reference applied. However, the court then downwardly departed from 240 months to 170 months because the cross reference resulted in “(1) an enormous upward adjustment (2) for uncharged conduct (3) not proved at trial and (4) found by a preponderance of the evidence (5) where the court has doubts as to the accuracy of the finding.”⁵⁶

The first four factors listed by the *Murgas* court apply to nearly every cross reference there is! As such, these should be cited in urging a downward departure in any case

in which cross references cause a significant increase in the sentence. The fifth factor in *Murgas* is a bit of a mystery, as the district court was unclear why it found the facts supporting the enhancement while harboring “doubts” about the factual accuracy of the proof. That said, the case is helpful where the sentencing court’s factual findings are a close call.

B. FIREARMS OFFENSES

In 1931, notorious Chicago organized crime boss Al Capone began serving an 11-year federal prison sentence. Was Mr. Capone convicted of his alleged part in the infamous St. Valentine’s Day Massacre of 1929? Was he convicted of the prostitution, gambling, and alcohol-related rackets that he by all accounts ran during the prohibition era? No, but he was surely punished for all of that after being merely convicted for tax evasion.

The government’s strategy to punish defendants for violent behavior not part of the offense of conviction continues today. More than any other crime, the prosecution of felons in possession of firearms permits the federal government to punish offenders for behavior that not only differs from the offense of conviction, but even falls outside the federal courts’ subject matter jurisdiction.⁵⁷

The Sentencing Commission has admittedly collaborated on this issue with the Department of Justice and the Bureau of Alcohol, Tobacco, and Firearms.⁵⁸ Such collaboration helps explain why post-1987 revisions to the firearm guidelines have “resulted in significant severity increases over historic levels.”⁵⁹ For all firearms offenses, the penalties doubled between pre-guidelines levels and 2000.⁶⁰ The severity of punishment for simple firearm possession offenses doubled between 1988 and 1995.⁶¹ In its latest proposed amendments, the Commission recommends several more increases in such penalties.⁶²

Today, the Capone treatment is accomplished most often through the application of several cross references found within USSG § 2K2.1, the “primary firearms guideline,”⁶³ and that which applies to mere possession offenses.⁶⁴ In light of the government’s strategy and the Commission’s participation toward that end, it is particularly important to be aware of these cross references and protect your client from their wrath.

USSG § 2K2.1(c)(1) – Cross Reference to Violent Crime Guideline and the Armed Career Criminal

During a traffic stop, your client, who of course has several prior felony convictions, was found to be in possession of a firearm. For good measure, he agreed to a consent search of his home, where the police found a four-year-old pawn shop receipt for a firearm. A preponderance of the evidence shows that five years ago (prior to pawning the weapon) your client murdered a man with that uncharged firearm.

Your client has now been charged with violation of 18 U.S.C. § 922(g) – simple possession of a firearm by a

convicted felon. The indictment makes no mention of any firearm other than the one found in your client’s car. Unfortunately, based upon the nature of his prior convictions, he is also subject to the Armed Career Criminal Act (ACCA), which mandates a 15-year mandatory minimum term of imprisonment and a maximum term of life without parole.⁶⁵ Your client wishes to plead guilty and hope for a prison term equal to the 15-year statutory minimum. But how will the uncharged pawned firearm affect his sentence?

USSG § 2K2.1(c)(1) states: “If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense . . .” then cross reference to the guideline provision that applies to that other offense, “if the resulting offense level is greater.”⁶⁶ Several federal circuits have interpreted “any firearm” broadly to include any firearm that is part of the “relevant conduct” of the offense,⁶⁷ whether or not such firearm was charged in the indictment or a part of any stipulated facts in a plea agreement or plea colloquy.⁶⁸ Thus, in the above example, the guidelines would require cross reference to the murder guideline, resulting in a suggested sentence of life imprisonment.⁶⁹

Avoiding the Firearm Cross Reference

The only guaranteed way to avoid the full brunt of the firearm cross reference is to negotiate a plea to a firearm offense that statutorily limits the client’s exposure to criminal sanctions. The goal is to plead the client to an offense (1) for which the statutory maximum is lower than the applicable guideline range; and (2) to which the ACCA is inapplicable.⁷⁰ Depending upon the facts of your case, the possibilities are almost endless. The key is to negotiate a creative plea agreement.⁷¹ Consider three oft-applicable options.

1. 18 U.S.C. § 922(j) or (k). “It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm.”⁷² It is also a federal crime to possess a firearm which has had “the serial number removed, obliterated, or altered.”⁷³ Conviction for either of these offenses carries a 10-year statutory maximum.⁷⁴ Most important, neither is subject to the enhanced penalties of the ACCA.⁷⁵ According to the best statistics available, approximately 28 percent of handguns used in criminal offenses are likely stolen⁷⁶ and approximately 9.5 percent have altered serial numbers.⁷⁷ So, there is a decent chance that your client did not come by the weapon legitimately and could plead guilty to one of these offenses.

2. 18 U.S.C. § 922(q)(2)(A). “It shall be unlawful for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reason to know, is a school zone.”⁷⁸ Conviction of this offense carries only a five-year maximum term of imprisonment and is actually classified as a misdemeanor.⁷⁹ Now is when MapQuest®⁸⁰ becomes your best friend. Client possessed the gun at home? See if he

lives in a school zone. Client possessed the gun while attempting to purchase it at a pawn shop? See if the pawn shop is in a school zone. Client possessed the gun in his car? See if he ever drove *through* a school zone!

Does the five-year maximum sound too good to be true? It is indeed true. But be careful – any sentence imposed for the school zone offense must run *consecutive* to any other term of imprisonment.⁸¹ As such, a plea to this offense should be avoided where your client is already serving another prison sentence or is pleading to one or more additional counts.

3. 18 U.S.C. § 922(a)(6). It is a federal crime to make a false statement in connection with “the acquisition or attempted acquisition of any firearm or ammunition” from a firearm dealer or manufacturer.⁸² Violation of this statute carries a maximum prison term of 10 years.⁸³ This offense is often charged where non-felon “straw purchasers” buy firearms on behalf of prohibited persons. However, where a felon makes false statements in order to purchase (and in the process handle) a firearm, he will usually instead be charged with violation of the dreaded Section 922(g) statute. Where such defendants are armed career criminals, a plea to a false statement offense significantly caps their sentencing exposure.

C. CHILD SEX OFFENSES

Beginning in 1988 with the Child Protection and Obscenity Enforcement Act,⁸⁴ and continuing through and beyond the PROTECT Act of 2003⁸⁵ and its infamous Feeney Amendment,⁸⁶ Congress has feverishly passed criminal legislation aimed at prosecuting and severely punishing the use of computer technology to sexually exploit children. In 1995, the FBI created within its Cyber Division the Innocent Images Unit, which investigates, among other things, the possession and distribution of child pornography and the online enticement of children for purposes of sexual exploitation.⁸⁷ The effects of the federal government’s increasingly aggressive focus on these crimes are clear. Between 1996 and 2005, federal sex crime cases increased 2,026 percent, totaling nearly 5,000 charged cases.⁸⁸ Most recently, on July 31 of this year, President Bush signed into law the Adam Walsh Child Protection and Safety Act of 2006.⁸⁹ As the government focuses more on these cases, it becomes ever more important for criminal defense counsel to avoid the related cross references that can significantly increase punishment.⁹⁰

Most federal prosecutions in this arena relate to either: (1) the possession and/or distribution of child pornography;⁹¹ or (2) so-called child enticement cases, in which the perpetrator communicates with a child (or, more likely, an undercover law enforcement agent), with the intent to later meet that child for a sexual encounter.⁹² In November 2004, the Sentencing Commission significantly simplified those portions of the guidelines pertaining to the receipt, possession, and distribution of child pornography,

such that there is a single, seldom-applicable cross reference.⁹³ We therefore focus on the cross reference pitfalls present in federal child enticement cases.

Cross References in Child Enticement Cases

In recent years, federal law enforcement,⁹⁴ the media,⁹⁵ and even private organizations⁹⁶ and citizens⁹⁷ have focused intensely upon the capture and prosecution of sexual offenders or sexual predators. In particular, local and national media have even conducted and broadcast “stings” aimed at catching adult men attempting via computer to arrange a sexual encounter with a child.⁹⁸ Such publicity has resulted in a public outcry of almost hysterical proportions against those who commit these offenses. Neither the real danger of online sex predators, nor the political climate created by the mass media exposure, has been lost on federal law enforcement officials. In 1994 and 1995 combined, the federal government prosecuted a total of 423 child sex cases.⁹⁹ In 2005, the federal government prosecuted 1,447 child sex cases against 1,503 defendants.¹⁰⁰

The typical federal child enticement case goes something like this.¹⁰¹ Big, hairy, male FBI Agent Johnson¹⁰² persistently visits an internet chat room that is frequented by potential pedophiles. Agent Johnson identifies himself with a screen name that sounds like a teenaged girl, perhaps of a particular age, say, “surfgirl14” or “maryjane13.” Your future client then reaches out via the chat room to Agent Johnson, often by asking whether “she” likes older men.¹⁰³ Now that your client is on the hook, Agent Johnson, posing as a cute and sexually naive 14-year-old girl, over time chats with him via computer. Eventually, and likely after much sexual talk, your client will arrange a meeting with the “child.” After obtaining via subpoena your client’s real identity and address from the internet service provider, Agent Johnson will typically get a search warrant for your client’s residence and then arrest him when he arrives at the scene of the arranged meeting. Your client, sorely disappointed and completely uninterested in a sexual encounter with Agent Johnson, now finds himself charged with violating 18 U.S.C. § 2422(b) and facing a 10-year to lifelong stay in a federal prison.

USSG § 2G1.3 – The Applicable Guideline Provision

The applicable guideline section for a violation of 18 U.S.C. § 2422(b) is USSG § 2G1.3.¹⁰⁴ The above-described, typical scenario (assuming no criminal history or Chapter 3 enhancements) would result in an advisory guideline range of 78-97 months in prison.¹⁰⁵ A guilty plea with the full three-level reduction for “acceptance of responsibility” results in a sentencing range of 57-71 months,¹⁰⁶ thus ensuring that a low-end sentence mirrors the 60-month statutory mandatory minimum term.¹⁰⁷ Where the client has no viable defense to the charged crime, a guilty plea and the minimum five-year prison term may sound like the best option. However, beware the cross reference!

USSG § 2G1.3(c)(3) – Cross Reference to Violent Sex Crime Guideline

Although the child enticement guideline contains several cross references,¹⁰⁸ Section 2G1.3(c)(3) is the one to watch out for. That section states in relevant part: “If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242 [defining certain violent sexual behavior], apply § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above.”¹⁰⁹

In the above example the defendant would, as a result of the cross reference, be subject to an advisory sentencing range of 151-188 months’ imprisonment.¹¹⁰ Even assuming a guilty plea and a low-end guideline sentence, your client now unexpectedly faces 108 months in prison.¹¹¹ Needless to say, you will have a very uncomfortable, if not painful, conversation with this client after receiving his pre-sentence report.

Strategies for Avoiding the Cross Reference

The child enticement cross reference is difficult, but not impossible, to avoid. Again, counsel must be mindful of the cross reference, and then think outside of the box in order to avoid its application. Consider the following options.

1. *Negotiate a guilty plea to possession of child pornography.* Try to negotiate a guilty plea to violation of 18 U.S.C. § 2252A(a)(5)(B) (possession of child pornography). “But the client wasn’t charged with the possession of child pornography!” you protest. No problem. As they say, “where’s there’s smoke, there’s fire.” Assuming that your child enticement client indeed has some sexual interest in children, chances are that he also possesses child pornography on his computer. The government may or may not have discovered, or even searched, for such material – but a client interview and some independent investigation should easily confirm its existence.

Our fictitious child enticement client would fare much better on a child pornography plea. Most important, the applicable child pornography guideline provision, USSG § 2G2.2,¹¹² contains no cross reference pertaining to child enticement behavior. Moreover, the possession guideline will very often result in a significantly lower advisory guideline range. Even assuming the application of certain enhancements, our child enticement client’s plea to violation of § 2252A(a)(5) would result in a sentencing range of only 46-58 months.¹¹³

Note, however, that a plea to a child pornography offense can itself be fraught with danger. Be mindful of the following important issues before even considering this avenue. First, be sure that your client pleads to *possession* of child pornography,¹¹⁴ not the *distribution* or *receipt* of such material.¹¹⁵ Possession carries a statutory penalty range of zero to 10 years’ imprisonment,¹¹⁶ while the distribution or receipt of the same pornographic material subjects a

defendant to a statutory mandatory minimum sentence of 5 years and a maximum of 20 years.¹¹⁷ Second, make sure that your client does not have prior state or federal convictions for child-sex related behavior. With respect to the possession of child pornography, one such prior conviction subjects the defendant to an enhanced mandatory minimum of 10 years’ imprisonment.¹¹⁸ Finally, during your own investigation of the case, determine the quantity and nature of the child pornography that was in your client’s possession. Section 2G2.2 contains some pretty brutal sentencing enhancements for certain image quantity thresholds and (surprisingly common) image characteristics, such as those depicting prepubescent children.¹¹⁹ Once aware of the facts, negotiate a plea agreement that limits the client’s exposure to these enhancements.

2. *Consider the applicability of interstate child enticement.* In our example, we assume that the defendant arranged an *intrastate* meeting, which subjects him to a 10-year mandatory minimum sentence and a statutory maximum of life.¹²⁰ Note, however, that persuading (or attempting to persuade) a minor to travel *interstate* for illegal sexual activity surprisingly carries a lesser penalty of up to 20 years in prison and no minimum term.¹²¹ Where your client encouraged a minor to travel interstate, consider interstate child enticement (18 U.S.C. § 2422(a)) as a potential alternative statute of conviction in order to limit your client’s sentencing exposure.

3. *Argue that the defendant’s offense behavior does not constitute attempted criminal sexual abuse.* Your client chatted up “surfgirl14” and arranged a rendezvous. After showing up and meeting with, instead, our friend Agent Johnson, he finds himself in some serious hot water. Your client’s behavior may make him guilty of violating § 2422(b), but it does not, necessarily, make him subject to the cross reference.

USSG § 2G3.1(c)(3) does not send *every* defendant to § 2A3.1 – only those whose attempted sexual liaison was to involve “conduct described in 18 U.S.C. § 2241 or § 2242,”¹²² defining various forms of “aggravated sexual abuse” and “sexual abuse,” respectively. In child enticement cases, the most easily applicable of these statutes is 18 U.S.C. § 2242(2)(A), which defines “sexual abuse” as “engag[ing] in a sexual act with another person [who is] incapable of appraising the nature of the conduct.” A “sexual act” is defined as direct sexual contact or penetration involving particular areas of the body,¹²³ or “the intentional touching, not through the clothing, of another person who has not attained the age of 16 years with an intent to . . . arouse or gratify the sexual desire of any person.”¹²⁴

In order to avoid the cross reference, you must establish that your client’s intended “sexual activity” does not constitute a “sexual act.” In light of the above definition, there are generally two types of sexual behavior that would

fall short of a “sexual act” – (1) sexual touching that does not reach the requisite skin-to-skin contact or penetration; or (2) under-the-clothing touching of the genitals of a child who has reached the age of 16. With respect to the former, courts have conducted a factual analysis, applying the statutory definition of “sexual act” on a case-by-case basis.¹²⁵ Counsel should therefore carefully review the chats between client and “victim” and determine whether the defendant clearly stated an intention to commit a “sexual act” as statutorily defined. With respect to the latter, counsel must determine the age of any real victim, or the age that the undercover agent claimed to be.

Chats in child enticement cases nearly inevitably suggest a meeting at which a sexual act will occur. And undercover agents almost always pose as children under the age of 16. As such, this is a long shot. If this option does not work, counsel should withdraw.¹²⁶

III. Last Line of Defense – Due Process

Despite a complete investigation and your most creative plea negotiations to date, neither the government nor the probation officer will budge – one of the dreaded cross references is applicable to your client’s case. Do not despair. It is not yet time to retreat to your corner and say “no mas.” The fight now simply moves to a new arena – the sentencing hearing. And you must invoke a new weapon – Due Process.¹²⁷

Generally, after *Booker*, the facts relied upon to increase a defendant’s sentence within the statutory maximum must be proved by a mere preponderance of the evidence.¹²⁸ Such is the case where the jury acquitted the defendant of that very same conduct.¹²⁹ This general rule holds true where judicial fact-finding is necessary to application of a cross reference.¹³⁰ However, the defendant must still be afforded due process, which provides counsel with a two-pronged battle plan at sentencing: (1) evidence must bear “minimal indicia of reliability;”¹³¹ and (2) the judge must find the facts by a proper evidentiary standard.¹³²

Evidence at Sentencing Must be Reliable

Most of us who have practiced criminal law in federal court have seen it happen. At sentencing, the case agent or a government snitch shows up and says all kinds of terrible things about our client. Drug quantities, loss amounts, or other sentence enhancements are increasing with every word. Blindsided, it can be difficult to keep such unsubstantiated evidence from destroying our client at sentencing.

Of course, hearsay and other evidence that would be inadmissible at trial is admissible against your client at sentencing.¹³³ However, due process requires that evidence used to enhance a defendant’s sentence must nevertheless be *reliable*.¹³⁴ Moreover, the defendant must be given an

opportunity to rebut any such evidence.¹³⁵ Counsel should thus hold the government to this burden by attacking the reliability of the government’s proof and requesting that the sentencing court require a live witness who can be cross-examined.¹³⁶ Counsel can also request a continuance in order to afford the defendant sufficient time to prepare evidence in rebuttal of the government’s proof.¹³⁷

Heightened Standard of Proof

There is, at present, no consensus among the federal courts as to the standard of proof for judicial fact-finding at sentencing. Citing the Due Process Clause, the Ninth Circuit has held that a heightened standard of proof applies to facts necessary to enhance a defendant’s sentence, particularly where a cross reference is at issue.¹³⁸ In *Mezas de Jesus*, the court, considering a variety of factors, held that sentencing factors must be proven by clear and convincing evidence where it “has an extremely disproportionate effect on the sentence relative to the offense of conviction.”¹³⁹ Other circuits have specifically rejected calls for a heightened standard of proof.¹⁴⁰ Still others have seemed to consider the idea, but not based upon the factual scenario in front of them.¹⁴¹ In the post-*Booker* world, the Supreme Court has yet to take up the issue. So, if you practice in the Ninth Circuit, be sure to hold the government to the higher burden that is required of it. And if you practice elsewhere, request the heightened standard and cross your fingers. At least you will have preserved this issue for appeal.

CONCLUSION

At least for now, and in spite of federal courts’ newfound discretion in imposing sentences, federal defendants face severe sentencing consequences in light of the various cross references tucked away within the United States Sentencing Guidelines. Counsel is well-served to become familiar with the most common cross references, and to work strategically and creatively to avoid their sometimes harsh effects.

¹ 452 U.S. 296 (2004).

² *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

³ *Id.*

⁴ 543 U.S. 220 (2005).

⁵ Edward Lazarus, *The Supreme Court’s Sentencing Guidelines Decision: Its Logic, and its Surprisingly Limited Practical Effect*, Jan. 21, 2005, available at <http://writ.news.findlaw.com/lazarus/20050121.html>.

⁶ *See, e.g. United States v. Taylor*, 2006 WL 1667290, *2 (11th Cir. June 16, 2006) (unpublished opinion) (affirming cross reference from jury verdict on a firearms charge to an uncharged murder) *United States v. Hodge*, 49 Fed. Appx. 133, *5-*6 (9th Cir. 2002) (affirming four-level enhancement for uncharged robbery of a fast-food restaurant in a firearms case). *See also United States v. Vernier*, 335 F. Supp. 2d 1374 (S.D. Fla. 2004) (departing upward on

conviction of fraudulent money withdrawal due to court's suspicion of uncharged murder), aff'd in part, vacated in part on other grounds, 152 Fed. Appx. 827, (11th Cir. Oct. 11, 2005).

⁷ U. S. Sentencing Commission, *Guideline Manual* [hereinafter USSG], §1A1.1, comment. (2005).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*, at 66 (2004) [hereinafter *Fifteen Year Assessment*], at v.

¹² *Id.*; USSG § 1B1.3(a) (Nov. 1, 2005).

¹³ USSG § 1B1.5 (Nov. 1, 2005).

¹⁴ See, e.g., *United States v. Lombard*, 72 F.3d 170, 176 (1st Cir. 1995) (“A sentencing court may . . . consider relevant conduct of the defendant for purposes of making Guidelines determinations, even if he has not been charged with – and indeed, even if he has been *acquitted* of – that conduct, so long as the conduct can be proved by a preponderance of the evidence.”) (emphasis in original).

¹⁵ United States Sentencing Commission, *Revised Draft Sentencing Guidelines* (1987).

¹⁶ See generally USSG (Nov. 1, 2005).

¹⁷ *Fifteen Year Assessment* at 47.

¹⁸ *Id.* at 76.

¹⁹ *Id.* at 48.

²⁰ *Id.*

²¹ Pub. L. No. 99-570, 100 Stat. 3207 (October 27, 1986).

²² *Id.*

²³ 21 U.S.C. § 841.

²⁴ *Fifteen Year Assessment*. at 49.

²⁵ *Id.*

²⁶ 21 U.S.C. § 841(b)(1)(A)(iii).

²⁷ *Id.*

²⁸ See USSG 2D1.1(c)(4) (Nov. 1, 2005) (proscribing offense level 32 for crack quantity between 50 and 150 grams).

²⁹ See 21 U.S.C. § 841(b) (doubling mandatory minimum sentence where defendant has prior felony drug conviction).

³⁰ USSG §§ 2D1.1(a)(1), 3E1.1; USSG Ch. 5, Part A, sent. table (Nov. 1, 2005) (adjusted offense level 40 after guilty plea; offense level 40 and criminal history category I corresponding to sentencing range of 292-365 months in prison).

³¹ USSG §§ 2D1.1(a)(1) and (2) are labeled as an enhancements rather than a cross references, as each raises the base offense level within the Guideline section itself rather than directing the court to a separate section.

³² See, e.g., *United States v. Ortiz*, 52 F.3d 323 (Table); 1995 WL 234276, *3 (4th Cir., Apr. 21, 1995) (unpublished

opinion) (conspirator must only foresee distribution of drug, not resulting death).

³³ See, e.g., *United States v. Reyes-Echevarria*, 345 F.3d 1, 6-7 (1st Cir. 2003) (affirming application of murder cross-reference in case where indictment only charged drug conspiracy); *United States v. Carbajal*, 290 F.3d 277, 282-87 (5th Cir. 2002) (same); but see *United States v. Rebmann*, 321 F.3d 540, 542-45 (6th Cir. 2003) (holding that 2D1.1 more than mere sentencing enhancement and must be plead in the indictment). Note that there are increased statutory mandatory minimum and maximum penalties that apply to this same situation, see 21 U.S.C. §§ 841(b)(1)(A)-(C). These provisions must be plead in the indictment. See, e.g., *United States v. Solis*, 299 F.3d 420, 448-49 (5th Cir. 2002).

³⁴ 1 U.S.C. § 843(b).

³⁵ 1 U.S.C. § 843(d)(1)

³⁶ 8 U.S.C. § 4

³⁷ USSG §§ 2D1.1(a)(1) and (a)(2) (Nov. 1, 2005).

³⁸ *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3rd Cir.) (“The effort to determine the proper meaning of “offense of conviction” in the context of drug cases illustrates a potentially serious problem with regard to the drafting of the Guidelines in the wake of *Apprendi*”), *cert. denied*, 534 U.S. 1013 (2001).

³⁹ See, e.g., *United States v. Rodriguez*, 279 F.3d 947, 949-51 (11th Cir. 2002) (affirming “death resulted” enhancement to 20-year statutory maximum based upon finding by preponderance standard); *United States v. McIntosh*, 236 F.3d 968, 976 (8th Cir.), *cert. denied*, 532 U.S. 1022, 121 S.Ct. 1964 (2001) (same); *United States v. Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (same, in case where jury acquitted defendant of death element); *United States v. Murgas*, 321 F. Supp. 2d 451, 455-56 (N.D.N.Y. 2004) (on remand from 2nd Circuit, applying preponderance standard to murder enhancement).

⁴⁰ 321 F.3d 540 (6th Cir. 2003).

⁴¹ *Id.* at 541.

⁴² *Id.* at 541-42.

⁴³ *Id.* at 541.

⁴⁴ *Id.* at 543-44.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 544. See also, *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001) (stating, in *dicta*, that “offense of conviction” language in 2D1.1(a) enhancements excludes relevant conduct).

⁴⁸ 18 U.S.C. § 924(c).

⁴⁹ 21 U.S.C. § 841(a)(1).

⁵⁰ See USSG §§ 2D1.1; 3E1.1 (Nov. 1, 2005) (base offense level 32 + 2 (weapon possessed) – 3 (acceptance of responsibility) = adjusted offense level 29); USSG Ch. 5, sent. table. (adjusted offense level 28 and criminal history

category I corresponds to sentencing range of 87-108 months' imprisonment); USSG § 5G1.2(b) (where guideline range lower than statutory minimum term, the mandatory minimum "shall be the guideline sentence"); 21 U.S.C. § 841(b)(1)(A)(i) (mandatory minimum term of 10 years for 1 kilo or more of heroin).

⁵¹ USSG § 2D1.1(c) (Nov. 1, 2005).

⁵² See, e.g., *United States v. Smalls*, 2006 WL 1676473, *3 (4th Cir. June 13, 2006) (unpublished opinion) (affirming 20-year statutory maximum sentence based upon first-degree murder cross reference found by a preponderance of the evidence); *United States v. Reyes-Echevarria*, 345 F.3d 1, 7 (1st Cir. 2003) (affirming sentence of life imprisonment based upon first degree murder cross reference found by a preponderance of the evidence).

⁵³ See, e.g., *United States v. Richardson*, 51 Fed.Appx. 90, 94-95 (4th Cir. 2002) (affirming cross reference to murder guideline where jury acquitted defendants of murder).

⁵⁴ See, e.g., *Richardson*, 51 Fed.Appx. at 94-95 ("[f]or the cross reference to apply, a homicide must meet the statutory definition of murder under 18 U.S.C. § 1111").

⁵⁵ 321 F. Supp. 2d at 455-56.

⁵⁶ *Id.* at 457.

⁵⁷ See e.g. *United States v. Rashaw*, 170 Fed. Appx. 986, 987 (8th Cir. 2006) (affirming defendant's 360-month sentence for firearms conviction after considering allegations that the defendant had committed a triple homicide); *United States v. Thomas*, 112 F.3d 514 (8th Cir. April 24, 1997) (unpublished opinion) (affirming trial court's cross reference of the felon in possession guideline to sentence defendant for an uncharged rape).

⁵⁸ Fifteen Year Assessment at 66 (2004).

⁵⁹ *Id.*

⁶⁰ *Id.* at 67.

⁶¹ *Id.*

⁶² Amendments to the Sentencing Guidelines, 71 Fed. Reg. 28063, 28071 (May 18, 2006).

⁶³ *Id.*

⁶⁴ USSG App. A (Nov. 1, 2005).

⁶⁵ See 18 U.S.C. § 924(e) (defendant convicted of violating 18 U.S.C. § 922(g) who has three prior convictions for violent felonies or serious drug offenses subject to mandatory minimum 15-year prison sentence).

⁶⁶ Note that where the firearm was possessed in connection with more than one offense, the Guidelines require cross-reference to the most serious of those offenses. See USSG §§ 1B1.5(d); 1B1.5 comment. (3). (Nov. 1, 2005).

⁶⁷ See USSG § 1B1.3 (Nov. 1, 2005) (defining relevant conduct).

⁶⁸ See, e.g., *United States v. Williams*, 431 F.3d 767, 771-72 (11th Cir. 2005) ("any" firearm as defined at USSG § 2K2.1(c)(1) "truly means 'any firearm;'" it must pertain to

relevant conduct, but need not be the firearm of conviction); *United States v. Jardine*, 364 F.3d 1200, 1206-10 (10th Cir. 2004), *vacated*, 543 U.S. 1102 (2005), *remanded to*, 406 F.3d 1261(10th Cir. 2005) (vacated and remanded after *Booker*, same result reached) (same); *United States v. Jones*, 313 F.3d 1019, 1022 (7th Cir. 2002) (same). See also *United States v. Settle*, 414 F.3d 629, 633-34 (6th Cir. 2005) (holding that "any firearm" pertains to uncharged firearm part of relevant conduct, but suggesting that there must be "clear connection" to charged weapon); *United States v. Mann*, 315 F.3d 1054, 1056-57 (8th Cir. 2003) (interpreting "any firearm" enhancement at USSG § 2K2.1(b)(5) to mean any firearm part of relevant conduct, whether or not related to charged firearm). But see *United States v. Gonzales*, 996 F.2d 88, 92 (5th Cir. 1993) ("any firearm" not limited to relevant conduct, but firearm must be related to firearm of charged offense).

⁶⁹ See USSG § 2A1.1 (Nov. 1, 2005) (imposing base offense level 43 for first degree murder); USSG Ch. 5, Pt.A, sent. table (Nov. 1, 2005) (suggesting life sentence for any defendant subject to offense level 43).

⁷⁰ It is important to recognize that an ACCA-eligible defendant who pleads guilty to a § 922(g) offense is ultimately eligible for the ACCA's 15-year mandatory minimum, even if the enhanced penalty is not charged in the indictment. The school of thought at one time was to quickly plead a defendant guilty in such an instance, so that the penalty would be limited to § 922(g)'s 10-year maximum prison term. However, several federal courts have held that, where a defendant pleads guilty to § 922(g) and is not warned at the time of plea that the ACCA and its enhanced penalties apply to him, the defendant must either (1) withdraw his guilty plea, or (2) proceed with sentencing according to the ACCA. See e.g. *United States v. Rodriguez*, 205 F.3d 1336 *1 (4th Cir. 2000) (unpublished opinion); *United States v. Cobia*, 41 F.3d 1473, 1476 (11th Cir. 1995).

⁷¹ Where you have a sympathetic client, educate the prosecutor about what your client is facing. Often, the AUSA is wholly unaware that the run-of-the-mill § 922(g) case that they indicted is actually an ACCA case or, worse yet, a case where the cross reference will result in a 30-year or lifetime prison sentence. This is especially true where juvenile convictions put the defendant into the ACCA category. See 18 U.S.C. § 924(e)(2)(B). In such cases, your best strategy is to convince the AUSA that your client does not deserve such a harsh sentence and work together to find an agreeable alternative offense. It is helpful to remind the government that your client will be pleading to a serious felony firearm charge and, most likely, be serving a significant period of time behind bars. Such a result will often appease both the prosecutor and the law enforcement agent who investigated the case.

⁷² 18 U.S.C. § 922(j).

⁷³ 18 U.S.C. § 922(k).

⁷⁴ 18 U.S.C. § 924(a)(2).

⁷⁵ 18 U.S.C. § 924(e).

⁷⁶ See U.S. Dep't of Justice, Bureau of Justice Statistics, *Guns Used in Crime: Firearms, Crime and Criminal Justice*, July 1995, <http://www.ojp.usdoj.gov/bjs/pub/ascii/guic.txt> (“According to the 1991 Survey of State Prison Inmates, among those inmates who possessed a handgun, 9 percent had acquired it through theft and 28 percent had acquired it through an illegal market such as a drug dealer or fence. Of all inmates, 10 percent had stolen at least one gun, and 11 percent had sold or traded stolen guns”).

⁷⁷ Dep't of Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Youth Crime Gun Interdiction Initiative*, July 2002 at 50-51, available at http://www.atf.treas.gov/firearms/ycgii/2000/generalfinding_s.pdf, at 50-51.

⁷⁸ 18 U.S.C. § 922(q)(2)(A).

⁷⁹ 18 U.S.C. § 924(a)(4).

⁸⁰ MapQuest® is one of many internet websites where the user can input an address and see a street-level map of the area surrounding the address. See <http://www.mapquest.com>

⁸¹ *Id.*

⁸² 18 U.S.C. § 922(a)(6).

⁸³ 18 U.S.C. § 924(a)(2).

⁸⁴ Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251, 2252).

⁸⁵ See Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act (“PROTECT Act”), Pub. L. No. 108-21, 117 Stat. 650 (2003).

⁸⁶ See PROTECT Act, § 401(b), 117 Stat. at 669-69 (codified at 18 U.S.C. § 3553(b)(2)) (significantly limiting judicial discretion to depart downward from the applicable sentencing guideline range in child sex cases).

⁸⁷ See generally FBI—Innocent Images National Initiative, <http://www.fbi.gov/publications/innocent.htm>.

⁸⁸ *Id.*

⁸⁹ See Sex Offender Registration and Notification Act (short title), Pub. L. No. 109-248 (2006) (popular name used in text). The new law focuses greatly on the registration and tracking of convicted sex offenders. However, it also increases mandatory minimum five-year prison sentence for violation of 18 U.S.C. § 2422(b) (child enticement) to a ten-year minimum sentence and a maximum of life.

⁹⁰ As with firearms offenses, cross references within the child pornography and child enticement guidelines can often result in punishment for uncharged violent behavior for which the federal government would otherwise lack subject matter jurisdiction. See, e.g., USSG § 2G1.3(c)(3) (Nov. 1, 2005) (cross-referencing child enticement offense to

attempted sexual abuse guideline); USSG § 2G2.1(c)(1) (cross-referencing sexual exploitation offense to murder guideline); 18 U.S.C. §§ 2241, 2242, 243, 2244 (limiting federal prosecution of such sex crimes to offenses taking place in federal prisons or the special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 1111 (similarly limiting federal prosecution of murder).

⁹¹ See, e.g., 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b).

⁹² See, e.g., 18 U.S.C. § 2422.

⁹³ See USSG App. C, Amend. 664 (Nov. 1, 2004); USSG § 2G2.2(c) (Nov. 1, 2005) (lone cross reference pertaining to possession, receipt, or distribution of child pornography).

⁹⁴ See *supra* n. 44 and accompanying text.

⁹⁵ See, e.g., Alberto Gonzalez, U.S. Attorney General, Address to Employees of National Center for Missing and Exploited Children (April 21, 2006) (transcript available at <http://www.impactwire.com/article.asp?id=2604>) (praising increased media coverage of child enticement sting operations).

⁹⁶ See, e.g., Perverted-justice.com, <http://www.perverted-justice.com/> (private organization which “recruits volunteer contributors who pose as underage children in chatrooms” for the purpose of ensnaring alleged sex predators).

⁹⁷ See, e.g., *Citizens Volunteering for Online Sex Sting*, A.P., April 28, 2006, available at http://abclocal.go.com/ktrk/story?section=sci_tech&id=4126184 (discussing trend of private citizens volunteering to pose as children on the internet in effort to catch child sex predators).

⁹⁸ See, e.g., *To Catch a Predator*, <http://www.msnbc.msn.com/id/10912603/> (website for NBC’s “Dateline” television news show’s sting campaign). Some have questioned the media’s involvement in conducting such stings, especially where none of the subjects are ever charged with a crime. See, e.g., <http://www.corrupted-justice.com/article12.html>; <http://www.corrupted-justice.com/article16.html>; http://www.onthemedial.org/transcripts/transcripts_040204_bust.html (all questioning media and private party stings that are not supervised by law enforcement).

⁹⁹ United States Sentencing Commission, Report to Congress, *Sex Offenses Against Children: Findings and Recommendations Regarding Federal Penalties* (June 1996) at 2, available at http://www.ussc.gov/r_congress/SCAC.PDF.

¹⁰⁰ Press Release, U.S. Dep't of Justice, Fact Sheet: Department of Justice, Project Safe Childhood Initiative (February 15, 2006), available at http://www.usdoj.gov/opa/pr/2006/February/06_opa_081.html.

¹⁰¹ For a typical factual scenario in a federal child enticement case, see, e.g., *United States v. Munro*, 394 F.3d 865, 868-869 (10th Cir. 2005), cert. denied, 544 U.S. 1009,

125 S. Ct. 1964 (2005); *United States v. Panfil*, 338 F.3d 1299, 1299-1300 (11th Cir. 2003).

¹⁰² For purposes of 18 U.S.C. § 2422(b), the “child” may in fact be a law enforcement agent. *See, e.g.*, USSG § 2A3.1 comment. (1); *United States v. Tykarsky*, 446 F.3d 458, 468-69 (3rd Cir. 2006) (citing cases).

¹⁰³ Defendants often lie about their own age during such chats, which may result in a sentencing enhancement if intended to induce the victim. *See* USSG § 2G1.3(b)(2). *But see United States v. Miranda*, 348 F.3d 1322, 1333 (11th Cir. 2003) (with respect to USSG § 2G1.3, not clearly erroneous for district court to find that defendant’s false statements about his age were not intended to induce child).

¹⁰⁴ *See* USSG App. A (Nov. 1, 2005).

¹⁰⁵ *See* USSG § 2G1.3 (Nov. 1, 2005) (base offense level 24 +2 (defendant lied about his own age) +2 (defendant used a computer) = adjusted offense level 28); USSG Ch. 5, Pt.A, sent. table. (adjusted offense level 28 and criminal history category I corresponds to sentencing range of 78-97 months’ imprisonment).

¹⁰⁶ *See* USSG § 3E1.1 (Nov. 1, 2005) (acceptance of responsibility); USSG Ch. 5, Pt.A, sent. table. (Adjusted Offense Level 25 and Criminal History Category I corresponds to sentencing range of 57-71 months’ imprisonment).

¹⁰⁷ When the statutory mandatory minimum exceeds the applicable guideline range, the mandatory minimum serves as the guideline sentence. *See* USSG § 5G1.1(b) (Nov. 1, 2005); *United States v. Moreland*, 437 F.3d 424, 437 n.9 (4th Cir. 2006) (citing USSG § 5G1.1(b) for proposition that mandatory minimum trumps applicable guideline range); *United States v. Smith*, 354 F.3d 171, 175 (2d Cir. 2003) (same).

¹⁰⁸ *See* USSG §§ 2G1.3(c)(1) – (3) (Nov. 1, 2005).

¹⁰⁹ USSG § 2G1.3(c)(3) (Nov. 1, 2005). Curiously, this cross reference, like most others, applies only where the new guideline section results in a *longer* sentence. This begs the question: If “real offense” sentencing aims to punish the defendant for his actual behavior, why does the Commission choose not to apply the guideline applicable to the “real offense” on the rare occasion when it results in a *shorter* sentence?

¹¹⁰ *See* USSG § 2A3.1 (Nov. 1, 2005) (base offense level 30 +2 (“victim between 12 and 16 years of age) +2 (defendant lied about his own identity) + adjusted offense level 34); USSG Ch. 5, Pt.A, sent. table (providing for sentencing range of 151-188 months for Adjusted Offense Level of 34 and Criminal History Category I).

¹¹¹ *See* USSG § 3E1.1 (Nov. 1, 2005) (three-level reduction in offense level for timely guilty plea); USSG Ch. 5, Pt.A, sent. table (providing for sentencing range of 108-135 months for adjusted offense level of 31 and criminal history category I).

¹¹² *See* USSG App. A (Nov. 1, 2005).

¹¹³ *See* USSG § 2G2.2 (Nov. 1, 2005) (base offense level 30 +2 (“victim between 12 and 16 years of age) +2 (defendant lied about his own identity) + adjusted offense level 34); USSG Ch. 5, Pt.A, sent. table (providing for sentencing range of 151-188 months for adjusted offense level of 34 and criminal history category I).

¹¹⁴ 18 U.S.C. § 2252A(a)(5)(B).

¹¹⁵ 18 U.S.C. § 2252A(a)(2).

¹¹⁶ 18 U.S.C. § 2252A(b)(2).

¹¹⁷ 18 U.S.C. § 2252A(b)(1).

¹¹⁵ 18 U.S.C. § 2252A(b)(2)

¹¹⁹ *See* USSG § 2G2.2(b) (Nov. 1, 2005) (Specific Offense Characteristics). As distasteful or uncomfortable as it may be, counsel *must* personally inspect the child pornography at issue in a federal client’s case. Otherwise, counsel relies upon the government or the probation officer to determine the important sentencing questions of how many images are present and whether such images warrant sentencing enhancements. Federal probation officers often do not personally inspect this evidence and instead rely on the case agent’s statements. Needless to say, the case agent is not out to help your client avoid guideline enhancements.

¹²⁰ *See* 18 U.S.C. § 2422(b) (as amended by the Adam Walsh Act). Note that child enticement crimes committed prior to July 31, 2006, would be subject to reduced penalties of five to 30 years in prison. *See* 18 U.S.C. § 2422(b) (2005).

¹²¹ *See* 18 U.S.C. § 2422(a).

¹²² USSG § 2G1.3(c)(3) (Nov. 1, 2005).

¹²³ 18 U.S.C. §§ 2246(2)(A)-(C).

¹²⁴ 18 U.S.C. § 2246(2)(D).

¹²⁵ *See, e.g., United States v. Blue Bird*, 372 F.3d 989, 993-94 (8th Cir. 2004) (defendant touching of victim’s hand, stomach, and shirt did not constitute attempted sexual act; where defendant on separate occasion attempted to take his pants off but passed out on top of victim, attempted sexual act did occur); *United States v. Hayward*, 359 F.3d 631, 639-643 (3d Cir. 2004) (defendant’s attempt to put victim’s mouth on his penis not “sexual act” because defendant was wearing pants and there was therefore no chance for skin-to-skin contact); *United States v. Miranda*, 348 F.3d 1322, 1330-31 (11th Cir. 2003) (defendant who stated in chats an intent to “have sex” and “make love” with victims committed attempted sexual act); *United States v. Payne*, 77 Fed. Appx. 772, 772-73 (6th Cir. 2003) (unpublished) (defendant’s chat room request of victim to perform oral sex on him constituted attempted sexual act); *United States v. Panfil*, 338 F.3d 1299, 1302-03 (11th Cir. 2003) (defendant’s offer (via internet chat) to perform oral sex on child constituted attempted sexual act). *See also United States v. Poor Bear*, 359 F.3d 1038, 1039-40 (8th Cir. 2004) (expressly recognizing that whether sexual contact is over or

underneath clothing is significant for purposes of determining whether “sexual act” occurred and, in turn which guideline provision is applicable; holding that direct contact with victim’s vagina constitutes sexual act). *But see United States v. Jackson*, 2002 WL 1125340, at *2-3 (N.D. Tex. 2002) (finding, without explanation, that defendant’s online solicitation of oral sex from young boys did not constitute attempted sexual act).

¹²⁶ Do not withdraw!

¹²⁷ See generally *United States v. Jackson*, - - F.3d - -, 2006 WL 1681099 at *2 (5th Cir. June 20, 2006) (discussing scope of defendants’ due process rights at sentencing); see also *United States v. Giltner*, 889 F.2d 1004, 1007 (11th Cir. 1989) (same).

¹²⁸ See, e.g., *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005), cert. denied, --- U.S. ---, 126 S.Ct. 432, 163 L.Ed.2d 329 (2005) (affirming sentence of life imprisonment after the district court found facts at sentencing by the preponderance of the evidence).

¹²⁹ See, e.g., *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005) (“[W]hen a district court makes a determination of sentencing facts by a preponderance of the evidence test under the now-advisory Guidelines, it is not bound by jury determination reached through application of the more onerous reasonable doubt standard.”); *United States v. Partida*, 385 F.3d 546, 565 (5th Cir. 2004) (“[A] jury’s verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.”) (internal citations omitted); but see *United States v. Coleman*, 370 F. Supp. 2d 661, 668-673 (S.D. Ohio 2005) (refusing to consider acquitted conduct out of respect for the jury verdict and because “consideration of acquitted conduct skews the criminal justice system’s power differential too much in the prosecution’s favor.”).

¹³⁰ See *United States v. Lawrence*, 405 F.3d 888, 890 (10th Cir. 2005) (“[T]he Supreme Court’s holding in *Booker* would not have prohibited the district court from making the same factual findings and applying the same enhancements and adjustments to [the defendant’s] sentence as long as it did not apply the Guidelines in a mandatory fashion”); but see, e.g., *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (finding that the defendant committed a murder by clear and convincing evidence when the jury had found that the murder had not been proven beyond a reasonable doubt, and using a cross reference to enhance the sentence accordingly).

¹³¹ See, e.g., *United States v. Rodriguez*, 765 F.2d 1546, 1555 (11th Cir. 1985).

¹³² See, e.g., *United States v. Petty*, 982 F.2d 1365, 1369 (9th Cir.), amended on other grounds, 992 F.2d 1015 (9th

Cir.1993) (finding that due process requires that sentences not be based on “materially incorrect information.”).

¹³³ See 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); see, also *United States v. Nichols*, 438 F.3d 437, 444 (4th Cir. 2006) (allowing a confession obtained in violation of *Miranda* to be considered during sentencing), *United States v. Graves*, 785 F.2d 870, 873 (10th Cir. 1986) (allowing evidence excluded under the Fourth Amendment to be considered during sentencing); see also *Booker*, 543 U.S. at 304 (“Inexplicably, however, the [majority] opinion concludes that the manner of achieving uniform sentences was more important to Congress than actually achieving uniformity – that Congress was so attached to having judges determine ‘real conduct’ on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old-fashioned process of having juries find the facts that expose a defendant to increased prison time.”) (emphasis in original) (Scalia, J., dissenting).

¹³⁴ See USSG § 6A1.3(a) (Nov. 1, 2005) (“[T]he court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.”); See, e.g., *United States v. Lawrence*, 47 F.3d 1559, 1566-67 (11th Cir. 1995) (government must prove drug quantity by presenting “specific and reliable evidence”); *United States v. Waters*, 313 F.3d 151, 156 (3rd Cir. 2002) (requiring the government to provide “substantial evidence” of the determination enhancing the sentence”).

¹³⁵ See, e.g., *United States v. Linnear*, 40 F.3d 215, 218-219 (7th Cir. 1994) (“The court may rely upon hearsay evidence at the sentencing hearing, but only if such evidence is reliable and the defendant has a reasonable opportunity to rebut the contested hearsay.”) (internal citations omitted).

¹³⁶ But see, e.g., *United States v. Cabbagestalk*, 2006 WL 1582049, *3 (3rd Cir. June 9, 2006) (finding that the Sixth Amendment right to cross-examine witnesses does not apply to sentencing hearings).

¹³⁷ *Linnear*, 40 F.3d at 218-19.

¹³⁸ See, e.g., *United States v. Bearchild*, 85 Fed. Appx. 629, *1 (9th Cir. 2004) (unpublished opinion) (stating in response to defendant’s claim that cross reference should not have applied after jury acquitted him of the same conduct that the “court may consider acquitted conduct as ‘relevant conduct’ in its sentencing calculations if it finds that the government proved the conduct by a preponderance of the evidence (or, where required, by clear and convincing

evidence.”); *United States v. Mezas de Jesus*, 217 F.3d 638, 643 (9th Cir. 2000); *United States v. Fry*, 322 F.3d 1198, 1201 (9th Cir. 2003); *United States v. Staten*, 450 F.3d 384 (9th Cir. 2005) (vacating and remanding sentence so district court could determine if facts supported by clear and convincing evidence); *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000) (finding that a seven-level increase made the enhancement “extremely disproportionate” to the original sentence, and requiring the district court to apply the clear and convincing standard); *see also United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1029 (D. Neb. 2005) (holding that any factor that increases a sentence must be proved beyond a reasonable doubt).

¹³⁹ *See Mezas de Jesus*, 217 F.3d at 643. The Ninth Circuit has established a “disproportionate impact” test using the following factors: “[1] Does the enhanced sentence fall within the maximum sentence for the crime alleged in the indictment? [2] Does the enhanced sentence negate the presumption of innocence or the prosecution’s burden of proof for the crime alleged in the indictment? [3] Do the facts offered in support of the enhancement create new offenses requiring separate punishment? [4] Is the increase in sentence based on the extent of a conspiracy? [5] Is the increase in the number of offense levels less than or equal to four? [6] Is the length of the enhanced sentence more than double the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence?” *United States v. Peyton*, 353 F.3d 1080, 1088 (9th Cir. 2003).

¹⁴⁰ *See United States v. Reddick*, 2006 WL 1683461, *3 n.1 (11th Cir. June 20, 2006) (unpublished opinion) (rejecting defendant’s argument that district court should have applied a clear and convincing evidence standard rather than the preponderance standard and stating that the argument “lack[ed] merit and warrant[ed] no further discussion.”); *United States v. Johnson*, - - F.3d - -, 2006 WL 1667634, *2 (8th Cir. 2006) (rejecting clear and convincing standard even where enhancements have a disproportionate effect); *United States v. Grier*, 449 F.3d 558 (3rd Cir. 2006) (affirming preponderance of the evidence standard and overruling previous case law that certain enhancements must be proved by clear and convincing evidence).

¹⁴¹ *See United States v. Cuellar-Cuellar*, 157 Fed. Appx. 732, 735 n.4 (5th Cir. 2005) (“[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of sentence.”); *United States v. Davison*, 166 Fed. Appx. 246, 248-49 (7th Cir. Feb. 10, 2006) (unpublished opinion) (“We never explicitly have adopted a higher standard than preponderance of the evidence for sentencing determinations, and our case law has not been consistent

with respect to whether a higher burden of proof should be imposed.”); *United States v. Dixon*, 2006 WL 897771, *1 (2nd Cir. March 28, 2006) (unpublished opinion) (mentioning that the Supreme Court appeared to leave open the possibility of a higher standard being necessary at sentencing in some circumstances); *United States v. Long*, 328 F.3d 655, 671 (D.C. Cir. 2003) (affirming application of clear and convincing standard).

Favorable Case Law Update

1st Circuit upholds nine-year sentence for career offender where court gave "reasoned explanation" for sentence. Defendant was sentenced as a career offender based on two prior Massachusetts assault convictions. The convictions counted as felonies because they were punishable by imprisonment for a term exceeding more than one year. He argued that a sentence of less than nine years (the sentence he received) was necessary to avoid the purportedly "unwarranted sentencing disparity," 18 U.S.C. § 3553(a)(6) between his sentence and the sentences received by defendants who are prosecuted for similar offenses in other states. The First Circuit affirmed the sentence, given the court's "reasoned explanation" for the sentence imposed. The nine-year sentence, which was three and one half years below the bottom of the guideline range, was not unreasonably high in light of the relevant statutory factors. The court had found that the public's need to be protected from defendant's "demonstrably violent personality," see 18 U.S.C. § 3553(a)(2)(C), and the need to account for his "terrible ... violent record," § 3553(a)(1) warranted a "substantial sentence." *U.S. v. Caraballo*, 447 F.3d 26 (1st Cir. 2006).

5th Circuit holds that felony classification is determined by the section defining the offense, not maximum Guideline sentence. Defendant was originally convicted of transportation of an illegal alien, in violation of 18 U.S.C. § 1324 and was sentenced to 25 months imprisonment and a term of supervised release. He violated the terms of his supervised release. The district court revoked the supervised release and sentenced defendant to 24 months' imprisonment. Defendant argued that the underlying offense was a Class E felony, and therefore the revocation sentence exceeded the statutory maximum authorized by 18 U.S.C. § 3583. He contended that the felony classification of the underlying crime is determined by the 25-month sentence he received for violating § 1324. The Fifth Circuit disagreed, holding that the felony classification of the underlying

offense is determined by the section defining the offense, not from the maximum Guideline sentence calculated by the district court. See 18 U.S.C. § 3559(a). *U.S. v. Alfaro-Hernandez*, 453 F.3d 280 (5th Cir. 2006)

10th Circuit holds that driving for 8 1/2 hours at night did not involve reckless creation of a substantial risk of death or serious injury. At about 7:30 a.m., defendant fell asleep at the wheel of his car, and collided with another vehicle, killing one of his passengers and the driver of the other vehicle. Defendant had been transporting four illegal aliens from Texas to Pennsylvania. At the time of the accident, defendant had been driving for 8 1/2 hours, with only one brief stop for gas. Defendant admitted that he traveled at night on a more remote highway to avoid detection by immigration authorities. The Tenth Circuit reversed a six-level enhancement under § 2L1.1(b)(5) for intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person. Falling asleep at the wheel, when considered alone, generally constitutes negligence, not recklessness. There was no evidence that defendant had not slept prior to departing from Arizona, or that he consciously disregarded warnings of impending sleep during the trip. Nor was there evidence that defendant had a propensity to fall asleep while driving a car. Without some evidence that defendant was sleep deprived, driving for 8 1/2 hours with only one break is not reckless. *U.S. v. Aranda-Flores*, 450 F.3d 1141 (10th Cir. 2006).

9th Circuit finds that sentence based on aggravating factors found by judge violates *Apprendi*. Defendant was convicted of attempted kidnapping and attempted robbery. Those offenses carried a maximum sentence of 20 years. Under Arizona law at that time, the court could increase defendant's sentence if it found certain aggravating factors. The judge found that defendant had caused physical and emotional harm to his victim and that his prior non-dangerous offenses were strikingly similar to the instant offense. Based on those aggravating factors, the court sentenced defendant to an aggravated term of 25 years. The Ninth Circuit held that increasing defendant's maximum sentence based on findings made by the judge violated the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Stokes v. Shriro*, 465 F.3d 397 (9th Cir. 2006).

Articles set out Constitution Project's proposed reform of the Federal Sentencing Guidelines. A series of articles in the *Federal Sentencing Reporter* summarize the Constitution Project Sentencing Initiative, which is a diverse group of sentencing and criminal justice professionals chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann. The group has produced a set of "Principles for the Design and

Reform of Sentencing Systems," and two reports, which are available at www.constitutionproject.org. The reports make recommendations for reforming the sentencing guidelines if Congress decides to enact new legislation in response to the Supreme Court's decision in *U.S. v. Booker*, 243 U.S. 220 (2005), which made the guidelines advisory. A Working Group has drafted model guidelines that are individually authored by Frank Bowman, Michael O'Hear, Mary Price, Nora Demleitner, Steve Chanenson and Beverly Dyer. These model guidelines are set out in the *Federal Sentencing Reporter*. Frank O. Bowman, III, *Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT. REP. 301 (2006).

Commission implements statute allowing reduction for 70-year-old prisoners who have served 30 years. The Commission added a new policy statement at §1B1.13, permitting a court, on motion of the Director of the Bureau of Prisons pursuant to 18 U.S.C. §3582(c)(1)(A), to reduce the term of imprisonment of any prisoner who is at least 70 years old who has served at least 30 years in prison. *Amendment 1, effective November 1, 2006.*

7th Circuit remands because judge appeared to misunderstand its post-*Booker* discretion. Defendant was convicted of being a felon in possession of a firearm. At sentencing, defendant argued for a sentence below the 41-51 month Guideline range, arguing that his previous convictions had occurred 14 years earlier, he had not engaged in any criminal conduct since, and under the government's theory of the case, he possessed the gun for protection, not for any criminal purpose. In imposing a 41-month sentence, the judge said, "[I'm] imposing the lowest sentence I can and I would impose a lower one if I could." The judge further commented that he could not depart on the basis of an overstated criminal history, explaining that "[t]his is a case where I don't have the authority." The Seventh Circuit found it unclear whether the judge properly took its post-*Booker* discretion into account, and remanded for resentencing. Defendant's sentencing hearing took place relatively soon after *Booker*, and it appeared that the court believed its discretion was still cabined by pre-*Booker* departure jurisprudence. *U.S. v. Mancari*, 463 F.3d 598 (7th Cir. 2006).

**from: Federal Sentencing Guide
Vol 17, No. 21, October 16, 2006
Vol 17, No. 22, October 30, 2006**

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