

## **Hurry Up and Wait**

**By: Lance M. Hester; Nov 2004**

Recently, we filed a federal habeas petition on behalf of a client who was sentenced for money laundering to 57 months based on an offender score of 25. The base offender score was determined by cross-referencing §2D1.1 (offenses involving drugs) of the Sentencing Guidelines from §2S1.1 (money laundering provision). In determining the appropriate guidelines none of the parties (including the presentence investigator and court) addressed subsection (b)(6) of §2D1.1, which provides:

If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by two levels.

§5C1.2 of the guidelines is the “safety valve” provision which allows for a sentence under a minimum term for a few designated offenses. However, subsection (b)(6) of §2D1.1 does not limit the applicability of the safety valve provision.

There are a few cases that discuss this particular issue. The Ninth Circuit addressed the issue in an unpublished case. See United States v. Talo, 221 F.3d 1350 (9<sup>th</sup> Cir. 2000) (finding that (b)(6) does not apply). Additionally, the 3<sup>rd</sup> Circuit in an unpublished decision addressed this issue with the Government agreeing that (b)(6) applies. See United States v. Ramirez, 58 Fed. Appx 536 (3<sup>rd</sup> Cir. 2002). However, the 4<sup>th</sup> Circuit, in the only published decision, addressed this argument in the context of a guilty plea to aiding and abetting the distribution of cocaine within 1000 feet of a school. See United States v. Warnick, 287 F.3d 299 (2002).

Warnick involved a situation where the parties and the court had to cross-reference guideline sections in order to determine the appropriate guideline range. While the conviction in Warnick involved a §860 conviction (aiding and abetting the distribution of cocaine within 1000 feet of a school) it likewise involved a guideline sentence determined by §2D1.2 of the guidelines. Ultimately, the 4<sup>th</sup> circuit reversed the district court’s refusal to apply the (b)(6) reduction, finding that it was applicable in that situation.

The court concluded that the underlying conviction addressed by §2D1.2 of the Sentencing Guidelines cross-referenced the entire 2D1.1 guideline. 287 F.3d at 302-303. Subse-

quently, the court then determined whether her offense of conviction, which was excluded from consideration under the safety valve provision, rendered her ineligible for the two-point deduction. However, the court noted that 2(b)(6) only addressed subdivisions (1)-(5) of §5C1.2. Because §2D1.1(b)(6) only required that the defendant meet the criteria found in the subdivisions, it did not limit the defendant's eligibility for the downward reduction based on the offense of conviction. Id. at 303-304.

Whereas in Warnick the underlying sentencing guideline provision directed the cross-reference to apply only to the quantity of controlled substance, there is no such limitation in §2S1.1 of the guidelines. §2S1.1 of the guidelines sets forth the cross-reference without any limitation directed towards quantity.

After receiving our briefs, as well as the government's brief, Judge Nielson of the Eastern District of Washington granted our request for relief which was accomplished through an ineffective assistance of counsel argument. The court did so, notwithstanding (in its words) the fact that the probation department, the United States attorney and the defense attorneys (in two companion cases) all missed the provision. Additionally, the court ignored the unpublished Ninth Circuit case noted above, which reached a contrary conclusion.

Thus, assuming the continued vitality of the guidelines after Blakley, be sure to look to the safety valve provision for a two-point reduction if your client's sentence is to be determined under §2D1.1 of the guidelines.

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