

United States v. Dezell Stewart

Table 1

Rulings by Circuit regarding Downward Departures for Over-representation of Career Offender Status

Circuit/District	Case Name	Citation	Authorized/Upheld	Type of Departure	Reasons¹
Fourth Circuit	<i>U.S. v. Adkins</i>	937 F.2d 947 (1991)	Authorized	NA	NA
Fourth Circuit	<i>U.S. v. Pinckney</i>	938 F.2d 519 (1991)	Authorized	NA	NA
Fourth Circuit	<i>U.S. v. Bailey</i>	77 F.3d 471 (1996) (table) 1996 WL 63035	Upheld	To non-career offender range	Despite absconding from parole, def. had no new convictions in previous 10 yrs., during which he worked, although “sporadically”; and lingering questions re: records for one predicate conviction
Dist. Md.	<i>U.S. v. Hall</i>	40 F. Supp. 340 (1999)	NA ²	NA	2 convictions for relatively minor drug offenses when def. was 19 & 21 yrs. old and for which he rec’d. mild sentences does not make def. a “career” criminal & less than career offender sentence will be adequate deterrent in future
First Circuit	<i>U.S. v. Lindia</i>	82 F.3d 1154 (1996)	Authorized	NA	NA

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Unless otherwise noted, the basis for any departure was that the “career offender” designation amounts to an overrepresentation of the defendant’s previous criminal record.

² *Hall* was an action brought under 28 U.S.C. §2255 based on ineffective assistance of counsel. In *Hall*, Chief Judge Motz found that if it had been brought to his attention at sentencing that he could have departed for overrepresentation, then he would have done so.

D. Mass.	<i>U.S. v. Lacy</i>	99 F.Supp.2d 108 (2000)	NA	1 ½ crim. history categories (24 months) ³	Prior convictions (1 CDS poss., 3 PWID, 1CDS distribution, 1 purse-snatching) amounted to “petty criminality associated with a poor addict’s attempt to acquire money for . . . narcotics”
Second Circuit	<i>U.S. v. Rivers</i>	50 F.3d 1126 (1995)	Upheld/remand	To category IV ⁴	Risk of recidivism lower than typical career offender where def. committed bank robbery 17 yrs. after 4 bank robberies previously convicted of committing and 9 yrs. after parole from prior sentences
S.D. New York	<i>U.S. v. Williams</i>	78 F.Supp2d 189	Authorized	NA	NA
Third Circuit	<i>U.S. v. Shoupe (III)</i>	35 F.3d 835 (1994)	Remanded	To category III ⁵	2 of def’s. 3 prior felony convictions (burglary, robbery, drug sale), were committed when def. was 18 yrs. old & 14 yrs. before new offenses (CDS sales)

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In *Lacy*, the court initially departed down 15 months from a range or 151-188 months to 136-173 months on the ground that the defendant had already served 15 months on a state charge related to the federal case. Keeping the offense level the same at 29, the *Lacy* court equated the 136-173 month range as falling between a criminal history category IV and V. It then departed 1 ½ criminal history categories to a category III. With an offense level 29, the resulting range was 1080135 months. A sentence of 108 months was imposed. The departure for over-representation was in effect, 24 months.

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In *Rivers*, the departure was upheld and the case was remanded for consideration by the sentencing judge as to whether a vertical departure (via offense levels) was appropriate since he apparently thought he only had authority to depart horizontally (via criminal history category).

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In *Shoupe (III)*, the district court departed to a criminal history category III but the case was remanded for consideration by the sentencing judge as to whether a vertical departure (via offense levels) was appropriate since he apparently thought that prior rulings by the Court of Appeals in *U.S. v. Shoupe (I)*, 929 F.2d 116 (3rd. Cir.), *cert. denied*, 502 U.S. 943 (1991) and *U.S. v. Shoupe (II)*, 988 F.2d 440 (3rd. Cir. 1993), he only had authority to depart horizontally (via criminal history category). In the first appeal, the Third Circuit had reversed the district court’s downward departure of eight levels due to the fact that the reasons relied on had been adequately taken into account by the Sentencing Commission.

W.D. Penn.	<i>U.S. v. Taylor</i>	843 F.Supp. 38 (1993)	NA	14 levels & 1 criminal history category	Where record consisted of series of burglaries when def. was 18 yrs. old (including a burglary when def. was on probation), 11 yrs. before new offenses -- 3 undercover drug sales -- plus drug offenses from same time as new offenses, prosecuted in state court, seriousness of prior record and risk of recidivism overstated by career offender status
Sixth Circuit	<i>U.S. v. Fletcher</i>	15 F.3d 553 (1994)	Upheld	10 levels & 1 crim. history category	Career offender status overstated seriousness of record and risk of recidivism where new offense (robbery) was preceded by felony assault 15 yrs. before and aggravated assault 6 yrs. before
Eighth Circuit	<i>U.S. v. Brown</i>	903 F.2d 540 (1990)	Authorized	NA	NA
Eighth Circuit	<i>U.S. v. Smith</i>	909 F.2d 1164 (1990), <i>cert. denied</i> , 498 U.S. 1032 (1991)	Upheld	4-10 + years	2 “small-time” crimes (burglary and conspiracy to do 2 minor drug sales), both in 1983 when def. 19 yrs. old makes criminal “career” unusual and resulting sentence is a sufficient deterrent
Eighth Circuit	<i>U.S. v. Senior</i>	935 F.2d 149 (1991)	Upheld	172 months ⁶	3 prior robberies within 3 week period when def. was 18 yrs. old and 2 CDS offenses within 2 weeks 3 yrs. before new offense (PWID) overstated by career offender status

In *Senior*, the district court downward departed from a career offender range of 292-365 months to the statutory mandatory minimum sentence of 120 months. The non-career offender range was 92-115 months.

Ninth Circuit	<i>U.S. v. Lawrence</i>	916 F.2d 553 (1990)	Upheld/remand	Non-career offender range (12.6-15.6 yrs. to 30 mos.) ⁷	Low risk of recidivism where def. was 52 yrs. old & priors consisted of 2 PWID's, in 1980 & 1982
Ninth Circuit	<i>U.S. v. Brown</i>	985 F.2d 478 (1993)	Authorized	NA	NA
Ninth Circuit	<i>U.S. Reyes</i>	8 F.3d 1379 (1993)	Remanded	Non-career offender range ⁸	Career offender status overstated seriousness of record of "minor offenses" (CDS use, PWID of 6 baggies of marijuana, theft attempt, obstructing police officer, poss. CDS, sale of \$20 of cocaine)
Tenth Circuit	<i>U.S. v. Bowser</i>	941 F.2d 1019 (1991)	Upheld	Non-career offender range	Career offender status overstated seriousness of def's. prior record of kidnaping and robbery which were committed 2 mos. apart when def. was 20 yrs. old
Tenth Circuit	<i>U.S. v. Collins</i>	122 F.3d 1297 (1997)	Upheld	Non-career offender range	Low risk of recidivism where def. was 64 yrs. old & priors consisted of 2 "minor" drug-trafficking convictions & older convictions for possessing an illegal still, marijuana possession and assault
Eleventh Circuit	<i>U.S. v. Webb</i>	139 F.3d 1390 (1998)	Authorized	NA	NA
D.C. Circuit	<i>U.S. v. Beckham</i>	968 F.2d 47 (1992)	Authorized	NA	NA

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In *Lawrence*, the district court departed to the sentencing range which it thought would apply if not for the career offender status. Although the departure was upheld in principle, the case was remanded for a determination by the district court of the appropriate non-career offender offense level since the district court had apparently thought that in determining the offense level, it could not consider uncharged conduct.

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Although in *Reyes*, the Ninth Circuit agreed with the district court's factual basis for an overrepresentation departure, it nonetheless remanded because the court failed to articulate reasons for the degree of its departure.