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Recent Developments: Williams v. United States: Supreme Court Establishes National Consensus Regarding the Scope of Appellate Review under the Sentencing Reform Act of 1984

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“induced an individual to break the law and the defense of entrapment is at issue . . . the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.” *Jacobson*, 112 S. Ct. at 1540 (citing *United States v. Whioie*, 925 F.2d 1481 (D.C. Cir. 1991)).

The Court next explained that in a situation where an individual is merely presented with the opportunity to commit a crime, the immediate willingness to engage in criminal conduct gives a clear indication of a defendant’s criminal predisposition. *Id.* at 1541. *Jacobson*’s conviction, however, involved an extended effort on the part of the Government, culminating in an arrest only after twenty-six months of ongoing correspondence with fictitious organizations. *Id.* Thus, the Court ruled that although *Jacobson* may have been predisposed to receive mail-order child pornography by the time of his arrest in 1987, the Government did not prove that this inclination developed independently of the investigation directed toward *Jacobson* since 1985. *Id.*

The evidence produced by the Government concerning *Jacobson*’s sexual propensity prior to the law enforcement mail campaign was insufficient to support a finding of his predisposition to commit a criminal act. *Id.* The Court opined that the receipt of two magazines from a California bookstore, as the sole piece of such pre-investigative evidence, could indeed indicate *Jacobson*’s desire to view sexually oriented photographs. *Id.* This inference, however, merely demonstrated a certain preference to act within a broad range of sexual conduct, only some of which was criminal, and thus was not probative of a predisposition to engage in illegal activity. *Id.* The Court further acknowledged that because most people tend to obey the law even if they disagree with it, evidence of one’s inclination to perform what was once a lawful act does not justify an inference of a tendency to perform that

which is now illegal. *Id.* at 1542.

Similarly, the Court emphasized that evidence produced during the investigation failed to prove *Jacobson*’s predisposition to receive child pornography through the mail. *Id.* The Court viewed his responses to the many communications prior to the commission of the actual crime as indicative only of *Jacobson*’s personal inclinations and interests rather than sufficing as proof of any criminal design on his part. *Id.* Furthermore, the Government’s tactic in its solicitation was to suggest to *Jacobson* that viewing the prohibited sexually oriented materials should be within his constitutional privilege of freedom of choice. *Id.* The Court concluded that the Government exerted considerable pressure on him to obtain the outlawed materials as a protest against an encroachment on his constitutionally guaranteed individual liberties. *Id.* Consequently, rational jurors could not determine beyond a reasonable doubt that, absent the protracted investigation by the Government, *Jacobson* was autonomously predisposed to commit the crime. *Id.* at 1543.

In a lengthy dissent, Justice O’Connor, joined by Chief Justice Rhenquist, Justice Kennedy, and in part by Justice Scalia, maintained that the majority’s position unnecessarily usurped a reasonable jury inference of predisposition. *Id.* at 1544. In the dissent’s view, the holding redefined the term “predisposition” and placed a new requirement on law enforcement officials by demanding a determination of a “reasonable suspicion of illegal activity before contacting a suspect.” *Id.* at 1544. The minority argued that the Government cannot induce a suspect to commit a criminal act through its communications until it actually provides the opportunity to engage in such illegal conduct, because until then, there can be no finding of an implantation of criminal design in the mind of an innocent person. *Id.* In addition, the dissent lamented that the Government must now show

not only that a suspect was predisposed to commit a crime before an opportunity was presented, but also that such person was criminally predisposed before the Government came on the scene. *Id.* at 1545. Furthermore, Justice O’Connor reasoned that the readiness with which *Jacobson* responded to the opportunity to commit the crime indicated that he likely would have broken the law if left to his own devices. *Id.* at 1543-44.

Jacobson v. United States represents an important clarification of the law of entrapment because it places a limitation on the Government’s use of undercover agents to enforce the law. The Supreme Court thus has reaffirmed the individual’s right of freedom from unwarranted government intrusion by recognizing a level of intervention by law enforcement officers at which a finding of criminal predisposition by a jury is unreasonable. *Jacobson* will effectively prompt the courts to scrutinize more carefully law enforcement sting operations, and will ultimately provide criminal defendants with a heightened opportunity to argue for exoneration if induced to engage in illegal activity by government officials.

- Scott N. Alperin

***Williams v. United States*: SUPREME COURT ESTABLISHES NATIONAL CONSENSUS REGARDING THE SCOPE OF APPELLATE REVIEW UNDER THE SENTENCING REFORM ACT OF 1984.**

In *Williams v. United States*, 112 S. Ct. 1112 (1992), the Supreme Court reviewed the Sentencing Reform Act of 1984 (“Sentencing Act”) in an attempt to establish a national consensus on the scope of appellate review when a district court’s sentence varies from the United States Sentencing Commission Guidelines (“Guidelines”). The Court held that when a lower court relies on both valid and invalid factors during sentencing, a reviewing court cannot affirm a sentence solely on its independent assessment that the dis-

district court's departure from the Guidelines sentencing range was reasonable.

The United States District Court for the Western District of Wisconsin convicted Williams of possession of a firearm while a convicted felon. The district court departed from the Guidelines' recommended sentencing range of 18 to 24 months for a criminal with Williams' criminal history. The court determined that this sentencing range was inadequate because the range failed to take into account two outdated convictions and several previous arrests and sentenced Williams to 27 months imprisonment based on section 4A1.3 of the Guidelines Manual. This section allows a district court to increase a sentence "if 'reliable information' indicates that the criminal history category does not adequately reflect the seriousness of the defendant's criminal background or [his] propensity for future criminal conduct." *Id.* at 1117. Applying the appellate review provisions of the Sentencing Act, the Court of Appeals for the Seventh Circuit upheld Williams's conviction and sentence. *Id.*

The Sentencing Act permits district courts to depart from the recommended sentencing range established by the Sentencing Guidelines in certain circumstances. To ensure proper application of the Sentencing Guidelines by the district courts, the Act also provides for limited appellate review of sentencing in section 3742(f). *Id.* at 1118. Section 3742(f)(1) provides for remand of the case if the sentence "was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines." *Id.* (quoting 18 U.S.C. § 3742(f)(1)(1988)). In addition, section 3742(f)(2) provides that the appellate court may set aside the sentence and remand if the sentence was "outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guidelines and is plainly unreasonable." *Id.* (quoting 18 U.S.C. § 3742(f)(2)(1988)).

In affirming Williams's conviction,

the court of appeals agreed with the district court's assessment that "the two outdated convictions were 'reliable information,' indicating more extensive criminal conduct than was reflected by Williams's criminal history category." *Id.* at 1117 (citing *Williams v. United States*, 910 F.2d 1574 (1990)). The court of appeals, however, rejected the district court's reliance upon Williams's past arrests which had not resulted in prosecution. The court of appeals noted that the Sentencing Act prohibits a court from departing from the Guidelines based only on a prior arrest record. *Id.* (citing § 4A1.3 of the Guidelines Manual). Nevertheless, the court of appeals affirmed Williams's sentence, concluding that "despite the District Court's error in considering Williams's prior arrest record, the court had 'correctly determined that Mr. Williams's criminality was not reflected properly in the criminal history category and that the relevant evidence justified the rather modest increase in sentence.'" *Id.* at 1118 (quoting *Williams*, 910 F.2d 1574, 1580 (1990)). The United State Supreme Court granted certiorari to determine whether a reviewing court may affirm a district court sentence based on valid and invalid factors which differ from the Guideline range.

The Supreme Court began its analysis by considering Williams' argument that the use of his arrest record as a reason for departure was a misapplication of the Guidelines, and that the "incorrect application" standard established in section 3742(f)(1) required remand once a departure ground was invalidated. *Id.* at 1119. The Supreme Court found that for purposes of appellate review pursuant to section 3742(f)(1), it is an "incorrect application" of the Sentencing Guidelines when a district court departs from the applicable sentencing range based on a factor, which was previously rejected by the Sentencing Commission as an appropriate basis for departure from the guideline range. *Id.*

The Supreme Court next turned to

the provisions of the Sentencing Act which set forth the scope of appellate review when a district court makes an "incorrect application" of the sentencing guidelines. *Id.* at 1120. The Court noted that when a district court relies on an improper ground in departing from the guideline range, a reviewing court is precluded from affirming a sentence "based solely on its independent assessment that the departure was reasonable" under section 3742(f). *Id.* That provision, the Court explained, specified two circumstances in which an appellate court must remand for resentencing: "(1) if the sentence was imposed as a result of an incorrect application of the Guidelines or (2) if the sentence is an unreasonable departure from the applicable guideline range." *Id.* The Court noted, however, that while unreasonable guidelines departures are reviewed under section 3742(f)(2), "incorrect application" of the guidelines requires the same review under section 3742(f)(1). *Id.*

Next, the Supreme Court set forth a two-part inquiry that the reviewing court is obliged to conduct in order to determine whether to apply section 3742(f)(1) or section 3742(f)(2). Under section 3742(f)(1) remand is required if an appellate court finds that the sentence was "imposed either in violation of law or as a result of an incorrect application of the Guidelines." *Id.* If, however, the appellate court determines that the departure is not the result of an interpretive or applicative error, it should question whether the "resulting sentence is an unreasonably high or low departure from the relevant guideline range," and remand the case as specified in section 3742(f)(2). *Id.*

The Court refused to interpret these provisions as requiring an automatic remand to rectify every "incorrect application" of the Guidelines and indicated that a remand is necessary only if the sentence was "imposed as a result of an incorrect application" of the Guidelines. *Id.* (emphasis in original). Thus, the Court explained that an appellate court's determination of

whether the sentence was imposed “as a result of” a misapplication of the Guidelines depends on “whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors.” *Id.* Applying this test, the Court noted that when a district court intentionally departs from the Guideline range, the court’s sentence is “imposed ‘as a result of’ a misapplication of the Guidelines, if the sentence would have been different but for the district court’s error.” *Id.*

This decision provides substantial insight into the scope of appellate review under the Guidelines of the Sentencing Reform Act. The Supreme Court in *Williams* gave an extremely narrow reading to the scope of such review, and emphasized the deference that appellate courts are to give to a district court’s exercise of its sentencing discretion. In so ruling, the Court established a national consensus on the scope of appellate review under the Sentencing Reform Act.

- Gloria A. Worch

3011 Corp. v. District Court: CORPORATIONS CHARGED WITH A CRIMINAL OFFENSE HAVE A RIGHT TO A JURY TRIAL.

In *3011 Corp. v. District Court*, 327 Md. 463, 610 A.2d 766 (1992), the Court of Appeals of Maryland held that a corporation has a right to a trial by jury when it is charged with a criminal offense carrying a maximum penalty of imprisonment in excess of 90 days. In a unanimous decision, the court interpreted section 4-302(e)(2)(i) of Maryland’s Courts and Judicial Proceedings Article as providing a statutory right to a jury trial based on the maximum penalty provided for the offense itself and not the penalty likely to be imposed upon a particular defendant. Therefore, although a corporation is not subject to imprisonment, it is entitled to a jury trial.

3011 Corporation, trading as U.S. Books, and L.R. News, Inc., trading as

Edgewood Books, were adult book stores in Harford County. Both corporations were charged with 100 counts of knowingly displaying sexually oriented material for advertising purposes in violation of art. 27, section 416D of the Maryland Code. Each violation was punishable by a fine of up to \$1,000 or imprisonment of up to six months. Both corporations also were charged with one count of exhibiting obscene matter in violation of art. 27, section 418 of the Maryland Code. The penalty for this charge was up to a \$1,000 fine and/or imprisonment up to one year. Similar charges were filed against Larry Hicks, who was an officer of both corporations.

All parties requested a jury trial. The District Court for Harford County granted Mr. Hicks’s demand for a jury trial and subsequently transferred his case to the Circuit Court for Harford County. However, the district court denied both corporations’ request for a jury trial and the corporations filed petitions for writs of certiorari to the Circuit Court for Harford County. After a hearing, the petitions were dismissed and the corporations appealed to the Court of Special Appeals of Maryland. While the appeal was pending, the counts for exhibiting obscene material were dismissed. Before argument in the court of special appeals, the Court of Appeals of Maryland issued a writ of certiorari to determine whether a corporation charged in district court with a criminal offense carrying a penalty in excess of 90 days had a right to a jury trial.

The corporations argued in the court of appeals that they had a statutory right to jury trial under section 4-302(e)(2)(i) of the Courts and Judicial Proceedings Article, and that they were entitled to a constitutional right to a jury trial under Articles 5, 21, and 23 of the Maryland Declaration of Rights and under the Sixth and Fourteenth Amendments to the United States Constitution. *3011 Corp.*, 327 Md. 467-68, 610 A.2d 768. The State argued that no corporation ever has the right to

a jury trial under the statute because the statute requires a defendant to be subject to more than 90 days imprisonment and a corporation cannot be imprisoned. *Id.* at 468, 610 A.2d at 768. The State contested the Maryland constitutional right to a jury trial by arguing that the charge was a minor offense to which the right to jury trial does not attach. *Id.*, 610 A.2d at 768-69 (citing, e.g., *State v. Huebner*, 305 Md. 601, 608-10, 505 A.2d 1331, 1335 (1986)). The State also argued that there was no federal constitutional right to a jury trial for corporations since a corporation could not be imprisoned and the maximum fines were not substantial. *Id.*, 610 A.2d at 769.

The court of appeals found a right to a jury trial through statutory interpretation and did not reach the constitutional issues. The court ruled that if the crime with which the defendant is charged carries a penalty of imprisonment in excess of 90 days, a criminal defendant is entitled to a jury trial if he makes a timely request in district court. *Id.* at 469, 610 A.2d at 769. The court rejected the State’s contention that the particular defendant must be subject to imprisonment in excess of 90 days, holding that “the maximum penalty provision relates to the *offense* itself and not the particular defendant.” *Id.* (emphasis in original). The court found that the Maryland General Assembly distinguished between less serious and more serious criminal offenses by authorizing more than 90 days imprisonment for more serious crimes. *Id.* Thus, the option of a jury trial was allowed for offenses with a maximum penalty in excess of 90 days. *Id.* The court emphasized that the controlling principle guiding the constitutional right to a jury trial is the maximum sentence and place of incarceration that the legislature established for the particular offense, not the maximum sentence or place of incarceration to which this particular defendant may be subjected. *Id.* (citing *Kawamura v. State*, 299 Md. 276, 292, 473 A.2d 438, 447 (1984)). The court found that the Mary-