



# NATIONAL LEGAL PROFESSIONAL ASSOCIATES

*Margaret A. Robinson Professional Advocacy Center*

11331 Grooms Road

Suite 1000

Cincinnati, Ohio 45242

Telephone Number: (513) 247-0082

Facsimile No. (513) 247-9580

Website: [www.NLPA.com](http://www.NLPA.com)

E-mail: [contactus@nlpacincinnati.com](mailto:contactus@nlpacincinnati.com)

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

## Newsletter

*Legal News Briefs for Attorneys*

---

### **NLPA Stands Ready As Your Primary Sentencing Source**

\* \* \*

#### **Amber Alert Bill Turns Policy of Sentencing Guidelines Upside Down**

---

**CONTENTS:**

AMBER ALERT BILL CHANGES USSG POLICIES.....	1
WHAT'S NEW AROUND THE NATION.....	2
PRACTICE TIPS .....	4
ABOUT NLPA.....	5

Since its early years of practice, *National Legal Professional Associates* has been defense counsels' primary source for assistance in understanding and utilizing the United States

Sentencing Guidelines. NLPA has prided itself on its staff's expertise in understanding the guidelines and the manner in which each circuit applied the Federal standards to specific

cases.

With the adoption on April 30, 2003 of the commonly referenced "Amber Alert" bill, substantial changes have been made to the American justice system. Traditionally, judges weigh all the facts of a case when determining an offender's sentence. But in the 1970s and 1980s, the U.S. Congress and many state legislatures passed laws that force judges to give fixed prison terms to those convicted of specific crimes, most often drug offenses. Lawmakers believed these harsh, inflexible sentencing laws would catch those at the top of the drug trade and deter others from entering it. Instead, this heavy-handed response to the nation's drug problem filled prisons with low-level offenders, resulting in over-capacity prison populations and higher costs for taxpayers. Mandatory sentencing laws disproportionately affect people of color and, because of their severity, destroy families. Two decades after the enactment of mandatory sentences, these laws have failed to deter people from using or selling drugs: drugs are cheaper, purer and more easily obtainable than ever before.

Last month, the latest attack on judicial autonomy in sentencing criminal defendants

approved in the way the Guidelines are to be applied. Yet despite these major changes, NLPA remains committed as counsel's primary out-source specialist in understanding the changes introduced into Congress. Known as the Feeney Amendment, it was attached to the Amber Alert legislation designed to provide Federal intervention for abducted children. With no hearings nor substantive debate, the Feeney Amendment colorably addressed child abduction and pornography but also materially altered the intent, direction, and policy of the overall guidelines. The primary policy change of the Feeney Amendment is to overturn the United States Supreme Court's decision in *Koon v. United States* by establishing overly strict appellate review of departures, and directing the Sentencing Commission to amend the guidelines "to ensure that the incidence of downward departures are [sic] substantially reduced."

In specifics, the new legislation, which became effective on April 30, 2003 with President Bush's signature, altered existing guidelines by:

1. Establishing new, separate departure procedures and standards for child-related offenses and sex offenses.
2. Announcing that the only permissible departures from the

Guidelines and maximizing their effectiveness for the benefit of a defendant.

guidelines would be those that the Commission specifically enumerates.

3. Prohibiting the Sentencing Commission, for a period of two years, from adding new departure grounds or passing amendments that are inconsistent with the departure restrictions.
4. Limiting age and physical impairment departures in child and sex cases.
5. Prohibiting gambling dependence departures in child and sex cases.
6. Prohibiting aberrant behavior departures in child and sex cases.
7. Prohibiting family ties departures in child and sex cases.
8. Prohibiting diminished capacity departures in child and sex cases.
9. Establishing *de novo* appellate review of departures rather than the existing standard of abuse of discretion.
10. Prohibiting downward departure on remand based on new grounds.
11. Requiring the government to affirmatively move for the extra 1-level adjustment based on extraordinary acceptance of responsibility and prohibiting the Commission from ever

altering this amendment.<sup>12</sup> Chilling departures by imposing more burdensome 13. Requiring the Department of Justice to report downward departures to the Congressional Judiciary Committees, unless within 90 days the Attorney General reports to Congress on new regulations for opposing and appealing downward departures.

14. Directly amending the pornography guidelines and commentary and prohibiting the Commission from ever altering that text.<sup>15</sup> Directing the Sentencing Commission to amend the guidelines and policy statements "to ensure that the incidence of downward departures are [sic] substantially reduced."<sup>16</sup> Limiting the number of judges on the Sentencing Commission to three. These changes, to be sure, are material, substantive, and will impact on the window of opportunity to challenge PSI recommended sentences. Though NLPA expects judicial scrutiny on the manner in which these new changes are effected, creativity in advocacy is clearly going to be a necessity in addressing and re-acquiring judicial control over the important phase of punishing criminal defendants.

Please keep NLPA in mind as you move toward sentencing

reporting requirements on judges who depart, and giving the Department of Justice access in any of your cases. As our history reflects, there is no better out-source and specialist in the field.

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

#### **United States Supreme Court Exploitation of an Illegal Arrest**

In *Robert Kaupp v. Texas*, No. 02-5635, 2003 U.S. LEXIS 3670 (May 5, 2003), the case turned on the Fourth Amendment rule that a confession obtained by exploitation of an illegal arrest may not be used against a criminal defendant.

After a 14-year-old girl disappeared in January 1999, the Harris County Sheriff's Department learned she had had a sexual relationship with her 19-year-old half brother, who had been in the company of the defendant, then 17 years old, on the day of the girl's disappearance. On January 26th, deputy sheriffs questioned the brother and the defendant at police headquarters; the defendant was cooperative and was permitted to leave, but the brother failed a polygraph examination. Eventually he confessed that he had fatally stabbed his half sister and placed her body in a drainage ditch. He also implicated the defendant in the crime. Detectives

to Commission data files that identify each judge's departure practices.

immediately tried but failed to obtain a warrant to question Defendant Kaupp. Nevertheless, in the company of two other plain clothes detectives and three uniformed officers, police went to the defendant's house at approximately 3 a.m. on January 27th. After they were let in, the police went to the defendant's bedroom, awakened him with a flashlight, identified themselves, and said, "we need to go and talk." Kaupp replied with a simple "Okay."

The defendant was then handcuffed and led, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. They stopped for 5 or 10 minutes where the victim's body had just been found, in anticipation of confronting the defendant with the brother's confession, and then went on to the sheriff's headquarters. There, they took the defendant to an interview room, removed his handcuffs, and advised him of his rights under *Miranda v. Arizona*. At first, he denied any involvement in the victim's disappearance, but 10 or 15 minutes into the interrogation, told of the brother's confession, he admitted having some part in the crime. He did not, however, acknowledge causing the fatal wound or confess to

murder, for which he was later indicted. After moving unsuccessfully to suppress his confession as the fruit of an illegal arrest, the defendant was convicted and sentenced to 55 years' imprisonment. The State Court of Appeals affirmed the conviction by unpublished opinion, concluding that no arrest had occurred until after the confession. The defendant appealed, but the Court of Criminal Appeals of Texas denied discretionary review. The U.S. Supreme Court granted the motion for leave to proceed *in forma pauperis*, granted the petition for certiorari, and ultimately vacated the judgment below. In its recent opinion, the Court reiterated that a seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. Although certain seizures may be justified on something less than probable cause, the Court stated that it In this case, traders acquired control over large blocks of stock and stock warrants. After acquiring the stocks, the traders used various methods to create artificial market demand for those stocks. On appeal, the traders argued that restitution should not have

had never sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.

The facts in this case were very strong. A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned. This evidence points to an arrest. Since the defendant was arrested before he was questioned, and because the state did not have probable cause to detain him at that point, well-established precedent requires suppression of the confession unless that confession was an act of free will sufficient to purge the primary taint of the unlawful invasion. As the record did not indicate that any been ordered under the MVRA, because that statute specifically did not apply where the victims of a crime and their losses were unidentifiable or their numbers were too large for restitution to be practical. The district court apparently set restitution in an amount agreed upon by the

substantial time passed between the defendant's removal from his home in handcuffs and his confession after only 10 or 15 minutes of interrogation, the Supreme Court held that the confession must be suppressed.

### *Second Circuit* **Restitution Procedures**

The dictates of 18 U.S.C. 3663A establish specific procedures under which a sentencing court may impose mandatory restitution. In the recent case of *United States v. Catoggio*, Case No. 01-1367, 2003 U.S. App. LEXIS 7137 (2nd Cir. April 17, 2003, amended ) an \$80 million order of restitution imposed under the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. section 3663A, against a defendant convicted of racketeering in connection with securities fraud schemes, is vacated where the methods employed in the restitution calculation were not in accordance with the procedures set forth in the MVRA.

trader and probably exceeding any sum the trader would ever pay. Further, the court obviously knew that it would take time for the government to discover the identities of the victims and their actual losses, but believed restitution was an important part of the traders'

sentence. Although the appellate court believed that the district court's efforts were understandable, the methods employed were not in accordance with the procedures set forth in the MVRA. The district court erred in ordering restitution to unidentified, as opposed to unidentifiable, victims and in an amount that may not have represented the actual losses to those victims.

The court vacated the restitution portion of the trader's sentence and remanded the case for resentencing on restitution

### ***Practice Tips***

#### ***Washington*** **BOP Program Statement on Publications Amended.**

Earlier in the year, PS 5266.10 was amended involving the rights of inmates regarding receiving publications in the prison mail. Though the changes were in line with prior policy, the provisions of the program statement are noteworthy for those attorneys with federal inmate clients.

The rules provide that inmates may receive commercially published matter; however, all hard cover books must be sent to the inmate directly from the bookstore or publisher. When it comes to soft cover

publications, the rules are institution dependant. Prison camp and facilities with low security generally may allow soft cover books from anyone. Higher level institutions require that all written materials come from an independent third party such as a bookstore or publisher.

The policy also addresses newspapers. As long as the newspaper does not endanger the safety or well being of the institution and is not in code, it will generally be allowed. NLPA has received many requests for information addressing Arabic language newspapers since 9/11. Both state and Federal institutions have no policy prohibiting commercially produced newspapers solely because they are written in a foreign language such as Arabic. If you are encountering similar challenges, please feel free to contact our staff at NLPA to address improper administrative decisions.

Finally, the program statement reiterates the Ensign Amendment's position on pornography and nudity.

#### ***Cincinnati***

#### **NLPA Offers Jury Selection Assistance**

Through new software, well tested in the Eleventh Circuit, NLPA can now offer practitioners the ability to assist in jury selection through new

computer technology. With NLPA's assistance, counsel at trial can rank potential jurors using demographic information, perform public record searches in real-time as jurors are being selected, record quotes, comments, and responses to case questions, record body language, flag challenges for cause, create and print seating charts for use by counsel, and prepare comprehensive individual profiles for each member.

If you as trial counsel would like NLPA's assistance in selecting a jury, please contact

---

***IN FORMA PAUPERIS.***

---

our Cincinnati office for details.

**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.

---

[Latin] In the character of a poor person – a method by which a litigant without money for lawyers is considerably permitted to lose his case. When Adam long ago in Cupid's awful court (for Cupid ruled ere Adam was invented) sued for Eve's favor, says an ancient law report, He stood and pleaded unhabilimented. "You sue \_in forma pauperis\_, I see," Eve cried; "Actions can't here be that way prosecuted." So all poor Adam's motions coldly were denied: He went away – as he had come – nonsuited. G.J."

- Ambrose Bierce [1842-1914], "The Devil's Dictionary", 1911

---

### National Legal Professional Associates

**Margaret A. Robinson**  
**Professional Advocacy Center**  
**11331 Grooms Road, Suite 1000**  
**Cincinnati, OH 45242**

**Tel.: (513) 247-0082**  
**Fax: (513) 247-9580**

**Other Office Locations:**  
**Naples, Florida**  
**San Juan Capistrano,**  
**California**  
**Tijuana, Baja California,**  
**Mexico**

**E-Mail:**  
**contactus@nlpacincinnati.com**

***WE GET RESULTS***

PUBLICATION WAS NOT NECESSARILY PREPARED BY PERSONS LICENSED TO PRACTICE LAW IN A PARTICULAR JURISDICTION.

*Or to find out more, visit us at our recently updated Website at*

***www.NLPA.com***

***WE CARE,***

***WE LISTEN,***

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

THIS PUBLICATION IS NOT MEANT TO BE A SUBSTITUTE FOR LEGAL OR OTHER PROFESSIONAL ADVICE, WHICH NLPA IS NOT RENDERING HEREIN.

Copyright © 2003 National Legal  
Professional Associates