

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 13
Issue 1 *Fall 2005*

Article 6

2005

Public Health and Safety Exception: Finding a "Position of Trust" Where None Exists. *United States v. Snook*

John R. Griffith

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

John R. Griffith, *Public Health and Safety Exception: Finding a "Position of Trust" Where None Exists. United States v. Snook*, 13 Mo. Env'tl. L. & Pol'y Rev. 54 (2005)
Available at: <https://scholarship.law.missouri.edu/jesl/vol13/iss1/6>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

A PUBLIC HEALTH AND SAFETY EXCEPTION: FINDING A “POSITION OF TRUST” WHERE NONE EXISTS

*United States v. Snook*¹

I. INTRODUCTION

The Seventh Circuit recently extended the sentencing enhancement for an abuse of a “position of trust”² to violators of the Clean Water Act (“CWA”).³ This extension was premised under the recently developed “public health and safety” rationale for establishing a “position of trust” relationship between an employee of a private contractor and the general public. As precedent, this decision undermines the logic of an “abuse of trust” sentencing enhancement by overlooking a critical point – the public, the victim, must “entrust” the abuser before such a position of public trust is created. Abusers of public trust are more culpable because their crimes are committed by abusing the public’s trust. If desired, Congress could easily subject all CWA violators to increased sentences. The Seventh Circuit essentially legislated a new “public health” exception for an increased sentence, an exception that finds no home under the now advisory U.S. Sentencing Guidelines (“Guidelines”) or within the pertinent case law.

Although the U.S. Supreme Court declared sections of the Guidelines unconstitutional in *United States v. Booker*,⁴ the Guidelines are still a valuable tool for federal courts.⁵ In finding unconstitutionality, the Supreme Court determined that the Guidelines circumvented the jury trial requirements of the Sixth Amendment because the Guidelines allowed judges to make additional findings of fact beyond what a jury considers and then impose enhanced sentencing.⁶ Despite these recent changes, pre-*Booker* case law is still influential as judges will continue to look to the Guidelines when properly imposing sentences within the statutory range for a particular offense.

II. FACTS AND HOLDING

In 1989, Clark Refining and Marketing, Inc. (“Clark”), a petroleum refinery in Blue Island, Illinois, hired Ronald Snook.⁷ Between 1994 and 1997, Snook worked at Clark as an “Environmental Manager.”⁸ Snook’s duties as Environmental Manager included maintaining compliance with various environmental regulations and managing Clark’s wastewater treatment system.⁹ Snook was responsible for the discharge, on a daily average, of over a million gallons of processed wastewater into a sewer system that was connected to a water treatment plant in the Metropolitan Water Reclamation District of Greater Chicago (“District”).¹⁰

The District’s Sewage and Waste Control Ordinance prohibited Clark from discharging water with “a concentration of pollutants, such as fats, oils, and greases, of [more] than 100 milligrams per liter.”¹¹ The

¹ 366 F.3d 439 (7th Cir. 2004) [hereinafter *Snook*].

² See U.S. Sentencing Guidelines Manual § 3B1 (2001) [hereinafter “Guidelines”].

³ 33 U.S.C. § 1251 (2002).

⁴ 125 S.Ct. 738, 749-50 (2005) See also *Washington v. Blakely*, 542 U.S. 296 (2004) (stating the Guidelines are subject to jury trial requirements guaranteed by the Sixth Amendment).

⁵ See *United States v. Sisson*, 326 F.Supp.2d 203, 205 (D. Mass. 2004) (noting the court would “continue to rely on the Guidelines as recommendations worthy of serious consideration”) (quoting *United States v. King*, 328 F.Supp.2d 1276, 1285 (M.D. Fla. 2004)).

⁶ *Booker*, 125 S.Ct. at 749-50.

⁷ *Snook*, 366 F.3d at 442.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

District's ordinance also prohibited Clark from discharging water with a pH level below 5 or above 10.¹² Clark was obligated to self-monitor and semiannually submit reports ("RD-115 reports") demonstrating compliance.¹³ Most importantly, the District required dischargers to submit all of their self-monitoring data, even if it was taken in addition to the minimum requirements, and report any violations to the District within twenty-four hours.¹⁴

In July of 2000, Snook and his fellow conspirators¹⁵ were indicted for selectively reporting testing results and failing to report violations.¹⁶ The indictment asserted that while Snook was acting as the Environmental Manager, Environmental Monitoring and Technologies, Inc. ("EMT"), he discovered Clark's wastewater violated the District's ordinances.¹⁷ Although Snook knew of the violations, he allegedly submitted numerous RD-114¹⁸ and RD-115 reports for Clark that reflected only a six-day period (the minimum amount of time required), wherein Clark's wastewater satisfied the District's standards.¹⁹ Additionally, the indictment claimed Snook omitted any results indicating Clark's wastewater violations and that Snook deceived an inspector for the Environmental Protection Agency ("EPA") when he told the inspector that the reported data was the only data which he had collected.²⁰

In January 2002, a jury for the U.S. District Court for the Northern District of Illinois found Snook guilty of conspiring to defraud the federal government by violating the CWA.²¹ Snook was also found guilty of "five counts of concealing material information regarding a matter within the jurisdiction of the federal government."²² Snook was "sentenced to concurrent terms of 21 months' imprisonment, concurrent terms of two years of supervised release, a \$1,000 fine, and \$600 in special assessments."²³ On appeal, Snook contended the prosecution made improper statements during closing arguments.²⁴ More importantly, Snook challenged the increase in his sentence resulting from his alleged abuse of a position of public trust.²⁵ After a review of the record, the U.S. Court of Appeals for the Seventh Circuit held that the improper statements by the prosecution did not unduly prejudice Snook and that Snook's position with Clark was one in which Snook was in a position of public trust, thus allowing for a sentencing enhancement.²⁶

III. LEGAL BACKGROUND

A. Section 3B1.3: Abuse of a Position of Trust or Use of a Special Skill

For purposes of this note, the focus will be on section 3B1.3 of the Guidelines as of the time of this decision.²⁷ When this decision was made, section 3B1.3 was a sentencing enhancement that a court could apply if a "defendant abused a position of public or private trust, or used a special skill, in a manner that significantly

¹² *Id.*

¹³ *Id.* Additionally, the District would conduct periodic testing of dischargers, such as Clark, and would issue cease and desist orders for wastewater violations. *Id.* When a violation is found, the violator is required to submit reports (RD-114 reports) demonstrating their wastewater is back in compliance. *Id.*

¹⁴ *Id.*

¹⁵ Snook was indicted with Elva Carusiello, an Assistant Manager at Clark, and Environmental Monitoring and Technologies, Inc., ("EMT") a company hired by Clark to test its wastewater. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ After a violation, the violator must file an RD-114, which states that the wastewater is again in compliance with the standards. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* See 18 U.S.C. § 371 (2000), 33 U.S.C. §§ 1317(d) (2000) and 1319(c)(2)(A) (2000).

²² *Snook*, 366 F.3d at 442. See 18 U.S.C. § 1001(a)(1).

²³ *Snook*, 366 F.3d at 442.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 445-46.

²⁷ See Guidelines § 3B1.3.

facilitated the commission or concealment of the offense.”²⁸ From this language, two distinct questions have arisen: first, how should a “position of trust” be defined, and second, is the defendant’s abuse of that position sufficient to justify an increase in sentencing?²⁹ Determining whether a defendant occupied a “position of trust” has proven to be the more troubling of the two.³⁰

Although section 3B1.3 offers little guidance in defining such a position,³¹ the Commentary to the Guidelines attempts to clarify the terms “public or private trust.”³² The Commentary asks courts to consider whether the position was one of professional or managerial discretion, how much deference was granted, and how much supervision the employer exercised.³³ Further, it suggests several examples of where an increase in sentencing is proper: “an embezzlement of a client’s funds by an attorney serving as a guardian, a bank executive’s fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.”³⁴ The Commentary distinguishes a managerial position from that of an ordinary bank teller or hotel clerk because such lower-level positions do not generally possess significant discretion and are often subject to higher levels of supervision.³⁵

Nonetheless, uncertainty in defining a “position of trust” has created varying methods of analyses among the courts.³⁶ And while similarities among the circuits exist, dissimilarities predominate as courts attempt to define and apply sentencing enhancements for an abuse of a “position of trust.”

B. Common Ground among the Circuits

In *United States v. Hill*,³⁷ the Ninth Circuit stated held that “[f]or purposes of section 3B1.3, a position of trust must be established from the perspective of the victim.”³⁸ Yet, determining if the defendant held such a position with respect to a particular victim is a more difficult problem. In *United States v. Technic Services, Inc.*,³⁹ the defendant allegedly violated provisions of the CWA and Clean Air Act (“CAA”), victimizing the federal government and the general public.⁴⁰ Nonetheless, the court stated the defendant was not in a position of trust with respect to the public or the government because he was an employee of a private company, not a

²⁸ *Id.* This sentencing enhancement allows the court to increase a defense’s sentence by two levels. *Id.*

²⁹ Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?* 30 PEPP. L. REV. 459, 476 (April, 2003).

³⁰ Lisa M. Fairfax, *Trust, The Federal Sentencing Guidelines, and Lessons from Fiduciary Law*, 51 CATH. U. L. REV. 1025, 1039 (2002).

³¹ Section 3B1.3 of the Guidelines states.

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under § 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).

Guidelines § 3B1.3.

³² *Id.* at cmt. n.1. “Public or private trust” is defined as:

[A] position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant’s responsibility for the offense more difficult).

Id.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Fairfax, *supra* note 30, at 1045-46.

³⁷ 915 F.2d 502 (9th Cir. 1990).

³⁸ *Id.* at 506 n.3. See also *United States v. Queen*, 4 F.3d 925, 929 (10th Cir. 1993) (finding that an abuse of a position of trust for purposes of the sentencing guidelines must be viewed from the perspective of the victim).

³⁹ 314 F.3d 1031 (9th Cir. 2002).

⁴⁰ *Id.* at 1049.

government employee.⁴¹ The Ninth Circuit found individuals *employed* by the government could be in a trust relationship with the public or the government.⁴²

More discussion of determining whether a particular victim entrusted a defendant with public or private trust can be found in *United States v. White*.⁴³ In *White*, the defendants were both public employees of the Ohio County Water District (“Water District”) and were convicted of making false reports to the Kentucky Department for Environmental Protection’s Division of Water.⁴⁴ The court ruled, “the general public may be victims of a government employee’s crimes for purposes of deciding whether the employee’s sentence may be enhanced pursuant to § 3B1.3.”⁴⁵ Yet, the court noted that *White* must hold a position of trust vis-à-vis the public.⁴⁶ While not all public servants are in a quasi-fiduciary relationship with the general public, it was clear *White* and the Water District held positions of trust in relation to the public.⁴⁷ The public may not have known *White*’s identity, but it did engage in a trust relationship with the Water District, *White*’s governmental employer.⁴⁸ The court held that, “*officers charged with protecting public health and safety*, whether or not elected by or known to members of the public, enjoy a special trust relationship with the public that is breached when they commit a crime.”⁴⁹

Additionally, courts agree that individuals in positions of trust are more culpable for their crimes than individuals who are not in such a position.⁵⁰ In *United States v. Ragland*,⁵¹ the Sixth Circuit believed the culpability of trust abusers to be similar to those who steal by deceit as opposed to those who commit simple theft.⁵² Theft by deceit involves a conscious decision by an individual to take advantage of a vulnerable victim, and in essence, “undermines faith in one’s fellow man in a way that the ordinary pick-pocket simply cannot.”⁵³ Therefore, similar to theft by deceit, an abuse of a position of trust achieves negative results in a way a simple crime cannot.⁵⁴

D. A Plethora of Approaches: Interpreting Section 3B1.3

Similarities aside, interpretations of section 3B1.3 have produced three dominant approaches⁵⁵ that

⁴¹ *Id.*

⁴² *Id.* See *United States v. Foreman*, 926 F.2d 792, 796 (9th Cir. 1991) (holding that police officers are entrusted with public trust to enforce the law, and thus, it is expected they will not violate the laws they are entrusted with enforcing).

⁴³ 270 F.3d 356 (6th Cir. 2001).

⁴⁴ *Id.* at 360.

⁴⁵ *Id.* at 371.

⁴⁶ *Id.*

⁴⁷ *Id.* at 372-73.

⁴⁸ *Id.* at 373.

⁴⁹ *Id.* (emphasis added).

⁵⁰ *United States v. Garrison*, 133 F.3d 831, 837 (11th Cir. 1998). The Commentary of the Guidelines contains specific language indicating that such individuals are more culpable because of the abuse of their position of trust. See Guidelines § 3B1.3 cmt. background.

This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. The adjustment also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not. Such persons generally are viewed as more culpable.

Id.

⁵¹ 72 F.3d 500 (6th Cir. 1996).

⁵² *Id.* at 503.

⁵³ *Id.*

⁵⁴ See *id.*

⁵⁵ Some circuits have developed “hybrid approaches.” See *United States v. Williams*, 966 F.2d 555, 557 (10th Cir. 1992) (using the following factors in assessing whether a sentence increase is appropriate: “the extent to which the position provides the freedom to commit a difficult-to-detect wrong, and whether an abuse could be simply or readily noticed; defendant’s duties as compared to those of other employees; defendant’s level of specialized knowledge; defendant’s level of authority in the position; and the level of public trust”). See also *United States v. Pardo*, 25 F.3d 1187, 1192 (3rd Cir. 1994) (stating that a court must consider: “(1) whether the position allows the defendant to commit a difficult-to-detect wrong; (2) the degree of authority which the position vests in defendant vis-à-vis the object of the wrongful act [victim]; and (3) whether there has been reliance on the integrity of the person occupying the position”).

courts use in cases involving an abuse of a position of trust: the amount of access or authority an employee has to items of value,⁵⁶ whether the position makes the crime a “difficult-to-detect wrong,”⁵⁷ and the level of discretion granted to the individual in question.⁵⁸ While these three approaches can be separated, they often intertwine within the circuits.

1. Access or Authority Approach

In *United States v. Davuluri*,⁵⁹ the Seventh Circuit held that a formal position of trust is not required for a sentencing enhancement under section 3B1.3.⁶⁰ The court stated Davuluri’s trading of commodities on behalf of a doctor qualified him for an enhancement even though Davuluri was not a licensed broker in a formal position of trust.⁶¹ The court stated it must look past the formal labels of relationships between defendants and victims, and rather, examine the authority or responsibility entrusted by the victim.⁶² The court reasoned that a lack of a formal position of trust, because the defendant lacked a broker’s license, did not bar the authority and responsibility indicative of the formation of a position of trust.⁶³ In addition, the court also relied upon a discretion standard regarding the substantial control the doctor granted Davuluri, thus, providing an example of how circuits can utilize more than one approach in establishing a position of trust.⁶⁴

The Eighth Circuit in *United States v. Brelsford*⁶⁵ applied a similar access/authority analysis to a bank teller supervisor when it distinguished her authority and access as a supervisor to that of an ordinary bank teller.⁶⁶ The court asserted that Brelsford’s authority to review the daily reports, to conduct regular audits, to assign tellers drawers, and to safeguard the keys to idle teller drawers established her position as one of trust.⁶⁷ The court posited that the relevant inquiry concerns whether trust is inherent to the nature of the position.⁶⁸ In *Brelsford*, the access and authority granted by the bank to the defendant evidenced a position of trust.⁶⁹

2. The “Difficult-to-Detect Wrong” Approach

Several circuits have focused their approach in defining a “position of trust” on a “difficult-to-detect wrong” standard.⁷⁰ In *Hill*, the Ninth Circuit stated, “the primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong.”⁷¹ In that case, the defendant abused his position as a professional driver when he and his brother

⁵⁶ *United States v. Cruz*, 317 F.3d 763, 767 (7th Cir. 2003).

⁵⁷ *United States v. Technic Service, Inc.*, 314 F.3d 1031, 1048-49 (9th Cir. 2002).

⁵⁸ *Garrison*, 133 F.3d at 839 (holding that an abuse of trust enhancement applies only if the defendant abuses discretionary authority entrusted to him or her by the victim).

⁵⁹ 239 F.3d 902 (7th Cir. 2001). See also *United States v. Lamb*, 6 F.3d 415, 420-21 (7th Circuit, 1993) (stating that “it is the access or authority over valuable things which puts defendants in positions of trust . . . [t]he guideline should be used to increase the level for those defendants”) (quoting *United States v. Odoms*, 801 F.Supp. 59, 63 (N.D. Ill. 1992)). The Seventh Circuit applies the “access approach” most consistently. *Lamb*, 6 F.3d at 420.

⁶⁰ *Davuluri*, 239 F.3d at 908.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 982 F.2d 269 (8th Cir. 1992).

⁶⁶ *Id.* at 272.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* See *United States v. Lange*, 918 F.2d 707 (8th Cir. 1990) (finding that direct access to express and certified mail created a opportunity to steal beyond that of ordinary postal workers).

⁷⁰ See, e.g., *Hill*, 915 F.2d at 505-06; *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995).

⁷¹ *Hill*, 915 F.2d at 506. See *Technic*, 314 F.3d at 1048-49. (holding a position of trust is primarily determined by the freedom the position provides to commit a difficult-to-detect wrong). See also, *United States v. Isaacson*, 155 F.3d 1083, 1086 (9th Cir. 1998).

sold the goods that belonged to families who the brothers were helping to relocate.⁷² The Ninth Circuit proclaimed two indicia of the difficult-to-detect wrong test: (1) “the inability of the trustor “objectively and expediently to determine the trustee’s honesty . . . [in] a criminal act which cannot be discovered as a matter of routine is such a ‘difficult-to-detect wrong;’” and (2) “the ease with which the trustee’s activities can be observed.”⁷³ In *Hill*, the trusting families did not know the defendant, they could not assess his honesty, and they put him in a position where his crimes could be committed without fear of ready notice by the families.⁷⁴

The Fourth Circuit, used the Ninth Circuit’s “difficult-to-detect wrong” approach in *United States v. Helton*.⁷⁵ In *Helton*, the court found that the defendant’s embezzlement during her employment at a bank was not a difficult-to-detect wrong because her crime could have been “readily noticed.”⁷⁶ Helton signed 224 traveler’s checks in her name for over a year, and the district court noted that her supervisors could have readily detected this embezzlement had they not been lazy, inept, or sloppy in their duties.⁷⁷ The court noted that under the government’s logic, any bank employee not subject to effective auditing would be in a position of trust and that lack of necessary supervision due to inept supervisors did not put Helton in a position of trust.⁷⁸

3. The Discretionary Approach

The Commentary to section 3B1.3 states: “[p]ublic or private trust refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference).”⁷⁹ In *White*, the Sixth Circuit emphasized that the “substantial discretionary judgment” comment is applicable to the discretion granted to the defendant as a governmental employee when protecting public health and safety.⁸⁰ The Sixth Circuit has repeatedly held that the level of discretion granted to a defendant is a critical factor in establishing a position of trust with respect to a particular victim.⁸¹ Additionally, this trust relationship is not simply based on reliance or confidence, but rather, on the discretion granted to a trustee or fiduciary.⁸²

⁷² *Hill*, 915 F.2d at 504.

⁷³ *Id.* at 506. The court applied the two-prong test to reach the conclusion that an “ordinary bank teller is not in a position of trust.” *Id.* at 505. The court explained:

First, there is a simple, objective method of determining whether a teller has embezzled any funds which pass through the teller’s hands: if the bank till [sic] does not balance at the end of the teller’s shift, the teller is presumed to be responsible for the missing funds. Second, surveillance is easy; the teller is normally in plain view. The branch manager need only look up from her or his desk to determine whether all tellers are at their appropriate stations; the absence of a teller from his or her window would be quickly noticed.

Id.

⁷⁴ *Id.*

⁷⁵ 953 F.2d 867, 869-70 (4th Cir. 1992). See *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995) (holding that a person is in a position of trust if the position provides the freedom to commit a difficult-to-detect wrong, and that physicians in such positions exercise enormous discretion which enables them to commit welfare fraud with little chance of detection). This is another example of how a “difficult-to-detect wrong” approach can be intermingled with a “discretionary” approach.

⁷⁶ *Helton*, 953 F.2d at 869-70.

⁷⁷ *Id.*

⁷⁸ *Id.* at 870.

⁷⁹ Guidelines § 3B1.3, cmt. n.1.

⁸⁰ *White*, 270 F.3d at 372-73.

⁸¹ See *United States v. Tribble*, 206 F.3d 634, 637 (6th Cir. 2000) (holding the Sentencing Guidelines and case law suggest the “level of discretion accorded an employee is to be the decisive factor in determining whether his position was one that can be characterized as a trust position” and “the inherent nature of the work itself should naturally convey a substantial degree of discretion to the defendant concerning how to properly administer the property of another or otherwise act in their best interest”). See also, *United States v. Kuhn*, 345 F.3d 431, 436, (6th Cir. 2003) (utilizing the managerial or professional discretion approach).

⁸² *Ragland*, 72 F.3d at 502-03. (ruling that “trust,” as discussed in the Guidelines “is not the one contemplated by the ordinary dictionary concept of reliance or confidence,” in the sense of a bank trusting its tellers not steal from their tills. Instead, “position of public or private trust” is more akin to the legal concept of a trustee or fiduciary as such persons are subject to less direct supervision, and thus, their supervisors have greater difficulty in detecting employee misdeeds). This case is another example of the inherent connection between the various approaches to defining “position of trust” in that “discretion” granted an employee leads to problems with supervision and therefore, a “difficult-to-detect wrong.”

Echoing this theme, the Second Circuit, in *United States v. Jolly*,⁸³ held that defendants in positions of trust occupy “a position vis-à-vis the victim that is in the nature of a fiduciary relationship.”⁸⁴ It is clear under the discretion approach that the level of trust required is more than simple reliance or confidence.⁸⁵ In *United States v. Broderson*,⁸⁶ the court articulated that not only must managerial or substantial discretion be present, but also the victim must entrust any discretion to the defendant.⁸⁷ In *Broderson*, the defendant was a high-ranking executive who filed false information to the government in violation of federal law.⁸⁸ The court asserted it would be problematic at best to find that Broderson held a position of trust with respect to the government.⁸⁹ The court reasoned that if Broderson held such a position of trust, then any taxpayer filing false tax returns might be subject to a section 3B1.3 sentencing enhancement.⁹⁰ The court found this to be beyond the intent of the Sentencing Commission in formulating the Guidelines.⁹¹

The Fifth Circuit, in *United States v. Ehrlich*,⁹² ruled that Ehrlich, a loan clerk, was in a position of trust apart from other employees because her position gave her knowledge of the employer’s Electronic Data Systems and information about non-reconciled MedCentre accounts.⁹³ Ehrlich had discretion to initiate loan-balancing transactions, and she had discretion to balance the loan suspense account; both activities aided her in her embezzlement.⁹⁴ Considering that other employees did not have such information or discretion, the court was quick to affirm the district court’s ruling that Ehrlich abused a position of trust.⁹⁵

E. Summary

It is apparent that courts define what constitutes a position of trust in a variety of ways. For example, courts may use a single approach, multiple approaches, or even a list of factors.⁹⁶ The ambiguity of section 3B1.2 and its Commentary has allowed courts to form their own interpretations.

IV. INSTANT DECISION

A. The Majority Opinion

The Court of Appeals for the Seventh Circuit disposed of Snook’s evidentiary arguments before addressing the issue of whether Snook’s position with Clark amounted to a “position of trust.”⁹⁷ Snook posited

⁸³ 102 F.3d 46 (2nd Cir. 1996).

⁸⁴ *Id.*

⁸⁵ *See id.* The *Jolly* court stated: “[l]imiting an enhancement for abuse of trust to the misuse of discretionary authority entrusted by the victim or on the victim’s behalf is consistent with the examples given in the Commentary.” *Id.* “They each involve factual situations in which the defendant occupies a position vis-à-vis the victim . . .” *Id.*

⁸⁶ 67 F.3d 452 (2nd Cir. 1995).

⁸⁷ *Id.* at 456.

⁸⁸ *Id.* at 455.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 902 F.2d 327 (5th Cir. 1990). *See also*, *United States v. Deville*, 278 F.3d 500, 508-09 (5th Cir. 2002) (holding a police chief’s position of trust afforded Deville information, authority, and discretion which the defendant used to not only allow illegal drug trafficking, but also used his badge to facilitate the transport drugs free of complications from other law enforcement officers).

⁹³ *Ehrlich*, 902 F.2d at 331.

⁹⁴ *Id.*

⁹⁵ *Id.* From the facts of *Ehrlich*, one can see how the defendant’s abuse of trust was factually based upon her access to information and authority or discretion in initiating her crimes. *See id.* Simply put, this case could be an example of both the “access” approach or “discretion” standard or factor courts use in abuse of position of trust cases. *Id.*

⁹⁶ *See, e.g., Erlich*, 902 F.2d at 330-31; *Williams*, 966 F.2d at 557-58; *Pardo*, 25 F.3d at 1192.

⁹⁷ *Snook*, 366 F.3d at 443-45. First, Snook argued the district court erred in excluded evidence of Clark selectively reporting results for clients in the past because such evidence was relevant to Snook’s state of mind. *Id.* The court quickly asserted that under the CWA, criminal penalties only require Snook had knowledge of the underlying facts, which the court found he did. *Id.* As to the other counts, the court determined that the prior

that the district court's decision to impose a two-level increase under section 3B1.3 for Snook's alleged abuse of a position of trust was inappropriate.⁹⁸ The Seventh Circuit responded to Snook's argument by holding that an increase is proper when a defendant "occupies a position of trust and abuses that trust to significantly facilitate a crime."⁹⁹ The court noted that no formal labels or categories define which positions qualify as ones "of trust" but that courts must look to the interplay between the defendant, the victim, and the degree of responsibility the victim gave to the defendant.¹⁰⁰

In reviewing the district court's interpretation of the Guidelines, the court considered Snook's argument that he held a position of trust with Clark, his employer, but not with the victims, the District and the public.¹⁰¹ The court rejected this notion because the CWA is public-welfare legislation; the victims of such violations are the public.¹⁰² It was up to Snook, as Clark's Environmental Manager, to conduct proper wastewater testing to protect the public.¹⁰³ The court was moved by the fact that violations persisted for over three years because Snook chose not to report the violations.¹⁰⁴

The court distinguished Snook's position as Environmental Manager from other self-reporting situations, such as paying taxes, in that the regulations in this case affect matters that "directly and significantly affect the public's health and safety."¹⁰⁵ The court found this distinction supported an increased sentence because Snook's position granted him responsibility and discretion over Clark's wastewater, which relates directly to the public health.¹⁰⁶ The court held that Snook abused his responsibility and discretion by not complying with the District's regulations, and thus, the district court did not err in finding that Snook's abuse of his position negatively affected the victims, the public.¹⁰⁷

B. The Dissent

In the dissent, Judge Coffey agreed with the majority as to the facts of the case as well as the affirmation of Snook's conviction.¹⁰⁸ Coffey believed that Snook did not abuse a position of public trust, and thus, a sentence enhancement was unwarranted.¹⁰⁹

Coffey's dissent began by examining section 3B1.3.¹¹⁰ The Guidelines call for a two-level increase

acts of Clark might be relevant, but Snook's lack of evidence that he was aware of such practices or informed of their illegality supports the district court's exclusion of the evidence. *Id.* Second, Snook argued the district court erred in allowing evidence of other acts. *Id.* Snook referred to testimony of a former EMT technician that recounted how Snook told him to dispose of hazardous materials at or near a canal dock. *Id.* The court agreed the evidence of propensity was ambiguous and of little probative value, but due to overwhelming evidence of Snook's guilty and a proper limiting instruction by the district court, the court here found Snook was not prejudiced by the technician's testimony. *Id.* Finally, Snook argued the district court erred by allowing the comments about Snook's decision not to testify during the government's closing argument. *Id.* The appellate court, after examining the actual statements, concluded the first two comments referred to Snook's case overall, and not his decision not to testify. *Id.* Regarding the third comment, the court ruled Snook's counsel's opportunity to address the government's statements in his or her closing, along with an abundance of evidence indicating guilt, was sufficient not to unduly prejudice Snook. *Id.*

⁹⁸ *Id.* at 445.

⁹⁹ *Id.* (citing *United States v. Cruz*, 317 F.3d 763, 766 (7th Cir. 2003); and *United States v. Mabrook*, 301 F.3d 503, 510 (7th Cir. 2002)).

¹⁰⁰ *Snook*, 366 F.3d at 445 (citing *Mabrook*, 301 F.3d at 510).

¹⁰¹ *Snook*, 366 F.3d at 445.

¹⁰² *Id.* at 445-46.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 446.

¹⁰⁵ *Id.* (citing *United States v. Gonzalez-Alvarez*, 277 F.3d 73, 81-82 (1st Cir. 2002) (where an abuse of trust sentencing enhancement was applied to a dairy farmer for violations); *White*, 270 F.3d at 372-73 (increase imposed upon employee at water-treatment plant); *United States v. Turner*, 102 F.3d 1350, 1360 (4th Cir. 2001) (increase imposed upon owners and operators of coal mine); *Technic Servs., Inc.*, 314 F.3d at 1049 (where an increased sentence was not imposed upon a private contractor hired to clean up asbestos)).

¹⁰⁶ *Snook*, 366 F.3d at 446.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

when a “defendant abuses a ‘position of trust’ that he occupies in relation to the victim of his crime.”¹¹¹ The dissent points to the Commentary of the Guidelines, which phrases a “position of trust” as a position of public or private trust where there is substantial discretionary judgment that is ordinarily given deference.¹¹² Coffey examined *United States v. Broderson*,¹¹³ which held that an “abuse of trust” enhancement is only proper when the discretion granted was “entrusted to the defendant by the victim.”¹¹⁴ Coffey noted it is from this perspective of the victim that the “position of trust” determination must be drawn.¹¹⁵ Acknowledging the fiduciary nature of the attorney/client, bank executive/bank client, and doctor/patient relationship, Coffey emphasized how courts have held that to establish a “position of trust . . . the [G]uideline enhancement requires more than a mere showing that the victim had confidence in the defendant . . . [s]omething more akin to a fiduciary function is required.”¹¹⁶ Coffey noted how each of the examples of an “abuse of trust” in the Guidelines’ Commentary involved a victim entrusting an agent or employee with trust and discretion.¹¹⁷

Coffey argued that Snook could not have been a fiduciary without the public first placing him in that position.¹¹⁸ Coffey contended the public did not place Snook in a fiduciary position, rather it was Clark that “entrusted” Snook in his position as Environmental Manager and “entrusted” Snook to comply with the CWA’s reporting requirements.¹¹⁹ In this case, Clark hired Snook to serve as its Environmental Manager, but in assuming his position Snook did not take any oath of office or swear to follow the CWA in order to protect the public.¹²⁰ As such, Coffey contended that the District or the District Officer was the fiduciary of the public’s environmental welfare and health safety.¹²¹ Therefore, the District was responsible for inspecting Clark for compliance, issuing cease and desist orders to Clark and others for non-compliance, and monitoring Clark’s discharge levels.¹²²

Next, the dissent attacked the majority’s argument that Clark put Snook in a position of public trust by granting Snook discretion to monitor wastewater for compliance with the CWA.¹²³ Coffey drew an analogy between Snook’s position as Environmental Manager and a corporate executive certifying a corporation’s tax return to the Internal Revenue Service.¹²⁴ Coffey explained that the IRS is unable to audit every defaulting taxpayer annually, and if the majority’s reasoning were applied, then any corporate executive who certified a company’s tax return would occupy a “position of public trust,” and thus be subject to “abuse of discretion” sentence enhancements.¹²⁵ Taken a step further, Judge Coffey pointed out that under the majority’s reasoning; anyone (such as taxpayers filing tax returns) that was statutorily required to report to the government could be subject to sentencing enhancements under section 3B1.3.¹²⁶

Coffey posited that the majority attempted to avoid such absurd results by limiting public trust enhancements to criminal activities affecting the public health.¹²⁷ But there is no mention of a “health and welfare” distinction anywhere in the Guidelines, nor anything to suggest, as the majority does, that any

¹¹¹ *Id.*

¹¹² *Snook*, 366 F.3d at 446. See Guidelines § 3B1.3 cmt. n.1.

¹¹³ 67 F.3d 452 (2d Cir. 1995).

¹¹⁴ *Snook*, 366 F.3d at 447 (citing *Broderson*, 67 F.3d at 456).

¹¹⁵ *Snook*, 366 F.3d at 447 (citing *United States v. Hathcoat*, 30 F.3d 913, 919 (7th Cir. 1994)).

¹¹⁶ *Id.* (quoting *United States v. Brunson*, 54 F.3d 673, 678 (10th Cir. 1995)).

¹¹⁷ *Id.* (citing *Broderson*, 67 F.3d at 456).

¹¹⁸ *Id.* (citing *Lopacich v. Falk*, 5 F.3d 210, 213 (7th Cir. 1993)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 448-49.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 449.

¹²⁷ *Id.*

distinction should be made with health issues.¹²⁸ To support its distinction, the majority referenced *White*, a case where an abuse of public trust was found concerning an environmental violation.¹²⁹ Yet, the dissent noted a glaring problem with the majority's reference because *White* involved actions of a local Water District, a government entity with a commitment to the public, not a private corporation like Clark.¹³⁰

The dissent's final point addressed the majority's reliance on *United States v. Gonzalez-Alvarez*, the only circuit court case to extend sentencing enhancements to private individuals working in regulated health fields.¹³¹ Coffey asserted that the health distinction of the majority and the *Gonzalez-Alvarez* court was expressly rejected by the Ninth Circuit in *United States v. Technic Services, Inc.*¹³² The *Technic* court held that health and safety laws alone are not sufficient to support a finding that a position is one of public trust.¹³³

In summation, Coffey argues that section 3B1.3's abuse of trust sentencing enhancement is not applicable to Snook unless he held a position of trust vis-à-vis the public.¹³⁴ Respectfully, Coffey would reverse the imposed sentence and remand for sentencing.¹³⁵

V. COMMENT

A. *Snook's Position Granted Him Discretion and Authority to Commit His Crimes*

There is no question that Snook violated the CWA, but the question remains whether a sentencing enhancement pursuant to section 3B1.3 was proper. As this note has shown, there are a variety of approaches courts could use in finding that Snook occupied a position of trust. In Snook's case, his position as Environmental Manager at Clark gave him access to testing results, including discretion over which results to report, and authority over the implementation of Clark's wastewater treatment and testing.¹³⁶ Additionally, Snook's criminal acts can only be classified as "difficult-to-detect wrongs" because the District did not have its own monitoring resources and, therefore, had to rely on Clark for accurate results.¹³⁷ However, the question remains whether the public, Snook's alleged victim, actually placed him in a position of trust.

B. *The Public Did Not "Entrust" Snook*

There is no doubt that a section 3B1.3 enhancement for an abuse of trust must "be established from the perspective of the victim." The *Snook* court has adopted this notion and claims the public entrusted Snook in his position.¹³⁸ This is simply not the case. Snook was an employee of Clark, a private firm, not the government.¹³⁹ Courts have made clear the distinction between governmental and non-governmental employees with respect to positions of trust.¹⁴⁰ In *White*, the Sixth Circuit said that an abuser of such trust must have acquired his or her trust vis-à-vis the public.¹⁴¹ The court stated that while the public did not know White,

¹²⁸ *Id.*

¹²⁹ *Id.* See *White*, 270 F.3d at 372-73.

¹³⁰ *Id.*

¹³¹ *Snook*, 366 F.3d at 450 (citing *Gonzalez-Alvarez*, 277 F.3d at 81-82).

¹³² *Id.* See *Technic Services, Inc.*, 314 F.3d at 1050.

¹³³ *Technic*, 314 F.3d at 1050.

¹³⁴ *Snook*, 366 F.3d at 451.

¹³⁵ *Id.*

¹³⁶ See *id.* at 442.

¹³⁷ *Id.* Applying the various approaches or factors to Snook's case, it is clear that Snook's position as an Environmental Manager at Clark provided him with the ability to perpetrate his crimes.

¹³⁸ *Snook*, 366 F.3d at 445.

¹³⁹ *Id.*

¹⁴⁰ See *Technic Services, Inc.*, 314 F.3d at 1049.

¹⁴¹ *White*, 270 F.3d at 371-73.

the public did engage in a trust relationship with White's governmental employer, the Water District.¹⁴² In *Kuhn*, the court again made the distinction between a governmental employee and a private contractor.¹⁴³ The court found that a governmental employee was in a position of public trust because the public entrusted him with the safe and efficient operation of a wastewater treatment plant.¹⁴⁴ Similar to the defendant in *Kuhn*, Snook was responsible for protecting the public from pollution, but unlike the defendant in *Kuhn*, Snook was an employee of a private contractor, not the government.

Most courts that apply section 3B1.3 sentencing enhancements look at cases involving a trust between a victim (e.g., a bank) and an abuser (e.g., a bank teller).¹⁴⁵ In the present case, because the victim is the public, the public must entrust someone as a protector or fiduciary before that person can abuse the public's trust.¹⁴⁶ In *Broderson*, the court held merely filing false reports in violation of federal law was insufficient to establish such a relationship.¹⁴⁷ Snook filed false reports in violation of federal law, but an "abuse of trust" enhancement cannot be sustained when the public never entrusted Snook with the position of Clark's Environmental Manager. Instead, the public entrusted the District, a governmental entity, to monitor and protect the public from pollution. Courts have consistently held that the public entrusts governmental employees with their positions. However, this same entrustment has not been extended to private employees.¹⁴⁸ In this case, Snook was a private individual who had no greater duty than that of the ordinary citizen to follow the provisions of the CWA.

The majority recognized the logic of *Broderson*, which held that merely having a reporting duty to the government does not create a trust relationship with the public.¹⁴⁹ The court attempted to distinguish Snook's reporting duties as Clark's Environmental Manager from that of an ordinary self-reporting tax payer. Unlike paying taxes, the CWA regulations "directly and significantly affect the public's health and safety."¹⁵⁰ The court asserted that somehow the nature of the regulations "entrusted" Snook with a duty to protect the public trust.¹⁵¹ The court pointed to *Gonzalez-Alvarez*, where the First Circuit held that an abuse of trust enhancement should apply to a private dairy farmer when the farmer violated federal regulations relating to public health and safety.¹⁵² In *Gonzalez-Alvarez*, the court found that a licensed dairy farmer adulterated milk from his dairy farm with water and salt.¹⁵³ It is of note that in *Gonzalez-Alvarez*, the defendant was officially licensed by the Oficina de Reglamentacion de la Industria Lechera ("ORIL"), a division of the Puerto Rico Department of Agriculture.¹⁵⁴ ORIL licenses dairy farmers to produce milk according to assigned quotas, assigns farms to processing plants, and tests the milk to ensure its quality.¹⁵⁵ The *Gonzalez-Alvarez* court held that it was proper to enhance a licensed dairy farmer's sentence under section 3B1.3 for an abuse of public trust relating to public health and safety.¹⁵⁶

Yet, the dissent correctly pointed out that the First Circuit is the only circuit to apply a public trust enhancement to a private individual working in a federally regulated industry relating to protecting the public

¹⁴² *Id.* at 373.

¹⁴³ *Kuhn*, 345 F.3d at 436-38.

¹⁴⁴ *Id.*

¹⁴⁵ *See Brelsford*, 982 F.2d at 272.

¹⁴⁶ *Technic*, 314 F.3d at 1049. In *Technic*, the court held that a quasi-fiduciary position or a special trust relationship vis-à-vis the victims of the crimes could be considered to have been in a trust relationship with the public or government. *Id.*

¹⁴⁷ *Broderson*, 67 F.3d at 455-56.

¹⁴⁸ *See Foreman*, 926 F.2d at 796.

¹⁴⁹ *Snook*, 366 F.3d at 446.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* *See Gonzalez-Alvarez*, 277 F.3d at 76.

¹⁵³ *Gonzalez-Alvarez*, 277 F.3d at 76.

¹⁵⁴ *Id.* at 75-76.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 81-82.

health.¹⁵⁷ In fact, the Ninth Circuit in *Technic* specifically rejected a public health distinction for private individuals or government contractors.¹⁵⁸ The *Technic* court stated:

The importance of such [public health] work and its potential effect on public health heighten the amount of interest the public has . . . , but those facts do not transform that kind of interest into the relational kind of interest that is required to find a position of public trust.¹⁵⁹

The public's expectation that a government contractor like Clark would follow the CWA or any law is "not enough to trigger the 'abuse of trust' enhancement."¹⁶⁰ The *Technic* court specifically rejected the *Gonzalez-Alvarez* approach because it would subject nearly every defendant to an abuse of trust enhancement for violating a public health or safety regulation.¹⁶¹

C. Policy Concerns: The Clean Water Act

The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁶² Punishing those that contribute to the pollution of our waters is of substantial importance, but as in all cases, the punishment must fit the crime. But here the Seventh Circuit is attempting to create an exception, unfounded in section 3B1.3, by which any criminal violation of a public health or safety regulation would permit an abuse of trust enhancement. Would harsher sentences help to deter future violations of the CWA or other public health acts? Mostly likely yes. But as the Guidelines and case law dictate, there is simply no basis for doing so. Snook's position as a private non-licensed employee is simply not enough. As has been made clear, the public health and safety exception that the Seventh Circuit proposes is not supported by section 3B1.3 or the majority of case law. The Seventh Circuit's proposed public health and safety exception would result in penalties for individuals who are simply not as culpable as those truly violating a position of public trust.

D. An Important Note on the Constitutionality of Section 3B1.3 After Booker

The United States Supreme Court's decision in *Booker*, declared section 3B1.3 unconstitutional on the grounds the federal sentencing guidelines violated jury trial requirements guaranteed by the Sixth Amendment.¹⁶³ The guidelines allowed judges to make additional findings of fact beyond what the jury considers, and then, impose enhanced sentencing. Today, the Sentencing Guidelines are advisory aids for the federal courts to use when sentencing within the appropriate statutory range for a particular offense.

Prior to *Booker*, section 3B1.3 allowed a district court judge to make additional findings of fact and impose an enhanced sentence for those he or she found to have abused a position of public or private trust, despite not presenting the issue to the jury. If Snook was tried today, the judge would leave the fact-finding relating to Snook's alleged "position of trust" to the jury. The jury would have determined whether Snook held such a position, and the judge would then consider the jury's finding in sentencing. Although the Guidelines are now only advisory, they are still influential, and the various approaches and interpretations regarding this area of law by the circuits will still carry substantial weight.

¹⁵⁷ *Snook*, 366 F.3d at 450.

¹⁵⁸ *Technic Services, Inc.*, 314 F.3d at 1050.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² 33 U.S.C. § 1251(a).

¹⁶³ *See Blakely*, 542 U.S. at 308-10; *Booker*, 125 S.Ct. at 749-50.

VI. CONCLUSION

As courts will certainly rely upon pre-*Booker* case law in the future, the holdings of cases such as *Snook* must be carefully scrutinized, and its principles of law recognized as influential. The Seventh's Circuit's attempt to implement a public health and safety exception that essentially creates an automatic entrustment between a CWA violator and the general public is misplaced. An abuse of trust enhancement can only be found if the victim of the violation entrusted the violator in his or her position. In the case at hand, the public, the victim, put the District, the government entity, in a position of trust. The public did not place a non-government, non-licensed, employee of a private contractor into a position of public trust. The *Snook* majority's attempt to find an entrustment in any case involving a position of discretion and a public health and safety violation has no basis in either the Guidelines or in the pertinent case law. Therefore, it would be ill-advised for future courts addressing "abuse of trust" sentencing issues to adopt the unfounded reasoning of the *Snook* court. Rather, courts should follow any of the various approaches previously mentioned to determine whether a defendant was truly entrusted and placed in a position of trust by the victim of his or her crime.

JOHN R. GRIFFITH