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*“The pursuit of justice is a team effort.”*

## *Newsletter*

*Legal News Briefs for Attorneys*

### ***The Importance of Creative Advocacy At Sentencing***

Often, *National Legal Professional Associates* is contacted by defense counsel or their clients asking for research assistance after the defendants have pled guilty, but prior to being sentenced. When this occurs, NLPA focuses on

minimizing the defendant’s sentence by preparing a sentencing memorandum that, among other issues, outlines any alternative sentencing arguments or requests for downward departures that may be appropriate.

his PSI, but prior to sentencing. The PSI outlined the Defendant’s juvenile convictions, and based on these convictions, the Probation Officer determined his Criminal History Score to be Category II. Further, his offense level was determined to be 21, derived from a base offense level of 24 with an adjustment for acceptance of responsibility. From these calculations, the PSI recommended a guideline range of 41-46 months.

*United States v. Pearson*, Case No. 00-CR-50075-FL U.S.D.C. Eastern District of Michigan was just such a case where NLPA’s input at sentencing helped provide significant results.

In *Pearson*, NLPA was contacted by the Defendant’s family in order to assist counsel after Mr. Pearson had received

Based on consultation with Mr. Pearson’s counsel, letters from Mr. Pearson and his family, and

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a review of Mr. Pearson's PSI, NLPA prepared various arguments designed to minimize Mr. Pearson's sentence and sent them to Mr. Pearson's counsel. At sentencing, counsel utilized NLPA's research and made several arguments for a reduced sentence. Among other issues, counsel argued that 1) the drug amounts attributed to the Defendant in the PSI had been erroneously calculated, and were unreliable and insufficient; 2) the criminal history score in the PSI had been erroneously calculated and over-represented the seriousness of the Defendant's criminal history; and 3) the safety valve was applicable to Defendant's case.

Aptly, the Court agreed with some of the arguments at sentencing, and reduced Mr. Pearson's offense level by two points. Instead of receiving the PSI's recommended range of imprisonment of 41-46 months, Mr. Pearson received a reduced sentence of 33 months. The departure represented a reduction in the Mr. Pearson's potential sentence more than 28%!!! (1 year)!

### ***What's New Around The Nation***

#### ***Washington:***

#### **Sentencing Commission Adopts Emergency Amendments**

As required under last year's Sarbanes-Oxley Act of 2002, the United States Sentencing Commission adopted emergency amendments to the Federal determinate sentencing program on January 25, 2003. In a brief 180 days, the Commission fashioned several emergency enactments as required by Congressional legislation.

The new punishments generally address corporate fraud and obstruction of justice, modifying §2B1.1 (the consolidated section involving fraud and deceit), §2J1.2 (obstruction of justice), and §2E5.3 (falsification of statements and concealment of facts).

The modifications account more adequately for the significant impact large corporate fraud offenses have on large numbers of victims such in the Enron and related cases. The new penalties also now include an enhancement for offenses that endanger the solvency or financial security of a publicly traded company.

The amendments target officers and directors of public companies who fail in their statutory, fiduciary duties, or

who cause catastrophic economic losses. Finally, the new emergency amendments address conduct associated with document destruction in the realm of obstruction of justice. It is anticipated that these emergency amendments will be permanently adopted as part of the annual amendments approved for inclusion in November.

#### ***Eleventh Circuit***

#### **Downward Departure for Adverse Immigration Effects**

Last month, the Eleventh Circuit issued an opinion in the case of *United States v. Maung*, No. 02-12945, (11<sup>th</sup> Cir., February 10, 2003) in which it held that a court may not downward depart a sentence for the purpose of taking a crime out of the definition of an aggravated felony in order to shield a defendant from immigration consequences. In this case, the Defendant had been convicted of exporting stolen cars, which carried a 30-37 month sentence, qualifying the crime as an aggravated felony. As such, the Attorney General of the United States was required to remove the Defendant, an alien, from the United States. 8 U.S.C. § 1101(a)(43)(R). While the district court believed that the Defendant was eligible for downward departure because expulsion could lead to torture in the Defendant's native Burma, which is outside of the scope of the circumstances

envisioned by the Sentencing Guidelines, the Circuit Court of Appeals disagreed, and remanded the case for sentencing within the guidelines.

### *Tenth Circuit*

#### **Proving an Assault**

In *United States v. Hathaway*, No. 02-3050 (10th Cir. February 06, 2003), the Defendant was convicted for assault under 18 U.S.C. § 111(a). The Defendant objected to the fact that he was found guilty and sentenced for the commission of a felony, instead of a misdemeanor. Hathaway argued that the indictment, as well as the jury instructions, failed to distinguish between simple (misdemeanor) and non-simple (felony) assault. Therefore, the elements required for a non-simple assault were not proved to a jury beyond a reasonable doubt.

Section 111 of Title 18 explicitly defines three separate offenses for assault on a federal officer, and each element must be charged in the indictment and proven beyond a reasonable doubt. Defendant's indictment was insufficient to sustain a conviction under Section 111(a). No conduct beyond a simple assault was alleged nor proved, making the felony conviction unwarranted. As a felony conviction can be highly prejudicial to individuals, the

court agreed with Hathaway's argument, and remanded the case so that all of Hathaway's records could be changed to reflect that of a misdemeanor conviction.

### *Eighth Circuit*

#### **Departures Aren't Always Accepted**

In the recent case of *United States v. Johnson*, Case No. 01-2937/3086 (8th Cir. February 10, 2003), a defendant was convicted of two counts of possession and distribution of cocaine. The defendant received a five-year downward departure on his sentence because of physical impairments. Johnson suffered from coronary artery disease, and had to undergo a coronary angioplasty. Johnson also suffered from Hodgkin's disease. Both conditions were successfully treated prior to sentencing. In order to qualify for a downward departure for physical impairments under § 5H1.4, a defendant must show that (1) the physical condition would cause imprisonment to be more than the normal hardship; (2) imprisonment would cause more than normal inconvenience or danger; or (3) the condition has a substantial effect on the defendant's ability to function. The district court found that Johnson satisfied the third prong of this test.

The appellate court disagreed,

stating that the situation must be examined to determine whether the condition is "substantially more dangerous for prisoners than non-prisoners," citing *United States v. Krilich*, 257 F.3d 689, 693 (7th Cir. 2001). Therefore, the district court erred in granting a five-year downward sentence departure based on defendant's physical condition, because the condition was not an "extraordinary physical impairment" as that term has been interpreted in prior cases. The case was remanded for resentencing.

### *First Circuit*

#### **Strip Searches and Qualified Immunity**

Defendants in the case of *Savard v. State*, Case No. 02-1568 (1st Cir. February 11, 2003) were all nonviolent, non-drug minor offenders who had been arrested and placed in the Adult Correctional Institution under the control of the state of Rhode Island. The Defendants were subjected to strip and visual body cavity searches at the prison. The Defendants claimed that this action was unconstitutional. The District Court ruled that the prison officials were protected under the theory of qualified immunity. This court stated, on appeal, that prison officials who ordered strip searches are not entitled to qualified immunity where the law was clearly established that people arrested

for nonviolent, non-drug related minor offenses could not be subjected to strip and visual body cavity searches absent reasonable suspicion that they were concealing contraband or weapons. The court stated that the officials violated a clearly established constitutional right, and did not act in an objectively reasonable manner. Therefore, the district court's ruling was reversed, and this case was remanded for further proceedings.

### Illinois

#### Seize But Don't Search

In the case of *People v. Stehman*, Case No. 92287 (Ill. December 19, 2002), the Defendant had exited his vehicle before a police officer approached him and arrested him for Failure to Appear in Court. With the Defendant in custody, the officer, without permission from the Defendant searched the Defendant's car, and found drug paraphernalia. The officer claimed that he was conducting an inventory check prior to having the car towed. The district court suppressed the paraphernalia evidence. This decision was upheld by the appellate court and subsequently the Illinois Supreme Court.

The Court stated that once a subject who has exited a vehicle prior to initiation of contact by a police officer is in custody,

officers must avoid creating "artificial" situations to get around the requirements of the Fourth Amendment's search and seizure rules. If the officer has reasonable suspicion regarding the vehicle, a warrant should be obtained. Even the fact that the Defendant was a "recent occupant" of the vehicle does not change the outcome of this search.

### Practice Tips

#### Washington

#### Sentencing Commission Posts Notice of Proposed Amendments

In addition to the emergency amendments adopted by the Commission effective January 23, 2003, the U.S.S.C. has published proposed amendments, and currently seeks comments on these proposed amendments to sentencing guidelines, policy statements, and commentary.

The specific amendments proposed are as follows:

- (1) a proposed amendment to repromulgate the temporary, emergency amendment implementing the Sarbanes-Oxley Act, Pub. L. 107--204, as a permanent, non-emergency amendment, and issues for comment;
- (2) a proposed amendment to repromulgate the temporary, emergency amendment implementing the Bipartisan Campaign Reform Act of 2002,

Pub. L. 107--155, as a permanent, non-emergency amendment;

(3) a proposed amendment implementing section 11009 of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107--273, which directs the Commission to review and amend the sentencing guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence or drug trafficking crime in which the defendant used body armor;

(4) a proposed amendment to § 2 D 1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) that provides increased penalties for offenses involving oxycodone;

(5) issues for comment regarding an appropriate enhancement for offenses involving influencing, assaulting, resisting, impeding, retaliating against, or threatening a federal judge, magistrate judge, or any other official described in section 111 or section 115 of title 18, United States Code; and

(6) an issue for comment regarding section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Pub. L. 107--296, which directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense

under section 1030 of title 18, United States Code.

For those of our colleagues who are interested in providing written comments (which are due no later than March 17<sup>th</sup>), we are also enclosing a Memorandum outlining the proposals in more detail. Of course, if you wish to discuss any of these proposals in more depth as to how they might affect your clients, please feel free to contact one of NLPA's staff attorneys.

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As Doctors seldom take their own prescriptions and Divines do not always practice what they preach, so Lawyers are very shy of meddling with the Law on their own account, knowing it to be an edged tool of uncertain application, very expensive in the working, and rather remarkable for its properties of close shaving, than for its always shaving the right person."

-- Dickens, *The Old Curiosity Shop*

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#### *About NLPA -*

NLPA is a technical consulting firm, owned by attorneys, and dedicated to the professional mission of providing counsel, research, and related work product to members of the Bar. Although our fifteen-person attorney research department provides some consulting assistance to attorneys in the area of civil practice, most of NLPA's sixteen year history has been dedicated to working with the criminal defense bar. Our ownership structure includes attorneys licensed to practice before many local, state, and federal courts; however, NLPA is not a law firm and provides no "front line" legal services. On the other hand, we are far from being simply a paralegal service. Our sole purpose is to provide research and consulting assistance. With cutting-edge computer research capabilities, an experienced and top quality staff, and more than sixteen years' experience, NLPA is well-positioned to provide the type of assistance members of the bar oftentimes needs.

Since 1986, NLPA has provided affordable, quality consulting to lawyers across the nation. Through our involvement in literally thousands of cases, coupled with our national professional staff, NLPA has developed a unique and unmatched expertise in pretrial, trial, sentencing, appellate, and post conviction matters.

Whether your client is in the state or federal systems, faced with local or international matters, NLPA is a team member worth engaging.

As a result of its affiliations, National Legal Professional Associates has increased its ability to service you as counsel. With NLPA's relationship with the law firm of Murray, Ratliff & Robinson, P.A., assistance is available in arranging for local counsel and co-counsel, if needed, throughout any judicial district in the United States. NLPA has also increased its centers of operation, now having offices in San Juan Capistrano, California and Tijuana, Mexico to augment its Cincinnati, Ohio operations center, and Naples, Florida administrative office.

Getting NLPA started on your team is not difficult nor time-consuming. Simply contact us at the numbers below and a member of our staff will review your case and needs, discuss financial arrangements and time constraints, and commence a program for meeting your needs.

You are important to us and we hope we can commence and maintain a long-term relationship with you. Please know that we are here to assist in all your needs.

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**WE CARE,**

**WE LISTEN,**

**WE GET RESULTS**

THIS NEWSLETTER IS DESIGNED TO INTRODUCE YOU TO NLPA. AS NLPA IS NOT A LAW FIRM, PROFESSIONAL SERVICES ARE ONLY PROVIDED TO LICENSED COUNSEL IN ALL AREAS THAT INVOLVE THE PRACTICE OF LAW. NLPA HAS CREATED THIS PUBLICATION TO PROVIDE YOU WITH AUTHORITATIVE AND ACCURATE INFORMATION CONCERNING THE SUBJECT MATTER COVERED. HOWEVER, THIS PUBLICATION WAS NOT NECESSARILY PREPARED BY PERSONS LICENSED TO PRACTICE LAW IN A PARTICULAR JURISDICTION.

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