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Looking at the Law

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Departures and the Presentence Report

AS EVERY probation officer knows, the Sentencing Reform Act of 1984 has radically changed the content, structure, and role of the presentence report. Rule 32(c)(1), Federal Rules of Criminal Procedure, now requires the preparation of a presentence report in every case unless there is sufficient information in the record to sentence under the applicable guidelines. The parties may not simply waive the presentence report. Rule 32(c)(2)(B) also requires that the report contain guideline relevant information, including the following:

> the classification of the offense and the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines. . . ; and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

Section 3552 of title 18, United States Code, incorporates by reference the requirements of Rule 32(c). Both Rule 32 and section 3552 now provide that the presentence report be disclosed to the defendant, defendant's counsel, and the attorney for the government at least 10 days before sentencing.[1]

Administrative Office Publication 107, *Presentence Reports under the Sentencing Reform Act*, attempts to give a structure to these requirements by organizing the presentence report to facilitate the application of the guidelines. First, relevant factual matters are set out to determine the offense level, followed by prior record information to determine the criminal history category. These elements define the guideline range that is determinative of the sentencing options available to the court. Among the available options, of course, may be a departure from the applicable guideline range pursuant to the guidelines and 18 U.S.C. §3553(b). Accordingly, Publication 107 recommends that the presentence report include a section F, "Factors That May Warrant Departure," which is intended to comport with the provisions of Rule 32(c)(2)(B), quoted above, by including a discussion of factual information that could potentially be considered grounds for departure by the court. The section is not intended to present new information, but to analyze that relevant information already discussed that could warrant departure. Neither is the section designed to indicate that the officer will recommend a departure to the court. All potential departures should be discussed in section F.

Notice of Departure

Section F not only identifies potential departure factors for the court, it provides notice to the defendant and the government that the court might rely on such factors to depart from the applicable guideline range and enables the parties to adequately prepare to discuss those factors at the sentencing hearing. Recently, a number of decisions in the courts of appeals have underscored the importance of such notice.

In *United States* v. *Nuno-Para* 877 F.2d 1409 (9th Cir. 1989), the district court had departed upward from the guideline ranges applicable to the two defendants for a number of reasons, including possession of marijuana, one of the defendant's criminal history, and the size and sophistication of the smuggling operation that was the basis of the convictions. Although all of the information that the court relied upon appeared in the presentence report, none of it was identified as warranting departure, nor did the court indicate that this information was to be relied upon in departing from the guidelines until the pronouncement of sentence. The court of appeals vacated the sentence on the ground that defendants had not received notice of the factors the court relied upon in departing from the guidelines. The court reasoned that the provisions of Rule 32 and 18 U.S.C. §3552 requiring disclosure of the presentence report and permitting the parties to comment on the report indicated the necessity for providing notice of the factors the

[1] In recognition of the continuing importance of the presentence report in the sentencing process, including appeal and any post-trial remedies, recent amendments to Rule 32 delete the requirement that the report be returned to the court after sentencing. This amendment is effective for all proceedings in criminal cases begun after December 1, 1989, and, "insofar as just and practicable, all proceedings in criminal cases then pending." H.R. Doc. No. 101-55, 101st Cong., 1st Sess. 1 (1989).

court would rely upon to justify a departure. In order for the notice to be meaningful, the factors must be specifically identified as potential grounds for departure. Notice of the information without any warning that the information might be relied upon for departure is not sufficient.

In *United States* v. *Otero*, 868 F.2d 1412 (5th Cir. 1989), the district court had departed upward from the guidelines applicable in a drug conviction because of the purity of the drugs. As in *Nuno-Para*, this information was contained in the presentence report but not identified as a potential ground for departure, and the court did not indicate it would rely on this factor prior to sentencing. The court of appeals vacated the sentence because the defendant had no opportunity to rebut the use of the drug purity as a ground for departure.

The Fifth Circuit noted, however, that information that might constitute grounds for departure could arise for the first time at the sentencing hearing. Or the court could decide, as did the district courts in *Nuno-Para* and *Otero*, that information contained in the presentence report but not identified by the probation officer as grounds for departure, justifies departure. In neither situation should the court be precluded from departing. There is no requirement in Rule 32 or recent case law that notice of the grounds for departure must be included in the presentence report. In fact, Rule 32(a)(1) explicitly recognizes that the presentence report might not include all information necessary for sentencing. That subsection provides that the parties be offered an opportunity to comment on the probation officer's report and "*other matters* relating to the appropriate sentence" (emphasis added).

Nonetheless, the defendant and his counsel must receive sufficient notice prior to the pronouncement of sentence to address the issue. The Ninth Circuit in *United States* v. *Mendoza*, 890 F.2d 176, 179 (9th Cir. 1989), recognized that this notice does not have to be in the presentence report nor does it have to be given prior to the sentencing hearing. The court warned, however, that the notice must be sufficient to permit a meaningful response:

> [D]ue process concerns and Fed. R. Crim. P. 32(a)(1)(A), (B), and (C) would seem to dictate that such notice be given as soon as is reasonably possible to enable the defendant to prepare to meet the issue. So long as a defendant receives notice of the proposed departure and is given an opportunity to address the issue prior to the imposition of sentence, there is no due process violation.

See also United States v. *Jordan*, 890 F.2d 968 (7th Cir. 1989). The Second Circuit has also emphasized the necessity of adequate notice. *See United States* v. *Palta*, 880 F.2d 636, 640 (2nd Cir. 1989), and *United States* v. *Cervantes*, 878 F.2d 50, 56 (2nd Cir. 1989).

These holdings suggest that particular care be given in preparing the section of the presentence report that identifies factors warranting departure. The more complete that section is in identifying factors that might be relied upon by the court, the greater the opportunity the parties will have to prepare to discuss them at the sentencing hearing and the less likelihood that the court will rely on information of which the defendant received no notice.

Should the court decide that an issue not so identified in the presentence report justifies departure, the court may provide notice and an opportunity to be heard prior to the pronouncement of sentence. Such notice would normally result in minimal protraction of the sentencing hearing. It is not inconceivable, however, that under certain circumstances the parties would need more time, and perhaps a recess of the sentencing hearing, to prepare a meaningful response. Again, a thorough examination of the factual circumstances by the probation officer in order to identify everything that could warrant departure under the Sentencing Reform Act (18 U.S.C. §3553(b)) and the guidelines (U.S.S.G. §5K2) will expedite the sentencing hearing and could avoid an unnecessary appeal.

Statement of Reasons for Departure

The "Factors That Warrant Departure" section of the presentence report could also be of assistance to the court in fulfilling the requirement, set out in 18 U.S.C. §3553(c)(2), that the reasons for any departure be specifically stated on the record. The failure to state these reasons with particularity has resulted in a number of reversals. These cases make clear that while no specific incantation is required, *United States* v. *De Luna-Trujillo*, 868 F.2d 122, 124 (5th Cir. 1989), there must be an explicit articulation of the aggravating or mitigating factors and the reasons the court believes the Sentencing Commission inadequately considered those factors in formulating the guidelines. *See United States* v. *Smith*, 888 F.2d 720, 724 (10th Cir. 1989); *United States* v. *Cervantes*, *supra* at 54; and *United States* v. *Michel*, 876 F.2d 784, 876 (9th Cir. 1989). Although courts of appeals may, in some cases, search the record for adequate grounds for departure in cases in which the district court's statement is not sufficiently detailed (*see, e.g., United States* v. *Jordan*, *supra*), the opinions have warned that the appellate courts are unable to

meaningfully review a sentence to determine if the departure was "reasonable" without the district court's reasons.

> The district court must set forth the specific aspects of the defendant's criminal history or of the charged offense that the district court believes have not been adequately represented in the recommended sentence. While we cannot set forth exactly how specific these findings must be to support a departure from the guidelines, we note that they must be sufficiently specific so that this court can engage in the meaningful review envisioned under §3742 of the Act. . . .

United States v. *Wells*, 878 F.2d 1232, 1233 (9th Cir. 1989).

Naturally the court should, in stating the reasons for departure, indicate the reason for choosing the particular sentence outside the applicable guideline range. In *United States* v. *Lopez*, 871 F.2d 513 (5th Cir. 1989), for example, the court of appeals remanded for resentencing a case in which the district court departed upward from the applicable guideline range because the criminal history score did not take into account certain older convictions. The district court did not, however, consider departing to the guideline range that would be applicable had those convictions been accounted for in the criminal history score. This decision was partially based on U.S.S.G. §4A1.3, which provides that, when the court departs because the defendant's criminal history score underrepresents his criminal background, it should use as a reference for the degree of departure the criminal history score that would result if the older convictions were counted. Nevertheless, the decision highlights the importance of explaining not only the reason for the departure itself, but the amount of the departure. *See also United States* v. *Kennedy*, 893 F.2d 825 (6th Cir. 1990).

Probation officers can assist the court in making the findings required in connection with departures by specifically articulating in the presentence report the reasons why certain factors warrant departure. Part F of Publication 107 indicates that the probation officer should analyze the factors that might warrant departure without attempting to "evaluate" them. This caution should not be taken to mean that the report should not thoroughly discuss why certain factors could justify departure. It simply indicates that this section of the report should not attempt to urge a departure upon the court.

Departures to Probation

The Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570, title I, §1007(b) (Oct. 27, 1986)) amended 18 U.S.C. §3553(e) to permit the court, upon motion of the government,[2] "to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assis-tance. . . ." This section was intended by Congress to provide an incentive to defendants to assist law enforcement officials by providing a means of avoiding the otherwise inflexible mandatory minimum terms established for some offenses. *See United States* v. *Severich*, 676 F. Supp. 1209 (S.D. Fla. 1988), *aff'd*, 872 F.2d 434 (11th Cir. 1989). Section 3553(e) also provides that any such departure must be imposed in accordance with the guidelines and policy statements promulgated by the United States Sentencing Commission. The policy statement incorporating this provision is located at U.S.S.G. §5K1.1.

The application of 18 U.S.C. §3553(e) and U.S.C. §5K1.1, however, is problematic for Class A and B felonies and for more serious drug offenses. Section 3561(a)(1) of title 18, United States Code, excepts Class A and B felonies from those offenses for which probation is statutorily authorized.[3] In addition, those drug penalties in title 21 that contain mandatory minimum sentences specifically prohibit probation:

> Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.

See, e.g., 21 U.S.C. §§841(b)(1)(A), (B) and (C); and §§960(b)(1), (2) and (3).

It is arguable that the specific exclusion of probation in §3561(a)(1) and the specific prohibition of probation in many title 21 sections would preclude a departure to probation. Section 3553(e) generally permits departure to below a "minimum sentence." Had Congress intended that section 3553(e) override the specific ban on probation, it should have done so with more particularity. Yet such an interpretation seems to negate the congressional purpose for the amendment to that section. Given the extent of ineligibility for probation that results from this interpretation, the incentive to cooperate that Congress envisioned would be unavailable to a large proportion of criminal defendants.

Recently, however, the Fourth Circuit has interpreted section 3553(e) to permit a departure to probation in a Class A or B felony. In *United*

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[2]Although questions have been raised about the exclusive authority of the government to initiate such a departure (*see, e.g., United States* v. *Justice*, 877 F.2d 664 (8th Cir.), *cert. denied* _____U.S._____, 110 S.Ct. 375 (1989)), the courts of appeals have uniformly held that the requirement of a government motion is proper. *See, e.g., United States* v. *Francois*, 889 F.2d 1341 (4th Cir. 1989).

[3]Section 3559(a) of title 18, United States Code, defines a Class A felony as an offense that carries a maximum term of imprisonment of life or carries the death penalty. A Class B felony is one that carries a maximum term of imprisonment of 25 years or more.

States v. *Daiagi*, 892 F.2d 31 (4th Cir. 1989), the court characterized the provisions of section 3561(a)(1) as a ban on probation and held that section 3553(e) was a specific exception to that ban:

> As we view Section 3553(e), there is no logical distinction between the two situations, i.e., between the mandatory minimum sentence and the prohibition against probation. The statute was intended to free the sentencing judge to exercise, on motion of the Government, a prudent discretion by disregarding, where there has been substantial governmental assistance by the defendant, both the affirmative mandate to impose a minimum prison sentence and the negative mandate of Section 3561(a)(1) not to grant probation to a Class A or a Class B offender. Under this reconciliation of the two statutes, the ban on probation in sentencing in Class A and Class B cases is maintained save in the rare case where the assistance of the defendant has been sufficiently substantial that the Government determines to move the sentencing court to impose a sentence below the statute's minimum or without the prohibition on a probationary sentence.

Daigai did not involve a statute that included a specific ban on probation. The defendant had pled guilty to a conspiracy to possess and distribute cocaine in violation of 21 U.S.C. §846. The conspiracy ended on Dec. 20, 1987, when the defendant was arrested in possession of 500 grams of cocaine. Thus, the conspiracy ended prior to the effective date of the Anti-Drug Abuse Act of 1988 (Pub. L. No. 100-690, title VI, §6470(a) (Nov. 18, 1988)), which amended 21 U.S.C. §846 to subject a person convicted under that section to "the same penalties as those prescribed for the offense, the commission of which was the object of the. . . conspiracy." Prior to that amendment, section 846 was generally interpreted to incorporate only the maximum penalties set out in the underlying offense. *See e.g. Bifulco* v. *United States*, 447 U.S. 381 (1980). Accordingly, the specific prohibition of probation set out in 21 U.S.C. §841(b)(1)(B), which would have applied had defendant been convicted of an offense occurring after November 18, 1988, did not apply.

Nonetheless, the language and logic of the opinion in *Daiagi* would certainly support an argument that the provisions of section 3553(e) override the prohibition contained in the title 21 provisions. As the above quoted language indicates, the court treated section 3561(a)(1) as a prohibition on probation and held that the ban did not apply where the court granted a motion under section 3553(e). But as the court noted elsewhere in the decision, the amendment to section 3553(e) was made 2 years after the passage of the original Sentencing Reform Act of 1984, which included 18 U.S.C. §3561(a)(1). The amendment to section 3553(e) was part of the Anti-Drug Abuse Act of 1986, which also included the prohibitions on probation in title 21. Accordingly, it could be argued that, had Congress intended that the provisions of section 3553(e) override the title 21 bans on probation, it would likely have done so specifically.

Accordingly, although the opinion in *United States* v. *Daiagi* provides support for a broad interpretation of the courts' authority to depart under the provisions of 18 U.S.C. §3553(e), the resolution of this question (at least outside the Fourth Circuit) must await further attention by the courts. In the meantime, a similar result may be obtained by departing under the provisions of 18 U.S.C. §3553(e) and U.S.S.G. §5K1.1 and sentencing the offender to a very short jail term to be followed by a term of supervised release. This would accomplish almost the same result as a probation sentence, except for the technical differences between the term of supervision and the available term of imprisonment upon revocation of supervised release as compared to the term of probation and the available term of imprisonment upon revocation of probation.[4]

Sentencing Guidelines in Assimilative Crimes Act Cases

A persistent question of guideline application has been whether the guidelines apply in prosecutions under the provisions of the Assimilative Crimes Act (18 U.S.C. §13). The Sentencing Commission seems to assume that they do. The commentary to U.S.S.G. §2X5.1 notes as follows:

> Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that such offenses proscribe. The court is required to determine if there is a sufficiently analogous guideline, and, if so, to apply the guideline that is most analogous.[5]

But does application of the sentencing guidelines to Assimilative Crimes Act cases fulfill the statutory purpose of the Act to punish assimilated state crimes "only in a way and to the extent that [the same offenses] would have been punished if the territory . . . where the crime was

[4]The maximum term of supervision for supervised release is 5 years for a Class A or B felony, 3 years for a Class C or D felony, and 1 year for a Class E felony or misdemeanor. See 18 U.S.C. §3583(b). Higher terms of supervised release are provided for some offenses under title 21, United States Code. The maximum term of probation is 1 to 5 years for a felony, and 1 year for a misdemeanor. *See* 18 U.S.C. §3561(b). The maximum sentence upon revocation of supervised release is all of the term of supervised release, but a maximum of 3 years for a Class B felony and 2 years for a Class C or D felony. See 18 U.S.C. §3583(e)(4). Upon revocation of probation, the court may impose any other sentence that was available at the time of the initial sentencing. *See* 18 U.S.C. §3565(a).

[5]Since the guidelines do not cover petty offenses, this section would be applicable only to felonies and Class A misdemeanors. Section 19 of title 18, United States Code, defines petty offense as a class B or C misdemeanor or an infraction.

committed remained subject to the jurisdiction of the state?" *United States* v. *Press Publishing Co.*, 219 U.S. 1, 10 (1911). As articulated by the Supreme Court, the "like punishment" purpose of the Assimilative Crimes Act might appear to clash with the purpose of the Sentencing Reform Act to reduce unreasonable disparity in the sentencing of Federal crimes. Such was the conclusion of the United States magistrate in *United States* v. *Richards*, 1 Fed. Sent. R. 303 (D. Kan. Oct. 21, 1988). He found that the Sentencing Reform Act was not intended to repeal the "like punishment" provision of the Assimilative Crimes Act and that, therefore, the guidelines, specifically U.S.S.G. §2X5.1, do not apply to Assimilative Crimes Act cases.

A fundamental rule of statutory construction, however, is that, absent a clearly expressed congressional intention to be contrary, statutes should not be interpreted so as to be incompatible. The opinion in *Richards* did not attempt to read the two statutes as capable of coexistence. The Tenth Circuit has recently taken a much closer look at both statutes and has concluded that, although there is a tension between the two acts, the Sentencing Reform Act does apply to Assimilative Crimes Act cases.

In *United States* v. *Garcia*, 893 F.2d 250 (10th Cir. 1989), defendant pled guilty to the assimilative New Mexico offense of involuntary manslaughter. The district court imposed a guideline sentence of 18 months plus 1 year of supervised release.[6] The Tenth Circuit analyzed the language and purposes of the two acts and concluded that the Sentencing Reform Act does not repeal the Assimilative Crimes Act because of the provision of 18 U.S.C. §3551(a) that the guidelines apply "except as otherwise specifically provided." The Assimilative Crimes Act specifically provides that an individual charged under that Act is to be subject to punishment consistent with state law. State law, however, normally imposes only a maximum sentence within which the court may exercise considerable discretion. Occasionally, state law also sets a mandatory minimum, below which a court may not sentence. The Assimilative Crimes Act has generally been held to require only that sentences be imposed within such maximum and minimum limits. *See* "Looking at the Law," 50 Fed. Prob. 78 (Sept. 1986).

Within this range, however, the Sentencing Reform Act and the guidelines promulgated thereunder should be applied "to the extent possible." Thus, the Assimilative Crimes Act's goal of like punishment and the Sentencing Reform Act's goal of uniformity are both served, albeit imperfectly.

The court held further, however, that U.S.S.G. §2X5.1 is not authorized by statute because it is more restrictive than the statute allows. The commentary to section 2X5.1 provides that where there is no specifically applicable sentencing guideline, the court must apply a "sufficiently analogous" offense guideline. By contrast, 18 U.S.C. § 3553(b) provides that in the absence of an applicable guideline the court is to have "due regard" for sentences prescribed by the guidelines for similar offenses and offenders. The Tenth Circuit held that these two directions are contrary, and so the guideline, at least as described in the commentary, falls.

The opinion is confusing, however, because it states that the commentary "is of no legal effect," but does not really discuss the guideline itself. The guideline indicates that the court must apply the "most analogous guideline," but then modifies that requirement by indicating that, "[i]f there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. §3553(b) shall control." The commentary seems to accurately describe this provision by noting that the court must first search for a sufficiently analogous guideline and, if any exists, apply the most analogous. It appears, therefore, that the Tenth Circuit has invalidated the guideline at section 2X5.1 at least insofar as it applies to Assimilative Crimes Act cases.

Regardless of the Tenth Circuit's holding, however, it would appear that in the case of an assimilative crime for which there is a guideline for similar offensive behavior, the "regard" due that guideline would be considerable. The presentence report should certainly identify that guideline and, absent considerations that would warrant a departure, apply that guideline to the offense behavior. Of course, the court might decide, consistently with the Tenth Circuit holding, that it is not bound to apply the analogous guideline but simply consider, or give "due regard," to it. Outside the Tenth Circuit and until other courts rule on this issue, however, application of the analogous guideline is required by U.S.S.G. §2X5.1, and, even where that section has been invalidated, the analogous guideline should serve as a good reference point for the sentence imposed in accordance with 18 U.S.C. §§3553(a) and (b).

Constructive Possession

While possession of contraband such as drugs and firearms has always been an issue in proba-

[6]The court originally imposed a non-guideline sentence because it found the Sentencing Reform Act unconstitutional, but also imposed an alternative guideline sentence to take effect if a higher court found the guidelines constitutional.

tion supervision, the Anti-Drug Abuse Act of 1988 enacted provisions requiring very specific consequences for the possession of drugs and firearms.[7] Section 7303 of the Act amended 18 U.S.C. §3563(a) by adding the requirement that any defendant who is sentenced to probation must receive a mandatory condition that the probationer not possess illegal controlled substances. That section also amended 18 U.S.C. §3565(a) to provide that a violation of such a condition shall result in a mandatory revocation of probation. Section 7303 added similar requirements for supervised releasees and parolees. Finally, section 6214 amended 18 U.S.C. §3565 to provide that probation must be revoked if the defendant is in actual possession of a firearm.[8] These changes make the issue of possession even more important than it has been in the past. Accordingly, some discussion of the concept is in order.

Actual possession, of course, is not a problem. If sufficiently reliable evidence exists to show that a probationer was found with illegal drugs or a firearm on his person, possession may be established. The concept of "constructive possession," however, has been created in order to extend the coverage of laws prohibiting possession. Constructive possession has been defined as follows:

> Constructive possession consists of the knowing exercise of or the knowing power or right to exercise dominion and control over the substance . . . . Constructive possession need not be exclusive . . . and can be proven circumstantially by ownership, dominion, or control over the premises on which the substance is located . . . . (Citation omitted.)

United States v. *Poole*, 878 F.2d 1389, 1392 (11th Cir. 1989).

Although the definition is extremely broad, care should be taken not to extend it too far. The mere proximity to contraband, or the mere presence or mere association with an individual who actually possesses the contraband, is insufficient to support a finding of constructive possession. *United States* v. *Batimana*, 623 F.2d 1366, 1369 (9th Cir. 1980). But proximity, presence, or association may be sufficient when accompanied by evidence connecting the defendant with the contraband. *United States* v. *Espinosa*, 771 F.2d 1382, 1397-98 (10th Cir. 1985).

A few examples of the application of the concept of constructive possession may assist in understanding its reach. In *United States* v. *Onick*, 889 F.2d 1425 (5th Cir. 1989), the police raided a house and found quantities of drugs in several parts of the house. The defendant, Angela Faye Onick, who was visiting co-defendant, Alvin Tolliver, at his house overnight, was dressed in night clothes when the house was raided. In addition, the police found women's clothing in a bedroom closet and a photograph of Onick and Tolliver. Finally, a locksmith testified that Onick had shown him where to install a safe in the house. The court found that this evidence was not sufficient to show that Onick exercised dominion and control over the drugs or the premises where the drugs were found. The court emphasized that it would not "lightly impute dominion or control (and hence constructive possession) to one found in another person's house." 889 F.2d at 1429.

Contrast the situation in *Onick* with *United States* v. *Poole*, *supra*. In that case, the defendant was the sole owner of a house where cocaine was found under the couch on which the defendant was lying when the police entered. Police also found cocaine and money in the bedroom, equipment for diluting cocaine in the dining room, and a scale containing trace amounts of cocaine in the kitchen. Although other persons resided in the home, the court held that defendant exercised dominion and control over the house. This was sufficient to establish constructive possession.

The mere presence of a defendant in a room with a person who possesses drugs, however, even if the defendant has knowledge of the existence of drugs, does not constitute possession. *United States* v. *Martin*, 483 F.2d 974 (5th Cir. 1973). But if there is other evidence linking the defendant to the contraband, a finding of constructive possession is justified. In *United States* v. *Alverson*, 666 F.2d 341 (9th Cir. 1982), for example, defendant James Alverson argued that he was not in possession of firearms found in the trailer of Nancy Alverson. Although defendant argued that there was no evidence that indicated that he and Nancy were living together, witnesses testified that they believed Nancy was James' wife, and the evidence did show that Nancy accompanied James to several gun stores and that weapons were purchased in her name at these times. The court held that the defendant had the power to exercise dominion and control over the firearms found in the trailer and so constructively possessed them. Note that Nancy clearly possessed the weapons; she had purchased them. Possession does not have to be exclusive, however. One may constructively possess that which is possessed by another.

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[7]The effective date of the provisions of the Anti-Drug Abuse Act of 1988 is November 18, 1989.

[8]In specifically requiring "actual possession" for mandatory revocation of probation, Congress apparently intended that constructive possession should not require revocation. It is doubtful, however, that this provision removes the court's *discretion* to revoke probation when a probationer has been found to be in constructive possession of a firearm, particularly where such possession also constitutes a violation of law such as 18 U.S.C. §922(g).

It is not necessary that the defendant ever have had dominion and control over the contraband if he has dominion and control over the place where the contraband is found. In *United States* v. *Posner*, 868 F.2d 720 (5th Cir. 1989), defendant rented a van to transport marijuana that he had purchased from undercover agents. Defendant then instructed one of his agents to drive the van to a certain hotel parking lot and directed another co-conspirator to retrieve the van and the marijuana. The co-conspirator took the keys to the van, inspected the marijuana, entered the van, and attempted to start it. The court found that this circumstantial evidence was sufficient to show that the defendant shared dominion and control over the van and had the ability to reduce the marijuana to actual possession. *See also United States* v. *Martorano*, 709 F.2d 863 (3rd Cir.), *cert. denied*, 464 U.S. 993 (1983). Naturally, as was clearly shown in this case, the possessor must have had knowledge of his possession. "Constructive possession includes a knowledge element." *United States* v. *Poole*, *supra*, at 1392.

While possession may be constructive, the power to exercise control over the contraband may not be assumed. In *United States* v. *Latham*, 874 F.2d 852 (1st Cir. 1989), for example, defendant had only 1 ounce of cocaine in his possession but agreed with undercover agents that he would sell them 4 ounces. He then indicated that he would meet them later to sell them the 4 ounces. The court held that this was not sufficient evidence to show that the defendant possessed 4 ounces of cocaine with intent to distribute. The defendant had indicated that the 1 ounce of cocaine in his possession was not for sale but for personal use. The fact that he agreed to sell 4 ounces does not support an assumption that he possessed that amount, and there was no other information tending to show that the defendant actually or constructively possessed the cocaine that he intended to distribute.

In summary, a determination as to whether an individual is in possession of contraband must be made on a case by case basis. There must be sufficient reliable evidence that shows directly or circumstantially that an individual has the power to control the contraband.

Revocation and Urinalysis

With respect to the provisions of 18 U.S.C. §§3565(a) and 3583(g), which require revocation upon a finding of possession of a controlled substance, the question has arisen as to whether this provision requires revocation based upon a single positive urinalysis. As indicated above, circumstantial evidence may be used to show possession. Certainly a positive urinalyses provides good circumstantial evidence that an individual has been in possession of a controlled substance. Although I have found no Federal court cases on point, it seems clear that such a finding of possession based on accurate urinalysis results would be upheld by the courts of appeals. *Cf. Stephens* v. *State*, 302 S.E.2d 724 (Ga. App. 1983).

However, do sections 3565 and 3583 now *require* revocation based on a positive urinalysis? The legislative history of the amendments to these sections would not warrant such a conclusion. The original Senate sponsored legislation proposing changes to sections 3563, 3565, and 3583 would have required the court to take certain actions if a probationer or supervised releasee tested positive for illegal use of controlled substances on two separate tests taken at least 3 weeks apart. After such a finding, the court would have had the options of revoking probation or supervised release, requiring the defendant to reside and participate in a residential community drug treatment center, requiring the defendant to participate in an outpatient program, or imposing a condition of house arrest. If, on the other hand, a probationer tested positive on three separate tests taken at least 3 weeks apart, the court would have been required to revoke probation and sentence the defendant to not less than one-third of the original sentence. The amendment included extensive safeguards to the testing process. *See* 134 Cong. Rec. S15791 (daily ed. Oct. 13, 1988). The amendment was not adopted, however, but was significantly revised to appear in its present form. Congressman Kastenmeier explained the purpose of the change:

> Section 7303 relates to the revocation of probation, parole or supervised release when such person has been adjudicated by the court to have violated a criminal law relating to possession of an illegal drug. The provisions in this section are derived from the senate amendments to the bill, but have been modified to preserve essential elements of judicial or parole commission discretion.

134 Cong. Rec. H11248 (daily ed. Oct. 21, 1988).

Given this history, it seems obvious that Congress did not intend that even a series of positive urinalysis results, much less a single positive, must necessarily result in revocation proceedings. Accordingly, probation officers should follow the procedures currently in effect with respect to the commencement of revocation proceedings based on positive urinalyses. The current statute would require revocation and sentencing according to the provisions thereof, however, if revocation proceedings are commenced and the court specifically finds that an individual was in possession of a controlled substance pursuant to the positive urinalyses.