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April 20, 1992

MEMORANDUM:

TO: Article III Judges
United States Magistrate Judges
United States Probation Officers
United States Attorneys
Federal Public and Community Defenders

FROM: John R. Steer
General Counsel

SUBJECT: 1991 Selected Guidelines Application Decisions

Attached for your information is a document summarizing selected United States Supreme Court, Courts of Appeals and District Court opinions issued during the period January through December 1991, involving application of the federal sentencing guidelines or related sentencing issues. The previously distributed summary for the period January-June 1991 is superseded by this document and may be discarded.

The cases are organized by the guideline section or sections that were central to the court's decision. For ease of reference, additional topic headings cover legal issues and sentencing procedures. Decisions are organized within each guideline section by circuit; district court decisions are located within their respective circuits. Subsequent case history is provided when available. Opinions for which citations are unavailable are referenced by docket number and date of decision.

Any questions regarding this document should be directed to the Office of the General Counsel.

Attachment

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SELECTED GUIDELINE APPLICATION DECISIONS

1991

Disclaimer: Information provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case.

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CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

Fourth Circuit

United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991). The district court did not err in applying the guidelines to a conspiracy that continued after November 1, 1987 where the appellants continued to make mortgage payments, receive rents, and manage the properties which formed a basis for their convictions. *See* U.S. v. Mennuti, 679 F.2d 1032 (2d Cir. 1982); U.S. v. Walker, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982). According to the circuit court, "although [one appellant's] active conduct in the conspiracy had ceased before the effective date of the guidelines, . . . the conspiracy itself continued . . . [and] since [the appellant] offered no evidence that he acted to defeat or disavow the purposes of the conspiracy, we hold that the guidelines were correctly applied to him."

§1B1.1 Application Instructions

District of Columbia Circuit

United States v. Barry, 938 F.2d 1327 (D.C. Cir. 1991). The district court erred by failing to identify the relevant base offense level, and by neglecting to specifically state whether it applied any enhancements or reductions to, or departures from, the base offense level. According to the circuit court, "[t]he parties' right of review is frustrated . . . if they do not know the legal basis for the district court's decision."

Sixth Circuit

United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991). The district court did not err in enhancing appellant's offense level for bank robbery by two levels pursuant to U.S.S.G. §2B3.1(b)(3), when an arresting officer was injured in a struggle with the appellant. The district court found that the officer, who "was beaten and kicked, resulting in numerous abrasions, the hyper-extension of his shoulder, and soreness in his knees and elbow for two weeks" sustained "bodily injury" as that term is defined in U.S.S.G. §1B1.1.

Ninth Circuit

United States v. Eaton, 934 F.2d 1077 (9th Cir. 1991). The district court did not err by refusing to grant more than one two-level adjustment for acceptance of responsibility. The application instructions in U.S.S.G. §1B1.1 do not contemplate calculating acceptance of responsibility for each offense, but only to making the adjustment after the combined offense level has been calculated. *See* U.S. v. McDowell, 888 F.2d 285 (3d Cir. 1989); U.S. v. Wright, 873 F.2d 437 (1st Cir. 1989).

Tenth Circuit

United States v. Lanzi, 933 F.2d 824 (10th Cir. 1991). The district court did not err in refusing to adjust defendant's base offense level upward to account for a victim's bodily injury in the form of psychological trauma. Without determining whether purely psychological injury can ever constitute "bodily injury" within the meaning of U.S.S.G. §§2B3.1(b)(3)(A), 1B1.1, comment n.1(b), the court of appeals held that the lower court's refusal to adjust the base offense level did not meet the clearly erroneous standard. The victim, a teller at the credit union robbed by the defendant, attended one counseling session and changed occupations following the crime.

More Than Miminal Planning

Eighth Circuit

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). The district court did not err in finding that the appellant's conviction for conspiracy to steal an aircraft involved "more than minimal planning" where he purchased disguises for himself and his girlfriend. According to the circuit court, "[t]his alone is sufficient to establish he used more than minimal planning."

§1B1.2 Applicable Guidelines

Supreme Court

Braxton v. United States, 111 S. Ct. 1854 (1991). The Supreme Court, in a unanimous opinion, observed that the Sentencing Commission has the initial and primary task of eliminating conflicts among the circuits with respect to the interpretation of the guidelines. According to the Supreme Court, "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." The Court did not address the issue of whether the defendant's conviction by a plea contained a "stipulation" because the Commission had already begun an amendment process to eliminate a circuit conflict over the meaning of U.S.S.G. §1B1.2.

Fifth Circuit

United States v. Garcia, 931 F.2d 1017 (5th Cir. 1991). The district court erred in sentencing the appellants, convicted of use of a communication facility in committing a felony, based on the greater offense of possession with intent to distribute 155 kilograms of marijuana. The circuit court rejected the government's argument that the stipulation of facts established the appellants precise involvement in the greater offense. According to the circuit court, "at best, the stipulation shows that the defendants were present during the commission of a drug trafficking offense. Mere presence, however, is not enough to establish possession with intent to distribute." The circuit court also rejected the argument that the sentencing court could rely on facts in the presentence report to establish the elements of the greater offense because the appellants failed to object to those facts. According to the circuit court, "[a]ppellants' failure to object to the facts set forth in the [presentence report] does not constitute a 'stipulation' of those facts, much less a stipulation 'on the record.'"

United States v. Garcia, 943 F.2d 1313 (5th Cir. 1991). The district court properly applied the guidelines where stipulated facts established a more serious offense. "[S]tipulations under section 1B1.2(a) include any statement of facts which the defendant adopts and accepts, either expressly or implicitly."

Seventh Circuit

United States v. Eske, 925 F.2d 205 (7th Cir. 1991). The district court did not err in basing the appellant's offense level on offenses to which he stipulated, where the parties agreed the violations could be used "for determining the appropriate sentencing guideline range" but would not be charged. The concurring opinion focuses on the "potentially severe cost" to the plea bargaining process where a defendant stipulates to unrelated and uncharged offenses with a higher offense level than the charged offense.

Ninth Circuit

United States v. Cambra, 933 F.2d 752 (9th Cir. 1991). The district court did not err in applying the fraud guideline, U.S.S.G. §2F1.1, rather than the guideline relating to food and drug offenses, U.S.S.G. §2N2.1, where the appellant pleaded guilty to three counts of violating the Food, Drug & Cosmetic Act, two counts of which allow for increased penalties where violations were committed "with the intent to defraud or mislead." The guidelines instruct the sentencing court to "[d]etermine the offense guideline section . . . most applicable to the offense of conviction." The Statutory Index is not an exclusive listing but "an interpretive

aid." According to the circuit court, "[r]ather than establishing immutably the exclusive list of available guidelines for given offenses, the Index merely points the court in the right direction. Its suggestions are advisory; what ultimately controls is the 'most applicable guideline.'" The court held in the instant case, where the offense involved deceit and fraud, the most applicable guideline is U.S.S.G. §2F1.1. The commentary to U.S.S.G. §2N2.1 supports the district court's determination by directing in Application Note 2, to apply the guideline applicable to the underlying conduct if the offense involved fraud. Failure to follow the commentary explaining guideline application may lead to reversal on appeal. The circuit court also found that because there was no ambiguity as to which guideline applied the rule of lenity did not come into play.

Tenth Circuit

United States v. Gardner, 940 F.2d 587 (10th Cir. 1991). The district court did not err in sentencing the appellant pursuant to the bank robbery guideline where the parties agreed as part of a plea bargain that facts supporting the more serious offense occurred and could be presented to the court for application of the guidelines relating to the more serious offense. The circuit court held that the circumstances in this case satisfied every circuit's definition of "stipulation" under U.S.S.G. §1B1.2(a). Further, the court held that application of U.S.S.G. §1B1.2(a) does not turn on whether the stipulation is written.

Eleventh Circuit

United States v. Day, 943 F.2d 1306 (11th Cir. 1991). Appellant plead guilty to fraud and deceit charges after burning a boat in order to receive the insurance benefits. The district court did not err in sentencing appellant under U.S.S.G. §2K1.4, the sentencing guidelines for arson, where it found that the stipulated facts in appellant's plea agreement sufficiently established the crime of arson.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

District of Columbia Circuit

United States v. Dukes, 936 F.2d 1281 (D.C. Cir. 1991). Despite plea agreement in which the government dropped the original charge of possession with intent to distribute "more than five grams" of cocaine base in return for defendant's plea of guilty to possession with intent to distribute "a detectable amount" of cocaine base, the district court properly considered the entire quantity involved in calculating defendant's sentence.

First Circuit

United States v. Bianco, 922 F.2d 910 (1st Cir. 1991). The district court did not err by relying on the value and amount of marijuana which the appellants believed would be involved in their joint criminal enterprise "for its inference that a co-defendant's possession of a firearm was reasonably foreseeable . . . ." In a case of first impression for the circuit, the appellate court held that the enhancement for possession of a firearm in furtherance of the appellant's joint criminal venture was not clearly erroneous. The circuit court did not decide whether the Pinkerton doctrine provides a basis for enhancing a defendant's sentence when a joint venturer is in possession of the firearm. Rather, the circuit court concluded that the enhancement for possession of a firearm in the instant case was supportable under U.S.S.G. §1B1.3.

United States v. Rosen, 929 F.2d 839 (1st Cir.), *cert. denied*, 112 S. Ct. 77 (1991). The district court did not err in basing the appellant's sentence on the full load of marijuana found in his car. The circuit court rejected the appellant's argument that since he had negotiated, paid for, and expected to receive only 30 pounds of marijuana, the 150 pounds of marijuana, loaded in the car by government agents as part of a "sting" operation, should not be included. According to the circuit court, "while [appellant] may have negotiated for less, he knowingly accepted the greater amount."

United States v. Wood, 924 F.2d 399 (1st Cir. 1991). The district court erred in sentencing the appellant, who was convicted of conspiracy to distribute and possession with intent to distribute cocaine, based on quantities of drugs that were not part of one "common scheme or plan" or a single "course of

conduct." In the instant case, the conspiracy for which appellant was convicted involved 3.2 ounces of cocaine. The district court found that the relevant amount for sentencing, however, was 15.4 ounces based on appellant's participation in four other drug transactions which formed part of a common scheme. Recognizing that U.S.S.G. §1B1.3(a)(2) is an "important exception" to the guidelines "charge offense" approach, the circuit court stated that "[U.S.S.G.] §1B1.3(a)(2) is not open-ended in allowing a sentencing court to take into account criminal activity other than the charged offense." According to the circuit court, "[t]he goal of the provision, [U.S.S.G. §1B1.3(a)(2)] . . . , is for the sentence to reflect accurately the seriousness of the crime charged, but not to impose a penalty for the charged crime based on unrelated criminal activity." In the instant case, three of the four subsequent drug transactions show the same pattern of conduct that formed the basis for the charged conspiracy. However, the fourth transaction did not involve appellant and he did not know about it until it was over. The appellant's only connection with the latter transaction was as a beneficiary for someone else's criminal activity. According to the circuit court, "[appellant's] after-the-fact connection to the [fourth] transaction would reveal nothing about his culpability as a drug conspirator, and therefore would not be relevant in determining his offense level for the charged crime."

Second Circuit

United States v. Azeem, 946 F.2d 13 (2d Cir. 1991). The district court erred in including as relevant conduct quantities of drugs which the appellant distributed in a foreign country. Without a clear mandate from Congress, the circuit court declined "to create the complexities that the inclusion of foreign crimes in the base offense level would generate. These issues are best considered and resolved by Congress." The appellate court distinguished this case from cases involving the discretionary use of foreign convictions to increase a sentence within the guidelines range. *See* U.S. v. Soliman, 889 F.2d 441 (2d Cir. 1989).

United States v. Cousineau, 929 F.2d 64 (2d Cir. 1991). The district court did not err in including as relevant conduct uncharged quantities of cocaine that were distributed as much as two years before the conduct charged in the conspiracy, because of the high degree of similarity and because relevancy "is not determined by temporal proximity alone." In the instant case, the appellant "engaged in the same course of conduct--cocaine distribution--for a period of years without significant interruption. His methods of distribution remained virtually unchanged over this time; after obtaining an amount of cocaine, he would distribute it by using his children and other intermediaries to contact customers, deliver the drugs to them, and collect money owed on the transactions."

United States v. Hernandez, 941 F.2d 133 (2d Cir. 1991). The district court erred in increasing the appellant's criminal history category from IV to VI based on current, uncharged conduct and improperly relied on U.S.S.G. §1B1.3 as authority for the departure.

United States v. Joyner, 924 F.2d 454 (2d Cir. 1991). The district court did not err by including as relevant conduct vials of crack cocaine possessed by a co-defendant. The appellant was "otherwise accountable" for the co-defendant's possession of the entire quantity of crack available for sale that day. The circuit court rejected the appellant's argument that the 1989 amendment to the commentary to U.S.S.G. §1B1.3 created a more stringent version of relevant conduct, and that prior to the amendment, the "foreseeability" standard applied only to conspiracies. The circuit court also noted that the "reasonable foreseeability" standard of U.S.S.G. §1B1.3 does not create a narrower test, but reflects only the normal limits of criminal responsibility. *See* Pinkerton v. U.S., 328 U.S. 640, 647-48 (1946).

United States v. Mickens, 926 F.2d 1323 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992). The district court erred in attributing the full quantity of cocaine distributed by the conspiracy to appellant J. The district court approximated the quantity of drugs involved in the conspiracy based on appellant M's unexplained income of over two million dollars during the operation of the conspiracy. According to the circuit court, "[a]bsent reliable evidence connecting [appellant J] to the quantity of narcotics extrapolated from [appellant M's] unreported income, [appellant J's] 327-month sentence is unsupportable."

United States v. Miranda-Ortiz, 926 F.2d 172 (2d Cir.), *cert. denied*, 112 S. Ct. 347 (1991). The district court erred in sentencing the appellant, who was convicted of one count of conspiracy to distribute

and possess with intent to distribute more than five kilograms of cocaine and one court of distribution of more than 500 grams of cocaine, based on the entire quantity of drugs distributed during the conspiracy when he was member of the conspiracy for one day, without first making a finding that appellant knew or should have known of the quantities of drugs distributed before he joined the conspiracy. *See* U.S. v. Willard, 909 F.2d 780 (4th Cir. 1990); U.S. v. Guerrero, 894 F.2d 261 (7th Cir. 1990).

United States v. Moon, 926 F.2d 204 (2d Cir. 1991). The district court erred in sentencing the appellant based on two kilograms of cocaine where the object of the conspiracy was the sale of a single kilogram of cocaine. In the instant case, the appellant negotiated to buy one kilogram of cocaine from co-conspirator L and was simultaneously negotiating with another supplier who eventually sold the cocaine to him at a better price. The record supports the position that the kilogram of cocaine that was eventually obtained from the supplier was intended to be a replacement for, not an addition to, the kilogram which appellant had agreed to buy from co-conspirator L. Although the district court made a downward departure based on substantial assistance, the circuit court remanded the case for resentencing based on correct information as to the proper guideline range. *See* U.S. v. Rich, 900 F.2d 582 (2d Cir. 1990).

United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991). The district court did not err in including as relevant conduct a quantity of cocaine which the appellant negotiated to deliver in March, four months before the distribution of cocaine for which he was convicted. The circuit court concluded that the negotiations were part of the "same course of conduct" as the July transaction, although there was a change in the operation's *modus operandi*, and the identity of the co-conspirators. These changes need not affect the "same course of conduct" inquiry when the appellant's continued involvement in the specified criminal activity--cocaine trafficking--remained evident. According to the circuit court, "[t]he 'same course of conduct' concept . . . looks to whether the defendant repeats the same type of criminal activity over time. It does not require that acts be 'connected together' by common participants or by an overall scheme. It focuses instead on whether the defendant has engaged in an identifiable 'behavior pattern' of specified criminal activity."

United States v. Quintero, 937 F.2d 95 (2d Cir. 1991). The district court did not err in including as relevant conduct quantities of drugs that were the subject of three counts which were dismissed as part of a plea agreement. The circuit court rejected the appellant's argument that the application of the relevant conduct guideline conflicts with the Commission's policy statement on plea bargaining at U.S.S.G. 6B1.2(a). According to the circuit court, "[l]ong prior to the sentencing guidelines it was settled that a sentence on a count of conviction could be based on conduct charged in dismissed counts." The circuit court noted that guidelines have brought into focus the significance of basing sentences on conduct charged in dismissed counts and for all the criticism of the guidelines "one of their virtues is the illumination of practices and policies that were applicable in the pre-guidelines era, but that received less attention when sentences were only a generalized aggregator of various factors, many of which were frequently unarticulated."

Third Circuit

United States v. Frierson, 945 F.2d 650 (3d Cir. 1991). The district court did not err in considering as relevant conduct the appellant's use of a gun during a robbery as a basis for a sentence enhancement. The appellant's belief that the court would not consider the gun was unfounded and unreasonable in light of the guidelines and the government's disclosure of a federal district court case in which the court enhanced a robbery sentence on the basis of gun possession.

United States v. Torres, 926 F.2d 321 (3d Cir. 1991). The district court properly considered in determining the applicable sentence a quantity of cocaine seized in violation of the Fourth Amendment and suppressed for that reason. The case was remanded for appropriate relief, however, because the plea agreement was based on a stipulation that a lesser quantity of drugs would be used in computing the sentence.

Fourth Circuit

United States v. Hicks, 948 F.2d 877 (4th Cir. 1991). The district court properly determined that cash found in appellant's home was relevant conduct to his underlying conviction for possession with intent to

distribute cocaine under U.S.S.G. §1B1.3. Relying on the commentary to U.S.S.G. §2D1.4, the district court did not err in determining the drug equivalent of the cash seized, which resulted in an offense level of 32 under U.S.S.G. §2D1.1(a)(3).

United States v. Mitchell, 947 F.2d 942 (4th Cir. 1991) (unpublished). The district court did not err in calculating the appellant's offense level pursuant to U.S.S.G. §1B1.3. The appellant argued that the amount of drugs an informant said he bought from the appellant was not proven by a preponderance of the evidence and that consideration of this information violated due process because the informant was unreliable and was testifying pursuant to a plea agreement. The circuit court rejected these claims and held that the decision to include those drugs was not clearly erroneous where the informant "was subjected to extensive cross examination and was further examined by the court. The fact that [the informant] had entered into a plea agreement was known to the court."

United States v. Turner, 925 F.2d 1458 (4th Cir. 1991) (table). The district court did not err by including as relevant conduct allegations of tax fraud committed in 1982 and 1983. According to the circuit court, "the statute of limitations only applies to charges or indictments brought after a specific point in time and does not deal with the question whether a court may consider uncharged conduct when fashioning an appropriate sentence." Secondly, the guidelines provide for consideration of all prior relevant conduct at sentencing. *See* U.S.S.G. §1B1.4. The prior alleged acts of tax fraud were used only to enhance the punishment for the act for which he was convicted. The defendant was not being punished independently for the prior acts.

Fifth Circuit

United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 967 (1992). The district court properly calculated appellant B's base offense level by including laundered money of which her co-defendant was convicted but of which she was acquitted. According to the circuit court, "[t]he sentencing court may rely on facts underlying an acquitted count if the preponderance standard is satisfied."

United States v. Moore, 927 F.2d 825 (5th Cir.), *cert. denied*, 112 S. Ct. 205 (1991). The district court did not err in including as relevant conduct quantities of amphetamine that appellant negotiated for future sale and quantities of amphetamine confiscated from his home by police five months prior to the sale of amphetamine for which he was convicted. According to the circuit court, "[t]he similar nature of the drugs found in the earlier search, the ongoing negotiations for additional amphetamine [appellant] was willing to supply to the officers, and the testimony of [appellant's wife] demonstrate that [appellant] was engaged in a continuing amphetamine manufacture and distribution enterprise." The circuit court rejected appellant's argument that his earlier conduct should be placed off-limits because of a lapse of time. According to the circuit court, a district court is not required to deliberately don blinders designed to obscure a defendant's crime from the light of common sense.

Sixth Circuit

United States v. Kappes, 936 F.2d 227 (6th Cir. 1991). The district court erred in finding that the appellant's 1983 offense for making a false statement on his pre-employment form was relevant conduct in sentencing him for the 1989 offense for violating the same statute. According to the circuit court, "[t]he fact that [appellant] may not have been in a position to commit the second offense if he had not committed the first offense does not, by itself, make the second offense 'part of the same course of conduct or common scheme or plan'" as the first offense. If this type of "but for" reasoning were to gain acceptance, the relevant conduct provision would assume increasingly broad proportions." The circuit court also rejected the government's argument that the 1983 offense is relevant conduct because both offenses relate to the appellant's status with the Postal Service. The circuit court declined to interpret U.S.S.G. §1B1.3 "so broadly as to incorporate such an improbable situation." Terming the 1983 conduct as relevant conduct is not the appropriate way to make up for lost opportunities to prosecute the earlier offense because of the expiration of the statute of limitations. The circuit court also indicated that because the sentence for this type of crime, unlike those for drug offenses, does not depend on a quantity, determinations about relevant conduct are more difficult to make and perhaps less appropriate.

United States v. Moreno, 933 F.2d 362 (6th Cir.), *cert. denied*, 112 S. Ct. 265 (1991). The district court did not err in sentencing the appellant based on conduct for which he had been acquitted. The district court's factual findings were not clearly erroneous. The evidence was sufficient to show the appellant's earlier involvement in drug trafficking. *See* U.S. v. Funt, 896 F.2d 1288 (11th Cir. 1990); U.S. v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir.), *cert. denied*, 111 S. Ct. 127 (1990).

Seventh Circuit

United States v. Blas, 947 F.2d 1320 (7th Cir. 1991). The appellant was convicted of a drug distribution conspiracy involving two kilograms of cocaine. In addition, the evidence indicated that he was involved in a larger conspiracy involving five to fifteen kilograms. The district court did not err in applying U.S.S.G. §1B1.3(a)(2) to determine appellant's offense level. The circuit court held that "the cocaine from the larger conspiracy qualifies as being 'part of the same course of conduct or common scheme or plan as the offense of conviction,' and that the district court properly sentenced the appellant "on the basis of the amount of cocaine established by the preponderance of the evidence."

United States v. Duarte, 950 F.2d 1255 (7th Cir. 1991). The district court erred in determining defendant's base offense level based on an amount of cocaine greater than the amount for which he was convicted without making a factual finding that it was part of the "same course of conduct or common scheme or plan" as the counts of conviction.

United States v. Edwards, 945 F.2d 1387 (7th Cir. 1991) *(petition for cert. filed Jan. 13, 1992)*. The district court erred in sentencing all of the defendants in an extensive, multi-party drug distribution conspiracy based on the total amount of heroin determined to have been distributed by the conspiracy for the relevant time period. Pursuant to U.S.S.G. §1B1.3, the district court is required to determine the amount of heroin distributed by the conspiracy that was reasonably foreseeable by each defendant, and to determine each defendant's base offense level based on that amount.

United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991). The appellant challenges his 157 month sentence imposed following his convictions for drug conspiracy and firearms charges. The district court erred in calculating the appellant's offense level since it was not clear from the record how the sentence was computed. The circuit court stated that the presentence reports, while meant to guide the trial judge at sentencing, are not to be "taken for gospel." "The exact sentence ultimately to be imposed and the basis for it are the responsibility not of the U.S. Attorney's office or the Probation office, but of the court itself, and while presentence reports should be a helpful source of information to judges, they are to be weighed by the judge like any other source of information. . . . A court in imposing sentence must give reasons. . . . In a drug case, that necessarily means making a finding about the quantity of drugs for which the defendant is being held accountable. The sentence depends in large part on the quantity. Nonetheless, quantities were never mentioned at [the appellant's] sentencing hearing."

United States v. Ruiz, 932 F.2d 1174 (7th Cir.), *cert. denied*, 112 S. Ct. 151 (1991). The district court erred in sentencing the appellant based on "an off-hand statement referring to larger quantities of narcotics that amounts to no more than braggadocio." According to the circuit court this "braggadocio" is insufficient to establish that ten kilograms of cocaine were "under negotiation" as envisioned in U.S.S.G. §2D1.4. This case did not involve a defendant who had actually arranged the details of a drug sale, but was arrested with or charged with a lesser amount. This case also did not involve a negotiated deal that fell through because the buyer found a better deal. According to the circuit court, "[i]n this case . . . the only drug sales arranged by [appellant] and his co-conspirators involved amounts actually delivered: a total of approximately 2.08 kilograms. Ruiz's single comment was not sufficient to establish that the conspiracy had as its goal the consummation of a deal for upwards of ten kilograms."

United States v. Scroggins, 939 F.2d 416 (7th Cir. 1991). The district court did not err in calculating the appellant's offense level because the "guidelines concept of reasonable foreseeability does not require that a co-conspirator be aware of the precise quantity [of drugs] involved in each of an on-going series of illegal transactions."

United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991). In a drug conspiracy case, the district court erred in failing to make an individualized determination of the quantities of cocaine that were reasonably foreseeable to the appellants. According to the circuit court, "[t]he government's premise that a conspiracy conviction reflects membership in a group is faulty." In the instant case, "the government, and the district court, assumed that because the total quantity of drugs attributable to the defendants named in count I of the indictment (the conspiracy count) exceeded 50 kilograms, [appellant W] should be held accountable for that amount." The district court did not determine "the scope of each defendant's agreement as the guidelines require. Without such a determination, the court could not accurately calculate the quantity of cocaine for which these [appellants] can reasonably be held accountable."

Eighth Circuit

United States v. Barton, 949 F.2d 968 (8th Cir. 1991). The district court erred in including as relevant conduct, quantities of drugs involved in a 1983 conviction. According to the circuit court, "[u]nder no circumstances could [the appellant] now be criminally liable or 'accountable' in 1989 for the conduct that resulted in his conviction in 1983." Furthermore, the district court's calculation of the appellant's sentence is at variance with the guidelines approach of separating the nature and circumstances of the offense from the history and characteristics of the offender. [*But see* Amendment #389, effective November 1, 1991, indicating that under U.S.S.G. §1B1.3(a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense is not considered relevant conduct.]

United States v. Burks, 934 F.2d 148 (8th Cir. 1991). The district court erred in calculating the appellant's base offense level for attempting to deliver amphetamines on the testimony of an undercover investigator that the appellant had offered to sell him a drug lab that was capable of producing between 7 and 8 pounds of amphetamine. No laboratory was found, no location of the lab was given, and appellant had a tendency to exaggerate. The circuit court expressed concern "that in a case such as this where the Government conducts an undercover investigation, inclusion of offenses that ostensibly stem from exaggerated and fabricated facts may in the future open the door for serious error."

United States v. Franklin, 926 F.2d 734 (8th Cir.), *cert. denied*, 112 S. Ct. 230 (1991). The district court did not err in sentencing the appellant on the basis of the amount of cocaine originally in the package when intercepted and inspected by a postal inspector, rather than the amount actually delivered. *See* U.S. v. White, 888 F.2d 490 (7th Cir. 1989).

United States v. Galloway, 943 F.2d 897 (8th Cir. 1991), *reh'g. granted and opinion vacated*, Nov. 20, 1991). The circuit court affirmed the sentence imposed by the district court without reaching the constitutional issues decided by the district court. After studying the enabling legislation of the U.S. Sentencing Commission and its history, the circuit court concluded that the Commission exceeded its statutory authority by promulgating §1B1.3(a)(2) to encompass separate property crimes that occurred on separate days, at separate places, targeted separate victims and involved a variety of merchandise. The circuit court held "the provision unenforceable insofar as it permits offenders to be systematically penalized for factually and temporally distinct property crimes that have neither been charged by indictment nor proven at trial."

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991). The district court did not err in considering a co-defendant's statement in calculating the amount of drugs for which the appellant was accountable. According to the circuit court, "there is nothing improper about using a co-defendant's statements against a defendant who has pled guilty." *See* U.S. v. Boyd, 901 F.2d 842 (10th Cir. 1990); U.S. v. Davis, 912 F.2d 1210 (10th Cir. 1990). The district court erred, however, by including the amount of cocaine from trips to Sioux Falls in calculating the total amount of drugs where this information "did not clearly establish either the dates on which these deliveries were made or the amounts of cocaine delivered." According to the circuit court, "[t]he government took the defendant's statements regarding the two trips . . . where he admitted to bringing 112 grams per trip and then assumed that this was the amount of cocaine defendant brought on each of the trips to which [the informant] referred." *See* U.S. v. Phillippi, 911 F.2d 149, 151 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 702 (1991).

United States v. Montoya, 952 F.2d 226 (8th Cir. 1991). The district court erred in determining the defendant's base offense level by considering a drug transaction he was purportedly involved in, but was not shown to be related to the instant offense of conviction. While the Guidelines permit inclusion of additional transactions in determining an offense level, U.S.S.G. §1B1.3(a)(2) requires some meaningful relationship among them before disparate transactions in different drugs may be attributed to the "same course of conduct" or a "common scheme or plan."

United States v. Townley, 929 F.2d 365 (8th Cir. 1991). The district court erred in sentencing appellant on quantities of cocaine found in B's apartment. The government failed to prove that the appellant joined his half-brother and B in a cocaine distribution ring. The district court also erroneously included a quantity of cocaine seized at the bus station that was allegedly destined for appellant's half-brother. According to the circuit court, it "cannot tolerate this kind of guilt by association." In the instant case, the government charged and proved only a single drug transaction involving 27 grams of cocaine. The government did not establish by a preponderance of the evidence that the criminal conduct of B and appellant's half-brother was "reasonably foreseeable" to appellant.

Ninth Circuit

United States v. Fine, 946 F.2d 650 (9th Cir. 1991). The district court erred in relying on dismissed counts in calculating the defendant's sentence for mail fraud. In the instant case, the district court enhanced the base offense level based on the total amount of loss specified in the indictment, rather than solely on the count of conviction. Relying on U.S. v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990), the court held that "it is not only unfair, it violates the spirit if not the letter of the bargain to be penalized on charges that have by agreement been dismissed."

United States v. Newbert, 952 F.2d 281 (9th Cir. 1991). The district court did not err in enhancing appellant's sentence to account for all the money procured through the submission of false petty cash vouchers to a government contractor instead of only the amounts specifically stated in the information to which the appellant pled guilty. Even though the government did not show which amounts were attributable to U.S. contracts, all submissions were relevant conduct within the meaning of U.S.S.G. §1B1.3. "There is no indication the Sentencing Commission intended to distinguish among the jurisdictional components of a clearly common pattern of criminal conduct. Rather, the sentencing guidelines evidence a clear intent that persons who commit a scheme of fraud be punished in accordance with the total harm caused by the fraud." The Ninth Circuit also held that the proscription against double jeopardy is not implicated when a person might be tried in state court for conduct on the basis of which he received an enhanced sentence in federal court.

Tenth Circuit

United States v. Matthews, 942 F.2d 779 (10th Cir. 1991). The district court erred in calculating the appellant's offense level based on a quantity of drugs distributed prior to his joining the conspiracy. According to the circuit court, "[w]e think it implausible that a person who undertakes a one-time drug deal in concert with others thereby assumes responsibility for the entire past misdeeds of his or her co-conspirators." *See* U.S. v. North, 900 F.2d 131 (8th Cir. 1990). As a late-entering co-conspirator, the appellant can only be sentenced for past quantities that he knew or should have known the conspiracy distributed. *See* U.S. v. Miranda-Ortiz, 926 F.2d 172 (2d Cir.), *cert. denied*, 112 S. Ct. 347 (1991); U.S. v. Sanders, 929 F.2d 1466 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 143 (1991); U.S. v. Willard, 909 F.2d 780 (4th Cir. 1990).

United States v. Poole, 929 F.2d 1476 (10th Cir. 1991). The district court did not err in sentencing the appellant, convicted of possession with intent to distribute crack cocaine, based on the entire quantity of crack cocaine located in the restaurant which he controlled. According to the circuit court "[i]t was not necessary to determine that the appellant was in exclusive possession of a specific quantity of cocaine seized at the restaurant." Since the evidence showed that the appellant operated the restaurant as a partnership and sold crack cocaine at the restaurant, "the court could reasonably conclude that the 7.8 grams of crack cocaine seized in the raid was part of a common scheme or plan."

United States v. Riles, 928 F.2d 339 (10th Cir. 1991). The circuit court rejected the appellant's argument that U.S.S.G. §1B1.3 permitted him to litigate the issue of entrapment at sentencing. Appellant claimed that he should not be held "otherwise accountable" for conduct in which he would not have engaged without government coercion. According to the circuit court, "the 'otherwise accountable' language permits a court to consider acts in addition to those which a defendant committed; it is not a limitation which permits him to raise at sentencing the question of whether he is 'otherwise accountable' for the offense which he committed."

Eleventh Circuit

United States v. Averi, 922 F.2d 765 (11th Cir. 1991). The circuit court extended its holding in U.S. v. Funt, 896 F.2d 1288 (11th Cir. 1990) (in the context of pre-guideline sentencing "an acquittal does not ban a sentencing court from considering the acquittal conduct in imposing sentence.") to guideline sentencing. According to the circuit court, "because the standard of proof for consideration of relevant conduct remains the same for sentencing under the guidelines as it was under pre-guideline law (and therefore remains lower than the beyond-a-reasonable-doubt standard on which defendant's acquittal is based), the holding of Funt--that facts relating to acquittal conduct may be considered in imposing sentence--also remains the rule."

United States v. Bennett, 928 F.2d 1548 (11th Cir. 1991). The district court erred in making a two-level enhancement for possessing a dangerous weapon during the commission of a drug offense where there was "absolutely no evidence presented at trial indicating that [appellant] possessed a firearm at the time of the drug offense for which he was convicted." According to the circuit court "it would appear that the Guidelines did not contemplate use of this enhancement where the defendant possessed the firearm seven months after the drug transaction occurred." The circuit court rejected the government's argument that the enhancement should apply because the altercation with the government informant during which the appellant possessed the gun was about the informant providing information to the government about drug transactions. According to the circuit court "the enhancement in §2D1.1(b)(1) would appear to be the 'otherwise specified' which precludes application of the §1B1.3 in this case."

United States v. Manor, 936 F.2d 1238 (11th Cir. 1991). The district court did not err in aggregating all drug quantities involved in the same course of conduct, even if some of the amounts were not specified in the count of conviction. The circuit court rejected the appellant's argument that the court erred in basing his sentence on an amount of cocaine involved in a charge on which he had been acquitted. According to the circuit court, "acquittal based on a reasonable doubt standard should not preclude a contrary finding using the preponderance of the evidence." In U.S. v. Funt, 896 F.2d 1288 (11th Cir. 1990), the circuit court made it clear in a non-guideline case that "an acquittal does not does not bar a sentencing court from considering the acquitted count in imposing sentence." This holding was extended to guideline sentencing in U.S. v. Rivera-Lopez, 928 F.2d 372 (11th Cir. 1991). Several other circuits are in accord. *See* U.S. v. Mocciola, 891 F.2d 13 (1st Cir. 1989); U.S. v. Rodriguez-Gonzalez, 899 F.2d 177 (2d Cir.), *cert. denied*, 111 S. Ct. 127 (1990); U.S. v. Isom, 886 F.2d 736 (4th Cir. 1989); U.S. v. Juarez-Ortega, 866 F.2d 747 (5th Cir. 1989); U.S. v. Ryan, 866 F.2d 604 (3d Cir. 1989). *But see* U.S. v. Brady, 928 F.2d 844 (9th Cir. 1991).

United States v. Robinson, 935 F.2d 201 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 885 (1992). The circuit court held that the November 1, 1989 amendment to U.S.S.G. §1B1.3 did not substantially disadvantage the appellant, who pleaded guilty to distribution of crack cocaine on one occasion, because the amount of cocaine sold by the conspiracy in which she was involved was the same amount based upon her "relevant conduct" under either amendment. The circuit court rejected the appellant's argument that the November 1, 1989 amendment to U.S.S.G. §1B1.3 was a substantive change. Rather, the clear intent of the Commission was "to express its constant intent throughout the application of U.S.S.G. §1B1.3, *i.e.*, to ensure that all relevant conduct be considered upon sentencing of all defendants pursuant to the [guidelines]."

United States v. Query, 928 F.2d 383 (11th Cir. 1991). The district court did not err in counting 875 grams of methamphetamine--the subject of a state conviction--in determining the base offense level for his federal conviction where the appellant was convicted of his state charges after his guilty plea to federal charges; but his state court sentence was imposed prior to his federal sentence. According to the circuit court, the state and federal cases were "related" and the 875 grams could be considered as relevant conduct.

The drugs seized were the same. The source in both cases was the same. The two seizures occurred within days of each other.

§1B1.4 Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)

Second Circuit

United States v. Cabrera, 756 F. Supp. 134 (S.D.N.Y. 1991). The district court judge rejected the government's contention that evidence seized illegally and suppressed for that reason could be considered in imposing sentence. The district court judge distinguished pre-guideline precedent in U.S. v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971), on the basis that the guidelines make the use of a gun analogous to a statutory element of the crime and the exclusionary rule in guideline sentencing can have a substantial deterrent effect.

Ninth Circuit

United States v. Harrington, 923 F.2d 1371 (9th Cir.), *cert. denied*, 112 S. Ct. 164 (1991). The district court erred in considering at sentencing a psychiatric evaluation of the appellant which was court ordered by the State of Oregon in a previous state criminal case, where applicable state law assured him that his statements would not "be used against him in any civil proceeding or in any other criminal proceeding." According to the circuit court, the use of the appellant's statements violated his "constitutional privilege not to have incriminating statements used against him without his consent." Despite assurances to the appellant that his statements would not be used against him in future criminal proceedings, the district court judge considered the statement "as it deemed fit."

§1B1.7 Significance of Commentary

Ninth Circuit

United States v. Anderson, 942 F.2d 606 (9th Cir. 1991), *vacating*, 895 F.2d 641 (1990). In an *en banc* opinion, the Ninth Circuit held that guideline commentary is not the equivalent of the guidelines themselves, but is different from legislative history which can be ignored. According to the circuit court, "the commentary is analogous . . . to the advisory committee notes that accompany the federal rules of practice and procedure," since the commentary is more likely to reflect the intent of the Commission and of Congress than is ordinary legislative history. To reflect the general reliability of the commentary while recognizing its limitations, the circuit court advised sentencing courts to consider the guideline and commentary together, but if it is not possible to construe them consistently, to apply the guideline language.

See U.S. v. Cambra, 933 F.2d 752 (9th Cir. 1991), §1B1.2, p. 2.

United States v. Fine, 946 F.2d 650 (9th Cir. 1991). The district court erred in relying on U.S. v. Gross, 897 F.2d 414 (9th Cir. 1990), in holding that the appellant's two prior cases were unrelated. The Ninth Circuit's opinion in U.S. v. Anderson, 942 F.2d 606 (9th Cir. 1991), *vacating* 895 F.2d 641 (1990), effectively overruled Gross, by stating that courts cannot disregard commentary, unless the commentary and the Guidelines cannot be construed consistently.

Tenth Circuit

United States v. McFarlane, 933 F.2d 898 (10th Cir. 1991). The district court did not err in enhancing the defendant's base offense level for his co-defendant's possession of a firearm during commission of a drug offense. The co-defendant stated that he knew about the availability of the gun and that a drug deal was taking place. Based on this statement, the district court held that it was reasonably foreseeable that the defendant was aware of his co-defendant's possession of the firearm. *See* U.S. v. Aguilera-Zapata, 901 F.2d 1209, 1215 (5th Cir. 1990).

§1B1.8 Use of Certain Information

Fourth Circuit

United States v. Malvito, 946 F.2d 1066 (4th Cir. 1991). The district court erred in refusing to make a downward departure for the appellant's substantial assistance to the government based on information that the appellant provided under a cooperation agreement and that the government promised would not be used against him. In the instant case, the appellant provided information to the government which implicated him in marijuana trafficking. The government was entitled to promise the appellant that the information would not be used against him and the appellant was entitled to trust the promise. Although the terms of §1B1.8 forbid the use of such information only in determining the sentencing range, the broader policy considerations set forth in the commentary suggest that a defendant should not be "subject to an increased sentence by virtue of his cooperation." The district court could have refused the downward departure for almost any reason, because of the broad discretion it can exercise under U.S.S.G. §5K1.1, but not for the reason it gave. *Dissent:* Wilkins, J., "Nothing in section 1B1.8 or its commentary precludes a court from using defendant-provided information to refuse a downward departure, and nothing in section 5K1.1 mandates a court to grant a government motion to depart based on a defendant's substantial assistance."

Fifth Circuit

United States v. Shacklett, 921 F.2d 580 (5th Cir. 1991). The district court erred in using the probation officer's "bald assertion" that the government knew that the appellant was responsible for sixty-six pounds of amphetamine prior to negotiating the cooperation agreement. According to the circuit court, the "presentence report does not refer to the source of the 'facts' it contains and is unclear as to who (if not Shacklett) or what provided the information to the probation officer." Without more than the probation officer's "conclusory statement" the district court erred in considering the higher quantity especially in light of the government's concession on the issue.

Eighth Circuit

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991). The district court did not err in calculating the appellant's criminal history by using information obtained post-plea from the appellant. Section §1B1.8 specifically provides that the cooperation agreement does not restrict the use of self-incrimination concerning the existence of prior convictions and sentences in determining the defendant's criminal history category.

§1B1.10 Retroactivity of Amended Guideline Range (Policy Statement)

Ninth Circuit

United States v. Mooneyham, 938 F.2d 139 (9th Cir.), *cert. denied*, 112 S. Ct. 443 (1991). The Ninth Circuit joins the First, Seventh, and Eighth Circuits in holding that the amendment to §4B1.1 which authorizes the application of the acceptance of responsibility adjustment is not retroactive. *See* U.S. v. Havener, 905 F.2d 3 (1st Cir. 1990); U.S. v. Alvarez, 914 F.2d 915 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991); U.S. v. Williams, 905 F.2d 217 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 687 (1991). Two other circuits have suggested in *dicta* that the amendment is a "clarification." *See* U.S. v. Delvecchio, 920 F.2d 810 (11th Cir. 1991); U.S. v. Maddalena, 893 F.2d 815 (6th Cir. 1989), *cert. denied*, 112 S. Ct. 233 (1991). The Ninth Circuit noted that the amendment was not included on the list of amendments given retroactive effect. The appellant argued that since he was appealing his sentence rather than making a motion for modification of a previously imposed sentence that §1B1.10 did not apply. The circuit court rejected that argument stating, "[t]o accept [that] argument, we would have to hold that when a sentence is appealed, the guidelines that apply are those in effect at the time of the appeal, rather than those in effect at time of sentencing."

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder

Second Circuit

United States v. Gonzalez, 922 F.2d 1044 (2d Cir.), *cert. denied*, 112 S. Ct. 660 (1991). Neither the Sentencing Reform Act nor the Guidelines grant discretion to a sentencing court in the case of a defendant convicted of first degree murder under 18 U.S.C. § 1111. In the instant case, the district court had no discretion under 18 U.S.C. § 1111 to sentence the appellant to other than life in prison without possibility of parole for first degree murder. Section 5G1.1 expressly adopts the minimum or maximum statutory sentence as the guideline minimum or maximum where the guideline sentence exceeds or falls below the statutory sentence. *See* U.S. v. Sharp, 883 F.2d 829 (9th Cir. 1989).

§2A1.4 Involuntary Manslaughter

Fourth Circuit

United States v. Chambers, 940 F.2d 653 (4th Cir. 1991) (unpublished). The district court did not err in departing from a guideline range of 24-30 months to a sentence of 120 months based on endangering the public health or safety, pursuant to U.S.S.G. §5K2.14, because his conduct "went well beyond the degree of deviation from the standard of care contemplated by the term 'reckless.'" In the instant case, the appellant led patrolmen on a two-mile car chase during which he exceeded speeds of 100 mph, ran several stop signs and a stop light, and finally struck a van carrying ten people. Six people were killed and three were seriously injured. The circuit court held that "the mere fact that a departure sentence exceeds by several times the maximum recommended under the Guidelines is of no independent consequence in determining whether the sentence is reasonable." *See* U.S. v. Lopez-Escobar, 884 F.2d 170 (5th Cir. 1989).

§2A2.2 Aggravated Assault

Third Circuit

United States v. Johnson, 931 F.2d 238 (3d Cir.), *cert. denied*, 112 S. Ct. 242 (1991). The district court did not err in increasing appellant's base offense level by four levels because in pointing his gun at the Assistant U.S. Attorney's head he "otherwise used" rather than "brandished" a weapon. In making the distinction between the two terms, the circuit court agreed with the trial judge "that when a defendant did not simply point or wave about a firearm, but actually leveled the gun at the head of a victim at close range and verbalized a threat to discharge the weapon, the conduct is properly classified as otherwise using" a firearm. *See* U.S. v. De La Rosa, 911 F.2d 985 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2275 (1991).

Sixth Circuit

United States v. Daniels, 948 F.2d 1033 (6th Cir. 1991). The district court did not err in applying U.S.S.G. §2A2.2, Aggravated Assault, rather than U.S.S.G. §2B1.3, relating to property damage or destruction, in sentencing the appellant convicted of damaging a motor vehicle with a reckless disregard for the safety of human life in violation of 18 U.S.C. §§ 33 and 2. Despite the fact that U.S.S.G. §§2B1.3 and 2K1.4 were listed in the statutory index for violations of 18 U.S.C. § 33, the district court did not err in finding that U.S.S.G. §2A2.2 to be the most analogous guideline for the offense conduct involved in the instant case.

United States v. Hamilton, 929 F.2d 1126 (6th Cir. 1991). The district court did not err in assessing a four-level enhancement for "otherwise using" a weapon rather than a three-level enhancement for "brandishing" a weapon where the victim's injury was a direct and foreseeable consequence of the appellant's

use of the weapon. The circuit court rejected appellant's argument that a weapon is not "otherwise used" unless it is actually employed to intentionally inflict bodily injury.

Eighth Circuit

United States v. Slow Bear, 943 F.2d 836 (8th Cir. 1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §2A2.2 where the victim's skull fracture required hospitalization. According to the circuit court, "[c]onduct which is the subject of an acquittal may be used to enhance a sentence." The circuit court also held that a successor judge is given broad discretion in determining whether he properly can perform his sentencing duties in a case upon which he did not preside at trial.

§2A3.1 Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

Eighth Circuit

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). The district court erred in refusing to apply an enhancement for use of force pursuant to U.S.S.G.§ 2A3.1(b)(1), and finding that the Guidelines adequately took into account the force inherent in the instant offense, making a four-level increase under this section unwarranted. According to the circuit court, in order for the adjustment to apply, the Government need not show "a greater degree of force than is necessary to sustain a conviction." *See* U.S. v. Eagle Thunder, 893 F.2d 950, 956 (8th Cir. 1990).

United States v. Arcoren, 929 F.2d 1235 (8th Cir.), *cert. denied*, 112 S. Ct. 312 (1991). The district court did not err in making a two-level enhancement pursuant to U.S.S.G. §2A3.1(b)(2)(B) where the victim was under the age of 16. According to the circuit court "[n]othing in section 2A3.1(b)(2)(B) even suggests that there is an implied exception to the two-level increase where the victim was less than sixteen years old if the defendant believed that the victim was at least sixteen. If the Sentencing Commission had intended such an exception, it presumably would have specifically so provided, as Congress did in 18 U.S.C. section 2243."

Tenth Circuit

United States v. Ransom, 942 F.2d 775 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 897 (1992). The appellant argued the enhancement under U.S.S.G. §2A3.1(b)(2) constitutes "double counting" because the victim's age was already taken into account in the base offense level. The circuit court rejected this argument holding that the district court properly applied the guidelines as indicated by the U.S. Sentencing Commission and the age of the victim was not fully incorporated into the base offense level. According to the circuit court, "[w]e see no room for interpreting the Guidelines in a contrary manner where the plain language . . . directs the court to enhance the base offense level if the victim is under twelve years old."

§2A3.4 Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

Eighth Circuit

United States v. Morin, 935 F.2d 143 (8th Cir. 1991). Defendant pled guilty to two counts of abusive sexual contact with his seven-year-old niece. The district court applied an upward departure for significant physical injury pursuant to U.S.S.G. §§5K2.2, for extreme psychological injury pursuant to U.S.S.G. §5K2.3, and for the victim's young age. The circuit court reversed the sentence because circumstances supporting physical or psychological injury were not supported by the record. The circuit court remanded for resentencing based on the victim's age since U.S.S.G. §2A3.4 had been recently amended to require a four-level increase in the base offense level if the victim was under twelve.

§2A4.1 Kidnapping, Abduction, Unlawful Restraint

Fourth Circuit

United States v. Depew, 932 F.2d 324 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991). The district court did not err in sentencing the appellant, convicted of conspiracy to kidnap and conspiracy to exploit a minor in a sexually explicit film, pursuant to U.S.S.G. §2X1.1 with cross-references to U.S.S.G. §§2A4.1 and 2A1.1. The circuit court rejected the appellant's argument that the district court treated him as if he had completed the kidnapping and murder. The appellant's argument overlooked the three-level reduction provided by U.S.S.G. §2X1.1(b)(1) for his unsuccessful attempt. According to the circuit court, "[a]ppellant also overlooks that his crime was conspiracy to kidnap which included the kidnapping, torture, sexual abuse and eventual murder of an innocent young victim. The guidelines are based on relevant conduct and the extent of the appellant's crime is not reflected by the simple application of the kidnapping guideline."

§2A6.1 Threatening Communications

Second Circuit

United States v. Hornick, 942 F.2d 105 (2d Cir.), *cert. denied*, 112 S. Ct. 942 (1991). The district court erred when it increased the appellant's offense level under U.S.S.G. §2A6.1 where "the plain language of the guideline provides that the conduct needed to show an intent to carry out a threat must occur either contemporaneously with or after the threat."

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

Tenth Circuit

United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991). The district court erred when it determined loss under U.S.S.G. §2F1.1, since the circuit court could not "tell from the presentence report or sentencing transcript if the figures used to arrive at defendant's offense level [was] the real estate's fair market value." *See* U.S.S.G. §2B1.1, comment. n.2.

§2B1.2 Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

Eighth Circuit

See U.S. v. Culver, 929 F.2d 389 (8th Cir. 1991), §1B1.1, More Than Minimal Planning, p. 2.

§2B1.3 Property Damage or Destruction

Sixth Circuit

See U.S. v. Daniels, 948 F.2d 1033 (6th Cir. 1991), §2A2.2, p. 13.

§2B3.1 Robbery

Sixth Circuit

See U.S. v. Muhammad, 948 F.2d 1449 (6th Cir. 1991), §1B1.1, p. 1.

Seventh Circuit

United States v. Jones, 950 F.2d 1309 (7th Cir. 1991). The district court did not err in assessing a four-level enhancement for the use of a firearm pursuant to U.S.S.G. §2B3.1(b)(2) and a four-level

enhancement for abducting a person to facilitate the offense pursuant to U.S.S.G. §2B3.1(b)(4) in calculating appellants' sentence level for conspiracy to commit bank robbery. While it is true that under the guidelines a court should not add offense levels for speculative specific offense characteristics, U.S.S.G. §2X1.1 specifically provides that enhancements should apply for conduct shown to be intended by the defendants. According to the circuit court, "[t]hat the robbery never actually took place is irrelevant to the district court's computation and does not change the evidence into mere speculation."

Ninth Circuit

United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). The district court erred in basing a departure on the number of robberies which the appellant committed, where pursuant to a plea agreement he plead guilty to two counts, and admitted responsibility for two of the five dismissed counts. According to the circuit court, "the sentencing court should reject a plea bargain that does not reflect the seriousness of the defendant's behavior and should not accept a plea bargain and later count dismissed charges in calculating the defendant's sentence."

United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991). The district court erred in basing a departure on the use of a toy gun during the robbery. According to the circuit court, "the use of a toy gun during a crime was clearly a circumstance considered by the Commission in formulating the guidelines, it may not serve as a basis for departure from the guideline."

Tenth Circuit

See U.S. v. Lanzi, 933 F.2d 824 (10th Cir. 1991), §1B1.1, p. 1.

United States v. Pool, 937 F.2d 1528 (10th Cir. 1991). The district court did not err in making a three-level adjustment for brandishing, displaying, or possessing a dangerous weapon where the 16-year-old unindicted co-defendant entered one bank with a toy gun, and at another bank pointed to her jacket to indicate the presence of a gun.

§2B3.2 Extortion by Force or Threat of Injury or Serious Damage

Sixth Circuit

United States v. Williams, 952 F.2d 1504 (6th Cir. 1991). The appellant challenged his 41-month sentence following his convictions for conspiracy to extort and violations under the Hobbs Act, 18 U.S.C. U.S.C. §§ 371 and 951. The appellant argued that the district court erred in applying U.S.S.G. §2B3.2 and that the most applicable guideline was §2C1.1. The circuit court held that the implicit threats made by the appellant brought his case within U.S.S.G. §2B3.2 and "the fact that neither the defendant nor his shadowy counterpart, Sheriff [ ], were to take any official action in exchange for a bribe tends to take his case out of the operation of §2C1.1." The circuit court found no error in the district court's application of the guidelines.

§2B5.1 Offenses Involving Counterfeit Bearer Obligations of the United States

Eleventh Circuit

United States v. Castillo, 928 F.2d 1106 (11th Cir. 1991). The district court did not err in finding that a counterfeit currency detector found in the appellant's possession was a "counterfeiting device" which permits the enhancement of a sentence under U.S.S.G. §2B5.1(b)(2). The circuit court rejected the appellant's argument that the "counterfeiting device" had to be "used in the manufacture or production of counterfeit currency." According to the circuit court, the more reasonable view is that the "possession of a device used by those involved in counterfeiting, either in manufacturing or distributing, is sufficient to trigger the enhancement provision without proof that the device was actually used for counterfeiting." In the instant case, evidence showed that the device was used as a means of "quality control." *See* U.S. v. Penson, 893 F.2d 996 (8th Cir. 1990) (increasing offense level to 15 based on possession of paper cutter.)

§2B5.3 Criminal Infringement of Copyright

Ninth Circuit

United States v. Hernandez, 952 F.2d 1110 (9th Cir. 1991). The appellant challenged his sentence following convictions relating to counterfeiting audio cassettes and labels. The appellant argued that the district court erred in calculating the sentence by using the market value of the audio tapes, when it should have used the profit lost by the victim recording industry. The circuit court noted that "profit, not market value, indicates loss to the recording industry and gain to the defendants in this case. The court also explained that the guidelines note that 'the loss need not be determined with precision, and may be inferred from any reasonably reliable information available.'" The court further noted "[u]sing microeconomic theory, you could estimate the loss in profits to the industry which would be the proper loss measure . . . [however, although] the microeconomic approach theoretically might produce quite accurate results, the guidelines do not require such precision, which could only be pursued in a lengthy and complex hearing." The circuit court held that "[m]arket value of counterfeited tapes is a reasonable value to use in a copyright case."

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

Fourth Circuit

United States v. Kant, 946 F.2d 267 (4th Cir. 1991). In a bribery case where the appellant and his two cohorts conspired to pay a $400,000 bribe for the opportunity to purchase a ship valued between $6 and $8 million for $3 million, the district court erred in calculating the amount of loss based on the lower figure representing the amount of the bribe, rather than based on the figure representing the benefit to be received from the bribe. In the instant case there was sufficient evidence of the net benefit to the appellant because parties expressly stipulated that the net benefit was between $3 and $5 million. Additionally the court had available undisputed expert testimony on the issue of net benefit.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)

Supreme Court

Chapman v. United States, 111 S. Ct. 1919 (1991). The Supreme Court, in a 7-2 opinion, held that the statutory construction of 21 U.S.C. § 841(b)(1)(B)(v) requires the carrier weight to be included in determining the lengths of sentences for trafficking in LSD. According to the Supreme Court, this construction of the statute does not violate due process and is not unconstitutionally vague.

District of Columbia Circuit

See U.S. v. Dukes, 936 F.2d 1281 (D.C. Cir. 1991), §1B1.3, p. 3.

United States v. Shabazz, 933 F.2d 1029 (D.C. Cir.), *cert. denied*, 112 S. Ct. 431 (1991). The district court did not err in sentencing the appellant based on the gross weight of the pharmaceutically manufactured drug dilaudid, rather than the net weight of the hydromorphine, the active ingredient in dilaudid. The Sentencing Commission did not act unreasonably in treating pharmaceuticals like the eight controlled substances that Congress has expressly singled out for gross-weight treatment.

First Circuit

See U.S. v. Bianco, 922 F.2d 910 (1st Cir. 1991), §1B1.3, p. 3.

United States v. Fuller, 936 F.2d 621 (1st Cir. 1991). Citing Chapman v. United States, 111 S. Ct. 1919 (1991), the circuit court held that defendant's sentence was properly calculated based on the weight of the LSD plus the blotter paper carrier-medium despite defendant's argument that his sentence should be based on the weight of the drug alone.

United States v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.), *cert. denied*, 112 S. Ct. 648 (1991). Citing Chapman v. U.S., 111 S. Ct. 1919 (1991), the circuit court held that defendant's sentence was properly calculated based on the weight of the cocaine plus the acrylic suitcase material to which it was chemically bonded despite defendant's argument that the sentence should be based on the weight of the drug alone.

United States v. Restrepo-Contreras, 942 F.2d 96 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 955 (1992). The district court did not err when it included the entire weight (26 kilograms) of wax statues made from beeswax and cocaine as a mixture or substance within the meaning of U.S.S.G. §2D1.1. The circuit court could not discern any "meaningful distinction between an acrylic-cocaine suitcase and a beeswax-cocaine statue." *See* U.S. v. Mahecha-Onofre, 936 F.2d 623 (1st Cir.), *cert. denied*, 112 S. Ct. 648 (1991).

Second Circuit

See U.S. v. Cousineau, 929 F.2d 64 (2d Cir. 1991), §1B1.3, p. 4.

United States v. Jacobo, 934 F.2d 411 (2d Cir. 1991). The district court erred in determining that it was bound by the jury's findings as to the quantity of drugs involved in the conspiracy. The sentencing guidelines "required the court itself to make findings with respect to the defendant's intent and ability to produce the negotiated quantity." The circuit court rejected the government's argument that remand was unnecessary because the jury found that each appellant had the requisite knowledge and intent beyond a reasonable doubt, and that the district court would certainly make similar findings since it need only so find by a preponderance of the evidence.

See U.S. v. Mickens, 926 F.2d 1323 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992), §1B1.3, p. 4.

See U.S. v. Miranda-Ortiz, 926 F.2d 172 (2d Cir.), *cert. denied*, 112 S. Ct. 347 (1991), §1B1.3, p. 4.

See U.S. v. Moon, 926 F.2d 204 (2d Cir. 1991), §1B1.3, p. 5.

United States v. Obi, 947 F.2d 1031 (2d Cir. 1991). The district court did not err in establishing a base offense level based on the quantity of heroin appellant attempted to smuggle into the country despite appellant's contention that he believed the substance he was carrying was cocaine.

United States v. Odofin, 929 F.2d 56 (2d Cir.), *cert. denied*, 112 S. Ct. 154 (1991). The district court did not err in determining that a heroin importation count and a false passport count were not closely-related and should not be grouped. According to the circuit court, "the interests protected by the laws regulating passports and the laws prohibiting narcotics smuggling are sufficiently different to preclude grouping under the multi-count analysis."

See U.S. v. Perdomo, 927 F.2d 111 (2d Cir. 1991), §1B1.3, p. 5.

United States v. Pimentel, 932 F.2d 1029 (2d Cir. 1991). The district court did not err in sentencing the appellants based on two kilograms of cocaine where the evidence showed that they distributed one kilogram of cocaine, but negotiated to sell two kilograms of cocaine and were capable of producing the second kilogram. According to the circuit court, "disputed facts supporting sentencing calculations under the guidelines need only be proven by a preponderance of the evidence."

United States v. Quintero, 937 F.2d 95 (2d Cir. 1991). The district court did not err in making a two-level enhancement under U.S.S.G. §2D1.1(b)(1) for possession of a gun during commission of the offense where the gun was possessed on one date and the offense of conviction occurred on another. The appellant's reliance on U.S. v. Rodriguez-Nuez, 919 F.2d 461 (7th Cir. 1990), that the connection between the

weapon and the offense was too attenuated, fails to reckon with the relevant conduct guideline. According to the circuit court, "the gun possessed on June 14 may result in a weapons [enhancement] if the gun was possessed in connection with drug activity and if the drug activity on June 14 was part of the same course of conduct, or common scheme as [the offense of conviction.]"

Fourth Circuit

United States v. Dingle, 947 F.2d 942 (4th Cir. 1991). The district court did not err in enhancing the appellant's offense level pursuant to U.S.S.G. §2D1.1(b)(1). The circuit court held that the enhancement was appropriate since eighteen weapons were discovered in his house along with numerous drug trafficking documents indicating the house was used to further the drug transactions. The enhancement was upheld although the weapons were never seen during the drug transactions and no drugs were found in appellant's house.

See U.S. v. Hicks, 948 F.2d 877 (4th Cir. 1991), §1B1.3, p. 5.

United States v. Poteet, 940 F.2d 654 (4th Cir. 1991) (table). The district court did not err in enhancing appellant A's offense level under U.S.S.G. §2D1.1 where he "purchase[d] ten firearms during the course of the conspiracy, and on two occasions, us[ed] firearms in a threatening manner against people who worked with him in the cocaine business."

Fifth Circuit

United States v. Hooten, 942 F.2d 878 (5th Cir. 1991). The district court erred by enhancing the appellant's offense level pursuant to U.S.S.G. §2D1.1(b)(1) following his conviction for conspiracy to manufacture drugs. The circuit court found "[t]he district court never addressed the question of who owned the pistol . . . . Here the district court did not make an explicit determination that the PSR was accurate, nor did it determine whether the government met its burden of proof." The circuit court remanded the case so the district court could comply with the guidelines.

See U.S. v. Moore, 927 F.2d 825 (5th Cir. 1991), §1B1.3, p. 6.

Sixth Circuit

United States v. Andress, 943 F.2d 622 (6th Cir. 1991). The district court properly calculated the appellant's sentence under U.S.S.G. §2D1.1 when it considered "the weight of the blotter paper medium as well as the pure LSD deposited on it." *See* U.S. v. Elrod, 898 F.2d 60 (6th Cir.) *(per curiam)*, *cert. denied,* 111 S. Ct. 104 (1991); Chapman v. U.S., 111 S. Ct. 1919 (1991).

United States v. Garner, 940 F.2d 172 (6th Cir. 1991). The district court erred in making a two-level enhancement for possession of a firearm during the commission of a drug offense, where the evidence showed that the weapon, an unloaded gun, was in a locked safe which "neither contained any indicia of drug paraphernalia nor was located within sufficient proximity to raise an inference of relatedness." The circuit court also found that the gun, "an antique style single-shot" Derringer, was not the type normally associated with drug activity. The circuit court emphasized that this was not a case where the government failed to meet its burden of proof of establishing the applicability of U.S.S.G. §2D1.1(b)(1), but rather a case where the defendant established that "it is clearly improbable that the weapon was connected to the offense." The circuit court rejected the government's argument that once the government meets its burden of proof by proving that the defendant possessed a firearm, that U.S.S.G. §2D1.1(b)(1) automatically applied.

United States v. Hodges, 935 F.2d 766 (6th Cir.), *cert. denied*, 112 S. Ct. 251 (1991). The district court erred in refusing to impose the ten-year mandatory minimum sentence in connection with the defendant's sentence when it found the amount of cocaine involved in the conspiracy fell within the range of 2 to 3.5 kilograms. The district court took the position that the mandatory minimum provisions of 21 U.S.C. § 841(b)(1)(B) would apply only to a conspiracy that deals in quantities of 500 grams or more at a time, and not to a conspiracy that deals in several smaller transactions which may add up to 500 grams or more.

According to the circuit court, "the district court should have established the quantity of drugs by adding up the total amount sold during the lifetime of the conspiracy." *See* U.S. v. Sailes, 872 F.2d 735 (6th Cir. 1989); U.S. v. Miller, 910 F.2d 1321 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 980 (1991). Once the quantity of drugs specified in the statute are established, the district court has no discretion with respect to the application of mandatory minimum sentences.

United States v. Jennings, 945 F.2d 129 (6th Cir. 1991). The district court erred in sentencing the appellants, convicted of illegal manufacture of methamphetamine, based on the total weight of the mixture containing methamphetamine and poisonous unreacted chemicals and by-products found in a crockpot. According to the circuit court, "interpreting the statute [18 U.S.C. § 841(b)(1)(A)] to require the inclusion of the entire contents of the crockpot for sentencing in this case would produce an illogical result and be contrary to the legislative intent underlying the statute." The circuit court found it "fortuitous, and unwarranted by the statute, to hold the defendants punishable for the entire weight of the mixture when they could have neither produced that amount of methamphetamine nor distributed the mixture containing methamphetamine." The circuit court remanded the case for the district court to develop the record with respect to the contents of the crockpot. If the district court finds that the mixture did contain undigestible byproducts, it would be more appropriate for the district court to sentence the defendants based on the amount of methamphetamine that they were capable of producing.

See U.S. v. Moreno, 933 F.2d 362 (6th Cir.), *cert. denied*, 112 S. Ct. 265 (1991), §1B1.3, p. 7.

Seventh Circuit

United States v. Atterson, 926 F.2d 649 (7th Cir.), *cert. denied,* 111 S. Ct. 2909 (1991). The district court erred in failing to make a two-level enhancement for possession of a dangerous weapon during the commission of a drug offense where the evidence established that two loaded handguns and large sums of cash were stored in a headboard "in a home found to have drugs strewn throughout its rooms." According to the circuit court, U.S.S.G. §2D1.1(b)(1) "does not require that the government show a connection between the weapon and the offense, only that the weapon was possessed during the offense." *See* U.S. v. Franklin, 896 F.2d 1063 (7th Cir. 1990); U.S. v. Durrive, 902 F.2d 1221 (7th Cir. 1990).

United States v. Edwards, 940 F.2d 1061 (7th Cir. 1991). The district court erred in enhancing the appellant's offense level under U.S.S.G. §2D1.1 for possession of firearms where "the weapons were twenty-five miles away, inaccessible 'during the commission of the offense.' U.S.S.G. §2D1.1(b)(1)." *See also* U.S. v. Rodriguez-Nuez, 919 F.2d 461 (7th Cir. 1990).

United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991). In a case of first impression for the court, the Seventh Circuit held that the 100 to 1 ratio of cocaine to cocaine base pursuant to U.S.S.G. §2D1.1(a)(3) does not violate the Due Process clause. The court noted that "[m]embers of Congress considered cocaine base to be more dangerous to society than cocaine because of crack's potency, its highly addictive nature, its affordability, and its increasing prevalence." The court therefore held that considering the "problems caused by the special qualities of crack, it was not irrational for Congress to determine that substantially greater penalties for the sale and distribution of crack were necessary to counter balance a lure of profit that would otherwise attract persons into the crack trade."

United States v. Thomas, 930 F.2d 526 (7th Cir.), *cert. denied,* 112 S. Ct. 171 (1991). The district court erred in sentencing the defendant, convicted of violating 21 U.S.C. § 841(a), to a term of probation in lieu of imprisonment when making a departure pursuant to 18 U.S.C. § 3553(e) for substantial assistance. According to the circuit court, the departure provision does not eliminate the probation ban under § 841(b). The district court's interpretation renders the probation ban meaningless. Section 841(b) requires that the district court sentence defendant to some period of confinement. Since there is little difference between a sentence of probation and a very short prison term, the circuit court then addressed the government's second issue that the extent of the departure was unreasonable. According to the circuit court, the district court can only consider factors relating to a defendant's cooperation when making a departure based on substantial assistance under §3553(e). In the instant case, the district court based the departure not only on the defendant's cooperation but also on her "extremely burdensome family responsibilities." According to the

appellate court, U.S.S.G. §5H1.6 should be read narrowly. "Section 5H1.6 contains no suggestion that departures may be based on family considerations whenever they strike judges as particularly compelling. Had the Commission wanted to do that, it knew how." The circuit court instructed the sentencing judge, when resentencing the defendant, to use the government's recommended sentence as a starting point in determining the extent of the departure. "If the district court imposes a different sentence, it should explain in what respects the government's recommended departure is appropriate by reference to factors like those enumerated in §5K1.1(a) and their significance to the court's evaluation of the quality of the assistance rendered by [appellant]."

See U.S. v. Thompson, 944 F.2d 1331 (7th Cir. 1991), §1B1.3, p. 8.

United States v. Webb, 945 F.2d 967 (7th Cir. 1991). The appellant asserted that the application of U.S.S.G. §2D1.1 denied him due process and equal protection under the law in violation of the fifth amendment because the Guidelines and the accompanying Drug Quantity Table prescribe sentences that are arbitrary and capricious. In particular, the appellant claimed that the weight assigned to marijuana plants in the Drug Quantity Table should be based on the actual yield of each plant. The circuit court dismissed the appellant's argument by asserting that the weights assigned to each plant for sentencing purposes need not represent scientifically correct yields. Since the Commission had used the sentences and equivalencies derived from 21 U.S.C. § 841(b)(1) as the primary basis for the guideline sentences and "judgments concerning what conduct should be made criminal and how heavily it should be punished are for Congress rather than courts to make," appellant's claim was held to be without merit.

United States v. Welch, 945 F.2d 1378 (7th Cir. 1991). The district court did not err in computing the amount of cocaine involved in the conspiracy based on testimony by a co-conspirator that he sold 1-2 ounces of cocaine for defendant per month. The court also did not err in applying a two-level enhancement for the use of a dangerous weapon pursuant to U.S.S.G. §2D1.1(b)(1), even though the defendant was acquitted of violating 18 U.S.C. § 924(c). The circuit court held that "a verdict of 'not guilty' does not meant that the defendant didn't do it; it means that the prosecution failed to establish culpability beyond a reasonable doubt." *See* U.S. v. Fonner, 920 F.2d 1330, 1332 (7th Cir. 1990).

Eighth Circuit

United States v. Bechtol, 939 F.2d 603 (8th Cir. 1991). The district court did not err by including marijuana cuttings in calculating the appellant's base offense level for manufacturing marijuana. The circuit court held that a cutting which has root hairs is a plant. *See* U.S. v. Eves, 932 F.2d 856 (10th Cir.), *cert. denied*, 112 S. Ct. 236 (1991); U.S. v. Carlisle, 907 F.2d 94 (9th Cir. 1990) (*per curiam*).

United States v. Burks, 934 F.2d 148 (8th Cir. 1991). The district court did not err in making a two-level enhancement for possession of a firearm during the commission of a drug offense where after the appellant's arrest for the instant drug offense, a search of his house revealed a pistol with three loaded clips under his bed. The circuit court rejected the appellant's argument that the gun was not related to the instant drug transaction since all conversations about drugs occurred outside his house and he was headed away from his house at the time of the arrest.

United States v. Duckworth, 945 F.2d 1052 (8th Cir. 1991). The district court did not err in calculating the appellant's offense level pursuant to U.S.S.G. §2D1.1 where it considered an aggregate amount of drugs instead of the lesser amount charged in the indictment. The circuit court stated, "[w]e have held that a district court may approximate the quantities of controlled substances . . . . The sentencing court is not limited by the amount seized and may sentence according to its estimation based on the trial testimony."

United States v. Duke, 935 F.2d 161 (8th Cir. 1991). The district court properly applied a two-level enhancement for possession of a firearm pursuant to U.S.S.G §2D1.1(b)(1), where the record indicated that a search of appellant's home revealed drugs, scales, and a handgun.

United States v. Eberspacher, 936 F.2d 387 (8th Cir. 1991). Pursuant to U.S.S.G. §2D1.4, the district court properly considered three empty kilogram wrappers with traces of cocaine in addition to the one kilogram defendant admitted distributing, in determining his base offense level. The district court did not err in applying a two-level enhancement pursuant to U.S.S.G. §2D1.1(b)(1) for possession of a firearm after defendant had been acquitted of using a firearm in connection with a drug trafficking crime. According to the circuit court, "[t]he government's burden on the weapons charge is to prove guilt beyond a reasonable doubt. In contrast, the Guidelines enhancement for possession of a firearm 'should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.'"

Ninth Circuit

United States v. Bertrand, 926 F.2d 838 (9th Cir. 1991). The district court did not err by estimating the drug laboratory's potential where the police seized 75 kilograms of ephedrine and 8 pounds of red phosphorous from the appellant's trailer. Relying on U.S.S.G. §2D1.1, Application Note 12 [which incorporates by reference U.S.S.G. §2D1.4, Application Note 2], because the appellants were convicted of the underlying crimes as well as the conspiracy, the circuit court held that the "district court correctly took into account the 'potential' methamphetamine because the 7 kilograms seized did not reflect the scale of appellant's offense." The circuit court did not address the contention whether an amendment in U.S.S.G. §2D1.4(a) from "incomplete conspiracy" to "conspiracy" was a substantive change.

United States v. Kelso, 942 F.2d 680 (9th Cir. 1991). The district court erred by enhancing the appellant's offense level under U.S.S.G. §2D1.1(b)(1) where a sufficient connection between the defendant and the contraband did not exist to support the inference that the defendant exercised dominion and control. *See* U.S. v. Disla, 805 F.2d 1340, 1350 (9th Cir. 1986). In the instant case, the district court "applied the enhancement because [the appellant] had access to the weapon and had used weapons in the commission of prior offenses." According to the circuit court, "[a]lthough [the appellant] may have had access to the gun, there is no evidence he owned it, or even was aware of its presence."

United States v. Martinez, 946 F.2d 100 (9th Cir. 1991). The district court erred in basing the appellants' upward departures in part on the large quantity of cocaine involved. When appellants committed the offense, the guidelines called for a base offense level of 36 for all cases involving more than 50 kilograms of cocaine. The language of the guideline indicates that the Commission had considered the circumstance of larger quantities of drugs. The court distinguished this case from U.S. v. Bennett, 900 F.2d 204 (9th Cir. 1990), where the circuit court upheld an upward departure based on the quantity of drugs in a sentence for using a communication facility to commit a drug offense. The Commission's subsequent amendment of §2D1.1 providing for higher offense levels based on larger quantities was not entitled to substantial weight in construing earlier law. According to the circuit court, "[a] subsequent amendment is entitled to substantial weight in construing earlier law when it plainly serves to clarify, rather than change the existing law. [Citations omitted.] Here, however, where the circumstances surrounding the relevant guideline and its amendment fail to make clear that the amendment's purpose was not merely to clarify rather than to alter pre-existing law, we will confer no weight on the subsequent amendment." The circuit court refused to follow the contrary holding in U.S. v. Vasquez, 909 F.2d 235 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2826 (1991).

United States v. Stewart, 926 F.2d 899 (9th Cir. 1991). The district court did not err in making a two-level enhancement for possession of a firearm during a drug offense where the overt act of distribution in furtherance of the conspiracy occurred at one location and appellant admitted possessing a machine gun during the time of the conspiracy at his home, approximately 15 miles away. The circuit court rejected appellant's argument that U.S.S.G. §2D1.1(b)(1) violates due process by creating a presumption that a weapon is connected to an offense upon proof of mere possession, and then shifts the burden to the defendant. Relying on U.S. v. Willard, 919 F.2d 606 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 208 (1991), the circuit court held that "the key is whether the gun was possessed during the course of criminal conduct, not whether it was 'present' at the site." The circuit court distinguished U.S. v. Vasquez, 874 F.2d 250 (5th Cir. 1989) (a loaded pistol found in defendant's bedroom, several miles away from the drug scene was not possessed during the offense) by noting that the defendant in Vasquez was charged with "mere possession," and the appellant is charged with conspiracy. According to the circuit court, "[t]he conspiracy charge has no

definitive location and the mere fact that the gun was not present at the place where the overt act took place does not mean that it had no connection with the conspiracy."

Tenth Circuit

United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991) *(petition for cert. filed Jan. 9, 1992)*. The trial court did not err in applying a two-level enhancement for possession of a dangerous weapon pursuant to U.S.S.G. §2D1.1(b)(1), even though defendant was acquitted of violating 18 U.S.C. § 924(c), when the record indicated that two weapons had been located at the arrest scene, that the weapons were handled at will by the residents, and that the weapons were kept for the protection of the conspiracy participants, the money, and the cocaine.

United States v. Eves, 932 F.2d 856 (10th Cir.), *cert. denied*, 112 S. Ct. 236 (1991). The district court did not err in finding that the appellant's crime involved 1000 or more marijuana plants, subjecting him to a mandatory ten-year sentence pursuant to 21 U.S.C. § 841(b)(1)(A). The circuit court rejected the appellant's argument to accept the scientific or botanical definition of "plant." The circuit court concluded that the word "plant" under the guidelines is to be given its plain and ordinary meaning and that the district court did not err in counting cuttings with roots as plants. *See* U.S. v. Malbrough, 922 F.2d 458 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2907 (1991) (accepting expert testimony that a cutting is not a plant until it develops roots); U.S. v. Corley, 909 F.2d 359 (9th Cir. 1990) (only cuttings with sufficient roots to survive are plants); U.S. v. Carlisle, 907 F.2d 94 (9th Cir. 1990) (same).

United States v. Goodard, 929 F.2d 546 (10th Cir. 1991). The district court did not err in making a two-level enhancement under U.S.S.G. §2D1.1(b)(1) where the appellant's co-conspirator possessed the gun in furtherance of the conspiracy. The co-conspirator, with appellant's knowledge, possessed the gun during their entire trip to buy cocaine. The appellate court distinguished U.S. v. Vasquez, 874 F.2d 250 (5th Cir. 1989) and U.S. v. Burke, 888 F.2d 862 (D.C. Cir. 1989). According to the circuit court "the enhancement is based on Goddard's complicity with [his co-conspirator] and the gun's connection with the conspiracy not on an 'inference' that Goddard possessed the weapon."

United States v. Haar, 931 F.2d 1368 (10th Cir. 1991). The district court did not err in basing the appellant's sentence on a projection of the amount of methamphetamine that could have been produced from the quantities of chemicals seized. The parties agreed to the stipulation of the government's expert witnesses on the issue. Estimating the drug quantity in terms of the amount capable of being produced is an acceptable method of computation both under the Guidelines and by the courts. *See* U.S.S.G. §2D1.1; U.S. v. Evans, 891 F.2d 686 (9th Cir. 1989), *cert. denied*, 495 U.S. 931 (1990).

United States v. Jensen, 940 F.2d 1539 (10th Cir. 1991) (unpublished). The appellant challenged the calculation of the base offense level arguing that the amount of precursor chemical possessed was not convertible, and alternatively, that it did not convert to the cocaine equivalency determined by the court. The circuit court, following U.S. v. Havens, 910 F.2d 703 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 687 (1991), held that the district court correctly estimated the quantity of producible drugs based upon proper expert testimony.

United States v. Leazenby, 937 F.2d 496 (10th Cir. 1991). The district court properly considered the total weight of the blotter paper which had been impregnated with lysergic acid diethylamide (LSD), as opposed to only the weight of the drug, in determining defendant's offense level pursuant to U.S.S.G. §2D1.1(c).

United States v. McCann, 940 F.2d 1352 (10th Cir. 1991). According to the Tenth Circuit, both the government and the defense proceeded under the erroneous assumption that the parties' stipulation that the government failure to specify a quantity of drugs in the indictment eliminated consideration of the mandatory minimum sentence based on the quantity of drugs. "The sentencing guidelines require the district court to consider all relevant chemicals in sentencing, not just those chemicals charged in the indictment. Thus, the imposition of a mandatory minimum sentence under the guidelines cannot be eliminated from the court's consideration simply because a specific amount of drugs was not alleged in the indictment." The circuit court

held that U.S. v. Crockett, 812 F.2d 626 (10th Cir. 1987), a pre-guidelines case holding that without an allegation as to drug quantity in the indictment, the trial court could not impose an enhanced sentence, is inapposite to post-guideline cases. However, in the instant case, the defendant's belief, and that of the court and the government, that the stipulation prevented the court from considering the mandatory minimum sentence on one of the courts, made the plea involuntary.

See U.S. v. McFarlane, 933 F.2d 898 (10th Cir. 1991), §1B1.3, p. 11.

United States v. Ruth, 946 F.2d 110 (10th Cir. 1991). The district court did not err in calculating the appellant's base offense level pursuant to U.S.S.G. §2D1.1 where drugs sold by the appellant's brother were included in this determination. "The record supports the district court's finding that [these drugs were] a part of the same course of conduct or common scheme or plan."

Eleventh Circuit

See U.S. v. Bennett, 928 F.2d 1548 (11th Cir. 1991), §1B1.3, p. 10.

United States v. Lazarchik, 924 F.2d 211 (11th Cir.), *cert. denied*, 112 S. Ct. 96 (1991). The district court did not err in using the gross weight of the pharmaceutical drugs distributed by the appellant to calculate the base offense level. The circuit court rejected the appellant's argument that Congress intended to use gross weight for "street drugs," yet retain the use of net weight in calculating the heroin equivalency of pharmaceuticals. *See* U.S. v. Gurgiolo, 894 F.2d 56 (3d Cir. 1990); U.S. v. Bayerle, 898 F.2d 28 (4th Cir.), *cert. denied*, 111 S. Ct. 65 (1990).

United States v. Lynch, 934 F.2d 1226 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992). The district court did not err in considering illegally-seized handguns in sentencing the appellant. After analyzing the issue, the circuit court concluded that the disadvantages of applying the exclusionary rule at sentencing are large and the benefits smaller or non-existent.

United States v. Martinez, 924 F.2d 209 (11th Cir.), *cert. denied*, 112 S. Ct. 203 (1991). The district court did not err in making a two-level enhancement for appellants' possession of a firearm during the commission of a drug offense, when the possessor of the firearm, [B], was charged as a co-conspirator, each of the appellants was a member of the conspiracy at the time B possessed the firearm, and B possessed the firearm in furtherance of the conspiracy. The circuit court noted that its decision in U.S. v. Otero, 890 F.2d 366 (11th Cir. 1989), upon which the decision in the instant case is based, is fully in accord with the Guidelines and the commentary to U.S.S.G. §1B1.3(a)(1) and follows the rationale in Pinkerton v. U.S., 328 U.S. 640 (1946). The circuit court also rejected the argument that the use of the two-level gun enhancement based only on proof by a preponderance of evidence, rather than a charge and conviction under 18 U.S.C. § 924(c), violates due process.

United States v. Rolande-Gabriel, 938 F.2d 1231 (11th Cir. 1991). The district court erred in sentencing the appellant, convicted of importing cocaine, on the overall weight of the bags containing the cocaine, since the bags included an "unusable" liquid mixture. The Eleventh Circuit distinguishing Chapman v. U.S., 111 S. Ct. 1919 (1991) found that the unusable liquid was "packaging." The cocaine was "easily distinguished from and separated from" its liquid waste carrier medium. According to the appellate court, "[t]he entire weight of drug mixtures which are usable in the chain of distribution should be considered in determining a defendant's sentence."

§2D1.4 Attempts and Conspiracies

First Circuit

United States v. Tabares, 951 F.2d 405 (1st Cir. 1991). The district court did not err in determining the appellant's offense level under U.S.S.G. §2D1.1 based not only on amounts of cocaine found in appellants' possession, but also based on amounts that seized records indicated that he and his co-defendants had sold during the preceding months. Pursuant to U.S.S.G. §2D1.4, when the amount seized does not

reflect the scale of the offense, a judge may consider financial or other records to approximate the total drug activity.

See U.S. v. Wood, 924 F.2d 399 (1st Cir. 1991), §1B1.3, p. 3.

Second Circuit

See U.S. v. Jacobo, 934 F.2d 411 (2d Cir. 1991), §2D1.1, p. 18.

Fourth Circuit

See U.S. v. Hicks, 948 F.2d 877 (4th Cir. 1991), §1B1.3, p. 5.

Seventh Circuit

See U.S. v. Ruiz, 932 F.2d 1174 (7th Cir.), *cert. denied*, 112 S. Ct. 151 (1991), §1B1.3, p. 7.

See U.S. v. Welch, 945 F.2d 1378 (7th Cir. 1991), §2D1.1, p. 21.

Eighth Circuit

See U.S. v. Eberspacher, 936 F.2d 387 (8th Cir. 1991), §2D1.1, p. 22.

United States v. Stuart, 923 F.2d 607 (8th Cir.), *cert. denied*, 111 S. Ct. 1599 (1991). In the appeal of the appellant's conviction for aiding and abetting in the knowing and intentional attempt to possess to distribute more than 500 grams of cocaine, the circuit court rejected his argument that he was subjected to "sentencing entrapment." The appellant argued that the conduct of the government in fronting the necessary money to buy a larger quantity of drugs than which his co-defendant could afford, entrapped him into committing a greater offense than he was pre-disposed to commit. According to the circuit court, "[t]he record does not show with sufficient clarity that [appellant] was predisposed to commit only a lesser offense."

Tenth Circuit

United States v. Leopard, 936 F.2d 1138 (10th Cir. 1991). The district court did not err in determining defendant's offense level based on an approximation of the amount of methamphetamine the defendant could have produced. Pursuant to U.S.S.G. §2D1.4, "where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance." Based upon the chemicals and equipment seized, the court's determination that defendant had the ability to produce 41.7 pounds of methamphetamine was not clearly erroneous.

United States v. Short, 947 F.2d 1445 (10th Cir. 1991) *(petition for cert. filed Jan. 29, 1992)*. The district court did not err in relying on information in the presentence report to estimate, pursuant to U.S.S.G. §2D1.4, the production capacity of a methamphetamine laboratory discovered in appellant's residence.

§2D1.5 Continuing Criminal Enterprise

Seventh Circuit

United States v. Bafia, 949 F.2d 1465 (7th Cir. 1991). The district court erred in considering the defendant's guilt on a conspiracy conviction when sentencing him on a "continuing criminal enterprise" conviction. U.S. v. Alvarez, 860 F.2d 801, 830-31 (7th Cir. 1988). Under U.S.S.G. §2D1.5 the district court is expressly prohibited from enhancing the "continuing criminal enterprise" adjusted offense level for defendant's "role in the offense" because the substance of the "continuing criminal enterprise" offense embraces the notion that the defendant supervised a large-scale criminal operation.

§2D1.6 Use of Communication Facility in Committing Drug Offense

Fifth Circuit

See U.S. v. Garcia, 931 F.2d 1017 (5th Cir. 1991), §1B1.2, p. 2.

Seventh Circuit

United States v. Feekes, 929 F.2d 334 (7th Cir. 1991). The district court did not err in making an upward departure from the recommended offense level for the "use of telephone" conviction based on the quantity of drugs involved and the fact that appellant attempted to distribute heroin in prison. The circuit court also found that the extent of the departure was reasonable. The district court looked to the drug quantity table in U.S.S.G. §2D1.1. The extent of the departure is identical to the base offense level of the current guideline §2D1.6, which was amended after the appellant's conviction. According to the circuit court, the amendment "shows that the sentencing judge was on the same wave-length as the Sentencing Commission when it used the drug quantity table to determine the extent of the departure."

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

First Circuit

United States v. Pavao, 948 F.2d 74 (1st Cir. 1991). The district court did not err in determining the amount of loss attributable to appellant's fraud to be between $20,000 and $40,000. The record indicated that one of the victims lost an $8,760 "investment" he had made in appellant's business, and that one victim lost her home when appellant's payroll checks bounced and she was unable to make her mortgage payments. The district court found that if not for appellant's impersonation, the first victim would not have made the investment, and the other would not have left steady employment to work for the appellant. Therefore, the district court's determination that the loss included the investment and $15,000, which was half of the value of the mortgage, was not clearly erroneous.

Second Circuit

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991). The appellants challenged the 151 month sentence imposed following their convictions for racketeering and mail fraud offenses in connection with waste dumping operations. Preliminarily, the circuit court noted that the objections to the sentence were not raised in the district court, but decided to entertain the appeal because of the complexity and novelty of the instant case. *See, e.g.,* U.S. v. McCall, 915 F.2d 811, 814 (2d Cir. 1990); *see also* U.S. v. Rodriguez, 943 F.2d 215, 216-17 (2d Cir. 1991). The appellants argued that the district court erred in calculating their offense level by using the environmental guideline, instead of the mail fraud guideline, resulting in an offense level of 26 rather than 23. The circuit court found some merit to this challenge because the mail fraud guideline, §2F1.1, appeared to conflict with U.S.S.G. §1B1.2(a). The difficulty arises because the appellants were not charged with or convicted of environmental offenses and §2F1.1, Application Note 15, appears to conflict with the requirement in §1B1.2(a) that the calculation of the offense level proceed under sections dealing with the offense of conviction. The circuit court did not resolve the conflict because "[f]ortunately . . . the district court stated an alternate basis for its arrival at an offense level 26." The district court stated that the appellants had "been convicted of one of the largest and most serious frauds involving environmental crimes ever prosecuted in the U.S." and "if it had sentenced [the appellants] under 2F1.1, it would have, under guidelines §5K2.0 or §5K2.5, 'substantially depart[ed] upward to capture the harm which the defendants caused to both the . . . land and the environment.'"

Third Circuit

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). The district court erred in making a four-level enhancement under U.S.S.G. §2F1.1(b)(2) where both "more than minimal planning" and a scheme to

defraud more than one victim were involved. According to the circuit court "[i]f either characteristic is present, the commentary tells us to apply a two-level increase. The commentary does not indicate a four-level enhancement where both signs of harm are present." *See* U.S. v. Irabor, 894 F.2d 554 (2d Cir. 1990); U.S. v. Bolden, 889 F.2d 1336 (4th Cir. 1989).

Fourth Circuit

See U.S. v. Kant, 946 F.2d 267 (4th Cir. 1991), §2C1.1, p. 17.

Sixth Circuit

United States v. Benskin, 926 F.2d 562 (6th Cir. 1991). The district court did not err in making an upward departure from a guideline range of 27-33 months imprisonment to a sentence of 60 months where the appellant, who was convicted of mail and securities fraud, engaged in a fraudulent scheme for nearly five years involving more than 600 individual investors who had losses exceeding three million dollars. According to the circuit court, "[t]he district court judge correctly found that the psychological harm inflicted on these investors (including disabled and elderly individuals) is immeasurable." The circuit court rejected the appellant's argument that the case involved an "average white-collar crime."

Seventh Circuit

United States v. Boula, 932 F.2d 651 (7th Cir. 1991). The district court erred in making a ten-level departure in a mail fraud case based on the number of victims. According to the circuit court, the "number of victims was an element anticipated by the Commission and provided for through the 'more than one victim' enhancement, as well as the large loss enhancement."

United States v. Schneider, 930 F.2d 555 (7th Cir. 1991). In the instant case the defendants, a husband and wife, were convicted of conspiring to defraud and defrauding two federal agencies. Mr. Schneider, an experienced building contractor, submitted a bid on a contract for alterations in a federal building. In the papers he submitted with the bid, he falsely stated that he had not been charged with a criminal offense within the past three years. Mrs. Schneider submitted a bid for another project which included a fraudulent bond. The district court calculated the "loss" for each defendant differently without giving a reason. According to the circuit court, the difference in treatment was "irrational" and both calculations were erroneous. The appellate court noted a distinction between two types of fraud cases. One type involves a "true con artist" who does not intend to perform his undertaking and means to pocket the entire contract price without rendering any service in return. The other type of fraud is committed in order to obtain a contract that the defendant might otherwise not obtain, but he means to perform and is able to do so. The instant case is of the second type. According to the circuit court, the defendants in this case "got (or would of gotten, had their fraud succeeded) nothing from the government but a pair of contracts, and the defendants were experienced contractors and the low bidders to boot. They may have placed the government at risk, but the government has made no effort to quantify that risk, liberal as the requirements are for such qualifications."

Eighth Circuit

United States v. West, 942 F.2d 528 (8th Cir. 1991). In sentencing the appellant convicted of selling adulterated meat food products with the intent to defraud, the district court did not err in adding a two-level enhancement for more than minimal planning where it is not disputed that the offense itself involved more than minimal planning and the appellant was involved for almost two years.

Ninth Circuit

United States v. Cambra, 933 F.2d 752 (9th Cir. 1991). The district court did not err in applying U.S.S.G. §2F1.1(b)(1)(H) (enhancing the guideline score where amount of fraud falls within $200,001 and $500,000) where the fraud on federal enforcement agencies was not financial in nature. In the instant case the appellant plead guilty to the three counts of violating the Food, Drug and Cosmetic Act, two counts of

which allow for increased penalties where violations were committed "with the intent to defraud or mislead." The circuit court found that "[f]ederal agencies may be victims of fraud in counterfeiting and misbranding drugs."

United States v. Deeb, 944 F.2d 545 (9th Cir. 1991). In a bank fraud and embezzlement case, the district court did not err by enhancing the appellant's offense level "for more than minimal planning" even though the conviction stemmed from a single taking. The circuit court found that significant affirmative steps were taken to conceal the offense, including transferring a mis-coded check into two separate bank accounts, opening a second bank account under a fictitious name, and rehearsing plausible alibis to use if questioned.

See U.S. v. Fine, 946 F.2d 650 (9th Cir. 1991), §1B1.3, p. 9.

United States v. Nazifpour, 944 F.2d 472 (9th Cir. 1991). The district court did not err by enhancing the sentence of the appellant, convicted of making a false statement in a bankruptcy case, where his secured creditors as well as the bankruptcy trustee were victims of his fraud. The circuit court held "[c]learly, the false statement [the appellant] made in relation to his bankruptcy case was intended to result in an under valuation of the estate in bankruptcy and the availability of less money to satisfy the demands of the creditors." Also, the district court did not err by enhancing the appellant's offense level pursuant to U.S.S.G. §2F1.1(b)(1)(D) where, although the appellant closed a certain account prior to filing his bankruptcy petition, he did not report its existence when he prepared the schedule of assets and liabilities.

Tenth Circuit

United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991). The district court did not err in calculating loss under U.S.S.G. §2F1.1 in this mail fraud and equity skimming case by considering the value of all the property taken, including the value of the real estate and cash.

§2F1.2 Insider Trading

Seventh Circuit

United States v. Cherif, 943 F.2d 692 (7th Cir. 1991) *(petition for cert. filed Dec. 30, 1991)*. The district court did not err in enhancing the appellant's offense level under U.S.S.G. §2F1.2 where the commentary instructs the court to do so. "Although [the appellant] was charged with mail and wire fraud, not insider trading, his conduct involved 'misuse of inside information for personal gain' . . . ." The court also properly enhanced the appellant's sentence based on trading gains of other people where the appellant recommended the stocks and shared information with those people.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G1.1 Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct

First Circuit

United States v. Camuti, 950 F.2d 72 (1st Cir. 1991). The appellant challenged his sentence following a conviction for knowingly inducing an individual to travel in interstate commerce to engage in prostitution and argued that the district court erred in applying a three-level enhancement to his offense level based on the transportation of more than one person in interstate commerce with the intent to engage in prostitution. The circuit court held that a two-level, rather than a three-level, enhancement was warranted. The circuit court found that even though the appellant was only convicted on one count, a conviction which did not include transportation as offense conduct, he remained otherwise accountable, pursuant to U.S.S.G. §1B1.3, for conduct involved in dismissed counts pursuant to a plea agreement. It was this relevant conduct that was properly applied to calculate his offense level. This determination was based on the distinction between transporting an individual and inducing or persuading them to travel. *See* U.S. v. Sabatino, 943 F.2d 94 (1st Cir. 1991); U.S. v. Jones, 909 F.2d 533 (D.C. Cir. 1990). "Applying the analysis in Jones and accepted

in Sabatino to this case we conclude that the transportation of only two individuals [not three as the district court found] can be attributed to [the appellant] for purposes of . . . U.S.S.G. §2G1.1(c)."

United States v. Sabatino, 943 F.2d 94 (1st Cir. 1991). The district court erred when it applied the coercion enhancement to each of the appellants convicted of a Mann Act violation based on their superior bargaining power and the victims' economic dependence. The circuit court held that it was error to find coercion where the prostitutes could have quit at any time. The circuit court had reservations about accepting as coercion the type of economic pressures present in the instant case.

§2G1.2 Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

First Circuit

United States v. Ellis, 935 F.2d 385 (1st Cir.), *cert. denied*, 112 S. Ct. 201 (1991). The district court did not err in making an upward departure from a guideline range of 188-235 months to a sentence of 300 months imprisonment for the appellant, convicted of three counts of knowingly transporting a minor under the age of 18 to engage in illegal sexual activity, where he sexually abused his stepdaughter and caused her extreme psychological injury. The evidence showed that the abuse began shortly after the appellant was released from prison when his victim was five-years old. The circuit court found that the departure was not based simply on the victim's age, which was incorporated into the guidelines, but "on the extreme psychological harm inflicted on the victim as a result of the [appellant's] extreme conduct. Not only did [appellant] continuously assault [the victim], his abuse took particularly degrading and insulting forms."

Part H Offenses Involving Individual Rights

§2H1.3 Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property

Sixth Circuit

United States v. Gresser, 935 F.2d 96 (6th Cir.), *cert. denied*, 112 S. Ct. 239 (1991). The district court erred by failing to treat a conviction under 18 U.S.C. § 844(h)(1) (cross-burning) as an underlying offense in calculating the sentence pursuant to U.S.S.G. §§2H1.3 and 2H1.2 [deleted]. The Sixth Circuit, following U.S. v. Worthy, 915 F.2d 1514 (11th Cir. 1990), held that the "use of fire" guideline [U.S.S.G. §2K1.4] applies whether or not the "use of fire" constitutes legal arson. While holding that U.S.S.G. §2K1.4 applies to 18 U.S.C. § 844 in this case and that the conviction was an underlying offense of the conspiracy, the circuit court did not rule directly on a "stair-step" approach which would increase the offense level an additional two levels under U.S.S.G. §2H1.3.

Part J Offenses Involving the Administration of Justice

§2J1.3 Perjury or Subornation of Perjury

Fourth Circuit

United States v. Pierson, 946 F.2d 1044 (4th Cir. 1991). In refusing to apply the cross reference to U.S.S.G. §2X3.1, the district court did not err in its application of U.S.S.G. §2J1.3 to an appellant convicted of making false statements to a grand jury. While the record indicated that the false statements were made with respect to a criminal offense, there was insufficient evidence to conclude that those statements were made to assist or protect others. Thus, application of the Accessory After the Fact Guideline (§2X3.1) was inappropriate.

Seventh Circuit

United States v. Bradach, 949 F.2d 1461 (7th Cir. 1991). A jury convicted the appellant of eleven counts of making false statements and sentenced him to 30 months imprisonment and a $50,000 fine. The

appellant argued that the district court erred by increasing his offense level pursuant to U.S.S.G. §2J1.3(b)(2) for perjurious statements that led to unnecessary expenditures of government resources where, as he asserts, his false testimony was never believed. The circuit court rejected this argument finding that the appellant's conduct "not only impaired grand jury proceedings but also necessitated four perjury-related trials within three years."

§2J1.4 Impersonation

First Circuit

United States v. Pavao, 948 F.2d 74 (1st Cir. 1991). The district court did not err in applying U.S.S.G. §2F1.1 to the appellant who pled guilty to a charge of impersonating a federal drug enforcement agent. The district court found that the appellant's impersonation helped him obtain money. Using the cross-reference at U.S.S.G. §2J1.4, the district court correctly determined appellant's offense level based on its application of the fraud guideline.

§2J1.6 Failure to Appear by Defendant

District of Columbia Circuit

United States v. Williams, 932 F.2d 1515 (D.C. Cir. 1991). The district court did not err in concluding that U.S.S.G. §2J1.6 required the appellant's sentence for failure to appear to be enhanced on the basis of the offense for which he was indicted and tried, rather than the less serious offense of which he was convicted. According to the circuit court, the appellant "failed to appear for his status call before trial, when only the offense of indictment was relevant."

Fifth Circuit

United States v. Harper, 932 F.2d 1073 (5th Cir.), *cert. denied*, 112 S. Ct. 443 (1991). The district court did not err in sentencing the appellant to fifteen months imprisonment for failure to surrender for service of sentence. The circuit court rejected the appellant's argument that the Sentencing Commission exceeded its statutory authority when it set the offense for failure to report for service of sentence. The Fifth Circuit refused to adopt the reasoning in U.S. v. Lee, 887 F.2d 888 (8th Cir. 1989). The circuit court concluded that "§2J1.6 [the 1989 version] parallels congressional intent by increasing the offense level for failure to appear based on the seriousness of the underlying offense as reflected in its maximum sentence. This provision also represents a rational, if not the only rational way for the Comission to have approached the issue of failure to appear."

Tenth Circuit

United States v. Agbai, 930 F.2d 1447 (10th Cir. 1991). The district court did not err in sentencing the appellant for failure to appear pursuant to U.S.S.G. §2J1.6 when he fled to London while on bond and did not appear at a district court hearing. The Tenth Circuit agrees with the reasons outlined in U.S. v. Nelson, 919 F.2d 1381 (9th Cir. 1990), on the legality of U.S.S.G. §2J1.6. According to the circuit court, "[t]here is a direct relationship between the length of the potential sentence which one who fails to appear attempts to evade and the seriousness of the evasion. A correspondence between a sentence for the offense of failure to appear and the seriousness of the charge for which the defendant failed to appear is logical and compelling, and thus does not violate the restraints of 18 U.S.C. § 3553." The appellate court also found the appellant's reliance on 28 U.S.C. § 994 misplaced because the sentence received for the appellant's underlying offense is not an aggravating or mitigating circumstance of the failure to appear.

Eleventh Circuit

United States v. Gabay, 923 F.2d 1536 (11th Cir. 1991). The district court did not err in determining that there was no analogous guideline for appellant's conviction for criminal contempt. The circuit court rejected the appellant's argument that U.S.S.G. §2J1.6, Failure to Appear by a Defendant, is an analogous

guideline. In the instant case, the appellant jumped bail after being arrested for counterfeiting a travelers check. He left behind a videotape explaining the reasons for his flight, and after an extensive effort was subsequently found in a "luxury" apartment in Venezuela, hiding in a bookcase. The appellant's flight resulted in two trials [one for him and another for his co-defendant]. The circuit court found that this case was not a "simple" failure to appear. Where there are no applicable guidelines the appellate court will reverse the sentence only if it is "plainly unreasonable." 18 U.S.C. § 3742(e)(2). In the instant case the appellant "displayed a tremendous level of contempt for the court and the federal criminal process." A sentence of 60 months for criminal contempt is not "plainly unreasonable" in these circumstances.

§2J1.7 Commission of Offense While on Release

Second Circuit

United States v. Rodriguez, 928 F.2d 65 (2d Cir. 1991). The district court judge erred to the extent that he believed that he did not have discretion to grant a two-level adjustment for acceptance of responsibility, when he had already made a three-level enhancement pursuant to U.S.S.G. §2J1.7 because the appellant committed an offense while on release pending a judicial proceeding.

Part K Offenses Involving Public Safety

§2K1.3 Unlawfully Trafficking In, Receiving, or Transporting Explosives

Sixth Circuit

See U.S. v. Gresser, 935 F.2d 96 (6th Cir.), *cert. denied*, 112 S. Ct. 239 (1991), §2H1.3, p. 29.

§2K1.4 Arson; Property Damage By Use of Explosives

Seventh Circuit

United States v. Hubbard, 929 F.2d 307 (7th Cir.), *cert. denied*, 112 S. Ct. 206 (1991). The district court did not err in relying upon certain hearsay testimony in determining the appellant's sentence. According to the circuit court, the hearsay testimony was reliable for the purpose of determining whether the appellant "intended to cause bodily injury" under U.S.S.G. §2K1.4(c)(1).

Eleventh Circuit

See U.S. v. Day, 943 F.2d 1306 (11th Cir. 1991), §1B1.2, p. 3.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

District of Columbia Circuit

United States v. Taylor, 937 F.2d 676 (D.C. Cir. 1991). The district court properly applied a two-level enhancement under U.S.S.G. §2K2.1(b)(2) for a stolen firearm, despite defendant's contention that he was not aware that the gun had been stolen. The circuit court held that "the Guidelines unambiguously require the two-level increase under section 2K2.1 regardless of a defendant's knowledge that the firearm he possessed was stolen."

Second Circuit

United States v. Blakney, 941 F.2d 114 (2d Cir. 1991). The district court did not err in giving dual consideration to the appellant's prior drug conviction in calculating his offense level and criminal history category. "Section 2K2.2 does not specify whether or not a conviction considered under that section should also be taken into account in calculating criminal history." The court was also persuaded that "(1) the general purpose underlying the consideration of both the nature of the offense and the defendant's past

history and (2) differences in the frames of reference required by the pertinent sections that dual consideration in the case of §§2K2.2 and 4A1.1(b) is required." *See* U.S. v. Wyckoff, 918 F.2d 925 (11th Cir. 1990).

Fifth Circuit

United States v. Dancy, 947 F.2d 1232 (5th Cir. 1991). The district court erred in holding that the two-level enhancement provided in U.S.S.G. §2K2.1(b)(2), for possession of a firearm if the firearm is stolen, did not apply unless the defendant knew the weapon was stolen. The circuit court held that the enhancement "applies regardless of whether the possessor knew that the firearm was stolen."

United States v. Keller, 947 F.2d 739 (5th Cir. 1991). The appellant was convicted of three counts of violating federal firearm statutes, 18 U.S.C. §§ 922(g)(1), 924(b), & 5861(d) & (i). The district court did not err in refusing to allow a four-level reduction in his offense level for sport and recreational use of a firearm under U.S.S.G. §2K2.1(b)(2) when appellant offered no evidentiary basis for application of that provision.

United States v. Singleton, 946 F.2d 23 (5th Cir. 1991). The appellant challenged his sentence after being convicted for possession of a firearm by a felon. He raised two arguments. First, he contended that because the guidelines do not specify the mental elements involved in possession of a stolen firearm, the rule of lenity requires that the government prove actual knowledge that the firearm was stolen. The circuit court rejected this argument because the rule of lenity operates only when a statute is ambiguous and held "[t]he language and meaning of this section is plain, and three other circuits have held that U.S.S.G. §2K2.1(b)(1) is not ambiguous and does not require knowledge that the gun was stolen. *See* U.S. v. Taylor, 937 F.2d 676, 681-82 (D.C. Cir. 1991); U.S. v. Peoples, 904 F.2d 23, 25 (9th Cir. 1990) (*per curiam*); U.S. v. Anderson, 886 F.2d 215, 216 (8th Cir. 1989)." The appellant also argued that if the guidelines provide for an enhancement of the offense level based on possession of a stolen firearm, where the defendant did not know the firearm was stolen, that this scheme violates due process. Finding that U.S.S.G. §2K2.1(b)(1) does not create a crime, the circuit court rejected this argument, holding that "the upward adjustment . . . does not stand alone as an independent crime but is part of a sentencing court's quest to formulate a proper sentence . . . . [S]entencing courts always have considered whether the firearm was stolen in formulating their sentences . . . [B]ecause this upward adjustment occurs during sentencing, when district court discretionary authority is especially broad, this adjustment does not offend due process."

Ninth Circuit

See U.S. v. Cambra, 933 F.2d 752 (9th Cir. 1991), §2F1.1, p. 27.

United States v. Mun, 928 F.2d 323 (9th Cir. 1991). The district court did not err in sentencing the appellant, who was convicted under 18 U.S.C. § 922(g)(1) for being an ex-felon in possession of a weapon by using the cross-reference at U.S.S.G. §2K2.1(c)(2) and applying the guideline for the underlying offense of attempted murder. The circuit court rejected the appellant's argument that his conviction in state court for charges arising out of the same underlying conduct barred the cross-reference. The circuit court also found that, using a preponderance of evidence standard, the district court could conclude that the appellant intended to kill his victim since he announced his intent to kill and then pursued the victim, firing his gun three times.

United States v. Palmer, 946 F.2d 97 (9th Cir. 1991). The district court did not err in refusing to reduce the appellant's offense level pursuant to U.S.S.G. §2K2.1(b)(1) where he had not met the burden of proof that he possessed a firearm solely for "sporting purposes or collection," and there was no evidence in the record to support his claim.

United States v. Prator, 939 F.2d 844 (9th Cir. 1991). The district court erred in concluding that the reduction authorized by U.S.S.G. §2K2.1(b)(1) is unavailable to persons convicted of receiving a firearm after having been convicted of a crime punishable by imprisonment exceeding one year. According to the circuit court, "[t]he government's argument confuses unlawful receipt or possession of a firearm with the intended use of the weapon." The Sentencing Commission intended lawful use, as determined by the surrounding

circumstances, as a mitigating factor. In mitigating the punishment, the Sentencing Commission did not discriminate against felons.

Tenth Circuit

United States v. Willis, 925 F.2d 359 (10th Cir. 1991). The district court did not err in sentencing the appellant for his firearm offense by applying the sentence that would have been imposed for whatever underlying offense conduct he committed with the illegal firearm, if that would lead to a greater sentence. In the instant case where the gun illegally possessed was used in an aggravated assault, the district court correctly used the aggravated assault provisions of U.S.S.G. §2A2.2. The cross-reference clause of U.S.S.G. §2K2.1 does not federalize a state crime. The cross-reference merely allows the sentence for the charged offense to reflect the reality of the crime.

§2K2.2 Unlawful Trafficking and Other Prohibited Transactions Involving Firearms

Fourth Circuit

United States v. Blackburn, 940 F.2d 107 (4th Cir. 1991). The district court erred in increasing the appellant's offense level under U.S.S.G. §2K2.2 where the court considered the twenty-eight inert grenades as destructive devices where only two of the grenades were actually destructive devices. According to the circuit court, "[a] defendant may be penalized under §2K2.2(b) for only that number of destructive devices which may be 'readily assembled' from the parts in his possession. A defendant must possess every essential part necessary to construct a destructive device." *See* U.S. v. Malone, 546 F.2d 1182 (5th Cir. 1977).

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

Second Circuit

United States v. Stanley, 928 F.2d 575 (2d Cir.), *cert. denied*, 112 S. Ct. 141 (1991). The district court erred in making a downward departure to adjust disparity in sentencing between defendants who engaged in similar conduct but were charged with different offenses as a result of plea bargaining decisions by the prosecutor. In the instant case the defendant was convicted after a jury trial of possessing more than five grams of crack with intent to distribute and of using a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). The district court judge made the downward departure because of what he perceived as an unwarranted disparity caused by the use of the 18 U.S.C. § 924(c) charge in the plea negotiating process by the U.S. Attorney's office. The district court found that the U.S. Attorney "often charges defendants who refuse to plead guilty with 924(c) . . . but allows similarly situated defendants who plead guilty to avoid the § 924 charges," thereby creating a disparity between defendants who receive only the guidelines' weapon enhancement and those who receive the 60-month consecutive sentence under § 924(c). The decision whether to charge a § 924(c) count is within the sound discretion of the prosecutor, as long as its selection is not for some unconstitutional basis. *See* Bordenkircher v. Hayes, 434 U.S. 357, *reh'g. denied*, 435 U.S. 918 (1978). According to the circuit court, in making the downward departure the district court "nullified" the legislative intent to impose additional punishment for violating § 924(c).

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.1 Smuggling, Transporting, or Harboring an Unlawful Alien

United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991). The Ninth Circuit, in an *en banc* decision, decided that the five-step process for reviewing departures that was adopted by the panel may be combined into a three-step process. First, the appellate court must decide whether the district court had legal authority to depart. Second, the court reviews for clear error the factual findings supporting the existence of the identified circumstance. Third, the court must determine whether the extent of the departure was reasonable. The circuit court adopts the view that while the degree of the departure is properly a discretionary judgment, that discretion is limited by the judgments of Congress and the Commission. According to the circuit court, "in departing the judge should compare the seriousness of the

aggravating factors at hand with those the Commission considered." The Ninth Circuit concluded that the guidelines and Congress intended to limit departure sentences by the sentencing structure established by the Sentencing Reform Act. Wallace, C.J., *concurring in part and concurring in the judgment:* An exploration of the extent of the departure in terms of analogous guidelines is recommended, but not required. Therefore, failure to provide an exploration in terms of the structure of the guidelines does not constitute *per se* grounds for reversal. Hall, J., *concurring in part and concurring in the judgment:* Disagrees with the majority's assessment that Congress and the Commission intended to limit a sentencing judge's discretion in selecting a departure sentence.

§2L2.4 Fraudulently Acquiring or Improperly Using a United States Passport

Tenth Circuit

United States v. Strickland, 941 F.2d 1047 (10th Cir.), *cert. denied*, 112 S. Ct. 614 (1991). The district court did not err in making an upward departure from a guideline range of six to twelve months to a sentence of twenty-four months imprisonment where the appellant, convicted of making a false statement in an application for a passport, engaged in more than minimal planning and intended to use the passport to escape law enforcement authorities. Section 2L2.4 does not provide an appropriate punishment for the appellant's offense since the Commission contemplated that this guideline would be used for sentencing illegal aliens convicted of fraudulently acquiring passports to enter or remain in the country. The Commission did not contemplate its use in sentencing citizens convicted of fraudulently acquiring a passport to avoid prosecution. The circuit court also found that the degree of the departure was reasonable. The appellant's conduct was analogous to a crime where the Commission determined that more than minimal planning is a relevant consideration justifying a two-level increase and where the purpose in committing the offense was to obstruct the administration of justice, justifying another two-level increase.

Part M Offenses Involving National Defense

§2M5.2 Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

First Circuit

United States v. Johnson, 952 F.2d 565 (1st Cir. 1991). The district court did not err in holding that the appellants, who conspired to export remote-control bombs of their own design to the Republic of Ireland for use by the Provisional Irish Republican Army, were involved in the export of "sophisticated weaponry" within the meaning of U.S.S.G. §2M5.2.

Fifth Circuit

United States v. Nissen, 928 F.2d 690 (5th Cir. 1991). The district court did not err in finding that the export of venturi heaters "involv[ed] sophisticated weaponry" since they are integral to the effectiveness of the F-4 aircraft. The higher offense level of 22 was properly imposed in this case since the export of the military equipment was targeted for Iran. The circuit court found that the November 1, 1990 amendment to §2M5.2 which allows consideration of the degree to which the violation threatened a security interest of the United States clarified the guideline and could be used in interpreting the guideline, although it was not effective at the time of sentencing for the offense in the instant case.

Ninth Circuit

United States v. Helmy, 951 F.2d 988 (9th Cir. 1991). The circuit court rejected the appellant's argument that U.S.S.G. §2M5.2 was unconstitutionally vague because the guideline fails to define the term "sophisticated" as it applies to weaponry. According to the circuit court, "[b]ecause missiles [intermediate range ballistic missiles and their constituent components] fall within any common sense definition of "sophisticated weaponry" and because the government established that the materials here were intended for use as missile components, the guideline is not vague with respect to appellants." The Ninth Circuit followed

the Fifth and Eleventh Circuits in holding that although the term sophisticated was undefined, the higher offense level can apply to certain activities. *See* U.S. v. Nissen, 928 F.2d 690 (5th Cir. 1991); U.S. v. Fu Chin Chung, 931 F.2d 43 (11th Cir. 1991).

Part N Offenses Involving Food, Drugs, Agricultural Products, and Odometer Laws

§2N2.1 Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

Fifth Circuit

United States v. Arlen, 947 F.2d 139 (5th Cir. 1991). The appellant was convicted of conspiring to sell and selling steroids. He asserted on appeal that the district court erred in departing upward from the guidelines. The district court concluded that the Sentencing Commission had not considered fraud or misrepresentation in promulgating guideline §2N2.1, and applied the fraud guideline, §2F1.1 instead. The circuit court rejected the appellants challenge, holding that "[a]pplying the fraud guideline . . . is a direct application of the guidelines, rather than a departure from them, and leaves [the appellant] without a basis for objection."

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

Eleventh Circuit

United States v. Weaver, 920 F.2d 1570 (11th Cir. 1991). The district court erred in basing a departure on an escapee's voluntary return to custody after three and one-half months. While the 96-hour time frame is not absolute, three and one-half months comes too late to support a departure from §2P1.1(b)(2).

Part Q Offenses Involving the Environment

§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

Fifth Circuit

United States v. Sellers, 926 F.2d 410 (5th Cir. 1991). The district court did not err in enhancing appellant's offense level by four levels where evidence showed that one of the barrels containing hazardous waste had leaked. According to the circuit court, "because of the toxicity [of the hazardous waste] the district court may have inferred actual environmental contamination from the leak, even for one day." *See* U.S. v. Bogas, 920 F.2d 363 (6th Cir. 1990).

Sixth Circuit

United States v. Rutana, 932 F.2d 1155 (6th Cir.), *cert. denied*, 112 S. Ct. 300 (1991). The district court erred in sentencing the appellant, convicted of knowing discharge of pollutants into a public sewer system, to five years probation and a $90,000 fine. In making the downward departure, the district judge erroneously relied on the appellant's ownership of another business which might fail if appellant were to be incarcerated. According to the circuit court, "[w]e find nothing special about an industrial polluter who also happens to be an employer. The very nature of the crime dictates that many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families."

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

Fifth Circuit

United States v. Richardson, 925 F.2d 112 (5th Cir.), *cert. denied*, 111 S. Ct. 2868 (1991). The district court did not err in making a three-level enhancement for the amount of money laundered during the course of the conspiracy. Even if appellant did not know at the time that the initial transaction was illegal, his knowledge of its illegality by the time of the second transaction made the initial transaction relevant conduct under the guidelines. The circuit court also rejected appellant's argument that an additional $225,000 was not relevant conduct, because he never touched the money and intended to "rip off" the agents. According to the circuit court, the appellant's intention to take the money was clear when he arrived at the scene of the "sting" with a valise and a loaded 9 mm. pistol. Although appellant had yet to touch the money before he was arrested, a co-conspirator counted the money, put it in the valise, and placed it near appellant. The appellant's intent was also supported by his extensive discussions with the undercover agents about his money laundering expertise.

Seventh Circuit

United States v. Atterson, 926 F.2d 649 (7th Cir.), *cert. denied,* 111 S. Ct. 2909 (1991). The district court erred by adding to the total value of the funds actually found to have been laundered, the figure representing the approximate street value of the total quantity of marijuana found to have been involved in the drug conspiracy. According to the circuit court, to include the value of drugs in computing the total value of funds involved in the money-laundering, after making the three-level enhancement under U.S.S.G. §2S1.1(b)(1) for appellant's knowledge that the funds were from illegal drug activity, amounts to a double enhancement because drugs were involved in the money-laundering scheme.

§2S1.3 Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

Fifth Circuit

See U.S. v. Allibhai, 939 F.2d 244 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 967 (1992), §1B1.3, p. 6.

United States v. Sanders, 942 F.2d 894 (5th Cir. 1991). The district court did not err in applying a five-level enhancement pursuant to U.S.S.G. §2S1.3(b)(1) based on the appellant's knowledge that the funds were criminally derived. The district court could properly rely on the presentence report's conclusion that funds were criminally derived and that appellant was aware of this fact despite his unsubstantiated claim that the funds were legitimate.

Seventh Circuit

United States v. Hassan, 927 F.2d 303 (7th Cir. 1991). The district court did not err in making a five-level enhancement to appellant's base offense level for knowing or believing the funds were criminally derived. The circuit court distinguished U.S. v. Safirstein, 827 F.2d 1380 (9th Cir. 1987), where the only evidence the district court considered to conclude that the defendant was involved in drug trafficking was the amount of money in the defendant's possession when he was arrested. In the instant case, the district court considered many factors and based on a preponderance of the evidence found that the appellant knew or believed that the money she carried was criminally derived.

Ninth Circuit

United States v. Ruiz-Naranjo, 944 F.2d 475 (9th Cir. 1991). In the instant case, the appellant was convicted for failing to report currency in excess of $10,000 upon entering the United States. The circuit court held that it was not error for the district court to apply the base offense level of 13 pursuant to

U.S.S.G. §2S1.3(a)(1)(B) where the appellant was twice asked whether he was carrying more than $10,000 and he twice responded that he was not.

Part T Offeness Involving Taxation

§2T1.1 Tax Evasion

Fourth Circuit

See U.S. v. Turner, 925 F.2d 1458 (4th Cir. 1991) (table), §1B1.3, p. 6.

§2T1.3 Fraud and False Statements Under Penalty of Perjury

Fourth Circuit

United States v. Schmidt, 935 F.2d 1440 (4th Cir. 1991). The district court erred in calculating the base offense level for various federal tax violations based on 28% of the gross income that purchasers of an illegal tax shelter listed on their trust tax returns since "gross income for a trust is determined in the same manner as that of an individual." According to the circuit court, a fair reading of U.S.S.G. §2T1.3(a) only supports punishing a crime whose severity is represented by the actual loss of tax to the IRS rather than the full extent of participation in a tax evasion scheme regardless of the tax consequences to the government. The circuit court remanded the case for a recalculation of the appellants' base offense levels consistent with the actual tax loss sustained by the government.

§2T1.9 Conspiracy to Impair, Impede or Defeat Tax

Fourth Circuit

See U.S. v. Schmidt, 935 F.2d 1440 (4th Cir. 1991), §2T1.3, p. 37.

Part X Other Offenses

§2X1.1 Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

Fourth Circuit

See U.S. v. Depew, 932 F.2d 324 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991), §2A4.1, p. 13.

Seventh Circuit

See U.S. v. Jones, 950 F.2d 1309 (7th Cir. 1991), §2B3.1, p. 15.

§2X3.1 Accessory After the Fact

Fourth Circuit

See U.S. v. Pierson, 946 F.2d 1044 (4th Cir. 1991), §2J1.3, p. 29.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

First Circuit

United States v. Pavao, 948 F.2d 74 (1st Cir. 1991). The district court did not err in applying a two-level enhancement for the vulnerability of one of appellant's victims pursuant to U.S.S.G. §3A1.1. Although the victim was not a minor, she was a drug user, and the appellant exploited that weakness to obtain money from the victim and her family. The circuit court did not hold "that anyone involved with drugs becomes *ipso facto* a 'vulnerable victim,'" but held that the "individual facts about [the victim] . . . combined with those of the crime . . . make a finding of unusual vulnerability plausible."

United States v. Sabatino, 943 F.2d 94 (1st Cir. 1991). The district court erred in applying the vulnerable victim adjustment to the sentences of appellants convicted of violating the Mann Act, and aiding and abetting in the use of interstate commerce to carry on and facilitate prostitution. The circuit court reviewed the legislative history of the Mann Act and found that the district court's reasons for enhancing the offense levels were not valid where the victims were not unusually vulnerable given the kind of victim the statute was intended to protect.

Third Circuit

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). The district court did not err in making a two-level adjustment on the grounds that the appellant's victims were vulnerable where the relationship between the appellant and his girlfriend rendered her parents "unusually susceptible to [appellant's] persistent requests for more investment funds." The appellant even promised to marry his girlfriend in order to get more money from her parents. The circuit court did not decide whether the adjustment based on the investors' ages and lack of sophistication was correct. The appellant plead guilty to wire fraud and tax evasion involving a fraudulent stockbrokerage scheme.

Fourth Circuit

United States v. Depew, 932 F.2d 324 (4th Cir. 1991). The district court did not err in applying the vulnerable victim adjustment under §3A1.1 where the record showed the appellant, convicted of conspiracy to kidnap, and conspiracy to exploit a minor in a sexually explicit film, targeted a young 12-year old boy as the victim of his criminal activity. According to the circuit court, "[a] boy of such age would certainly be 'unusually vulnerable,' if he fell into the hands of the appellant."

Fifth Circuit

United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991). The district court did not err by increasing the appellant's offense level pursuant to U.S.S.G. §3A1.1 where the district court found that the victims of the appellant's fraud were his patients and not the insurance companies and the Department of Defense. The circuit court held that for "each false diagnosis submitted, an unwitting patient was made an instrumentality of the fraud . . . [the appellant's] patients relied on him to protect and improve their health, but instead he used them for his own gain."

United States v. Greer, 948 F.2d 934 (5th Cir. 1991). The district court did not err in adjusting the appellant's offense levels under U.S.S.G. §3A1.1 where the victims were particularly vulnerable because of their racial and ethnic status. The court cautioned against the overuse of this section stating, "[t]he Sentencing Guidelines were not intended to provide harsher penalties for crimes committed against certain racial and ethnic groups. Rather, the section is available for the limited use in which the racial and ethnic

characteristics of a victim or victims play a significant role in their being targeted by certain individuals for criminal activity."

Eighth Circuit

United States v. Callaway, 943 F.2d 29 (8th Cir. 1991). In a social security fraud case where the appellant concealed from the Social Security Administration that her infant granddaughter was no longer living in the home and continued to receive benefits on her behalf, the district court erred in making the vulnerable victim enhancement. According to the circuit court, "[a]lthough the record shows that [the infant] was a victim, and was both young and handicapped, the record does not support a finding that [the appellant] chose [the infant] as a target for the crime because of her youth and physical handicaps." *See* U.S. v. Cree, 915 F.2d 352 (8th Cir. 1990).

United States v. Paige, 923 F.2d 112 (8th Cir. 1991). The district court erred in making two-level adjustment for targeting a "vulnerable victim" where the only evidence of vulnerability was the appellant's statements that he targeted stores staffed by young caucasian clerks, whom he considered "inexperienced and naive."

Tenth Circuit

United States v. Smith, 930 F.2d 1450 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991). The district court erred to the extent it based its finding of victim vulnerability on nothing more than the victim's "elderly" status. According to the circuit court, "to enhance a defendant's punishment for the exploitation of a vulnerable victim under §3A1.1 required analysis of the victim's personal or individual vulnerability." In the instant case, the presentence report stated there was no victim related adjustment, but suggested that the district court make an upward departure because the appellant, convicted of bank robbery, stole a car from a "vulnerable victim, that being an elderly woman." According to the circuit court, "the probation officer's confusion of upward departure and offense level adjustment led to a misapplication of the guidelines."

Eleventh Circuit

United States v. Long, 935 F.2d 1207 (11th Cir. 1991). According to the Eleventh Circuit, in applying the sentencing guidelines to defendants convicted of interfering with the civil rights of others, "the victim's race, in itself, cannot be used to increase automatically the level of punishment, but . . . the victim's race is a fact that can be considered together with the other specific circumstances" to determine whether the vulnerable victim adjustment applies. The appellate court emphasized that U.S.S.G. §3A1.1 "turns on the defendant's decision to target the victim. The section does not authorize sentence enhancement based on the severity of the victim's suffering." The Eleventh Circuit also disagreed with the Fifth Circuit's determination that the applicability of §3A1.1 is purely a factual determination. *See* U.S. v. Mejia-Orosco, 868 F.2d 807 (5th Cir. 1989). In the instant case, the district court judge erred in rejecting the government's argument that race was a relevant factor. According to the circuit court, "[w]e think that when the race of the victim could reasonably give the appearance, in light of other circumstances, of increased isolation on part of the victim, so that a defendant could think that aid for the victim might be less available or slower in coming, race accounts towards vulnerability. Here, defendants did know that the [victims] were the first and only black family to move into the area. Therefore, we believe that the [victim's] race must be considered in deciding if they were vulnerable."

§3A1.2 Official Victim

Second Circuit

United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991). The district court erred in making a three-level adjustment upon a determination that an undercover police officer was an "official victim," without a finding that the appellants acted "knowing or having reasonable cause to believe that a person was a law enforcement officer or corrections officer." In the instant case, the appellants forced the undercover officer to snort cocaine in an effort to determine if he was a police officer. The district court's conclusion that

"[appellants] did believe that there was a possibility that he might be a police officer" does not satisfy the requirements of U.S.S.G. §3A1.2.

Sixth Circuit

United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991). The district court did not err in making a three-level enhancement under U.S.S.G. §3A1.2 where the appellant, in attempting to flee the scene of the crime, assaulted a police officer with a semi-automatic weapon. The sentencing court's enhancement for bodily injury under U.S.S.G. §2B3.1(b)(3) and enhancement for official victim under U.S.S.G. §3A1.2 did not constitute improper double counting of offense conduct, because each guideline requires different conduct and punishes different wrongdoing.

Ninth Circuit

United States v. Hoyungowa, 930 F.2d 744 (9th Cir. 1991). The district court erred in making a departure based on the fact that the victim was a police officer where the guideline sentence already included an upward adjustment for killing an "official victim." The aggravating factors advanced by the government amount merely to the guideline requirement that the defendant killed the victim because he was a law enforcement officer.

§3A1.3 Restraint of Victim

Fourth Circuit

United States v. Mikalajunas, 936 F.2d 153 (4th Cir. 1991). The district court erred in making an adjustment pursuant to U.S.S.G. §3A1.3 for physical restraint of the victim where the restraint was "part and parcel" of the stabbing. In the instant case, the defendant was convicted of being an accessory after the fact to second-degree murder. The appellant's brother and two of his friends struck the victim in the head with a baseball bat, after which the victim ran away. They chased him and caught him and stabbed him to death. A few weeks after the murder, the appellant buried the body. According to the circuit court, "[e]very murder involves the ultimate restraint. Such terminal restraint is simply an element of the crime of homicide." Niemeyer, J., *dissenting:* "Although the restraint was arguably brief, it was sufficiently restrictive to keep the victim from completing his flight and avoiding his brutal death."

Eighth Circuit

United States v. Arcoren, 929 F.2d 1235 (8th Cir.), *cert. denied*, 112 S. Ct. 312 (1991). The district court did not err in making an adjustment under U.S.S.G. §3A1.3 [if the victim was "physically restrained in the course of the offense"] where the appellant repeatedly pushed and grabbed the victims of sexual assault, preventing them from leaving the bedroom on numerous occasions. The circuit court rejected the appellant's argument that the adjustment was not applicable because the victims were not "tied, bound, or locked up." According to the circuit court, the use of the words "such as" in the definition of "physically restrained" in U.S.S.G. §1B1.1 before those three terms indicates that they are illustrative examples and do not limit the type of conduct that may constitute physical restraint. The circuit court also rejected the appellant's argument that the adjustment under U.S.S.G. §3A1.3 was inappropriate since U.S.S.G. §2A3.1 provides for an enhancement if the offense "was committed by the means set forth in 18 U.S.C. § 2241(a) or (b)" [forcible rape]. Following the analysis of U.S. v. Tholl, 895 F.2d 1178 (7th Cir. 1990), the circuit court concluded that the "use of force" required for forcible rape does not necessarily entail physical restraint.

Part B Role in the Offense

§3B1.1 Aggravating Role

First Circuit

United States v. Reyes, 927 F.2d 48 (1st Cir. 1991). The district court did not err in making a two-level adjustment for appellant's leading role in an illegal alien smuggling ring where the evidence established that the appellant and a co-defendant co-piloted the two-day trip; that they were both in control of the boat; that they gave specific instructions as to where and how to sit when the seas got rough; and that they operated the engines, steered and bailed the vessel.

United States v. Rotolo, 950 F.2d 70 (1st Cir. 1991). The district court did not err in assessing a two-level adjustment for role in the offense pursuant to U.S.S.G. §3B1.1 without first finding that appellant's conduct was more culpable than that of the average leader, organizer, manager, or supervisor.

Second Circuit

United States v. Lanese, 937 F.2d 54 (2d Cir. 1991). The district court did not err in making a three-level adjustment for appellant's role in the offense by finding that he was a "manager or supervisor . . . and the criminal activity . . . was otherwise extensive." In the instant case, the appellant was convicted of collecting a gambling debt by extortionate means. The circuit court found that appellant's gambling operation, which he admitted was extensive, was part of the relevant conduct for sentencing purposes. The panel's earlier decision, Lanese I, 890 F.2d 1284 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2207 (1990), intimated that an adjustment under U.S.S.G. §3B1.1 was limited to the offense of conviction. Since that decision, the guidelines have been amended and in U.S. v. Perdomo, 927 F.2d 111 (2d Cir. 1991), the court determined that the amendment clarified the pre-existing guidelines understanding of role in the offense as including consideration of the defendant's uncharged "relevant conduct."

United States v. Perdomo, 927 F.2d 111 (2d Cir. 1991). The district court did not err in considering the appellant's role in uncharged conduct in making an adjustment pursuant to U.S.S.G. §3B1.1. After determining that the appellant's narcotics activity from February to May was part of the "same course of conduct" as the offense of conviction, the conduct can be considered in making the role in the offense adjustment.

Third Circuit

United States v. Murillo, 933 F.2d 195 (3d Cir. 1991). The district court erred in considering all relevant conduct in deciding to make an adjustment for role in the offense. According to the circuit court, "when determining role in the offense for all offenses committed before November 1, 1990, a court should look both to the acts or omissions of the defendant that satisfied the specific elements of the offense of conviction and to those that brought about the offense of conviction, *see, i.e.*, all acts or omissions of conviction." The circuit court disagreed with the conclusion by the Fourth Circuit that in U.S. v. Fells, 920 F.2d 1179 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2831 (1991), that "all conduct within the scope of §1B1.3" should be considered in making role in the offense determinations.

Fourth Circuit

United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3B1.1 where he "was an essential link in the conspiracy, managing and supervising and arranging for the deals to be struck."

United States v. Dingle, 947 F.2d 942 (4th Cir. 1991). The district court did not err by adjusting the appellant's offense level pursuant to U.S.S.G. §3B1.1(a) where he was a supervisor in the conspiracy and supplied drugs to a number of people over whom he exerted control based on their financial debts to him. *See* U.S. v. Fells, 920 F.2d 1179, 1182-83 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2831 (1991).

Fifth Circuit

United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 967 (1992). The district court properly adjusted appellant A's offense level pursuant to U.S.S.G. §3B1.1 where the money laundering scheme involved at least two countries, spanned almost three years, laundered over one million dollars, and was capable of handling even larger sums. Although the scheme only involved four people, it used the services of many outsiders.

United States v. Rodriguez, 925 F.2d 107 (5th Cir. 1991). The district court did not err in making a two-level adjustment for appellant's role in the offense pursuant to U.S.S.G. §3B1.1(c) where he was convicted of two counts of structuring transactions to evade reporting requirements, and controlled two other persons in transactions that were part of the same "underlying scheme" as well as the "same course of conduct or common scheme or plan" as the offense of conviction. The circuit court adopted the analysis of U.S. v. Barbontin, 907 F.2d 1494 (5th Cir. 1990), as narrowly construed in U.S. v. Mir, 919 F.2d 940 (5th Cir. 1990).

Seventh Circuit

United States v. Boula, 932 F.2d 651 (7th Cir. 1991). The district court did not err in applying both a two-level enhancement under U.S.S.G. §2F1.1(b)(2) for "more than minimal planning" and a four-level adjustment under U.S.S.G. §3B1.1 for appellants' leadership role in an organization that was "otherwise extensive." According to the circuit court, "[t]hese guidelines sections are not mutually exclusive and therefore no double counting occurred from these sentencing determinations."

United States v. Fairchild, 940 F.2d 261 (7th Cir. 1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3B1.1 (or in the alternative U.S.S.G. §3B1.3) where the appellant established a chemical company and used it to obtain needed chemicals for methamphetamines, directed his brother-in-law in buying chemicals, made batches of drugs, moved vehicles used in committing the offense and sold the drugs. Further, the appellant "had a degree in biology and formerly worked as the chief lab technician for the department of surgery at a Texas hospital. He used his knowledge . . . to purchase chemicals . . . and put them together in the right combination . . . to make methamphetamine."

United States v. Welch, 945 F.2d 1378 (7th Cir. 1991). The district court did not err in applying a two-level enhancement for role in the offense under U.S.S.G. §3B1.1(c) when the record indicated that the appellant "was the prime mover in setting up the . . . cocaine distribution organization," that he supplied money for purchasing the cocaine, that the buyers always gave the cocaine to him, and that he would then provide the cocaine to co-conspirators for distribution.

Eighth Circuit

United States v. Duckworth, 945 F.2d 1052 (8th Cir. 1991). The district court did not err in adjusting the appellant's offense level pursuant to U.S.S.G. §3B1.1 where the appellant supplied several mid-level drug dealers and had extended credit to at least some of these individuals for their drug purchases.

United States v. Fuller, 942 F.2d 454 (8th Cir.), *cert. denied*, 112 S. Ct. 315 (1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3B1.1 where the appellant directed the drug distribution, organized two co-conspirators, coordinated the drug sales, organized the drug production, and was at the center of the scheme.

United States v. Furlow, 952 F.2d 171 (8th Cir. 1991). The district court erred in making a two-level adjustment for the appellant's role in the offense of forging checks when he acted alone. Although evidence showed that the appellant recruited another individual to perpetrate an almost identical crime in Georgia, the circuit court did not consider his role in the collateral conduct. Section 3B1.1 was amended after the appellant was sentenced to clarify that courts should consider relevant conduct in applying the guideline. However, the court did not apply the guideline retroactively. *See* U.S. v. Dortch, 923 F.2d 629 (8th Cir. 1991). Prior to the November 1, 1990 amendment, the circuit court had held that U.S.S.G. §3B1.1 is an

enhancement for the role in the offense of conviction and not his collateral conduct. *See* U.S. v. Streeter, 907 F.2d 781 (8th Cir. 1990), Gibson, J., *dissenting:* The district court's findings provide a sufficient basis to uphold the district court's application of §3B1.1. The issues of whether the Georgia conduct was collateral and whether the guideline amendments apply retroactively are not before the court.

United States v. West, 942 F.2d 528 (8th Cir. 1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3B1.1 where the record supports the finding that the criminal activity was "otherwise extensive." "The 'otherwise extensive' language refers 'to the number of persons involved in the operation,'" and includes "all persons involved . . . including 'outsiders' who did not have knowledge of the facts." *See* U.S. v. Boula, 932 F.2d 651 (7th Cir. 1991).

Ninth Circuit

United States v. Anderson, 942 F.2d 606 (9th Cir. 1991), *vacating*, 895 F.2d 641 (1990). The Ninth Circuit joins the Sixth, Seventh, and Eleventh Circuits in holding that U.S.S.G. §3B1.1(c) only applies when the offense is committed by more than one criminally responsible person. While the guideline itself does not mention a particular number of participants for an adjustment under subsection (c), considering the guideline and the commentary and construing them to be consistent with each other and with the guidelines as a whole leads to that conclusion. *See* U.S. v. DeCicco, 899 F.2d 1531 (7th Cir. 1990); U.S. v. Markovic, 911 F.2d 613 (11th Cir. 1990); U.S. v. Carroll, 893 F.2d 1502 (6th Cir. 1990).

United States v. Helmy, 951 F.2d 988 (9th Cir. 1991). The district court erred in making an adjustment pursuant to U.S.S.G. §3B1.1(b) without determining whether any of the people whom the appellant managed was criminally responsible. It appeared to the circuit court that the determination that the appellant was a manager was based solely on his activities with respect to unwitting suppliers, shippers, and storage companies. The commentary to U.S.S.G. §3B1.1 makes clear that the purpose of Part B is to allow the sentencing court to take into account the relative responsibility of a defendant. Accordingly, the Ninth Circuit held "that in order for a defendant to receive an adjustment under §3B1.1(b) for his role as a manager or supervisor, the defendant must have managed or supervised at least one other participant--that is, a person who was criminally responsible for the commission of the offense."

United States v. Lillard, 929 F.2d 500 (9th Cir. 1991). The district court properly made a two-level adjustment for defendant's role in the offense where the evidence showed that the appellant operated two ongoing and sophisticated methamphetamine labs and had the assistance of one employee. The circuit court, relying on an amendment to U.S.S.G. §3B1.1, held that §3B1.1 is not limited to the offense of conviction.

United States v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991). The district court did not err in making a two-level adjustment for appellant's role in the offense as an organizer or manager as described in U.S.S.G. §3B1.1(c). The circuit court rejected appellant's argument that his managerial role was already taken into account by his conviction under 21 U.S.C. § 856 and U.S.S.G. §2D1.8 (Renting or Managing a Drug Establishment).

Tenth Circuit

United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991). The appellant challenged his sentence of 130 months following his conviction for possession of cocaine with intent to distribute. The appellant argued that the district court erred by considering conduct for which he was not convicted in imposing an adjustment to his offense level pursuant to U.S.S.G. §3B1.1(b). The circuit court noted that in U.S. v. Pettit, 903 F.2d 1336 (10th Cir.), *cert. denied*, 111 S. Ct. 197 (1990), it held that "§3B1.1 requires that the sentencing court focus on the 'defendant's role in the offense,' rather than other criminal conduct," and concluded that, under Pettit, the U.S.S.G. §3B1.1(b) adjustment is proper only if the conduct which forms the basis of the adjustment stems from the count of conviction. Subsequent to the holding in Pettit, the Sentencing Commission amended the commentary to Chapter 3, Part B stating that the determination of a U.S.S.G. §3B1.1(b) adjustment is to be made on the basis of all conduct within the scope of U.S.S.G. §1B1.3. The Tenth Circuit reconsidered Pettit *en banc* in light of this amendment and voted unanimously that a sentencing court may consider conduct for which a defendant was not convicted of in determining the

applicability of U.S.S.G. §3B1.1(b). Although the circuit court stated that under the law in effect at the time of the appellant's sentencing, the district court committed no error, the circuit court refused to affirm the district court's decision. The circuit court held that application of the post-amendment interpretation of U.S.S.G. §3B1.1 violates the *ex post facto* clause and applied the original reasoning in Pettit. According to the circuit court, "[a]lthough the Sentencing Commission has since clarified its intended meaning of §3B1.1 contrary to Pettit, we are unwilling to abandon our reasoning in Pettit in order to interpret U.S.S.G. §3B1.1, as of November 1988, consistent with the November 1990 amendment. [T]he amendment represents a substantive change in the law. Because the November 1990 amendment disadvantaged defendant relative to the law in effect at the date of his offense, we are required to apply the pre-amendment interpretation of §3B1.1." U.S. v. Underwood, 938 F.2d 1086, 1090 (10th Cir.), *cert. denied*, 112 S. Ct. 382 (1991).

Eleventh Circuit

United States v. Cornog, 945 F.2d 1504 (11th Cir. 1991). The circuit court remanded the case for resentencing since it was not clear from the record whether the district court used a "beyond a reasonable doubt" or "preponderance of the evidence" standard to assess the sufficiency of the evidence presented by the government to support a two-level upward adjustment pursuant to U.S.S.G. §3B1.1(c).

United States v. Query, 928 F.2d 383 (11th Cir. 1991). The district court did not err in finding that the appellant was an organizer or leader of a criminal scheme involving five or more participants. According to the circuit court "[a]lthough the section [3B1.1] and accompanying commentary are silent on the question whether the defendant is included for purposes of counting members of the criminal activity, we need not decide whether appellant should be included in the organization for counting purposes." Without counting the appellant, "the criminal activity involved more than five participants."

United States v. Zaccardi, 924 F.2d 201 (11th Cir. 1991). The district court did not err in failing to make an adjustment for appellant's role in the offense where the Presentence Report stated he was clearly "less culpable than most other participants." According to the circuit court, the "district court was not obliged on that basis to determine that appellant was a 'minor' participant for purposes of §3B1.2 of the guidelines." A particular defendant may be least culpable among those who are actually named as defendants, but that does not establish that he performed a minor role in the conspiracy.

§3B1.2 Mitigating Role

First Circuit

United States v. Brum, 948 F.2d 817 (1st Cir. 1991). The district court did not err in refusing to grant a role adjustment pursuant to U.S.S.G. §3B1.2. When there is more than one possible interpretation of the evidence established at trial, "the sentencing court's choice among supportable alternatives cannot be clearly erroneous." *See* U.S. v. Ruiz, 905 F.2d 499, 508 (1st Cir. 1990). Moreover, appellant's acquittal on drug distribution conspiracy charges did not entitle her, as a matter of law, to an adjustment for role in the offense for her conviction for possession with intent to distribute.

United States v. Rosado-Sierra, 938 F.2d 1 (1st Cir. 1991). The district court properly refused to grant the appellant a two-level adjustment for role in the offense. The evidence indicated that appellant was one of four persons arrested in connection with the attempted sale of approximately one kilogram of cocaine to an undercover agent. The appellant also was a broker and representative of the supplier, and he had vouched for the quality of the cocaine. Based on the evidene contained in the record, the district court's finding that defendant was not a minor participant was not clearly erroneous.

United States v. Tabares, 951 F.2d 405 (1st Cir. 1991). The district court did not err in finding appellant a "minor participant" and applying a two-level downward adjustment pursuant to U.S.S.G. §3B1.2(b). The district court's conclusion that it could not find the appellant a "minimal participant" in light of "the drugs in plain sight and the readily accessible cash" was not clearly erroneous.

Fifth Circuit

United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 967 (1992). The district court did not err when it refused to make an adjustment pursuant to U.S.S.G. §3B1.2 for appellant B where she performed an important role in the money laundering scheme by relaying messages, counting money, and at least on one occasion transporting the money to another country.

United States v. Richardson, 925 F.2d 112 (5th Cir.), *cert. denied*, 111 S. Ct. 2868 (1991). The district court did not err in finding that the appellant was not entitled to a two-level adjustment for "minor role" in the money laundering conspiracy where a transcript of a video-taped conversation showed appellant's extensive knowledge of money laundering, and other evidence showed that he was more than a "mere runner."

Sixth Circuit

United States v. Daniels, 948 F.2d 1033 (6th Cir. 1991). The district court did not err in refusing to grant the appellant a four-level downward adjustment for his role in the offense pursuant to U.S.S.G. §3B1.2(a). The circuit court noted that "the trial court's determinations in this regard enjoy the protection of the "clearly erroneous" standard of review." According to the circuit court, there was nothing in the record to indicate that the appellant's participation in the offense was "sufficiently minimal to require departure as a matter of law."

Eighth Circuit

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). The district court did not err in failing to find that the appellant, convicted of conspiracy to transport a stolen aircraft, was a minor participant where the other conspirators could not pilot the plane. According to the circuit court, appellant's role was "crucial."

United States v. West, 942 F.2d 528 (8th Cir. 1991). The district court did not err in refusing to reduce the appellant's offense level under U.S.S.G. §3B1.2 where the appellant was merely less culpable than a co-defendant. According to the circuit court, "[u]nder the guidelines, the mere fact that the defendant was less culpable than his co-defendant does not entitle the defendant to 'minor participant' status as a matter of law."

Ninth Circuit

United States v. Andrus, 925 F.2d 335 (9th Cir.), *cert. denied*, 112 S. Ct. 249 (1991). The district court did not err in failing to make a downward adjustment for appellant's "minor" role in the offense where he had a methamphetamine laboratory in his basement in which he has actively involved, and had chemical burns on his hands and methamphetamine and syringes on his person when arrested. In determining whether an appellant is a minor participant, the appellate court adopted the approach taken by the Fourth Circuit in U.S. v. Daughtrey, 874 F.2d 213 (4th Cir. 1989). The appellate court concluded that it was "sensible to look at the acts of each participant in relation to the relevant conduct for which the appellant is held accountable and also measure each participant's individual acts and relative culpability against the elements of the offense of conviction."

United States v. Lui, 941 F.2d 844 (9th Cir. 1991). The district court did not err in refusing to reduce the appellant's offense level under U.S.S.G. §3B1.2 where the appellant failed to demonstrate that his role was purely that of a courier. According to the circuit court, "a defendant may be a courier without being either a minimal or a minor participant."

United States v. Madera-Gallegos, 945 F.2d 264 (9th Cir. 1991). The district court did not err by finding that the appellant was a minor rather than a minimal participant and thus reducing the offense level by two instead of four. The circuit court noted that the commentary to U.S.S.G. §3B1.2, comment. (n.2) states that the minimal role reduction is to be used infrequently and that the appellant gave no reason to upset the factual determination of the sentencing court fully supported by the record.

Tenth Circuit

United States v. Caruth, 930 F.2d 811 (10th Cir. 1991). The district court did not err in finding that the appellant was a minor participant, rather than a minimal participant, where the evidence showed that he was involved in transporting a commercial shipment of marijuana across the United States--although he was uncompensated and had no knowledge of the scope of the enterprise. According to the circuit court, "being comparatively less culpable than the other defendants and obtaining minimal participant status are not necessarily synonomous." *See* U.S. v. Andrus, 925 F.2d 335 (9th Cir. 1991); U.S. v. Calderon-Porras, 911 F.2d 421 (10th Cir. 1990). In determining defendant's role in the offense, the court can compare a defendant's conduct with that of others in the same enterprise as well as with the conduct of an average participant in that type of crime. According to the circuit court, "resort may be had to both internal and external measurements for culpability." *See* U.S. v. Sanchez, 914 F.2d 206 (10th Cir. 1990).

United States v. Rios-Ramirez, 929 F.2d 563 (10th Cir. 1991). The district court did not err in failing to make an adjustment for appellant's "minor role" in the offense where he was the "driver and sole occupant of a vehicle which was stopped at the border, and which, after a search, was found to contain a quantity of marijuana secreted in its door panels." According to the circuit court, "even if he was a mere courier . . . 'couriers are indispensable to any drug-dealing network.'"

§3B1.3 Abuse of Position of Trust or Use of Special Skill

District of Columbia Circuit

United States v. Young, 932 F.2d 1510 (D.C. Cir. 1991). The district court erred in making a two-level enhancement based on appellant's use of a "special skill" to facilitate the conspiracy to manufacture and distribute PCP. According to the circuit court "[s]ection 3B1.3 properly applies when a defendant uses some pre-existing, legitimate specialized skill not possessed by the general public to facilitate the commission or concealment of a crime." In the instant case, the government did not establish that appellant was a "chemist" or that he had specialized knowledge of chemistry beyond that needed to make PCP. "Nothing in the commentary suggests that §3B1.3 applies to a criminal who, like appellant bones up on the tricks of his trade and becomes adept at committing a crime that the general public does not know how to commit."

First Circuit

United States v. Rehal, 940 F.2d 1 (1st Cir. 1991). The appellant was a police officer convicted of conspiracy to distribute and to possess with intent to distribute cocaine. Despite the district court's erroneous statement that a two-level adjustment for abuse of a public trust pursuant to U.S.S.G. §3B1.3 is appropriate in any case in which a police officer "engages in conduct so directly violative of the law," the appellate court upheld the enhancement because the evidence showed that the appellant had "used his position as a police officer to, among other things, follow up on the operations of federal investigators inquiring into his activities."

Second Circuit

United States v. Castagnet, 936 F.2d 57 (2d Cir. 1991). The district court did not err in making a two-level enhancement for abuse of a position of trust where the appellant, a former junior station agent for an airline, used computer access codes made known to him while an employee to issue tickets to himself. In deciding the issue on appeal, the circuit court found that where the facts are not in dispute, "[t]he question whether an interpretation of the guidelines embraces these facts is, in our view, a legal question which we review *de novo*." In analyzing the "paucity of cases" interpreting U.S.S.G. §3B1.3, the circuit court concluded that "[f]or the purpose of §3B1.3 whether the defendant was in a position of trust must be viewed from the perspective of the victim. *See* U.S. v. Hill, 915 F.2d 502 (9th Cir. 1990). Altimari, J., *dissenting:* The appellant's position as a junior station agent, which required him to process reservations and issue tickets, does not endow him with more trust or responsibility than an ordinary bank teller."

Fifth Circuit

United States v. Brown, 941 F.2d 1300 (5th Cir.), *cert. denied*, 112 S. Ct. 648 (1991). The district court did not err in adjusting the appellant's offense level pursuant to U.S.S.G. §3B1.3 following his conviction for drug possession with intent to distribute. The appellant was employed inside a state penitentiary as a correctional case manager. The circuit court concluded that "[h]is job responsibilities afforded him the unique opportunity of interacting with convicted felons . . . . As a result of his position, [the appellant] was able to obtain controlled substances."

Seventh Circuit

See, United States v. Fairchild, 940 F.2d 261 (7th Cir. 1991), §3B1.1, p. 42.

United States v. Hubbard, 929 F.2d 307 (7th Cir.), *cert. denied*, 112 S. Ct. 206 (1991). The district court did not err in making an enhancement under U.S.S.G. §3B1.3 based on the use of appellant's "special skill" in connection with the construction and placement of more than a dozen bombs in and around Salem, Indiana. The record supported the conclusion that the appellant's engineering knowledge and experience with explosives was essential to the construction of the bombs.

United States v. Jackson, 935 F.2d 832 (7th Cir. 1991). The district court did not err in making a three-level adjustment for appellant's managerial role in a drug conspiracy where the evidence showed that he supervised one of the drug distribution houses, prepared cocaine for sale and collected the money from the street-dealers. The evidence presented established by the preponderance of the evidence that the appellant was a manager.

United States v. Kosth, 943 F.2d 798 (7th Cir. 1991). The district court erred in imposing a two-level adjustment for abuse of position of trust, where the appellant obtained money from his bank through his merchant account for "phantom" purchases of merchandise. According to the circuit court, the fraud in this case is no different from any other commercial credit transaction fraud. The appellant was not an "insider," but rather "an ordinary merchant customer of the bank who committed fraud by abusing his contractual and commercial relationship with it."

Eighth Circuit

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). The district court did not err in making a two-level adjustment for appellant's special skill as a pilot, where he was convicted of conspiracy to transport a stolen aircraft. The circuit court rejected the appellant's argument that the adjustment was inapplicable because he was arrested before he had the opportunity to actually pilot the plane. According to the circuit court, the appellant's "skills were required to plan for fuel, devise flight paths, and to prepare the aircraft for flight after the undercover agent left."

Ninth Circuit

United States v. Pascucci, 943 F.2d 1032 (9th Cir. 1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3B1.3 where he used his job as a U.S. Marshal to further his illegal activities.

Tenth Circuit

United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991). The district court did not err in increasing defendant's offense level by two levels for his role in the offense pursuant to U.S.S.G. §3B1.1(c) when "it was a 'very reasonable inference from th[e] evidence' that Mr. Morgan was 'calling the shots and making the decisions . . . .'"

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

District of Columbia Circuit

United States v. Barry, 938 F.2d 1327 (D.C. Cir. 1991). The court erred in applying a two-level adjustment for obstruction of justice pursuant to U.S.S.G. §3C1.1 on the basis of perjurious testimony, when the testimony was not related to the charge of conviction. The district court also failed to adequately explain how the perjurious testimony was connected to the instant offense. According to the circuit court, "[a]n obstruction of justice enhancement is warranted only if the defendant attempted to obstruct the investigation, prosecution, or sentencing of the offense of conviction."

First Circuit

United States v. Brum, 948 F.2d 817 (1st Cir. 1991). The district court did not err in applying a two-level upward adjustment for obstruction of justice pursuant to U.S.S.G. §3C1.1, where the appellant made several contradictory statements regarding the source of family income in her trial testimony, that the district court determined to be perjurious.

United States v. Martinez, 922 F.2d 914 (1st Cir. 1991). The circuit court rejected the government's argument that since the sentencing court increased the defendant's offense level for his managerial role in the offense based on its findings that the defendant was in possession of a key to the apartment, that it necessarily followed that the defendant's denial of the key's ownership at trial was perjury and should be punished by a two-level adjustment for obstruction of justice. The circuit court refused to adopt a "mechanistic approach to sentencing whereby decisions a sentencing judge has to make regarding certain matters handcuff him or her with respect to decisions he or she has to make regarding others." The court also noted "that to hold a jury's verdict of guilty beyond a reasonable doubt on the basis of evidence which was in direct conflict with a defendant's testimony signals perjury would in effect amount to punishing a defendant for exercising his right to take the witness stand in his own defense."

United States v. Pilgrim Market Corp., 944 F.2d 14 (1st Cir. 1991). The district court did not err in applying a two-level enhancement for obstruction of justice pursuant to §3C1.1 when the evidence showed that defendant hid adulterated meat products from Department of Agriculture inspectors, and then sold the adulterated meat when there was no longer a possibility of detection.

United States v. Tabares, 951 F.2d 405 (1st Cir. 1991). The district court erred in applying a two-level increase for obstruction of justice pursuant to U.S.S.G. §3C1.1. Although the appellant provided the probation officer with a false social security number, it was the number the appellant had used for a long time and was the one on his tax returns. The circuit court held that the appellant's failure to identify the social security number as false was not a willful attempt to mislead the probation officer, and was not a material falsehood. The fact that the appellant provided this number "is likely to have helped, not impeded, the investigators as they looked for [appellant's] prior work history and assets."

United States v. Rehal, 940 F.2d 1 (1st Cir. 1991). The district court properly applied a two-level adjustment for obstruction of justice pursuant to U.S.S.G. §3C1.1 to the appellant who had "testified untruthfully at trial," and advised potential witnesses to change their stories and refuse to cooperate with law enforcement personnel. In addition, the circuit court held that the district court "is not required to specify those portions of a defendant's testimony it believes to have been falsified, so long as the finding of untruthfulness is sufficiently supported by the record."

United States v. Veilleux, 949 F.2d 522 (1st Cir. 1991). The district court did not err in adjusting the appellant's offense level pursuant to U.S.S.G. §3C1.1 where threats to a government's witness are specifically included as the type of conduct to which U.S.S.G. §3C1.1 applies. The appellant argued that the threat did not occur and provided a witness to corroborate this testimony. The circuit court, however, held "[g]iven the

district court's finding . . . based on the 'more credible' testimony of [the government witness] . . . we are unable to find any clear error in the enhancement."

Second Circuit

United States v. Bonds, 933 F.2d 152 (2d Cir. 1991). The district court erred to the extent that it based its obstruction of justice adjustment on the fact that appellant changed his appearance after being served with a grand jury subpoena requesting him to submit to photographs and fingerprints. According to the circuit court, "[i]t is natural that an individual served with an official document calling for him to appear before federal authorities will attempt to make himself more presentable." Also, the subpoena did not explicitly tell appellant not to change his appearance. Without some other evidence demonstrating the appellant's intent to deceive, "a change of appearance alone will generally be an insufficient basis for an obstruction of justice upgrade." However, the district court properly based the obstruction enhancement on the fact that the appellant deliberately lied to the jury when he denied knowing that the money he had distributed was counterfeit. The circuit court cautioned that its holding "should not be interpreted as authorizing sentencing judges to impose obstruction of justice upgrades whenever a defendant has testified on his own behalf."

United States v. Padron, 938 F.2d 29 (2d Cir. 1991), *cert denied*, 112 S. Ct. 978 (1992). The district court's warning to the appellant that he would consider it obstruction of justice, warranting a two-level increase pursuant to U.S.S.G. §3C1.1, if he testified and then he was convicted, was held not to be error when the appellant failed to object when the caution was given. Further, the circuit court noted that the appellant's claim that his right to testify on his own behalf was impermissibly chilled by the warning may not be cognizable because he chose not to testify. *See* Luce v. U.S., 469 U.S. 38 (1984).

United States v. Restrepo, 936 F.2d 661 (2d Cir. 1991). The district court erred in making a downward departure to offset an enhancement for obstruction of justice where the appellants had served a sentence of civil contempt for the same conduct. The circuit court disagreed with the "district court's legal analysis insofar as it equated the goals of civil contempt and the sentence enhancement for obstruction of justice." The circuit court found that the appellants reaped a substantial sentencing benefit by their confinement for contempt of court, while it was merely a change in the formal status of their imprisonment. A more reasonable remedy would have been to vacate the civil contempt orders and allow the appellants credit for their imprisonment for contempt.

United States v. Rodriguez, 943 F.2d 215 (2d Cir. 1991). The district court did not err in adjusting the appellant's offense level under U.S.S.G. §3C1.1 where the appellant falsely claimed to his probation officer that he had no prior record.

Fourth Circuit

United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991) *(petition for cert. filed Feb. 10, 1992)*. The district court erred when it enhanced the appellant's offense level by two levels under U.S.S.G. §3C1.1 where it found that the appellant had testified untruthfully at her drug conspiracy trial. The circuit court feared that the enhancement for obstruction would become the "commonplace punishment for a convicted defendant . . . ." In rejecting the enhancement, the circuit court found that there were not enough safeguards in place to prevent the enhancement from coercing defendants into remaining silent at trial. According to the circuit court, "the rigidity of the guidelines makes the §3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify on his own behalf."

United States v. Hall, 941 F.2d 1208 (4th Cir. 1991) (unpublished). The district court erred in making an adjustment for obstruction of justice where the appellant made a general threat to informers. According to the circuit court, since "the government concedes that there was no evidence that [the appellant] had any knowledge that his activities were being investigated at the time the general threat was uttered, some five months prior to arrest . . . there is simply insufficient evidence . . ." that the appellant obstructed justice.

United States v. Hicks, 948 F.2d 877 (4th Cir. 1991). The district court did not err in applying a two-level enhancement for obstruction of justice pursuant to U.S.S.G. §3C1.1 when the record indicated that the appellant engaged in a high speed chase, endangered the lives of police officers and innocent bystanders, threw two kilograms of cocaine from the car during the course of the chase, and lied to the probation officer regarding the fees he was paying his attorney. The circuit court also found that the adjustment for obstruction was warranted given appellant's obstructive conduct and was not negated by defendant's post-arrest cooperation, for which he received an adjustment for acceptance of responsibility.

United States v. Takizal, 940 F.2d 654 (4th Cir. 1991) (table). In a government cross-appeal, the circuit court rejected the government's argument that the district court must apply the obstruction of justice adjustment because the appellant was found guilty after testifying. The circuit court emphasized that the guidelines leave the discretion to the district court to determine whether obstruction occurred. In the instant case, the district court found that the defendant had not committed perjury. The circuit court also rejected the argument that the appellant's false statements on financial affidavits for the purpose of obtaining court-appointed counsel amounted to obstruction of justice.

Fifth Circuit

United States v. Rodriguez, 942 F.2d 899 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 990 (1992). The district court did not err in adjusting the appellant's offense level pursuant to U.S.S.G. §3C1.1 following his conviction for making a false statement during the acquisition of a firearm. The circuit court held that there was express authorization in the guidelines for the district court's decision to increase the offense level where the appellant provided a fraudulent birth certificate to establish his identity.

United States v. Valdiosera-Godinez, 932 F.2d 1093 (5th Cir. 1991). The district court did not err in making a two-level adjustment pursuant to U.S.S.G. §3C1.1 where the appellant attempted to escape from jail while awaiting trial for the instant offense. Prior to the November 1, 1990 amendment to U.S.S.G. §3C1.1, the commentary did not specifically list escape as an example covered by the guideline, but stated that the list was not "exclusive." After analyzing the facts in the case, the circuit court concluded that escape from jail was covered by the provision, even before the amendment. According to the circuit court, "[t]hat the Sentencing Commission now explicitly agrees with this conclusion provides more, not less, support for our holding."

Sixth Circuit

United States v. Hamilton, 929 F.2d 1126 (6th Cir. 1991). The district court did not err in imposing a two-level enhancement under U.S.S.G. §3C1.1 for obstruction of justice where the appellant repeatedly perjured himself at the sentencing hearing. Although U.S.S.G. §3C1.1 does not act to limit the defendant's right to object at the sentencing hearing to any factual findings relevant to the application of guidelines, the right to contest the applicability of a specific guideline is not so broad as to entitle a defendant to perjure himself. According to the circuit court, "[t]he oath a defendant takes before testifying at a sentencing hearing is no less sacred than the one he takes before testifying at trial."

United States v. Williams, 952 F.2d 1504 (6th Cir. 1991). The appellant challenged his 41-month sentence following his convictions for conspiracy to extort and violations under the Hobbs Act, 18 U.S.C. §§ 371 and 951. The district court erred in adjusting the appellant's offense level pursuant to U.S.S.G. §3C1.1 where the appellant's false statements did not materially impede the government's investigation. The circuit court stated "it seems the government's real argument is not that defendant succeeded in misleading anyone, but that his failure to confess and cooperate with the government when first approached required the government to continue an investigation that might otherwise have been shortened. This argument is not supported by any provision in section 3C1.1 . . . . [W]e do not believe that defendant's statements significantly obstructed or impeded the investigation. The facts are that the investigation of the defendant was reaching its conclusion, . . . and the defendant's false statements fooled no one."

Seventh Circuit

United States v. Cherif, 943 F.2d 692 (7th Cir. 1991) *(petition for cert. filed Dec. 30, 1991)*. The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3C1.1 where he wrote a letter to a witness in an attempt to influence her to lie.

United States v. Contreras, 937 F.2d 1191 (7th Cir. 1991). The district court did not err in making a two-level adjustment for obstruction of justice where the appellant testified at trial on his own behalf and the district court judge found his story "to be a batch of lies." The circuit court also rejected the appellant's argument that U.S.S.G. §3C1.1 is unconstitutional whenever it is applied to a defendant's trial testimony because of its chilling effect on the defendant's right to testify on his own behalf. *See* U.S. v. Grayson, 438 U.S. 41 (1978); U.S. v. Batista-Polanco, 927 F.2d 14 (1st Cir. 1991). The circuit court also did not find that U.S.S.G. §3C1.1 violated the Eighth Amendment's ban on cruel and unusual punishment.

United States v. DeFelippis, 950 F.2d 444 (7th Cir. 1991). The appellant challenged his 37-month sentence following his guilty plea to two counts of bank fraud. The district court erred by increasing the appellant's offense level pursuant to U.S.S.G. §3C1.1 where his "factual inaccuracies in his representations could not have influenced his sentence, even if believed." Holding that the false information must be material, the circuit court found that "[w]hether the appellant was employed for a few days or two months, and whether or not he received any compensation were not material to the PSI."

United States v. Fiala, 929 F.2d 285 (7th Cir. 1991). The district court erred in making an adjustment for obstruction of justice based on appellant's statement to the police officer that he did not have anything illegal in his car. According to the circuit court, the appellant's statement to the police officer was no more than a denial of guilt and "falls squarely within Note 3's exception to the obstruction of justice enhancement." The circuit court rejected the government's attempt to distinguish between those denials of guilt spoken before the initiation of judicial proceedings, and those spoken after such proceedings have begun.

United States v. Hassan, 927 F.2d 303 (7th Cir. 1991). The district court did not err in making a two-level adjustment for obstruction of justice where the appellant lied repeatedly at the detention hearing and testified untruthfully at the sentencing hearing.

United States v. Jackson, 935 F.2d 832 (7th Cir. 1991). The district court erred in making a two-level adjustment for obstruction of justice where the evidence "indicate[d] no more than that [the appellant] did not tell all he knew about [a co-defendant's] role because he was not asked to." The circuit court rejected the government's argument that the adjustment was appropriate because it "expended resources . . . only to find that [the appellant's] information was misleading." The government failed to point to a single false statement in appellant's January statement, and failed to establish how his failure to tell all "significantly obstructed or impeded" efforts to close down the illegal drug business that was the object of the instant offense.

United States v. Jones, 950 F.2d 1309 (7th Cir. 1991). The district court did not err in assessing a two-level adjustment for obstruction of justice when appellant's conviction demonstrated that he necessarily perjured himself when testifying regarding his own involvement, and the conviction of a codefendant necessarily showed that he perjured himself with respect to his testimony about the codefendant's involvement.

United States v. Lawrence, 951 F.2d 751 (7th Cir. 1991). The district court did not err in applying a two-level adjustment for obstruction of justice pursuant to U.S.S.G. §3C1.1 when the record indicated that the appellant had given at least three different stories about his involvement during the investigation and trial on charges of possession with intent to distribute cocaine base.

United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991). The district court erred in adjusting the appellant's sentence for obstruction of justice without making an independent finding and relying instead on the jury's guilty verdict after the appellant's testimony. According to the circuit court, "[t]o enhance the

sentence simply because the defendant testified--without a finding by the judge that he lied about a material subject, or the clear implication of the jury's verdict that he must have done so . . . raises grave constitutional problems." *See* U.S. v. Grayson, 438 U.S. 41 (1978).

United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991). The district court erred in making a two-level adjustment for obstruction of justice based on the appellants' denial that they used drugs during the course of the trial. The district court's determination was based on an earlier decision, U.S. v. Jordan, 890 F.2d 968 (7th Cir. 1989). However, after Jordan, and after the appellants were sentenced, the Sentencing Commission amended the commentary to §3C1.1 to clarify the operation of the guideline. The amended commentary makes clear that the interpretation of §3C1.1 adopted in Jordan was not intended by the Commission. The circuit court followed the precedent of several other circuits and its own in determining that it could consider *ex post facto* revisions to guideline commentary that were intended to merely clarify, rather than to substantively change the guideline. *See* U.S. v. Guerrero, 863 F.2d 245 (2d Cir. 1988); U.S. v. Nissen, 928 F.2d 690 (5th Cir. 1991); U.S. v. Caicedo, 937 F.2d 1227 (7th Cir. 1991); U.S. v. Fiala, 929 F.2d 285 (7th Cir. 1991); U.S. v. Urbanek, 930 F.2d 1512 (10th Cir. 1991); U.S. v. Scroggins, 880 F.2d 1204 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990). Based on the revised commentary, the circuit court concluded that the obstruction of justice enhancement was not merited.

United States v. Welch, 945 F.2d 1378 (7th Cir. 1991). The district court properly applied a two-level enhancement for obstruction of justice finding that the appellant's explanation that he gave money to a co-conspirator as a car loan "the third most incredible statement offered by a defendant in a proceeding which has come before the court," given the one and one-half hours from the time the defendant gave his co-conspirator the money and he returned with the cocaine.

Eighth Circuit

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). The district court did not err in refusing to apply a two-level adjustment for obstruction of justice based on defendant's denial of guilt. Although an upward adjustment for obstruction of justice may be appropriate when the district court finds the defendant committed perjury, U.S. v. Willis, 940 F.2d 1136, 1140 (8th Cir. 1991) *(petition for cert. filed Dec. 9, 1991)*, the "defendant's denial of guilt . . . is not a basis for application of this provision." U.S.S.G. §3C1.1 n.1.

United States v. Duke, 935 F.2d 161 (8th Cir. 1991). Despite the district court's denial of the government's motion to withdraw from its plea agreement after the government concluded defendant had been less than truthful, the district court did not err in applying a two-level increase for obstruction of justice under U.S.S.G. § 3C1.1. According to the circuit court, "[t]hat the court denied the government's motion to withdraw from the plea agreement does not mean that the court could not also find that Duke 'willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice.'"

United States v. Johnson, 944 F.2d 396 (8th Cir.), *cert. denied*, 112 S. Ct. 646 (1991). In this drug distribution case, the district court did not err in adjusting the appellants' offense level pursuant to U.S.S.G. §3C1.1, based on their untruthful testimony at trial. Although one appellant claimed that he lied because of threats against himself and his family, the circuit court held that this argument did not provide a basis for reversing the district court. The other appellant claimed that the adjustment was an impermissible burden on his right to testify. The circuit court rejected this argument relying on circuit precedent. *See* U.S. v. Wagner, 884 F.2d 1090, 1098-99 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1829 (1990).

United States v. Miller, 943 F.2d 858 (8th Cir. 1991). The district court did not err by adjusting the appellant's offense level pursuant to U.S.S.G. §3C1.1 where he attempted to escape from custody before trial. The circuit court found that while the appellant was being transferred to another correctional center, wearing waist chains, leg irons and handcuffs, he was caught standing with his hands on an emergency door trying to open it. When the marshal saw this, the appellant said "I had nothing to lose by trying." The circuit court held that "although the evidence of an attempted escape was weak, it supported an increase for obstruction of justice."

United States v. Ogbeifun, 949 F.2d 1013 (8th Cir. 1991). The district court did not err in making a two-level adjustment for obstruction of justice where there is a specific finding based on the trial judge's independent evaluation of the defendant's testimony that the defendant perjured himself at trial. The circuit court noted its disagreement with U.S. v. Dunnigan, 944 F.2d 178 (4th Cir. 1991) *(petition for cert. filed Feb. 10, 1992)*. The circuit court was convinced that the view taken in U.S. v. Willis, 940 F.2d 1136 (8th Cir. 1991) *(petition for cert. filed Dec. 9, 1991)*, was correct and any other view was foreclosed by the decision of the Supreme Court in U.S. v. Grayson, 438 U.S. 41 (1978). The appellate court rejected the notion expressed in the concurring opinion and in Dunnigan that the Grayson analysis does not apply to guidelines sentencing.

United States v. Paige, 923 F.2d 112 (8th Cir. 1991). The district court did not err in making a two-level adjustment for obstruction of justice where the appellant "raced down a highway, drove on the shoulders, went around roadblocks, and crossed the median to change direction, with the highway patrol in hot pursuit." Appellant's conduct was more than "mere flight in the immediate aftermath of a crime."

United States v. Sparks, 949 F.2d 1023 (8th Cir. 1991). The district court did not err in applying a two-level upward adjustment for obstruction of justice to an appellant who dropped a bag carrying cocaine base and shouted "[r]un, police!" when police arrived at the scene of a narcotics transaction. The circuit court held that "the commentary in effect on [the date of sentencing] did not require that an offender's conduct result in a 'material hindrance' in order for an obstruction increase to apply." *See* U.S. v. Dortch, 923 F.2d 629, 632 n.2 (8th Cir. 1991).

United States v. Watts, 940 F.2d 332 (8th Cir. 1991). The district court did not err in making a two-level enhancement for obstruction of justice where the appellant threw a package of cocaine out a car window while the car was being closely followed by police officers in an unmarked car. According to the circuit court, "we believe it is reasonable to infer [defendant] thought he was being followed by law enforcement authorities, thought his arrest was imminent, and attempted to get rid of evidence."

Ninth Circuit

United States v. Fine, 946 F.2d 650 (9th Cir. 1991). The district court did not err in adjusting the appellant's offense level for obstruction of justice where he made false statements upon his arrest and generally provided misleading information during the initial interrogation.

United States v. Lato, 934 F.2d 1080 (9th Cir.), *cert. denied*, 112 S. Ct. 271 (1991). The district court did not err in making a two-level adjustment for obstruction of justice where the appellant's obstructive conduct was committed during investigation by state rather than federal authorities. In a case of first impression, the Ninth Circuit found that the commentary to U.S.S.G. §3C1.1 supports the view that there is no state-federal distinction for obstruction of justice.

United States v. Madera-Gallegos, 945 F.2d 264 (9th Cir. 1991). The district court erred in adjusting the appellant's offense level pursuant to U.S.S.G. §3C1.1 where the appellant merely fled arrest. According to the circuit court, "[c]ase law supports this conclusion." *See* U.S. v. Garcia, 909 F.2d 389, 392 (9th Cir. 1990); *accord* U.S. v. John, 935 F.2d 644, 648 (4th Cir.), *cert. denied*, 112 S. Ct. 242 (1991) (*dicta*); U.S. v. Hagan, 913 F.2d 1278, 1285 (7th Cir. 1990). The district court's alternate ground for its decision to adjust the offense level by two was also in error. The district court improperly believed it could "depart" two levels due to the appellant's flight from arrest. The circuit court held "flight from arrest is a factor adequately considered . . . [and] . . . it cannot be used as a basis for departure."

United States v. Mondello, 927 F.2d 1463 (9th Cir. 1991). The district court did not err in making a two-level adjustment for obstruction of justice where after his arrest, the appellant "played a cat-and-mouse game of avoiding the authorities," and when located by police, fled from his car and was captured after a forty minute chase. The circuit court distinguished U.S. v. Stroud, 893 F.2d 504 (2d Cir. 1990), finding that the appellant's flight did not occur in the immediate aftermath of his crime, but after he had already been arrested for the offense.

United States v. Pascucci, 943 F.2d 1032 (9th Cir. 1991). The district court did not err in enhancing the appellant's offense level under U.S.S.G. §3C1.1 where he sent threatening letters to a government agent, her family and friends.

Tenth Circuit

United States v. Gardiner, 931 F.2d 33 (10th Cir. 1991). The district court did not err in making an adjustment for obstruction of justice where the appellant "withheld his true identity from law enforcement officers at the time of his arrest and from the United States Magistrate at three separate court appearances." The appellant's reliance on the November 1, 1990, Application Note 4(a) to U.S.S.G. §3C1.1 is unpersuasive. By using an alias during his appearances before the U.S. Magistrate, Application Note 3(f) to U.S.S.G. §3C1.1 applies, which states that "providing materially false information to a judge or magistrate" merits an obstruction of justice enhancement. The circuit court also found that the appellant's actions were intentional and the district court made the necessary finding of intent to justify an obstruction of justice adjustment.

United States v. Jensen, 940 F.2d 1539 (10th Cir. 1991) (unpublished). The district court did not err by enhancing the appellant's offense level under U.S.S.G. §3C1.1 where he perjured himself at trial.

United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991). The district court did not err in applying a two-level increase in defendant's offense level for obstruction of justice pursuant to U.S.S.G. §3C1.1 when the defendant maintained his innocence throughout the proceeding and evidence indicated that he testified untruthfully. The circuit court recognized that merely denying guilt or exercising one's fifth amendment rights is not a proper basis for an obstruction of justice enhancement, but held that "an enhancement is justified where a defendant goes further and testifies falsely."

United States v. Urbanek, 930 F.2d 1512 (10th Cir. 1991). The district court erred in making a two-level adjustment for obstruction of justice where the appellant made false statements to IRS investigators during an interview, but none of the false statements impeded the investigation. Statements in which appellant denied the existence of bank accounts or taxable income amounted to no more than a denial of guilt or an "exculpatory no." The appellant's denial of having used aliases in the past in connection with the crime was also not enough to justify the enhancement. "Similarly, his refusal to disclose the names under which he did business is merely a 'refusal to admit guilt or to provide information and is not meant to justify a §3C1.1 enhancement for obstruction of justice." In the instant case, the IRS investigators already had the correct information when they asked the questions. The appellant recanted on the spot when confronted with the truth.

Eleventh Circuit

United States v. Williams, 922 F.2d 737 (11th Cir.), *cert. denied*, 112 S. Ct. 258 (1991). The district court erred in making a two-level adjustment for obstruction of justice where the appellant had already been convicted of contempt and sentenced to six months in jail for the same conduct.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

First Circuit

United States v. Pilgrim Market Corp., 944 F.2d 14 (1st Cir. 1991). The district court did not err in refusing to group all counts of selling adulterated meat and poultry products pursuant to U.S.S.G. §3D1.2(b). The district court's finding that defendant's sales of food products from different sources of contamination were not part of a common scheme or plan was not clearly erroneous.

Second Circuit

See U.S. v. Odofin, 929 F.2d 56 (2d Cir.), *cert. denied*, 112 S. Ct. 154 (1991), §2D1.1, p. 18.

Third Circuit

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). The circuit court affirmed the district court's alternative holding that the appellant's wire fraud and tax evasion convictions were not groupable under U.S.S.G. §3D1.2. According to the circuit court, the tax evasion and fraud counts did not involve the same victims. Several private investors suffered the harm of the fraudulent stockbrokerage scheme, while the appellant targeted the government with the tax evasion. Therefore, grouping was inappropriate under U.S.S.G. §3D1.2(a). Grouping is also inappropriate under U.S.S.G. §3D1.2(c). Section 3D1.2(c) targets "conduct" embodied in one count that is treated as a "specific offense characteristic" in another count. According to the circuit court, neither of the specific offense characteristics listed at U.S.S.G. §2T1.1(b)(1) constitutes conduct embodied in the fraud count.

United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991). The district court erred in treating each count as a separate "group" where the appellant plead guilty to (1) possession of firearms by a felon, (2) delivery of firearms to a common/contract carrier, and (3) possession of an altered firearm. The circuit court rejected the government's argument that grouping is not correct where offenses require proof of different elements. According to the circuit court, "[t]he guidelines already provided for enhanced punishment for possession of a firearm by a felon if that firearm was altered; to enhance the penalty further by adding a 'unit' for the count for possession of an altered firearm clearly violates guidelines §3D1.2(c) which requires grouping for these offenses. Additionally, grouping of the offenses of possession of a firearm by a felon and delivery to a common/contract carrier was required because to hold otherwise would provide enhanced punishment for Riviere's status as a felon, rather than his 'additional conduct that is not otherwise accounted for by the guidelines.'" *See* U.S. v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).

Seventh Circuit

United States v. Bruder, 945 F.2d 167 (7th Cir. 1991) (*en banc*). The district court erred in failing to group the appellant's convictions of felon in possession of a firearm and possession of an unregistered firearm. According to the circuit court, "[a]lthough none of the examples included in the guidelines provides much assistance in solving this thorny problem, we must keep in mind the guidelines' directive that some counts 'are so closely intertwined' with other offenses that conviction for them ordinarily would not warrant increasing the guideline range." In the instant case, because the offenses "are so closely intertwined," the guidelines require grouping under §3D1.2(a). Whenever a felon possesses a shotgun, he will necessarily violate sections 922(g) and 5861. Both of the statutes in question are aimed at protecting society from the indiscriminate availability of firearms, but provide alternative means to achieve that end. Therefore, "the interests invaded by these two offenses are not meaningfully different," especially since the appellant, unlike the defendant in U.S. v. Pope, 871 F.2d 506 (5th Cir. 1989), possessed one weapon. *See* U.S. v. Riviere, 924 F.2d 1289 (3d Cir. 1991). *Dissent:* None of the subsections of §3D1.2 appear to apply. According to the dissenting opinion, "Application Note 2 says that subsections (a) and (b) do not cover these offenses because they are 'victimless' crimes; the term 'victim' is not intended to include indirect or secondary victims such as the general public."

Eighth Circuit

United States v. Williams, 935 F.2d 1531 (8th Cir. 1991). The district court's failure to group defendant's conviction for jury tampering with his conviction for conversion was a misapplication of the guidelines when defendant had attempted to influence jurors during his conversion trial. Pursuant to U.S.S.G. §3D1.2(c), "when conduct that represents a separate count, *e.g.*, bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor." According to the circuit court, "the offense levels for the two cases should have been compared to determine which case carried the highest offense level."

Tenth Circuit

United States v. Morrow, 929 F.2d 566 (10th Cir. 1991). The district court did not err in grouping appellant's conviction for engaging in a continuing criminal enterprise with his conviction of manufacturing a quantity of methamphetamine, which was one of the three predicate acts for the continuing criminal enterprise. The district court correctly chose the highest offense level of the counts in the group. The circuit court rejected the appellant's argument that the manufacture of methamphetamine charge is a lesser included offense of the continuing criminal enterprise charge.

§3D1.3 Offense Level Applicable to Each Group of Closely-Related Counts

Fourth Circuit

United States v. Guevara, 949 F.2d 706 (4th Cir. 1991). The panel denied a government petition to rehear *en banc* the Fourth Circuit holding in U.S. v. Guevara, 941 F.2d 1299 (4th Cir. 1991) *(petition for cert. filed Feb. 11, 1992)*. It therefore affirmed the holding in the earlier case that an explicit waiver of appeal in a plea agreement by a defendant must be construed as an implicit waiver of the government's right to appeal.

§3D1.4 Determining the Combined Offense Level

Second Circuit

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991). The appellants challenged the 151 month sentence imposed following their convictions for racketeering and mail fraud offenses in connection with waste dumping operations. The appellants argued that the district court erred in using the multiple count sections of the guidelines to adjust their offense level from 26 to 28. The circuit court held that the multiple count sections provide rules for calculating a single offense level that takes into consideration all of the counts of conviction. "The underlying premise . . . is that there have been multiple counts and multiple convictions. Here, no counts of the indictment charged [the appellants] with violation of federal environmental laws, and they were not convicted of environmental offenses." The circuit court held, however, "there is no basis for resentencing, for the [sentencing] court stated that if no upward multiple-count adjustments were proper, the court would, under §5K2.0, depart upward by two levels" because the defendants had defrauded various agencies and individuals.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

District of Columbia Circuit

United States v. Bruce, 939 F.2d 1053 (D.C. Cir. 1991). The district court did not err in refusing to make an adjustment under U.S.S.G. §3E1.1 where the appellant disputed his guilt throughout his drug distribution trial and made other statements that the circuit court found justified the sentencing court's refusal to make the adjustment.

United States v. Harrington, 947 F.2d 956 (D.C. Cir. 1991). Post-offense but pre-trial drug rehabilitation may justify a two-level adjustment for acceptance of responsibility, but not a separate downward departure, unless on rare occasions the rehabilitation is so extraordinary that it was not adequately considered by the acceptance of responsibility adjustment.

United States v. McLean, No. 90-3287 (D.C. Cir. Dec. 27, 1991). The appellant challenged his 210-month sentence following his convictions for drug offenses. The district court did not err in refusing to adjust the appellant's offense level pursuant to U.S.S.G. §3E1.1 where the appellant did not meet the burden to establish his entitlement to the reduction. The appellant contended that he never received notice of the acceptance issue. The circuit court rejected this argument stating that the presentence report provides sufficient notice of the issue. The circuit court further stated "if a defendant desires the two-point reduction

. . . he must be prepared to carry his burden of convincing the court by a preponderance of the evidence that he is entitled to it. The favorable recommendation of the probation officer does not relieve him of the burden. Neither does the government's failure to object." *See* U.S. v. White, 875 F.2d 427, 431-32 (4th Cir. 1989).

United States v. Taylor, 937 F.2d 676 (D.C. Cir. 1991). The district court did not err in refusing to grant a reduction for acceptance of responsibility to the appellants who plead guilty to being felons in possession of firearms when the court found their stated reasons for carrying the weapons "inherently incredible."

First Circuit

United States v. De Jongh, 937 F.2d 1 (1st Cir. 1991). The district court did not err in refusing to apply a two-level downward adjustment for acceptance of responsibility when defendant had maintained innocence throughout her trial. Citing U.S. v. Paz Uribe, 891 F.2d 396 (1st Cir.), *cert. denied*, 110 S. Ct. 2216 (1989), the circuit court rejected defendant's fifth amendment challenge, holding that the requirement of U.S.S.G §3E1.1 that defendant accept responsibility for the charged criminal behavior is "not an impermissible burden on the exercise of constitutional rights."

United States v. O'Neil, 936 F.2d 599 (1st Cir. 1991). The district court did not err in considering defendant's criminal conduct after the offense of conviction to conclude that defendant lacked appropriate remorse, and thus to deny a two-level downward adjustment for acceptance of responsibility.

United States v. Pavao, 948 F.2d 74 (1st Cir. 1991). The district court did not err in refusing to grant the appellant a two-level adjustment for acceptance of responsibility pursuant to U.S.S.G. §3E1.1. The record indicated that while appellant admitted to his impersonation of the drug enforcement agent, he maintained that his only purpose for doing so was to help one of the victims with her drug problem. Because the appellant refused to accept responsibility for his intent to defraud, the district court did not abuse its discretion in denying the two-level adjustment.

United States v. Reyes, 927 F.2d 48 (1st Cir. 1991). The district court did not err in failing to make a two-level adjustment for acceptance of responsibility where the appellant persisted in his denial of being a captain of the vessel involved in an illegal alien smuggling ring and said nothing about his role as a co-pilot. The circuit court found that this fact denotes no contradiction with appellant's prior statement at the time he signed his plea agreement, but it does reflect a "continuous desire to minimize his responsibility for the crime."

United States v. Tabares, 951 F.2d 405 (1st Cir. 1991). The district court did not err in refusing to grant a two-level adjustment for acceptance of responsibility pursuant to U.S.S.G. §3E1.1. The appellant was charged with firearms and controlled substance offenses. He never accepted responsibility for the controlled substance offenses, and only accepted responsibility for the firearms offenses when the trial was almost over. In light of the late and incomplete acceptance of responsibility for the criminal conduct, the district court did not abuse its discretion in refusing to grant the two-level adjustment.

United States v. Yeo, 936 F.2d 628 (1st Cir. 1991). Notwithstanding defendant's cooperation and guilty plea, the district court did not err in refusing a two-level downward adjustment for acceptance of responsibility when defendant fled before sentencing and lied about his identity when apprehended several months later.

Second Circuit

United States v. Cousineau, 929 F.2d 64 (2d Cir. 1991). The district court did not err in denying appellant a two-level adjustment for acceptance of responsibility where he had not shown remorse or acknowledged the wrongfulness of the conduct for which he was convicted. While it is true that the district court improperly based the denial of the adjustment on the appellant's failure to accept responsibility for

uncharged conduct, the denial can be affirmed where a court articulates permissible as well as impermissible reasons for the denial.

See U.S. v. Rodriguez, 928 F.2d 65 (2d Cir. 1991), §2J1.7, p. 31.

Third Circuit

United States v. Frierson, 945 F.2d 650 (3d Cir. 1991). The Third Circuit joins the Fifth and Fourth Circuits in holding that §3E1.1 refers to acceptance of responsibility for the offense of conviction and all relevant conduct. *See* U.S. v. Mourning, 914 F.2d 699 (5th Cir. 1990); U. S. v. Gordon, 895 F.2d 932 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); *contra* U.S. v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989); U.S. v. Oliveras, 905 F.2d 623 (2d Cir. 1990). The Third Circuit also held that for fifth amendment purposes, a denied reduction in sentence is equivalent to an increase in sentence; both are "penalties." However, in the instant case, since the appellant did not assert his privilege against self-incrimination when talking to the FBI and the probation officer, his statements were voluntary, and therefore the court was free to consider them in sentencing.

United States v. Singh, 923 F.2d 1039 (3d Cir.), *cert. denied*, 111 S. Ct. 2065 (1991). The district court did not err by failing to make an adjustment for acceptance of responsibility where the appellant denied to the probation officer having knowingly committed a crime. The district court was not compelled to reach a different result because of the appellant's guilty plea and the stipulation contained in the plea agreement that he had accepted responsibility. There is also nothing inherently inconsistent in the district court's finding that appellant had provided substantial assistance but had not accepted responsibility as contemplated in U.S.S.G. §3E1.1. The sentencing judge must address these two aspects of sentencing separately. According to the circuit court, "[i]t is, after all, possible for a defendant to provide assistance to authorities without fully implicating himself."

Fourth Circuit

United States v. Takizal, 940 F.2d 654 (4th Cir. 1991) (table). In a government cross-appeal, the circuit court held that the district court did not err in adjusting the appellant's offense level under U.S.S.G. §3E1.1 where the "defendant expressed remorse to the probation officer and also in court at the sentencing." The court stated, "[t]he trial judge is in a unique position in assessing a defendant's acceptance of responsibility." In the instant case, the defendant was indicted on two counts of selling, transferring and/or delivering counterfeit obligations. The jury acquitted him of the two counts but convicted him of aiding and abetting with regards to both counts.

Fifth Circuit

United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 967 (1992). The district court properly refused to grant the appellants an adjustment under U.S.S.G. §3E1.1 where "even though [the appellants] professed contrition at sentencing, their attitudes at trial 'did not comport with the sort of attitude that this reduction in offense level is for.'"

United States v. Hooten, 942 F.2d 878 (5th Cir. 1991). The district court did not err in refusing to make an adjustment for acceptance of responsibility following appellant's conviction for conspiracy to manufacture drugs. The appellant argued that the district court improperly considered his failure to comply with the conditions of his bond as a basis for the refusal and cited U.S. v. George, 911 F.2d 1028 (5th Cir. 1991) to support the assertion that U.S.S.G. §3E1.1 does not contemplate the failure to comply with bond conditions as an indication of the defendant's failure to accept responsibility. While the circuit court agreed with the appellant's reading of George "to support his narrow statement," it noted that a more expansive reading "would create an absurd result." Relying on the commentary to U.S.S.G. §3E1.1, the circuit court held that "the guidelines permit, rather than bar, the sentencing court's consideration of relevant factors beyond those enumerated in the guideline commentary." The appellant also contended that the sentencing court should be limited to considering only criminal activity committed while on bond as a basis to refuse to award the adjustment. The circuit court disagreed and stated that the appellant "cannot seriously contend

that the term 'inconsistent conduct' requires such a restrictive reading" and held that "[b]ased on the district court's consideration of both positive [a voluntary and truthful admission of the offense conduct] and negative [failure to comply with bond conditions] factors . . . we do not find that [the district court] erred in concluding that [the appellant] did not demonstrate an acceptance of responsibility."

United States v. Rodriguez, 942 F.2d 899 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 990 (1992). The district court did not err in refusing to make an adjustment for acceptance of responsibility where the appellant continued to allege that he was someone that he was not. The circuit court held that he "had not shown 'true remorse' and . . . this is not one of those 'extraordinary cases in which adjustments under both sections 3C1.1 and 3E1.1 may apply.'"

Sixth Circuit

United States v. Chambers, 944 F.2d 1253 (6th Cir. 1991). In the instant case, the appellant was charged with possession with the intent to distribute drugs. He contended that the district court erred when it failed to adjust his offense level for acceptance of responsibility and that the denial of the adjustment violated his Fifth Amendment right against self-incrimination. The circuit court held that the district court did not err in refusing to make the adjustment where the appellant would not admit his involvement in the conspiracy, and his contrition, which the district court found to be insincere, came just before sentencing. The circuit court rejected the appellant's constitutional challenge by relying on case law. *See* U.S. v. White, 869 F.2d 822 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989); U.S. v. Gordon, 876 F.2d 1121 (5th Cir. 1989); U.S. v. Monsour, 893 F.2d 126 (6th Cir. 1990).

United States v. Osborne, 948 F.2d 210 (6th Cir. 1991). The appellant challenged his sentence of 57 months following his conviction for bank fraud. The district court did not err in refusing to reduce the appellant's offense level pursuant to U.S.S.G. §3E1.1 where the appellant had: (1) an extensive criminal history (24 points); (2) submitted an unsigned written statement to the probation officer; (3) did not voluntarily admit his guilt; (4) did not try to make restitution; and (5) showed no sign of "changing his ways," but was found to be a "con man." The circuit court rejected the appellant's claim that his guilty plea, his oral admission of guilt to a federal agent and his written statement to his probation officer should not be outweighed by the factors used by the district court.

United States v. Phillip, 948 F.2d 241 (6th Cir. 1991). The district court did not err in refusing to grant a two-level adjustment for acceptance of responsibility when the appellant, who was convicted of second-degree murder of his four-year-old son and of committing and permitting first-degree criminal child abuse of the child prior to his death, admitted child abuse but refused to admit responsibility for the child's death.

United States v. Reed, 951 F.2d 97 (6th Cir. 1991). The district court did not err in refusing to grant a two-level adjustment for acceptance of responsibility pursuant to U.S.S.G. §3E1.1. The record indicated that appellant, who plead guilty to credit card fraud, engaged in further credit card fraud from a jail telephone while incarcerated pending sentencing.

United States v. Tucker, 925 F.2d 990 (6th Cir. 1991). The district court erred in ruling that an Alford plea categorically precludes an adjustment for acceptance of responsibility. In the instant case, the appellant entered an Alford plea "expressing her willingness to forego a trial but maintaining her innocence." The language of U.S.S.G. §3E1.1, that the adjustment may be made without regard "to whether the defendant's conviction is based upon a guilty plea or a finding of guilt by the court or jury" or "the practical certainty of conviction at trial," supports the appellant's position. However, the appellant failed to sustain her burden of establishing that she was entitled to the adjustment.

United States v. Williams, 940 F.2d 176 (6th Cir.), *cert. denied*, 112 S. Ct. 666 (1991). In a government appeal, the circuit court found that the district court erred in making a two-level adjustment for acceptance of responsibility where the defendant had obstructed justice. The defendant, convicted by a jury of unlawful possession with intent to distribute in excess of 400 grams of cocaine base, lied about her name and age when arrested, and during juvenile court proceedings. After her conviction, but before sentencing,

the defendant sent the court a letter in which she painted herself a victim and denied any knowledge of the crime. According to the circuit court, "[h]er letter was not an affirmative acceptance of responsibility, it was a renouncement of culpability." The defendant's submission of the letter "falls for short of providing the extraordinary circumstances necessary to show [the defendant] accepted responsibility after having obstructed justice." *See* U.S. v. Ojo, 916 F.2d 388 (7th Cir. 1990); U.S. v. Bogas, 920 F.2d 363 (6th Cir. 1990).

United States v. Williams, 952 F.2d 1504 (6th Cir. 1991). The appellant challenged his 41-month sentence following his convictions for conspiracy to extort and violations under the Hobbs Act, 18 U.S.C. §§ 371 and 951. The district court did not err in refusing to adjust the appellant's offense level pursuant to U.S.S.G. §3E1.1 where that factual decision was supported by the record. The circuit court stated, "[t]his adjustment is not intended to apply to a defendant who puts the government to it's burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse."

Seventh Circuit

United States v. Atterson, 926 F.2d 649 (7th Cir.), *cert. denied,* 111 S. Ct. 2909 (1991). The district court did not err in failing to make a two-level adjustment for acceptance of responsibility where the appellant provided information to the government regarding his marijuana distribution network, but was hesitant to testify at grand jury proceedings and tested positive for substance abuse following his arraignment.

United States v. Blas, 947 F.2d 1320 (7th Cir. 1991). The district court did not err in refusing to grant appellant a two-level adjustment for acceptance of responsibility where the appellant failed to accept responsibility for his conduct until the end of the sentencing hearing. The appellant stated that it was reasonable to wait "to avoid admission of disputed information." The circuit court held that if the appellant "were willing to accept responsibility, he would have admitted his involvement in the crimes charged to the investigating probation officer as well as to the court." Because the district court's finding that appellant's last-minute attempt to accept responsibility was not timely, its finding that appellant did not accept responsibility is not clearly erroneous.

United States v. Bruder, 945 F.2d 167 (7th Cir. 1991) (*en banc*). The district court properly refused to depart based on the appellant's post-offense rehabilitation. The circuit court, agreeing with the Fourth Circuit's pronouncement in U.S. v. Van Dyke, 895 F.2d 984 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 112 (1990), held that post-offense rehabilitation was equivalent to acceptance of responsibility. In the instant case, the appellant had already received the benefit of the two-level adjustment.

United States v. DeFelippis, 950 F.2d 444 (7th Cir. 1991). The appellant challenged his 37-month sentence following his guilty plea to two counts of bank fraud. The district court did not err by refusing to adjust the appellant's offense level pursuant to U.S.S.G. §3E1.1 where the court did not believe that his protestations of remorse were sincere. The circuit court held that the record supported the district court's determination that the appellant rationalized and minimized his conduct, played word games, and was trying to manipulate the court. The circuit court found that the appellant tried to put a "favorable spin on the information he provided."

United States v. Knorr, 942 F.2d 1217 (7th Cir. 1991). The district court did not err in denying the appellant, convicted of conspiracy to possess with intent to distribute cocaine, a two-level adjustment for acceptance of responsibility under U.S.S.G. §3E1.1 where he fled and did not appear for sentencing. The circuit court rejected the appellant's argument that his conduct was analogous to an escapee who ultimately sees the light and voluntarily surrenders. In the instant case, when the marshals approached him, almost seven months after he failed to appear for sentencing, he attempted to flee. Although the appellant may have been of assistance to authorities after his arrest, the district court judge was not clearly erroneous in determining that his conduct did not demonstrate acceptance of responsibility.

Eighth Circuit

United States v. Amos, 952 F.2d 992 (8th Cir. 1991). The district court erred in granting the defendant a two-level adjustment for acceptance of responsibility under U.S.S.G. §3E1.1 where the defendant admitted to the crime and accepted responsibility when he initially entered a guilty plea, but later denied the offense at trial. The adjustment for acceptance of responsibility is "not intended to apply to a defendant who puts the [g]overnment to its burden of proof at trial by denying the essential factual elements of guilt." U.S.S.G.§ 3E1.1 n.2.

United States v. Charger, 928 F.2d 818 (8th Cir.), *vacating* 924 F.2d 765 (1991). On rehearing, the circuit court vacated its original opinion and remanded the case for resentencing because of the district court's "conflicting statements" on the reason for denying the acceptance of responsibility adjustment. According to the circuit court, the "[district] court's comments that [appellant] did not accept responsibility because she went to trial must be weighed with the probation officer's outright rejection of an acceptance of responsibility reduction because her remorse came after conviction." Arnold, J., *concurring in part & dissenting in part:* The district court did not err in failing to make adjustment for acceptance of responsibility where the defendant attempted to avoid responsibility by telling a story at trial "materially" different from her pretrial statement. Apparently, neither the jury nor the judge believed it.

United States v. Duke, 935 F.2d 161 (8th Cir. 1991). The district court did not err in refusing to apply the two-level reduction for acceptance of responsibility pursuant to U.S.S.G. §3E1.1. According to the circuit court, "the district court is afforded much discretion in deciding whether or not to grant the acceptance-of-responsibility reduction." Defendant's guilty plea and agreement to cooperate with the government are factors to be considered, but they do not "compel the conclusion that the District Court could not exercise its discretion by denying the requested reduction . . . ."

United States v. Eberspacher, 936 F.2d 387 (8th Cir. 1991). The district court did not err in refusing to grant a two-level reduction for acceptance of responsibility under U.S.S.G. §3E1.1 when the record indicated that the defendant failed to name his source, bordered on perjuring himself at his plea hearing, and tested positive for cocaine use while awaiting sentencing in violation of his bond.

United States v. Kloor, No. 91-2312 (8th Cir. Dec. 20, 1991). The district court did not err in declining to make an adjustment for acceptance of responsibility. According to the circuit court, "[t]hough [the appellant] pleaded guilty, stipulated to the facts of his offense, and did not deny the offense, he also fled from authorities, attemtped to hide the express mail package, and consistently refused to expound on the facts of his offense." *See* U.S. v. Thompson, 876 F.2d 1381 (8th Cir.), *cert. denied*, 493 U.S. 868 (1989).

United States v. Lyles, 946 F.2d 78 (8th Cir. 1991). The appellants argued that they were denied a two-level adjustment for acceptance of responsibility because they refused to discuss their case pending appeal of their convictions, and that the district court's interpretation of their refusal to discuss their case as an unwillingness to accept responsibility for their alleged conduct constituted a violation of their fifth amendment right against self-incrimination. Relying on U.S. v. Crawford, 906 F.2d 1531, 1534 (11th Cir. 1990), the court stated "the acceptance of responsibility provision of the federal sentencing guidelines . . . does not violate either the fifth or the sixth amendment, but merely formalized and clarifies a tradition of leniency extended to defendants who express genuine remorse and accept responsibility for their wrongs."

United States v. Miller, 951 F.2d 164 (8th Cir. 1991). The district court did not err in refusing to make a two-level adjustment for acceptance of responsibility where the record indicated that appellant withheld information from the probation officer, refused to discuss her involvement in the offense, and argued that she signed the plea agreement under duress without having read it. The circuit court affirmed that a defendant's guilty plea does not guarantee a reduction for acceptance of responsibility.

Ninth Circuit

See U.S. v. Eaton, 934 F.2d 1077 (9th Cir. 1991), §1B1.1 at 1.

United States v. Fine, 946 F.2d 650 (9th Cir. 1991). The district court did not err in refusing to adjust the appellant's offense level for acceptance of responsibility where the appellant had obstructed justice by making false statements and providing misleading information.

United States v. Hall, 952 F.2d 1170 (9th Cir. 1991). The appellant was convicted of six counts of bank robbery and four counts of using a firearm during a crime of violence. He challenged his 365-month sentence contending that the district court erred in refusing to reduce his offense level pursuant to U.S.S.G. §3E1.1. The appellant first argued that his confession to two government agents three months after he was arrested was acceptance of responsibility because he admitted committing the robberies and revealed the identity of a partner. The circuit court rejected this argument finding that "[i]n light of [the appellant's] remark . . . that he was confessing because he hoped the judge would consider his cooperation, and his statements at the suppression hearing that he confessed only to get a lighter sentence, the district court did not clearly err." The appellant maintained that his discrepant statements should not be considered as insincere claims of remorse because he has a history of mental illness. The circuit court responded by pointing out that the appellant was not denied the reduction because he was mentally ill but because he was unbelievable. The appellant also argued that the refusal to adjust his sentence was illegal because it was based on his exercise of his right to counsel at the presentence interview and his decision to go to trial. He stated that the district court violated U.S. v. Herrera-Figueroa, 918 F.2d 1430, 1431 (9th Cir. 1990), because the court relied on the probation officer's finding that the appellant's statements of remorse were not sincere because they were the result of "coaching and direction" from his counsel. The circuit court held that "the court's reliance on the probation officer's observation does not indicate the court felt that [the appellant] should be punished for having counsel present to advise him, but simply that [the appellant's] manner of responding did not reflect his own, genuine remorse." The circuit court also rejected the appellant's claim that the denial of adjustment was an attempt to penalize him for deciding to go to trial.

United States v. Palmer, 946 F.2d 97 (9th Cir. 1991). The district court did not err in failing to adjust the appellant's offense level pursuant to U.S.S.G. §3E1.1 where that decision was "based on evidence clearly available to defense counsel." The circuit court rejected the appellant's contention that he had no notice of the district court's intention to deny the adjustment since there was "ample opportunity . . . to take up the matters, put on evidence, and present an argument."

Tenth Circuit

United States v. Ochoa-Fabian, 935 F.2d 1139 (10th Cir. 1991), *(petition for cert. filed Nov. 7, 1991)*. The district court did not err in refusing to grant a two-level reduction in offense level pursuant to U.S.S.G. §3E1.1 when appellant had maintained his innocence throughout the trial and after his conviction. The circuit court stated, "[a]ppellant's eleventh hour attempt to accept responsibility brought into question whether he manifested a true remorse for his criminal conduct."

United States v. Ruth, 946 F.2d 110 (10th Cir. 1991). The district court did not err in refusing to grant the appellant a two-level adjustment pursuant to U.S.S.G. §3E1.1 where the appellant did not meet his burden of proof. According to the circuit court, "[a] guilty plea to one count of a multi-count indictment does not necessarily entitle a defendant to a reduced offense level based on acceptance of responsibility." U.S. v. Whitehead, 912 F.2d 448, 450 (10th Cir. 1990). The circuit court found that the appellant accepted responsibility for acts underlying his count of conviction and little more.

Eleventh Circuit

United States v. Aimufua, 935 F.2d 1199 (11th Cir. 1991) (*per curiam*). In a case of first impression for the Eleventh Circuit, the appellate court found that the district court did not engage in impermissible double-counting by denying a two-level reduction for acceptance of responsibility because the appellant failed to terminate or withdraw from criminal conduct, and in making a one-level upward departure based on the same criminal conduct.

United States v. Bennett, 928 F.2d 1548 (11th Cir. 1991). The district court did not err in failing to make a two-level adjustment for acceptance of responsibility where the appellant cooperated with the government, but went to trial and denied responsibility for one of the offenses for which he was convicted.

United States v. Cruz, 946 F.2d 122 (11th Cir. 1991). The district court did not err in ruling that appellant was not entitled, as a matter of right, to a two-level adjustment for acceptance of responsibility under §3E1.1.

United States v. Jones, 934 F.2d 1199 (11th Cir. 1991). The district court did not err in refusing to apply a two-level adjustment for acceptance of responsibility when appellants "ceased their criminal activity only after they were arrested." The appellants not only maintained their innocence throughout their trial, but also challenged the credibility of the government's witnesses. Despite defendants' subsequent admission to a probation officer, the court's finding that they had failed to demonstrate acceptance of responsibility was not erroneous.

United States v. Query, 928 F.2d 383 (11th Cir. 1991). The district court did not err in failing to make an adjustment for appellant's acceptance of responsibility where he refused to acknowledge his full participation to the probation officer, made false statements to the investigating agent, declined to inform authorities of the methamphetamine lab in his attic, and continued his criminal activity after his arrest through communications to his common-law wife.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

Fourth Circuit

United States v. Freeman, 943 F.2d 50 (4th Cir. 1991). The district court did not err in assessing three criminal history points pursuant to U.S.S.G. §4A1.1(a) for state law convictions and sentences even though the offenses were committed after the federal offense for which appellant was being sentenced. The circuit court stated, a "'prior offense' means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense."

Fifth Circuit

United States v. Arellano-Rocha, 946 F.2d 1105 (5th Cir. 1991). At sentencing on an attempted escape charge, the district court did not err in calculating the appellant's criminal history category pursuant to U.S.S.G. §4A1.1(d). In rejecting the appellant's contention that this increase was improper, the circuit court held "that if a defendant commences an offense following conviction for an earlier offense, but before sentencing on that earlier one, he or she nevertheless commits the instant offense 'while under [a] criminal justice sentence,' so long as: (1) the conduct involved in the instant offense was not part of the earlier offense; and (2) the defendant is sentenced on the earlier offense before being sentenced on the instant offense."

United States v. Taylor, 933 F.2d 307 (5th Cir.), *cert. denied*, 112 S. Ct. 235 (1991). The district court properly enhanced appellant's sentence for committing the instant offense while under a criminal justice sentence and while on escape status pursuant to U.S.S.G. §§4A1.1(d) and (e) even though escape was the underlying offense. *See* U.S. v. Bigelow, 897 F.2d 160 (5th Cir. 1990); U.S. v. Vickers, 891 F.2d 86 (5th Cir. 1989).

Eighth Circuit

United States v. Burnett, 952 F.2d 187 (8th Cir. 1991). In sentencing the defendant for failure to appear for service of sentence, the district court did not err in assessing three points under U.S.S.G. §4A1.1(a) for the offense for which he failed to appear. The circuit court also rejected the argument that the assessment of points under both U.S.S.G. §§4A1.1(a) and (d) was double counting.

United States v. Thomas, 930 F.2d 12 (8th Cir. 1991). The district court did not err in applying U.S.S.G. §4A1.1(d) and (e), thereby adding consideration of an earlier conviction and confinement to the offense of escape. *See* U.S. v. Goolsby, 908 F.2d 861 (11th Cir. 1990); U.S. v. Jiminez, 897 F.2d 286 (7th Cir. 1990). According to the circuit court, "their application does not violate the double jeopardy clause because a defendant is only being punished for one crime with the sentence being affected by the defendant's prior criminal history."

United States v. Ulrich, 953 F.2d 1082 (8th Cir. 1991). The appellant challenged his 63-month sentence following his conviction for manufacturing marijuana. The district court did not err in calculating the appellant's criminal history category by including a prior conviction more than ten years old. The circuit court held that the appellant's "challenge to the prior conviction fails because its exclusion would not change his criminal history category and therefore any error would be harmless. *See* U.S. v. Nash, 929 F.2d 356, 359-60 (8th Cir. 1991).

Ninth Circuit

United States v. Hoy, 932 F.2d 1343 (9th Cir. 1991). The district court did not err in including sentences imposed for conduct committed after the offense of conviction as "prior sentences" in determining the appellant's criminal history category. According to the circuit court, "[u]nder the plain language of the guidelines, [appellant's] sentences for the Idaho theft and the Oregon stolen car were properly included in calculating his sentence on the bank robbery charge. Both sentences were imposed before Hoy's July 9, 1990 sentencing on the bank robbery charge." The circuit court rejected the appellant's argument that counting sentences imposed for illegal conduct occurring after the instant offense promotes disparity in sentencing because he will have a higher criminal history score than another defendant who committed the same illegal conduct, but had not yet been sentenced for it. *See* U.S. v. Walker, 912 F.2d 1365 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1004 (1991); U.S. v. Smith, 900 F.2d 1442 (10th Cir. 1990).

United States v. Lillard, 929 F.2d 500 (9th Cir. 1991). The district court did not err in enhancing the appellant's criminal history category by two points where the appellant was convicted of a criminal offense within two years of the instant offense, but had yet to serve his sentence. According to the circuit court, "[n]on-supervisory status does not exempt the sentence from inclusion under 4A1.1(d)."

Tenth Circuit

United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991) *(petition for cert. filed Jan. 9, 1992)*. The district court did not err in adding three criminal history points under U.S.S.G. §4A1.1 for defendant's conviction for retaliating against a government witness. Despite defendant's contention that the witness retaliation indictment was "intimately related" to the conspiracy and possession offenses, the district court did not err as a matter of law in considering defendant's witness retaliation sentence in calculating his criminal history category. The drug conspiracy and the witness retaliation did not occur on a single occasion, and the attack upon the government witness took place at the close of defendant's first trial while the jury was deliberating.

United States v. Pettit, 938 F.2d 175 (10th Cir. 1991). The district court did not err in enhancing the appellant's criminal history score for being under a criminal justice sentence, where there was an outstanding warrant for his failure to appear at a parole hearing for a misdemeanor offense.

Eleventh Circuit

United States v. Martinez, 931 F.2d 851 (11th Cir.), *cert. denied*, 112 S. Ct. 268 (1991). The district court did not err in assigning defendant two criminal history points under U.S.S.G. §4A1.1(d) where he had not yet reported for service of his eight-year sentence. According to the circuit court, "[the appellant] was 'under [a] criminal justice system' from the time he was sentenced by the district court, regardless of when he was expected to begin serving that sentence."

§4A1.2 Definitions and Instructions for Computing Criminal History

District of Columbia Circuit

United States v. Samuels, 938 F.2d 210 (D.C. Cir. 1991). The district court improperly considered prior juvenile convictions when it departed upward from the prescribed sentencing range. The circuit court concluded that, when not counted toward the determination of the criminal history category, "nonincludable juvenile offenses should not trigger a departure under section 4A1.3."

First Circuit

United States v. Yeo, 936 F.2d 628 (1st Cir. 1991). The district court properly determined defendant's criminal history category by dividing several prior convictions into two sets originally consolidated for sentencing despite defendant's claim that all of the convictions were part of a common scheme or plan and were thus related pursuant to U.S.S.G §4A1.2.

Second Circuit

United States v. Castro-Vega, 945 F.2d 496 (2d Cir. 1991) *(petition for cert. filed Jan. 8, 1992)*. The district court did not err in including a prior uncounseled misdemeanor conviction, for which defendant received probation, to calculate defendant's criminal history. The use of prior uncounseled misdemeanor convictions for which no imprisonment was imposed does not violate a defendant's sixth amendment right to counsel.

Fourth Circuit

See United States v. Freeman, 943 F.2d 50 (4th Cir. 1991), §4A1.1, p. 63.

United States v. Rivers, 929 F.2d 136 (4th Cir.), *cert. denied*, 112 S. Ct. 431 (1991). The district court erred in finding that two convictions for bank robbery which were entered five months apart in different courts having separate jurisdiction were consolidated for purposes of trial and sentencing. The fact that the judge for the second conviction gave a partially concurrent sentence does not make the prior convictions "related."

Fifth Circuit

United States v. Guajardo, 950 F.2d 203 (5th Cir. 1991). The Fifth Circuit held that the use of the length and recency of prior convictions to determine an offender's criminal history score pursuant to U.S.S.G. §§4A1.1 and 4A1.2, or to classify a defendant as a "career offender" pursuant to U.S.S.G. §4B1.2 does not violate either the Due Process or Equal Protection clauses of the Constitution even if the criminal history score can increase the punishment range for the instant offense. The court held "that a district court's consideration of past offenses is related to the goal of having dangerous criminals serve longer sentences; using these prior offenses to calculate another sentence is rationally related to achieving that goal and promotes respect for the law, provides deterrence, and protects the public from further crimes."

United States v. Hardeman, 933 F.2d 278 (5th Cir. 1991). The district court erred in basing the appellant's criminal history score on a misdemeanor conviction for driving without adequate insurance. In determining whether an offense is "similar" to one listed at U.S.S.G. §4A1.2(c)(2) the appellate court adopted

a "common sense approach which relies on all possible factors of similarity, including a comparison of punishments for the listed and unlisted offenses, the perceived seriousness of the offense as indicated by the level of punishment, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct." In the instant case, the appellant was sentenced to one day in jail and fined $250.00 for driving without insurance. In view of the light sentence, and the regulatory nature of the violation, the appellate court concluded that the appellant's conviction for failure to maintain insurance did not have any bearing on whether he is likely to commit other crimes in the future.

Sixth Circuit

United States v. Bradley, 922 F.2d 1290 (6th Cir. 1991). The district court erred in calculating the appellant's criminal history category by including an invalid state court conviction. The appellant carried his burden at the sentencing hearing by reading into the record a portion of the plea colloquy which showed that the state court failed to advise him of the penalties for the charge to which he was pleading.

Seventh Circuit

United States v. Eske, 925 F.2d 205 (7th Cir. 1991). The district court did not err in including in appellant's criminal history calculation a prior sentence that was imposed within ten years of another offense to which he stipulated, but was more than ten years from the offense charged. According to the circuit court "instant offense" as used in U.S.S.G. §4A1.2(e)(2) included "any relevant conduct." Relevant conduct includes "all acts . . . committed . . . by the defendant . . . during the commission of the offense of conviction," and "offense of conviction" includes the stipulated offenses.

Eighth Circuit

United States v. Fuller, 942 F.2d 454 (8th Cir.), *cert. denied*, 112 S. Ct. 315 (1991). The district court did not err in calculating the appellant's criminal history category when it included two violations for operating a vehicle while intoxicated. According to the circuit court, "[t]hese are not minor traffic violations" under the guidelines.

United States v. Hewitt, 942 F.2d 1270 (8th Cir. 1991). The district court did not err by calculating the appellant's criminal history category since U.S.S.G. §4A1.2 authorizes the inclusion of the DUI, and because the appellant made no showing that the DUI conviction was previously ruled constitutionally invalid.

United States v. Lowe, 930 F.2d 645 (8th Cir. 1991). The district court did not err in finding that the appellant's six prior convictions for passing bad checks were unrelated. According to the circuit court, the similarity of motive and *modus operandi* are not determinative of single common scheme or plan. In the instant case, the offenses occurred over a two- year period, involved different victims, were committed in different locations and were not consolidated for trial or sentencing.

United States v. Mitchell, 941 F.2d 690 (8th Cir. 1991). The district court erred in calculating the appellant's criminal history category, and found that the appellant's prior fictitious license plate offense was "closely related" to the drug dealing offense in the instant case. According to the circuit court, "[t]he two offenses of drug dealing and driving with false license plates are not remotely 'similar' to each other, and any drug offenses to which [the appellant] might have been a party at the time of his fictitious license arrest were never charged and do not justify skewing the §4A1.2(c)(1) determination."

United States v. Watson, 952 F.2d 982 (8th Cir. 1991). The district court did not err by refusing to treat a 1989 conviction and a 1987 conviction as "related cases" within the meaning of U.S.S.G. §4A1.2(a)(2) when determining appellants' criminal history scores pursuant to U.S.S.G. §4A1.1. The record indicated that the 1989 sentencing judge ordered his sentence to run concurrently with that imposed in 1987, but that the offenses were not committed, tried, or sentenced on the same occasion.

Ninth Circuit

See U.S. v. Fine, 946 F.2d 650 (9th Cir. 1991), §1B1.7, p.9.

United States v. Guthrie, 931 F.2d 564 (9th Cir. 1991). The district court erred in basing the appellant's guideline sentence on a vacated state court conviction. At the time of the original sentencing, the district court held a hearing to determine whether the appellant's representation had been ineffective due to an alleged conflict of interest. The district court rejected the claim and added three criminal history points. Following the federal sentencing hearing, a state court vacated the 1973 conviction, reinstated appellant's "not guilty" plea and confirmed that the District Attorney had dismissed the information against him. The appellant then returned to federal court on collateral review arguing that the court was bound to respect the state court's judgment vacating his 1973 conviction. The federal court reasoned the state court should have respected its earlier decision affirming the validity of the 1973 conviction and refused to subtract the three criminal history points. According to the circuit court, the issue in the case "is the role of prior state convictions in a federal sentencing scheme, not doctrines such as "full faith and credit, collateral estoppel and *res judicata*, and related jurisdictional principles." A state court has plenary authority to vacate state convictions. It would be contrary to the guidelines "for a federal court to treat as valid a state conviction that no longer exists, even though the conviction is being considered for the limited purposes of federal sentencing." On remand the district court can decide whether the conduct underlying the vacated conviction warrants an upward departure because it provides "reliable information" regarding appellant's criminal past.

United States v. Harrington, 923 F.2d 1371 (9th Cir.), *cert. denied*, 112 S. Ct. 164 (1991). The district court did not err by classifying the appellant as a career offender where he was incarcerated for both a 1967 robbery and a 1964 robbery (by virtue of his parole revocation) within fifteen years of the commission of instant offense of armed robbery.

United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991). The district court erred in basing the appellant's criminal history score on a 1977 state robbery conviction which was "set aside" and then determining that appellant was a career offender. The state statute which "set aside" the conviction is specifically referred to as a rule "expunging" a prior conviction, and releases the juvenile delinquent "from all penalties and disabilities resulting from the offense or crime for which he or she has committed." The circuit court also relied on an analogy to the Federal Youth Corrections Act, 18 U.S.C. § 5021 (repealed) which also contained a provision which "automatic[ally] set aside" a conviction if the offender was unconditionally discharged prior to the expiration of his sentence. According to the circuit court, when discussing the purpose and legislative history of 18 U.S.C. § 5021 "[the [Supreme] Court clearly understood the term 'set aside' to mean 'expunged' for purposes of the Act."

United States v. Palmer, 946 F.2d 97 (9th Cir. 1991). The district court did not err by including six points in the appellant's criminal history score, pursuant to U.S.S.G. §4A1.2, where his prior sentences for a burglary conviction and revocation of probation on a forgery conviction were consolidated at sentencing, but were counted separately for the purposes of criminal history. The circuit court held that "§4A1.2(a)(2) and its commentary direct that the sentence imposed upon revocation be treated as part of the original sentence, and that such sentences are to be computed separately from the sentence imposed for a new criminal conviction."

Tenth Circuit

United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991) *(petition for cert. filed Jan. 9, 1992)*. The district court did not err in considering defendant's juvenile conviction for auto theft in the computation of defendant's criminal history pursuant to U.S.S.G. §4A1.2(d)(2)(B). Although the date when the sentence was imposed was unknown, the district court did not err in concluding that it fell within the past five years because the arrest date was within that time frame and the sentence was necessarily imposed after the arrest.

United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991). The appellant argued it was improper for the district court to count a deferred sentence from a state court in calculating his criminal history. The circuit court agreed and held "the expunction provisions of Oklahoma's deferred sentencing statute operate

automatically and the defendant in this case was not required to follow some unknown and unspecified procedure to have his prior criminal record expunged."

United States v. Novey, 922 F.2d 624 (10th Cir.), *cert. denied*, 111 S. Ct. 2861 (1991). The district court did not err in classifying the appellant as a career offender where he plead guilty to a controlled substance offense, and had previous controlled substance convictions in 1983 and in 1972 from which he was released from prison within 15 years of the instant offense. The provisions of U.S.S.G. §§ 4B1.2 and 4A1.2(3) are not ambiguous. A felony conviction is counted as one of two prior convictions, for determining if defendant is a career offender, if the defendant was incarcerated during part of the fifteen-year period.

United States v. Pettit, 938 F.2d 175 (10th Cir. 1991). The district court did not err in adding two points to the appellant's criminal history score for his prior misdemeanor conviction for writing bad checks. The appellant received a sentence of six months for the conviction and served six days of that sentence in prison. According to the circuit court, "[b]ecause [the appellant's] conviction involved a sentence of imprisonment of more than thirty days, it cannot qualify as an exception to the general rule that counts misdemeanors in the criminal history computation."

Eleventh Circuit

United States v. Cornog, 945 F.2d 1504 (11th Cir. 1991). The defendant was convicted of conspiracy to possess and distribute cocaine and two substantive counts of cocaine distribution. The district court did not err by failing to count a prior revocation of appellant's parole, ruled constitutionally invalid, when computing his criminal history pursuant to U.S.S.G. §4A1.2.

See U.S. v. Query, 928 F.2d 383 (11th Cir. 1991), §1B1.3, p. 10.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

District of Columbia Circuit

United States v. Jones, 948 F.2d 732 (D.C. Cir. 1991). The appellate court upheld an upward departure from criminal history category II to criminal history category V where the appellant, convicted of fraudulent use of credit cards, admitted to committing other uncharged criminal conduct, and evidence showed that he committed the instant offense while on release from three different pending cases in different jurisdictions. One of the reasons advanced for the departure was improper, but according to the circuit court, the "elimination of the improper ground would not have changed the district judge's view of the proper sentence to be imposed."

See U.S. v. Samuels, 938 F.2d 210 (D.C. Cir. 1991), §4A1.2, p. 65.

First Circuit

United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991). The district court did not err in making an upward departure from a guideline range of 21-27 months imprisonment to a sentence of 60 months based on three interim calculations stemming from analogies to the guidelines that were made before formulating the extent of the overall departure. The circuit court noted that there are no absolute requirements that the sentencing judge use analogies in shaping the contours of an upward or downward departure. According to the circuit court, "the emphasis should be on ascertaining a fair and reasonable sentence, not on subscribing slavishly to a particular formula." The appellant's seven earlier convictions, while outdated and dissimilar to the offense of conviction, were distinguished by their "numerosity and dangerousness."

United States v. Figaro, 935 F.2d 4 (1st Cir. 1991). The district court did not err in concluding that appellant's criminal history warranted an upward departure pursuant to U.S.S.G. §4A1.3, and his uncharged, relevant conduct warranted an upward departure pursuant to U.S.S.G. §5K2.0, based on circumstances surrounding both the current offense and a similar attempt six months earlier. Citing U.S. v. Aymelek, 926

F.2d 23 (1st Cir. 1991), the circuit court held that "[i]n an appropriate case . . . an amalgamation of both types of departures is permissible."

United States v. Madrid, 946 F.2d 142 (1st Cir. 1991). The district court did not err in finding that appellant's criminal history score underrepresented his criminal history where the record indicated that he had committed two felonies while on bail for a third felony. Therefore, the district court properly sentenced him as if he had a criminal history category if IV when it found "that criminal history category III did not fairly represent either the seriousness of appellant's criminal history or the seriousness of the risk of recidivism."

United States v. Moore, 931 F.2d 3 (1st Cir. 1991). The district court did not err in making an upward departure from a guideline range of 4-10 months to a sentence of 16 months where appellant had "no fewer than 23 other potential criminal points" which, for a variety of reasons, were excluded from his criminal history score. Some of these prior convictions evidenced "similar misconduct" while others revealed the same sort of dishonesty and misappropriation of other people's property as the offense of conviction. According to the circuit court, "[t]his case, we believe, is close to a textbook model for departure jurisprudence."

United States v. Polanco-Reynoso, 924 F.2d 23 (1st Cir. 1991). The district court did not err in making an upward departure from criminal history category I to Criminal History Category II, where at the time the appellant committed the offenses in the instant case, possession of more than 100 grams of heroin for distribution and conspiracy to distribute and to possess more than 100 grams of heroin, he was out on bail pending sentencing on an unrelated state court charge of heroin trafficking. The court found that the inappropriateness of criminal history category I was shown from the fact "that if [appellant] had been finally sentenced and convicted on the state court charge to which he had already pleaded guilty, appellant would have been subject to a mandatory minimum prison sentence of ten years for the offenses of conviction in the instant case."

United States v. Rodriguez-Cardona, 924 F.2d 1148 (1st Cir.), *cert. denied*, 112 S. Ct. 54 (1991). The district court did not err in making an upward departure from Criminal History Category III to Criminal History Category VI, since the appellant was an important drug supplier, used minors in his business, and there was a large amount of money involved in his drug business. The reasons for the departure as set forth by the district court, "paint a portrait of appellant as a lifetime criminal offender, one who has shown no respect whatsoever for the law or other social institutions." Where the district court is departing not solely on appellant's past criminal conduct but also on other aggravating circumstances, the sentencing court need not move sequentially through the criminal history categories. In the instant case, the district court departed from Criminal History Category III to Criminal History Category VI, and from offense level 20 to 28. The guideline range was 41-51 months imprisonment, and the district court sentenced him to 135 months imprisonment.

United States v. Tabares, 951 F.2d 405 (1st Cir. 1991). The district court did not err by holding that appellant's criminal history category did not adequately reflect the seriousness of his past criminal conduct, and in making an upward departure from criminal history category from IV to V. The appellant's record contained three prior charges, one for possession of a dangerous weapon and two for assault with a deadly weapon, that did not result in convictions for reasons unrelated to a finding of factual innocence. The district court did not err in considering these instances of "prior similar adult conduct" as a basis for an upward departure pursuant to U.S.S.G. §4A1.3(e).

Second Circuit

See U.S. v. Hernandez, 941 F.2d 133 (2d Cir. 1991), §1B1.3, p. 4.

Fifth Circuit

United States v. Fields, 923 F.2d 358 (5th Cir.), *cert. denied*, 111 S. Ct. 2066 (1991). The district court did not err in making an upward departure from the statutorily mandated minimum sentence where

the appellant had twelve prior felonies which were four times as many as required to invoke the sentence enhancement provisions of 18 U.S.C. § 924(e)(1), and each time he had been released on parole he returned to criminal activity. According to the circuit court, "[f]orbidding an upward departure from the guideline sentence of 180 months would have the effect of amending [18 U.S.C.] §924(e)(1), rewriting it to provide for a sentence ranging from fifteen years to life, but rather for a fixed sentence of fifteen years."

Sixth Circuit

United States v. Feinman, 930 F.2d 495 (6th Cir. 1991). The district court did not err in making an upward departure from criminal history category V to criminal history category VI where the appellant's long-time continued association with the drug trade, coupled with its economic benefit to him, increased the likelihood of recidivism. Martin, J., *dissenting in part:* "It is undisputed that all [appellant's] prior criminal activity was considered and counted in determining his original criminal history category of V. For it is only when past criminal activity is not counted by the guidelines that a defendant's criminal history could be under-represented."

United States v. Gonzales, 929 F.2d 213 (6th Cir. 1991). The district court did not err in making an upward departure from a guideline range of 97-121 months (offense level 28, criminal history category III) to a sentence of 236 months (offense level 32; criminal history category VI) where the judge found that the guideline did not adequately take into account that there was a consolidation of the defendant's two prior felony drug convictions. The consolidation of the two prior felony drug convictions precluded the appellant's classification as a career offender. If the appellant had been sentenced as a career offender the guideline range would have been 210 to 262 months. According to the circuit court, the departure to 236 months "can hardly be deemed unreasonable in light of Gonzales' crimes."

United States v. Lassiter, 929 F.2d 267 (6th Cir. 1991). The district court erred in making an upward departure from criminal history category II to criminal history category VI without justifying the degree of the departure. According to the circuit court, a conclusory statement that a particular sentence is "too lenient" is not a "demonstration" or reasoned explanation. In the instant case, the district court made the departure because the appellant was arrested on state charges for illegal drug activity while on bond for the offense of conviction. The district court must "adequately link its departure to the structure of the guidelines" to ensure a reasonable degree of departure and to further the goal of uniformity.

United States v. Osborne, 948 F.2d 210 (6th Cir. 1991). The appellant challenged his sentence of 57 months following his conviction for bank fraud. The district court did not err in making an upward departure pursuant to U.S.S.G. §4A1.3 where his "criminal history score of 24 was so high, category VI did not adequately reflect the seriousness of the defendant's persistent criminal history as a 'con man.'" The appellant did not challenge the decision to depart but argued that the court improperly calculated the sentencing range. The circuit court rejected this contention and approved the district court's decision to model its method of departure on the approach found in U.S. v. Dycus, 912 F.2d 466 (6th Cir. 1990). *See also* U.S. v. Belanger, 892 F.2d 473 (6th Cir. 1989); U.S. v. Christoph, 904 F.2d 1036, 1042 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991). Nelson, J., *dissenting:* "It was inappropriate to use the defendant's criminal history as a basis both for denying the acceptance of responsibility credit and for departing upward from the sentence range indicated by the guidelines." Offering his own methodology for a departure, the judge stated he "would therefore remand the case for imposition of a sentence of imprisonment for not more than 46 months."

Seventh Circuit

United States v. DeFelippis, 950 F.2d 444 (7th Cir. 1991). The appellant challenged his 37-month sentence following his guilty plea to two counts of bank fraud. The district court did not err in making an upward departure pursuant to U.S.S.G. §4A1.3, where the presentence report provided a wealth of information about other fraudulent conduct by which the appellant sought to acquire, and often acquired, expensive goods and services without any means to pay for them. The sentencing judge relied on the pattern of uncharged conduct in concluding that the guidelines do not adequately reflect either defendant's criminal conduct or the likelihood of repetition. Although the court was concerned about the rationale for the

departure, it stated, "[w]e think the sentencing judge adequately explained and justified the result and we see no purpose in asking him to re-articulate the way he got there."

United States v. Mettler, 938 F.2d 764 (7th Cir. 1991) (unpublished). The district court did not err in increasing the appellant's criminal history category from I to III on the basis of five drug conspiracies between 1981 and 1985 for which he had not been convicted. The court's determination that the appellant had participated in the conspiracies was supported by the evidence. A conviction on just one of the other conspiracies would have increased defendant's criminal history category from I to III. In addition, U.S.S.G. §4A1.3 "clearly provides for the consideration of prior criminal activity for sentencing purposes."

United States v. Terry, 930 F.2d 542 (7th Cir. 1991). The district court did not err in finding that the appellant engaged in prior similar criminal conduct and that a departure on that ground was warranted. The trial court did not rely on the arrest record alone, but rather on information in the police report which was appended to the presentence report. Nevertheless, the district court improperly considered the appellant's conviction by summary court martial.

Eighth Circuit

United States v. Andrews, 948 F.2d 448 (8th Cir. 1991). The appellant plead guilty to one count of aiding and abetting an armed bank robbery, and to one count of using a firearm during and in relation to a crime of violence. The district court did not err in departing upward from defendant's guideline range of 37-46 months to impose a sentence of 90 months based on defendant's confession to five additional bank robberies for which he had not been indicted. The district court found that defendant's offense level of 21 would have been 28 had the five additional bank robberies been calculated under the guidelines, and departed upward to an offense level of 26. In addition, it found that defendant's prior convictions: three for armed robbery, one for possession of stolen mail, and one for possession of marijuana, which could not be counted to determine defendant's criminal history because they occurred more than fifteen years before the instant offense, would have resulted in a criminal history category of III. Because an offense level of 26 at criminal history category III results in a guideline range of 78-97 months, the district court did not err in departing upward to impose a sentence of 90 months.

United States v. Fawbush, 946 F.2d 584 (8th Cir. 1991). The appellant challenged his 241-month sentence imposed after the district court's decision to depart from the applicable guideline range of 135-168 months following his conviction for aggravated sexual abuse. The district court did not err in citing the repetitive nature of the appellant's acts to justify an upward departure. In the instant case, the court considered evidence that the appellant committed similar acts involving his daughters. The circuit court held "[t]he guidelines permit upward departures where 'prior similar adult criminal conduct not resulting in a criminal conviction' exists."

United States v. Franklin, 926 F.2d 734 (8th Cir.), *cert. denied*, 112 S. Ct. 230 (1991). The district court did not err in failing to make a downward departure from criminal history category I where the appellant had no prior convictions. Section 4A1.3 explicitly addresses this situation: "The lower limit of the range for a category I criminal history is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for a category I criminal history on the basis of adequacy of criminal history can not be appropriate."

Ninth Circuit

United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991). The district court did not err in departing downward from a guideline range of 360 months-life to a sentence of 17 years based on a finding that the appellant's "youthful lack of guidance" mitigated the seriousness of his past and present criminality. The appellant was convicted of conspiracy to distribute cocaine and rock cocaine. The circuit court rejected the government's argument that the district court was required to specify the weight that it accorded to each element of the mitigating circumstance and determine whether each element would qualify independently as a mitigating factor. According to the circuit court, a combination of factors can constitute a "mitigating circumstance." *See* U.S. v. Cook, 938 F.2d 149 (9th Cir. 1991). The circuit court did not find that the

departure conflicted with the provisions of 28 U.S.C. § 994(e), and U.S.S.G. §5H1.2. According to the circuit court, Congress intended § 994(e) to ensure that people who lacked educational skills would not receive heavier sentences than people who did have such skills. For the court to use § 994(e) and the corresponding provision of the guideline to "prohibit a downward departure based on youthful lack of guidance would impute to Congress an intent it never manifested." The circuit court also found a "basic difference" between §5H1.6 and the departure. According to the circuit court, the guideline recommends against departure based on the present existence of family obligations and "does not even speak to a departure based on the absence of family guidance at an earlier age." The circuit court also found the degree of the departure reasonable. If the departure had been based solely on the fact that appellant's criminal history category overrepresented his past criminality the presumptive range would have been 235-293 months. Circuit precedent does not permit a departure below the applicable guidelines range for criminal history category I for criminal history overrepresentation. The degree of the downward departure was not unreasonable because the departure was also based on the effect that the defendant's youthful lack of guidance had on his present offense.

United States v. Hoyungowa, 930 F.2d 744 (9th Cir. 1991). The district court erred in failing to explain how the defendant's tribal criminal record warranted all or part of the ninety-month upward departure the court imposed.

Tenth Circuit

United States v. Little, 938 F.2d 1164 (10th Cir.), *cert. denied*, 112 S. Ct. 329 (1991). The district court did not err in making an upward departure where the appellant, convicted of voluntary manslaughter, committed the offense while awaiting trial on a state charge of murdering his five-week-old son. The circuit court agreed with the district court that the guidelines did not specifically account for the aggravating circumstances present in the instant case. The circuit court also held that the district court's decision to add two points to the appellant's criminal history score by analogizing to §4A1.1 was not unreasonable.

United States v. Rivas, 922 F.2d 1501 (10th Cir. 1991). The district court did not err in finding that the appellant's criminal history score did not adequately reflect the seriousness of his criminal history where his convictions for first degree murder, soliciting a first degree felony, and kidnapping resulted in the addition of only three points to his criminal history score. The three felony convictions were treated as one prior sentence. *See* U.S.S.G. §4A1.2(2) ("Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history"). The district court, however, erred in departing upward from the guideline range of 33-41 months to a sentence of 51 months, without making an "explicit reference in the record . . . as to the method used to determine the degree of the departure." *See* U.S. v. Jackson, 921 F.2d 985 (10th Cir. 1990) (*en banc*).

Eleventh Circuit

United States v. Delvecchio, 920 F.2d 810 (11th Cir. 1991). The district court erred in an alternative ruling that if the appellant was incorrectly sentenced as a career offender an upward departure was appropriate because his criminal history was the equivalent of a career offender. The district court may make a departure from the guideline range only after first calculating the appropriate guideline sentencing range. In the instant case, the sentencing judge did not determine the guideline range. He merely noted that if the appellant was not a career offender he would depart to the same 262 month sentence.

United States v. Johnson, 934 F.2d 1237 (11th Cir. 1991). The district court erred by increasing the appellant's offense level, after determining that his criminal history category did not adequately reflect the seriousness of his past criminal conduct. According to the circuit court, a district court in making an upward departure pursuant to U.S.S.G. §4A1.3, the court must look to the next highest criminal history category and determine whether that category more accurately reflects the defendant's criminal history.

United States v. Simmons, 924 F.2d 187 (11th Cir. 1991). The district court did not err in making an upward departure from the statutory minimum and guideline sentence of 15 years and imposing a sentence of 50 years imprisonment for the appellant, who was convicted of being a felon in possession of a firearm. The circuit court noted that the applicable guidelines do not contain a reference to 18 U.S.C. § 924(e) and

that while U.S.S.G. §5G1.1(b) transforms the statutory minimum into the presumptive guideline range, the guidelines assign no offense level or criminal history category which corresponds to the statutory minimum sentence. According to the circuit court, "[w]ithout a starting point on the grid, it is impossible to explain a departure in terms of increases in offense level or criminal history category." The departure was justified since "[n]either the statute nor the guidelines provide any means to factor the enhancement for obstruction of justice into the offense level, or to adjust the defendant's criminal history category based on conduct not used in calculating the statutory sentence.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

District of Columbia Circuit

United States v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991). The district court did not err in sentencing appellant as a career offender without first determining whether defendant's prior robbery convictions were crimes of violence. District courts are under no affirmative obligation to conduct this inquiry without a specific request by defendant to do so.

Second Circuit

United States v. Chartier, 933 F.2d 111 (2d Cir. 1991). The circuit court concluded that U.S.S.G. §4B1.1 does not require that the conviction for the first offense precede the second offense, only that the two qualifying convictions precede the instant offense. While the precise issue of sequence does not appear to have been explicitly raised or considered in other circuits, several courts have upheld the application of the career offender guideline where the first conviction did not precede the second offense. *See* U.S. v. Wildes, 910 F.2d 1484 (7th Cir. 1990); U.S. v. Jones, 898 F.2d 1461 (10th Cir.), *cert. denied*, 111 S. Ct. 111 (1990); U.S. v. Flores, 875 F.2d 1110 (5th Cir. 1989). In the instant case, the appellant had three prior robbery convictions in New York which were consolidated for sentencing and a federal conviction for robbery in Massachusetts. The appellant alleged that his four prior offenses were "part of a single common scheme or plan." Although this issue was not raised at trial, the circuit court decided that appellant "should have further opportunity to obtain a finding on an issue on which turns an increment of 15 years of imprisonment."

United States v. Richardson, 923 F.2d 13 (2d Cir. 1991). Where the appellant plead guilty to distribution of cocaine, and was previously convicted within the prior 15 years for robbery and assault, the district court did not err in holding that it lacked the authority to depart downward from the career offender guidelines on the basis of the small amount of cocaine involved in the appellant's offense. The circuit court rejected the appellant's argument that "Sentencing Commission did not intend such harsh treatment for street dealers." According to the circuit court, "[[t]he legislative history of the Federal Sentencing Guidelines and the language of the career offender proviso do not differentiate among types of dealers and do not in any way advocate treating street dealing career offenders differently from other career offenders." As a matter of law, the circuit court concluded that "a small quantity of controlled substance is not basis for downward departure from the career offender Guidelines range." *See* U.S. v. Hays, 899 F.2d 515 (6th Cir.), *cert. denied*, 111 S. Ct. 385 (1990).

Third Circuit

United States v. Amis, 926 F.2d 328 (3d Cir. 1991). The district court did not err in sentencing the appellant as a career offender and applying the enhanced penalty provision of 21 U.S.C. § 841(b)(1). The circuit court rejected the appellant's argument that the application of the career offender guideline to the enhanced penalty provision was double punishment for his prior convictions. *See* U.S. v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989).

United States v. McAllister, 927 F.2d 136 (3d Cir.), *cert. denied*, 112 S. Ct. 111 (1991). The district court erred in making a downward departure from the career offender guideline where the defendant had two prior adult felony convictions for crimes of violence. Relying on U.S. v. Preston, 910 F.2d 81 (3d Cir.

1990), *cert. denied*, 111 S. Ct. 1002 (1991), the appellate court stated that it need not look beyond the fact of the conviction and the charge to ascertain whether the conviction was a "violent felony," and that inquiry into the underlying facts of the two robberies was not necessary.

United States v. Shoupe, 929 F.2d 116 (3d Cir.), *cert. denied*, 112 S. Ct. 382 (1991). The district court erred in making a downward departure from the career offender guideline range of 168 to 210 months to a sentence of 84 months based on (1) appellant's youthfulness and immaturity at time of prior convictions, (2) the short timespan between the commission of the offenses, (3) the defendant's cooperation with the authorities, and (4) his responsibilities to support his minor child. The circuit court found the circumstances relied upon by the district court were adequately taken into account by the Commission. Rosenn, J., *dissenting:* The majority opinion applies the definition of "career offender" mechanically and rigidly. Other courts have read the provision more flexibly and have permitted downward departures from the career offender guidelines where the criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. *See* U.S. v. Lawrence, 916 F.2d 553 (9th Cir. 1990); U.S. v. Brown, 903 F.2d 540 (8th Cir. 1990).

Fourth Circuit

United States v. Bassil, 932 F.2d 342 (4th Cir. 1991). The district court erred in sentencing the appellant as a career offender where he was sentenced on the second requisite felony after he committed the instant offense. The circuit court rejected the government's argument that a guilty plea qualified as a prior conviction. On remand, the circuit court also suggested that the district court might consider a departure pursuant to §4A1.3 to reflect the harmfulness of the appellant's past criminal conduct.

See U.S. v. Hicks, 948 F.2d 877 (4th Cir. 1991), §1B1.3, p. 5.

United States v. Wilson, 951 F.2d 586 (4th Cir. 1991) *(petition for cert. filed Mar. 2, 1992)*. In a case of first impression, the Fourth Circuit held that the district court did not err in refusing to examine the factual circumstances behind appellant's prior conviction for robbery. Notwithstanding appellant's characterization of his prior robbery conviction as the offense of "pick-pocketing," the district court did not err in treating it as a crime of violence within the meaning of U.S.S.G. §§4B1.1 and 4B1.2, and in classifying appellant as a "career offender."

Sixth Circuit

United States v. LaSalle, 948 F.2d 215 (6th Cir. 1991). The district court erred in departing below the defendant's guideline range of 210-262 months to impose a sentence of sixty-three months based on that court's dissatisfaction with the career offender sentencing provisions of U.S.S.G. §4B1.1. The Sixth Circuit held that a district court "may not depart downward because he believes a career offender sentence would be excessive." The circuit court further noted that "[w]hether a judge agrees or disagrees with the guidelines, it is his duty to abide by those ranges and depart only in the 'unusual' cases where the guidelines do not adequately take into account the nature of the crime. In short, it is the United States Sentencing Commission guidelines, not individual judges, that now dictate the appropriate range of sentences in a case." *See* U.S. v. Robison, 904 F.2d 365, 373 (6th Cir.), *cert. denied*, 111 S. Ct. 360 (1990).

United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991). The district court did not err in sentencing the defendant as a career offender based on a prior conviction for armed bank robbery committed when he was seventeen. The court of appeals held that, while the guidelines' definition of prior felony convictions does limit such convictions to "prior adult" convictions (*see* U.S.S.G. §4B1.2 commentary, Application Note 3), the defendant in fact was tried and convicted as an "adult." The circuit court noted the defendant's extensive criminal history and concluded that, although Congress intended to preclude juveniles from career offender status, a sentencing court should not ignore a prior adult conviction merely because the defendant was seventeen at the time of the offense.

Seventh Circuit

United States v. Chapple, 942 F.2d 439 (7th Cir. 1991). The district court erred in considering the appellant a career offender where it found that the mere possession of a firearm constituted a crime of violence. According to the circuit court, "[d]espite the obvious dangers of convicted felons possessing firearms, it is quite a stretch to contend that simple possession alone constitutes a crime of violence." *See* U.S. v. Alvarez, 914 F.2d 915 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991). "[U]nless the use of the weapon is overtly implied it is not a crime violence . . . ." *See* U.S. v. Nichols, 740 F. Supp. 1332 (N.D. Ill. 1990).

United States v. Poff, 926 F.2d 588 (7th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 96 (1991). In an *en banc* decision, the Seventh Circuit held that the district court correctly concluded that U.S.S.G. §5K2.13 did not authorize departures where the appellant was convicted of a "crime of violence" as defined by U.S.S.G. §4B1.2. In the instant case, the appellant was convicted of threatening President Reagan. Her prior convictions for making bomb threats, threatening a county prosecutor, and arson required the trial judge to sentence her as a career offender. Section 5K2.13 limits the authority to decrease the sentences of defendants with reduced mental capacity to cases in which the defendant committed a non-violent offense and where "the defendant's criminal history does not indicate a need for incarceration to protect the public." According to the circuit court, "[c]areer offenders, by definition fail to meet his condition." Easterbrook, J., *dissenting:* Absent a clear statement from the Commission that "crime of violence" and "non-violent offense" are mutually exclusive, the judges in the dissent did not think the appellant "must be treated the same as a terrorist whose plan was thwarted only by chance."

Eighth Circuit

United States v. Adams, 938 F.2d 96 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 974 (1992). The circuit court rejected the appellant's argument that the district court erred in sentencing him as a career offender because the government failed to give him notice that his sentence would be enhanced under U.S.S.G. §4B1.1. In the instant case, the government filed an information pursuant to 21 U.S.C. § 851 that defendant faced a sentence of not less than 10 nor more than life if found guilty of Count I. The presentence report also clearly set forth the appellant's prior convictions and stated that he fell within the career offender category. *See* U.S. v. Wallace, 895 F.2d 487 (8th Cir. 1990); U.S. v. Auman, 920 F.2d 495 (8th Cir. 1990).

United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991). The district court did not err in finding that appellant's conviction for being a felon in possession of a firearm is a "crime of violence." According to the circuit court, "courts should look beyond the mere statutory elements of a crime when determining whether an offense is a crime of violence."

Ninth Circuit

United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991). The district court erred in justifying the degree of its departure by analogizing to the career offender provisions when the appellant was not a career offender because he had not been convicted of two crimes of violence at the time of the instant offense. In the instant case, the district court found that it was a quirk of timing that the defendant had been saved from being a career offender because he was awaiting sentencing after a *nolo contendere* plea for false imprisonment. The circuit court distinguished between a departure based on U.S.S.G. §4A1.3, which allows guided departures when other information provides a reliable substitute for a conviction, and U.S.S.G. §§4B1.1 and 4B1.2 which strictly require convictions. According to the circuit court, "[t]he harshness of the remedy explains the absolute requirement of a final conviction." The circuit court also noted that an analogy to the career offender provisions does not function well because "they are too blunt an instrument to serve that purpose." Also, by the time the appellant was sentenced on the instant offense the false imprisonment charges had been dropped.

See U.S. v. Hidalgo, 932 F.2d 805 (9th Cir. 1991), §4A1.2, p. 67.

See U.S. v. Mooneyham, 938 F.2d 139 (9th Cir.), *cert. denied*, 112 S. Ct. 443 (1991), §1B1.10., p. 12.

Tenth Circuit

United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991). The district court did not err in making a downward departure from the career offender category where "the defendant's two prior convictions were (a) committed when he was merely twenty years old, (b) committed within two months of each other, and (c) punished by concurrent sentences in the Kansas courts." The circuit court emphasized that all three factors in combination with each other justified the departure. According to the circuit court "[w]e cannot parse the factors, holding each one separately for consideration, without unfairly abusing the trial court's judgment." The circuit court also found that the extent of the departure was reasonable because the court did not depart below the offense level and criminal history category that was computed for the appellant's crime absent the career offender enhancement. Baldock, J. *dissenting:* "None of these factors, alone, or in combination, justify departure because all were adequately considered in formulating the sentencing guidelines."

United States v. Novey, 922 F.2d 624 (10th Cir.), *cert. denied*, 111 S. Ct. 2861 (1991). The district court did not err in punishing the appellant as a career offender when the government alleged only one prior conviction in the information it filed pursuant to 21 U.S.C. § 851(a)(1). The statutory requirement of 21 U.S.C. § 851 is satisfied with notice of one prior controlled substance conviction. This notice allows the district court to sentence a defendant to a maximum of 30 years under the recidivist provision of 21 U.S.C. § 841(b)(1)(C). Although the provisions of the career offender guidelines require two prior convictions, the appellant's sentence of 262 months in the instant case is within the statutory maximum penalty of 30 years. According to the circuit court, "[s]ection 851(a)(1) is satisfied when a defendant's guideline sentence is within the statutory maximum that could be imposed on the basis of the government providing notice of a single prior conviction." *See* U.S. v. Marshall, 910 F.2d 1241, 1244-45 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991); U.S. v. Wallace, 895 F.2d 487, 490 (8th Cir. 1990); *contra* U.S. v. Williams, 899 F.2d 1526, 1529 (6th Cir. 1990).

United States v. Walker, 930 F.2d 789 (10th Cir. 1991). The district court did not err in finding that the appellant's conviction for unlawful possession of a firearm by a felon was a crime of violence by considering his conduct in the instant offense. A review of the guidelines prior to the November 1, 1989 amendment to U.S.S.G. §4B1.1 and case law interpreting the guideline, indicates that "the conduct of the defendant in the instant offense can be taken into consideration in determining whether the defendant has committed a crime of violence for the purposes of sentencing under [U.S.S.G.] §4B1.1." In the instant case, since the defendant's conduct involved the actual firing of the firearm at a person, it falls squarely within the reasoning of U.S. v. Williams, 892 F.2d 296 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3221 (1990) and U.S. v. McNeal, 900 F.2d 119 (7th Cir. 1990). In so holding, the circuit court refused to follow the rationale of U.S. v. O'Neal, 910 F.2d 663 (9th Cir.), *amended and superseded*, 937 F.2d 1369 (1990), that the "by its nature" language of 18 U.S.C. § 16 means that possession of a firearm by a convicted felon necessarily constitutes a crime of violence.

Eleventh Circuit

United States v. Delvecchio, 920 F.2d 810 (11th Cir. 1991). The district court erred in sentencing the appellant as a career offender where his two prior controlled substance convictions were consolidated for sentencing pursuant to Rule 20. According to the circuit court, "[t]he prior convictions requirement is interpreted strictly: the defendant must have been sentenced twice in unrelated cases to classify as a career offender." *See* U.S. v. Dorsey, 888 F.2d 79 (11th Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).

United States v. Robinson, 935 F.2d 201 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 885 (1992). The district properly sentenced appellant under the applicable guideline range and not under the career offender provisions, since the offense level under the career offender guideline was less than the otherwise applicable offense level. According to the circuit court, U.S.S.G. §4B1.1 is a "sentence enhancement provision rather than one of reduction. This interpretation is strongly supported by Congress's intention that career offenders receive a sentence of imprisonment at or near the maximum term authorized by statute."

United States v. Stinson, 943 F.2d 1268 (11th Cir. 1991). The Eleventh Circuit held that illegal weapons possession by a convicted felon is inherently a "crime of violence" as defined by the sentencing guidelines. In the instant case, the appellant robbed a bank. When he was arrested a few days later, he was in possession of hand grenades, ammunition, components for the construction of bombs, a razor knife, and a sawed-off shotgun. The circuit court found that felon in possession is an offense that "by its nature presents a serious risk of physical injury to another." *See* U.S. v. O'Neal, 910 F.2d 663 (9th Cir.), *amended and superseded*, 937 F.2d 1369 (1990) (interpreting an earlier version of U.S.S.G. §4B1.1). [*But see* Amendment #433, effective November 1, 1991, stating that a felon in possession conviction is not considered a crime of violence within the meaning of U.S.S.G. §4B1.1.]

Young v. United States, 936 F.2d 533 (11th Cir. 1991). In a case of first impression for the Eleventh Circuit, the appellate court held that the government does not have to follow the notice requirements of 18 U.S.C. § 851(a)(1) in order to use a defendant's prior convictions to enhance a defendant's sentence as a career offender, so long as the enhanced sentence is still within the permissible statutory range. *See* U.S. v. Wallace, 895 F.2d 487 (8th Cir. 1990); U.S. v. Novey, 922 F.2d 624 (10th Cir.), *cert. denied*, 111 S. Ct. 2861 (1991); U.S. v. Sanchez, 917 F.2d 607 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1625 (1991); U.S. v. Marshall, 910 F.2d 1241 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 976 (1991).

§4B1.2 Definitions of Terms Used in Section 4B1.1

District of Columbia Circuit

See U.S. v. Bradshaw, 935 F.2d 295 (D.C. Cir. 1991), §4B1.1, p. 73.

Fourth Circuit

United States v. Adkins, 937 F.2d 947 (4th Cir. 1991). The Fourth Circuit joined the Eighth and Ninth Circuits in holding that in an atypical case a district court may make a downward departure where career offender status overstates the seriousness of the defendant's past conduct. According to the circuit court, "[a]t bottom 'career offender' is a type of, not an alternative to, criminal history." *See* U.S. v. Brown, 903 F.2d 540 (8th Cir. 1990); U.S. v. Lawrence, 916 F.2d 533 (9th Cir. 1990).

United States v. Johnson, 953 F.2d 110 (4th Cir. 1991). In a issue of first impression, the Fourth Circuit held that being a felon in possession is not a "crime of violence" within the meaning of U.S.S.G. §4B1.2. Therefore, the district court erred in sentencing appellant for possession of firearms by a convicted felon as a career offender. The court reasoned, "[w]hile a felon in possession of a firearm may pose a statistical danger to society, we refuse to interpret this statistical threat as evidence of specific intent on the part of an individual defendant. We hold, therefore, that the offense, felon in possession of a firearm, in the absence of any aggravating circumstances charged in the indictment, does not constitute a *per se* 'crime of violence' under the provisions of U.S.S.G. §4B1.2."

Fifth Circuit

See U.S. v. Guajardo, 950 F.2d 203 (5th Cir. 1991), §4A1.2, p. 65.

Sixth Circuit

United States v. Moreno, 933 F.2d 362 (6th Cir.), *cert. denied*, 112 S. Ct. 265 (1991). The district court did not err in imposing a 15-year term of imprisonment pursuant to 18 U.S.C. § 924(e). The circuit court rejected the appellant's argument that the exclusion in U.S.S.G. §4A1.2 of felony convictions not within 15 years of the instant offense controlled the sentencing in the instant case. According to the circuit court, "[s]ection 4A1.2 addresses the computation of a defendant's criminal history category for use in application of the sentencing guidelines. This section does not affect the statutory range set pursuant to 18 U.S.C. § 924(e)."

Eighth Circuit

United States v. Senior, 935 F.2d 149 (8th Cir. 1991). Defendant was convicted of conspiracy to distribute cocaine and possessing cocaine with intent to distribute. Defendant had three prior felony convictions for crimes of violence and two controlled substance offenses, which under the guidelines made him a career offender with a sentencing range of 292-365 months. The circuit court held that the district court did not err in departing downward from the career offender guideline to impose the statutory minimum sentence of 120 months. The circuit court affirmed the departure finding that, "[t]he overstatement of the seriousness of Senior's criminal history was a circumstance unusual enough to warrant departure."

Eleventh Circuit

Young v. United States, 936 F.2d 533 (11th Cir. 1991). The district court impermissibly sentenced the appellant as a career offender where the two predicate offenses were not controlled substance offenses as defined in U.S.S.G. §4B1.2. According to the circuit court, the government has the burden to prove that the defendant had two prior convictions for controlled substance offenses. In the instant case, since the appellant's convictions were state convictions, the court had to determine whether the convictions were "substantially similar to any of [the offenses] listed in subsection (2) of the guideline" or "are substantially equivalent to the offenses listed." According to the circuit court, the appellant's convictions for using forged prescriptions to obtain controlled substances were not "substantially similar" or "substantially equivalent" to the drug trafficking offenses listed at U.S.S.G. §4B1.2(2). The circuit court rejected the government's argument that any offense that may be used for statutory enhancement under 21 U.S.C. § 841(b)(1)(C) is substantially similar to the offenses in U.S.S.G. §4B1.2(2).

§4B1.3 Criminal Livelihood

Fifth Circuit

United States v. Cryer, 925 F.2d 828 (5th Cir. 1991). The district court did not err in applying the criminal livelihood adjustment where appellant, who was convicted of unlawfully possessing a credit card stolen from the mail, made $2,071.91 in unlawful credit card charges and stole the car in which the credit cards were found. The stolen car was valued at $15,000.00. According to the circuit court, "it would not have been error to treat the entire market value of the car--$15,000--as income for the year in which [appellant] stole it."

United States v. Quertermous, 946 F.2d 375 (5th Cir. 1991). In the instant case, the appellant was convicted of knowing possession of stolen mail. At sentencing the court adjusted his offense level pursuant to U.S.S.G. §4B1.3. On appeal he contended that the adjustment was in error because the total amount of income derived from his illegal activity did not reach the threshold amount under the guidelines and that stealing mail was not his primary occupation. Relying on U.S. v. Cryer, 925 F.2d 828 (5th Cir. 1991), the circuit court held that the value of the uncashed stolen checks was properly considered income from the appellant's crime and that the totality of the circumstances supported the finding that the appellant derived his primary source of income and livelihood from stealing mail.

Sixth Circuit

United States v. Reed, 951 F.2d 97 (6th Cir. 1991). The district court properly applied the criminal livelihood provision of U.S.S.G. §4B1.3 where the record indicated that the appellant had fraudulently obtained $17,000 worth of merchandise over a period of time when his legitimate income amounted to only $350.

Seventh Circuit

United States v. Rosengard, 949 F.2d 905 (7th Cir. 1991). Appellant plead guilty to one count of conspiring to engage in an illegal gambling business in violation of 18 U.S.C. § 371, and one count of failing to register with the I.R.S. as a person engaged in the business of accepting wagers, in violation of 26 U.S.C.

§ 7203. The district court did not err in sentencing appellant pursuant to the criminal livelihood enhancement, U.S.S.G. §4B1.3, where appellant's own written statements and the presentence investigation report supported its factual finding that appellant engaged in illegal gambling as his livelihood.

§4B1.4 Armed Career Criminal

Second Circuit

United States v. Mitchell, 932 F.2d 1027 (2d Cir. 1991). The district court did not err in sentencing the appellant, convicted of felony possession of a firearm, as an armed career criminal pursuant to 18 U.S.C. § 924(e)(1) where he had the requisite three prior convictions of crimes of violence. The circuit court rejected appellant's argument that § 924(e)(1) only applies when a defendant both commits and is convicted for each predicate act before he commits and is convicted of the next act. According to the circuit court, the language of the statute "unambiguously requires that a defendant's three convictions stem from three separate criminal episodes and does not suggest, much less require, that the criminal acts and prior convictions take place in any particular sequence." *See* U.S. v. Schieman, 894 F.2d 909 (7th Cir.), *cert. denied*, 111 S. Ct. 155 (1990); U.S. v. Schoolcraft, 879 F.2d 64 (3d Cir.), *cert. denied*, 110 S. Ct. 546 (1989); U.S. v. Wicks, 833 F.2d 192 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); U.S. v. Herbert, 860 F.2d 620 (5th Cir. 1988), *cert. denied*, 490 U.S. 1070 (1989).

Fourth Circuit

United States v. Williams, 946 F.2d 888 (4th Cir. 1991) (table). The district court erred in failing to impose a minimum sentence of 15 years' incarceration pursuant to 18 U.S.C. § 924(e)(1). Section 5G1.1(b) "directs that where a statutorily required minimum sentence is greater than the maximum applicable Guideline range, the statutorily required minimum sentence shall be the Guidelines sentence."

Fifth Circuit

United States v. Fields, 923 F.2d 358 (5th Cir.), *cert. denied*, 111 S. Ct. 2066 (1991). The district court did not err in sentencing the appellant under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), where the government introduced proof of conviction of only one prior felony. In the Fifth Circuit, in most instances, it is error to admit proof of more than one prior felony to prove that the defendant is a convicted felon because of the prejudicial nature of the evidence. To give effect to 18 U.S.C. § 924(e)(1), the government is allowed to prove that the defendant committed three felonies at the sentencing stage. In the instant case, the government met its burden by evidence in the presentence report indicating that the appellant had twelve prior felonies. The government did not need to specify which three of the twelve felonies it was relying upon for imposing an enhanced sentence under 18 U.S.C. § 924(e)(1).

Sixth Circuit

United States v. Wolak, 923 F.2d 1193 (6th Cir.), *cert. denied*, 111 S. Ct. 2824 (1991). The district court erred in making an upward departure from a mandatory minimum sentence of 15 years under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1) and imposing a sentence of 240 months. According to the circuit court, "the very factors which the court found aggravating were the same factors that motivated Congress to pass the ACCA and which led to a criminal history category of VI (the highest) for the defendant. A person with a long criminal history has obviously not learned much from past incarcerations and is indeed a potential threat to society. However, that is why the defendant, who committed an offense with a basic maximum penalty of only five years, ended up with a 15-year minimum sentence being imposed."

Eighth Circuit

United States v. Cornelius, 931 F.2d 490 (8th Cir. 1991). The district court erred in finding that the defendant's conviction for breaking and entering did not constitute burglary under Taylor v. U.S., 495 U.S. 575 (1990), and that the defendant was, therefore, not an armed career criminal. According to the circuit

court, Taylor does not prevent the district court from looking behind defendant's guilty plea to breaking and entering to determine whether the elements of the offense for which he was convicted constituted generic burglary. *See* U.S. v. Payton, 918 F.2d 54 (8th Cir. 1990).

Eleventh Circuit

See U.S. v. Simmons, 924 F.2d 187 (11th Cir. 1991), §4A1.3, p. 72.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.3 Conditions of Probation

Ninth Circuit

United States v. Blue Mountain, 929 F.2d 526 (9th Cir. 1991). The district court erred in sentencing four soft-drink companies, that were convicted of price fixing, to pay $600,000 into a fund for substance abuse centers, as a condition of probation. Price-fixing and drug and substance abuse programs "are in no way related." According to the circuit court, "[t]he judiciary should not take upon itself the role of selecting beneficiaries of defendant's crimes."

Part C Imprisonment

§5C1.1 Imposition of A Term of Imprisonment

Third Circuit

United States v. Perakis, 937 F.2d 110 (3d Cir. 1991). The circuit court lacked jurisdiction to review the district court's imposition a term of imprisonment instead of probation which the defendant requested.

Sixth Circuit

United States v. Jalili, 925 F.2d 889 (6th Cir. 1991). The district court lacked jurisdiction under 28 U.S.C. § 2255 to hear a challenge to the execution of defendant's sentence. The direction in the sentencing order that the defendant serve his ten-month sentence at the Community Treatment Center was mere surplusage and did not invalidate the sentence. *See* U.S. v. Herb, 436 F.2d 566 (6th Cir. 1971) (per curiam). The district court, therefore, erred in vacating its original sentence of ten months imprisonment. According to the circuit court, "[a]lthough the intentions of the district judge may have been thwarted by the wording of his original sentencing order . . . it is improper to use collateral attack as a mechanism for ensuring that a judge's expectations are carried out."

Part D Supervised Release

Fourth Circuit

United States v. Swan, 940 F.2d 654 (4th Cir. 1991) (table). The district court did not err by imposing a term of supervised release in addition to the maximum term of imprisonment although the total sentence exceeded the statutory maximum. *See* U.S. v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990); U.S. v. Butler, 895 F.2d 1016 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 82 (1990).

§5D1.1 Imposition of a Term of Supervised Release

Sixth Circuit

United States v. Strozier, 940 F.2d 985 (6th Cir. 1991). The district court did not err in *sua sponte* amending a sentencing order one week after it had been entered. Relying on U.S. v. Cook, 890 F.2d 672 (4th Cir. 1989), the circuit court held that "[n]o prejudice is suffered by the defendant if the district court amends a sentence which would have otherwise violated a mandatory provision of the sentencing guidelines." According to the circuit court "a court may *sua sponte* amend a sentence (1) if it does so within the time of appeal and (2) only amends the sentence to conform it to the mandatory provision of the sentencing guidelines." In the instant case, the district court, *sua sponte*, added a three year term of supervised release to the appellant's split sentence of seven months in prison and seven months of community confinement. The circuit court held that "community confinement" is included within the definition of "imprisonment" as it is used in U.S.S.G. §5D1.1(a) and therefore since appellant's sentence exceeded one year, the guidelines required a term of supervised release. Nevertheless, the district court's authority to *sua sponte* amend defendant's sentence allowed it to only conform the sentence to a mandatory requirement of the guidelines, or in this case, to two years.

Part E Restitution, Fines, Assessments, Forfeitures

Sixth Circuit

United States v. Hopper, 941 F.2d 419 (6th Cir. 1991). The district court erred by imposing a fine on the appellant without considering factors such as his income, his ability to pay, and the effect that the fine might have on his dependents. The district court also did not consider allowing the appellant to pay his fine in installments.

Eighth Circuit

United States v. West, 942 F.2d 528 (8th Cir. 1991). The district court erred in imposing restitution without considering the defendant's financial resources, his financial needs and earning ability, and the needs of his dependents.

§5E1.1 Restitution

Fourth Circuit

United States v. Sharp, 927 F.2d 170 (4th Cir.), *cert. denied*, 112 S. Ct. 139 (1991). The district court erred in granting restitution for lost income in a case involving property damage where there was no bodily injury to a victim. *See* 18 U.S.C. § 3663(a). The district court properly took into account the entire amount of damage to the mine that the defendants bombed, including the cost of repairs. On remand, the district court was instructed to make findings on an individualized basis, balancing the victim's interest in compensation against each defendant's ability to pay.

Eleventh Circuit

United States v. Husky, 924 F.2d 223 (11th Cir.), *cert. denied*, 112 S. Ct. 111 (1991). The district court erred in ordering the appellant to pay restitution for the victim's mental suffering following her rape. According to the circuit court, 18 U.S.C. § 3663(b)(2) does not authorize the court to compel a defendant to pay for losses suffered by a victim, other than those specifically listed in the statute. Although 18 U.S.C. § 3664(a) and the sentencing guidelines provide that in determining whether to order restitution and the appropriate amount, a court may consider "the amount of loss sustained by any victim as a result of the offense," these provisions do not authorize restitution for expenses not enumerated in the statute.

United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991). The district court erred in determining that the issue of restitution could be reopened at such time in the future as when the defendant began to earn

money. According to the circuit court, "18 U.S.C. § 3663 suggests that restitution must be ordered at the time of sentencing and not thereafter."

§5E1.2 Fines for Individual Defendants

Fifth Circuit

United States v. Hagmann, 950 F.2d 175 (5th Cir. 1991). The district court did not err in assessing a fine pursuant to U.S.S.G. §5E1.2 without explicitly examining appellant's ability to pay. The record indicated that appellant argued he was unable to pay a fine and that the government argued the opposite. The court's imposition of a fine, and the fact that the court imposed a fine that was only a fraction of the statutory maximum and waived the interest requirement, demonstrate that the district court gave due consideration to appellant's ability to pay a fine. The guideline requirement that the fine imposed also include an amount equivalent to the government's cost of imprisonment, pursuant to U.S.S.G. §5E1.2(i), did not violate the Sentencing Reform Act, and is not unconstitutional. The Fifth Circuit held that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment--an indicator of the actual harm each has inflicted upon society--is a rational means to assist the victims of crime collectively."

Seventh Circuit

United States v. Blackman, 950 F.2d 420 (7th Cir. 1991). The district court did not err in considering defendant's assets and his "ability to earn excellent wages to pay the obligation" when imposing a fine. A district judge may properly consider not only the assets and liabilities, but also the earning capacity of a defendant when assessing a fine. U.S.S.G. §5E1.2(d)(2)

United States v. Bradach, 949 F.2d 1461 (7th Cir. 1991). A jury convicted the appellant of eleven counts involving false statements and sentenced him to 30 months imprisonment and a $50,000 fine. The appellant challenged the imposition of the fine in his case because he asserts the district court did not weigh the factors listed in 18 U.S.C. § 3572(a). The circuit court found that, in fact, the district court had weighed all statutory factors relevant in his case as evidenced by the presentence report and "[a]lthough the statutory factors were considered with respect to defendant's ability to pay a $40,000 fine rather than a $50,000 fine, the defendant did not argue that his ability to pay $50,000 was substantially less than his ability to pay $40,000. Perhaps if defendant had objected to the increased fine at trial, he could have demonstrated that a 25% increase in his fine was unfair . . . . However, he failed to raise such an objection . . . [Thus] the trial judge's determination . . . was permissible."

Ninth Circuit

United States v. Nazifpour, 944 F.2d 472 (9th Cir. 1991). The district court did not err in imposing restitution pursuant to Chapter Five, Part E of the guidelines where the appellant had chosen a lifestyle beyond his means. The circuit court found that the appellant earned $31,000 per year, owed debts to relatives that could be paid off at any time, was paying off a new BMW automobile, and was allowing a friend to live rent-free in his apartment. The circuit court held that the payment "schedule could be met if [the appellant] lived within his means."

Tenth Circuit

United States v. Nez, 945 F.2d 341 (10th Cir. 1991). The district court did not err by imposing a fine as part of the appellant's sentence where it had undisputed evidence concerning the relevant factors set forth in U.S.S.G. §5E1.2. The circuit court rejected the appellant's claim that the district court committed plain error by failing to make specific findings on the record concerning the factors in U.S.S.G. §5E1.2. According to the circuit court, "a sentencing court's failure to make explicit findings in support of imposing a fine is not plain error where the sentencing court had before it undisputed and unchallenged facts necessary to the imposition of a substantial fine." U.S. v. Harvey, 885 F.2d 181 (4th Cir. 1989); U.S. v. Weir, 861 F.2d 542, 545 (9th Cir. 1988), *cert. denied*, 489 U.S. 1089 (1989); U.S. v. Condon, 816 F.2d 434, 436 (8th Cir. 1987).

United States v. Ruth, 946 F.2d 110 (10th Cir. 1991). The district court did not err in imposing a fine pursuant to U.S.S.G. §5E1.2 based on the appellant's "financial profile" and "future earning potential." In the instant case, "[appellant] had considerable assets, . . . an expensive car, an expensive boat, a house in Texas, and $25,000 in cash." Although some, but not all, of his assets were seized in a forfeiture proceeding, a loss of assets obtained in illegal activity did not insulate the defendant from a fine.

United States v. Williams, 945 F.2d 325 (10th Cir. 1991). The district court erred in imposing a fine after the appellant's conviction for use of a communication facility in connection with an unlawful drug transaction. In this case, the circuit court vacated the fine because "the district court apparently relied on the wrong guideline fine range and because we cannot determine whether the imposition of the entire fine was based on the district court's erroneous determination concerning ability to pay vis-a-vis the rental property." Here the circuit court could find no evidence in the record to support the district court's finding that the appellant was stripping herself of rental property to avoid paying a fine. According to the circuit court, "[w]e think that defendant should be punished with respect to the offense of conviction, rather than upon her financial decision to satisfy 'perfectly legitimate obligations' in a priority not endorsed by the district court. Defendant met her burden of showing that the rental house should not be included in any ability to pay calculation."

Part G Implementing The Total Sentence of Imprisonment

First Circuit

United States v. Benefield, 942 F.2d 60 (1st Cir. 1991). The district court erred by amending the appellant's original sentence for a conviction under 18 U.S.C. § 922(g)(1) and imposing a more severe sentence after he had begun serving his period of confinement under the original sentence.

Eleventh Circuit

United States v. Woodard, 938 F.2d 1255 (11th Cir. 1991). The district court erred in imposing a general sentence on counts I and III, rather than a separate and specific sentence on each count. The circuit court rejected the government's argument that the adoption of the sentencing guidelines changed the context of sentencing so that the court did not need to follow the rule against general sentences. According to the circuit court, "the guidelines and the commentary indicate not that general sentences are permissible under the guidelines, but that they are prohibited."

§5G1.1 Sentencing on a Single Count of Conviction

District of Columbia Circuit

United States v. Green, 952 F.2d 414 (D.C. Cir. 1991). The district court erred in imposing a prison sentence based on an amended version of U.S.S.G. §2D2.1 which took effect after the date of defendant's offense but prior to his sentencing. The amendment provided a 63-78 month sentencing range while the previous version provided for a sentencing range of 0-6 months. The substantive statute under which the defendant was convicted, 21 U.S.C. 844(a), established a mandatory minimum imprisonment term of not less that 5 years and not more than 20 years. Defendant's sentence, 63 months, was improper because at the time of the offense U.S.S.G. §5G1.1(b) expressly provided that the proper sentence was the mandatory minimum stated in the statute that established the offense. According to the circuit court, application of the amended version of U.S.S.G. §2D2.1 violated the *ex post facto* clause, since the amended guideline effected substantive changes which adversely affected the defendant's sentence.

First Circuit

United States v. Rodriguez, 938 F.2d 319 (1st Cir. 1991). The district court erred in departing below the statutory minimum sentence based on the defendant's mental condition because "the guidelines do not supersede a minimum sentence mandated by statute." In the instant case, the appellant was convicted of

eleven criminal charges including possession with intent to distribute more than 500 grams of cocaine, which carries a statutory mandatory minimum of five years.

Second Circuit

See U.S. v. Gonzalez, 922 F.2d 1044 (2d Cir.), *cert. denied*, 112 S. Ct. 660 (1991), §2A1.1, p. 13.

Fifth Circuit

United States v. Pace, No. 90-8543 (5th Cir. Dec. 20, 1991). The government challenged the defendant's sentence following his convictions for drug distribution. In this appeal, the government asserted that the district court's decision to impose a sentence below the statutory minimum was in error. The defendant's guideline range was 51-63 months. The offense of conviction, 21 U.S.C. §§ 841(a) and 846, punishable under 21 U.S.C. § 841(b) provides for a sentence of not less than five years. The district court sentenced the defendant to 51 months, 9 months less than the statutory minimum, and then added 9 months pursuant to 18 U.S.C. § 3147 because the defendant was convicted in state court of assault, following his pretrial release. The district court judge thought that by imposing the additional 9 months pursuant to 18 U.S.C. § 3147, he "brought the sentence up to a total equal to the statutory minimum." The circuit court held that "[t]his method of computing the total sentence was incorrect. [T]he guidelines do not supplant the minimum sentences provided for in various criminal statutes."

Ninth Circuit

United States v. Williams, 939 F.2d 721 (9th Cir. 1991). The district court did not err in sentencing appellant under 21 U.S.C. § 841(b)(1)(B) which requires a mandatory minimum ten-year sentence for repeat offenders of certain drugs. The circuit court rejected the appellant's argument that Congress implicitly repealed mandatory minimum sentence provisions when it enacted the Sentencing Reform Act. Section 5G1.1 flatly contradicts the appellant and so does Congress's intent.

§5G1.2 Sentencing on Multiple Counts of Conviction

Fifth Circuit

United States v. Martinez, 950 F.2d 222 (5th Cir. 1991). The district court did not err in sentencing defendant to consecutive terms of imprisonment where the applicable Guideline range for defendant's convictions exceeded the statutory maxima. "If the sentence imposed on the count carrying the statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects sentences on all counts shall run concurrently, except to the extent otherwise required by law." U.S.S.G. §5G1.2(d).

United States v. Parks, 924 F.2d 68 (5th Cir. 1991). The district court did not err in imposing concurrent sentences for appellant's pre-guideline convictions and separate concurrent sentences for her post-guideline convictions with the two groups of sentences to run consecutively where the court considered pre-guideline conduct in calculating the guideline sentence. The circuit court noted the Commission's advisory that when relevant conduct for a guideline offense overlaps with conduct sanctioned as part of a pre-guideline count there is a potential for double-counting. According to the circuit court, however, "[t]he Guidelines and the advisory still afford the district court discretion in imposing consecutive sentences on defendants comparable to [appellant]. The advisory sets out no absolute rule." *See* U.S. v. Watford, 894 F.2d 665 (4th Cir. 1990).

Eighth Circuit

United States v. Lincoln, 925 F.2d 255 (8th Cir.), *cert. denied*, 111 S. Ct. 2838 (1991). The district court did not err in sentencing the appellant to consecutive sentences where only one count was subject to the sentencing guidelines. Relying on U.S. v. Watford, 894 F.2d 665 (4th Cir. 1990) and U.S. v. Garcia, 903

F.2d 1022 (5th Cir.), *cert. denied*, 111 S. Ct. 364 (1990), the appellate court concluded that "it was not an abuse of discretion to impose consecutive sentences when a defendant stands convicted of related pre-Guidelines and Guidelines offenses--even if the Guidelines would mandate concurrent sentences if both offenses were subject to them."

Ninth Circuit

United States v. Pedrioli, 931 F.2d 31 (9th Cir. 1991). The district court erred in failing to follow the usual procedures for departing from the guidelines when it chose to exercise its discretion under 18 U.S.C. § 3584(a) to sentence consecutively rather than to run the sentences concurrently. *See* U.S. v. Stewart, 917 F.2d 970 (6th Cir. 1990); U.S. v. Miller, 903 F.2d 341 (5th Cir. 1990); U.S. v. Rogers, 897 F.2d 134 (4th Cir. 1990); U.S. v. Fossett, 881 F.2d 976 (11th Cir. 1989). Three circuits have noted in *dicta* that the district court's discretion under 18 U.S.C. § 3584(a) is not bounded by the departure procedures. *See* U.S. v. Nottingham, 898 F.2d 390 (3d Cir. 1990); U.S. v. Schmude, 901 F.2d 555 (7th Cir. 1990); U.S. v. Smitherman, 889 F.2d 189 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1493 (1990).

§5G1.3 Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment

Fifth Circuit

United States v. Brown, 920 F.2d 1212 (5th Cir.), *cert. denied*, 111 S. Ct. 2034 (1991). A district court "may prospectively forbid its sentence from being served concurrently with any sentence that may subsequently be handed down by a state court, even when the state proceedings arise from identical offense conduct." According to the circuit court, "[w]hether a sentence imposed should run consecutively or concurrently is committed to the sound discretion of the district court, subject to consideration of the factors set forth in 18 U.S.C. § 3553(a)." In the instant case the district court did not err in determining that the appellant's crime, bank robbery, warranted a consecutive sentence to any imposed in state court for the same criminal conduct.

Eighth Circuit

United States v. Lincoln, 925 F.2d 255 (8th Cir.), *cert. denied*, 111 S. Ct. 2838 (1991). The district court did not err in sentencing the appellant to consecutive sentences where only one count was subject to the sentencing guidelines. Relying on U.S. v. Watford, 894 F.2d 665 (4th Cir. 1990) and U.S. v. Garcia, 903 F.2d 1022 (5th Cir.), *cert. denied*, 111 S. Ct. 364 (1990), the appellate court concluded that "it was not an abuse of discretion to impose consecutive sentences when a defendant stands convicted of related pre-Guidelines and Guidelines offenses--even if the Guidelines would mandate concurrent sentences if both offenses were subject to them."

Part H Specific Offender Characteristics

§5H1.1 Age (Policy Statement)

District of Columbia Circuit

United States v. Lopez, 938 F.2d 1293 (D.C. Cir. 1991). The circuit court held that it lacked authority to review the adequacy of the Commission's statement of reasons in support of its conclusion that age is not ordinarily relevant to sentencing. The circuit court stated, "That by subjecting the promulgation of the guidelines to . . . one section of the APA, Congress affirmed that the Commission's rulemaking was not subject to any other provisions of the APA, including those for review."

Fifth Circuit

United States v. Guajardo, 950 F.2d 203 (5th Cir. 1991). The district court did not err in refusing to depart downward from appellant's applicable guideline range on the basis of appellant's age or physical condition pursuant to U.S.S.G. §§5H1.1 and 5H1.4. Neither the appellant's age of fifty-five nor the state of

his health, which included cancer in remission, high blood pressure, a fused right ankle, an amputated left leg, and drug dependency, constituted extraordinary circumstances that would justify a downward departure.

United States v. Hatchett, 923 F.2d 369 (5th Cir. 1991). The district court erred in sentencing the defendants based on their socioeconomic status, educational opportunities and youthfulness. The district court judge filed a supplemental sentencing order and was granted *amicus curiae* status on appeal after the government conceded error to two of the appellants. The district court judge explained that he was merely lecturing the appellants. According to the circuit court, "[t]he judge's statements at sentencing include both permissible and impermissible considerations and are too interrelated to characterize some as actual considerations in sentencing and others as mere observations."

United States v. White, 945 F.2d 100 (5th Cir. 1991). The district court erred in departing from the guidelines based on the appellant's age (eighteen years old). The circuit court held "[t]he guidelines have adequately taken into consideration the defendant's age in §5H1.1, specifying extremely limited circumstances under which a sentencing court may use age in departing from the applicable range. The circumstance of being young is not a permissible consideration under the guidelines."

§5H1.2 Education and Vocational Skills (Policy Statement)

Fifth Circuit

See U.S. v. Hatchett, 923 F.2d 369 (5th Cir. 1991), §5H1.1, p. 86.

Ninth Circuit

See U.S. v. Floyd, 945 F.2d 1096 (9th Cir. 1991), §4A1.3, p. 71.

§5H1.3 Mental and Emotional Conditions (Policy Statement)

First Circuit

See U.S. v. Rodriguez, 938 F.2d 319 (1st Cir. 1991), §5G1.1, p. 83.

Fifth Circuit

United States v. Vela, 927 F.2d 197 (5th Cir.), *cert. denied*, 112 S. Ct. 214 (1991). The district court did not err in refusing to make a downward departure from the guideline range because of the corrupting influence of appellant's family history. Although the appellant's stepfather sexually abused her and the denial of the abuse by her mother predisposed her to commit the offense, the court found that her family history was not "the type of extraordinary mental and emotional conditions that impact the crime and thus does not permit a departure."

Sixth Circuit

United States v. Harpst, 949 F.2d 860 (6th Cir. 1991). The district court erred in basing a downward departure on the defendant's suicidal tendencies. While the record indicated that the defendant had contemplated suicide in the early days after his crime was exposed, both his wife and an examining psychologist testified that those self-destructive tendencies had been resolved. The circuit court noted that whether suicidal tendencies were a proper basis for a departure was an issue of first impression in the Sixth Circuit, and stated its hesitancy to establish "a rule permitting departures on the basis of appellee's avowed self-destructive tendencies." *See* U.S. v. Studley, 907 F. 2d 254, 259 (1st Cir. 1990).

First Circuit

United States v. Hilton, 946 F.2d 955 (1st Cir. 1991). The defendant sought a downward departure pursuant to U.S.S.G. §5H1.4 because she suffered from calcinosis universalis, a form of dermatomyositis where calcium deposits form under the skin and often become infected, requiring immediate attention by a physician. The district court refused to depart, finding that the federal prison system had the capacity to "accommodate the defendant's medical needs" and that the condition did not "justify a sentence of no imprisonment under 5H1.4." On appeal, the appellant claimed that the district court erroneously believed that U.S.S.G. §5H1.4 allows only two choices: a guideline sentence or a sentence of no imprisonment. The circuit court rejected the appellant's characterization of the district court's ruling and held "U.S.S.G. §5H1.4 clearly contemplates that, if an extraordinary physical impairment is shown to exist, a sentencing court is not faced with an all-or-nothing choice between a guideline sentencing range of imprisonment or no imprisonment, but may lawfully decide to impose a reduced prison sentence below the guideline sentencing range." The district court's statement that the appellants' condition was not one that justified no imprisonment" under U.S.S.G. §5H1.4 was found by the circuit court to be a direct response to the appellant's repeated argument that she should not be incarcerated at all. The circuit court held "[w]hen, as here, a party has couched her plea in terms of a yea-or-nay choice between imprisonment or no imprisonment, we cannot read too much into the judge's adoption of the party's parlance in denying the plea." The circuit court also rejected the appellant's claim that the district court mistakenly believed that U.S.S.G. §5K2.0 did not furnish a basis for downward departure independent of U.S.S.G. §5H1.4 and held "[w]e believe that, in a case like this one, section 5H1.4's exception for 'extraordinary physical impairment' is co-extensive with section 5K2.0's 'mitigating circumstance' requirement insofar as departures are concerned, . . . [u]nder either section, a downward departure would necessitate the existence of some extraordinary physical impairment."

United States v. Rushby, 936 F.2d 41 (1st Cir. 1991). The district court did not err by failing to consider defendant's family responsibilities, employment record, or alcohol and drug dependence in its refusal to depart from the Guideline sentence.

Fifth Circuit

See U.S. v. Guajardo, 950 F.2d 203 (5th Cir. 1991), §5H1.1, p. 85.

Sixth Circuit

See U.S. v. Harpst, 949 F.2d 860 (6th Cir. 1991), §5H1.1, p. 86.

Ninth Circuit

United States v. Martin, 938 F.2d 162 (9th Cir. 1991) *(petition for cert. filed Jan. 17, 1992)*. The district court did not err in refusing to make a downward departure based on the defendant's post-arrest, pre-sentencing drug rehabilitation efforts. The Ninth Circuit agrees with the Third Circuit's reading of §5H1.4 "that dependence upon drugs, or separation from such a dependency, is not a proper basis for a downward departure from the guidelines." *See* U.S. v. Pharr, 916 F.2d 129 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991). According to the appellate court, "to permit departure for post-arrest drug rehabilitation would provide a benefit to defendants with a drug problem that is unavailable to defendants without one."

United States v. Sanchez, 933 F.2d 742 (9th Cir. 1991). The district court erred in making a six-month downward departure from the defendant's sentence for unarmed bank robbery based on the remoteness of his convictions, the calculation of a parole violation, and his drug dependency. The Commission has adequately considered these factors and specifically prohibits a downward departure unless the offense is non-violent and the drug use is involuntary.

Eleventh Circuit

United States v. Williams, 948 F.2d 706 (11th Cir. 1991). The district court did not err in refusing to make a downward departure from the applicable Guideline range, ruling that it had no discretion to make a downward departure for recovery from drug addiction. The district court would have possessed discretion to make a downward departure in this case if recovery from drug addiction was a factor "of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described." U.S.S.G. §5K2.0. The circuit court found that, "[d]rug dependence . . . is not a reason for imposing a sentence below the Guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program." U.S.S.G. §5H1.4. The district courts possess discretion to depart downward on the basis of post-arrest, pre-sentence recovery from addiction, but only in extraordinary cases. *See* U.S. v. Sklar, 920 F.2d 107, 115-117 (1st Cir. 1990). The degree of recovery achieved by the defendant in this case was not unusual enough to merit a downward departure.

§5H1.5 Previous Employment Record (Policy Statement)

First Circuit

See U.S. v. Rushby, 936 F.2d 41 (1st Cir. 1991), §5H1.4, p. 87.

Fourth Circuit

United States v. Porter, 948 F.2d 1283 (4th Cir. 1991) (table). The defendant plead guilty to engaging in an illegal gambling business in violation of 18 U.S.C. § 1955. The district court erred in departing downward based on the defendant's employment record and his attitude toward his offense. Section 5H1.5 states that a defendant's "[e]mployment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." Also, without unusual circumstances, the two-level adjustment for "acceptance of responsibility" adequately takes into consideration a defendant's attitude toward his offense.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)

First Circuit

United States v. Carr, 932 F.2d 67 (1st Cir.), *cert. denied*, 112 S. Ct. 112 (1991). The district court erred in basing a downward departure on the defendants' family responsibilities for their four-year old son and the fairness of their sentences in comparison with other sentences imposed by the court. The circuit court stated, "[w]e do not think that responsibilities to their four-year-old son place defendants outside the 'heartland' of typical cases." The circuit court also concluded that the "district court's individual beliefs as to proportionality and uniformity based on sentencing in other cases cannot alone constitute aggravating or mitigating circumstances not adequately taken into consideration by the Sentencing Commission."

See U.S. v. Rushby, 936 F.2d 41 (1st Cir. 1991), §5H1.4, p. 87.

Fifth Circuit

United States v. O'Brien, 950 F.2d 969 (5th Cir. 1991). The district court erred in departing downward from a guideline range of 33-41 months because of the appellant's "work in the community and [his] interest in providing assistance to those who are less fortunate." The circuit court vacated the sentence because "neither of these are adequate reasons for departure from the guideline range." The circuit court further stated that the "factors enumerated in §5H1 may supply a basis for determining what term of imprisonment is appropriate within the applicable guideline range, . . . but they cannot be used to depart

below the range . . . [A] sentence . . . based on individual characteristics . . . partake[s] of the model of penology Congress rejected in the Sentencing Reform Act." *See* U.S. v. Burch, 873 F.2d 765 (5th Cir. 1989).

Seventh Circuit

See U.S. v. Thomas, 930 F.2d 526 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991), §2D1.1, p. 20.

Ninth Circuit

See U.S. v. Floyd, 945 F.2d 1096 (9th Cir. 1991), §4A1.3, p. 71.

Tenth Circuit

United States v. Pena, 930 F.2d 1486 (10th Cir. 1991). The district court did not err in making a downward departure from a guideline range of 27-33 months to a sentence of five years probation because of defendant's "unique family responsibility" and other circumstances. The defendant was a single mother whose income was the only source support for herself and her two-month old child. She had been steadily employed for a long time and is providing financial support for her 16 year-old daughter, who herself was a single mother of a two-month old child. The defendant also had no prior record of drug abuse, nor any prior felony criminal convictions. According to the circuit court, the "aberrational character of her conduct, combined with her responsibility to support two infants, justified the departure." The circuit court also rejected the government's argument that the district judge impermissibly used defendant's sex as a basis for departure. According to the circuit court, "[w]e find nothing in the record or in the judge's reasoning to suggest that he departed because [appellant] is a woman or that he would have refused to depart in these circumstances had she been a man."

§5H1.10 Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)

District of Columbia Circuit

United States v. Lopez, 938 F.2d 1293 (D.C. Cir. 1991). In refusing to depart downward on the basis of the appellant's personal background, the circuit court found that the sentencing judge defined "socioeconomic status" too broadly and incorrectly concluded that U.S.S.G. §5H1.10 left him no discretion to consider the defendant's special circumstances. According to the circuit court, "[v]iolence among family members and its attendant dislocations do not follow class lines, nor should class lines determine whether a sentencing judge may consider them."

Fourth Circuit

United States v. Graham, 946 F.2d 19 (4th Cir. 1991). The district court erred in basing its decision to depart from the fine range on its finding that the Commission had not considered that a defendant may possess wealth sufficient to permit payment of a larger fine. According to the circuit court, "to permit an upward departure based on the defendant's ability to pay a greater fine would be tantamount to holding that the district court may impose any fine amount it determined the defendant's economic situation would permit, thereby effectively nullifying the fine guideline." The circuit court was concerned that the sentence would send an improper message that the preferred punishment for affluent defendants would be a fine in lieu of incarceration.

Fifth Circuit

See U.S. v. Hatchett, 923 F.2d 369 (5th Cir. 1991), §5H1.1, p. 86.

Sixth Circuit

United States v. Harpst, 949 F.2d 860 (6th Cir. 1991). The district court erred in granting a downward departure from the defendant's 12-18 month guideline range for embezzlement to impose a

sentence of five years probation with six months home detention. The district court based its departure in part on the grounds that a prison sentence would frustrate any hope of making restitution. The circuit court held that it was error to base a departure on the ability to make restitution. It noted that "a rule permitting greater leniency in sentencing in those cases in which restitution is at issue and is a meaningful possibility (*i.e.*, generally white-collar crimes) would, we believe, nurture the unfortunate practice of disparate sentencing based on socioeconomic status, which the guidelines were intended to supplant."

See U.S. v. Rutana, 932 F.2d 1155 (6th Cir.), *cert. denied*, 112 S. Ct. 300 (1991), §2Q1.2, p. 35.

Eighth Circuit

United States v. Onwuemene, 933 F.2d 650 (8th Cir. 1991). The district court erred in sentencing the appellant, a Nigerian citizen convicted of mail fraud, based on his status as an alien. In sentencing the appellant at the top of the guideline range the district court permissibly noted the seriousness of the offense, the potential loss to the victims, and his refusal to identify the other participants in the insurance scheme. Nevertheless, the district court impermissibly commented at the sentencing hearing on the appellant's status as an alien as a reason for sentencing him. The circuit court found that sentence violated U.S.S.G. §5H1.10, as well as the Constitution. Although the written order of judgment did not include consideration of the appellant's alien status as a reason for the sentence, the circuit court concluded that the orally imposed sentence controlled. *See* U.S. v. Khoury, 901 F.2d 975 (11th Cir. 1990).

Part K Departures

Standard of Appellate Review--Departures and Refusals to Depart

Eleventh Circuit

United States v. Weaver, 920 F.2d 1570 (11th Cir. 1991). Agreeing with the First Circuit's assessment in U.S. v. Diaz-Villafane, 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S.Ct. 177 (1989), the Eleventh Circuit adopted a three-step standard of appellate review for departure cases.

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

First Circuit

United States v. Banister, 924 F.2d 21 (1st Cir. 1991). The district court did not violate the appellant's due process rights by denying him a downward departure pursuant to U.S.S.G. §5K1.1. The district court found that the government had not made a commitment to the appellant prior to his trial to make a motion pursuant to U.S.S.G. §5K1.1. The appellant was unwilling to cooperate until after he was convicted and by that time the government had ample evidence against his co-conspirator from other sources. The government's refusal to make a motion under U.S.S.G. §5K1.1 was not "unmistakably arbitrary and capricious."

United States v. Drown, 942 F.2d 55 (1st Cir. 1991). The circuit court vacated the appellant's sentence and remanded the case because the government's decision to defer the question of whether to file a U.S.S.G. §5K1.1 motion was based mainly on the fact that the appellant remained a potential wellspring of future assistance. The government argued that the appellant's assistance could be considered after the sentencing hearing pursuant to Fed. R. Crim. P. 35(b). The circuit court held that this government strategy "improperly merges the temporal boundaries established in section 5K1.1 and Fed. R. Crim. P. 35(b) . . . 5K1.1 was designed to recognize, and in an appropriate case to reward, assistance rendered prior to sentencing. Rule 35(b), on the other hand, was designed to recognize and reward subsequent cooperation . . . . Thus a unilateral decision by the government to reserve judgment on a defendant's presentence assistance in order to secure his post-sentence assistance . . . impermissibly melds what should be two discrete determinations."

Second Circuit

United States v. Agu, 949 F.2d 63 (2d Cir. 1991). Citing U.S. v. Reina, 905 F.2d 638, 640 (2d Cir. 1990), the circuit court held that a government motion is required before the district judge can depart below the guidelines for an offender's substantial assistance pursuant to U.S.S.G. §5K1.1. The circuit court also held, however, that under U.S.S.G. §5K2.0, "cooperation with the Government in respects other than the prosecution of others or cooperation with the judicial system can, in appropriate circumstances, warrant a departure notwithstanding the absence of a Government motion. *See* U.S. v. Khan, 920 F.2d 1100 (2d Cir. 1990); U.S. v. Garcia, 926 F.2d 125 (2d Cir. 1991).

United States v. Ah-Kai, 951 F.2d 490 (2d Cir. 1991). Rejecting the government's assertion that a motion to depart pursuant to U.S.S.G. §5K1.1 only refers to a departure below the guideline range, the Second Circuit held that the better view, as espoused in U.S. v. Keene, 933 F.2d 711 (9th Cir. 1991), is "that 994(n) and 5K1.1 do not create a separate motion for reduction below the guidelines exclusive of 3553(e)'s provision for reduction below the statutory minimum." According to the circuit court, "[t]he prosecution's role is limited to deciding whether to move for a departure for the defendant's 'substantial assistance.' Once the motion is made, the rest is up to the sentencing court." In the instant case, the parties entered a cooperation agreement and a plea agreement where the government had the sole discretion to move for a substantial assistance departure. The government submitted a letter to the court recommending that the court make a downward departure from the guidelines range. Both the government and the appellant agreed that the letter constituted the equivalent of a motion pursuant to U.S.S.G. §5K1.1 and the circuit court treated it as such.

Third Circuit

United States v. Santos, 932 F.2d 244 (3d Cir.), *cert. denied*, 112 S. Ct. 592 (1991). The Third Circuit joined several other appellate courts in rejecting due process challenges to the substantial assistance provisions of the guidelines. The district court did not err in finding that it did not have the authority to make a departure for substantial assistance in the absence of a government motion.

Fourth Circuit

United States v. Conner, 930 F.2d 1073 (4th Cir.), *cert. denied*, 112 S. Ct. 420 (1991). The district court did not err in finding that the appellant had breached his plea agreement, and therefore the government was not required to make a substantial assistance motion. While acknowledging that the circuits have generally upheld U.S.S.G. §5K1.1 against various constitutional attacks, the court concluded that "once the government uses its §5K1.1 discretion as a bargaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement." Where §5K1.1 is used as a bargaining chip, the district court must determine if the government has in fact agreed to make the motion in return for substantial assistance, and, if so, whether the defendant has satisfied his contractual obligation. In the instant case, the plea agreement required the appellant, *inter alia*, "to provide truthful information about any and all criminal activity within his knowledge"; in exchange, the government would inform the court of the appellant's assistance, and should "substantial assistance in this regard" be provided, recommend a sentence of no more than a thirty-month sentence of imprisonment. Evidence at sentencing showed that the appellant was less than forthright in detailing his participation in the conspiracy. Using the analysis of Santobello v. New York, 404 U.S. 257 (1971), the circuit court found that the appellant had not lived up to his end of the bargain.

United States v. Wade, 936 F.2d 169 (4th Cir.), *cert. granted*, 112 S. Ct. 635 (1991). The district court did not err in concluding that it did not have the authority to make a downward departure for substantial assistance on the defendant's motion. In the instant case, the appellant, shortly after his arrest and without the benefit of a plea agreement, began to cooperate "which provided valuable assistant to the government in other prosecutions leading to the conviction of co-conspirators." According to the circuit court, the plain statutory language, however, permits court consideration of downward departures for substantial assistance only after the government has made the motion. The circuit court also rejected the appellant's argument that he may query the good faith of the government in refusing to make the motion. According to the circuit court, the government alone has to decide in its own judgment whether to make a

motion for substantial assistance. It follows then that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. According to the Fourth Circuit, "[t]o conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government."

Fifth Circuit

United States v. Campbell, 942 F.2d 890 (5th Cir. 1991). The district court did not err in refusing to dismiss all charges against the appellant based on the appellant's allegation that the government engaged in "outrageous conduct" by agreeing to dismiss all charges if he provided information about his superiors in a drug distribution chain, and then failed to do so even though he provided information at substantial risk to his own safety. The appellate court found that the record indicated the government never agreed to dismiss all charges, but only to make the appellant's cooperation known to the sentencing judge. The appellate court also held that even if appellant's allegations were supported by the record, the dismissal was not warranted because the conduct was not outrageous. *See* U.S. v. Yater, 756 F.2d 1058 (5th Cir.), *cert. denied*, 474 U.S. 901 (1985).

Sixth Circuit

United States v. Gardner, 930 F.2d 919 (6th Cir. 1991). The circuit court rejected the appellant's claim that he was deprived of substantive and procedural due process insofar as 18 U.S.C. § 3553(e) allowed the district court to sentence him below the mandatory minimum penalty for his drug conviction only upon a government motion. The circuit court's opinion in U.S. v. Levy, 904 F.2d 1026 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 974 (1991), controlled appellant's claim. The appellant's attempt to distinguish Levy on the basis that it involved a constitutional challenge to a guideline, U.S.S.G. §5K1.1, rather than a challenge to a statute, 18 U.S.C. § 3553, was misplaced since the guideline was promulgated in response to the statute. According to the circuit court, "the guideline and its parent statute are substantively identical for purposes of defendant's claim." The government's power to move for a departure for substantial assistance is no different than "the government's power over a defendant's ultimate sentence through its exclusive and unquestioned authority regarding what charges to bring or even to charge a defendant at all."

Seventh Circuit

United States v. Fairchild, 940 F.2d 261 (7th Cir. 1991). The district court did not err in denying the appellant's motion to withdraw his guilty plea where the government did not make a motion pursuant to U.S.S.G. §5K1.1. According to the circuit court, "[n]othing a defendant does, up to and including a 'good faith' effort to assist the government, guarantees him a substantial assistance departure. The government still must make the motion so a defendant's assertion of 'good faith' is irrelevant."

See U.S. v. Thomas, 930 F.2d 526 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991), §2D1.1, p. 20.

Eighth Circuit

United States v. Drake, 942 F.2d 517 (8th Cir. 1991). The district court did not err in refusing to depart downward where "the government fully complied with the plea agreement, dismissing . . . counts and detailing [the appellant's] assistance to the government in a letter . . . ," but made no motion under U.S.S.G. §5K1.1. According to the circuit court, "[t]he district court relied on the government's letter in sentencing [the appellant] to a term at the bottom of the applicable sentencing range . . . we cannot say the government acted in bad faith or acted arbitrarily."

Ninth Circuit

United States v. Goroza, 941 F.2d 905 (9th Cir. 1991). The district court erred when it departed downward pursuant to U.S.S.G. §5K1.1 when the government did not make a motion and the record provides no indication of bad faith. The district court also erred when it departed downward under U.S.S.G. §5K2.0 based on "cooperation with the government." According to the circuit court, "whether the government in its

discretion moves for a downward departure, is a circumstance that has been adequately taken into account . . . [therefore] departure under 5K2.0 for cooperation with the government is inappropriate." *See* U.S. v. Reina, 905 F.2d 638 (2d Cir. 1990); U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990); U.S. v. Taylor, 868 F.2d 125 (5th Cir. 1989); U.S. v. Justice, 877 F.2d 664 (8th Cir.), *cert. denied*, 110 S. Ct. 375 (1989); U.S. v. Chotas, 913 F.2d 897 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1421 (1991).

United States v. Keene, 933 F.2d 711 (9th Cir. 1991). In an appeal by the government, the Ninth Circuit held that once the government filed a motion for departure based on the defendant's substantial assistance, it was within the district court's authority to exercise its discretion in determining the appropriate extent of the departure. The district court did not err in sentencing the defendant below the mandatory minimum for possession of 437 kilograms of cocaine, once the government made the 5K1.1 motion. According to the circuit court, 18 U.S.C. § 944(n) and §5K1.1 "do not create a separate ground for motion for reduction below the mandatory minimum to 18 U.S.C. § 3553(e). Rather, §5K1.1 implements the directive of §§ 994(n) and 3553(e), and all three provisions must be read together in order to determine the appropriateness of a sentence reduction and the extent of any departure." Alarcon, J., *dissenting:* 18 U.S.C. § 3553(e) applies to government motions requesting a sentence below the statutory minimum based upon substantial assistance. Section 5K1.1 is limited to government motions recommending a downward departure from the applicable guideline range to the statutory minimum.

United States v. Sanchez, 927 F.2d 1092 (9th Cir. 1991). The district court did not err in finding that surrendering property pursuant to a civil forfeiture agreement was not "substantial assistance" within the meaning of U.S.S.G. §5K1.1. The language of U.S.S.G. §5K1.1 applies only to assistance provided in the investigation or prosecution of another person.

Tenth Circuit

United States v. Long, 936 F.2d 482 (10th Cir.), *cert. denied*, 112 S. Ct. 662 (1991). The circuit court cited several cases including U.S. v. Vargas, 925 F.2d 1260 (10th Cir. 1991); U.S. v. Snell, 922 F.2d 588 (10th Cir. 1990); and U.S. v. Sorenson, 915 F.2d 599 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1002 (1991), to hold that "a government motion is a jurisdictional prerequisite to a § 5K1.1 downward departure from the guidelines."

United States v. Vargas, 925 F.2d 1260 (10th Cir. 1991). The district court erred in denying a joint motion by the government and defendant to allow the defendant to provide substantial assistance by participating in a controlled drug buy. According to the circuit court, the district court "based the denial of the Joint Motion on incorrect assumptions of law and a judicial policy which is in conflict with the designs of the sentencing guidelines and criminal code." Relying on U.S. v. French, 900 F.2d 1300 (8th Cir. 1990), the appellate court noted that the kind of supervised activity proposed for the defendant would not implicate her in the commission of a drug trafficking offense, and in any event, she would be protected from prosecution by a pretransactional agreement with the prosecutor. The circuit court also found that neither the Constitution nor public policy prevented the district court from granting the motion.

Eleventh Circuit

United States v. Robinson, 948 F.2d 697 (11th Cir. 1991). The district court erred in imposing a sentence without first ruling on the government's motion to impose sentence below the applicable guideline range because defendant had provided substantial assistance. According to the circuit court, a sentencing judge, when faced with a section 5K1.1 motion, must rule on it before imposing sentence.

§5K1.2 Refusal to Assist (Policy Statement)

Seventh Circuit

United States v. Klotz, 943 F.2d 707 (7th Cir. 1991). The district court did not violate the proviso in U.S.S.G. §5K1.2 that states, "[a] defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor," by considering the extent of the appellant's

assistance when selecting a sentence within the guideline range. The circuit court rejected the appellant's contention that the district court judge's comments that he had not helped the government in finding his drug supplier violated both U.S.S.G. §5K1.2 and the self-incrimination clause. The circuit court noted that the term "aggravating sentencing factor" was not defined in the guidelines and that it appeared nowhere else in the guidelines text or commentary. The court interpreted the phrase to mean that the court could not make a departure from the guideline range. In the instant case the appellant "received a sentence eight months less than the upper bound of a properly determined range and so suffered no penalty by exercising his right to remain silent."

§5K2.0 Grounds for Departure (Policy Statement)

District of Columbia Circuit

See U.S. v. Harrington, 947 F.2d 956 (D.C. Cir. 1991), §3E1.1, p. 56.

First Circuit

United States v. Aymelek, 926 F.2d 64 (1st Cir. 1991). The district court did not err in making an upward departure, based on defendant's vow, when arrested, to continue his efforts to re-enter the country if deported again. The appellate court found such "brazen defiance of authority in the form of assured recidivism, can be considered an atypical factor sufficient to take the case beyond the heartland for the offense of conviction."

United States v. Citro, 938 F.2d 1431 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 902 (1992). The district court did not err in departing upward from the guideline sentencing range, pursuant to U.S.S.G. §5K2.0, where the appellant plead guilty to telephone counts in exchange for the dismissal of drug conspiracy and distribution charges. The circuit court noted that it ordinarily would not condone a district court basing an upward departure solely on conduct covered by dropped charges pursuant to a plea agreement. The circuit court questioned why the trial court would accept the plea if it believed the appropriate sentence should reflect the more serious conduct. Nevertheless, the appellate court also noted that U.S.S.G. §2D1.6, relating to the telephone counts, "took no account of the underlying drug conduct facilitated by the use of the telephone . . . " and held that "there were clearly legitimate grounds here for departure, that is, there existed aggravating circumstances of a kind or to a degree not adequately taken into consideration by the Sentencing Commission."

United States v. Diaz-Bastardo, 929 F.2d 798 (1st Cir. 1991). In reviewing an upward departure for transporting a boat load of illegal aliens from the Dominican Republic to Puerto Rico, the circuit court found that the district court erred to the extent the departure was based on inhumane treatment. In an earlier case involving the same incident, U.S. v. Trinidad de la Rosa, 916 F.2d 27 (1st Cir. 1990), another panel of the court ruled "that there was no factual basis for the finding of inhumane treatment." According to the circuit court, "[i]f we are to enshrine fairness and predictability of results in the judicial process, then in a multi-panel circuit, newly constituted panels should consider themselves bound by prior panel decisions closely on point, at least in the absence of supervening authority." The circuit court found, however, that the "dangerousness of the venture," crowding 54 people into a 34-foot awl, was a cognizable basis for a departure. Where a departure is based on both proper and improper reasons, the circuit court preferred the "balanced approach" of the Sixth and Seventh Circuits. *See* U.S. v. Franklin, 902 F.2d 501, 508 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); U.S. v. Rodriguez, 882 F.2d 1059, 1068 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). The circuit court vacated the sentence since the underlying grounds for the departure were linked together. The district court's comments were focused equally, if not more intensely on the treatment of the aliens than the dangerousness of the venture. According to the circuit court, "we do not believe that we should attempt to review the propriety and extent of a one-legged departure."

See U.S. v. Figaro, 935 F.2d 4 (1st Cir. 1991), §4A1.3, p 68.

United States v. Johnson, 952 F.2d 565 (1st Cir. 1991). The district court did not err in departing upward pursuant to U.S.S.G. §5K2.0 to impose a sentence that effectively doubled appellant's sentence

partially on the basis of appellants' terroristic purpose, pursuant to U.S.S.G. §5K2.15, which was not in effect at the time of the commission of the offense. The court also based its departure on appellants' extreme conduct pursuant to U.S.S.G. §5K2.8, their threat to public welfare and national security pursuant to U.S.S.G. §§5K2.14 and 2M5.2, and the extreme amount of planning or sophistication involved in the offense pursuant to U.S.S.G. §2M5.2. According to the circuit court, the extent of the departure was reasonable without consideration of §5K2.15.

United States v. Porter, 924 F.2d 395 (1st Cir. 1991). The district court did not err in making a two-month upward departure where the appellant urged his son to rob a bank to obtain money for his bail.

United States v. Reyes, 927 F.2d 48 (1st Cir. 1991). The district court did not err in making an upward departure, in an illegal alien smuggling case, from a guideline range of 8-11 months imprisonment and imposing a sentence of 36 months where there was a potential for tragic consequences and a reckless endangerment of human lives. According to the circuit court, "[a]lthough tragic consequences were fortunately averted, appellant's criminal conduct could have resulted in the death of seventy other persons. The district court's estimation of the sentence that would best reflect the seriousness of the crime was therefore not unreasonable."

See U.S. v. Rodriguez-Cardona, 924 F.2d 1148 (1st Cir.), *cert. denied*, 112 S. Ct. 54 (1991), §4A1.3, p. 69.

United States v. Wogan, 938 F.2d 1446 (1st Cir.), *cert. denied*, 112 S. Ct. 441 (1991). The district court erred in departing below the guideline sentencing range solely to impose a sentence in parity with that of an equally culpable codefendant. Defendant's guideline sentencing range was determined to be 87-108 months. The district court imposed a sentence of 27 months because an equally culpable codefendant had received a sentence of only 27 months. According to the appellate court "a perceived need to equalize sentencing outcomes for similarly situated codefendants, without more, will not permit a departure from a properly calculated guideline sentencing range."

Second Circuit

United States v. Alba, 933 F.2d 1117 (2d Cir. 1991). The district court properly relied on two of four factors for making a downward departure from the guideline range of 41-51 months to six months in a half-way house, followed by two years of supervised release and a $50 fine. First, the adjustment for the defendant's minimal role in the drug transaction did not adequately reflect his actual conduct and thus presented a legitimate reason for departure. *See* U.S. v. Barone, 913 F.2d 46 (2d Cir. 1990); U.S. v. McElroy, 910 F.2d 1016 (2d Cir. 1990). The defendant did not realize that he was involved in a drug transaction until it was nearly completed. Further, his co-defendant stated that he deliberately did not disclose all of the details of the transaction to the defendant. Second, the defendant's ties with his family constituted legitimate grounds for a downward departure as the defendant supported his wife, two children and his disabled grandfather. The defendant had long-standing employment and worked two jobs to maintain his family's economic well-being. *See* U.S. v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). However, the defendant's lack of knowledge regarding the specific amount of drugs involved in the transaction was not a legitimate ground for departure because this amounted to another way of describing the defendant's meager knowledge about the transaction. Also, disparity of sentences between co-defendants may not properly serve as a reason for departure from the guidelines. *See* U.S. v. Joyner, 924 F.2d 454 (2d Cir. 1991). The Second Circuit adopted a case-by-case rule to determine whether a remand is required when the district court relies on proper and improper grounds for a departure. While other circuits have split on the proper approach to this issue, the Second Circuit agreed with some circuits that where a departure based on proper grounds is reasonable, the recitation of improper grounds along with the proper ones generally should not change the result. *See* U.S. v. Franklin, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990). Where the improper factors are of such significance that the district court should reconsider the sentence or where the court expressed serious doubts in deciding to depart, the court of appeals should remand. *See* Joyner, 924 F.2d 454. This case falls into the latter category as the district court expressed doubt about the propriety of departing.

United States v. Baez, 944 F.2d 88 (2d Cir. 1991). The district court did not err in departing upward from the appellant's sentencing range of 21-27 months for possession of counterfeit currency to impose a sentence of 51 months, where the appellant abducted a government witness, placed a gun to his head, and threatened to kill him if he testified. The fact that a multi-count analysis of the departure factors indicated a guideline range of 33-41 months does warrant reversal because "the multi-count analysis is to provide only guidance as to the extent of a departure, not a rigid formula." *See* U.S. v. Kim, 896 F.2d 678 (2d Cir. 1990).

United States v. Contractor, 926 F.2d 128 (2d Cir. 1991). The district court erred in basing an upward departure on the purity of cocaine for which the appellant had no responsibility.

United States v. Garcia, 926 F.2d 125 (2d Cir. 1991). The district court did not err in making a downward departure from a guideline range of 51-63 months imprisonment and imposing a sentence of 36 months for "activities facilitating the proper administration of the justice in the district court." Although the government did not make a motion for substantial assistance, the district court found that the defendant's decision to plead guilty and cooperate caused his two co-defendants to plead guilty also. The defendants "cooperation" helped alleviate "the seriously overclogged dockets of the District Courts of the United States." The appellate court found that assistance in the administration of justice is different from "substantial assistance to the authorities" and is thus a proper basis for a downward departure.

United States v. Hernandez, 941 F.2d 133 (2d Cir. 1991). The district court properly looked outside the guidelines to increase the appellant's offense level where the court found that the appellant had used a weapon in dealing drugs and "looked to a federal statute [18 U.S.C. § 924(c)] which directly addresses the conduct that served as the basis for the upward departure."

United States v. Joyner, 924 F.2d 454 (2d Cir. 1991). The district court erred in making a downward departure to equalize a "perceived disparity" between the defendants and their "co-venturers." According to the circuit court, "[t]he Congressional objective was to eliminate unwarranted disparities nationwide. An applicable guideline range may seem harsh (or lenient) when compared to that of a co-defendant, but it is the same range applicable throughout the country for all offenders with the same combination of offense conduct and prior record. To reduce the sentence by a departure because the judge believes that the applicable range punishes the defendant too severely compared to a co-defendant injects a new and entirely unwarranted disparity between the defendant's sentence and that of all similarly situated defendants throughout the country."

United States v. Mickens, 926 F.2d 1323 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 940 (1992). The district court erred in making a downward departure based on a belief that a two-level adjustment for acceptance of responsibility did not adequately reflect the degree of the defendant's contrition. Although this rationale may be appropriate for a departure in another case, in the instant case the district court made no finding that the circumstances justified such a departure. The district court also erred in making a downward departure based on the jury's recommendation of leniency. A jury request for leniency without more, is an insufficient basis for a downward departure.

United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991). The district court did not err by departing upward pursuant to U.S.S.G. §5K2.0 or in the alternative, increasing the offense level by two pursuant to U.S.S.G. §3C1.1 where the appellants defaulted on their obligations under a forfeiture agreement with the government. The court stated, "[g]iven the district court's adequately supported finding that defendants had entered into the forfeiture agreement without intending to perform it, we see nothing in the guidelines or in logic to suggest that the conduct of [the appellants] should not have been considered attempts to 'impede[ ] the administration of justice during the . . . sentencing of the instant offense' within the meaning of guidelines §3C1.1, warranting a two-level upward adjustment in the offense level. If the present type of fraud was not envisioned by that section, an upward departure under 5K2.0 was hardly an abuse of discretion."

United States v. Restrepo, 936 F.2d 661 (2d Cir. 1991). The district court did not err in making a four-level downward departure for the defendants' minimal role, beyond the adjustment made available pursuant to U.S.S.G. §3B1.1 where the offense level was "extraordinarily magnified by a circumstance that bore little relation to the defendant's role in the offense." *See* U.S. v. Joyner, 924 F.2d 454 (2d Cir. 1991);

U.S. v. Colon, 905 F.2d 580 (2d Cir. 1990). In the instant case, the nine-level adjustment pursuant to U.S.S.G. §2S1.1 for the amount of cash involved in the money laundering charge had little relation to the appellants' roles as loaders of boxes of money into a truck. The circuit court noted that the example about minimal participants in U.S.S.G. §3B1.2 "does not address the spiralling effect that the amount of cash had on these defendants, particularly in light of its assumed link with their role in the enterprise." The circuit court found the four-level departure reasonable, although a discussion about an analogous guideline adjustment would have been helpful.

United States v. Skinner, 946 F.2d 176 (2d Cir. 1991). The district court had the authority under 18 U.S.C. § 3553(b) to depart downward since the defendants' conduct fell outside the "norm" or "heartland" of money laundering cases. In this case, the defendants did not enter into the financial transactions to conceal a serious crime, but only to complete the sale of the cocaine by sending the payment in a money order via the mail. Because the defendants' conduct was atypical of the conduct described in the guidelines, the district court was empowered to consider a downward departure.

See U.S. v. Stanley, 928 F.2d 575 (2d Cir.), *cert. denied*, 112 S. Ct. 141 (1991), §2K2.4, p. 33.

Third Circuit

United States v. Johnson, 931 F.2d 238 (3d Cir.), *cert. denied*, 112 S. Ct. 242 (1991). The district court did not err in basing a departure on the number of victims involved in an aggravated assault. According to the circuit court, "the language of [U.S.S.G. §2A2.2(b)(3)] suggests that the typical cases contemplated by the Commission were single-victim assaults." The circuit court also found that the "structured" departure based on the group counting guideline was reasonable.

See U.S. v. McAllister, 927 F.2d 136 (3d Cir.), *cert. denied*, 112 S. Ct. 111 (1991), §4B1.1, p. 73.

See U.S. v. Shoupe, 929 F.2d 116 (3d Cir.), *cert. denied*, 112 S. Ct. 382 (1991), §4B1.1, p. 74.

Fourth Circuit

United States v. Glick, 946 F.2d 335 (4th Cir. 1991). The district court erred in departing downward from a guideline range of 27-33 months to impose a sentence of five years probation based on "aberrant behavior." The district judge found the aberrant behavior consisted of sending five separate letters containing misappropriated, confidential information over a course of ten weeks, devising a code to use while communicating through a national trade publication, stealing equipment, and attempting to remain anonymous. The circuit court rejected the approach taken in U.S. v. Takai, 930 F.2d 1427 (9th Cir. 1991), *amended and superseded by* 941 F.2d 738 (9th Cir. 1991), that a series of actions calculated to further criminal conduct could be considered aberrant behavior and held that "[a] single act of aberrant behavior suggests 'a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning . . . .'" U.S. v. Carey, 895 F.2d 318, 325 (7th Cir. 1990). The court of appeals further held that the district court did not err in deciding to depart downward based on the appellant's diminished capacity at the time of the offense as established through the aid of psychiatric testimony, and that the extent of downward departure based upon this proper factor was not an abuse of discretion. Although the departure was based on two factors, the appellate court upheld the departure because the "proper factor" justified the extent of the departure. *See* U.S. v. Franklin, 902 F.2d 501 (7th Cir), *cert. denied*, 111 S. Ct. 274 (1990).

United States v. Greenwood, 928 F.2d 645 (4th Cir. 1991). The district court did not err in making a downward departure where the defendant had a severe physical handicap. The defendant lost both legs below the knee during the Korean War. The trial judge found that this severe medical impairment required treatment at a VA hospital and that incarceration would jeopardize his treatment.

United States v. McFadden, 940 F.2d 653 (4th Cir. 1991) (unpublished). The district court did not err in departing upward from a guideline range of 1-7 months to a sentence of 30 months based on the appellant's practice of exchanging crack cocaine for food stamps and because he sold crack to a state undercover agent on the same day that he entered his plea. The district court correctly concluded that

U.S.S.G. §2F1.1, the guideline applicable to the unlawful acquisition of food stamps, "did not take into account the harm to society when the food stamp fraud involves an exchange of food stamps for crack." The circuit court held that the extent of the departure was reasonable because "the length of the sentence was in the range that would have been used if [the defendant] pled guilty to the drug counts, and the plea agreement specified that this conduct could be considered in sentencing."

United States v. Wright, 924 F.2d 545 (4th Cir. 1991). The district court erred in making a downward departure for the defendant, a career offender convicted of possession with intent to distribute cocaine and crack while a prison inmate, based solely on a 26-month deferral of parole for unrelated crimes. According to the circuit court, "[c]onsideration of parole deferral as a factor justifying leniency in sentencing undermines the Congressional intent behind the Guidelines of meting out more severe punishment to career offenders." A downward departure of 120 months for a 26-month parole deferral is "simply unreasonable under any standard."

Fifth Circuit

United States v. Hatch, 926 F.2d 387 (5th Cir.), *cert. denied*, 111 S. Ct. 2239 (1991). The district court did not err in making an upward departure from a guideline range of 8-14 months imprisonment to a sentence of 24 months where appellant, the local sheriff, was convicted of mail fraud. According to the circuit court, the appellant's involvement in a fraudulent contract which resulted in a $43,750.00 loss to the sheriff's budget caused a significant disruption in a governmental function. A two-level adjustment for abuse of position does not preclude a departure under U.S.S.G. §5K2.7. The district court also properly found that the appellant's conviction "resulted in irreparable harm to public confidence in law enforcement. Certainly, conviction of the highest elected law enforcement official in the parish eroded public confidence in its sheriff's office."

United States v. Huddleston, 929 F.2d 1030 (5th Cir. 1991). The district court did not err in determining that an upward departure was appropriate and setting a sentence within the statutory limits. When departing from the guidelines a district court must articulate reasons justifying the upward departure, however, the district court need not give reasons for the extent of its departure. In the instant case the court departed upward from a guideline range of 27-33 months to a sentence of 60 months based on the failure of U.S.S.G. §2K1.3 to adequately consider the unique danger of improperly hauling explosives through residential areas.

United States v. Pigno, 922 F.2d 1162 (5th Cir. 1991). The district court did not err in making an upward departure from a guideline range of 0-4 months imprisonment to a sentence of 15 months where the appellant, the superintendent of the local school board plead guilty to misprision of a felony, and he could have been found guilty of the underlying offense of mail fraud. *See* U.S. v. Warters, 885 F.2d 1266 (5th Cir. 1989). The circuit court reviewed for plain error since the appellant failed to raise the issue below.

United States v. Wade, 931 F.2d 300 (5th Cir.), *cert. denied*, 112 S. Ct. 247 (1991). The district court did not err in making an upward departure for obstruction of justice where the evidence showed that the appellant, a county sheriff, convicted of conspiracy to manufacture methamphetamine, obstructed justice on several different occasions by discussing with co-conspirators false statements to tell the authorities, alerted a co-conspirator of an undercover operation in the sheriff's office, and instructed a co-conspirator to threaten a man who was talking to authorities. According to the circuit court, "the two-level increase for obstruction of justice was inadequate given the egregious facts of this case." The district court also reasonably relied upon the appellant's position as sheriff as a basis for departing upward. In the instant case, "the appellant abused his position as sheriff to further his drug manufacturing conspiracy." *See* U.S. v. Pridgen, 898 F.2d 1003 (5th Cir. 1990).

Sixth Circuit

See U.S. v. Benskin, 926 F.2d 562 (6th Cir. 1991), §2F1.1, p. 27.

See U.S. v. LaSalle, 948 F.2d 215 (6th Cir. 1991), §4B1.1, p. 74.

United States v. Patrick, 935 F.2d 758 (6th Cir.), *cert. denied*, 112 S. Ct. 269 (1991). The district court did not err in departing from a guideline range of 87-108 months to a sentence of 180 months for the appellant, who was convicted of kidnapping a three-year old child whom he intended to marry and keep her entire life. The district court was convinced that the appellant would complete the crime no matter what the period of incarceration. The circuit court found that the appellant's "purpose and conduct [were] indisputably rare and sufficiently aggravating to warrant a departure under §5K2.0."

United States v. Pickett, 941 F.2d 411 (6th Cir. 1991). The circuit court rejected the appellant's argument that the Sentencing Commission did not properly consider the true properties of crack and cocaine when formulating the equivalency ratio of 100:1. The circuit court held that the district court did not err in refusing to depart downward because (1) a court is never required to depart downward under section 3553(b); (2) a district court's refusal to depart downward from the guideline range is not appealable; and (3) the 100:1 ratio is not a sufficiently unusual circumstance to justify a downward departure.

See U.S. v. Wolak, 923 F.2d 1193 (6th Cir.), *cert. denied*, 111 S. Ct. 2824 (1991), §4B1.4, p. 79.

Seventh Circuit

See U.S. v. Boula, 932 F.2d 651 (7th Cir. 1991), §2F1.1, p. 27.

See U.S. v. Bruder, 945 F.2d 167 (7th Cir. 1991), §3E1.1, p. 60.

See U.S. v. Feekes, 929 F.2d 334 (7th Cir. 1991), §2D1.6, p. 26.

United States v. Gentry, 925 F.2d 186 (7th Cir. 1991). The district court erred by making a downward departure from a guideline range of 21-27 months imprisonment to a sentence of 12 months for the appellant, who was convicted of communicating a false report of food tampering, because the case was "atypical" and he suffered from reduced mental capacity. According to the circuit court, the first reason is "untenable, the second inadequately supported." Also, the district court failed to link the extent of the downward departure to the structure of the guideline.

United States v. Welch, 945 F.2d 1378 (7th Cir. 1991). The circuit held it was without jurisdiction to review the district court's refusal to grant a downward departure in the absence of some evidence that the district court improperly found that it was without the authority to depart. "[T]he record reveals that the district court considered all the factors raised by the defendant and refused to grant a downward departure."

Eighth Circuit

See U.S. v. Andrews, 948 F.2d 448 (8th Cir. 1991), §4A1.3, p. 71.

United States v. Desormeaux, 952 F.2d 182 (8th Cir. 1991). The district court erred in making a downward departure for the defendant, convicted of assault resulting in serious bodily injury and assault with a dangerous weapon, based on her history of abuse and the resulting emotional trauma, her post-arrest rehabilitation, and the victim's wrongful conduct. In the instant case, the defendant stabbed a woman who was on a date with the defendant's boyfriend. The circuit court found that although the victim's conduct probably was a "breach of dating etiquette," it was not within the scope of U.S.S.G. §5K2.10. The circuit court also noted that although the defendant claimed to have been abused in the past, the "boyfriend" involved in the instant offense was not the abuser. According to the circuit court, low self-esteem resulting from abuse is not of a kind or a degree which justifies departure. The circuit court also found that the defendant's post-arrest rehabilitative conduct (attaining her G.E.D.) was the equivalent of acceptance of responsibility and could not serve as a basis for a departure.

See U.S. v. Fawbush, 946 F.2d 584 (8th Cir. 1991), §4A1.3, p. 71.

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). The district court erred in holding it was without authority to consider a downward departure for restitution when appellant had planned to

recompense banks for $235,000 in fraudulently obtained loan proceeds with $1.4 million in assets before even learning he was under investigation. The circuit court held that "the guidelines provide the district judge with authority to depart downward based on extraordinary restitution," and concluded that "the district court should consider whether the extent and timing of [appellant's] restitution are sufficiently unusual to warrant a downward departure."

United States v. Martinez, 951 F.2d 887 (8th Cir. 1991). The district court did not err in refusing to grant appellant's motion for a downward departure based on U.S.S.G. §§5K2.0, 5K2.10, or 5K2.12. The alleged actions of the government did not rise to the level of entrapment and, thus, did not constitute "Victim conduct" sufficient to warrant a downward departure pursuant to U.S.S.G. §5K2.10. The appellant did not allege that the government made any threats to him or engaged in any unlawful activity, but only that the government used a paid informant in a "controlled buy." Thus, the circumstances required to depart under U.S.S.G. §5K2.12 were not satisfied by such lawful government activity. Also, the district court's decision not to grant defendant a downward departure under U.S.S.G. §5K2.0 was an exercise of discretion not reviewable on appeal.

United States v. Prestemon, 929 F.2d 1275 (8th Cir.), *cert. denied*, 112 S. Ct. 220 (1991). The district court erred in making a downward departure from a guideline range of 33-41 months to a sentence of 24 months based on the fact that the defendant was a bi-racial adopted child. The district court also should not have relied on a perceived disparity in the guideline sentence of appellee, who was convicted of armed bank robbery, and a defendant in another case who made false statements in connection with bank loans. Heany, J., *dissenting:* "We should not restrict a sentencing judge's discretion more than the guidelines do."

Ninth Circuit

United States v. Berlier, 948 F.2d 1093 (9th Cir. 1991). The district court erred in departing below defendant's guideline range of 15-21 months imprisonment to impose a sentence of straight probation and a fine for an embezzlement conviction. The factors stated by the court as reasons for departure included (1) the defendant's lack of prior record; (2) defendant's prompt total payment of restitution; (3) defendant's acceptance of responsibility; (4) defendant's efforts to keep his family together, the challenges that defendant and his family faced, and the manner in which they overcame them; (5) how unfair and counterproductive a period of incarceration would be under the circumstances; and (6) the totality of the situation, were all considered inappropriate bases for departure because they had been considered by the Sentencing Commission in preparing the guidelines.

United States v. Brady, 928 F.2d 844 (9th Cir. 1991). The district court erred in failing to give notice to the appellant of the factors it relied on in making an upward departure. The presentence report only noted one possible ground for an upward departure--not the several factors used by the district court to sentence beyond the range stated in the presentence report. According to the circuit court, the information must either be identified as a basis for departure in the presentence report, or the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment. *See* U.S. v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989). The district court also failed to indicate "the extent each factor played in increasing the sentence almost 200% from the maximum sentence referred to in the probation report." In making an upward departure based on the defendant's state of mind, the district court erred in reconsidering facts during sentencing that had been rejected by the jury's verdict of not guilty to first-degree murder and assault with intent to commit murder. According to the circuit court, "[a] sentencing court should not be allowed to circumvent this statutory directive by making a finding of fact--under any standard of proof--that the jury has necessarily rejected by its judgment of acquittal." The circuit court also found that any part of the departure based on a firearm being discharged was erroneous because the offense had already been adjusted by this factor. Any part of the departure based on a tribal court conviction is also erroneous. According to the circuit court, "[t]he convictions are simply not serious enough to warrant an upward grade in [appellant's] criminal history category." Wallace, C.J., *concurring in part and dissenting in part:* Because the court agreed to vacate the sentence based on the trial judge's failure to give notice of his intent to depart, the majority need not have reached the other issues.

United States v. Dickey, 924 F.2d 836 (9th Cir.), *cert. denied*, 112 S. Ct. 383 (1991). The district court did not err in rejecting the appellant's argument of "imperfect entrapment." The defendant argued that since the government informant "talked him into" printing the counterfeit money, the government misconduct was a mitigating factor justifying a downward departure. According to the circuit court, governmental misconduct does not mitigate the sentence of an admittedly guilty defendant. *See* U.S. v. Streeter, 907 F.2d 781 (8th Cir. 1990). Reinhardt, J., *dissenting in part:* "The fact that a defendant cannot obtain an acquittal on an entrapment defense does not mean, however, that the government's role in inducing him to commit the crime is irrelevant to the length of the sentence he should receive."

See U.S. v. Faulkner, 934 F.2d 190 (9th Cir. 1991), §4B1.1, p. 75.

See U.S. v. Floyd, 945 F.2d 1096 (9th Cir. 1991), §4A1.3, p. 71.

See U.S. v. Goroza, 941 F.2d 905 (9th Cir. 1991), §5K1.1, p. 92.

See U.S. v. Hoyungowa, 930 F.2d 744 (9th Cir. 1991), §3A1.2, p. 40.

United States v. Loveday, 922 F.2d 1411 (9th Cir. 1991). The district court did not err in making an upward departure from the guideline range of 10-16 months to a sentence of 24 months where the appellant plead guilty to possession of an unregistered firearm (a six-inch pipe bomb) in violation of 26 U.S.C. § 5861(d). Reliable evidence connected him to several other completed or partially complete bombs which the district court found, had "no social utility", and posed a "danger to society." The provisions of U.S.S.G. §2K2.2, which govern the offense of conviction, and deal primarily with guns, "suggests that the Commission did not have in mind the unique dangers homemade bombs pose to public safety." According to the circuit court, while U.S.S.G. §2K2.2 applies to "mere possession of a bomb . . . the specific offense characteristics under the section are wholly inapplicable to the bombs possessed and manufactured by [appellant]." The degree of the departure was reasonable. The sentence was only eight months above the guideline range and reflected the plea agreement, "which both the defendant and government considered reasonable at the time they entered into it."

See U.S. v. Martinez, 946 F.2d 100 (9th Cir. 1991), §2D1.1, p. 22.

United States v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991). The circuit court remanded appellant's case for resentencing where the district court made an upward departure from a guideline range of 6-12 months imprisonment to a sentence of 20 months because one of the grounds for departure was not supported by the record. The government's contention that the heroin was either of "good quality" or "fairly high purity" was insufficient to warrant departure. According to the circuit court, "[t]he drug must be 'of unusually high purity' to justify a departure." *See* U.S.S.G. §2D1.1, Application Note 9.

United States v. Mejia, 953 F.2d 461 (9th Cir. 1991). The Ninth Circuit held that it is improper to depart downward in order to reduce sentencing disparity among codefendants. The appellate court held that "[b]asic notions of fairness dictate that defendants should be sentenced in proportion to their crimes." Under guidelines sentencing, "[a] downward departure to correct sentencing disparity brings a defendant's sentence more into line with his of her codefendant's sentence, but places it out of line with sentences imposed on all similar offenders in other cases."

United States v. Monroe, 943 F.2d 1007 (9th Cir. 1991) *(petition for cert. filed Jan. 17, 1992)*. The district court did not err in refusing to depart downward to avoid a disparity between co-defendants because they were not found guilty of the same offenses, were sentenced before different judges, and the desire to equalize sentences was generally found to be an impermissible basis for departure.

United States v. Pascucci, 943 F.2d 1032 (9th Cir. 1991). The district court did not err in departing upward from the guidelines where the appellant orchestrated the crime while a U.S. Marshal and also involved one of his subordinates.

See U.S. v. Pedrioli, 931 F.2d 31 (9th Cir. 1991), §5G1.2, p. 85.

United States v. Takai, 930 F.2d 1427 (9th Cir. 1991), *amended and superseded by* 941 F.2d 738 (9th Cir. 1991). The district court did not err in weighing each and all of the factors presented in the instant case in reaching a decision to depart downward one level so that the defendants, convicted of conspiracy to bribe and bribing an official of the INS, would not be imprisoned. According to the circuit court, the district court was not clearly erroneous "in finding that the defendants did not seek pecuniary gain and that there is no evidence of any other benefit; in finding that the government agent's conduct influenced defendants in the direction of not withdrawing from the plan; in finding that [defendant] Takai had gone to great personal expense to assist crime and earthquake victims; and in finding that the defendants' conduct constituted single acts of aberrant behavior."

Tenth Circuit

United States v. Kalady, 941 F.2d 1090 (10th Cir. 1991). The district court erred in departing upward where the "judge explained that he imposed the additional ten months above the Guidelines range to protect society, and because criminal history category IV was inadequate." The explanation failed to reveal how the court selected the degree of departure--ten months. Under circuit precedent, this explanation was inadequate. *See* U.S. v. St. Julian, 922 F.2d 563 (10th Cir. 1990); U.S. v. Jackson, 921 F.2d 985 (10th Cir. 1990) (*en banc*); U.S. v. Davis, 912 F.2d 1210 (10th Cir. 1990); U.S. v. Gardner, 905 F.2d 1432 (10th Cir.), *cert. denied*, 111 S. Ct. 202 (1990)."

United States v. Pool, 937 F.2d 1528 (10th Cir. 1991). The district court erred in failing to explain the extent of the upward departure for two defendants convicted of bank robbery. The district court explained that it was making a six-month upward departure because the defendants involved a sixteen-year-old juvenile and endangered her life. According to the circuit court, "we can find 'no reasonable methodology hitched to the sentencing guidelines to justify the reasonableness of the departure.'" U.S. v. St. Julian, 922 F.2d 563 (10th Cir. 1990).

United States v. Rivas, 922 F.2d 1501 (10th Cir. 1991). In sentencing the appellant for attempted escape, the district court did not err by failing to consider as a mitigating circumstance allegations that he had been beaten by guards at the correctional facility following the commission of the offense. According to the circuit court, there are "other avenues of redress available to the defendant in which he can assert such claims."

United States v. Roth, 934 F.2d 248 (10th Cir. 1991). The district court did not err in making an upward departure for the appellant, a member of the Air Force, who stole and sold a variety of government equipment including three F-16 jet engines. While the departure was justified because the value of the items exceeded $10 million and the appellant's conduct resulted in a significant disruption of a government function and significantly endangered national security, the district court failed to explain the extent of the departure. According to the circuit court, "[n]owhere did the sentencing court draw analogies to the guidelines or explain its sentence in guideline terms."

See U.S. v. Strickland, 941 F.2d 1047 (10th Cir.), *cert. denied*, 112 S. Ct. 614 (1991), §2L2.4, p. 34.

United States v. Stumpf, 938 F.2d 172 (10th Cir. 1991). In the instant case, the circuit court found that the reasons offered for an upward departure were justified. The record, however, was inadequate to determine whether the degree of the upward departure was reasonable. *See* U.S. v. Jackson, 921 F.2d 985 (10th Cir. 1990) (*en banc*). According to the circuit court, "'[j]ust as the district court must premise its departure on the Guidelines' deficiency in assigning a defendant a particular offense level, criminal history category, or both, the court also must explain a departure sentence in these terms.'" *Id.*

Eleventh Circuit

See U.S. v. Aimufua, 935 F.2d 1199 (11th Cir. 1991) (*per curiam*), §3E1.1, p. 62.

United States v. Christopher, 923 F.2d 1545 (11th Cir. 1991). The district court did not err in making an upward departure and sentencing the appellant to life imprisonment without parole. Among the

factors warranting an upward departure were the appellant's extensive criminal history which was not adequately reflected in his criminal history category and his willingness to corrupt members of his family, including his children, by involving them in criminal activities.

United States v. Fairman, 947 F.2d 1479 (11th Cir. 1991). The district court did not mistakenly believe that it lacked the authority to grant a downward departure on the basis of appellant's mental and emotional condition. The appellant committed armed bank robbery after suffering devastating financial losses. The circuit court held that the refusal to grant a downward departure based on appellant's severe depression and diminished capacity was not error, because the Sentencing Commission has determined that mental and emotional conditions should not be considered if the offender has committed a violent crime. Therefore, pursuant to U.S.S.G. §5K2.13, the district court properly refused to consider appellant's mental and emotional conditions when imposing a sentence for armed bank robbery.

United States v. Hall, 943 F.2d 39 (11th Cir. 1991). The district court erred in making a downward departure below the statutory minimum based on the defendant's advanced age and heart condition. In the instant case, because the amount of cocaine exceeded 50 grams, the statutory minimum sentence was 10 years.

United States v. Sasnett, 925 F.2d 392 (11th Cir. 1991). The district court did not err in making an upward departure from a guideline range of 24-30 months to a sentence of 60 months for appellant, convicted of DUI Manslaughter in violation of a Florida statute, pursuant to the Assimilative Crimes Act. The district court stated that the case "went far beyond drinking under the influence . . . he did more than cause death, he caused multiple and bad injuries to various people who were in the car and otherwise caused property damage."

United States v. Valle, 929 F.2d 629 (11th Cir.), *cert. denied*, 112 S. Ct. 401 (1991). The district court did not err in making upward departures from guideline ranges of 37-46 months and 30-37 months to sentences of 180 months [the statutory maximum] where the appellants stole $1.7 million, only $50,000 of which was recovered, and evidence showed that appellants were aware of the location of the money and refused to return the proceeds. According to the circuit court, "the sentences are appropriate and even necessary to insure respect for the law, and more specifically, to see that our system of punishment retains its deterrent effect."

United States v. Weaver, 920 F.2d 1570 (11th Cir. 1991). The district court did not err in making a downward departure from the guideline range of 18-24 months to a sentence of 7 months to account for the Parole Commission's extension of the defendant's parole range, where the defendant was sentenced for escape from a federal prison camp. Recognizing that this type of case will not appear, except during the transition from the parole system to the guidelines, the circuit court upheld the departure, since the guidelines do not address the interaction of the two systems.

§5K2.1 Death (Policy Statement)

Eleventh Circuit

United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991). Defendants were convicted of being felons in possession of firearms. The district court did not err in departing upward from defendants' guideline range for criminal purpose pursuant to U.S.S.G. §5K2.9, for resulting death pursuant to U.S.S.G. §5K2.1, and for resulting physical injury pursuant to U.S.S.G. §5K2.2, where the record indicated that one of the defendants was the leader of a gang which had been engaged in drive-by shootings and that the firearms found in his possession had been used in the shootings.

§5K2.2 Physical Injury (Policy Statement)

Eighth Circuit

See U.S. v. Morin, 935 F.2d 143 (8th Cir. 1991), §2A3.4, p. 14.

Eleventh Circuit

See U.S. v. Sweeting, 933 F.2d 962 (11th Cir. 1991), §5K2.1, p. 103.

§5K2.3 Extreme Psychological Injury (Policy Statement)

First Circuit

See U.S. v. Ellis, 935 F.2d 385 (1st Cir.), *cert. denied*, 112 S. Ct. 201 (1991), §2G1.2, p. 29.

Second Circuit

United States v. Pergola, 930 F.2d 216 (2d Cir. 1991). The district court did not err in making an upward departure from a guideline range of 15-21 months to a sentence of 60 months where the appellant, who was convicted of mailing threatening communications, had previously shot and killed his former wife, and threatened to kill his estranged girlfriend. According to the circuit court, some upward departure from the guideline range was amply supported by the record. The appellant had been returned to prison to serve the remaining 19 months of his state prison term for manslaughter, after his parole violation, and it was during this time that he sent the barrage of letters that formed the basis for the offense of conviction. According to the circuit court, "[p]lainly it was reasonable to infer a Guidelines calculation that would result in incarceration for a similar period did not adequately take into account the likelihood that [appellant] would continue to commit these crimes." The district court based its upward departure on U.S.S.G. §5K2.3 because of the extreme psychological injury to the former girlfriend, but it also refused to discount the applicability of U.S.S.G. §5K2.8 because of the extreme character of appellant's conduct. The Second Circuit affirmed the departure, rejecting appellant's argument that his conduct was not relevant to the judge's determination.

Third Circuit

United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991). The district court did not err in making a two-level upward departure on the grounds that the appellant, who was convicted of wire fraud and tax evasion, inflicted extreme psychological injury on his victims. In this case, one family lost its life savings and one family member was forced to seek treatment for high blood pressure. Another family lost its life savings and an inheritance. One member of the family, who was already in poor health, "displayed adverse physical and behavioral effects" because he was victimized by the appellant's fraudulent scheme. Hutchinson, J., *dissenting.* Majority opinion misunderstands the relationship of U.S.S.G. §5K2.3 on extreme psychological injury and U.S.S.G. §3A1.1 on vulnerable victims.

Eighth Circuit

See U.S. v. Fawbush, 946 F.2d 584 (8th Cir. 1991)§4A1.3, p. 71.

See U.S. v. Morin, 935 F.2d 143 (8th Cir. 1991), §2A3.4, p. 14.

United States v. Perkins, 929 F.2d 436 (8th Cir. 1991). The district court did not err in making an upward departure from a guideline range of 30-37 months to a sentence of 84 months imprisonment based on the "guidelines' objective of deterring crime and the exceptional financial and emotional hardship to John E. Baker." In the instant case, the appellant, while on probation for past frauds, committed additional fraudulent acts, which formed the basis of the offenses of convictions for credit card fraud and fraud by wire. The appellant used several other people's identities in committing fraud, including Mr. John E. Baker. The appellant had used Mr. Baker's identity several times in the past, including using his academic record to enroll in a doctorate program and fraudulently obtaining a student loan. According to the circuit court, "[w]hat Perkins did to Mr. Baker and his family is reprehensible, and although the sentence imposed is lengthy, it is not an abuse of discretion for the district court to consider the impact of Perkins' crime on his victim."

Ninth Circuit

United States v. Hoyungowa, 930 F.2d 744 (9th Cir. 1991). The district court erred in basing an upward departure on the "extreme psychological injury" to the murder victim's family. According to the circuit court, "[i]f the guideline for extreme psychological injury also applied to those affected by crimes such as [the victim's] family, then the justice system would punish the murder of a head of a household more harshly than the murderer of a transient. The sentencing guidelines admit of no such disparity." Thus, the court found that U.S.S.G. §5K2.3 applies only to direct victims of the charged offense.

§5K2.5 Property Damage or Loss (Policy Statement)

Eighth Circuit

See U.S. v. Perkins, 929 F.2d 436 (8th Cir. 1991), §5K2.3, p. 104.

§5K2.7 Disruption of Governmental Function (Policy Statement)

Third Circuit

United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991). The district court erred in making an upward departure for appellant's conviction of assaulting a federal officer based on disruption of governmental function. According to the circuit court, "[a]ssault of a federal marshal inherently disrupts a governmental function because it interferes with the marshal's performance of his or her duties; thus, the disruption of the marshal's ordinary activity 'would have to be quite serious to warrant departure from the guidelines.'" The disruption in this case is not of the nature or kind for which the Commission intended an upward departure. *See* U.S. v. Singleton, 917 F.2d 411 (9th Cir. 1990).

Fifth Circuit

See U.S. v. Hatch, 926 F.2d 387 (5th Cir.), *cert. denied*, 111 S. Ct. 2239 (1991), §5K2.0, p. 98.

Sixth Circuit

United States v. Pulley, 922 F.2d 1283 (6th Cir.), *cert. denied*, 112 S. Ct. 67 (1991). The district court did not err in making an upward departure from a guideline range of 63-78 months imprisonment to a sentence of 120 months pursuant to U.S.S.G. § 5K2.7 where the appellant, convicted of drug charges, caused a significant disruption of a governmental function by persuading a co-defendant to recant his confession and persuaded other members of his family to perjure themselves.

Tenth Circuit

See U.S. v. Roth, 934 F.2d 248 (10th Cir. 1991), §5K2.0, p. 102.

§5K2.8 Extreme Conduct (Policy Statement)

First Circuit

See U.S. v. Ellis, 935 F.2d 385 (1st Cir.), *cert. denied*, 112 S. Ct. 201 (1991), §2G1.2, p. 29.

See U.S. v. Johnson, 952 F.2d 565 (1st Cir. 1991), §5K2.0, p. 105.

Second Circuit

See U.S. v. Pergola, 930 F.2d 216 (2d Cir. 1991), §5K2.3, p. 104.

Sixth Circuit

See U.S. v. Patrick, 935 F.2d 758 (6th Cir.), *cert. denied*, 112 S. Ct. 269 (1991), §5K2.0, p. 99.

United States v. Phillip, 948 F.2d 241 (6th Cir. 1991). The district court did not err in departing upward from a guideline range of 210-262 months to impose a sentence thirty years based on the severity of the child abuse inflicted over a period of six or seven weeks, which resulted in the child's death. The district court's finding that the offense conduct was "unusually heinous, cruel, brutal, or degrading" is not clearly erroneous. Furthermore, in light of the extreme criminal abuse inflicted on the four-year-old child, a total sentence of thirty years, representing an upward departure of 98 months, was considered appropriate.

Eighth Circuit

See U.S. v. Perkins, 929 F.2d 436 (8th Cir. 1991), §5K2.3, p. 104.

§5K2.9 Criminal Purpose (Policy Statement)

Eighth Circuit

United States v. Culver, 929 F.2d 389 (8th Cir. 1991). The district court did not err in making an upward departure where the offense of conviction, conspiracy to transport a stolen aircraft, was committed to facilitate the transport of drugs. According to the circuit court, "[w]hile the court did not specifically state the evidence upon which it was relying, the court's departure complies with the requirements of 18 U.S.C. § 3553(c)(2)." The record also supported the finding that the plane was to be used to transport drugs.

Eleventh Circuit

See U.S. v. Sweeting, 933 F.2d 962 (11th Cir. 1991), §5K2.1, p. 103.

§5K2.13 Diminished Capacity (Policy Statement)

First Circuit

United States v. Citro, 938 F.2d 1431 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 902 (1992). The district court properly refused to depart downward from defendant's guideline sentencing range on the basis of the defendant's alleged "history of involuntary cocaine and drug addiction." According to the appellate court, "[t]he Sentencing commission was perfectly aware that many traffickers are drug abusers, who are driven to commit criminal acts in order to feed their habits."

Seventh Circuit

See U.S. v. Poff, 926 F.2d 588 (7th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 96 (1991), §4B1.1, p. 75.

Eleventh Circuit

See U.S. v. Fairman, 947 F.2d 1479 (11th Cir. 1991), §5K2.0, p. 103.

§5K2.14 Public Welfare (Policy Statement)

First Circuit

See U.S. v. Johnson, 952 F.2d 565 (1st Cir. 1991), §5K2.0, p. 105.

Fourth Circuit

See U.S. v. Chambers, 940 F.2d 653 (4th Cir. 1991) (unpublished), §2A1.4, p. 13.

Fifth Circuit

United States v. Wade, 931 F.2d 300 (5th Cir.), *cert. denied*, 112 S. Ct. 247 (1991). The district court did not err in making an upward departure pursuant to U.S.S.G. §5K2.14 where the appellant, a county sheriff, "endangered the public health and safety by abusing his public office to further the manufacturing of drugs."

Tenth Circuit

See U.S. v. Roth, 934 F.2d 248 (10th Cir. 1991), §5K2.0, p. 102.

§5K2.15 Terrorism (Policy Statement)

First Circuit

See U.S. v. Johnson, 952 F.2d 565 (1st Cir. 1991), §5K2.0, p. 105.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

Fourth Circuit

United States v. Morgan, 942 F.2d 243 (4th Cir. 1991). The district court erred in sentencing the appellant where two factual disputes remained for resolution at the sentencing hearing and the court failed to make adequate findings. The district court "made no express finding about the amount of cocaine base for which [the appellant] would be held accountable. The only statement by the district court during the sentencing colloquy that might be construed as a ruling on the disputed issue is the statement by the district court that it adopted the presentence report *'in toto'*. . . . On this record we cannot determine whether the district court intended its ruling to apply to both of [the appellant's] objections or only to the possession of the firearm issue."

§6A1.3 Resolution of Disputed Factors (Policy Statement)

Second Circuit

United States v. Contractor, 926 F.2d 128 (2d Cir. 1991). The district court did not err by failing to personally give advance notice of a contemplated upward departure where the appellant had clear notice of the possibility of an upward departure in the presentence report, including the precise grounds, and an opportunity to contest the departure. The appellate court's earlier decisions in U.S. v. Cervantes, 878 F.2d 50 (2d Cir. 1989); U.S. v. Palta, 880 F.2d 636 (2d Cir. 1989); U.S. v. Kim, 896 F.2d 678 (2d Cir. 1990); and U.S. v. Uccio, 917 F.2d 80 (2d Cir. 1990) were "intended to protect the defendants from surprise, not to impose burdensome and unnecessary formalities upon busy district judges."

See U.S. v. Jacobo, 934 F.2d 411 (2d Cir. 1991), §2D1.1, p. 18.

United States v. Madkour, 930 F.2d 234 (2d Cir.), *cert. denied*, 112 S. Ct. 308 (1991). The circuit court rejected appellant's argument that a jury must make a finding, beyond a reasonable doubt, that the crime involved a quantity of drugs which would trigger a mandatory minimum sentence. According to the circuit court, "quantity relates solely to sentencing. And at sentencing, the district court is not limited to conclusions reached by the jury or even evidence presented at trial, but instead may consider any evidence that it deems appropriate."

See U.S. v. Pimentel, 932 F.2d 1029 (2d Cir. 1991), §2D1.1, p. 18.

United States v. Rosado-Ubiera, 947 F.2d 644 (2d Cir. 1991). The district court erred in determining an offense level and imposing a sentence without first resolving factual disputes relating to defendant's role in the offense as required by Fed. R. Crim. P. 32(c). *See* U.S. v. Shoulberg, 895 F.2d 882 (2d Cir. 1990).

United States v. Underwood, 932 F.2d 1049 (2d Cir. 1991). The district court did not err in sentencing the appellant according to the guidelines without a jury determination that his continuing criminal enterprise extended past the effective date of the guidelines. According to the circuit court, "the factual determination as to whether [appellant's] offense continued past the effective date of the guidelines in the language of McMillan [v. Pennsylvania, 477 U.S. 79 (1986)] is a 'sentencing factor,' and may be resolved by the district court using a preponderance of the evidence standard."

Fifth Circuit

United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991). The district court did not err by departing upward in sentencing the defendant in response to a government affidavit, where the defendant did not object in a timely manner. The appellant argued that the prosecutor's "11th hour" submission of an affidavit deprived the defense of an opportunity to refute the government's facts supporting a loss amount which formed the basis for an upward departure. The circuit court rejected this argument and found that "the only reason the government's submission was at the '11th hour' was the defendant's failure to submit his objections to the presentence investigation in a timely manner. As the delay was caused by [the appellant's] own inaction or delay he cannot now claim prejudice. *See* U.S. v. Taylor, 814 F.2d 172, 174 (5th Cir. 1987). More importantly . . . [i]n as much as [the appellant] had been aware for several weeks before sentencing that the [loss amount] was at issue and he failed to produce any evidence whatsoever to support his contention that the figure was incorrect, it is reasonable to infer that he understood the amount's significance to his sentencing and that he had ample opportunity to respond to the probation officer's conclusion." *See* Taylor, 814 F.2d at 174; *see also* U.S. v. Walker, 901 F.2d 21, 22 (4th Cir. 1990). The appellant further argued that the district court did not adequately justify the upward departure. The circuit court also rejected this claim by stating "[g]iven the extensive record in this case, the documentation presented to the court, the affidavit submitted by the investigating agent and the total absence of evidence to the contrary, we conclude that the district court's finding . . . was not clearly erroneous."

Ninth Circuit

See U.S. v. Harrington, 923 F.2d 1371 (9th Cir.), *cert. denied*, 112 S. Ct. 164 (1991), §1B1.4, p. 11.

United States v. Restrepo, 946 F.2d 654 (9th Cir. 1991). In a divided *en banc* opinion, the Ninth Circuit held "as a general rule and as a rule appropriate for the facts of this case, that due process does not require a higher standard of proof than preponderance of evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines." According to the majority opinion "[a] convicted defendant has an interest in the accurate application of the Guidelines within statutory limits, nothing more, nothing less." *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986). In so holding, the circuit court rejected the appellant's argument that because the guidelines reduce the judge's discretion and mandate the sentencing effect of uncharged crimes that due process requires a higher standard of proof for uncharged crimes under the guidelines.

Tenth Circuit

United States v. Anthony, 944 F.2d 780 (10th Cir. 1991). The district court erred by imposing the sentence without stating any findings after the appellant filed specific objections to the presentence report. The district court overruled the objections and accepted the presentence report without making any findings or determinations concerning the objections. The circuit court held that "[t]he district court did not comply with Fed. R. Crim. P. 31(c)(3)(D) and its counterpart, U.S.S.G. §6A1.3" and remanded for resentencing.

Eleventh Circuit

United States v. Query, 928 F.2d 383 (11th Cir. 1991). The district court did not err in relying on hearsay evidence to resolve disputed factual findings contained in the presentence report. The guidelines and case law from the Eleventh Circuit permit a district court to consider reliable hearsay evidence at sentencing. *See* U.S.S.G. §6A1.3; U.S. v. Castellanos, 904 F.2d 1490 (11th Cir. 1990). In the instant case, the appellant was given an opportunity to challenge the evidence against him and he had not shown that the hearsay evidence considered by the court was unreliable.

Part B Plea Agreements

Fourth Circuit

United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991) *(petition for cert. filed Feb. 11, 1992)*. The circuit court dismissed the government's appeal of the defendant's sentence. The circuit court found the plea agreement provision prohibiting appeal of the sentence by the defendant "far too one-sided" and held that such a provision must also be enforced against the government.

United States v. Poteet, 940 F.2d 654 (4th Cir. 1991) (table). The circuit court rejected the defendant's argument that his sentence violated the plea agreement where the government reserved the right to bring to the court's attention its version of disputed facts and submitted a position paper. According to the circuit court, "[t]he trial court did not consider the government's position paper to be a motion for upward departure."

§6B1.1 Plea Agreement Procedure (Policy Statement)

Third Circuit

United States v. Hayes, 946 F.2d 230 (3d Cir. 1991). The circuit court vacated the sentence imposed by the district court because the government breached its plea agreement to not recommend a specific sentence by advocating a sentence in the "Government's Response to Defendant's Presentence Objections and Sentencing Memorandum," and by making statements at the sentencing hearing similar to those contained in the written response.

See U.S. v. Torres, 926 F.2d 321 (3d Cir. 1991), §1B1.3, p. 5.

§6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)

Eighth Circuit

United States v. LeMay, 952 F.2d 995 (8th Cir. 1991). The district court did not err in refusing to accept the defendant's first of two plea agreements because the agreement it provided an excessive downward departure from the applicable Guidelines range. "In the case of a plea agreement that includes a nonbinding recommendation, the court may accept the recommendation if the court is satisfied . . . that . . . the recommended sentence departs from the applicable guidelines range for justifiable reasons." U.S.S.G. §6B1.2(b). "A decision that a plea bargain will result in the defendant receiving too light a sentence under the circumstances of the case is a sound reason for a judge's refusing to accept the agreement." U.S. v. Bean, 564 F.2d 700, 704 (5th Cir. 1977).

Ninth Circuit

United States v. Faulkner, 934 F.2d 190 (9th Cir. 1991). The district court erred in failing to provide adequate reasons for a departure and for the extent of the departure in sentencing the appellant on five counts of bank robbery. The district court erred in basing the departure on five robbery counts that the government agreed that appellant would not be charged within the future and three robbery counts that the government agreed to dismiss as a result of a plea bargain. If the district court believed that the remaining

charges did not adequately reflect the seriousness of the actual offense conduct, the court should have rejected the agreement and not have made a departure on that basis. *See* U.S. v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990). According to the appellate court, "[t]o reach any other result would undermine the integrity of the plea bargaining process." The circuit court found it "patently unfair" for a court to hold the defendant to his part of the bargain, while simultaneously denying him the benefits promised him from the bargain by relying on uncharged and dismissed counts. The circuit court rejected the government's argument that U.S.S.G. §1B1.4 gave sentencing courts a free reign to disregard the directive of U.S.S.G. §6B1.2 regarding plea bargaining. The appellate court also found that U.S.S.G. §5K2.0 also limited the application of U.S.S.G. §1B1.4. According to the circuit court, the Commission has already specifically considered in U.S.S.G. §6B1.2, that plea bargains would result in the dismissal counts, and therefore U.S.S.G. §5K2.0 barred the district court from departing on the basis of acts dropped and not charged pursuant to the plea agreement.

Rule 11

Second Circuit

United States v. Pimentel, 932 F.2d 1029 (2d Cir. 1991). The circuit court expressed its concern about the "escalating number of appeals from convictions based on guilty pleas in which the appellant claims that he was unfairly surprised by the severity of the sentence imposed under the guidelines." The circuit court suggested that the government might want to "sentence bargain" pursuant to Fed. R. Crim. P. 11(e)(1)(B) or (C) to avoid these appeals. According to the circuit court, "[g]iven that the guidelines have so circumscribed the judiciary's traditional role in sentencing, we think it even less likely now than before that judges would resist sentence bargains as undue or unseemly intrusions on the judicial function."

Fifth Circuit

United States v. Bachynsky, 934 F.2d 1349 (5th Cir.), *cert. denied*, 112 S. Ct. 402 (1991). The circuit court held that the district court's failure to inform defendant regarding the existence or potential effects of supervised release was a partial failure to address a core concern of Fed. R. Crim. P. Rule 11, but refused to vacate the sentence holding that the failure was "harmless error."

United States v. Tuangmaneeratmun, 925 F.2d 797 (5th Cir. 1991). At the plea hearing, the district court committed harmless error when it informed the appellant that he could receive a term of supervised release, but failed to explain the effect of a term of supervised release. According to the circuit court, since there was not an "entire failure" to address one of the three "core concerns" of Rule 11, the "inadequate address" issue is subject to harmless error analysis. *See* U.S. v. Dayton, 604 F.2d 931 (5th Cir. 1979) (*en banc*), *cert. denied*, 445 U.S. 904 (1980). The circuit court concluded that the error was harmless because appellant failed to demonstrate that his "substantial rights" were affected.

Eleventh Circuit

United States v. Hourihan, 936 F.2d 508 (11th Cir. 1991). The district court erred in failing to inform the appellant at the Rule 11 hearing that she faced a mandatory minimum sentence of five years. The circuit court rejected the government's argument that the Rule 11 requirement was met by the district court when it advised the defendant that the sentencing range was five to forty years. According to the circuit court, the government "misperceive[d]" the transcript of the hearing because the district court "clearly referred to the range of five to 40 years as a maximum sentence." Thus, the circuit court concluded that the error was not harmless. There was no indication in the record of the Rule 11 proceedings that the appellant knew of the five-year minimum mandatory sentence.

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

First Circuit

United States v. Ramos-Santiago, 925 F.2d 15 (1st Cir.), *cert. denied*, 112 S. Ct. 129 (1991). The district court did not err in sentencing the appellant, who tested positive for narcotics use on sixteen different occasions, to two years imprisonment for violating the conditions of supervised release. The circuit court rejected the appellant's argument that the sentencing court should have sentenced him using an analogy to the guideline for the offense of unlawful possession of heroin or opiates. *See* 18 U.S.C. § 3583(e)(3). According to the circuit court, 18 U.S.C. § 3583(g), which states "the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release," takes precedence over 18 U.S.C. § 3583(e)(3).

Fourth Circuit

United States v. Alli, 929 F.2d 995 (4th Cir. 1991). The district court erred in resentencing the defendant, upon revoking his sentence of probation, to a term of active prison confinement in excess of the initial guideline sentencing range. *See* U.S. v. Smith, 907 F.2d 133 (11th Cir. 1990); U.S. v. Von Washington, 915 F.2d 390 (8th Cir. 1990); U.S. v. Foster, 904 F.2d 20 (9th Cir. 1990). The conduct underlying the violation does not go unpunished, rather it results in the appellant losing any credit for the 138 days he spent in community confinement. The circuit court noted that the appellant's sentence is less than under the current policy statements, but the policy statements were not effective at the time of resentencing. Norton, J., *dissenting:* The majority construes the statutory probation revocation provisions too narrowly. When the statute speaks of "any other sentence that was available under subchapter A," it appears to refer to any sentence of imprisonment up to the statutory maximum. To construe the statute otherwise would reduce to mere surplusage Congress' directive to the Sentencing Commission to write guidelines or policy statements for probation revocation.

Fifth Circuit

United States v. Ayers, 946 F.2d 1127 (5th Cir. 1991). According to the Fifth Circuit, "even if the [Chapter 7] policy statements are not binding on the courts, the court should consider them in sentencing defendants." *See* U.S. v. Fallin, 946 F.2d 57 (8th Cir. 1991); U.S. v. Blackston, 940 F.2d 877 (3d Cir.), *cert. denied*, 112 S. Ct. 611 (1991). In the instant case, the district court had the discretion to impose two years imprisonment following revocation of the appellant's term of supervised release because it was within the statutory maximum. The district court's failure to articulate consideration of the policy statements was not plain error.

Sixth Circuit

United States v. Stephenson, 928 F.2d 728 (6th Cir. 1991). The circuit court rejected the appellant's argument that the maximum sentence he should receive upon revocation of supervised release is equal to the maximum allowable time in the guideline range for the original offense less the time he had already served. The plain language of 18 U.S.C. § 3583(e) grants the court discretion to resentence the defendant for any period up to the whole period of supervised release with certain limiting exceptions. According to the circuit court, "[i]f the resentencing period was connected and the defendant had already served a substantial part or all of his allowable term under the guidelines, his violation of a condition of supervised release would result in a tenuously short period of reincarceration, or no reincarceration at all. The possibility of reincarceration for violation of a condition of supervised release is a cornerstone of the sentencing structure." In this case, "[b]ecause of the lack of reliable evidence establishing [appellant] had either engaged in criminal conduct or

used alcohol to excess and because the district court made no written statement explaining the evidence relied on or the reasons for revoking release," the case was remanded.

Eighth Circuit

United States v. Oliver, 931 F.2d 463 (8th Cir. 1991). The district court did not err in imposing a sentence on revocation of appellant's supervised release that was longer than the sentence for his underlying conviction. According to the circuit court, "the sentence the district court imposed in this case, eighteen months, was reasonable and well within the statutory limits."

United States v. Smeathers, 930 F.2d 18 (8th Cir. 1991). The district court did not err in sentencing the appellant to two years imprisonment upon revocation of his supervised release when his original sentence was fourteen months confinement. The appellate court rejected appellant's argument that the district court incorrectly focused on the revocation conduct rather than the original offense.

United States v. Williams, 943 F.2d 896 (8th Cir. 1991). In revoking the appellant's three-year term of probation, the district court erred in sentencing him under the Chapter 7 revocation policy statements in effect at the time of the revocation proceeding. Relying on U.S. v. Von Washington, 915 F.2d 390 (8th Cir. 1990), the circuit court held that the "district court erroneously considered guideline policy statements that were not available when [appellant] was originally sentenced in August, 1988."

Ninth Circuit

United States v. Purvis, 940 F.2d 1276 (9th Cir. 1991). According to the Ninth Circuit, "[18 U.S.C.] § 3583 authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his substantive offense, will exceed the maximum incarceration permissible under the substantive statute." According to the appellate court, to hold otherwise, for those defendants who actually serve the maximum or close to the maximum period of incarceration, no violation of their supervised release, no matter how egregious, could ever result in its revocation. *See* U.S. v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990) (a sentencing court may impose a period of supervised release onto any term of imprisonment authorized by a substantive criminal statute, even a term near or at the maximum).

United States v. White, 925 F.2d 284 (9th Cir. 1991). The district court erred in sentencing the appellant to three years imprisonment for violation of probation where the sentence that was "available" at the initial sentencing was in the range of zero to six months. According to the circuit court, "probation conduct cannot directly increase a sentence. Sentencing courts are constrained by the offense level, criminal history category, and sentencing range determined during the initial sentencing." The circuit court did note, however, that probation-violating conduct can be considered in choosing an appropriate sentence with the initial guideline range, and in determining whether to depart.

Tenth Circuit

United States v. Boling, 947 F.2d 1461 (10th Cir. 1991). The Tenth Circuit held that when sentencing a defendant for a violation of conditions of supervised release, a federal district court may impose both additional prison time and an additional period of supervised release. The majority based its decision on the language in U.S.S.G. §7B1.3(g)(2) and portions of a Senate amendment to clarify 18 U.S.C. § 3583(e)(3). According to the circuit court, this interpretation is consistent with Congress's intent that federal courts retain flexibility to order an additional period of supervised release following imposition of a term of imprisonment for a violation of a condition of supervised release.

§7B1.4 Term of Imprisonment (Policy Statement)

Ninth Circuit

United States v. Baclaan, 948 F.d 628 (9th Cir. 1991). The circuit court rejected the government's argument that §7B1.4 was not applicable to the revocation proceeding because the offense of conviction and each positive urine test predated the effective date of the policy statement. According to the Ninth Circuit, "the applicable policy statements are those which are in effect on the date of sentencing." Positive urine tests and admission of drug use constituted "possession" under 18 U.S.C. § 3583(g).

United States v. Dixon, 952 F.2d 260 (9th Cir. 1991). The appellant challenged his sentence imposed for violation of probation stemming from a conviction for bank robbery while on probation for mail fraud and possession of stolen mail. The appellant received 41 months for the robbery and 15 months for the probation violation, to be served consecutively. The issue was whether a probation-violating defendant may receive a sentence other than one that was available at the time the defendant was first sentenced to probation. The circuit court found that the guidelines permit this course of action, but remanded the instant case for resentencing because of a conflict between the guidelines and the probation revocation statute. The circuit court noted that courts have consistently interpreted the revocation statute, 18 U.S.C. § 3565(a)(2), to require the sentencing court to apply the sentencing range calculated for the initial crime. *See* U.S. v. White, 925 F.2d 284, 286 (9th Cir. 1991); U.S. v. Von Washington, 915 F.2d 390, 392 (8th Cir. 1990); U.S. v. Smith, 907 F.2d 133, 135-36 (11th Cir. 1990). The circuit court adopted these courts' interpretations of 18 U.S.C. § 3565 holding that where the probation-violating conduct had not yet occurred at the time of the initial sentencing, any higher sentence justified by the later conduct was not "available" when the initial sentence was imposed. Thus, "[b]y directing the sentencing court to consider the probation-violating conduct in calculating the new sentence, the guidelines run afoul of the plain language of section 3565. To the extent that the guidelines conflict with the statutes, we find them invalid."

APPLICABLE GUIDELINES/EX POST FACTO

Seventh Circuit

United States v. Mettler, 938 F.2d 764 (7th Cir. 1991) (unpublished). The consideration of defendant's criminal conduct before the effective date of the Guidelines does not raise ex post facto issues because the prior activity was criminal at the time defendant engaged in it, and the sentence imposed was within the statutory maximum for the offense. According to the circuit court, "[a]n *ex post facto* law is one that punishes for conduct that was not criminal at the time it occurred or that increases the punishment for the conduct after the conduct is done."

Eleventh Circuit

See U.S. v. Robinson, 935 F.2d 201 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 885 (1992), §1B1.3, p. 10.

CONSTITUTIONAL ISSUES

Fourth Amendment

District of Columbia Circuit

United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992). The district court did not err in using evidence seized in violation of the fourth amendment in setting the defendant's offense level for sentencing. The government conceded that there was some "irregularity" when the police officers seized the evidence in a warrantless entry to arrest appellant. The evidence was excluded from the appellant's trial. However, "[w]here there is no showing of a violation of the Fourth Amendment

purposefully designed to obtain evidence to increase a defendant's base offense level at sentencing, this police misconduct is not sufficient to justify interfering with individualized sentencing."

Third Circuit

See U.S. v. Torres, 926 F.2d 321 (3d Cir. 1991), §1B1.3, p. 5.

Eleventh Circuit

See U.S. v. Lynch, 934 F.2d 1226 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 885 (1992), §2D1.1, p. 24.

Double Jeopardy

Sixth Circuit

United States v. Mack, 938 F.2d 678 (6th Cir. 1991). In an interlocutory appeal, the Sixth Circuit held that the guarantee in the Double Jeopardy clause against multiple punishments for the same offense is not implicated when a defendant's sentence is enhanced for other criminal activity and the defendant is later indicted for that additional criminal activity. *See* U.S. v. Troxell, 887 F.2d 830 (7th Cir. 1989); Sekou v. Blackburn, 796 F.2d 108 (5th Cir. 1986); U.S. v. Koonce, 885 F.2d 720 (10th Cir. 1989). According to the circuit court, "[a]n enhanced sentence because of a prior conviction is no more double jeopardy than is consideration of other relevant conduct, including the likelihood of a subsequent conviction."

Seventh Circuit

See U.S. v. Webb, 945 F.2d 967 (7th Cir. 1991), §2D1.1, p. 21.

Eighth Circuit

See U.S. v. Lyles, 946 F.2d 78 (8th Cir. 1991), §3E1.1, p. 61.

Tenth Circuit

United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991). The Tenth Circuit held that the appellant's conviction for possession with intent to distribute drugs was barred by the "multiple punishments" component of the Double Jeopardy clause because an earlier sentence in South Dakota for drug distribution had been increased by two offense levels for the same drugs. According to the circuit court, the guideline procedure of "aggregating fungible offense conduct" shows that Congress did not intend for a defendant to be punished a second time for conduct that has already been factored into the "base offense level for a related sentence in an earlier prosecution." It was irrelevant that the defendant's sentence was concurrent with the earlier one. The collateral adverse consequences of a second conviction make a second conviction "punishment" for purposes of the Double Jeopardy clause even if the sentences were concurrent.

United States v. Smith, 929 F.2d 1453 (10th Cir.), *cert. denied*, 112 S. Ct. 146 (1991). The district court did not err in resentencing the appellant before he began to serve the sentence imposed, where the original sentence imposed was based on a misreading of the presentence report. According to the circuit court, the appellant did not have an expectation of finality in his original sentence, at least not until the time for appeal had expired. Therefore, the Double Jeopardy clause was not violated. See U.S. v. DiFrancesco, 449 U.S. 117 (1980). McKay, J., *dissenting:* The district court lacked jurisdiction under Rule 35 to resentence the appellant. The district court has no authority *sua sponte* to retry the facts relating to sentencing. Also, the defendant had a legitimate expectation of finality in his sentence since no circumstances existed in the instant case which would have given the district court jurisdiction to resentence him.

United States v. Welch, 928 F.2d 915 (10th Cir.), *cert. denied*, 112 S. Ct. 153 (1991). The district court did not violate the constitutional guarantee against double jeopardy when it imposed a sentence in

excess of four years, the maximum imposed on a single count at appellant's initial sentencing. The circuit court found that the appellant did not have a "legitimate expectation of finality in his original sentence" since he appealed the original unlawful sentence. According to the circuit court "[u]nder these circumstances, the district court could impose a greater or lesser sentence upon resentencing given defendant's lack of a reasonable expectation of finality in the first sentence."

Eleventh Circuit

United States v. Carey, 943 F.2d 44 (11th Cir. 1991) *(petition for cert. filed Nov. 26, 1991)*. In an appeal of a motion to dismiss an indictment, the circuit court rejected the appellant's argument that the two level adjustment for obstruction of justice in her first sentence based on her failure to appear for sentencing, precluded her subsequent prosecution for failure to appear for sentencing because of double jeopardy protection against multiple punishments for the same offense. According to the circuit court, "the enhancement of [the appellant's] sentence in the first case did not constitute punishment for her failure to appear; rather, the district court properly considered Carey's actions, along with other evidence of her character, in an attempt to arrive rationally at an appropriate sentence."

United States v. Martinez, 931 F.2d 851 (11th Cir.), *cert. denied*, 112 S. Ct. 268 (1991). The circuit court found that the application of U.S.S.G. §4A1.1(a) in addition to §4A1.1(d) did not constitute multiple punishment for a single prior offense in violation of the double jeopardy clause. According to the circuit court, "[t]he district court's assignment of points under both section 4A1.1(a) and section 4A1.1(d) does not punish [appellant] more than once for the same offense, but rather only determines the severity of his single sentence." *See* U.S. v. Lewis, 900 F.2d 877 (6th Cir.), *cert. denied*, 111 S. Ct. 117 (1990).

Due Process

Second Circuit

United States v. Pimentel, 932 F.2d 1029 (2d Cir. 1991). The district court did not deny the appellant due process by failing to notify him that it would rely on facts from his brother's trial in setting his base offense level. The district court provided the appellant with a copy of the presentence report which set out all the facts established at trial that the judge relied upon. The appellant had the opportunity to challenge the accuracy and sufficiency of the information. According to the circuit court, "[d]ue process requires no more."

Sixth Circuit

United States v. Pickett, 941 F.2d 411 (6th Cir. 1991). The circuit court rejected the claim that the 100:1 ratio equivalency for crack to cocaine violated due process. The circuit court did not accept the argument that the effects of crack and cocaine are substantially identical and the distinction between them is arbitrary and irrational. The circuit court held "that there is sufficient difference of opinion in the scientific community regarding the different likelihoods of becoming addicted to crack or cocaine to justify the Congressional distinction between the two . . . Congress was clearly concerned that the special attributes of crack--its small size and cheap price per dose--could create other societal problems that require remedying."

Ninth Circuit

United States v. Ruiz, 935 F.2d 1033 (9th Cir. 1991). The district court did not err in refusing to follow the holding of U.S. v. Restrepo, 883 F.2d 781 (9th Cir. 1989), *withdrawn*, 896 F.2d 1228 (9th Cir. 1990) (Restrepo I) (no aggregation of drugs present in unconvicted offenses) which was withdrawn between the time of the appellant's plea agreement and sentencing. The appellant alleged that he relied on Restrepo I in entering his plea agreement. According to the circuit court, Restrepo I was not yet fixed as settled Ninth Circuit law. The appellant made a good gamble in relying on the decision, "but one that did not pay off as he had hoped." The appellant could have withdrawn his guilty plea but he explicitly rejected that option at sentencing.

Tenth Circuit

United States v. Jensen, 940 F.2d 1539 (10th Cir. 1991) (unpublished). The appellant argued that a refusal to depart downward violates due process where he attempted to withdraw from the conspiracy but was prevented from doing so because of threats on his life. According to the circuit court, the "[d]efendant has produced no authority to support his contention that a refusal to mitigate the sentence of an admitted member of a conspiracy is a violation of due process when the defendant suffered threats by a co-conspirator of physical violence during the pendency of the conspiracy."

United States v. Roth, 934 F.2d 248 (10th Cir. 1991). The district court rejected the appellant's argument that the district court judge's comments about his own military service, when sentencing him for theft of government property, constituted an abuse of discretion and a violation of due process. According to the circuit court, "his statement simply highlighted the seriousness of defendant's offense."

United States v. Turner, 928 F.2d 956 (10th Cir.), *cert. denied*, 112 S. Ct. 230 (1991). The Tenth Circuit joined several other circuits in holding that the different penalties for cocaine base and cocaine in its other forms do not violate due process and that the term "cocaine base" is not impermissibly vague. *See* U.S. v. Avant, 907 F.2d 623 (6th Cir. 1990); U.S. v. Buckner, 894 F.2d 975 (8th Cir. 1990).

Eleventh Circuit

See U.S. v. Martinez, 931 F.2d 851 (11th Cir.), *cert. denied*, 112 S. Ct. 268 (1991), Constitutional Challenges, Double Jeopardy, p. 115.

Sixth Amendment

Fourth Circuit

United States v. Johnson, 935 F.2d 47 (4th Cir.), *cert. denied*, 112 S. Ct. 609 (1991). The Fourth Circuit held that an *ex parte* conference between the probation officers who prepared the presentence reports and the sentencing judge did not violate the appellants' Sixth Amendment rights to effective assistance of counsel and confrontation of witnesses. Although the court recognized that guideline sentencing has changed the role of probation officers, the court found that the change does not carry constitutional significance. The probation officer continues to be a "neutral, information-gathering agent of the court, not an agent of the prosecution." The appellate court also found that when a probation officer conveys information to the sentencing court as its neutral agent, the interests underlying the confrontation clause are not implicated. The court presumes that probation officers will act properly and relies on the integrity of judges and their ability to disregard any attempt to impermissibly influence a sentencing decision. According to the circuit court, "[t]he resolution of disputed sentencing issues, and indeed, the determination of an appropriate sentence in all respects, remains the exclusive province of the trial judge who exercises independent and impartial judgment in arriving at final sentence determinations."

Sixth Circuit

United States v. Hodges, 935 F.2d 766 (6th Cir.), *cert. denied*, 112 S. Ct. 251 (1991). The district court did not violate the appellant's Sixth Amendment right to a jury trial by making a determination regarding the quantity of drugs involved in his offense. The circuit court recognized that the great weight of authority holds that the quantity of the drug involved in an illegal transaction is only relevant to the sentence that will be imposed and is not a part of the offense. *See* U.S. v. McNeese, 901 F.2d 585 (7th Cir. 1990); U.S. v. Gibbs, 813 F.2d 596 (3d Cir.), *cert. denied*, 484 U.S. 822 (1987); U.S. v. Wood, 834 F.2d 1382 (8th Cir. 1987). However, the issue in the instant case had not been explicitly addressed, but was implicitly rejected in U.S. v. Moreno, 899 F.2d 465 (6th Cir. 1990) and U.S. v. Sawyers, 902 F.2d 1217 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991).

Eighth Amendment

Second Circuit

United States v. Mitchell, 932 F.2d 1027 (2d Cir. 1991). The circuit court rejected appellant's argument that his 15-year sentence for violating 18 U.S.C. § 924(g) was cruel and unusual punishment. According to the circuit court, "[a]lthough Mitchell's sentence is a severe punishment for felony gun possession, when viewed in context of his three burglaries, it is no more severe than that found acceptable in Rummell v. Estell, 445 U.S. 263, 285 (1980) (upholding a mandatory life sentence with the eligibility of parole after 12 years for a defendant who had obtained $120.75 by false pretenses, and who had previously committed two similar crimes)."

Fifth Circuit

United States v. Park, 947 F.2d 130 (5th Cir. 1991), *vacated in part*, 951 F.2d 634 (1992). The appellant was convicted of failure to file a report of currency in excess of $10,000 and for making a false statement. He argued that his sentence of 15 months violated both the Eighth Amendment and the congressional intent to punish a failure to report money derived from illegal activities. The circuit court rejected these claims and relied on their recent decision in U.S. v. O'Banion, 943 F.2d 1422 (5th Cir. 1991). In that case, the court held that the statute of conviction applies "whether or not the money was derived from legitimate business" and did not violate the eighth amendment.

Sixth Circuit

United States v. Pickett, 941 F.2d 411 (6th Cir. 1991). The circuit court rejected the claim that the 100:1 ratio equivalency for crack to cocaine violates the Eighth Amendment prohibition against cruel and unusual punishment. *See* U.S. v. Avant, 907 F.2d 623 (6th Cir. 1990); U.S. v. Levy, 904 F.2d 1026 (1990), *cert. denied*, 111 S. Ct. 974 (1991); U.S. v. Buckner, 894 F.2d 975 (8th Cir. 1990); U.S. v. Colbert, 894 F.2d 373 (10th Cir.), *cert. denied*, 110 S. Ct. 2601 (1990); U.S. v. Cyrus, 890 F.2d 1245 (D.C. Cir. 1989); U.S. v. Malone, 886 F.2d 1162 (9th Cir. 1989).

Separation of Powers

Fifth Circuit

United States v. Richardson, 925 F.2d 112 (5th Cir.), *cert. denied*, 111 S. Ct. 2868 (1991). In a money laundering case, the circuit court rejected the defendant's argument that the power of the executive branch to determine a defendant's sentence based on the amount of money that government undercover agents brought to the table in a "sting" operation violates the separation of powers doctrine. According to the circuit court, a district court judge must make factual findings that the money brought to the table is relevant to the offense. The district court's discretion "to check the influence" of the executive branch eliminates any separation of powers violation. The appellate court also rejected a due process challenge to the government's "unfair" manipulation of the amount of money in a "sting" operation where the defendant asked for larger sums of money to launder and readily accepted the amount of funds involved in the money laundering conspiracy.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. §3553(c)

Eighth Circuit

United States v. Dumorney, 949 F.2d 997 (8th Cir. 1991). The district court gave sufficient reason for sentencing the defendant at the top of the guideline range. The district court's written order of judgment

listed career offender as the reason, but during the hearing the court was much more specific. The circuit court noted its concern about the rising number of appeals involving 18 U.S.C. § 3553(c)(1), and urged that sentencing courts refer to the facts of each case and explain why they chose a particular point in the sentencing range. The circuit court believed that the explanation would not only inform the defendant and the appellate court, and preclude many needless appeals and remands, but also would provide information to criminal justice researchers and assist the Commission in its continuing examination of the guidelines and policy statements.

18 U.S.C. § 3585

Fourth Circuit

United States v. Insley, 927 F.2d 185 (4th Cir. 1991). The district court did not err in failing to give appellant credit for "time served" when she was released on an appeal bond. According to the circuit court, "conditions of release are not custody." In calculating credit for "time served" under 18 U.S.C. § 3585 "official detention" means imprisonment in a place of confinement, not stipulations or conditions imposed upon a person not subject to full physical incarceration.

18 U.S.C. § 3742

Eleventh Circuit

United States v. Hall, 943 F.2d 39 (11th Cir. 1991). In a government appeal where the government did not supply proof of approval by the Solicitor General until 10 months after the notice of appeal was filed, the circuit court held that the statute does not require that approval be in writing or that proof of approval be included in the appellate record. Therefore, the circuit court did not lack jurisdiction to hear the appeal. *See* U.S. v. Long, 911 F.2d 1482 (11th Cir. 1990); U.S. v. Smith, 910 F.2d 326 (6th Cir. 1990); U.S. v. Gurgiolo, 894 F.2d 56 (3d Cir. 1990).

21 U.S.C. § 841

Sixth Circuit

United States v. Rigsby, 943 F.2d 631 (6th Cir. 1991). A panel of appellate court judges expressed its disagreement with the law in the Sixth Circuit and the great weight of authority holding that drug quantity is not an element of the offense in 21 U.S.C. § 841. *See* U.S. v. Hodges, 935 F.2d 766 (6th Cir.), *cert. denied*, 112 S. Ct. 251 (1991); U.S. v. Moreno, 899 F.2d 465 (6th Cir. 1990); U.S. v. Madkour, 930 F.2d 234 (2d Cir.), *cert. denied*, 112 S. Ct. 308 (1991); U.S. v. Cross, 916 F.2d 622 (11th Cir. 1990) (*per curiam*), *cert. denied*, 111 S. Ct. 1331 (1991); U.S. v. McNeese, 901 F.2d 585 (7th Cir. 1990); U.S. v. Jenkins, 866 F.2d 331 (10th Cir. 1989); U.S. v. Kinsey, 843 F.2d 383 (9th Cir.), *cert. denied*, 487 U.S. 1223 (1988); U.S. v. Gibbs, 813 F.2d 596 (3d Cir.), *cert. denied*, 484 U.S. 822 (1987); U.S. v. Wood, 834 F.2d 1382 (8th Cir. 1987). However, because the court was bound by the law of the circuit, however, it found that the district court did not err in determining the quantity of drugs involved in an § 841 offense by applying the preponderance of evidence standard at sentencing.

28 U.S.C. § 2255

Eighth Circuit

United States v. Serpa, 930 F.2d 639 (8th Cir. 1991). The circuit court affirmed the district court's dismissal of appellant's 28 U.S.C. § 2255 motion for resentencing. According to the circuit court, "because [appellant] did not challenge his sentence in [his earlier appeal], or seek reconsideration, he cannot now collaterally attack that decision or his sentence in a section 2255 *habeas* action."

PRE-GUIDELINE SENTENCE

Fourth Circuit

United States v. Bakker, 925 F.2d 728 (4th Cir. 1991). In a pre-guideline case, the circuit court vacated appellant's sentence where the district court judge impermissibly took his own religious convictions into account in sentencing. The appellant, a "well-known televangelist" was convicted of fraud and conspiracy and sentenced to 45 years imprisonment. According to the circuit court, the record of the sentencing procedure left the court "with the apprehension that the imposition of a lengthy prison here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed." The circuit court rejected the appellant's argument that the district court abused its discretion by failing to consult the guidelines in a pre-guideline case.

REVIEW OF SENTENCES *(other than departures)*

Standard of Review--18 U.S.C. § 3742

United States v. Anderson, 942 F.2d 606 (9th Cir. 1991), *vacating*, 895 F.2d 641 (1990). "Due deference" language added to 18 U.S.C. § 3742 on November 18, 1988, does not create a new standard of review. "It does require the court to determine what degree of factual inquiry is involved, and to apply the corresponding standard." If the inquiry is a purely factual one, the "clearly erroneous" standard applies. As the inquiry becomes more of a legal question, the "*de novo*" standard applies.

Statement of Reasons -- 18 U.S.C. § 3553(c)

Seventh Circuit

See U.S. v. Rodriguez-Luna, 937 F.2d 1208 (7th Cir. 1991), Rule 32, p. 120.

Tenth Circuit

United States v. Underwood, 938 F.2d 1086 (10th Cir.), *cert. denied*, 112 S. Ct. 382 (1991). The district court erred in failing to state the reasons for the appellant's sentence. According to the circuit court, "certainly the statement of reasoning does not have to be particularized, but in this case, the court made no statement. It referenced only to the accuracy of the presentence report as a whole." *See* U.S. v. Lockard, 910 F.2d 542 (9th Cir. 1990); U.S. v. Beaulieu, 893 F.2d 1177 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990).

ROLE OF PROBATION OFFICER

Fourth Circuit

See U.S. v. Johnson, 935 F.2d 47 (4th Cir.), *cert. denied*, 112 S. Ct. 609 (1991), Constitutional Challenges, Sixth Amendment, p. 116.

Seventh Circuit

United States v. Oduloye, 924 F.2d 116 (7th Cir.), *cert. denied*, 111 S. Ct. 2813 (1991). The circuit court rejected the appellant's argument that he was prejudiced by the probation officer's employment negotiations with the FBI during the time she conducted his presentence investigation. The circuit court noted the appearance of impropriety in the probation officer's failure to disclose her change of employment, especially since she took a sterner position than the government on the ultimate sentence. Nevertheless, the circuit court found that a new presentence investigation would not change the sentence.

RULE 32

Supreme Court

Burns v. United States, 111 S. Ct. 2182 (1991). The Supreme Court, in a 5-4 decision, held that "before a district court can depart on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." In the instant case, the presentence report concluded that there were no factors warranting a departure. Although neither party objected to the presentence report, the district court judge announced at the end of the sentencing hearing that he was making an upward departure from a guideline range of 30-37 months and imposing a sentence of 60 months. The Supreme Court remanded the case for further proceedings.

Seventh Circuit

United States v. Rodriguez-Luna, 937 F.2d 1208 (7th Cir. 1991). The district court erred in failing to ask the three questions at sentencing needed to determine whether the defendant and his attorney had the opportunity to read and discuss the presentence report. Nevertheless, resentencing was not required because the appellant did not allege on appeal that he did not review the presentence report, nor did he allege any facts he would have disputed if given the opportunity. The district court also failed to attach a written version of his findings to the presentence report. Although, "strict compliance with Rule (32(c)(3)(D) is not discretionary but mandatory," in this case the appellant's due process rights were not implicated because the district court clearly made findings regarding the relevant disputed facts.

United States v. Scott, 929 F.2d 313 (7th Cir. 1991). The district court did not abuse its discretion in refusing to consider evidence of appellant's expectations of his potential sentence before denying his motion to withdraw his guilty plea. Before accepting the plea, the district court conducted an extensive hearing in which appellant testified, *inter alia,* that no one had made a prediction as to his likely sentence. The judge also informed him that if the sentence he received was more severe than expected, he would not have the right to withdraw his plea. According to the circuit court, "[t]o allow [appellant] to withdraw his plea because of secret expectations that he harbored in the fact of his directly contradictory sworn testimony would undermine the strong societal interest in the finality of guilty pleas."

RULE 35

Fifth Circuit

United States v. Moree, 928 F.2d 654 (5th Cir. 1991). The district court erred in sentencing the appellant in absentia and without affording him the right to allocution, where the appellate court vacated the original sentence and remanded for resentencing. According to the circuit court, a Rule 35(a) proceeding to "correct" a sentence on remand is not a "reduction in sentence" under Rule 43(c)(4).

Tenth Circuit

See U.S. v. Smith, 929 F.2d 1453 (10th Cir.), *cert. denied*, 112 S. Ct. 146 (1991), Constitutional Challenges--Double Jeopardy, p. 114.

United States v. Smith, 930 F.2d 1450 (10th Cir.), *cert. denied*, 112 S. Ct. 225 (1991). The district court did not err in reconsidering the sentencing factors when resentencing the appellant after remand where the appellate court vacated the original sentence. The circuit court distinguished this case from the situation where the appellate court retains jurisdiction and asks the court to explain its reasons for imposing the sentence. *See* U.S. v. Davis, 912 F.2d 1210 (10th Cir. 1990) ("We therefore will retain appellate jurisdiction and ask the district court to explain its reasons for the extent of departure above the guideline range."). When a sentence is vacated and remanded for resentencing, "[s]uch an order directs the sentencing court to

begin anew, so that 'fully *de novo* resentencing' is entirely appropriate. The defendant is accorded the same procedural rights on resentencing as on initial sentencing."