Federal Judicial Center

Guideline Sentencing

An Outline of Appellate Case Law On Selected Issues

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Jefri Wood & Diane Sheehey

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This outline is cumulative and replaces all outlines of the same title previously issued by the Center

Contents

This outline identifies significant developments in federal appellate court decisions on the Sentencing Guidelines and the 1984 Sentencing Reform Act, as amended. It is based largely on cases that have been summarized in *Guideline Sentencing Update.* The outline does not cover all issues or all cases—it is an overview of selected issues that should be of interest to judges and others who use the Guidelines.

The outline includes court decisions up to December 31, 1994, and replaces all previous Center outlines under this title. Brackets at the end of a citation give the volume and issue numbers for cases that were summarized in *Guideline Sentencing Update* through volume 7, number 6. Denials of petitions for certiorari and per curiam references are omitted. Because policy statements are, for the most part, treated like guidelines, we have not added "p.s." after the section number of policy statements unless that status seems significant.

Note that recent and upcoming amendments to the Guidelines may affect some of the issues reported here as case law develops.

I. General Application Principles

A. Relevant Conduct

Effective Nov. 1, 1992, significant clarifying amendments were made to the relevant conduct guideline, §1B1.3, including how to attribute conduct in jointly undertaken criminal activity and definitions of "same course of conduct" and "common scheme or plan." Some of the cases that follow apply to prior versions of §1B1.3. Note that many of the cases concerning relevant conduct are covered under the pertinent subject headings, such as II.A. Drug Quantity, III. Adjustments, and IX.A.1. Plea Bargaining—Dismissed Counts.

1. Jointly Undertaken Criminal Activity

"[I]n the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" are used to set a defendant's offense level. U.S.S.G. §1B1.3(a)(1)(B). The 1992 amendment to Application Note 2 states that any conduct of others attributed to defendant must be *both* "(i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that activity." Note 2 adds that "the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." Thus, the sentencing court "must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement)." A court should make specific findings as to both the scope of the agreement and the foreseeability of others' conduct. See, e.g., *U.S. v. Saro,* 24 F.3d 283, 288 (D.C. Cir. 1994) ("The extent of a defendant's vicarious liability under conspiracy law is always determined by the scope of his agreement with his co-conspirators. Mere foreseeability is not enough."); *U.S. v. Jenkins,* 4 F.3d 1338, 1346–47 (6th Cir. 1993) (remanding attribution of drug amounts based only on foreseeability—district court must also determine "the scope of the criminal activity [defendant] agreed to jointly undertake") [6#2]; *U.S. v. Evbuomwan,* 992 F.2d 70, 73–74 (5th Cir. 1993) ("mere knowledge that crimi-

nal activity is taking place is not enough"—"the government must establish that the defendant agreed to jointly undertake criminal activities with the third person, and that the particular crime was within the scope of that agreement") [5#15]; *U.S. v. Gilliam,* 987 F.2d 1009, 1012–13 (4th Cir. 1993) ("in order to attribute to a defendant for sentencing purposes the acts of others in jointly-undertaken criminal activity, those acts must have been within the scope of the defendant's agreement and must have been reasonably foreseeable to the defendant"); *U.S. v. Olderbak,* 961 F.2d 756, 764 (8th Cir. 1992) ("Under subsection (a) of Section 1B1.3 of the Sentencing Guidelines, each conspirator is responsible for all criminal acts committed in furtherance of the conspiracy. . . . '[S]uch conduct is *not* included in establishing the defendant's offense level,' however, if it 'was neither within the scope of the defendant's agreement nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake.'").

See also cases in section II.A.2.

2. Same Course of Conduct, Common Scheme or Plan

Under U.S.S.G. §1B1.3(a)(2), relevant conduct includes, "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." "Common scheme or plan" and "same course of conduct" are defined in Application Note 9.

The Second Circuit has distinguished between "same course of conduct" and "common scheme or plan." It interpreted "same course of conduct" as requiring "the sentencing court[ ] to consider such factors as the nature of the defendant's acts, his role, and the number and frequency of repetitions of those acts." *U.S. v. Santiago,* 906 F.2d 867, 871–73 (2d Cir. 1990) (drug sales 8 to 14 months before sale of conviction properly considered—all sales were similar and to same individual). It later held that "same course of conduct . . . 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 defendant has engaged in an identifiable 'behavior pattern.'" *U.S. v. Perdomo,* 927 F.2d 111, 115 (2d Cir. 1991) (Vermont drug activities were a continuation of Canadian activities even though defendant dealt with different parties and had different role). See also *U.S. v. Azeem,* 946 F.2d 13, 16 (2d Cir. 1991) (heroin transaction in Cairo, Egypt, was part of same course of conduct as similar New York transaction); *U.S. v. Cousineau,* 929 F.2d 64, 68 (2d Cir. 1991) (uncharged drug sales predating charged drug conspiracy by two years were relevant conduct—"relevancy 'is not determined by temporal proximity alone'"). A "'common scheme,' in contrast, requires a connection among participants and occasions." *U.S. v. Shonubi,* 998 F.2d 84, 89 (2d Cir. 1993) (citing earlier cases).

The Ninth Circuit cited *Santiago* in holding that the "essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity." *U.S. v. Hahn,* 960 F.2d 903, 910 (9th Cir. 1992) [4#20]. "When one component is absent, however, courts must look for a stronger presence of at least one of the other components. In cases . . . where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of the third component." Id. Note that an amendment to §1B1.3, comment. (n.9(B)), effective Nov. 1, 1994, adopts this analysis for "same course of conduct."

Several circuits have followed *Santiago* and *Hahn.* See, e.g., *U.S. v. Roederer,* 11 F.3d 973,

979–80 (10th Cir. 1993) (cocaine sales in conspiracy that ended in 1987 were part of same course of conduct as instant offense of cocaine distribution in May 1992; defendant "was actively engaged in the same type of criminal activity, distribution of cocaine, from the 1980s through May, 1992. [His] conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate") [6#9]; *U.S. v. Cedano-Rojas*, 999 F.2d 1175, 1180–81 (7th Cir. 1993) (drug transactions almost two years before offense of conviction were part of same course of conduct—they were "conducted in substantially similar fashion," in the same city, and involved large amounts of cocaine; also, two-year span was partly explained by defendant having lost his supplier); *U.S. v. Sykes*, 7 F.3d 1331, 1336–38 (7th Cir. 1993) (following test for "similarity, regularity, and temporal proximity," it was error to include fourth fraud count that was dismissed—it bore only "general similarity" to other three frauds, and regularity and proximity were insufficient) [6#6]; *U.S. v. Chatman*, 982 F.2d 292, 294–95 (8th Cir. 1991) (following *Hahn* test, crack subject to state possession charge was related to federal offense of distributing crack occurring days earlier); *U.S. v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992) (similar and continuous distributions of cocaine over six-month period prior to offense of conviction); *U.S. v. Mullins*, 971 F.2d 1138, 1144–46 (4th Cir. 1992) (remanding finding that uncharged conduct was relevant to offense of conviction—"[r]egularity and temporal proximity are extremely weak here, if present at all," and the conduct "was not sufficiently similar"). Cf. *U.S. v. Phillippi*, 911 F.2d 149, 151 (8th Cir. 1990) (holding that the dates and nature of conduct occurring "as remotely as two years before [defendant's] arrest" must be "clearly established" in order to be considered relevant).

The *Hahn* court also stated, "When regularity is to provide most of the foundation for temporally remote, relevant conduct, *specific repeated events* outside the offense of conviction must be identified. Regularity is wanting in the case of a solitary, temporally remote event, and therefore such an event cannot constitute relevant conduct without a strong showing of substantial similarity." *Hahn*, 960 F.2d at 911. Cf. *U.S. v. Nunez*, 958 F.2d 196, 198–99 (7th Cir. 1992) [4#20] (affirmed: uncharged cocaine sales that occurred from 1986–1988 and in 1990 for defendant arrested in Oct. 1990 "amounted to the same course of conduct"—all sales were made to same buyer and were interrupted only by buyer's imprisonment); *U.S. v. Mak*, 926 F.2d 112, 114–16 (1st Cir. 1991) (affirmed: four similar drug deals all part of relevant conduct although each was separated by several months). The *Hahn* court noted, however, that "[i]n extreme cases, the span of time between the alleged 'relevant conduct' and the offense of conviction may be so great as to foreclose as a matter of law consideration of extraneous events as 'relevant conduct.'" 960 F.2d at 910 n.9. See, e.g., *U.S. v. Kappes*, 936 F.2d 227, 230–31 (6th Cir. 1991) (although the two were similar, "[i]t would take an impermissible stretch of the imagination to conclude that the 1983 offense was part of the same 'course of conduct' as the 1989 offense").

Note that the Commentary to §1B1.3(a)(2) was amended in Nov. 1991 by the addition of Application Note 8 (originally Note 7), which states in part: "For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction." See also *U.S. v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992) ("The Sentencing Commission has made it clear that offense conduct 'associated with' a prior state sentence is not to be considered relevant conduct for purposes of section 1B1.3(a)(2).").

Other examples: *U.S. v. Maxwell*, 34 F.3d 1006, 1010–11 (11th Cir. 1994) (remanded: unrelated cocaine distribution that occurred a year earlier and involved different people

than dilaudid conspiracy and other cocaine distribution on which defendant was convicted was not relevant conduct) [7#6]; *U.S. v. Fermin*, 32 F.3d 674, 681 (2d Cir. 1994) (remanded: drug quantities from 1983–1985 drug records could not be used as relevant conduct in 1990–1991 conspiracy offense—government failed to show high degree of similarity or regularity required where temporal proximity is lacking); *U.S. v. Jones*, 948 F.2d 732, 737–78 (D.C. Cir. 1991) (although current offense and prior criminal conduct both involved fraud, they were not related under §1B1.3 because they occurred more than a year apart, were different in nature, and involved different individuals); *Kappes*, 936 F.2d at 230–31 (remanded: unlawful false statement by defendant in 1983 that enabled him to make another unlawful false statement in 1989 for which he was prosecuted was not relevant conduct for the instant offense; although the two offenses were similar, "[t]he fact that Kappes 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"); *U.S. v. Wood*, 924 F.2d 399, 404–05 (1st Cir. 1991) [3#19] (remanded: drug transaction conducted solely by defendant's wife and about which defendant knew nothing until afterward should not have been included under §1B1.3(a)(2) as relevant conduct for defendant's drug conspiracy conviction, even though part of his drug debt was paid off during the deal—"Wood's only connection with the [wife's] transaction was as a beneficiary of someone else's criminal activity, a link that had nothing to do with *his* conduct."); *U.S. v. Sklar*, 920 F.2d 107, 111 (1st Cir. 1990) (affirmed: twelve packages of cocaine sent to defendant were part of a single course of conduct—"The repetitive nature of the mailings, their common origin and destination, their frequency over a relatively brief time span, the unvarying use of a particular mode of shipment, Sklar's admission that he supported himself . . . by selling drugs, . . . his lack of any known employment during that interval, and his acknowledgment . . . that he owed the sender money for an earlier debt, were more than enough to forge the requisite linkage.").

3. Conduct from a Prior Acquittal or Uncharged Offenses

The Ninth Circuit held that upward departure may not be based on relevant conduct underlying a charge on which a defendant was acquitted, *U.S. v. Brady*, 928 F.2d 844, 850–52 (9th Cir. 1991) [4#1], and later relied on the rationale of *Brady* to hold that conduct from an acquitted charge also may not be used for enhancements, *U.S. v. Pinkney*, 15 F.3d 825, 829 (9th Cir. 1994) (even if defendant reasonably foresaw accomplice's use of gun, enhancement under §2B3.1(b)(2)(C) for use of firearm during robbery was improper because defendant was acquitted of charge of armed robbery). Other circuits, however, have held that such conduct may be used as the basis for sentencing enhancements or departure if that conduct is established by a preponderance of the evidence. See, e.g., *U.S. v. Boney*, 977 F.2d 624, 635–36 (D.C. Cir. 1992) (drugs from acquitted counts as relevant conduct); *U.S. v. Romulus*, 949 F.2d 713, 717 (4th Cir. 1991) ("well settled that acquitted conduct may properly be used to enhance a sentence"); *U.S. v. Averi*, 922 F.2d 765, 766 (11th Cir. 1991) ("facts relating to acquitted conduct may be considered"); *U.S. v. Fonner*, 920 F.2d 1330, 1332–33 (7th Cir. 1990) (departure may be based on prior misconduct despite acquittal on charges arising out of that misconduct); *U.S. v. Duncan*, 918 F.2d 647, 652 (6th Cir. 1990) (enhancement for possessing weapon during drug offense, §2D1.1(b)(1), after acquittal on firearm charge); *U.S. v. Rodriguez-Gonzalez*, 899 F.2d 177, 181–82 (2d Cir. 1990) (same) [3#6]; *U.S. v. Dawn*, 897 F.2d 1444, 1449–50 (8th Cir. 1990) (same); *U.S. v. Mocciola*, 891 F.2d 13, 16–17 (1st Cir. 1989) (same) [2#18]; *U.S. v. Johnson*, 911 F.2d 1394, 1401–02 (10th Cir. 1990)

(enhancement for conduct in acquitted conspiracy count); *U.S. v. Isom,* 886 F.2d 736, 738–39 (4th Cir. 1989) (acquitted on counterfeiting charge but received enhancement for printing counterfeit obligations, §2B5.1(b)(2)); *U.S. v. Juarez-Ortega,* 866 F.2d 747, 748–49 (5th Cir. 1989) (acquitted of carrying firearm during drug offense, but underlying facts used for departure) [2#1]; *U.S. v. Ryan,* 866 F.2d 604, 606–10 (3d Cir. 1989) (acquitted of possession with intent to distribute, but evident packaging of drugs for sale used as basis for departure) [2#1]. Cf. *U.S. v. Concepcion,* 983 F.2d 369, 389 (2d Cir. 1992) (use of acquitted conduct to increase sentence from maximum of three years to almost 22 years is factor not adequately considered by Commission and downward departure may be considered).

Similarly, uncharged but relevant conduct may also be used. See, e.g., *U.S. v. Sanders,* 982 F.2d 4, 10 (1st Cir. 1992) (for departure); *U.S. v. Galloway,* 976 F.2d 414, 427–28 (8th Cir. 1992) (en banc) (proper to include similar but uncharged thefts) [5#3]; *U.S. v. Newbert,* 952 F.2d 281, 284–85 (9th Cir. 1991) (may include uncharged state offense) [4#17]; *U.S. v. Perdomo,* 927 F.2d 111, 116–17 (2d Cir. 1991) (role in offense properly based on uncharged conduct); *U.S. v. Ebbole,* 917 F.2d 1495, 1501 (7th Cir. 1990) (uncharged drug activity). Note, however, that some circuits have held that the obstruction of justice enhancement is limited to the offense of conviction, and that the acceptance of responsibility guideline limits the use of relevant conduct. See sections III.C.4 and III.E.3.

Note, however, that some circuits have held that a departure may not be based on charges that were dismissed or not brought as part of a plea agreement. See cases in section IX.A.1.

4. Double Jeopardy and Other Issues

Double jeopardy: The Second and Tenth Circuits have held that the "punishment component" of the Double Jeopardy Clause may be violated when relevant conduct that was used to increase a Guidelines sentence is then used as the basis for a later conviction, even if the second sentence runs concurrently with the first. *U.S. v. McCormick,* 992 F.2d 437, 439–41 (2d Cir. 1993) (following Tenth Circuit analysis, affirmed dismissal of charges that were used as relevant conduct in a prior guideline sentence) [5#13]; *U.S. v. Koonce,* 945 F.2d 1145, 1149–54 (10th Cir. 1991) ("there is no evidence that Congress intended that an individual who distributes a controlled substance should receive punishment both from an increase in the offense level under the Guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding") [4#9]. But cf. *U.S. v. Nyhuis,* 8 F.3d 731, 738–40 (11th Cir. 1993) (defendant properly convicted of cocaine conspiracy, although cocaine activities may have been used to increase prior pre-Guidelines sentence for marijuana CCE).

The Fifth Circuit specifically disagreed with the Second and Tenth Circuits, holding that Congress authorized multiple punishments through the Guidelines. Section 5G1.3(b), which requires concurrent sentences when a prior offense is fully taken into account in sentencing, "clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same course of conduct as the first offense—and sentence him *again* for all relevant conduct. . . . [Section] 5G1.3 reflects Congress's intent to prevent punishment from being larger if the government chooses to proceed with two different proceedings . . . not by foreclosing a second prosecution but by directing that the length of the resulting term of imprisonment be no greater than that which would have resulted from prosecution and conviction in a single proceeding." *U.S. v. Wittie,* 25 F.3d 250, 259–61 (5th Cir. 1994) (remanded: defendant may be tried and sentenced for cocaine offense that was used as relevant

conduct in prior sentencing for another drug offense) [6#16]. Note that certiorari has been granted in *Wittie*. See *Witte v. U.S.*, 115 S. Ct. 715 (Jan. 6, 1995) (spelling of name corrected in Supreme Court). See also *U.S. v. Cruce*, 21 F.3d 70, 73–77 (5th Cir. 1994) (affirmed: same, no violation of double jeopardy to indict defendants in Texas on bank fraud conspiracy charges that include loan transaction that was used as relevant conduct when defendants were sentenced in Kansas on other bank fraud charges). Accord *U.S. v. Duarte*, 28 F.3d 47, 48 (7th Cir. 1994) (affirmed: defendant, who received §3C1.1 obstruction enhancement in prior sentencing, could be prosecuted for same obstructive conduct and given sentence concurrent to first one). Cf. *U.S. v. Brown*, 31 F.3d 484, 494–95 (7th Cir. 1994) (affirmed: no double jeopardy violation where §3B1.1(a) enhancements here and in prior Texas sentencing were partly based on two common participants).

On a related issue, it has been held that relevant conduct may be included in sentencing even if the same conduct is the subject of a pending state proceeding. See *U.S. v. Rosogie*, 21 F.3d 632, 634 (5th Cir. 1994) (affirmed: may include stolen U.S. Treasury check in relevant conduct even though check is basis of pending state prosecution against defendant) [6#14]; *U.S. v. Caceda*, 990 F.2d 707, 709 (2d Cir. 1993) (affirmed: same, for cocaine subject to state charge).

The Seventh Circuit affirmed consecutive sentences for a RICO offense that was sentenced under the Guidelines and the predicate act offenses that were pre-Guidelines. Defendants argued that separate consecutive sentences for the predicate acts—which were used to increase their Guidelines sentence for the RICO offense—subjected them to multiple punishment for the same offense in violation of the Double Jeopardy Clause. The court held that defendants "clearly were never punished twice for the same crime: Defendants were punished once for racketeering and once (but separately) for extortion, gambling, and interstate travel. It just so happens the Sentencing Guidelines consider the predicate racketeering acts (i.e. extortion, gambling, and interstate travel) relevant to computing the appropriate sentence for racketeering. *See* U.S.S.G. §2E1.1(a). Though the commission of these acts increased the racketeering sentence, the Defendants were punished for racketeering—the predicate acts were merely conduct relevant to the RICO sentence." *U.S. v. Morgano*, 39 F.3d 1358, 1367 (7th Cir. 1994) [7#6].

Other issues: The Ninth Circuit held that relevant conduct is not limited to conduct that would constitute a federal offense. *U.S. v. Newbert*, 952 F.2d 281, 284 (9th Cir. 1991) (affirming sentence that took into account fraudulent conduct amounting to a state offense only) [4#17].

The Second Circuit held that a foreign drug transaction was part of the "same course of conduct" as the offense of conviction, but that it could not be used as relevant conduct to increase the base offense level "because it was not a crime against the United States." The court concluded that Congress intentionally gave foreign crimes a very limited role in the Guidelines, limited to criminal history considerations, and that there were good reasons for not using them in the offense level calculation. The court left open, however, the possible use of foreign crimes for departure. *U.S. v. Azeem*, 946 F.2d 13, 16–18 (2d Cir. 1991) (remanded: improper to include as relevant conduct drug amounts from foreign drug transaction).

The First Circuit held that, in a RICO case, "all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs" may be included as relevant conduct. However, the statutory maximum sentence for a RICO offense "must be determined by the conduct alleged within the four corners of the indictment," not

by uncharged relevant conduct. *U.S. v. Carrozza,* 4 F.3d 70, 75–77 (1st Cir. 1993) (remanded) [6#4].

The relevant conduct guideline, §1B1.3, has been upheld against general constitutional and statutory challenges. See, e.g., *U.S. v. Galloway,* 976 F.2d 414, 422–26 (8th Cir. 1992) (en banc) (no due process or statutory violation) [5#3]; *U.S. v. Bennett,* 928 F.2d 1548, 1558 (11th Cir. 1991) (not unconstitutional bill of attainder).

Criminal conduct that occurred outside the statute of limitations for the offense of conviction may be considered as relevant conduct under the Guidelines. *U.S. v. Wishnefsky,* 7 F.3d 254, 257 (D.C. Cir. 1993) (affirmed inclusion of amounts embezzled from 1980 to 1986 as relevant conduct in calculating loss caused by defendant convicted of embezzlement during 1987 to 1990) [6#6]. Accord *U.S. v. Silkowski,* 32 F.3d 682, 688–89 (2d Cir. 1994) (but also holding that when restitution is limited to offense of conviction, statute of limitations applies to calculation of loss for restitution purposes); *U.S. v. Neighbors,* 23 F.3d 306, 311 (10th Cir. 1994); *U.S. v. Pierce,* 17 F.3d 146, 150 (6th Cir. 1994); *U.S. v. Lokey,* 945 F.2d 825, 840 (5th Cir. 1991). And several circuits have affirmed use of pre-Guidelines activity as relevant conduct when appropriate. See, e.g., *Pierce,* 17 F.3d at 150; *U.S. v. Kienenberger,* 13 F.3d 1354, 1357 (9th Cir. 1994); *U.S. v. Kings,* 981 F.2d 790, 794 n.6 (5th Cir. 1993); *U.S. v. Haddock,* 956 F.2d 1534, 1553–54 (10th Cir. 1992); *U.S. v. Watford,* 894 F.2d 665, 668 n.2 (4th Cir. 1990); *U.S. v. Allen,* 886 F.2d 143, 145–46 (8th Cir. 1989).

See also section I.I. Continuing Offenses.

B. Stipulation to More Serious or Additional Offenses, §1B1.2

Section 1B1.2(a), as amended Nov. 1, 1992, provides that "in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense." In *U.S. v. Braxton,* 903 F.2d 292, 298 (4th Cir. 1990) [3#8], the court held that a stipulation under §1B1.2(a) may be oral and that a "stipulation" need not be formally designated as such to fall within §1B1.2(a). The Supreme Court reversed *Braxton* because it found the stipulation was not supported by the facts, but left unresolved whether a §1B1.2(a) stipulation could be oral. *Braxton v. U.S.,* 111 S. Ct. 1854, 1858 (1991) [4#4]. That the stipulation may be oral was made clear by the 1992 amendment, plus the 1991 clarifying amendment to the Commentary that stated a stipulation may be "set forth in a written plea agreement or made between the parties on the record during a plea proceeding." U.S.S.G. §1B1.2(a), comment. (n.1) (Nov. 1991).

Two other circuits have indicated that some formality is required under §1B1.2(a). See *U.S. v. McCall,* 915 F.2d 811, 816 n.4 (2d Cir. 1990) ("stipulation [must] be a part of the plea agreement, whether oral or written"); *U.S. v. Warters,* 885 F.2d 1266, 1273 n.5 (5th Cir. 1989) ("formal stipulation of [defendant's] guilt" required). However, the defendant need not expressly agree that the stipulated facts in a formal plea agreement establish the more serious offense. *U.S. v. Day,* 943 F.2d 1306, 1309 (11th Cir. 1991) (question is not how defendant characterizes actions, but whether as matter of law facts establish more serious offense) [4#11].

In *U.S. v. Roberts,* 898 F.2d 1465, 1467–68 (10th Cir. 1990) [3#5], the court rejected a claim that §1B1.2(a) was unconstitutionally vague because it did not define "more serious

offense."

Sentences under §1B1.2(a) are limited by the statutory maximum for the offense of conviction. U.S.S.G. §1B1.2(a), comment. (n.1). When the guideline range for the stipulated offense exceeds the statutory maximum, "the statutorily authorized maximum sentence shall be the guideline sentence." U.S.S.G. §5G1.1(a). If multiple-count convictions are involved and the statutory maximum sentence for each count is less than the sentence required under §1B1.2(a), the sentencing court should impose consecutive sentences to the extent necessary to equal an appropriate sentence for the more serious offense. *U.S. v. Garza,* 884 F.2d 181, 183–84 (5th Cir. 1989) (citing U.S.S.G. §§5G1.1(a) and 5G1.2(d)) [2#13]. Section 1B1.2(a) does not remove a sentencing court's discretion to depart, however, and the court may sentence below the guideline range or statutory maximum "provided that appropriate and adequate reasons for the departure are assigned." *U.S. v. Martin,* 893 F.2d 73, 76 (5th Cir. 1990) [2#20].

The court in *Martin* also cautioned courts to "proceed with due deliberation" when using §1B1.2(a), holding that "the determination that the stipulation contained in or accompanying the guilty plea 'specifically establishes a more serious offense' than the offense of conviction must be expressly made on the record by the court prior to sentencing." Moreover, "the trial court must follow the directive contained in Fed. R. Crim. P. 11(f) and satisfy itself that a 'factual basis for each essential element of the crime [has been] shown.'" 893 F.2d at 75. See also *Day,* 943 F.2d at 1309 (the relevant inquiry is "whether, as a matter of law, the facts provided the essential elements of the more serious offense") [4#11].

Section 1B1.2(c) provides that when a stipulation in a plea agreement "specifically establishes the commission of additional offense(s)," a defendant will be sentenced "as if the defendant had been convicted of additional count(s) charging those offense(s)." It has been held that sentencing courts do not have discretion whether or not to consider such additional offenses. See *U.S. v. Saldana,* 12 F.3d 160, 162 (9th Cir. 1993) (remanded: district court erred in choosing not to consider evidence of additional offenses established by stipulation of facts in plea agreement: "Nothing in the Guidelines, the commentary, or prior decisions of this court support a conclusion that a district court is free to ignore the command of §1B1.2(c) requiring it to consider additional offenses established by a plea agreement") [6#9]. *Cf. U.S. v. Moore,* 6 F.3d 715, 718–20 (11th Cir. 1993) (affirmed: under §1B1.2(c), the district court "*was required* to consider Moore's unconvicted robberies, to which he stipulated in his agreement, as additional counts of conviction . . . under section 3D1.4 . . . . Even if the parties had agreed that these unconvicted robberies were to be used . . . in some other way, the district court *was obligated* to consider these unconvicted robberies as it did"); *U.S. v. Eske,* 925 F.2d 205, 207 (7th Cir. 1991) (affirmed inclusion of ten uncharged offenses stipulated in plea agreement—"stipulated offenses are to be treated as offenses of conviction"); *U.S. v. Collar,* 904 F.2d 441, 443 (8th Cir. 1990) (for same provision in §1B1.2(a) before §1B1.2(c) was enacted, affirmed inclusion of two uncharged stipulated robberies—§1B1.2(a) "is unambiguous on its face and . . . directs the sentencing court to treat a stipulated offense as an 'offense of conviction'").

C. Sentencing Factors

General: In choosing the term of imprisonment within the guideline range, courts "may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G. §1B1.4. Under this

provision courts may consider factors that may already be accounted for in other guidelines. See, e.g., *U.S. v. Jones,* 997 F.2d 1475, 1477–80 (D.C. Cir. 1993) (en banc) (after granting §3E1.1 reduction, may consider defendant's decision to go to trial when selecting sentence within the guideline range) [6#2]; *U.S. v. Boyd,* 924 F.2d 945, 947–48 (9th Cir. 1991) (actual nature of road flare that was technically "dangerous weapon" under §2B3.1(b)(2)(C)) [3#20]; *U.S. v. Lara-Velasquez,* 919 F.2d 946, 954 (5th Cir. 1990) (rehabilitative potential) [3#18]; *U.S. v. Duarte,* 901 F.2d 1498, 1500–01 (9th Cir. 1990) (letters attesting to defendant's character) [3#7]; *U.S. v. Ford,* 889 F.2d 1570, 1573 (6th Cir. 1989) (information given by defendant to probation officer during presentence investigation that was also used to deny reduction for acceptance of responsibility) [2#18]; *U.S. v. Soliman,* 889 F.2d 441, 444–45 (2d Cir. 1989) (foreign conviction that was not used in criminal history score) [2#17]. But cf. *U.S. v. Onwuemene,* 933 F.2d 650, 651 (8th Cir. 1991) (may not consider defendant's status as alien); *U.S. v. Hatchett,* 923 F.2d 369, 373–75 (5th Cir. 1991) (do not consider socio-economic status) [3#19].

The Eleventh Circuit held that "it is inappropriate to imprison or extend the term of imprisonment of a federal defendant for the purpose of providing him with rehabilitative treatment." The district court improperly made defendant's sentence consecutive to a state sentence so defendant would serve enough time in federal prison to undergo a full drug treatment program. *U.S. v. Harris,* 990 F.2d 594, 595–97 (11th Cir. 1993) [5#13].

A panel of the Sixth Circuit had held that a district court should determine "at the outset of the sentencing process whether there were aggravating or mitigating circumstances" and, if so, should not follow the Guidelines but should sentence the defendant under 18 U.S.C. §3553(a). *U.S. v. Davern,* 937 F.2d 1041 (6th Cir. 1991) [4#6]. The en banc court vacated *Davern* and reissued the opinion holding that the Guidelines are mandatory and a court may only depart pursuant to 18 U.S.C. §3553(b). *U.S. v. Davern,* 970 F.2d 1490, 1492–93 (6th Cir. 1992) (en banc) [5#1]. See also *U.S. v. Johnston,* 973 F.2d 611, 613 (8th Cir. 1992) (Guidelines are mandatory).

Resentencing after remand: When a sentence is remanded for resentencing without limits (a complete or "de novo resentencing" rather than a limited remand), some courts have held that this "permits the receipt of any relevant evidence the court could have heard at the first sentencing hearing." *U.S. v. Ortiz,* 25 F.3d 934, 935 (10th Cir. 1994) (affirmed: district court properly considered new evidence of amount of drugs in offense of conviction). Accord *U.S. v. Bell,* 5 F.3d 64, 67 (4th Cir. 1993); *U.S. v. Cornelius,* 968 F.2d 703, 705 (8th Cir. 1992).

However, the Tenth Circuit held that this rule does not apply to new conduct that occurred after the first sentencing. "While [*Ortiz*] indicates resentencing is to be conducted as a fresh procedure, the latitude permitted is circumscribed by those factors the court could have considered 'at the first sentencing hearing.' Thus, events arising after that time are not within resentencing reach." *U.S. v. Warner,* 43 F.3d 1335, 1339–40 (10th Cir. 1994) (remanded: regardless of whether a defendant's post-sentencing rehabilitative conduct may ever provide ground for downward departure, it was improper to consider it when resentencing defendant after remand) [7#5].

New matters also should not be considered at resentencing when the case was remanded only for reconsideration of specific issues. See, e.g., *U.S. v. Gomez-Padilla,* 972 F.2d 284, 285–86 (9th Cir. 1992) (affirmed: where remand was limited to issue concerning defendant's role in offense, district court properly concluded that Rule 35(a) prohibited consideration of defendant's post-sentencing conduct at resentencing after remand); *U.S. v. Apple,* 962 F.2d 335, 336–37 (4th Cir. 1992) (proper to refuse to consider mitigating conduct after

original sentence and, per Rule 35, limit resentencing hearing to issues appellate court had specified might be incorrect).

D. Incriminating Statements as Part of Cooperation Agreement

U.S.S.G. §1B1.8(a) provides:

> Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

In *U.S. v. Shorteeth,* 887 F.2d 253, 256–57 (10th Cir. 1989) [2#15], the court found that language in the plea agreement promising that defendant would "not be subject to additional federal criminal prosecution for crimes committed in this judicial district" that might be revealed during her cooperation fell within §1B1.8(a). The court held that a "full disclosure approach" was required, that the agreement had "to specifically mention the court's ability to consider defendant's disclosures during debriefing in calculating the appropriate sentencing range before the court may do so." Cf. *U.S. v. Cox,* 985 F.2d 427, 431 (8th Cir. 1993) (may use incriminating statements when agreement stated that "testimony or other information provided by you . . . may be considered by the court or probation office . . . to determine the length of your sentence").

When an agreement precludes prosecution for "activities that occurred or arose out of [defendant's] participation in the crimes charged . . . that are known to the government at this time," self-incriminating information that is provided to the probation officer in reliance on the plea agreement may not be used in sentencing. *U.S. v. Marsh,* 963 F.2d 72, 73–74 (5th Cir. 1992) (remanded: Application Note 5 indicates such information is protected) [4#24]. Accord *U.S. v. Fant,* 974 F.2d 559, 562–64 (4th Cir. 1992) (remanded) [5#5]. But cf. *U.S. v. Kinsey,* 910 F.2d 1321, 1325–26 (6th Cir. 1990) (statement made to probation officer is not statement made to "government" within meaning of §1B1.8).

The Sixth Circuit held that information prohibited by §1B1.8 cannot be used as a basis for departure. *U.S. v. Robinson,* 898 F.2d 1111, 1117–18 (6th Cir. 1990) [3#4]. Amended application note 1 (Nov. 1992) makes it clear that prohibited information "shall not be used to increase the defendant's sentence . . . by upward departure." However, that note, and new §1B1.8(b)(5) (Nov. 1992), state that a downward departure for substantial assistance under §5K1.1 may be refused or limited on the basis of such information.

E. Amendments

General: A defendant's sentence should be based on the Guidelines "that are in effect on the date the defendant is sentenced." 18 U.S.C. §3553(a)(4); U.S.S.G. §1B1.11(a). (Nov. 1992). Most circuits have held or indicated, however, that amendments that occur after defendant's offense but before sentencing should not be applied if doing so would increase the sentence because that would violate the ex post facto clause of the Constitution. See *U.S. v. Seacott,* 15 F.3d 1380, 1386 (7th Cir. 1994); *U.S. v. Bell,* 991 F.2d 1445, 1448–52 (8th Cir. 1993); *U.S. v. Kopp,* 951 F.2d 521, 526 (3d Cir. 1991); *U.S. v. Nagi,* 947 F.2d 211, 213 n.1 (6th Cir. 1991);

U.S. v. Sweeten, 933 F.2d 765, 772 (9th Cir. 1991); *U.S. v. Young*, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); *U.S. v. Smith*, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); *U.S. v. Morrow*, 925 F.2d 779, 782–83 (4th Cir. 1991) [3#20]; *U.S. v. Lam*, 924 F.2d 298, 304–05 (D.C. Cir. 1991) [3#19]; *U.S. v. Harotunian*, 920 F.2d 1040, 1042 (1st Cir. 1990); *U.S. v. Worthy*, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); *U.S. v. Suarez*, 911 F.2d 1016, 1021–22 (5th Cir. 1990) [3#12]. But cf. *U.S. v. Gerber*, 24 F.3d 93, 97 (10th Cir. 1994) (not a violation of ex post facto clause to apply stricter version of §5K1.1 in effect when defendant attempted to provide substantial assistance, after Nov. 1, 1989, rather than earlier version in effect when defendant committed her offenses—"Section 5K1.1 speaks to the assistance a defendant provides to the government, rather than the criminal conduct for which the defendant was convicted") [6#13].

Similarly, barring ex post facto problems, the Guidelines that are in effect upon resentencing after remand should be applied. See, e.g., *U.S. v. Fagan*, 996 F.2d 1009, 1018 (9th Cir. 1993) [5#15]; *U.S. v. Gross*, 979 F.2d 1048, 1052–53 (5th Cir. 1992); *U.S. v. Hicks*, 978 F.2d 722, 726–27 (D.C. Cir. 1992) [5#5]; *U.S. v. Bermudez*, 974 F.2d 12, 14 (2d Cir. 1992); *U.S. v. Edgar*, 971 F.2d 89, 93 n.4 (8th Cir. 1992); *U.S. v. Kopp*, 951 F.2d 521, 534 (3d Cir. 1991). Note that intervening amendments may need to be applied and may affect which version of the Guidelines to use. See, e.g., *U.S. v. Garcia-Cruz*, 40 F.3d 986, 988–90 (9th Cir. 1994) (remanded: where defendant committed crime in Dec. 1988 and was originally sentenced in 1991 and resentenced in 1993, retroactive application of 1989 amendment to commentary stating that possession of weapon by felon is not crime of violence requires resentencing under 1988 Guidelines; without amendment he would be career offender and sentencing would have been proper under 1990 Guidelines, but application of amendment gives lower sentence under 1988 version and avoids ex post facto problem).

If, using a later version of the Guidelines, a defendant's offense level is increased but is offset by a new reduction, resulting in the same adjusted offense level and sentence, there is no ex post facto problem and it does not matter if the earlier or later Guidelines version is used. See *U.S. v. Nelson*, 36 F.3d 1001, 1004 (10th Cir. 1994) (using 1992, rather than 1988, Guidelines resulted in one point increase, but it was offset by extra point reduction under §3E1.1(b), not available in 1988).

Note that under §1B1.11(b)(1), "the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed" before the amendment, that date "is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred" after the amendment. §1B1.11, comment. (n.2). See, e.g., *U.S. v. Bennett*, 37 F.3d 687, 700 (1st Cir. 1994) (affirmed: proper to use 1988 rather than 1989 Guidelines even though relevant conduct occurred as late as 1990—conduct charged in indictment ended before 1989 amendments).

The "one book" rule: Section 1B1.11(b)(1), effective Nov. 1, 1992, states that if using the Guidelines Manual in effect on the date of sentencing would violate the ex post facto clause, use the Guidelines Manual in effect on the date the crime was committed. Whichever date is chosen, the Guidelines in effect on that date should be used in their entirety, although "subsequent clarifying amendments are to be considered." U.S.S.G. §1B.11(b)(2) and comment. (n.1). See also *U.S. v. Nelson*, 36 F.3d 1001, 1004 (10th Cir. 1994); *U.S. v. Springer*, 28 F.3d 236, 237–38 (1st Cir. 1994) [7#1]; *U.S. v. Milton*, 27 F.3d 203, 210 (6th Cir. 1994); *U.S. v. Lance*, 23 F.3d 343, 344 (11th Cir. 1994); *U.S. v. Boula*, 997 F.2d 263, 265–66 (7th Cir. 1993);

U.S. v. Warren, 980 F.2d 1300, 1305–06 (9th Cir. 1992) [5#8]; *U.S. v. Lenfesty*, 923 F.2d 1293, 1299 (8th Cir. 1991); *U.S. v. Stephenson*, 921 F.2d 438, 441 (2d Cir. 1990). But cf. *U.S. v. Seligsohn*, 981 F.2d 1418, 1424–26 (3d Cir. 1992) (expressly disapproving "one book rule"—different versions of Guidelines should be used for different counts as necessary) [5#8].

Note that when applying retroactive amendments under §1B1.10, courts should consider the sentence that would have been imposed "had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." U.S.S.G. §1B1.10(b). See also U.S.S.G. App. C, Amendment 504 (explaining that "in determining an amended guideline range, the court will use only those amendments expressly designated as retroactive").

Multiple counts: When grouping multiple counts, some of which occurred before and some after an amendment, it may be permissible to apply the amendment to the earlier offenses even if punishment is increased. In the Eighth Circuit defendant committed two firearms offenses before and one firearm offense after the Nov. 1991 amendments that increased penalties and required aggregation of multiple firearms offenses. The appellate court affirmed sentencing under the amended guidelines on all three counts even though the sentence was greater than it would have been under the pre-amendment guidelines. The court ruled there was no ex post facto violation because when defendant "elected to commit the third firearms violation he was clearly on notice of the 1991 amendments . . . [and thus] had fair warning that commission of the January 23, 1992, firearm crime was governed by the 1991 amendments that provided for increased offense levels and new grouping rules that considered the aggregate amount of harm." The court also reasoned that defendant's offenses could be likened to a continuing offense or "same course of conduct," for which "the date the crimes are completed determines the version of the Sentencing Guidelines to be applied. . . . The offense conduct to which Cooper pled guilty involved a series of firearm offenses spanning from August 24, 1991, to January 23, 1992." *U.S. v. Cooper,* 35 F.3d 1248, 1250–52 (8th Cir. 1994) [7#2]. See also U.S.S.G. §1B1.11(b)(3) ("If defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition . . . is to be applied to both offenses") (Nov. 1993).

The Third Circuit, however, following its earlier decision in *Seligsohn,* remanded a case where counts before and after an amendment were treated as related conduct and sentenced under the amended guideline. "Apparently, the district court believed that if the conduct is grouped together, there is no need to assess the counts independently to determine whether ex post facto clause considerations arise. . . . We expressly have disapproved the practice of combining different counts of the indictment when determining which Guidelines Manual applies. . . . The fact that various counts of an indictment are grouped cannot override *ex post facto* concerns." . . . In *Seligsohn,* we said that upon remand, 'before grouping the various offenses to determine the score, the district court must first apply the applicable Guidelines for each offense.' 981 F.2d at 1426. We do not read this language to be in conflict with [§1B1.11]. Rather, when *ex post facto* clause issues arise, while the one-book rule cannot apply to compel application of the *later* Manual to all counts, it certainly can compel application of the earlier Manual." *U.S. v. Bertoli,* 40 F.3d 1384, 1403–04 & n.17 (3d Cir. 1994).

Clarifying amendments: Generally, an amendment to commentary that merely "clarifies" the meaning of a guideline is retroactive. See, e.g., *U.S. v. Carillo,* 991 F.2d 590, 592 (9th Cir. 1993). However, the circuits have split as to whether a "clarifying" amendment to commentary should be applied retroactively when it conflicts with circuit precedent. The Tenth Circuit has held that when a change in the commentary requires a circuit "to overrule pre-

cedent . . . in order to interpret the guideline consistent with the amended commentary, we cannot agree . . . that the amendment merely clarified the pre-existing guideline." Such an amendment is a substantive change that implicates the ex post facto clause, and will not be applied retroactively if defendant is disadvantaged. *U.S. v. Saucedo,* 950 F.2d 1508, 1512–17 (10th Cir. 1991) (Nov. 1990 amendment to §3B1.1 commentary to "clarify" that adjustment should be based on all relevant conduct would not be applied retroactively because it conflicted with circuit precedent and would disadvantage defendant). Accord *Bertoli,* 40 F.3d at 1407 n.21 ("we have rejected the proposition that the Sentencing Commission's description of an amendment as 'clarifying' is entitled to substantial weight. *U.S. v. Menon,* 24 F.3d 550, 567 (3d Cir. 1994). . . . Rather, our own independent interpretation of the pre-amendment language is controlling"); *U.S. v. Prezioso,* 989 F.2d 52, 53–54 (1st Cir. 1993) (although labeled as "clarifying," amendment to §4A1.2(d) commentary that a fine is not a "criminal justice sentence" would not be given retroactive effect "in light of clear circuit precedent to the contrary") [5#13].

The Eleventh Circuit not only held that such an amendment would not be applied retroactively, but stated that it would not be bound by commentary changes that conflict with circuit precedent "unless or until Congress amends the guideline itself to reflect the change" or the Commission amends the guideline text and Congress reviews it. See *U.S. v. Louis,* 967 F.2d 1550, 1554 (11th Cir. 1992) (change to note 3(d) of §3C1.1 indicating that attempt to destroy or conceal evidence at time of arrest does not warrant enhancement would not be applied in light of case law to contrary); *U.S. v. Stinson,* 957 F.2d 813, 815 (11th Cir. 1992) (amendment to §4B1.2 commentary that possession of weapon by felon is not crime of violence cannot nullify circuit precedent) [4#19]. The Supreme Court reversed *Stinson,* holding that Guidelines commentary is binding, but did not rule on whether it should be applied retroactively. *Stinson v. U.S.,* 113 S. Ct. 1913, 1920 (1993) [5#12]. On remand, the Eleventh Circuit held that the amendment would be applied retroactively, accepting the Sentencing Commission's view of the amendment as a clarification rather than substantive change in the law. *U.S. v. Stinson,* 30 F.3d 121, 122 (11th Cir. 1994).

Other circuits have reevaluated precedent in light of amendments that they held "clarified," rather than substantively changed the guideline. See, e.g., *U.S. v. Garcia-Cruz,* 40 F.3d 986, 989 (9th Cir. 1994) (amendment re felon in possession should be applied retroactively despite contrary precedent); *U.S. v. Fitzhugh,* 954 F.2d 253, 255 (5th Cir. 1992) (earlier case holding felon in possession could be crime of violence "no longer controlling" in light of amendment); *U.S. v. Thompson,* 944 F.2d 1331, 1347–48 (7th Cir. 1991) (amendment to §3C1.1 commentary "makes clear" that previous holding to contrary should not be followed) [4#10]; *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991) (earlier decision holding that role in offense should be based only on conduct in offense of conviction was "nullified by the clarifying amendment" to §3B1's Introductory Commentary).

The Third Circuit took a middle ground, holding that "[w]here the Commission adopts an interpretive commentary amendment that the text of the guideline cannot reasonably support," the new commentary should not be followed. Where the guideline is ambiguous, however, amended commentary clarifying the guideline may be considered, even if the commentary mandates a result different from a prior panel's pre-amendment interpretation of the guideline. *U.S. v. Joshua,* 976 F.2d 844, 854–56 (3d Cir. 1992) (will follow amendment to §4B1.2 commentary that clarified that "crime of violence" is determined only by conduct charged in the count of conviction and that unlawful weapons possession by felon is not a crime of violence, but not to extent that amendment would make unlawful possession *never* a crime of violence) [5#5].

Retroactive amendments under §1B1.10: The First Circuit held that where a defendant's guideline level is lowered after sentencing because of an amendment listed in §1B1.10(d), the defendant is not necessarily entitled to a reduction in offense level, but is entitled to have the sentence reviewed for discretionary reduction under §1B1.10(a). *U.S. v. Connell,* 960 F.2d 191, 197 (1st Cir. 1992) [4#19]. Accord *U.S. v. Telman,* 28 F.3d 94, 96 (10th Cir. 1994) (affirmed: under §1B1.10(a) "a reduction is not mandatory but is instead committed to the sound discretion of the trial court") [6#15]; *U.S. v. Marcello,* 13 F.3d 752, 758 (3d Cir. 1994); *U.S. v. Coohey,* 11 F.3d 97, 101 (8th Cir. 1993); *U.S. v. Wales,* 977 F.2d 1323, 1327–28 (9th Cir. 1992). See also *U.S. v. Shaw,* 30 F.3d 26, 28–29 (5th Cir. 1994) (affirmed: where district court had already departed downward and sentence under retroactive amendment would not have been lower than sentence imposed, court could refuse to apply amendment and depart further—"application of [18 U.S.C.] §3582(c)(2) is discretionary")]7#2]. Cf. *U.S. v. Parks,* 951 F.2d 634, 635–36 (5th Cir. 1992) (under facts of case, the amendment listed in §1B1.10(d) "should be applied retroactively") [4#19].

The Second Circuit held that guideline amendments that might benefit defendant that are adopted after the sentence is imposed should not be applied retroactively by a court of appeals to cases pending on direct review. Rather, the district court has discretion to review the sentence in light of the amendments. *U.S. v. Colon,* 961 F.2d 41, 44–46 (2d Cir. 1992) [4#21]. The court noted, however, that appellate courts may apply post-sentence amendments that merely clarify. The D.C. Circuit cautioned that amendments that occur during an appeal should not automatically lead to resentencing: "our disposition of this case does not mean that a defendant is entitled to resentencing anytime a relevant Guideline is amended during the pendency of an appeal. The result here is dictated by unique circumstances—an amendment that appears to render a substantial constitutional issue without future importance and a record that does not reveal the precise basis for the district court's ruling. We doubt that many similar cases will arise in the future." *U.S. v. Hicks,* 978 F.2d 922, 926 (D.C. Cir. 1992) (remanded in light of change in §3E1.1 limiting acceptance of responsibility to offense of conviction) [5#5]. Cf. *U.S. v. Windham,* 991 F.2d 181, 183 (5th Cir. 1993) (regarding §3E1.1 change, agreeing with holding in *Colon* "that guidelines changes ought not generally be applied to cases in which the defendant was sentenced by the district court before the amendment took effect").

F. Commentary

The Supreme Court held that, with limited exceptions, courts must treat Guidelines commentary as binding: "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. U.S.,* 113 S. Ct. 1913, 1915 (1993) [5#12]. See, e.g., *U.S. v. Powell,* 6 F.3d 611, 613–14 (9th Cir. 1993) (Application Note 1 of §3A1.2, which limits that section's application to "when specific individuals are victims of the offense," conflicts with plain language of §3A1.2(b) and Note 5; thus, §3A1.2(b) takes precedence and was properly applied to defendant for assault on officer during course of unlawful possession of weapon by felon, a victimless crime). Accord *U.S. v. Ortiz-Granados,* 12 F.3d 39, 42–43 (5th Cir. 1994) [6#10].

Prior to *Stinson,* the Ninth Circuit had concluded that the type of commentary that "may interpret the guideline or explain how it is to be applied," U.S.S.G. §1B1.7, should be treated as "something in between" legislative history and the guidelines themselves. When using

such commentary, sentencing courts should "(1) consider the guideline and commentary together, and (2) construe them so as to be consistent, if possible, with each other and with the Part as a whole, but (3) if it is not possible to construe them consistently, apply the text of the guideline." *U.S. v. Anderson,* 942 F.2d 606, 612–14 (9th Cir. 1991) (en banc) [4#7]. The court noted that its holding "comports with the approach taken by other circuits." See, e.g., *U.S. v. Bierley,* 922 F.2d 1061, 1066 (3d Cir. 1990); *U.S. v. Smith,* 900 F.2d 1442, 1446–47 (10th Cir. 1990); *U.S. v. DeCicco,* 899 F.2d 1531, 1535–37 (7th Cir. 1990); *U.S. v. Smeathers,* 884 F.2d 363, 364 (8th Cir. 1989).

There are two other types of commentary set forth in §1B1.7, that which "may suggest circumstances which . . . may warrant departure," and that which "provide[s] background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." The *Anderson* court noted that such commentary should "be treated like policy statements." 942 F.2d at 610 n.4. See also *U.S. v. Guerra,* 962 F.2d 484, 486 (5th Cir. 1992) (§1B1.7 analogizes commentary to legislative history—"even if never cited by a party, we can—indeed we must—consider the commentary to the guideline used by the district court").

The First Circuit stated that when the "language of a guideline is not fully self-illuminating, a court should look to the application notes and commentary for guidance." *U.S. v. Weston,* 960 F.2d 212, 219 (1st Cir. 1992).

G. Policy Statements

In concluding that commentary is binding, the Supreme Court also stated: "The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements." *Stinson v. U.S.,* 113 S. Ct. 1913, 1917 (1993). The Seventh Circuit interpreted this to mean that policy statements, like commentary, must be followed "unless they contradict a statute or the Guidelines." *U.S. v. Lewis,* 998 F.2d 497, 499 (7th Cir. 1993) (Chapter 7 policy statements must be followed when sentencing defendant for violating supervised release) [6#1]. Other circuits, some after *Stinson,* have held that the Chapter 7 policy statements are not mandatory. See cases in section VII.

In an earlier case, the Supreme Court stated that "to say that guidelines are distinct from policy statements is not to say that their meaning is unaffected by policy statements. Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was 'imposed as a result of an incorrect application of the sentencing guidelines' within the meaning of [18 U.S.C.] §3742(f)(1)." *Williams v. U.S.,* 112 S. Ct. 1112, 1119 (1992) (holding use of prior arrest record alone as departure ground when §4A1.3 prohibits it is "incorrect application" of the Guidelines) [4#17].

The Second Circuit held that "courts must carefully distinguish between the Sentencing Guidelines and the policy statements . . . , and employ policy statements as interpretive guides to, not substitutes for, the Guidelines." Policy statements "can aid" in the decision to depart, but they do not supersede the statutory standard in 18 U.S.C. §3553(b). *U.S. v. Johnson,* 964 F.2d 124, 127–28 (2d Cir. 1992) (affirming downward departure for extraordinary family circumstances, §5H1.6) [4#23]. Cf. *U.S. v. Headrick,* 963 F.2d 777, 781 (5th Cir. 1992) ("although policy statements generally do not have the force of guidelines, particular

policy statements may carry such force when they inform the application of a particular guideline or statute").

H. Cross-References to Other Guidelines

Section 1B1.5 was revised Nov. 1992 to clarify that, while an instruction to apply another offense guideline means use the entire guideline, an instruction to use "a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline." §1B1.5(b)(2). See also *U.S. v. Payne*, 952 F.2d 827, 830 (4th Cir. 1991) (error to consider additional enhancements under §2F1.1(b)(2) where §2B5.1, the guideline under which the defendant was sentenced, only referenced the "table at §2F1.1"). The Eighth Circuit held that a court may "look to the underlying commentary for guidance in interpreting a term or phrase that appears in the specific subsection to which the court was referred." *U.S. v. Lamere*, 980 F.2d 506, 511–12 (8th Cir. 1992) (§2B5.1's reference to "table at §2F1.1" included Application Note 7 to §2F1.1).

I. Continuing Offenses

The Guidelines should be applied to a continuing offense, such as conspiracy, that began before but ended after the effective date of the Guidelines, Nov. 1, 1987. See *U.S. v. Dale*, 991 F.2d 819, 853 (D.C. Cir. 1993); *U.S. v. Fazio*, 914 F.2d 950, 959 (7th Cir. 1990); *U.S. v. Sloman*, 909 F.2d 176, 182–83 (6th Cir. 1990); *U.S. v. Meitinger*, 901 F.2d 27, 28–29 (4th Cir. 1990); *U.S. v. Williams*, 897 F.2d 1034, 1040 (10th Cir. 1990); *U.S. v. Terzado-Madruga*, 897 F.2d 1099, 1122–24 (11th Cir. 1990); *U.S. v. Thomas*, 895 F.2d 51, 57 (1st Cir. 1990); *U.S. v. Tharp*, 892 F.2d 691, 693–95 (8th Cir. 1989) [2#13]; *U.S. v. Rosa*, 891 F.2d 1063, 1069 (3d Cir. 1989); *U.S. v. Story*, 891 F.2d 988, 992–96 (2d Cir. 1990); *U.S. v. Gray*, 876 F.2d 1411, 1418 (9th Cir. 1989); *U.S. v. White*, 869 F.2d 822, 826–27 (5th Cir. 1989) [2#3].

Several circuits have held that a defendant must have affirmatively withdrawn from such a continuing conspiracy before Nov. 1, 1987, to preclude application of the Guidelines. See, e.g., *U.S. v. Martinez-Moncivais*, 14 F.3d 1030, 1038 (5th Cir. 1994) (Guidelines properly applied to defendant who "failed to take affirmative actions to withdraw from" conspiracy that lasted into 1990); *U.S. v. Granados*, 962 F.2d 767, 773 (8th Cir. 1992) ("burden of proving withdrawal from the conspiracy rests upon the defendant," who "'must take affirmative action . . . .' Mere cessation of activities is not enough"); *U.S. v. Arboleda*, 929 F.2d 858, 871 (1st Cir. 1991) (defendant must have affirmatively withdrawn from conspiracy before Nov. 1, 1987, to preclude application of Guidelines); *U.S. v. Nixon*, 918 F.2d 895, 906 (11th Cir. 1990) (same); *U.S. v. Williams*, 897 F.2d 1034, 1039–40 (10th Cir. 1990) (same). But cf. *U.S. v. Chitty*, 15 F.3d 159, 161–62 (11th Cir. 1994) (remanded for resentencing under pre-Guidelines law: although defendant was convicted of conspiracy and other conspirators remained active beyond Nov. 1, 1987, evidence clearly indicated that defendant's participation was limited to helping with one drug shipment in June 1987—"the evidence does not support criminal responsibility by Chitty for anything occurring after that date, nor may events after that date be the basis for sentencing").

J. Assimilative Crimes Act, Indian Major Crimes Act

The Crime Control Act of 1990 amended 18 U.S.C. §3551(a) to make it clear that the Guidelines are applicable to violations of the Assimilative Crimes Act, 18 U.S.C. §13, and the Indian Major Crimes Act, 18 U.S.C. §1153. See also U.S.S.G. §2X5.1, comment. (backg'd). Several circuits had already reached that conclusion, but limited the guideline sentence to the maximum and minimum terms established by state law. See *U.S. v. Young,* 916 F.2d 147, 150 (4th Cir. 1990) [3#15]; *U.S. v. Marmolejo,* 915 F.2d 981, 984 (5th Cir. 1990) [3#15]; *U.S. v. Leake,* 908 F.2d 550, 551–53 (9th Cir. 1990) [3#10]; *U.S. v. Norquay,* 905 F.2d 1157, 1160–63 (8th Cir. 1990) [3#10]; *U.S. v. Garcia,* 893 F.2d 250, 254 (10th Cir. 1989) [2#19]. Cf. *U.S. v. Harris,* 27 F.3d 111, 116 (4th Cir. 1994) (but, under "like punishment" clause of §13, within the minimum and maximum terms federal court must also follow any specific mandatory restriction on the sentence under state law).

The Ninth Circuit held that the Guidelines apply to the Indian Major Crimes Act only if the offense is defined and punished under federal law; otherwise, defendant should be sentenced under state law. *U.S. v. Bear,* 932 F.2d 1279, 1282–83 (9th Cir. 1990) (replacing 915 F.2d 1259 [3#15]).

K. Juvenile Sentencing

In general, the Guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act, but under 18 U.S.C. §5037(c), a juvenile delinquent may not receive a sentence longer than he or she would be subject to if sentenced as an adult under the Guidelines. *U.S. v. R.L.C.,* 112 S. Ct. 1329, 1339 (1992) [4#19], aff'g 915 F.2d 320, 325 (8th Cir. 1992) [3#14], and overruling *U.S. v. Marco L.,* 868 F.2d 1121, 1124 (9th Cir. 1989) ("maximum term of imprisonment" is "that term prescribed by the statute defining the offense") [3#14]. The sentence may exceed the otherwise applicable guideline range if there is an aggravating factor that warrants upward departure. See §1B1.12 (Nov. 1993).

II. Offense Conduct

This section does not cover all offense guidelines and assorted adjustments. Following are cases involving some of the more frequently used sections relating to drugs, loss, and more than minimal planning.

A. Drug Quantity—Setting Offense Level

1. Relevant Conduct—Defendant's Conduct

The offense level should be determined by the amount of drugs in the defendant's relevant conduct, not just amounts in the offense of conviction or charged in the indictment. *U.S. v. Cousineau,* 929 F.2d 64, 67 (2d Cir. 1991); *U.S. v. Restrepo,* 903 F.2d 648, 652–53 (9th Cir. 1990) [3#7] (partially withdrawn and replaced by 946 F.2d 654 (1991) [4#9]); *U.S. v. Alston,* 895 F.2d 1362, 1369–70 (11th Cir. 1990) [3#5]; *U.S. v. White,* 888 F.2d 490, 500 (7th Cir.

1989); *U.S. v. Allen,* 886 F.2d 143, 145–46 (8th Cir. 1989) [2#13]; *U.S. v. Sailes,* 872 F.2d 735, 737–39 (6th Cir. 1989) [2#5]; *U.S. v. Sarasti,* 869 F.2d 805, 806–07 (5th Cir. 1989) [2#4]. This may include drug quantities in counts that have been dismissed, *U.S. v. Mak,* 926 F.2d 112, 113 (1st Cir. 1991); *U.S. v. Williams,* 917 F.2d 112, 114 (3d Cir. 1990); *U.S. v. Turner,* 898 F.2d 705, 711 (9th Cir. 1990); *U.S. v. Smith,* 887 F.2d 104, 106–08 (6th Cir. 1989) [2#14], or on which defendant was acquitted, *U.S. v. Rivera-Lopez,* 928 F.2d 372, 372–73 (11th Cir. 1991).

The Seventh Circuit stated that "a district court should explicitly state and support, either at the sentencing hearing or (preferably) in a written statement of reasons, its finding that the unconvicted activities bore the necessary relation to the convicted offense." *U.S. v. Duarte,* 950 F.2d 1255, 1263 (7th Cir. 1991) (remanded: make specific finding that amount of cocaine beyond that seized was "part of the same course of conduct or common scheme or plan," §1B1.3(a)(2)).

Some circuits have held that whether other criminal conduct is part of the "same course of conduct" as the current offense, §1B1.3(a)(2), is determined by similarity and temporal proximity. See, e.g., *U.S. v. Maxwell,* 34 F.3d 1006, 1010–11 (11th Cir. 1994) (remanded: unrelated cocaine distribution that occurred a year earlier and involved different people than dilaudid conspiracy and other cocaine distribution on which defendant was convicted did not meet test for similarity, regularity, and temporal proximity) [7#6]; *U.S. v. Roederer,* 11 F.3d 973, 977–80 (10th Cir. 1993) (affirmed: drug amounts from conspiracy that ended in 1987 were relevant conduct for 1992 cocaine distribution—evidence showed defendant distributed cocaine "from the 1980s through May, 1992, [and his] conduct was sufficiently similar and the instances of cocaine distribution were temporally proximate") [6#9]; *U.S. v. Lawrence,* 915 F.2d 402, 406–08 (8th Cir. 1990) (quantities of cocaine that were not part of the offense of conviction—conspiracy to distribute marijuana—but were purchased and distributed during the course of that conspiracy and were part of a general pattern of drug distribution could be included in setting the offense level) [3#16]; *U.S. v. Santiago,* 906 F.2d 867, 872–73 (2d Cir. 1990) (drug sales occurring eight to fourteen months before drug sale that resulted in conviction were properly deemed part of same course of conduct—all sales were similar and to same individual).

Citing *Santiago* favorably, the Ninth Circuit held that "the essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity. . . . When one component is absent, however, courts must look for a stronger presence of at least one of the other components." *U.S. v. Hahn,* 960 F.2d 903, 909–11 (9th Cir. 1992) (remanded to determine whether past drug sales meet test) [4#20]. Cf. *U.S. v. Fermin,* 32 F.3d 674, 681 (2d Cir. 1994) (remanded: drug quantities from 1983–1985 drug records could not be used as relevant conduct in 1990–1991 conspiracy offense—government failed to show high degree of similarity or regularity required where temporal proximity is lacking); *U.S. v. Robins,* 978 F.2d 881, 890 (5th Cir. 1992) (affirmed: marijuana distributions prior to eighteen-month hiatus were still part of same course of conduct or common scheme or plan as subsequent distributions); *U.S. v. Nunez,* 958 F.2d 196, 198–99 (7th Cir. 1992) (affirmed: uncharged 1986–1988 and 1990 cocaine sales for defendant arrested in Oct. 1990 "amounted to the same course of conduct"—all sales made to same buyer and sole interruption was buyer's imprisonment); *U.S. v. Montoya,* 952 F.2d 226, 229 (8th Cir. 1991) (reversed: later attempt to purchase marijuana was not part of "same course of conduct" as conviction for conspiracy to distribute cocaine—only common element was presence of defendant). See also cases in section I.A.2.

Note that it has been held that a defendant need not know the exact amount of drugs he or she actually possessed in order to be held responsible for the full amount. "[I]n a possession case the sentence should be based on the total amount of drugs in the defendant's possession, without regard to foreseeability. . . . [A] defendant who knows she is carrying some quantity of illegal drugs should be sentenced for the full amount on her person." *U.S. v. de Velasquez,* 28 F.3d 2, 4–6 (2d Cir. 1994) (affirmed: proper to include heroin hidden in defendant's shoes, though she claimed she did not know it was there) [6#17]. See also *U.S. v. Imariagbe,* 999 F.2d 706, 707–08 (2d Cir. 1993) (defendant is responsible for 850 grams of heroin imported in suitcase rather than 400 grams he claimed he believed he carried; court noted that "one might hypothesize an unusual situation in which the gap between belief and actuality was so great as to [warrant] downward departure," but this is not such a case); U.S.S.G. §1B1.3, comment. (n.2) ("the defendant is accountable for all quantities of contraband with which he was directly involved," and the reasonable foreseeability requirement "does not apply to conduct that the defendant personally undertakes"). Cf. *U.S. v. Taffe,* 36 F.3d 1047, 1050 (11th Cir. 1994) (affirmed: defendant properly held responsible for full amount of cocaine in bags that he conspired to steal for distribution even though he did not know how much was in the bags—object of conspiracy was to possess all of the cocaine; however, defendant only responsible for one bag on possession count because that is all he actually possessed).

The Ninth Circuit held that drugs possessed by defendant that were solely for personal use should not be used to set the offense level for possession of cocaine with intent to distribute. "Drugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not 'part of the same course of conduct' or 'common scheme' as drugs intended for distribution." *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1993) [6#9]. But see *U.S. v. Brown,* 19 F.3d 1246, 1248 (8th Cir. 1994) (affirmed: it was not error to include amounts of cocaine base that drug conspirator purchased for personal use); *U.S. v. Innamorati,* 996 F.2d 456, 492 (2d Cir. 1993) (same—"defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy").

Whether conduct from a prior conviction should be included as relevant conduct or accounted for in the criminal history score may depend on the circumstances. Compare *U.S. v. Barton,* 949 F.2d 968, 970 (8th Cir. 1991) (use in criminal history—quantity of marijuana that was basis for 1983 state conviction was not relevant conduct because defendant could no longer be criminally liable or accountable under §1B1.3 for that marijuana even though defendant continued distribution) [4#14], with *U.S. v. Query,* 928 F.2d 383, 385–86 (11th Cir. 1991) (drug amount from previously imposed state sentence that was part of or related to conduct underlying instant federal offense may be included as relevant conduct; see §4A1.2(a)(1), "prior sentence" does not include sentence for conduct that was "part of the instant offense") [4#2].

The Second Circuit has held that drug amounts in relevant conduct may not be used as a basis for departure because the sentencing court is required to use those amounts in setting the offense level. *U.S. v. Colon,* 905 F.2d 580, 584 (2d Cir. 1990) [3#8]. See also *U.S. v. McDowell,* 902 F.2d 451, 453–54 (6th Cir. 1990) (conduct in dismissed count "that was part of the same course of conduct" as offense of conviction should be factored into sentencing range, not used for departure) [3#6]; *U.S. v. Rutter,* 897 F.2d 1558, 1562 (10th Cir. 1990) (court is *required* to consider drugs in relevant conduct). See also U.S.S.G. §5G1.3 and Outline at section V.A.

2. Relevant Conduct—"Jointly Undertaken Criminal Activity"

General Requirements: The relevant conduct guideline, §1B1.3, and its commentary and examples were substantially revised, effective Nov. 1, 1992. Application Note 2 makes clear that in the case of jointly undertaken criminal activity, defendant is responsible for the conduct of others only if it "was both: (i) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that activity." Note 1 adds that "[t]he principles and limits of sentencing accountability are not always the same as the principles and limits of criminal liability." Thus, a sentencing court must first determine the scope of each defendant's agreement with others, and then determine whether drugs attributed to others were reasonably foreseeable to that defendant within the scope of the agreement.

Some courts had previously held that knowledge or foreseeability alone were enough, but now require reasonable foreseeability within the scope of the jointly undertaken criminal activity. See, e.g., *U.S. v. Cabrera-Baez,* 24 F.3d 283, 288 (D.C. Cir. 1994) ("Mere foreseeability is not enough: someone who belongs to a drug conspiracy may well be able to foresee that his co-venturers, in addition to acting in furtherance of his agreement with them, will be conducting drug transactions of their own on the side, but he is not automatically accountable for all of those side deals"); *U.S. v. Jenkins,* 4 F.3d 1338, 1346–47 (6th Cir. 1993) ("to charge one participant in a conspiracy with the conduct of the other participants" requires findings of foreseeability and conduct in furtherance of jointly undertaken criminal activity) [6#2]; *U.S. v. Irvin,* 2 F.3d 72, 75–78 (4th Cir. 1993) (in a drug conspiracy, "determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement") [6#2]; *U.S. v. Maserati,* 1 F.3d 330, 340 (5th Cir. 1993) ("Application Note 2 makes clear that criminal liability and relevant conduct are two different concepts, regardless of whether the indictment includes a conspiracy allegation"); *U.S. v. Garrido,* 995 F.2d 808, 813 (8th Cir. 1993) (simple knowledge that coconspirator possessed other drugs not enough—must show that those amounts were reasonably foreseeable and in furtherance of agreement) [5#15]; *U.S. v. Ismond,* 993 F.2d 1498, 1499 (11th Cir. 1993) ("to determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. . . . Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation") [5#15]. See also cases above in section I.A.1.

The Seventh Circuit held that a defendant is not accountable for prior or subsequent drug quantities unless the court specifically finds they were "reasonably foreseeable" to that defendant, and it stressed that "the most relevant factor in determining reasonable foreseeability" is "the scope of the defendant's agreement with other co-conspirators." *U.S. v. Edwards,* 945 F.2d 1387, 1391–97 (7th Cir. 1991) (remanding several sentences, originally based on entire amount of drugs distributed by conspiracy, for determination of specific amount of drugs attributable to each defendant) [4#12]. See also *U.S. v. Collado,* 975 F.2d 985, 991–95 (3d Cir. 1992) ("whether an individual defendant may be held accountable for amounts of drugs involved in reasonably foreseeable transactions conducted by co-conspirators depends upon the degree of the defendant's involvement in the conspiracy") [5#3]; *U.S. v. Jones,* 965 F.2d 1507, 1517 (8th Cir. 1992) ("For activities of a co-conspirator to be 'reasonably foreseeable' to a defendant, they must fall within the scope of the agreement between the defendant and the other conspirators. . . . Thus, if a defendant agrees to aid a large-volume dealer in completing a single, small sale of drugs, the defendant will not be

liable for prior or subsequent acts of the dealer that were not reasonably foreseeable. . . . Simply because a defendant knows that a dealer he works with sells large amounts of drugs to other people does not make the defendant liable for the dealer's other activities."). Cf. *U.S. v. Castellone,* 985 F.2d 21, 24-26 (1st Cir. 1993) (remanded: no evidence that defendant, who had made two drug sales to undercover officer, foresaw separately made third sale between officer and defendant's supplier, or that third sale was in furtherance of a common plan between defendant and his supplier).

Note that a defendant need not necessarily know or foresee the *exact* amount of drugs involved in a criminal activity in order to be held responsible for the entire amount. "A defendant who conspires to transport for distribution a large quantity of drugs, but happens not to know the precise amount, pretty much takes his chances that the amount actually involved will be quite large." *U.S. v. De La Cruz,* 996 F.2d 1307, 1314 (1st Cir. 1993) (affirmed: defendant who drove truck transporting cocaine from warehouse may not have known exact amount but "must have known . . . that a very large quantity was involved").

Under §1B1.3(a)(1)(A), comment. (n.2), a defendant in a drug offense "is accountable for all quantities of contraband with which he was directly involved . . . . The requirement of reasonable foreseeability . . . does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A)." See, e.g., *U.S. v. Lockhart,* 37 F.3d 1451, 1454 (10th Cir. 1994) (affirmed: defendant who drove car to facilitate drug transaction "knew that the purpose of the trip was to obtain cocaine. He therefore aided, abetted, and willfully caused the transaction. Under these circumstances, the quantity of drugs need not be foreseeable."); *U.S. v. Corral-Ibarra,* 25 F.3d 430, 437–38 (7th Cir. 1994) (despite defendant's claims that he only foresaw the two kilos of cocaine that he was sent to test, and evidence that other conspirators did not want him to know that fifty kilos were involved, defendant can be held responsible for full amount under §1B1.3(a)(1)(A), which does not require reasonable foreseeability; by testing the cocaine, defendant "played a direct, personal role in furtherance of the attempt to obtain and distribute a large quantity of cocaine"). Cf. *U.S. v. Taffe,* 36 F.3d 1047, 1050 (11th Cir. 1994) (affirmed: although conspiracy defendant did not know how much cocaine was in warehouse and his attempted theft was interrupted by authorities after he had only stolen a portion of the drugs, he was properly held responsible for all 146 kilograms because "[n]othing in the actions of Taffe or his associates indicated that they planned to steal only a portion of the drugs at the warehouse").

Conduct before or after defendant's involvement: May drug quantities distributed by the conspiracy before defendant joined be used to set the offense level? Courts have indicated it is possible, but not likely. The *Edwards* court indicated they could if "reasonably foreseeable" and within the scope of the agreement, 945 F.2d at 1397, and the Seventh Circuit later affirmed such an attribution to a defendant who joined in the middle of a conspiracy but was "an experienced drug dealer who was accustomed to dealing with 'kilo quantities' of cocaine." *U.S. v. Mojica,* 984 F.2d 1426, 1446 (7th Cir. 1993) (finding that defendant could reasonably foresee that 6.5 kilograms of cocaine were involved in conspiracy was not clearly erroneous). See also *U.S. v. Phillips,* 37 F.3d 1210, 1214–15 (7th Cir. 1994) (affirmed: defendant properly held responsible for amounts distributed in two months before he joined conspiracy based on his "degree of commitment to the conspiracy," role in collecting debts for cocaine sold before his joining, and "extensive dealings with two individuals" who were members of conspiracy before him).

The First Circuit, however, held that a conspiracy defendant could not logically be found to have "reasonably foreseen" drug amounts distributed before he joined the conspiracy,

and thus should not have the earlier amounts used to set his base offense level. "We are of the view that the base offense level of a co-conspirator at sentencing should reflect only the quantity of drugs he reasonably foresees it is the object of the conspiracy to distribute after he joins the conspiracy. In making [that determination], the earlier transactions of the conspiracy before he joins but of which he is aware will be useful evidence. However, a new entrant cannot have his base offense level enhanced at sentencing for drug distributions made prior to his entrance merely because he knew they took place." *U.S. v. O'Campo,* 973 F.2d 1015, 1023–1026 (1st Cir. 1992). See also *U.S. v. Carreon,* 11 F.3d 1225, 1235–36 (5th Cir. 1994) ("'relevant conduct' as defined in §1B1.3(a)(1)(B) is prospective only, and consequently cannot include conduct occurring before a defendant joins a conspiracy"; however, knowledge of prior conduct may be evidence of what defendant agreed to and reasonably foresaw when he joined conspiracy) [6#10]; *Collado,* 975 F.2d at 997 ("In the absence of unusual circumstances . . . conduct that occurred before the defendant entered into an agreement cannot be said to be in furtherance of or within the scope of that agreement"); *U.S. v. Chavez-Gutierrez,* 961 F.2d 1476, 1479 (9th Cir. 1992) (for defendant convicted of aiding and abetting one drug sale, it was error to attribute prior distributions to him absent a showing that he aided and abetted prior distributions or was member of conspiracy to do so—defendant must be "criminally liable" for distribution to be charged to him) [4#23]; *U.S. v. Miranda-Ortiz,* 926 F.2d 172, 178 (2d Cir. 1991) (defendant who joined conspiracy near its end for only one transaction involving one kilogram of cocaine should have sentence based on that amount without inclusion of four to five kilograms distributed before he joined and that he did not know about) [4#2].

Note that a proposed amendment to §1B1.3, comment. (n.2), addresses this issue as follows: "A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct . . . . The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted."

The Fifth Circuit has held that a defendant might be held responsible for drugs distributed by the conspiracy after he was incarcerated, depending on whether he effectively withdrew from the conspiracy. However, the incarceration may have "some effect on the foreseeability of the acts of his co-conspirators occurring after his" arrest. *U.S. v. Puig-Infante,* 19 F.3d 929, 945–46 (5th Cir. 1994) (remanded). The Third Circuit agreed that incarceration may affect foreseeability: "While we reject a *per se* rule that arrest automatically bars attribution to a defendant of drugs distributed after that date, we agree that since '[t]he relevant conduct provision limits accomplice attribution to conduct committed in furtherance of the activity the defendant agreed to undertake,' . . . a defendant cannot be held responsible for conduct committed after he or she could no longer assist or monitor his or her co-conspirators." *U.S. v. Price,* 13 F.3d 711, 732 (3d Cir. 1994) (affirmed because district court relied on amounts distributed before incarceration). Cf. *U.S. v. Chitty,* 15 F.3d 159, 161–62 (11th Cir. 1994) (remanded for resentencing under pre-Guidelines law: defendant whose only participation in drug conspiracy was limited solely to helping with one drug shipment in June 1987 was properly convicted of conspiracy, but cannot be sentenced for later actions of other conspirators—"There is no evidence that Chitty knew anything of the conspiracy's past operations . . . or that future shipments were contemplated . . . . At most, the evidence showed Chitty to be a participant in a one-shot, transitory storage of a single shipment").

Findings: Generally, the circuits have stressed the need for express findings that the drugs were reasonably foreseeable to the defendant. See *U.S. v. Rogers,* 982 F.2d 1241, 1246 (8th Cir. 1993) (remanded: finding that "by virtue of the conspiracy conviction" LSD sales attributed to codefendant are also attributable to defendant was insufficient statement of reasons); *U.S. v. Lanni,* 970 F.2d 1092, 1093 (2d Cir. 1992) (remanded: must make specific findings of drug amounts reasonably foreseeable by each coconspirator) [5#2]; *U.S. v. Perkins,* 963 F.2d 1523, 1528 (D.C. Cir. 1992) (remanded: court must make express finding that drugs possessed by codefendant were foreseeable); *U.S. v. Chavez-Gutierrez,* 961 F.2d 1476, 1481 (9th Cir. 1992) (remanded: court must make express finding that defendant was accountable for drugs distributed by others before the date of defendant's drug offense) [4#23]; *U.S. v. Blankenship,* 954 F.2d 1224, 1227–28 (6th Cir. 1992) (remanded for specific findings as to whether defendant knew or should have known that codefendant possessed other drugs, or that object of conspiracy was to possess such drugs); *U.S. v. Puma,* 937 F.2d 151, 159–60 (5th Cir. 1991) (remanded: district court must make specific finding of amount each conspirator knew or should have known or foreseen was involved; conviction does not automatically mean every conspirator foresaw total amount involved). See also *U.S. v. Mitchell,* 964 F.2d 454, 458–61 (5th Cir. 1992) (remanded: while defendant had previously purchased small amounts of cocaine, no evidence that he knew conspiracy was dealing with twenty kilograms) [5#1]; *U.S. v. Johnson,* 956 F.2d 894, 906–07 (9th Cir. 1992) ("minor" participant in drug conspiracy can be sentenced only for drugs distributed before taken into custody) [4#16].

Findings on the extent of a defendant's involvement in a conspiracy must be supported by evidence, not simply based on hypothesis. See *U.S. v. Adams,* 1 F.3d 1566, 1580–81 (11th Cir. 1993) (remanded: for defendant who participated in only one attempted flight to pick up marijuana, it was error to attribute to him "a hypothetical second load that [he] never attempted to transport. . . . There was no evidence that Adams intended to be involved with another flight or that it was foreseeable to him that there would be another flight") [6#4].

3. Mandatory Minimum Sentences and Other Issues

Mandatory minimums: Some circuits have held that the amount of drugs attributable to a conspiracy defendant for purposes of statutory minimums under 21 U.S.C. §§841(b) and 846 is not set by the jury verdict or indictment but should be calculated by the district court under the same standards used for the Guidelines. See *U.S. v. Castaneda,* 9 F.3d 761, 769–70 (9th Cir. 1993) (remanded: amounts listed in indictment do not control sentencing; quantity is determined "in accord with the Guidelines, [by] the amount that the defendant 'could reasonably foresee . . . would be involved' in the offense of which he was guilty") [6#5]; *U.S. v. Irvin,* 2 F.3d 72, 75–78 (4th Cir. 1993) (use relevant conduct section of the Guidelines to "determine the application of §841(b) for a defendant who has been convicted of §846") [6#2]; *U.S. v. Young,* 997 F.2d 1204, 1210 (7th Cir. 1993) (remanded: "in imposing a sentence for conspiracy under the mandatory provisions of section 841(b), the district court must determine the quantity of drugs that the defendant could reasonably have foreseen," using the analysis from *U.S. v. Edwards,* 945 F.2d 1387 (7th Cir. 1991)) [5#15]; *U.S. v. Martinez,* 987 F.2d 920, 924–26 (2d Cir. 1993) (remanded: must find that defendant knew or reasonably should have known about cocaine sold by other conspiracy defendant—"the same 'reasonable foreseeability' standard of the Guidelines must be applied to sentencing for conspiracy under 21 U.S.C. §846") [5#10]; *U.S. v. Jones,* 965 F.2d 1507, 1516–17 (8th Cir. 1992) (fact that government stated amount in indictment and jury convicted defendant

on that charge did not determine amount of drugs for sentencing: "The same standards govern the district court's drug quantity determination for section 841(b) and the Sentencing Guidelines"). See also *U.S. v. Madkins,* 14 F.3d 277, 279 (5th Cir. 1994) (indicating agreement with above cases); *U.S. v. Moore,* 968 F.2d 216, 224 (2d Cir. 1992) ("district court, rather than the jury, must determine pursuant to Guidelines Section 2D1.4 the quantities involved in narcotics offenses for the purpose of Section 841(b)").

Note that foreseeability is not an issue in the mandatory minimum calculations if defendant is sentenced under §1B1.3(a)(1)(A). Application Note 2 states: "The requirement of reasonable foreseeability . . . does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A)." The Tenth Circuit followed this note in holding that the government did not have to prove that the quantity of drugs was reasonably foreseeable to a defendant who—knowing the purpose of the trip—drove the car in a cocaine transaction. "Because defendant personally participated in the transaction giving rise to the 1.5 kilograms that the trial court attributed to defendant, the foreseeability of the quantity was irrelevant." *U.S. v. Lockhart,* 37 F.3d 1451, 1454 (10th Cir. 1994).

The Tenth Circuit has held that quantities of drugs that trigger a mandatory minimum sentence are not limited to those in the indictment, but also include amounts in relevant conduct. When this may happen, however, the court must so advise defendant in taking a guilty plea. *U.S. v. McCann,* 940 F.2d 1352, 1358 (10th Cir. 1991) (remanded: court should have considered quantities of drugs in relevant conduct, even though they were not listed in indictment; however, defendant "is entitled to plead anew" because he was not informed he could thus be subject to mandatory minimum). See also *U.S. v. Reyes,* 40 F.3d 1148, 1151 (10th Cir. 1994) (for defendant convicted on one count of possession of cocaine with intent to distribute, affirmed inclusion of drugs from prior related transactions to reach mandatory minimum despite lower amount specified in indictment—defendant received notice in plea agreement that minimum might apply); *U.S. v. Watch,* 7 F.3d 422, 426–29 (5th Cir. 1993) (remanded: district court violated Rule 11 by not informing defendant at the plea colloquy that he could be subject to mandatory minimum even though the indictment purposely omitted alleging drug quantity in order to avoid a mandatory minimum—quantity is determined by court at sentencing, not by indictment) [6#6].

However, other circuits have held that relevant conduct may not be appropriate for mandatory minimum calculations. The Second Circuit vacated a mandatory sentence that was based on the inclusion of relevant conduct that was not part of the offense of conviction. "Unlike the Guidelines, which require a sentencing court to consider similar conduct in setting a sentence, the statutory mandatory minimum sentences of 21 U.S.C. §841(b)(1) apply only to the conduct which actually resulted in a conviction under that statute." *U.S. v. Darmand,* 3 F.3d 1578, 1581 (2d Cir. 1993) (in sentencing for Feb. 1992 cocaine conspiracy, drugs from dismissed Nov. 1991 cocaine possession count were properly used to compute guideline range, but cannot be used toward mandatory minimum quantity) [6#4]. The Fourth Circuit agreed, holding that "[t]he mandatory minimum sentence is applied based only on conduct attributable to the offense of conviction." Thus, marijuana from a separate conspiracy that was not charged "could not be properly considered in determining the applicability of the mandatory minimum sentence under §841(b)." *U.S. v. Estrada,* 42 F.3d 228, 231–33 (4th Cir. 1994) (remanded) [7#5]. Cf. *U.S. v. Carrozza,* 4 F.3d 70, 81 (1st Cir. 1993) (statutory maximum sentence for RICO offense "must be determined by the conduct alleged within the four corners of the indictment," not by uncharged relevant conduct) [6#4].

The Fourth Circuit also held that the Guidelines method of aggregating different drugs

should not be used to compute mandatory minimums. For a defendant convicted of conspiracy to distribute cocaine and cocaine base and of a separate count of possession with intent to distribute cocaine base, the amount of drugs from each offense should not have been combined and a mandatory minimum imposed for the total amount. "[W]hile aggregation may be sometimes required under the Guidelines, '§841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics.'" *U.S. v. Harris,* 39 F.3d 1262, 1271–72 (4th Cir. 1994) (remanded: defendant should have been sentenced under §841(b)(1)(B) because amount of each drug did not total amount required for §841(b)(1)(A)) [7#5].

On a related issue, the Sixth Circuit held that drug quantities from different offenses may not be aggregated for mandatory minimum purposes. "It is obvious from the statute's face—from its use of the phrase '*a* violation'—that this section refers to a *single* violation. Thus, where a defendant violates [§841(a)] more than once, possessing less than 50 grams of cocaine base on each separate occasion, [§841(b)(1)(A)] does not apply, for there is no *single* violation involving '50 grams or more' of cocaine base. This is true even if the sum total of the cocaine base involved all together, over the multiple violations, amounts to more than 50 grams." The court noted that "[i]n this way, §841(b)(1)(A) is quite unlike the sentencing guidelines," which require aggregation of amounts in multiple violations. *U.S. v. Winston,* 37 F.3d 235, 240–41 & n.10 (6th Cir. 1994) (defendant's separate conspiracy and possession convictions involving 23 and 37 grams of cocaine base improperly combined for mandatory sentence applicable to offense involving 50 or more grams) [7#5].

Similarly, the Guidelines method of using negotiated amounts, see §2D1.1, comment. (n.12), may not be appropriate for mandatory minimum calculations. The Fifth Circuit held that, for a defendant convicted of conspiracy to distribute heroin, only amounts that defendant "actually possessed or conspired . . . to actually possess" could be used for mandatory sentences under §841(b)(1)(A)(i). "Mere proof of the amounts 'negotiated' with the undercover agents . . . would not count toward the quantity of heroin applicable to the conspiracy count." *U.S. v. Mergerson,* 4 F.3d 337, 346–47 (5th Cir. 1993) (remanded: proof of negotiated amounts was sufficient to set guideline range, but insufficient for statutory minimum) [6#1]. The First Circuit, however, concluded that "application note 12 provides the *threshold* drug-quantity calculus upon which depends the statutory minimum sentence fixed under 21 U.S.C. §841(b)(1)(A)(ii)" and held that a defendant's "inability to produce the additional three kilograms was no impediment to [the] imposition of the ten-year minimum sentence mandated by statute." Defendant was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective." *U.S. v. Pion,* 25 F.3d 18, 24–25 & n.12 (1st Cir. 1994) [6#16].

The Eleventh Circuit held that it would use the new, narrower Guidelines definition for cocaine base in §2D1.1(c) ("cocaine base" means "crack") in determining whether a mandatory minimum sentence applied under 21 U.S.C. §960(b), contrary to an earlier decision that all forms of cocaine base were included in §960(b): "[W]e think it is proper for us to look to the Guidelines in the mandatory minimum statute, especially since both provisions seek to address the same problem. . . . There is no reason for us to assume that Congress meant for 'cocaine base' to have more than one definition." *U.S. v. Munoz-Realpe,* 21 F.3d 375, 377–78 (11th Cir. 1994) (because defendant's liquid cocaine base mixture was not "crack," it should be treated as cocaine hydrochloride) [6#13]. *But cf. U.S. v. Palacio,* 4 F.3d 150, 154 (2d Cir. 1993) (dicta, recognizing narrower definition of cocaine base for Guidelines, but stating amendment would not affect broader definition used for mandatory minimum sentences under 21 U.S.C. §841(b)).

On the other hand, the First Circuit held that the Nov. 1993 amendment to §2D1.1(c) that changed the guideline method for calculating the weight of LSD does not control for purposes of mandatory minimum sentences. Rather, that calculation is still controlled by the holding in *Chapman v. U.S.*, 500 U.S. 453, 468 (1991), that the weight of the carrier medium is included. Therefore, a defendant resentenced under §1B1.10(a) could not have his sentence reduced below the five-year mandatory minimum that applied under *Chapman,* even though his guideline range was lowered from 121–151 months to 27–33 months. *U.S. v. Boot,* 25 F.3d 52, 54–55 (1st Cir. 1994) [6#15]. See also *U.S. v. Pardue,* 36 F.3d 429, 431 (5th Cir. 1994) (affirming denial of resentencing under amendment because defendant still subject to ten-year minimum under *Chapman*) [7#4]; *U.S. v. Mueller,* 27 F.3d 494, 496–97 (10th Cir. 1994) (holding that defendant was not entitled to resentencing under §1B1.10 because, even though amended §2D1.1(c) would result in range of 18–24 months, defendant was still subject to the five-year minimum and he had already received Rule 35(b) departure to 39 months) [6#15]. The Eighth Circuit concluded that the new guideline method should be used for mandatory minimums, but the opinion was vacated for rehearing en banc. See *U.S. v. Stoneking,* 34 F.3d 651, 652–55 (8th Cir. 1994) [7#3].

The Ninth Circuit held that, for a defendant convicted of possessing methamphetamine with intent to distribute, drug amounts for mandatory minimum sentences under §841(b)(1)(A) include only the amount defendant intended to distribute, not amounts possessed for personal use. *U.S. v. Rodriguez-Sanchez,* 23 F.3d 1488, 1493–96 (9th Cir. 1994) (remanded: "the crime of possession with intent to distribute focuses on the intent to distribute, not the simple possession") [6#14]. The court held that it was not bound by *U.S. v. Kipp,* 10 F.3d 1463, 1465–66 (9th Cir. 1994), see section II.A.1, but that "the principle behind that decision guides our decision."

Amounts in verdict, evidence, or indictment: Generally, drug quantity is an issue for the sentencing court and it is not limited by the amount of drugs specified in a jury verdict. *U.S. v. Chapple,* 985 F.2d 729, 731–32 (3d Cir. 1993); *U.S. v. Jacobo,* 934 F.2d 411, 416–17 (2d Cir. 1991); *U.S. v. Moreno,* 899 F.2d 465, 473–74 (6th Cir. 1990) [3#5]. The court is also not limited by the evidence presented at trial. *U.S. v. Tavano,* 12 F.3d 301, 305 (1st Cir. 1993) [6#9]; *U.S. v. Shonubi,* 998 F.2d 84, 89 (2d Cir. 1993). But cf. *U.S. v. Gonzalez-Acosta,* 989 F.2d 384, 390 (10th Cir. 1993) (defendant waived right to challenge weight of marijuana by stipulating to its weight at trial).

Nor does a conspiracy conviction require a sentence based on all drugs charged in the indictment. *U.S. v. Gilliam,* 987 F.2d 1009, 1012–13 (4th Cir. 1993) (remanded: error to automatically attribute to conspiracy defendant total quantity of drugs attributed to conspiracy in indictment to which he pled guilty; unless there is a specific attribution to defendant, an admission or stipulation, the court must make an independent determination under §1B1.3(a)(1) of amount attributable to defendant) [5#9]; *U.S. v. Navarro,* 979 F.2d 786, 788–89 (9th Cir. 1992) (remanded: improper to hold defendant accountable for drugs sold subsequent to his participation in conspiracy despite conspiracy conviction) [5#6]. See also U.S.S.G. §1B1.3, comment. (n.1) (1992) ("The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability.").

Felony or misdemeanor? When quantity determines whether the conviction is a felony or misdemeanor, the circuits are split on whether the jury must find quantity in the verdict or the court determines it at sentencing. Compare *U.S. v. Monk,* 15 F.3d 25, 27 (2d Cir. 1994) ("quantity is not an element of simple possession because [21 U.S.C.] §844(a) prohibits the possession of *any* amount of a controlled substance, including crack. . . . The task

of determining [quantity] falls to the sentencing judge . . . to find that Monk possessed more than 5 grams of crack in order to treat the crime as a felony") [6#8] and *U.S. v. Smith,* 34 F.3d 514, 518–20 (7th Cir. 1994) (following *Monk*) with *U.S. v. Sharp,* 12 F.3d 605, 608 (6th Cir. 1993) (simple possession of crack is "a 'quantity dependant' crime, . . . and the facts relevant to guilt or innocence of that crime—including possession of a quantity of crack cocaine exceeding five grams—were for the jury to decide") [6#7] and *U.S. v. Puryear,* 940 F.2d 602, 604 (10th Cir. 1991) (same, for cocaine: "Absent a jury finding as to the amount of cocaine, the trial court may not decide of its own accord to enter a felony conviction and sentence, instead of a misdemeanor conviction and sentence, by resolving the crucial element of the amount of cocaine against the defendant").

Purity: A court may consider the purity of the drugs in determining where to sentence within the guideline range, *U.S. v. Baker,* 883 F.2d 13, 15 (5th Cir. 1989) [2#13], but is not required to reduce the offense level for low drug purity, *U.S. v. Davis,* 868 F.2d 1390 (5th Cir. 1989) [2#3]. Unusually high drug purity may provide a basis for upward departure. See *U.S. v. Legarda,* 17 F.3d 496, 501 (1st Cir. 1994); *U.S. v. Connor,* 992 F.2d 1459, 1463 (7th Cir. 1993); *U.S. v. Ryan,* 866 F.2d 604, 606–10 (3d Cir. 1989) [2#1]; U.S.S.G. §2D1.1, comment. (n.9).

B. Calculating Weight of Drugs

1. Drug Mixtures

The Guidelines have been amended to provide a new method of establishing the weight of LSD, based on number of doses and an assigned weight per dose. See §2D1.1(c)(n.*) and comment. (n.18) (Nov. 1993). This change is retroactive under §1B1.10. See *U.S. v. Coohey,* 11 F.3d 97, 100–01 (8th Cir. 1993) (upholding new method and remanding for consideration of retroactive application pursuant to §1B1.10) [6#9]. But cf. *U.S. v. Telman,* 28 F.3d 94, 96 (10th Cir. 1994) (under §1B1.10 a reduction "is not mandatory but is instead committed to the sound discretion of the trial court"; district court could properly conclude defendant did not merit lower sentence under amended LSD computation) [6#15]. The Supreme Court previously held that the weight of LSD includes the weight of the carrier medium. *Chapman v. U.S.,* 111 S. Ct. 1919, 1925–26 (1991), aff'g *U.S. v. Marshall,* 908 F.2d 1312, 1317–18 (7th Cir. 1990) (en banc). Other circuits had held the same. See *U.S. v. Elrod,* 898 F.2d 60, 61–63 (6th Cir. 1990); *U.S. v. Bishop,* 894 F.2d 981, 985–86 (8th Cir. 1990) [3#2]; *U.S. v. Daly,* 883 F.2d 313, 316–18 (4th Cir. 1989) [2#13]; *U.S. v. Taylor,* 868 F.2d 125, 127–28 (5th Cir. 1989) [2#3]. The First Circuit relied on *Chapman* to hold that a sentence based on the gross weight of LSD and the water it was dissolved in did not violate due process. *U.S. v. Lowden,* 955 F.2d 128, 130–31 (1st Cir. 1992) (defendant failed to show water was "unusual medium" for LSD).

Some circuits have concluded that *Chapman* still controls the calculation for LSD mandatory minimum sentences, rather than the amended §2D1.1(c) method. See *U.S. v. Pardue,* 36 F.3d 429, 431 (5th Cir. 1994) (affirming denial of resentencing under amendment because defendant still subject to ten-year minimum under *Chapman*) [7#4]; *U.S. v. Mueller,* 27 F.3d 494, 496–97 (10th Cir. 1994) (defendant was not entitled to resentencing under §1B1.10 because, even though amended §2D1.1(c) would result in range of 18–24 months, defendant was still subject to five-year minimum) [6#15]; *U.S. v. Boot,* 25 F.3d 52, 54–55 (1st Cir. 1994) (defendant resentenced under amended §2D1.1(c) could not have his sentence reduced below five-year mandatory minimum that applied under *Chapman,* even

though his guideline range was lowered from 121–151 months to 27–33 months) [6#15]. The Eighth Circuit had concluded that the new guideline method should be used to determine the quantity of LSD for mandatory minimums, but the opinion was vacated for rehearing en banc. See *U.S. v. Stoneking,* 34 F.3d 651, 652–55 (8th Cir. 1994) [7#3].

Other courts previously held, pursuant to the Drug Quantity Table, U.S.S.G. §2D1.1(c), that the weight of other drugs includes the weight of the mixture containing the illegal substance. See, e.g., *U.S. v. Blythe,* 944 F.2d 356, 363 (7th Cir. 1991) (dilaudid); *U.S. v. Shabazz,* 933 F.2d 1029, 1033 (D.C. Cir. 1991) (dilaudid pills) [4#4]; *U.S. v. Lazarchik,* 924 F.2d 211, 214 (11th Cir. 1991) (pharmaceutical drugs); *U.S. v. Callihan,* 915 F.2d 1462 (10th Cir. 1990) (amphetamine precursor) [3#15]; *U.S. v. McKeever,* 906 F.2d 129, 133 (5th Cir. 1990) (amphetamine); *U.S. v. Meitinger,* 901 F.2d 27, 29 (4th Cir. 1990) (dilaudid); *U.S. v. Murphy,* 899 F.2d 714, 717 (8th Cir. 1990) (methamphetamine); *U.S. v. Gurgiolo,* 894 F.2d 56, 59–61 (3d Cir. 1990) (schedule II, III, and IV substances) [2#20]. After *Chapman,* courts have still held that the total weight of pharmaceuticals and dilaudid pills should be used. See, e.g., *U.S. v. Landers,* 39 F.3d 643, 647–48 (6th Cir. 1994) (dilaudid); *U.S. v. Lacour,* 32 F.3d 1157, 1160–61 (7th Cir. 1994) (dilaudid); *U.S. v. Limberopoulos,* 26 F.3d 245, 252 (1st Cir. 1994) (pharmaceutical pills); *U.S. v. Neighbors,* 23 F.3d 306, 311 n.4 (10th Cir. 1994) (dilaudid); *U.S. v. Crowell,* 9 F.3d 1452, 1454 (9th Cir. 1993) (dilaudid) [6#9]; *U.S. v. Young,* 992 F.2d 207, 209–10 (8th Cir. 1993) (dilaudid).

A Nov. 1993 amendment to §2D1.1's commentary, Note 1, generally directs that only usable amounts of drug mixtures be counted, but leaves room for departure in some instances: "Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. . . . If such material cannot readily be separated from the mixture or substance . . . , the court may use any reasonable method to approximate the weight of the mixture or substance to be counted. An upward departure nonetheless may be warranted when the mixture or substance . . . is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection." Note that this change is retroactive under §1B1.10. See *U.S. v. Towe,* 26 F.3d 614, 617 (5th Cir. 1994) (remanding methamphetamine calculation for retroactive application of amendment).

Before this amendment, the circuits split over whether, in light of *Chapman,* total weight should be used for cocaine and methamphetamine mixtures that contained uningestible components. The First and Tenth Circuits held that total weight is used. See *U.S. v. Killion,* 7 F.3d 927, 930–35 (10th Cir. 1993) (use entire weight of amphetamine precursor mixture, "including waste by-products of the drug manufacturing process") [6#5]; *U.S. v. Restrepo-Contreras,* 942 F.2d 96, 99 (1st Cir. 1991) (include total weight of statues made of twenty-one kilograms of beeswax and five kilograms of cocaine) [4#12]; *U.S. v. Mahecha-Onofre,* 936 F.2d 623, 625–26 (1st Cir. 1991) (suitcase made from mixture of cocaine and acrylic material chemically bonded together was cocaine "mixture or substance" and entire weight of suitcase (less the weight of the metal fittings) properly used) [4#7]. Cf. *U.S. v. Nguyen,* 1 F.3d 972, 975 (10th Cir. 1993) (proper to use entire weight of "'eight-ball' comprised of small pieces of yellowish cocaine base mixed with white sodium bicarbonate powder"—although the two may not usually be combined this way, defendant purchased and sold the drug in this form) [6#3].

But several circuits read *Chapman* as calling for a market-oriented approach, which means excluding substances that are not normally sold or used as part of the final product. Thus, the weight of waste liquid, poisonous by-products, packing or transport materials, and other unmarketable substances should not be included as part of the drug mixture. See *U.S. v.*

Johnson, 999 F.2d 1192, 1195–97 (7th Cir. 1993) (waste water, which contained trace of cocaine base, was "merely a by-product of the manufacturing process" with no market value and should not have been included) [6#2]; *U.S. v. Newsome*, 998 F.2d 1571, 1578 (11th Cir. 1993) (error to include discarded and unusable "sludge" with less than 1% methamphetamine) [6#3]; *U.S. v. Rodriguez*, 975 F.2d 999, 1004–07 (3d Cir. 1992) (do not include distinguishable, unusable boric acid that is neither cutting agent nor transport medium) [5#4]; *U.S. v. Acosta*, 963 F.2d 551, 553–57 (2d Cir. 1992) (unmarketable, distillable creme liqueur mixed with cocaine should not be included) [4#23]; *U.S. v. Salgado-Molina*, 967 F.2d 27, 28 (2d Cir. 1992) (following *Acosta*) [4#23]; *U.S. v. Bristol*, 964 F.2d 1088, 1090 (11th Cir. 1992) (where cocaine mixed with wine for transporting, exclude wine); *U.S. v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991) (non-distributable, poisonous by-products should not be included in weight of methamphetamine mixture) [4#9]; *U.S. v. Rolande-Gabriel*, 938 F.2d 1231, 1235–38 (11th Cir. 1991) (unusable "liquid waste material" mixed with cocaine should not be included) [4#8]. Cf. *U.S. v. Tucker*, 20 F.3d 242, 244 (7th Cir. 1994) (proper to use weight of cocaine base at time of arrest for guidelines and mandatory minimum sentence purposes, rather than the smaller weight when reweighed several months later—weight loss was due to the evaporation of water, and water is part of the drug "mixture," not an excludable carrier medium or waste product) [6#12].

Before the 1993 amendments, the Fifth and Ninth Circuits drew a distinction between methamphetamine (use total mixture) and cocaine (use only marketable substance). Compare *U.S. v. Innie*, 7 F.3d 840, 845–47 (9th Cir. 1993) (for methamphetamine, use entire mixture) [6#5] with *U.S. v. Robins*, 967 F.2d 1387, 1389–91 (9th Cir. 1992) (weight of cocaine should not include cornmeal, which essentially functioned as packing material) [4#25] and *U.S. v. Palacios-Molina*, 7 F.3d 49, 53–54 (5th Cir. 1993) (error to include weight of unusable, unmarketable liquid used to transport cocaine) [6#5] with *U.S. v. Walker*, 960 F.2d 409, 412 (5th Cir. 1992) (include total weight of mixture containing 95% waste product and 5% methamphetamine) [4#23]. The Fifth Circuit reasoned, in part, that the liquid used to transport cocaine was "an otherwise innocuous liquid," whereas "the liquids involved in the methamphetamine cases were either precursor chemicals or by-products" that "are necessary to the manufacturing." *Palacios-Molina*, 7 F.3d at 53. The Ninth Circuit also noted that methamphetamine liquids are necessary to manufacturing, *Robins*, 967 F.2d at 1390, and distinguishable from "readily separable packaging agent[s] like cornmeal," *Innie*, 7 F.3d at 846.

Methamphetamine: The government must prove that the offense involves D-methamphetamine before the sentence may be based on that rather than the less severely punished L-methamphetamine. See *U.S. v. Bogusz*, 43 F.3d 82, 88–92 (3d Cir. 1994) (remanded); *U.S. v. Deninno*, 29 F.3d 572, 580 (10th Cir. 1994) (but affirmed because defendant failed to timely object) [7#1]; *U.S. v. Patrick*, 983 F.2d 206, 208–10 (11th Cir. 1993) (remanded). See also *U.S. v. Wessels*, 12 F.3d 746, 754 (8th Cir. 1993) (error for district court to take judicial notice that methamphetamine in offense was D-methamphetamine—government has burden of proof on this issue). The Third Circuit added that the "type of proof required to satisfy this standard will also vary from case to case. In some cases, the evidence will include a chemical analysis or expert testimony. In others, circumstantial evidence of which isomer is present may be sufficient to meet the preponderance of the evidence standard." *Bogusz*, 43 F.3d at 91–92 & n.17. See also *U.S. v. Lande*, 40 F.3d 329, 331 (10th Cir. 1994) (affirming district court's finding of D-methamphetamine based upon circumstantial evidence); *U.S. v. Koonce*, 884 F.2d 349, 352–53 (8th Cir. 1989) (affirming D-methamphetamine determination based on circumstantial evidence of defendant's prior methamphetamine shipment).

2. Marijuana

When live plants are seized, the base offense level is determined by the number of plants; when dried plants are seized, their weight is used. *U.S. v. Corley,* 909 F.2d 359, 361 (9th Cir. 1990) (following instruction at end of Drug Quantity Table, U.S.S.G. §2D1.1(c) at n.*) [3#11]. Accord *U.S. v. Bradley,* 905 F.2d 359, 360 (11th Cir. 1990). See also *U.S. v. Stevens,* 25 F.3d 318, 322–23 (6th Cir. 1994) (remanded: error to use number of plants defendant's supplier grew rather than weight of marijuana defendant distributed—the calculation for live plants should be applied "only to live marijuana plants found. Additional amounts for dry leaf marijuana that a defendant possesses—or marijuana sales that constitute 'relevant conduct' that has occurred in the past—are to be added based upon the actual weight of the marijuana and not based upon the number of plants from which the marijuana was derived") [6#17]; *U.S. v. Blume,* 967 F.2d 45, 49–50 (2d Cir. 1992) (remanded: when estimating past marijuana growing activity for relevant conduct, treat previously grown plants as dried and use weight, not number of plants). However, the Seventh Circuit held that when a marijuana growing operation completes harvesting and processing of plants into the final product for distribution, the one plant = one kilogram ratio should still be used even though the weight of the final product is less. *U.S. v. Haynes,* 969 F.2d 569, 571–72 (7th Cir. 1992) (and noting holding is limited to cultivation, harvesting, and processing of marijuana—"it does not encompass the activities of those individuals who enter the marijuana distribution chain after the processing stage"). See also *U.S. v. Young,* 34 F.3d 500, 506 (7th Cir. 1994) (remanded: when basing weight on number of plants, that number "*must* have been reasonably foreseeable to the defendant").

The Fourth and Eighth Circuits have held that §2D1.1(c)(n.*) is invalid as to offenders possessing fewer than 50 plants—actual weight, rather than presumed weight of 100 grams, is required by 21 U.S.C. §841. *U.S. v. Hash,* 956 F.2d 63, 64–65 (4th Cir. 1992) [4#17]; *U.S. v. Streeter,* 907 F.2d 781, 790 (8th Cir. 1990). After *Streeter* was decided, the background commentary to §2D1.1 was amended to explain that "[t]he decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana." (Nov. 1991). The Eighth Circuit declined to apply the amendment retroactively and adhered to its holding in *Streeter,* reversing a determination of marijuana quantity based on multiplying the number of plants by 100 grams. *U.S. v. Evans,* 966 F.2d 398, 402 (8th Cir. 1992). Other circuits have disagreed with *Streeter,* holding that the 100-gram figure has a rational basis and should be used. See *U.S. v. Dahlman,* 13 F.3d 1391, 1399–1400 (10th Cir. 1993); *U.S. v. Thompson,* 976 F.2d 666, 672–73 (11th Cir. 1992).

For more than 50 plants, courts have upheld the constitutionality of treating each plant as the equivalent of 100 grams of marijuana, or as one kilogram after the Anti-Drug Abuse Act of 1988 and the Nov. 1989 guideline amendments. See *U.S. v. Taylor,* 985 F.2d 3, 9 (1st Cir. 1993) (kilogram); *U.S. v. Murphy,* 979 F.2d 287, 289–91 (2d Cir. 1992) (kilogram); *U.S. v. Smith,* 961 F.2d 1389, 1390 (8th Cir. 1992) (kilogram); *U.S. v. Holmes,* 961 F.2d 599, 601–02 (6th Cir. 1992) (kilogram); *U.S. v. Lee,* 957 F.2d 778, 783–85 (10th Cir. 1992) (kilogram); *U.S. v. Belden,* 957 F.2d 671, 675–76 (9th Cir. 1992) (kilogram); *U.S. v. Osburn,* 955 F.2d 1500, 1505–10 (11th Cir. 1992) (kilogram); *U.S. v. Webb,* 945 F.2d 967, 968–69 (7th Cir. 1991) (100 grams); *U.S. v. Motz,* 936 F.2d 1021, 1025–26 (9th Cir. 1991) (100 grams). See also *U.S. v. Angell,* 11 F.3d 806, 811–12 (8th Cir. 1993) (remanded: must use guideline ratio of one kilogram per plant—testimony of expert, including government's expert, that plant's marketable yield is less is irrelevant).

Generally, a marijuana plant need not be fully developed in order to be counted under §2D1.1(c)—plant cuttings with observable evidence of root formation, such as root hairs, are counted. See *U.S. v. Foree*, 43 F.3d 1572, 1581 (11th Cir. 1995); *U.S. v. Delaporte*, 42 F.3d 1118, 1121 (7th Cir. 1994); *U.S. v. Robinson*, 35 F.3d 442, 446 (9th Cir. 1994); *U.S. v. Burke*, 999 F.2d 596, 600–01 (1st Cir. 1993); *U.S. v. Edge*, 989 F.2d 871, 879 (6th Cir. 1993); *U.S. v. Bechtol*, 939 F.2d 603, 605 (8th Cir. 1991); *U.S. v. Eves*, 932 F.2d 856, 860 (10th Cir. 1991). Also, male plants are counted even though they do not produce the controlled substance THC. See *U.S. v. Gallant*, 25 F.3d 36, 40 (1st Cir. 1994); *U.S. v. Traynor*, 990 F.2d 1153, 1160 (9th Cir. 1993); *U.S. v. Proyect*, 989 F.2d 84, 87–88 (2d Cir. 1993); *U.S. v. Curtis*, 965 F.2d 610, 615 (8th Cir. 1992). Cf. *U.S. v. Benish*, 5 F.3d 20, 26–28 (3d Cir. 1993) ("male, old, and possibly weak" plants not a ground for departure) [6#4]; *U.S. v. Upthegrove*, 974 F.2d 55, 56 (7th Cir. 1992) (poor quality of marijuana not a ground for departure). The Ninth Circuit rejected a claim that marijuana plants growing in the same space with intertwined root systems should be counted as one plant. *Robinson*, 35 F.3d at 447–48 ("Each stalk protruding from the ground and supported by its own root system should be considered one plant, no matter how close to other plants it is and no matter how intertwined are their root systems.").

Although for purposes of determining whether 21 U.S.C. §960(b)'s statutory penalties apply, mature stalks, fibers, and nongerminating seeds are not weighed, 21 U.S.C. §802(16), it is proper to include the stalks, fibers, and seeds in calculating the sentencing range under §2D1.1(c)(n.*). *U.S. v. Vincent*, 20 F.3d 229, 238 (6th Cir. 1994) [6#12]; *U.S. v. Vasquez*, 951 F.2d 636, 637–38 (5th Cir. 1992). The Seventh and Tenth Circuits have held that marijuana weight may include its moisture content. See *U.S. v. Pinedo-Montoya*, 966 F.2d 591, 595 (10th Cir. 1992); *U.S. v. Garcia*, 925 F.2d 170, 172 (7th Cir. 1991).

3. Cocaine and Cocaine Base

Some circuits have held that, when only cocaine powder is seized, it may be converted into cocaine base to calculate the offense level if the facts show that defendant was involved in a conspiracy to distribute crack rather than powdered cocaine. See, e.g., *U.S. v. Angulo-Lopez*, 7 F.3d 1506, 1511 (10th Cir. 1993) (affirmed: "it is proper to sentence a defendant under the drug quantity table for cocaine base if the record indicates that the defendant intended to transform powdered cocaine into cocaine base") [6#6]; *U.S. v. Paz*, 927 F.2d 176, 180 (4th Cir. 1991) (where "a defendant is convicted of conspiracy to manufacture crack, but the chemical seized was cocaine, the district court must . . . approximate the total quantity of crack that could be manufactured from the seized cocaine"); *U.S. v. Haynes*, 881 F.2d 586, 592 (8th Cir. 1989) (where evidence showed that defendant convicted of conspiracy to distribute cocaine sold crack, not cocaine powder, it was proper to convert seized powder cocaine and currency into crack for sentencing). See also *U.S. v. McCaskey*, 9 F.3d 368, 377–79 (5th Cir. 1993) (although defendants were charged with and pled guilty to conspiracy to distribute cocaine hydrochloride, it was not plain error to calculate sentences based on cocaine base when tests later showed true nature of substance). Cf. *U.S. v. McMillen*, 8 F.3d 1246, 1251–52 (7th Cir. 1993) (where it was foreseeable that "wholesale strength heroin" sold by defendant-supplier would be diluted for retail sale, it was proper to multiply wholesale amounts by three based on conservative estimate that heroin would have to be cut twice). But cf. *U.S. v. Palacio*, 4 F.3d 150, 153–54 (2d Cir. 1993) (affirmed: although government conceded the cocaine base dissolved in plastic flowerpots was likely to be converted

into cocaine hydrochloride for sale, it was proper to use cocaine base for applicable offense level and statutory minimum).

The First and Ninth Circuits held that "cocaine base" in Title 21, U.S. Code, means "crack." *U.S. v. Lopez-Gil,* 965 F.2d 1124, 1130 (1st Cir. 1992); *U.S. v. Shaw,* 936 F.2d 412, 415–16 (9th Cir. 1991) (presence of hydroxyl ion does not define "cocaine base"—"crack" and "rock cocaine" that can be smoked is "cocaine base"). As amended Nov. 1993, Guidelines §2D1.1(c), at n.*, also states that "'Cocaine base,' for the purposes of this guideline, means 'crack.'" See also *U.S. v. Munoz-Realpe,* 21 F.3d 375, 377 (11th Cir. 1994) (affirmed: after amendment, "forms of cocaine base other than crack are treated as cocaine hydrochloride," so defendant guilty of importing six liquor bottles containing a liquid that tested positive for cocaine base must be sentenced under guideline for cocaine hydrochloride rather than that for cocaine base) [6#13]. The Eleventh Circuit held that the amendment is not merely clarifying and thus should not be applied retroactively. *U.S. v. Camacho,* 40 F.3d 349, 354 (11th Cir. 1994) (affirmed: for defendant sentenced in May 1992, non-crack cocaine base was properly treated as cocaine base under Guidelines). Previously, some circuits held that cocaine base includes, but is not limited to, "crack." See, e.g., *U.S. v. Rodriguez,* 980 F.2d 1375, 1378 (11th Cir. 1992); *U.S. v. Jackson,* 968 F.2d 158, 161–62 (2d Cir. 1992); *U.S. v. Williams,* 962 F.2d 1218, 1227 (6th Cir. 1992); *U.S. v. Pinto,* 905 F.2d 47, 49 (4th Cir. 1990); *U.S. v. Metcalf,* 898 F.2d 43, 46 (5th Cir. 1990). Cf. *U.S. v. Jones,* 979 F.2d 317, 319–20 (3d Cir. 1992) ("'crack' is a 'cocaine base' and . . . it is a chemical compound created from alkaloid cocaine, with a definable molecular structure different from cocaine salt"); *U.S. v. Levy,* 904 F.2d 1026, 1033 (6th Cir. 1990) ("cocaine base is not water soluble, is concentrated in rock-hard forms . . . and is generally smoked").

Although circuits differ in their definitions of "cocaine base," they have held that the statutes and guidelines are not unconstitutionally vague. See *Jones,* 979 F.2d at 319–20; *Jackson,* 968 F.2d at 161–64; *U.S. v. Thomas,* 932 F.2d 1085, 1090 (5th Cir. 1991); *U.S. v. Turner,* 928 F.2d 956, 960 (10th Cir. 1991); *Levy,* 904 F.2d at 1032–33; *U.S. v. Van Hawkins,* 899 F.2d 852, 854 (9th Cir. 1990); *U.S. v. Reed,* 897 F.2d 351, 353 (8th Cir. 1990); *U.S. v. Barnes,* 890 F.2d 545, 552–53 (1st Cir. 1989); *U.S. v. Williams,* 876 F.2d 1521, 1525 (11th Cir. 1989); *U.S. v. Brown,* 859 F.2d 974, 975–76 (D.C. Cir. 1988).

All circuits ruling on the issue have upheld against assorted constitutional challenges the 100:1 ratio of cocaine to cocaine base in §2D1.1(c). See, e.g., *U.S. v. Smith,* 34 F.3d 514, 525 (7th Cir. 1994) (cruel and unusual punishment); *U.S. v. Singleterry,* 29 F.3d 733, 740–41 (1st Cir. 1994) (equal protection, racially discriminatory classification); *U.S. v. Byse,* 28 F.3d 1165, 1169–71 (11th Cir. 1994) (racially discriminatory purpose); *U.S. v. Thompson,* 27 F.3d 671, 678 (D.C. Cir. 1994) (due process, equal protection); *U.S. v. Thurmond,* 7 F.3d 947, 950–53 (10th Cir. 1993) (same); *U.S. v. Reece,* 994 F.2d 277, 278–79 (6th Cir. 1993) (same and equal protection); *U.S. v. Frazier,* 981 F.2d 92, 95 (3d Cir. 1992) (equal protection, cruel and unusual punishment, racially discriminatory purpose); *U.S. v. King,* 972 F.2d 1259, 1260 (11th Cir. 1992) (equal protection); *U.S. v. Harding,* 971 F.2d 410, 412–14 (9th Cir. 1992) (equal protection); *U.S. v. Simmons,* 964 F.2d 763 , 967 (8th Cir. 1992) (due process, equal protection, cruel and unusual punishment); *Williams,* 962 F.2d at 1227–28 (equal protection); *U.S. v. Watson,* 953 F.2d 895, 898 (5th Cir. 1992) (due process, equal protection); *U.S. v. Lawrence,* 951 F.2d 751, 755 (7th Cir. 1991) (equal protection); *U.S. v. Pickett,* 941 F.2d 411, 418 (6th Cir. 1991) (due process, cruel and unusual punishment); *Turner,* 928 F.2d at 960 (due process); *U.S. v. Thomas,* 900 F.2d 37, 39-40 (4th Cir. 1990) (equal protection); *U.S. v. Colbert,* 894 F.2d 373, 374–75 (10th Cir. 1990) (cruel and un-

usual punishment); *U.S. v. Cyrus,* 890 F.2d 1245, 1248 (D.C. Cir. 1989) (equal protection, cruel and unusual punishment) [2#18].

Some circuits have also rejected downward departure on the basis of disparate racial impact resulting from the 100:1 ratio. See *Thompson,* 27 F.3d at 679 (affirmed); *U.S. v. Maxwell,* 25 F.3d 1389, 1401 (8th Cir. 1994) (remanded); *U.S. v. Bynum,* 3 F.3d 769, 774–75 (4th Cir. 1993) (affirmed); *U.S. v. Haynes,* 985 F.2d 65, 70 (2d Cir. 1993) (affirmed); *Pickett,* 941 F.2d at 417–18 (affirmed).

4. Estimating Drug Quantity

In some situations courts have to estimate the amount of drugs in the offense. See U.S.S.G. §2D1.1, comment. (n.12) ("Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.") Following are some methods courts have used to estimate quantity in cases involving attempts, conspiracies, manufacturing, and sales. Note that the Sixth Circuit has stated that "when choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution." *U.S. v. Sims,* 975 F.2d 1225, 1243 (6th Cir. 1992). Accord *U.S. v. Paulino,* 996 F.2d 1541, 1545 (3d Cir. 1993) ("the need to estimate, however, is not a license to calculate drug amounts by guesswork"); *U.S. v. Sepulveda,* 15 F.3d 1161, 1198 (1st Cir. 1993) ("district courts must base their findings on 'reliable information' and, where uncertainty reigns, must 'err on the side of caution'"); *U.S. v. Ortiz,* 993 F.2d 204, 207–08 (10th Cir. 1993) (improper to base drug quantity on uncorroborated, out-of-court testimony of unidentified informant); *U.S. v. Walton,* 908 F.2d 1289, 1301–02 (6th Cir. 1990). See also *U.S. v. Davis,* 981 F.2d 906, 911 (6th Cir. 1992) (where unusual circumstances prevented any reasonable estimate of quantity of cocaine attributable to defendant, proper to use lowest offense level applicable to cocaine) [5#7].

Note that some circuits have held that testimony from addict-witnesses should be closely scrutinized. See cases in section IX.D.1.

a. Conspiracies and attempts

"In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount." U.S.S.G. §2D1.1, comment. (n.12) (1992) (formerly §2D1.4, comment. (n.1)). See *U.S. v. Foley,* 906 F.2d 1261, 1265 (8th Cir. 1990); *U.S. v. Buggs,* 904 F.2d 1070, 1078–79 (7th Cir. 1990); *U.S. v. Adames,* 901 F.2d 11, 12 (2d Cir. 1990); *U.S. v. Rodriguez,* 896 F.2d 1031, 1033–34 (6th Cir. 1990); *U.S. v. Garcia,* 889 F.2d 1454, 1456–57 (5th Cir. 1989) [2#18]; *U.S. v. Roberts,* 881 F.2d 95, 104–05 (4th Cir. 1989) [2#5]; *U.S. v. Perez,* 871 F.2d 45, 48 (6th Cir. 1989) [2#4]. Note, however, that the Fifth Circuit held that negotiated amounts cannot be used for mandatory minimum calculations in some cases, but the First Circuit held the opposite. See summaries of *U.S. v. Mergerson,* 4 F.3d 337 (5th Cir. 1993) [6#1] and *U.S. v. Pion,* 25 F.3d 18 (1st Cir. 1994) [6#16] in section II.A.3.

However, for an uncompleted transaction Note 12 also states that where "the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing." Some

courts have held that the government need only show *either* capability or intent, but a defendant must show *both* lack of capability and lack of intent under Note 12. See *U.S. v. Tillman,* 8 F.3d 17, 19 (11th Cir. 1993) (and "district courts must make factual findings concerning the defendant's intent and capability"); *U.S. v. Barnes,* 993 F.2d 680, 682–84 & n.1 (9th Cir. 1993); *U.S. v. Brooks,* 957 F.2d 1138, 1151 (4th Cir. 1992). See also *U.S. v. Gessa,* 971 F.2d 1257, 1265 (6th Cir. 1992) (en banc) (same for former §2D1.4, comment. (n.1)). Cf. *U.S. v. Pion,* 25 F.3d 18, 24–25 (1st Cir. 1994) (despite district court's finding that defendant was not "reasonably capable of producing" additional three kilograms he negotiated, that amount was properly included as relevant conduct under Note 12 because "he was a member of a conspiracy whose object was to distribute more than six kilograms and . . . he specifically intended to further the conspiratorial objective. . . . [N]either conjunctive clause in note 12 can be ignored") [6#16].

The Third Circuit agrees that, once the government meets its initial burden of proving the amount of drugs under negotiation, the defendant has the burden of showing lack of both intent and reasonable capability. However, the court also held that the ultimate burden of persuasion "remains at all times with the government. Thus, if a defendant puts at issue his or her intent and reasonable capability to produce the negotiated amount of drugs by introducing new evidence or casting the government's evidence in a different light, the government then must prove either that the defendant intended to produce the negotiated amount of drugs or that he or she was reasonably capable of doing so." Furthermore "a district court must make explicit findings as to intent and capability." *U.S. v. Raven,* 39 F.3d 428, 434–37 (3d Cir. 1994) ("it is more reasonable to read Note 12, in its entirety, as addressing how a defendant's base offense level may be determined in the first instance when a drug transaction remains unconsummated, for it is important to bear in mind that calculating the amount of drugs involved in criminal activity neither aggravates nor mitigates a defendant's sentence; rather, it provides the starting point") [7#4].

Other circuits require the government to prove both intent and reasonable capability to produce the quantity. See *U.S. v. Hendrickson,* 26 F.3d 321, 334–38 (2d Cir. 1994) (in conspiracy case, "Government bears the burden of proving the defendant's intent to produce such an amount, a task necessarily informed, although not determined, by the defendant's ability to produce the amount alleged to have been agreed upon") [6#16]; *U.S. v. Legarda,* 17 F.3d 496, 500 (1st Cir. 1994) ("Our case law has followed the language of this Commentary Note in a rather faithful fashion, requiring a showing of both intent and ability to deliver in order to allow the inclusion of negotiated amounts to be delivered at a future time"); *U.S. v. Ruiz,* 932 F.2d 1174, 1183–84 (7th Cir. 1991); *U.S. v. Bradley,* 917 F.2d 601, 604–05 (1st Cir. 1990). The Third and Fourth Circuits have implicitly held the same. See *U.S. v. Rodriguez,* 975 F.2d 999, 1008 (3d Cir. 1992) (government produced no evidence and court made no finding that defendants were capable of obtaining larger amount) [5#4]; *U.S. v. Richardson,* 939 F.2d 135, 142–43 (4th Cir. 1991) (amounts under negotiation not considered because nothing in record to indicate defendant was reasonably capable of producing the cocaine).

Note that this procedure has been held to apply to buyers as well as sellers, including those who negotiate purchases from undercover agents. See *U.S. v. Jean,* 25 F.3d 588, 598 (7th Cir. 1994); *U.S. v. Frazier,* 985 F.2d 1001, 1002–03 (9th Cir. 1993); *U.S. v. Brooks,* 957 F.2d 1138, 1151 (4th Cir. 1992); *U.S. v. Brown,* 946 F.2d 58, 60 n.3 (8th Cir. 1991); *U.S. v. Adames,* 901 F.2d 11, 12 (2d Cir. 1990). But see *U.S. v. Robinson,* 22 F.3d 195, 196 (8th Cir. 1994) (remanded: Note 12 does not apply to buyers—"the commentary by its terms applies when the defendant is the seller or distributor, not the buyer"). Similarly, pursuant to Note

12 courts must determine whether a buyer was capable of producing the money to buy the drugs. Note that buyers may not have to produce all of the money "up front," but may sell on consignment or provide only a down payment. See, e.g., *U.S. v. Alaga*, 995 F.2d 380, 382–83 (2d Cir. 1993) (promissory note payable one week after delivery of heroin defendant planned to sell was sufficient—when defendant buyer "negotiates for a particular quantity, he or she fully intends to commit the crime as planned"); *U.S. v. Fowler*, 990 F.2d 1005, 1006–07 (7th Cir. 1993) (negotiated drug quantity could be used even though defendant was unable to pay all of the seller's requested down payment—he had a demonstrated ability to resell large amounts and had sold on consignment); *U.S. v. Skinner*, 986 F.2d 1091, 1093–95 (7th Cir. 1993) (inability to pay irrelevant when defendant acts as middleman on consignment).

Several appellate courts have reversed factual determinations that larger drug quantities were under negotiation. See *U.S. v. Reyes*, 979 F.2d 1406, 1409–11 (10th Cir. 1992) (defendant agreed to a meeting but did not discuss details of additional sale—undercover agent's subjective belief that sale was agreed to insufficient) [5#7]; *U.S. v. Ruiz*, 932 F.2d 1174, 1184 (7th Cir. 1991) (defendant mentioned he could get greater quantity but did not discuss price); *U.S. v. Moon*, 926 F.2d 204, 209–10 (2d Cir. 1991) (initial conversations concerning "one or two" kilograms where eventual agreement was for only one kilogram); *Foley*, 906 F.2d at 1265 (defendant mentioned price of greater quantity only in response to request to purchase greater quantity). Note also that the "weight under negotiation in an uncompleted distribution" should not be used if the transaction is completed. "There is no ambiguity in [Note 12] and we can ascertain no reason why the plain language should not be followed." See *U.S. v. Podlog*, 35 F.3d 699, 708 (2d Cir. 1994) (remanded: although defendant originally inquired about purchasing 125 or 400 grams of heroin, district court could not use larger amount when defendant actually purchased 125 grams—because the distribution was completed "'the weight under negotiation in an uncompleted distribution' is not applicable").

The original weight of drugs in a mailed package is generally included even though postal inspectors remove a portion of drugs prior to delivery. See *U.S. v. Franklin*, 926 F.2d 734, 736–37 (8th Cir. 1991); *U.S. v. White*, 888 F.2d 490, 498–500 (7th Cir. 1989). However, original drug quantity is not included if the defendant reasonably believed the package contained less. *U.S. v. Hayes*, 971 F.2d 115, 117–18 (8th Cir. 1992) [5#1]. Cf. *U.S. v. Davern*, 970 F.2d 1490, 1493 (6th Cir. 1992) (en banc) (in possession offense, use negotiated drug amount even though undercover agent actually delivered less) [5#1].

b. Manufacturing

In a drug manufacturing case, the offense level may be set by estimating the amount of drugs the defendant was capable of producing if the amount actually seized was less. *U.S. v. Evans*, 891 F.2d 686, 687–88 (8th Cir. 1989) [2#19]. The Eighth and Tenth Circuits followed this rule in "attempt to manufacture methamphetamine" cases even though one of the precursor chemicals was not present at the time of arrest. The district courts properly approximated the amount that could have been produced in light of the other ingredients. *U.S. v. Beshore*, 961 F.2d 1380, 1383–84 (8th Cir. 1992); *U.S. v. Havens*, 910 F.2d 703, 705 (10th Cir. 1990) [3#10]. In two other cases, production capacity was used even though the laboratory was not operational at the time of arrest. *U.S. v. Bertrand*, 926 F.2d 838, 846–47 (9th Cir. 1991) (lab had been dismantled, necessary chemical not present); *U.S. v. Smallwood*, 920 F.2d 1231, 1236–37 (5th Cir. 1991) (lab not operational, some necessary precursors miss-

ing) [3#19]. Cf. *U.S. v. Burks,* 934 F.2d 148, 152 (8th Cir. 1991) (improper to include capability of lab defendant offered to sell when no evidence lab actually existed).

The Fourth and Fifth Circuits held that the Drug Equivalency Tables at §2D1.1, comment. (n. 10), are to be used for combining different substances to obtain one offense level and are not manufacturing conversion ratios. Where only one drug is being manufactured, the Drug Quantity Table, §2D1.1(c), should be used. See *U.S. v. Salazar,* 961 F.2d 62, 64 (5th Cir. 1992) (attempt to manufacture methamphetamine); *U.S. v. Paz,* 927 F.2d 176, 180 (4th Cir. 1991) (conspiracy to manufacture crack).

Crimes involving listed "precursor" and "essential" chemicals are sentenced under §2D1.11 and its Chemical Quantity Table. (Initially effective Nov. 1, 1991, this amendment was made retroactive Nov. 1, 1994.) If the listed chemical offense "involved" manufacturing or attempting to manufacture a controlled substance, the offense level should be calculated under both §2D1.1 and §2D1.11 and the higher one used. See §2D1.11(c)(1). This method should be used even if the only substance actually seized is an "immediate precursor" covered in §2D1.1. See *U.S. v. Wagner,* 994 F.2d 1467, 1470–72 (10th Cir. 1993) (following §2D1.11(c)1), if no listed chemical is seized estimate amount and calculate offense level under §2D1.11, then calculate offense level under §2D1.1 for seized substance and use higher level) [5#14]. It has been held that conspiracy to manufacture a controlled substance qualifies as an offense involving the manufacture or attempt to manufacture a controlled substance under §2D1.11(c)(1). See *U.S. v. Bellazerius,* 24 F.3d 698, 703-04 (5th Cir. 1994); *U.S. v. Myers,* 993 F.2d 713, 716 (9th Cir. 1993). Cf. §2D1.11(c)(1), comment. (n.2) (subsection (c)(1) applies if defendant "completed the actions sufficient to constitute the offense of unlawfully manufacturing . . . or attempting to manufacture a controlled substance unlawfully").

Note that the offense of conviction controls which guideline is used. For a defendant convicted of an offense sentenced under §2D1.1, that section should be used even if the only substance seized was a listed chemical. See *Myers,* 993 F.2d at 716 (affirmed: defendant convicted of conspiracy to manufacture methamphetamine under 21 U.S.C. §841(a) was properly sentenced under §2D1.1 rather than §2D1.11, even though only ephedrine, a listed chemical, was seized). However, if a controlled substance *and* a listed chemical are seized in a single offense that would be sentenced under §2D1.1, the Guidelines "do not provide an express method for combining" the two substances to calculate an offense level. *U.S. v. Hoster,* 988 F.2d 1374, 1381 (5th Cir. 1993) [5#11]. The Fifth Circuit concluded that the substances should be treated as separate offenses groupable under §3D1.2(d). The listed chemical should be converted to marijuana equivalent by comparing the offense level for that amount in §2D1.11 to the amount of marijuana for the same offense level in §2D1.1. That amount should then be added to the marijuana equivalent of the controlled substance, calculated from the Drug Equivalency Table at §2D1.1, comment. (n.10), and the offense level set by the total amount. *Id.* at 1381–82.

In a pre-§2D1.11 case, the Fifth Circuit held it was not plain error to use a DEA formula to convert 1348 grams of phenylacetic acid to 674 grams phenylacetone to 505.5 grams methamphetamine, arriving at a base offense level of 28, where the conversion of phenylacetone to methamphetamine using the Drug Equivalency Table would have resulted in a base offense level of 26—"the sentencing guidelines do not explicitly provide any method of assigning a base offense level for possession of phenylacetic acid." *U.S. v. Surasky,* 974 F.2d 19, 21 (5th Cir. 1992).

c. Evidence from prior sales or records

Quantities of drugs already sold may be calculated from financial information, such as by converting money earned from prior sales into the estimated quantity sold. *U.S. v. Gerante,* 891 F.2d 364, 368–69 (1st Cir. 1989) [2#18]; § 2D1.1, comment. (n.12). Accord *U.S. v. Watts,* 950 F.2d 508, 514–15 (8th Cir. 1991); *U.S. v. Hicks,* 948 F.2d 877, 881–83 (4th Cir. 1991) [4#13]; *U.S. v. Stephenson,* 924 F.2d 753, 764–65 (8th Cir. 1991). See also *U.S. v. Ortiz-Martinez,* 1 F.3d 662, 675 (8th Cir. 1993) (proper to estimate cocaine quantity based on seized $545,552.00 in currency and checks and $400,000 in wire transfers divided by average cost of $23,000 per kilogram); *U.S. v. Duarte,* 950 F.2d 1255, 1265 (7th Cir. 1991) (dividing cash amount by price per kilogram to estimate quantity of cocaine "is perfectly acceptable under the Guidelines") [4#13]; *U.S. v. Mickens,* 926 F.2d 1323, 1331–32 (2d Cir. 1991) (proper to approximate cocaine distributed during conspiracy based on amount of unexplained income).

Note that a connection between the drugs and currency must be shown. See *U.S. v. Rios,* 22 F.3d 1024, 1027–28 (10th Cir. 1994) (affirmed: may convert cash to drugs provided "the cash is attributable to drug sales which were part of the same course of conduct or common scheme or plan as the conviction count"); *U.S. v. Rivera,* 6 F.3d 431, 446 (7th Cir. 1993) (affirmed conversion of seized cash to cocaine amount—"the district court may convert the seized currency into an equivalent amount of the charged drug as long as the government proves the connection between the money seized and the drug-related activity"); *U.S. v. Gonzalez-Sanchez,* 953 F.2d 1184, 1187 (9th Cir. 1992) (requiring finding on the record that money seized during a search is the proceeds of the drug transaction or otherwise linked to it before converting cash into drug quantity). Cf. *U.S. v. Jackson,* 3 F.3d 506, 511 (1st Cir. 1993) ("When drug traffickers possess large amounts of cash in ready proximity to their drug supply, a reasonable inference may be drawn that the money represents drug profits. Small amounts of currency do not present such a clear case," but may still be used if evidence shows amounts are drug proceeds). Similarly, there must be evidence to support the price of drugs used in converting cash into drug quantity. See, e.g., *U.S. v. Jackson,* 990 F.2d 251, 254 (6th Cir. 1993) (remanded: insufficient evidence to support conversion ration of $1,000 per ounce of crack cocaine); *Duarte,* 950 F.2d at 1265–66 (remanded: error to base quantity on contradictory evidence as to price of kilogram of cocaine at time of defendant's offense).

Quantities of drugs evidenced in conspiracy defendant's notebook entries and found to be part of related conduct were properly included in the base offense level. *U.S. v. Tabares,* 951 F.2d 405, 410 (1st Cir. 1991) [4#13]. Accord *U.S. v. Cagle,* 922 F.2d 404, 407 (7th Cir. 1991); *U.S. v. Ross,* 920 F.2d 1530, 1538 (10th Cir. 1990). See also *U.S. v. Straughter,* 950 F.2d 1223, 1235–36 (6th Cir. 1991) (records of drug payments found in coconspirator's purse provided support for finding of larger amount of cocaine than that seized during arrests); *U.S. v. Schaper,* 903 F.2d 891, 896–99 (2d Cir. 1990) (on remand, court should consider evidence of drug purchases in records seized from defendant).

d. Using averages to estimate

Courts may estimate quantity using averages (e.g., amounts, number of trips, time), but the averages should be supported by evidence in the record, not mere conjecture. The Seventh Circuit upheld a calculation based on averages estimated from known sales in a given time period. Defendant was a member of the conspiracy for eight weeks, there were thirty-four sales, and eleven of those sales were known to average thirty-nine grams of heroin. Because

all the sales were similar in nature, it was reasonable to use the average of the known sales to obtain the heroin attributable to defendant for all sales. The appellate court noted that the district court acted cautiously and did not include other amounts that may have been foreseeable to defendant. *U.S. v. McMillen,* 8 F.3d 1246, 1250–51 (7th Cir. 1993). The appellate court also approved the use of a weekly average, based on several factors, to estimate the amount of "wholesale strength heroin" attributable to another defendant who was the sole supplier to the conspiracy for twenty-two weeks. In addition, it was proper to take into account the fact that the heroin sold would be diluted for retail sale. Based on the price a seller would have to get to make "a profit that would be reasonably foreseeable to a supplier," the district court conservatively estimated that the heroin would have to be cut twice, and thus multiplied the wholesale amounts sold by three for the total heroin attributable to defendant. *Id.* at 1252–53. See also *U.S. v. Green,* 40 F.3d 1167, 1175 (11th Cir. 1994) (affirmed: where 300 of approximately 8,000 intercepted phone calls demonstrated that conspirators handled 14,280 grams of cocaine base, district court could reasonably conclude that 720 grams more of cocaine base were involved in remaining 7,700 calls to hold defendants responsible for at least 15 kilograms); *U.S. v. Newton,* 31 F.3d 611, 614 (8th Cir. 1994) (affirmed: evidence supported using purity level of two seized "eight-balls" of methamphetamine to estimate quantity of drug in unrecovered eight-balls) [7#1]; *U.S. v. Roach,* 28 F.3d 729, 735 (8th Cir. 1994) (proper to set quantity of ephedrine on basis of amount found in one of five identical jars); *U.S. v. Thomas,* 12 F.3d 1350, 1369 (5th Cir. 1994) (finding that conspiracy distributed more than 150 kilograms of cocaine was supported by ledgers showing distribution of 56 kilograms over approximately one-third of conspiracy, and other evidence and testimony supported extrapolation).

Other courts have reversed estimates based on averaging because the evidence did not support the calculation. See, e.g., *U.S. v. Zimmer,* 14 F.3d 286, 289–90 (6th Cir. 1994) (remanded: "the size of defendant's operation at the time of arrest cannot be manipulated to infer a certain amount of past 'success' (25 plants per year) when there exists not a scintilla of evidence to support such a finding. That the defendant grew marijuana during the years prior to his arrest is not in question; he admitted as much. The amount attributed to him by the District Court, however, was created from whole cloth. It is improper . . . to simply 'guess'"); *U.S. v. Sepulveda,* 15 F.3d 1168, 1198–99 (1st Cir. 1993) (remanded: "sentencing court remains free to make judicious use of properly constructed averages," but here there was insufficient evidence to support use of "assumed average number of trips multiplied by an assumed average quantity of cocaine per trip"); *U.S. v. Shonubi,* 998 F.2d 84, 89–90 (2d Cir. 1993) (without further evidence, it was error to base calculation on assumption that amount of heroin recovered from one trip was amount imported in seven other trips); *U.S. v. Garcia,* 994 F.2d 1499, 1508–09 (10th Cir. 1993) (remanded: "nothing more than a guess" to estimate defendant's shipments as average of all shipments in that area); *U.S. v. Hewitt,* 942 F.2d 1270, 1274 (8th Cir. 1991) (remanded: cannot assume that amount of cocaine carried in two known trips was also carried on six other trips).

C. Possession of Weapon by Drug Defendant, §2D1.1(b)(1)

1. Burden of Proof

Application Note 3 to §2D1.1(b)(1) states: "The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the of-

fense." Several circuits have held that, once the government satisfies its initial burden of showing that the weapon was present, the burden of proof is then on defendant to show that the weapon was not connected to the offense. See, e.g., *U.S. v. Roberts,* 980 F.2d 645, 647 (10th Cir. 1992); *U.S. v. Corcimiglia,* 967 F.2d 724, 727–28 (1st Cir. 1992); *U.S. v. Durrive,* 902 F.2d 1221, 1222–23 (7th Cir. 1990); *U.S. v. Restrepo,* 884 F.2d 1294, 1296 (9th Cir. 1989) [2#13]; *U.S. v. McGhee,* 882 F.2d 1095, 1097–99 (6th Cir. 1989) [2#12]. The Eighth Circuit held that the burden is on the government to "establish a relationship between a defendant's possession of the firearm and the offense." *U.S. v. Khang,* 904 F.2d 1219, 1221–24 (8th Cir. 1990). See also *U.S. v. Richmond,* 37 F.3d 418, 419 (8th Cir. 1994) ("Our cases have consistently held that in order for §2D1.1(b)(1) to apply, the government has to prove by a preponderance of the evidence that it is not clearly improbable that the weapon had a nexus with the criminal activity"). Cf. *U.S. v. Zimmer,* 14 F.3d 286, 290–91 (6th Cir. 1994) (remanded: enhancement improper where defendant presented "unrefuted testimony that these rifles were for hunting and were unconnected with the marijuana") [6#10].

The D.C. Circuit, relying on language in §1B1.3(a) that was deleted by a Nov. 1989 amendment, held that the enhancement could not be applied absent a showing by the prosecution that defendant possessed the weapon "intentionally, recklessly, or by criminal negligence." *U.S. v. Burke,* 888 F.2d 862, 865–68 (D.C. Cir. 1989) [2#16]. Accord *U.S. v. Fiala,* 929 F.2d 285, 289 (7th Cir. 1991); *U.S. v. Suarez,* 911 F.2d 1016, 1020 (5th Cir. 1990) [3#12].

2. Possession by Codefendant

When the weapon was possessed by a codefendant the enhancement may be applied if the possession was reasonably foreseeable to defendant in connection with the jointly undertaken criminal activity. See U.S.S.G. §1B1.3, comment. (n.2); *U.S. v. Nichols,* 979 F.2d 402, 412–13 (6th Cir. 1992); *U.S. v. Soto,* 959 F.2d 1181, 1186–87 (2d Cir. 1992) [4#20]; *U.S. v. McFarlane,* 933 F.2d 898, 899 (10th Cir. 1991); *U.S. v. Bianco,* 922 F.2d 910, 912 (1st Cir. 1991); *U.S. v. Barragan,* 915 F.2d 1174, 1177–79 (8th Cir. 1990); *U.S. v. Garcia,* 909 F.2d 1346, 1350 (9th Cir. 1990) [3#11]; *U.S. v. Aguilera-Zapata,* 901 F.2d 1209, 1215 (5th Cir. 1990) [3#8]; *U.S. v. White,* 875 F.2d 427, 433 (4th Cir. 1989). But cf. *U.S. v. Cochran,* 14 F.3d 1128, 1133 (6th Cir. 1994) (remanded: "we require that there be objective evidence that the defendant knew the weapon was present, or at least knew it was reasonably probable that his coconspirator would be armed," and there was no such evidence here that defendant knew gun was hidden under seat of coconspirator's car).

The Eleventh Circuit held that a coconspirator may be subject to §2D1.1(b)(1) if the possessor of the weapon was charged as a coconspirator, possessed the weapon in furtherance of the conspiracy, and the defendant who is to receive the enhancement was a member of the conspiracy at the time the weapon was possessed. *U.S. v. Otero,* 890 F.2d 366, 367 (11th Cir. 1989) [2#18] (a later case, *U.S. v. Martinez,* 924 F.2d 209, 210 n.1 (11th Cir. 1991), notes that the *Otero* test incorporates foreseeability and is thus compatible with other circuits). Cf. *U.S. v. Williams,* 894 F.2d 208, 212–13 (6th Cir. 1990) (coconspirators not present at scene of crime where weapon was possessed may receive enhancement if that possession was foreseeable, but abuse of discretion to give enhancement when coconspirator who actually possessed weapon was not given enhancement) [3#1].

The Eleventh Circuit also held that "the rules of co-conspirator liability . . . do not require that the firearm possessor be a charged co-conspirator when that co-conspirator dies or is otherwise unavailable for indictment." *U.S. v. Nino,* 967 F.2d 1508, 1513–14 (11th Cir. 1992) (affirmed §2D1.1(b)(1) enhancement on basis of weapons possession by one coconspirator

who died before conspiracy ended and by another who received immunity for cooperating with government). The Seventh Circuit followed *Nino* in affirming the enhancement where defendant supervised unindicted coconspirators who possessed weapons during a drug transaction. *U.S. v. Johnson,* 997 F.2d 248, 256–57 (7th Cir. 1993) ("*Nino* makes clear that the one possessing the weapon need not be an indicted co-conspirator. We think this is especially true when the weapon was in the possession of someone under the defendant's control and in close proximity to the defendant and the drugs.").

3. Relevant Conduct, Proximity of Weapon to Drugs

A Nov. 1991 amendment to §2D1.1(b)(1) deleted "during commission of the offense," and is intended to clarify that the relevant conduct provisions apply to this section. See U.S.S.G. App. C, amendment 394. Thus, the weapon need not actually be possessed during the offense of conviction. See *U.S. v. Mumford,* 25 F.3d 461, 468–69 (7th Cir. 1994) (affirmed: codefendant's possession of weapon during relevant conduct was reasonably foreseeable to defendant); *U.S. v. Roederer,* 11 F.3d 973, 982–83 (10th Cir. 1993) (affirmed: although gun was not present in car during offense of conviction, it was possessed at apartment where relevant conduct occurred); *U.S. v. Falesbork,* 5 F.3d 715, 719–20 (4th Cir. 1993) (affirmed enhancement for gun used by coconspirator in murder related to cocaine distribution offense); *U.S. v. Quintero,* 937 F.2d 95, 97–98 (2d Cir. 1991) (gun possessed during dismissed drug count may be used for §2D1.1(b)(1) enhancement on other drug count that was part of same course of conduct); *U.S. v. Willard,* 919 F.2d 606, 609–10 (9th Cir. 1990) (weapons found at different location were part of same course of conduct, may be used for §2D1.1(b)(1) enhancement) [3#16]; *U.S. v. Paulk,* 917 F.2d 879, 884 (5th Cir. 1990) (firearm possessed during related drug conspiracy may be considered) [3#16]. Cf. *U.S. v. Baldwin,* 956 F.2d 643, 647 & n.4 (7th Cir. 1992) (reversed: enhancement not proper where defendant attacked agent with meat cleaver a month after the sale of drugs to which defendant pleaded guilty; court noted 1991 amendment would change result); *U.S. v. Garner,* 940 F.2d 172, 175–76 (6th Cir. 1991) (cumulative effect of factors made it clearly improbable that antique-style, single-shot, unloaded derringer, which was locked in a safe twelve feet from safe where drugs were found and is not the type of weapon "normally associated with drug activity," was connected to offense) [4#7].

A related question is whether the weapon and drugs must be in the same location during the offense, and courts have generally held that reasonable proximity is sufficient. The Fifth Circuit has stated that possession of a weapon under §2D1.1(b)(1) "is established if the government proves by a preponderance of the evidence 'that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and the defendant. . . . Generally, the government must provide evidence that the weapon was found in the same location where drugs or drug paraphernalia are stored or where part of the transaction occurred.'" *U.S. v. Eastland,* 989 F.2d 760, 770 (5th Cir. 1993) (affirmed where guns found in house from which defendant sold drugs; quoting *U.S. v. Hooten,* 942 F.2d 878, 882 (5th Cir. 1991)). See also *U.S. v. Wilson,* 11 F.3d 346, 355 (2d Cir. 1993) (affirmed: defendant kept loaded gun in apartment where drugs and drug sale proceeds were stored); *U.S. v. Williams,* 10 F.3d 590, 595–96 (8th Cir. 1993) (where residence was used for drug dealing, a "sufficient nexus existed" between weapon found in second-floor bedroom and cocaine and drug paraphernalia in first-floor kitchen where defendant was arrested); *U.S. v. Hammer,* 3 F.3d 266, 270 (8th Cir. 1993) (presence of guns in house where drugs were packaged and sold was sufficient); *U.S. v. Stewart,* 926 F.2d 899, 901 (9th Cir. 1991) ("key is whether the gun was

possessed during the course of criminal conduct, not whether it was 'present' at the site" of the offense of conviction); *U.S. v. Heldberg,* 907 F.2d 91, 92–94 (9th Cir. 1990) (enhancement applicable for unloaded firearm locked in briefcase in trunk of car where defendant arrested for drug importation); *U.S. v. Paulino,* 887 F.2d 358, 360 (1st Cir. 1989) (enhancement proper for guns in separate apartment in same building as apartment where drugs were sold).

Under the earlier version of §2D1.1(b)(1), the Seventh Circuit held that weapons possessed at one residence where drugs were sold could not be used to enhance the sentence for a drug offense that occurred at another residence several miles away—there must be physical proximity of weapon and contraband. *U.S. v. Rodriguez-Nuez,* 919 F.2d 461, 466–67 (7th Cir. 1990) [3#16]. See also *U.S. v. Zimmer,* 14 F.3d 286, 290–91 (6th Cir. 1994) (remanded: error to give enhancement for rifles found in home because no weapons were found anywhere near the marijuana and unrefuted evidence supported defendant's claims that they were either not his or used for hunting—"Given the nature of the operation (manufacturing, not dealing), the setting (rural), and the location of the contraband (in basement) away from the weapons, 'it is clearly improbable that the weapon(s) [were] connected with the offense'") [6#10]. But see *Mumford,* 25 F.3d at 468 (after 1991 amendment, §2D1.1(b)(1) "is no longer restricted to possession during the offense of conviction, but requires only that the defendant 'possessed' the weapon").

4. Miscellaneous

The enhancement may be given even if the defendant was acquitted of a charge of using or carrying a firearm during a drug offense. See *U.S. v. Romulus,* 949 F.2d 713, 716–17 (4th Cir. 1991); *U.S. v. Coleman,* 947 F.2d 1424, 1428–29 (10th Cir. 1991); *U.S. v. Welch,* 945 F.2d 1378, 1384–85 (7th Cir. 1991); *U.S. v. Duncan,* 918 F.2d 647, 652 (6th Cir. 1990); *U.S. v. Rodriguez-Gonzalez,* 899 F.2d 177, 179–82 (2d Cir. 1990) [3#6]; *U.S. v. Dawn,* 897 F.2d 1444, 1449–50 (8th Cir. 1990); *U.S. v. Mocciola,* 891 F.2d 13, 16–17 (1st Cir. 1989) [2#18].

It was not clearly erroneous to give the enhancement to a county sheriff who carried a gun as part of his job since carrying the firearm "as a sheriff . . . does not mean . . . that the weapon could not be connected with the offense." *U.S. v. Sivils,* 960 F.2d 587, 596 (6th Cir. 1992) [4#20]. Accord *U.S. v. Ruiz,* 905 F.2d 499, 508 (1st Cir. 1990). The enhancement was also proper for a defendant who accepted two weapons as partial payment for cocaine. *U.S. v. Overstreet,* 5 F.3d 295, 297 (8th Cir. 1993).

A "stun gun" was held to be a "dangerous weapon" for purposes of the §2D1.1(b)(1) enhancement. *U.S. v. Agron,* 921 F.2d 25, 26 (2d Cir. 1990) [3#18]. The enhancement has been applied when the weapon was unloaded, *U.S. v. Heldberg,* 907 F.2d 91, 94 (9th Cir. 1990), or inoperable, *U.S. v. Smith,* 905 F.2d 1296, 1300 (9th Cir. 1990). See also U.S.S.G. §1B1.1, comment. (n.1(d)) (Nov. 1, 1989) (amending commentary to add: "Where an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon").

The Eighth Circuit held the guideline is valid even though the prosecutor has the discretion to charge use of firearm as a substantive crime, 18 U.S.C. §924(c), or seek enhancement under §2D1.1(b)(1). *U.S. v. Foote,* 898 F.2d 659, 666 (8th Cir. 1990) [3#5].

D. Calculation of Loss

Generally, courts should calculate loss based on the fair market value of property or on the actual or intended loss caused by fraud, and the loss "need not be determined with precision" but may be based on a reasonable estimate. See §2B1.1, comment. (nn.2–3) and §2F1.1, comment. (nn.7–8). Following are examples of appellate decisions on loss calculation.

1. Offenses Involving Property

Application Note 2 in §2B1.1 states that loss is ordinarily measured by the "fair market value" of the property. Alternatives to this approach may be used when market value is difficult to measure or inadequately reflects the harm to the victim. See, e.g., *U.S. v. Thomas,* 973 F.2d 1152, 1159 (5th Cir. 1992) ("only where ascertaining market value is impractical, may a court measure loss in some other way"—error to consider incidental costs to victims of automobile fraud where retail value of cars easily determined); *U.S. v. Larracuente,* 952 F.2d 672, 674 (2d Cir. 1992) (proper to use retail, rather than "bootleg," value of counterfeit videotapes because high quality of tapes allowed their sale through normal retail outlets); *U.S. v. Wilson,* 900 F.2d 1350, 1356 (9th Cir. 1990) (upholding calculation of intended loss based on company's development costs versus amount at which defendant offered to sell stolen biotechnology information). Cf. *U.S. v. Kim,* 963 F.2d 65, 68–69 (5th Cir. 1992) (under §2B5.4, criminal infringement of trademark, "the retail value of the infringing items" means the retail value of the counterfeit goods, not value of genuine merchandise; however, retail value of genuine merchandise may be relevant evidence).

Furthermore, Application Note 3 states that "loss need not be determined with precision, and may be inferred from any reasonably reliable information available." See, e.g., *Kim,* 963 F.2d at 69–70 (not improper to use retail value of genuine merchandise where value of counterfeit items difficult to determine); *U.S. v. Hernandez,* 952 F.2d 1110, 1118 (9th Cir. 1991) (proper to multiply average market value of counterfeit cassette tapes by number of counterfeit insert cards discovered in warehouse to determine loss rather than calculate victim's lost profit); *Wilson,* 900 F.2d at 1356 ("where goods have no readily ascertainable market value, any reasonable method may be employed to ascribe an equivalent monetary value to the items").

Two courts, determining loss under §2B1.1 for violations of 18 U.S.C. §659, theft from interstate shipments, relied on 18 U.S.C. §641's definition of value and measured loss by the retail value of the stolen goods. *U.S. v. Watson,* 966 F.2d 161, 162–63 (5th Cir. 1992) (retail value used even though goods were shipped wholesale); *U.S. v. Russell,* 913 F.2d 1288, 1292–93 (8th Cir. 1990). See also *U.S. v. Colletti,* 984 F.2d 1339, 1345 (3d Cir. 1992) (proper to use retail value of stolen diamonds rather than replacement cost or amount of insurance payment).

Application Note 2 of §2B1.1 was amended Nov. 1993 to state: "Loss does not include the interest that could have been earned had the funds not been stolen." Previously, the First Circuit held that the amount of interest that would have been earned on embezzled funds may be used in calculating loss. *U.S. v. Curran,* 967 F.2d 5, 5–6 (1st Cir. 1992) ($10,000 that would have been earned on embezzled $174,000 properly included) [5#1]. Accord *U.S. v. Bartsh,* 985 F.2d 930, 933 (8th Cir. 1993) [5#9].

Note that loss is based on the amount taken or that which was intended to be taken. See, e.g., *U.S. v. Van Boom,* 961 F.2d 145, 147 (9th Cir. 1992) (loss from attempted bank robbery is amount defendant sought to take); *Hernandez,* 952 F.2d at 1118 (proper to base loss on

number of cassette tape labels discovered in warehouse even though counterfeiting scheme had produced few finished tapes); *U.S. v. Westmoreland,* 911 F.2d 398, 399 (10th Cir. 1990) (total value of goods stolen, $691,311, properly used as loss under §2B1.1 even though all but $10,768 worth was recovered); *U.S. v. Parker,* 903 F.2d 91, 105 (2d Cir. 1990) (entire amount of cash in stolen payroll car must count as "loss" even though robbers did not transfer all cash from stolen car to their getaway car). But see *U.S. v. Johnson,* 993 F.2d 1358, 1359 (8th Cir. 1993) (loss does not include misapplied funds never removed from the credit union—credit union was never at risk of losing funds).

Loss may also include incidental costs resulting from the offense, such as repairs. See, e.g., *U.S. v. King,* 915 F.2d 269, 272 (6th Cir. 1990) (defendants damaged bank vault in attempt to open it, and loss under §2B2.2 was properly increased for cost of hiring extra guards until vault repaired); *U.S. v. Scroggins,* 880 F.2d 1204, 1214–15 (11th Cir. 1989) (loss included cost of repairing damaged postal machines). The First Circuit upheld as "a robbery-related 'loss'" the value of a car stolen during a bank robbery getaway. Even though the robbers abandoned the car for another getaway vehicle, "the Guidelines do not limit the Commentary's word 'taken' to circumstances involving a 'permanent' deprivation of property," and the risk of loss "existed whether or not the property owner eventually suffered harm." *U.S. v. Cruz-Santiago,* 12 F.3d 1, 2–3 (1st Cir. 1993). But cf. *U.S. v. Newman,* 6 F.3d 623, 630 (9th Cir. 1993) (remanded: for defendant who set fire in national forest, loss was only cost of burnt vegetation, not cost of suppressing fire—loss under §2B1.1 "does not include consequential losses"; however, such losses may warrant upward departure under §2B1.3, comment. (n.4)); *U.S. v. Thomas,* 973 F.2d 1152,1159 (5th Cir. 1992) (error to consider incidental costs when market value was easily ascertainable).

The Ninth Circuit held that the cost of committing a theft is not subtracted from the value of goods in calculating loss. *U.S. v. Campbell,* 42 F.3d 1199, 1205 (9th Cir. 1994) (affirmed: defendant's "logging expenses" should not be subtracted from gross value of stolen timber to measure loss as defendant's "net gain") [7#6].

2. Offenses Involving Fraud and Deceit

The Guidelines recognize that "loss" in fraud cases may be difficult to calculate with precision. Thus, "the loss need not be determined with precision" and a court "need only make a reasonable estimate of the loss." See §2F1.1, comment. (n.8). The Third Circuit recognized that different types of frauds require different methods to ascertain the loss. See *U.S. v. Shaffer,* 35 F.3d 110, 114 (3d Cir. 1994) (check kiting and secured loan frauds are both bank fraud but loss must be calculated differently). Cf. *U.S. v. Harper,* 32 F.3d 1387, 1392 (9th Cir. 1994) (requiring "use of a realistic, economic approach to determining what losses [defendant] truly caused or intended to cause, rather than the use of some approach which does not reflect the monetary loss"). The following sections provide case law for fraud loss computation in general and for some specific situations.

a. Actual versus intended or probable loss

Application Note 7 of §2F1.1 indicates that the greater of actual or intended loss should be used. See also *U.S. v. Mills,* 987 F.2d 1311, 1315–16 (8th Cir. 1993) (use entire $1.5 million fraudulently received from victims even though defendant returned $746,816 in response to threatened legal action); *U.S. v. Katora,* 981 F.2d 1398, 1406 (3d Cir. 1992) (use greater intended loss even though actual loss is easily calculated); *U.S. v. Strozier,* 981 F.2d 281, 284

(7th Cir. 1992) (use $405,000 defendant fraudulently deposited into bank account even though he withdrew only $36,000—defendant intended to withdraw entire amount); *U.S. v. Wimbish*, 980 F.2d 312, 315–16 (5th Cir. 1992) (use as intended loss $100,944 face value of fraudulently deposited checks stolen from mail even though defendant withdrew only $14,731); *U.S. v. Haggert*, 980 F.2d 8, 12–13 (1st Cir. 1992) (use face amount of fraudulent sight drafts—defendant did not intend to pay loans); *U.S. v. Lghodaro*, 967 F.2d 1028, 1031 (5th Cir. 1992) (proper to use intended loss even though actual loss is easily calculated) [5#2]; *U.S. v. Lara*, 956 F.2d 994, 998 (10th Cir. 1992) (difference between altered and unaltered bid quotes was proper value of loss even though value of services rendered may have equaled altered bids—defendant intended to pocket the difference); *U.S. v. Smith*, 951 F.2d 1164, 1166 (10th Cir. 1991) ("Where there is no [actual] loss, or where actual loss is less than the loss the defendant intended to inflict, intended or probable loss may be considered"); *U.S. v. Davis*, 922 F.2d 1385, 1392 (9th Cir. 1991) (use value of jewels attempted to be obtained by fraud); *U.S. v. Johnson*, 908 F.2d 396, 398 (8th Cir. 1990) (entire amounts of car loans are "loss" even though banks repossessed cars—defendant did not intend repayment); *U.S. v. Wills*, 881 F.2d 823, 827 (9th Cir. 1989) (use entire $52,000 intended loss through credit card fraud scheme even though $25,000 was recovered).

However, probable or intended loss may be limited by what the actual loss *could* have been. See, e.g., *U.S. v. Dozie*, 27 F.3d 95, 99 (4th Cir. 1994) (affirmed: district court properly "discounted" false insurance claims to estimate realistic probable loss—"insurance claims are frequently inflated. Basing the probable loss on the claim, then, does not reflect economic reality"); *U.S. v. Galbraith*, 20 F.3d 1054, 1059 (10th Cir. 1994) (remanded: "Because this was an undercover sting operation which was structured to sell stock in a pension fund that did not exist, defendant could not have occasioned any loss [and] the intended or probable loss was zero"); *U.S. v. Deutsch*, 987 F.2d 878, 886 (2d Cir. 1993) (error to simply total face value of bogus checks used in credit card fraud—each one partially replaced previous ones, so actual or intended amount of fraud was much less); *U.S. v. Santiago*, 977 F.2d 517, 524–26 (10th Cir. 1992) (remanded: loss in unsuccessful insurance fraud could not exceed $4,800 insurance company would have paid, even though defendant filed fraudulent claim for $11,000: "whatever a defendant's subjective belief, an intended loss under Guidelines §2F1.1 cannot exceed the loss a defendant in fact could have occasioned if his or her fraud had been entirely successful") [5#6]; *U.S. v. Khan*, 969 F.2d 218, 220 (6th Cir. 1992) (court may not increase offense level by estimated loss where completed fraud could not have resulted in actual loss) [5#1]. If the calculated loss "does not fully capture the harmfulness and seriousness of the conduct," even if the loss is zero, the court may depart upward under §2F1.1, comment. (n.10) (originally n.9). See *U.S. v. Sneed*, 34 F.3d 1570, 1583–85 (10th Cir. 1994) (affirmed: departure warranted in government sting operation where "there could be neither actual loss to real victims nor true intended loss"; proper to use $147,000 defendant had negotiated as his share of fraud to set extent of departure).

The Ninth Circuit held that to prove intended loss, the government need only establish that the defendant attempted to inflict the loss. *U.S. v. Joetzki*, 952 F.2d 1090, 1096 (9th Cir. 1991) (check amount is intended loss even though the check was so fraudulent no one took it seriously—Application Note 10 to §2F1.1 allows downward departure in this circumstance). Furthermore, the calculation of intended loss is not limited by the "probable" loss. *U.S. v. Koenig*, 952 F.2d 267, 271 (9th Cir. 1991). Cf. *U.S. v. Moored*, 38 F.3d 1419, 1427 (6th Cir. 1994) (defining "intended loss as the loss the defendant subjectively intended to inflict on the victim, e.g., the amount the defendant intended not to repay. . . . 'loss' under §2F1.1 is not the potential loss, but is the actual loss to the victim, or the intended loss to the victim,

whichever is greater"). Note that the Fourth Circuit limits the use of "probable and intended" loss to attempt crimes only. *U.S. v. Bailey*, 975 F.2d 1028, 1031 (4th Cir. 1992) (remanded: improper to include foregone projected profits in completed fraud scheme) [5#5].

See also cases in next section regarding use of §2X1.1(b) in attempted or uncompleted fraud cases.

b. Check kiting/bank fraud

The Sixth Circuit stated three requirements for use of intended loss in a bad check case: (1) the defendant must have intended the loss; (2) it must have been possible for the defendant to cause the loss; and (3) the defendant must have completed, or been about to complete but for interruption, all of the acts necessary to bring about the loss. For the last factor, courts should use §2X1.1(b)(1), which governs attempts, to determine whether the offense level should be reduced. If the offense was only partially completed, the offense level is the greater of the offense level of the intended offense minus three levels or the offense level for the part of the offense that was completed. *U.S. v. Watkins*, 994 F.2d 1192, 1195–96 & n.4 (6th Cir. 1993) [5#14]. See also *U.S. v. Mancuso*, 42 F.3d 836, 849–50 (4th Cir. 1994) (remanded: in complex bank fraud case where fraud was only partially completed, court should follow instruction in §2F1.1, comment. (n.9), to determine offense level in accordance with provisions of §2X1.1); *U.S. v. Aideyan*, 11 F.3d 74, 76–77 (6th Cir. 1993) (remanded: district court correctly calculated intended loss, but failed to then apply §2X1.1(b)(1) analysis; the offense here was only partially completed, so Note 4 of §2X1.1 should be followed to set offense level).

In another check-kiting case, the Fifth Circuit held that the loss, for purposes of setting the offense level, is the amount of the overdraft, the bank's "out-of-pocket loss." It would not be treated like fraudulently obtained loans, in which loss is reduced by whatever collateral may be recovered by the bank. Whatever amounts have been or may be repaid will not be used to reduce the offense level. *U.S. v. Freydenlund*, 990 F.2d 822, 825–26 (5th Cir. 1993). The Third Circuit agrees, holding that courts "must calculate the victim's actual loss as it exists at the time the offense is detected rather than as it exists at the time of sentencing." *U.S. v. Shaffer*, 35 F.3d 110, 113–14 (3d Cir. 1994) ("the gross amount of the kite at the time of detection, less any other collected funds the defendant has on deposit with the bank at that time and any other offsets that the bank can immediately apply against the overdraft (including immediate repayments), is the loss to the victim bank") [7#3]. Cf. *U.S. v. Carey*, 895 F.2d 318, 322–23 (7th Cir. 1990) (reversed downward departure based on defendant making restitution of all but $20,000 of $220,000 loss in check-kiting scheme—restitution did not alleviate seriousness of offense).

c. Fraudulent loan applications

Application Note 7(b) (amended Nov. 1, 1992) now specifies that in fraudulent loan application and contract procurement cases, actual loss to the victim should be used unless the intended loss is greater. Also, "the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." The First Circuit held that Note 7(b) is binding commentary that must be followed, and that because the amendment

clarified, rather than changed, the definition of loss it may be applied to offenses completed before the amendment. *U.S. v. Bennett,* 37 F.3d 687, 695 (1st Cir. 1994) (remanded: error to reduce loss by amount repaid as part of civil settlement after fraudulent loan scheme was discovered). See also *U.S. v. Mummert,* 34 F.3d 201, 204 (3d Cir. 1994) (affirmed: where defendant arranged fraudulent unsecured loan to finance construction of house by third party, loss is not reduced by third party's offer to repay bank after sale of house or sign house over to bank if no sale—"A defendant in a fraud case should not be able to reduce the amount of loss for sentencing purposes by offering to make restitution after being caught"); *U.S. v. Jindra,* 7 F.3d 113, 113–14 (8th Cir. 1993) (affirmed: loss was amount of the loans outstanding at time of defendant's arrest for which no assets were pledged as security—amounts paid back between arrest and sentencing were properly not used to reduce loss); *U.S. v. Menichino,* 989 F.2d 438, 441–42 (11th Cir. 1993) (affirming $40,000 calculation of loss, which represented difference between value of collateral and value of intended loan); Note 7(b) "clarifies that, in a loan application case involving misrepresentation of assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lender could recover from collateral"). Cf. *U.S. v. Moored,* 38 F.3d 1419, 1427 (6th Cir. 1994) (defining "intended loss as the loss the defendant subjectively intended to inflict on the victim, e.g., the amount the defendant intended not to repay"); *U.S. v. Buckner,* 9 F.3d 452, 454 (6th Cir. 1993) (remanded: under 1991 version of Note 7(b), must reduce loss by amount defendant has repaid before offense discovered—use actual loss, not face value of loan); *U.S. v. Willis,* 997 F.2d 407, 417–18 (8th Cir. 1993) (under 1991 and 1992 versions of Note 7, proper to use intended loss where defendant intended to defraud bank of entire amount of loans, which were almost totally unsecured).

Previously, several circuits had held that where a contract or loan is fraudulently obtained, the face value of the contract or loan is not the loss when the actual loss is different. See *U.S. v. Shaw,* 3 F.3d 311, 313 (9th Cir. 1993) (using 1989 guideline, "'intended' loss is the loss the defendant intended to inflict on the victim," or the amount of the loan less what defendant intended to repay; use actual loss if higher); *U.S. v. Chichy,* 1 F.3d 1501, 1508 (6th Cir. 1993) (loss "in cases of fraudulently induced bank loans should be based on the 'actual' or 'expected' loss rather than on the face value of the total amount of the loan proceeds"); *U.S. v. Wilson,* 980 F.2d 259, 262 (4th Cir. 1992) (where defendant legitimately obtains bank loan but subsequently files false statement, only loss specifically attributed to false statement is included); *U.S. v. Gallegos,* 975 F.2d 709, 712–13 (10th Cir. 1992) (remanded: settlement agreement entered into between defendant and victim bank after offense was discovered "may be viewed as an offset" to reduce amount of loss); *U.S. v. Rothberg,* 954 F.2d 217, 218–19 (4th Cir. 1992) (reduce loss by collateral recovered or reasonably anticipated to be recovered, but not by amount victim may recover from other assets in civil proceeding); *U.S. v. Kopp,* 951 F.2d 521, 531–32 (3d Cir. 1991) (where defendant fraudulently obtained loan and bank later sold loan's security, "loss" is not face value of loan but "actual" loss to bank or loss defendant intended to inflict if that is higher); *U.S. v. Smith,* 951 F.2d 1164, 1167 (10th Cir. 1991) (net value, not gross value, of fraudulently obtained loans is "loss" and net loss must reflect value of property securing the loans); *U.S. v. Schneider,* 930 F.2d 555, 557–58 (7th Cir. 1991) (where defendant intended to perform construction contract obtained by fraud, "the amount bid . . . is not a reasonable estimate of the loss . . . where the contract is terminated before the . . . victim . . . has paid a dime"; rather, "loss" may include contract termination expenses or value of substitute, including higher contract price if market changed); *U.S. v. Whitehead,* 912 F.2d 448, 451–52 (10th Cir. 1990) (value of house not

"loss" where defendant fraudulently obtained lease on home and option to buy—value of option counts as loss).

In contrast, the Second and Fifth Circuits held that the entire face value of the loan is the loss even though the defendant intended to repay the loan and some or all of the loan was returned. See *U.S. v. Brach*, 942 F.2d 141, 143 (2d Cir. 1991) (face value of loan is "loss" even though defendant returned money and only few days' interest was actually lost—entire amount was put at risk); *U.S. v. Cockerham*, 919 F.2d 286, 289 (5th Cir. 1990) (loss is entire value of loans even though loans were repaid). Cf. *U.S. v. Galliano*, 977 F.2d 1350, 1353 (9th Cir. 1992) (where defendant does not intend to repay loans, loss is face value of loans even though lenders recovered collateral); *U.S. v. Johnson*, 908 F.2d 396, 398 (8th Cir. 1990) (same).

The Tenth Circuit held that where the defendant receives the fruits of his fraud without giving anything in return, the value of what the defendant received determines the loss. See *U.S. v. Johnson*, 941 F.2d 1102, 1114 (10th Cir. 1991) (value of houses obtained by fraudulent promise to assume loans represents "loss" even though houses were reacquired through foreclosure—seller only received worthless promise in return); and see explanation of *Johnson* in *Smith*, 951 F.2d at 1168. But see *U.S. v. Harper*, 32 F.3d 1387, 1392 (9th Cir. 1994) (rejecting *Johnson* rationale in case of fraudulent purchase of homes in danger of foreclosure—treating this as a fraudulent loan application case, appellate court held that actual loss to defrauded owners should be used, not value of houses)

d. Calculation and sentencing

Application Note 8 to §2F1.1 states that "the loss need not be determined with precision" and only "a reasonable estimate" is required "given the available information." In a case where actual loss was difficult to estimate, the Third Circuit distinguished *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991), and held that the face value of electrical contracts obtained by fraud constituted the loss. *U.S. v. Badaracco*, 954 F.2d 928, 936–38 (3d Cir. 1992). The court held it was appropriate to analogize to embezzlement, see Application Note 7, and that under Note 8 it was proper to use "the offender's gross gain" as an alternative to the actual loss. (Note 8 was amended Nov. 1, 1991 to replace "the offender's gross gain" with "the offender's gain."). See *U.S. v. Rothberg*, 954 F.2d 217, 219 (4th Cir. 1992) (improper to refuse to increase offense level on ground that actual loss was too speculative because victim might be able to recover damages in civil proceeding). Cf. *U.S. v. Reese*, 33 F.3d 166, 174 (2d Cir. 1994) (in fraudulent loan case, reasonable to estimate loss based on potential losses of loans that were in foreclosure at time of sentencing); *U.S. v. Mount*, 966 F.2d 262, 266–67 (7th Cir. 1992) (where "scalped tickets" broker paid $30,000 for baseball tickets that had $12,000 face value, loss was at least $18,000, the bargain element the baseball club would have offered to its fans); *U.S. v. Gennuso*, 967 F.2d 1460, 1462–63 (10th Cir. 1992) (affirmed use of "out of pocket" method—amount paid by victims minus actual value of items purchased—to calculate loss in consumer fraud case).

Note, however, that loss should not be reduced to reflect causes beyond the defendant's control; rather, departure is warranted if the loss overstates or understates the seriousness of the offense. *Kopp*, 951 F.2d at 531, 536. See also *U.S. v. Miller*, 962 F.2d 739, 744 (7th Cir. 1992) (defendants may be held responsible for losses directly caused by others—here defendants purchased property after fraudulently obtaining loan from HUD and sold to another who defaulted on mortgage and let property deteriorate, causing loss to HUD at foreclosure sale; district court departed downward, government did not appeal). Cf. *U.S. v. Ravoy*, 994

F.2d 1332, 1335 (8th Cir. 1993) (affirmed loss caused by another who defaulted on mortgage of house purchased from defendants because defendants had never intended to pay the mortgage—"loss the defendants intended to inflict . . . was the loss ultimately sustained") [5#15].

On the other hand, it has been held that loss under §2F1.1 should not be *increased* by "consequential and incidental damages" that may have occurred because of—but were not directly caused by—defendant's actions. See, e.g., *U.S. v. Daddona,* 34 F.3d 163, 170–72 (3d Cir. 1994) (remanded: although defendants' fraudulent actions on construction performance and payment bonds caused some loss, they cannot be held responsible for excess costs to complete project incurred by company that was not directly obligated under the bonds to complete project); *U.S. v. Marlatt,* 24 F.3d 1005, 1007–08 (7th Cir. 1994) (remanded: loss should not be increased by cost to title insurance company of purchasing condo units on which defendant sold fraudulent title insurance—company was only required to clear titles and optional act of buying units to avoid possible lawsuits is not part of loss); *U.S. v. Wilson,* 993 F.2d 214, 217 (11th Cir. 1993) (fraud loss calculation "does not allow for inclusion of incidental or consequential injury"). Note, however, that if the calculated loss "does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted." U.S.S.G. §2F1.1, comment. (n.10). See, e.g., *U.S. v. Fadayini,* 28 F.3d 1236, 1242 (D.C. Cir. 1994) (affirming one-level upward departure for volume of fraud and victim's distress over credit difficulties).

The Fourth Circuit held that loss should not be reduced by the amount a victim may recover from other assets of the defendant in civil restitution proceedings, *Rothberg,* 954 F.2d at 218–19, nor should it be reduced by the amount the victim recovered from a third party guarantor, *U.S. v. Wilson,* 980 F.2d 259, 261–62 (4th Cir. 1992) (include loss to guarantor as relevant conduct). Similarly, the amount of loss should not be reduced to account for any tax benefits that fraud victims may accrue. *U.S. v. McAlpine,* 32 F.3d 484, 489 (10th Cir. 1994) (affirmed: "had the Sentencing Commission desired to allow for tax savings to a victim as an element to be considered in reducing loss, it could have provided for such in the Guidelines") [7#3]. Accord *U.S. v. Harris,* 38 F.3d 95, 99 (2d Cir. 1994) ("we reject credit for any tax deductions that could be taken by the victims").

In fraud cases, loss "does not . . . include interest the victim could have earned on such funds had the offense not occurred." U.S.S.G. §2F1.1, comment. (n.7) (Nov. 1992). The Tenth Circuit distinguished Note 7 in affirming the inclusion of interest that could have been earned on fraudulently obtained funds where the defendant had guaranteed investors a 12% rate of return. The court reasoned that defendant "induced their investment by essentially contracting for a specific rate of return," which the court held was "analogous to a promise to pay on a bank loan or promissory note, in which case interest may be included in the loss." *U.S. v. Lowder,* 5 F.3d 467, 471 (10th Cir. 1993) [6#5]. See also *U.S. v. Henderson,* 19 F.3d 917, 928–29 (5th Cir. 1994) (interest on fraudulently obtained loans properly included: "Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction"; Note 7 "sweeps too broadly and, if applied in this case would be inconsistent with the purpose of §2F1.1").

Similarly, the First Circuit held that Note 7 does not prohibit inclusion of late fees and finance charges in credit card fraud loss. Such costs should not be considered "interest," but rather "part of the price of using credit cards" that the credit company "has a right to expect . . . will be paid." *U.S. v. Goodchild,* 25 F.3d 55, 65–66 (1st Cir. 1994) [6#17]. Accord *U.S. v. Jones,* 933 F.2d 353, 354 (6th Cir. 1991) (interest properly included in loss calculation where defendant defrauded credit card issuers). It has also been held that Note 7's exclusion of

interest in the loss calculation does not prohibit inclusion of interest in restitution. See *U.S. v. Hoyle,* 33 F.3d 415, 420 (4th Cir. 1994) (remanding loss calculation because interest was included, but affirming restitution order that included interest).

If a defendant is sentenced for pre-Guidelines and Guidelines conduct, the court may aggregate all losses if it imposes a concurrent sentence for the two time periods, or it must make express findings as to the loss for each period and calculate the Guideline sentence solely with reference to losses not considered in imposing the non-Guideline sentence. *U.S. v. Niven,* 952 F.2d. 289, 294 (9th Cir. 1991). But cf. *U.S. v. Haddock,* 956 F.2d 1534, 1553–54 (10th Cir. 1992) ("enhancement of a [Guideline] sentence . . . based on losses associated with [pre-Guidelines offenses] does not violate the Ex Post Facto Clause"; losses from pre-Guidelines offenses were properly grouped as relevant conduct).

3. Bribery and Extortion

Bribes that were not paid by the defendant but were part of the relevant conduct are included in calculating the value of the bribes. See *U.S. v. Kahlon,* 38 F.3d 467, 470 (9th Cir. 1994) (affirmed: "Bribes paid by others not in the presence of the defendant, but in furtherance of the conspiracy, can be 'reasonably foreseeable'").

The Fourth Circuit affirmed a loss calculation under §2C1.1(b)(2)(A) in which $500,000 promised to defendant if he obtained passage of a bill was added to the $602,109 that represented defendant's 20% interest in a corporation that could only remain viable if the legislation passed, even though the promisor reneged on the $500,000. *U.S. v. Ellis,* 951 F.2d 580, 585–86 (4th Cir. 1991). However, the appellate court rejected the claim that potential gains to corporations that would benefit from the bill should be included.

Application Note 2 specifies that "the value of the bribe" is not deducted from "the value of the benefit received or to be received." See also *U.S. v. Schweitzer,* 5 F.3d 44, 47 (3d Cir. 1993) (under §2C1.1, the "benefit received in return for" bribe is not reduced by amount of bribe).

4. Relevant Conduct

To calculate loss, relevant conduct under §1B1.3(a) must be considered for offenses that would be grouped under §3D1.2(d). See, e.g., *U.S. v. Bennett,* 37 F.3d 687, 694 (1st Cir. 1994) (remanded: "court shall include in the loss calculation the dollar amount of any and all uncharged loans that constitute relevant conduct"); *U.S. v. Colello,* 16 F.3d 193, 197 (7th Cir. 1994) (affirmed: although leader of insurance fraud scheme only gained $266,000, proper under §1B1.3(a) to attribute to him entire loss of $668,000 caused by scheme); *U.S. v. Fine,* 975 F.2d 596, 599–600 (9th Cir. 1992) (en banc) (guidelines and commentary "are unambiguous" on this point) [5#2]; *U.S. v. Lghodaro,* 967 F.2d 1028, 1030 (5th Cir. 1992) (where codefendant's conduct is "part of the joint scheme or plan which [defendant] aided and abetted," amount of loss attributable to codefendant is also attributable to defendant) [5#2]; *U.S. v. Morton,* 967 F.2d 577, 579–80 (8th Cir. 1992) (loss caused by defendant who pled guilty to mail fraud involving altered odometers on three cars may be based on larger number of cars in dismissed count) [4#18]; *U.S. v. Cockerham,* 919 F.2d 286, 289 (5th Cir. 1990) (fraudulent transactions underlying dismissed counts were "relevant conduct" and court therefore properly considered loss caused by those acts).

See also U.S.S.G. §2F1.1, comment. (n.6) ("The cumulative loss caused by a common scheme or course of conduct should be used in determining the offense level, regardless of

the number of counts of conviction."); *U.S. v. Martinson,* 37 F.3d 353, 357 (7th Cir. 1994) (proper to include loss from dropped count that was part of relevant conduct); *U.S. v. Smith,* 29 F.3d 914, 918 (4th Cir. 1994) (proper to include losses from other related fraudulent loans on which defendant not convicted); *U.S. v. Scarano,* 975 F.2d 580, 584 (9th Cir. 1992) (court required to include all losses that arose from common scheme or plan); *U.S. v. LaFraugh,* 893 F.2d 314, 317–18 (11th Cir. 1990) (wire fraud defendant's sentence properly based on losses caused by all conspirators). Cf. *U.S. v. Fox,* 889 F.2d 357, 360–61 (1st Cir. 1989) (proper to include as relevant conduct four prior uncharged acts of embezzlement for defendant convicted on only one count).

Note that to hold defendant accountable for the conduct of others, that conduct must be within the scope of defendant's agreement *and* reasonably foreseeable. See, e.g., *U.S. v. Evbuomwan,* 992 F.2d 70, 74 (5th Cir. 1993) (remanded: court must find that conduct was within scope of defendant's agreement relating to credit card fraud—"mere knowledge that criminal activity is taking place is not enough") [5#15]; *U.S. v. Fuentes,* 991 F.2d 700, 701 (11th Cir. 1993) (remanded: defendant should not have been sentenced on basis of coconspirator acts committed in furtherance of fraud conspiracy that were not reasonably foreseeable).

E. More Than Minimal Planning

Several guideline sections require a two-level increase in the offense level if the offense involved "more than minimal planning." See U.S.S.G. §§2A2.2(b)(1), 2B1.1(b)(5)(A), 2B1.3(b)(3), 2B2.1(b)(1), and 2F1.1(b)(2)(A). As defined in Application Note 1(f) to §1B1.1, more than minimal planning "means more planning than is typical for commission of the offense in simple form," "exists if significant affirmative steps were taken to conceal the offense," and "is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Generally, a finding of more than minimal planning is fact-specific and will only be reversed if clearly erroneous. See, e.g., *U.S. v. Cropper,* 42 F.3d 755, 758–59 (2d Cir. 1994) (enhancement under §2B1.1(b)(5) was clearly erroneous—facts show that theft did not involve more than minimal planning but was more likely "a spontaneous, reckless caper"). However, the Guidelines and case law provide some rules of thumb to guide district courts. For example, the Second Circuit noted that "it is safe to say that fraudulent loans in any substantial amount seldom result from minimal planning." *U.S. v. Brach,* 942 F.2d 141, 145 (2d Cir. 1991). See also *U.S. v. Fox,* 889 F.2d 357, 361 (1st Cir. 1989) ("We cannot conceive of how obtaining even one fraudulent loan would not require more than minimal planning.").

1. More Planning Than Typical

"'More than minimal planning' means more planning than is typical for commission of the offense in a simple form." U.S.S.G. §1B1.1 (comment n.1(f)). The Eighth Circuit relied on this note to affirm the enhancement where defendant did more than simply write a check on a closed account: defendant opened two bank accounts under different aliases, involved a third party, and coordinated the closing of accounts to avoid making good on the check. *U.S. v. Starr,* 986 F.2d 281, 282 (8th Cir. 1993). See also *U.S. v. Harrison,* 42 F.3d 427, 432–33 (7th Cir. 1994) (affirmed in food stamp theft by custodial worker in post office because he "formed an intent to commit the crime in advance" and "took the time prior to the thefts

to discover where [the valuable] items were kept"); *U.S. v. Barndt*, 913 F.2d 201, 204–05 (5th Cir. 1990) (affirmed: defendant "formed an intent to commit the crime in advance" and ensured that telephone cables—from which he stole copper wire—were not in service).

The Seventh Circuit reversed an enhancement in a check kiting case, in part, because writing a second check to cover the first was not only not more planning than is typical for the offense, it *is* the offense. The court also stated that "[t]he 'offense' is the crime of which the defendant has been convicted, not of the particular way in which he committed it. Thus the district court should compare the circumstances of this case with other fraud offenses, and not only with frauds committed by kiting checks." *U.S. v. Bean*, 18 F.3d 1367, 1370 (7th Cir. 1994).

2. Steps to Conceal Offense

Application Note 1(f) also states that "'[m]ore than minimal planning' exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 . . . applies." Several courts have relied on this statement to affirm enhancements. See, e.g., *U.S. v. Kim*, 23 F.3d 513, 517–18 (D.C. Cir. 1994) (affirmed: obtaining falsely notarized documentation to conceal false bank loan applications) [6#17]; *U.S. v. Williams*, 966 F.2d 555, 558–59 (10th Cir. 1992) (defendant used position and signed another's initials to conceal embezzlement); *U.S. v. Deeb*, 944 F.2d 545, 547 (9th Cir. 1991) (transferred miscoded check into two different accounts and rehearsed alibis with coconspirators); *U.S. v. Culver*, 929 F.2d 389, 393 (8th Cir. 1991) (purchasing disguises to conceal crime "is alone sufficient to establish [defendant] used more than minimal planning"). See also *U.S. v. Rust*, 976 F.2d 55, 58, n.1 (1st Cir. 1992) (remanded: fact that defendant altered dates and amounts on travel receipts to conceal his fraudulent expense vouchers is "independent basis to require a finding of more than minimal planning"). But cf. *U.S. v. Maciaga*, 965 F.2d 404, 406–08 (7th Cir. 1992) (remanded: for bank security guard who stole night deposit bags, "[h]iding the money and destroying evidence of the theft does not amount to 'more than minimal planning' since any thief might do the same"; also, there was no evidence of plans to conceal offense before it occurred) [4#24].

If the increase for more than minimal planning has been given, it is improper to impose an obstruction of justice enhancement for the same conduct. *U.S. v. Werlinger*, 894 F.2d 1015, 1017–19 (8th Cir. 1990).

3. Repeated Acts

Note 1(f) to §1B1.1 provides that "'[m]ore than minimal planning' is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune." Similarly, the Eighth Circuit stated that "[a]lmost any crime that consists of a pattern of activity over a long period of time would qualify as an offense involving more than minimal planning." *U.S. v. West*, 942 F.2d 528, 531 (8th Cir. 1991). See also *U.S. v. Wilson*, 955 F.2d 547, 550 (8th Cir. 1992) ("the repetitive nature of the criminal conduct by itself may warrant [the] adjustment; we reject appellants' contention that it may not be imposed unless the defendant engaged in extensive planning, complex criminal activity, or concealment"). Other courts have also relied on repeated acts to increase sentences. See, e.g., *U.S. v. Rust*, 976 F.2d 55, 58 (1st Cir. 1992) (remanded: submitting 23 intricately altered vouchers totaling over $15,000 over four-year period warranted enhancement); *U.S. v. Doherty*, 969 F.2d 425, 430 (7th Cir. 1992) (remanded: drafting 40 overdue

checks in single month warranted enhancement) [5#2]; *U.S. v. Williams,* 966 F.2d 555, 558–59 (10th Cir. 1992) (for embezzlements occurring over six months and involving numerous computer entries) [4#24]; *U.S. v. Gregorio,* 956 F.2d 341, 343 (1st Cir. 1992) (repeatedly preparing and submitting false loan statements); *U.S. v. Callaway,* 943 F.2d 29, 31 (8th Cir. 1991) (fraudulently accepting Social Security benefits over period of time); *U.S. v. Ojo,* 916 F.2d 388, 391–92 (7th Cir. 1990) (obtaining and using multiple forms of false identification); *U.S. v. Sanchez,* 914 F.2d 206, 207 (10th Cir. 1990) (using stolen credit card fifteen times in a month); *U.S. v. Bakhtiari,* 913 F.2d 1053, 1063 (2d Cir. 1990) (providing false information over several weeks); *U.S. v. Scroggins,* 880 F.2d 1204, 1215 (11th Cir. 1989) (nineteen postal thefts).

Some circuits have held that "repeated acts" requires more than two acts. See *U.S. v. Bridges,* – F.3d – (10th Cir. Mar. 17, 1994) (remanded: may not impose enhancement solely for planning two burglaries—"repeated" means "more than two") [6#12]; *U.S. v. Kim,* 23 F.3d 513, 515 (D.C. Cir. 1994) (enhancement could not be applied to defendant's two acts of obtaining blank power of attorney forms—"'repeated acts' in the description of more than minimal planning contemplates at least three acts") [6#17]; *U.S. v. Maciaga,* 965 F.2d 404, 407 (7th Cir. 1992) (indicating same, holding "that two acts—one planned and one unplanned—are not the sort of repeated acts the drafters sought to address").

The D.C. Circuit held that defendant's fifty-three thefts over six years were not adequately considered in the "more than minimal planning" enhancement and affirmed an upward departure based on the "prolonged and repetitive nature" of defendant's crimes. *U.S. v. Burns,* 893 F.2d 1343, 1346 (D.C. Cir. 1990), rev'd on other grounds, 111 S. Ct. 2182 (1991).

4. Procedural Issues

Relevant conduct: Two circuits have held that a defendant need not have personally engaged in the more than minimal planning to receive the enhancement—the planning may be attributable to defendant as relevant conduct if done by others in a jointly undertaken criminal activity. See *U.S. v. Ivery,* 999 F.2d 1043, 1045–46 (6th Cir. 1993) (reversed: error to refuse to apply §2F1.1(b)(2) to defendant where offense clearly involved more than minimal planning by codefendants—"'more than minimal planning' is determined on the basis of the overall *offense,* not on the role of an individual *offender*"); *U.S. v. Wilson,* 955 F.2d 547, 551 (8th Cir. 1992) (affirmed: conspiracy clearly involved more than minimal planning and "each conspirator is responsible for all acts in furtherance of the conspiracy" that qualify as relevant conduct).

With Chapter Three enhancements: "More than minimal planning" and Chapter Three enhancements can apply to the same conduct if each enhancement addresses a different concern. For cases involving "more than minimal planning" with (1) "abuse of trust" see *U.S. v. Reetz,* 18 F.3d 595, 600 (8th Cir. 1994) (not double counting because concerns behind enhancements differ); *U.S. v. Christiansen,* 958 F.2d 285, 288 (9th Cir. 1992) (more than minimal planning stemmed from repeated acts while abuse of trust stemmed from concealment of crime facilitated by defendant's bank job) [4#19]; *U.S. v. Marsh,* 955 F.2d 170, 171 (2d Cir. 1992) (proper to apply both enhancements); *U.S. v. Georgiadis,* 933 F.2d 1219, 1225–27 (3d Cir. 1991); (2) "special skill" see *U.S. v. Sloman,* 909 F.2d 176, 181 (6th Cir. 1990); and (3) aggravating role enhancements see *U.S. v. Godfrey,* 25 F.3d 263, 264 (5th Cir. 1994) (§3B1.1(a)); *U.S. v. Smith,* 13 F.3d 1421, 1429 (10th Cir. 1994) (§3B1.1(a)); *U.S. v. Wong,* 3 F.3d 667, 671–72 (3d Cir. 1993) (§3B1.1(c)) [6#3]; *U.S. v. Willis,* 997 F.2d 407, 418–19 (8th Cir. 1993) (§3B1.1(a)); *U.S. v. Kelly,* 993 F.2d 702, 705 (9th Cir. 1993)

(§3B1.1(a)); *U.S. v. Balogun,* 989 F.2d 20, 23–24 (1st Cir. 1993) (§3B1.1(c)); *U.S. v. Curtis,* 934 F.2d 553, 556 (4th Cir. 1991) (§3B1.1(c)); *U.S. v. Boula,* 932 F.2d 651, 654–55 (7th Cir. 1991) (§3B1.1(a)).

The Sixth Circuit disagrees with the last, holding that leadership role and more than minimal planning enhancements cannot both be given because a leadership role necessarily involves more than minimal planning. See *U.S. v. Chichy,* 1 F.3d 1501, 1506 (6th Cir. 1993) (§3B1.1(c)) [6#3]; *U.S. v. Romano,* 970 F.2d 164, 166–67 (6th Cir. 1992) ("§3B1.1(a) already takes into account the conduct penalized in §2F1.1(b)(2)") [5#2]. But cf. *U.S. v. Aideyan,* 11 F.3d 74, 76 (6th Cir. 1993) (*Romano* prohibition does not apply to enhancement under §2F1.1(b)(2)(B) for "a scheme to defraud more than one victim"). However, the Guidelines were recently amended to clarify that, unless otherwise specified, "the adjustments from different guideline sections are applied cumulatively . . . . For example, the adjustments from §2F1.1(b)(2) . . . and §3B1.1 . . . are applied cumulatively." §1B1.1, comment. (n.4) (Nov. 1993).

III. Adjustments

A. Victim-Related Adjustments

1. Vulnerable Victim (§3A1.1)

a. Application and definition

Section 3A1.1 states the adjustment should be given if the defendant "knew or should have known that a victim of the offense was unusually vulnerable . . . ." Application Note 1 states the adjustment applies "where an unusually vulnerable victim is made a target" of the offense. Some courts have held that defendants must intentionally select their victims because of their vulnerability. See, e.g., *U.S. v. Smith,* 39 F.3d 119, 124 (6th Cir. 1994) (remanded: "evidence must show that the defendant knew his victim was unusually vulnerable and that he perpetrated a crime on him because he was vulnerable"); *U.S. v. Sutherland,* 955 F.2d 25, 28 (7th Cir. 1992) (reversed: no evidence that defendant specifically targeted elderly) [4#18]; *U.S. v. Callaway,* 943 F.2d 29, 31 (8th Cir. 1991) (reversed: although defendant misappropriated disabled infant's Social Security benefits, she did not target infant because of youth and disability); *U.S. v. Cree,* 915 F.2d 352, 353–54 (8th Cir. 1990) (reversed: no evidence that defendant knew extent of victim's vulnerability or intended to exploit it) [3#14]; *U.S. v. Wilson,* 913 F.2d 136, 138 (4th Cir. 1990) (randomly selected targets for phone fraud not vulnerable) [3#14]. See also *U.S. v. Yount,* 960 F.2d 955, 957 (11th Cir. 1992) (Nov. 1, 1990 amendments "appear[ ] to require that the victim of the offense must have been unusually vulnerable and specifically targeted in the offense").

In any event, a court should make an "analysis of the victim's personal or individual vulnerability" to the defendant's criminal conduct. *U.S. v. Smith,* 930 F.2d 1450, 1455–56 (10th Cir. 1991) (elderly woman not per se vulnerable) [4#2]. See also *Sutherland,* 955 F.2d at 26–27 (World War I and II veterans and families were not "unusually vulnerable" as a group) [4#18]; *U.S. v. Paige,* 923 F.2d 112, 113–14 (8th Cir. 1991) (reversed: defendant targeted stores with young clerks for passing falsified money orders, but no evidence that clerks actually were unusually vulnerable).

Section 3A1.1 also applies when defendant "should have known" the victim was unusually vulnerable. See *U.S. v. Caterino,* 957 F.2d 681, 683–84 (9th Cir. 1992) (affirmed: defendants knew or should have known of vulnerability of elderly victims to phone fraud scheme) [4#19]; *U.S. v. Boise,* 916 F.2d 497, 506 (9th Cir. 1990) (affirmed: although defendant did not select victim because of vulnerability, "a six-week old infant is 'unusually vulnerable due to age'") [3#14]. See also *U.S. v. White,* 974 F.2d 1135, 1140 (9th Cir. 1992) (adjustment not limited to intentional crimes—properly applied to defendant convicted of involuntary manslaughter of two-year-old).

It has been held that if the victim's vulnerability is not "unusual" but is a "condition that occurs as a necessary prerequisite to the commission of a crime," enhancement under §3A1.1 is not proper. *U.S. v. Moree,* 897 F.2d 1329, 1335–36 (5th Cir. 1990) (victim's prior indictment did not make him "unusually vulnerable" to attempt to "fix" his sentence in exchange for money—it made the crime possible) [3#5]. See also *Wilson,* 913 F.2d at 138 (reversed: random targets of fraudulent solicitation to aid tornado victims not vulnerable—their sympathy for victims merely made crime more possible) [3#14]; *U.S. v. Creech,* 913 F.2d 780, 782 (10th Cir. 1990) (threats to harm family directed at recently married husband did not warrant enhancement under §3A1.1—recentness of marriage may have made the crime easier but did not make the victim "unusually vulnerable") [3#11].

Application Note 1 of §3A1.1 was amended Nov. 1, 1992, to state that "a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank." Partly as a result of this change, the Eleventh Circuit overruled *U.S. v. Jones,* 899 F.2d 1097 (11th Cir. 1990) [3#8], and held that "bank tellers, *as a class,* are not vulnerable victims within the meaning of section 3A1.1." Enhancement may be proper, however, "when a particular teller-victim possesses unique characteristics which make him or her more vulnerable or susceptible to robbery than ordinary bank robbery victims." *U.S. v. Morrill,* 984 F.2d 1136, 1137–38 (11th Cir. 1993) (en banc) (emphasis in original) [5#9].

One court held that a specific victim need not have been actually selected to apply the enhancement—it was proper where defendant had taken sufficient steps to be convicted of conspiracy to kidnap, sexually abuse, torture, and kill a young boy for a "snuff-sex" film. *U.S. v. DePew,* 932 F.2d 324, 330 (4th Cir. 1991).

The Ninth Circuit held it was error to apply two "vulnerable victim" enhancements under §3A1.1 for victims in two separate fraud counts arising under the same fraud scheme. *U.S. v. Caterino,* 957 at 684 (offense characteristics apply to overall scheme, not individual victims or counts). See also U.S.S.G. §3D1.3, comment. (n.3): "[d]etermine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole." Cf. *U.S. v. Haines,* 32 F.3d 290, 293–94 (7th Cir. 1994) (may apply both §3A1.1 and §3B1.3 for abuse of trust as long as each has separate factual basis).

b. Relevant conduct

Several circuits have held that vulnerable victims do not need to have been direct victims of the offense of conviction—they may be victims of related criminal conduct, otherwise suffer harm from the offense, or be exploited by defendant during the commission of the offense. See, e.g., *U.S. v. Haggard,* 41 F.3d 1320, 1325–26 (9th Cir. 1994) (affirmed for persons affected by defendant's false statements to FBI and grand jury: "courts may look beyond the four corners of the charge to the defendant's underlying conduct") [7#5]; *U.S. v. Echevarria,* 33 F.3d 175, 180–81 (2d Cir. 1994) (affirmed: patients were vulnerable victims of defendant

who posed as doctor to fraudulently obtain medical payments from government and insurers—defendant "directly targetted those seeking medical attention" and "exploit[ed] their impaired condition"); *U.S. v. Stewart,* 33 F.3d 764, 771 (7th Cir. 1994) (remanded: defendant used vulnerable elderly clients in scheme that defrauded funeral homes) [7#2]; *U.S. v. Yount,* 960 F.2d 955, 958 (11th Cir. 1992) (although bank was victim of money laundering offense, enhancement proper where defendant misappropriated funds of elderly accountholders); *U.S. v. Bachynsky,* 949 F.2d 722, 735 (5th Cir. 1991) (affirmed: patients of doctor who submitted false diagnoses to defraud insurance companies and government were vulnerable victims—apart from possible actual harm patients may have suffered from ineffective treatment, they were deceived and were unwitting instrumentalities of the fraud); *U.S. v. Smith,* 930 F.2d 1450, 1455–56 (10th Cir. 1991) (proper for bank robbery defendant who stole car from elderly woman beforehand to use in robbery); *U.S. v. Roberson,* 872 F.2d 597, 603 (5th Cir. 1989) (need not be victim of offense of conviction). Cf. *U.S. v. Lee,* 973 F.2d 832, 833–34 (10th Cir. 1992) (although account holders would not have suffered loss because bank would have reimbursed embezzled funds, they were victims; however, enhancement reversed because victims were not shown to be vulnerable).

The Sixth Circuit, however, held that §3A1.1 must be read more restrictively and "may be applied only when a victim is harmed by a defendant's conduct that serves as the basis of the offense of conviction. . . . [A] court cannot apply the adjustment based upon 'relevant conduct' that is not an element of the offense of conviction. Section 1B1.3 has no application in a section 3A1.1 adjustment." *U.S. v. Wright,* 12 F.3d 70, 72–74 (6th Cir. 1993) (remanded: individuals duped by defendant into aiding tax fraud against IRS may have been vulnerable and victimized by defendant, but they were not vulnerable victims of offense of conviction) [6#9]. Cf. *U.S. v. Cherry,* 10 F.3d 1003, 1011 (3d Cir. 1993) ("victim" of unlawful flight offense was government, which does not warrant §3A1.2 increase—may not use official victims of underlying offense for departure by analogy to §3A1.2). See also cases in section III.A.2.

The enhancement is appropriate where a defendant, "during the course of committing the offense for which he is convicted—targets the victim for related, additional 'criminal conduct' because he knows that the victim's characteristics make the victim unusually vulnerable." *U.S. v. Pearce,* 967 F.2d 434, 435 (10th Cir. 1992) (defendant, who pled guilty to kidnapping, sexually assaulted kidnap victim because of her physical traits).

c. Age, physical or mental condition

Some examples of when an enhancement under §3A1 is appropriate include *U.S. v. Stewart,* 33 F.3d 764, 771 (7th Cir. 1994) (targeting elderly in prepaid funeral expenses fraud) [7#2]; *U.S. v. Haines,* 32 F.3d 290, 293 (7th Cir. 1994) ("helpless elderly woman" dependent on fraud defendant for care); *U.S. v. Salemi,* 26 F.3d 1084, 1088 (11th Cir. 1994) (remanded: kidnapped six-month-old baby was vulnerable victim irrespective of defendant's mental and emotional condition); *U.S. v. Coates,* 996 F.2d 939, 941–42 (8th Cir. 1993) (kidnapping defendant selected victims partly for young age and small size); *U.S. v. Boise,* 916 F.2d 497, 506 (9th Cir. 1990) (six-week-old infant "unusually vulnerable" due to age) [3#14]; *U.S. v. Rocha,* 916 F.2d 219, 244–45 (5th Cir. 1990) (seventeen-year-old kidnap victim) [3#16]; *U.S. v. Boult,* 905 F.2d 1137, 1139 (8th Cir. 1990) (victim deliberately chosen because of age and size disadvantage compared with defendant); *U.S. v. White,* 903 F.2d 457, 463 (7th Cir. 1990) (elderly man with health problems taken hostage during an escape attempt) [3#9]. Cf. *U.S. v. White,* 979 F.2d 539, 544 (7th Cir. 1992) (affirmed: although transportation of a

minor for prostitution incorporates age into offense, victim was also "emotionally disturbed" and "particularly susceptible" to the crime); *U.S. v. Altman,* 901 F.2d 1161, 1165 (2d Cir. 1990) (affirmed: although sexual exploitation of minors incorporates age in offense, defendant also drugged victims, making them physically and mentally more vulnerable).

d. Susceptibility to the offense

Three courts have held that black families were "particularly susceptible" under §3A1.1 to a conspiracy to interfere with civil rights by burning a cross on their lawn. *U.S. v. Long,* 935 F.2d 1207, 1211–12 (11th Cir. 1991); *U.S. v. Skillman,* 922 F.2d 1370, 1377–78 (9th Cir. 1990); *U.S. v. Salyer,* 893 F.2d 113, 115–17 (6th Cir. 1989) [2#19]. See also *U.S. v. McDermott,* 29 F.3d 404, 411 (8th Cir. 1994) (affirmed enhancement for defendants convicted of civil rights violations for using violence to keep black persons out of city park). But cf. *U.S. v. Greer,* 939 F.2d 1076, 1100 (5th Cir. 1991) (affirmed enhancement against defendants, members of white "skinhead" group, who targeted minorities, but cautioned against overuse of this section when victims are minorities but not necessarily targeted because of that status).

The Second Circuit affirmed that a prisoner could be a vulnerable victim of a criminal act done under color of law by a prison guard—civil rights law did not already account for prisoner status. *U.S. v. Hershkowitz,* 968 F.2d 1503, 1505–06 (2d Cir. 1992).

Other examples of when a victim is "particularly susceptible" to the crime include *U.S. v. Harris,* 38 F.3d 95, 99 (2d Cir. 1994) ("By virtue of their ages and difficulties in providing for themselves," fraud defendant's victims were "particularly susceptible to alluring promises of financial security"); *U.S. v. Bengali,* 11 F.3d 1207, 1212 (4th Cir. 1993) (recent immigrants unfamiliar with U.S. business customs and law were particularly susceptible to extortion); *U.S. v. Lallemand,* 989 F.2d 936, 939–40 (7th Cir. 1993) (married homosexuals specifically targeted by extortionist may be considered "a particularly susceptible subgroup of blackmail victims") [5#11]; *U.S. v. Newman,* 965 F.2d 206, 211–12 (7th Cir. 1992) (defendant should have known that twenty-year-old woman who had been raped at age fifteen was susceptible to intimidation, deceit, and abuse); *U.S. v. Peters,* 962 F.2d 1410, 1418 (9th Cir. 1992) (foreseeable that targeted victims with bad credit ratings would be particularly susceptible to credit card mail fraud); *U.S. v. Astorri,* 923 F.2d 1052, 1055 (3d Cir. 1991) (victims of fraudulent scheme vulnerable because defendant used relationship with their daughter to induce them to invest) [3#20]. See also *U.S. v. Shyllon,* 10 F.3d 1, 6 (D.C. Cir. 1993) (without specifying defendants were particularly susceptible, affirmed enhancement for tax auditor who threatened audits and fines in extorting money from foreign-born businessmen who may have had limited knowledge of tax laws and English language).

2. Official Victim (§3A1.2)

Law enforcement officers who were shot at while attempting to serve an arrest warrant were "official victims" under §3A1.2. *U.S. v. Braxton,* 903 F.2d 292, 299 (4th Cir. 1990), rev'd on other grounds, 111 S. Ct. 1854 (1991). Similarly, a postmistress, robbed and tied up at a post office, was an "official victim." *U.S. v. Bailey,* 961 F.2d 180, 182–83 (11th Cir. 1992). See also *U.S. v. Muhammad,* 948 F.2d 1449, 1457–58 (6th Cir. 1991) (§3A1.2 enhancement for bank robbery defendant who assaulted police officer in attempt to free coconspirator from custody during flight); *U.S. v. Telemaque,* 934 F.2d 169, 171 (8th Cir. 1991) (bankruptcy judge, congressman, and IRS Commissioner and employees who were targeted in tax fraud scheme were "official victims").

However, a government official was not an "official victim" where he received a threat directed at others but was not the target of the threat, *U.S. v. Schroeder,* 902 F.2d 1469, 1471 (10th Cir. 1990) [3#9]. Cf. *U.S. v. McCaleb,* 908 F.2d 176, 178–79 (7th Cir. 1990) (affirmed: President was "official victim" of threat to kill him mailed to Secret Service; victim need not be aware of threat). For defendant convicted of unlawful flight to avoid prosecution, the victims of the underlying offense could not be used to depart upward by analogy to §3A1.2(a). *U.S. v. Cherry,* 10 F.3d 1003, 1011 (3d Cir. 1993) ("victim" of instant offense was government, which does not warrant §3A1.2 increase).

The Ninth Circuit held that there does not have to be a victim of the offense of conviction to apply §3A1.2(b) for assault during the offense or flight. Although Application Note 1 limits application of the enhancement to "when specific individuals are victims of the offense," it conflicts with the plain language of subsection (b) and Note 5, which were added later. Thus, §3A1.2(b) takes precedence and was properly applied to a defendant who assaulted an officer during the course of unlawful possession of a weapon by a felon, which is a victimless crime. *U.S. v. Powell,* 6 F.3d 611, 613–14 (9th Cir. 1993). Accord *U.S. v. Ortiz-Granados,* 12 F.3d 39, 42–43 (5th Cir. 1994) [6#10]. See also *U.S. v. Fleming,* 8 F.3d 1264, 1267 (8th Cir. 1993) (§3A1.2(b) increase "is appropriate in a prosecution for being a felon in possession of a firearm when an assault on a police officer is involved"); *U.S. v. Gonzales,* 996 F.2d 88, 92–93 (5th Cir. 1993) (for defendant convicted of unlawful possession, affirmed enhancement for murder of police officer by other offender in related conduct).

Note that whether the statute of conviction accounts for the victim's official status is not determinative—it is whether the guideline that sets the offense level does. If it does not, then using §3A1.2 is not double counting. See, e.g., *U.S. v. Green,* 25 F.3d 206, 211 (3d Cir. 1994) (affirmed: although 18 U.S.C. §115(a) covered victim's status as federal law enforcement officer, guideline §2A6.1 does not); *U.S. v. Pacione,* 950 F.2d 1348, 1356 (7th Cir. 1992) (same); *U.S. v. Park,* 988 F.2d 107, 110 (11th Cir. 1993) (assault on federal officer, 18 U.S.C. §111, covers victim's official status, but §2A2.2 does not); *U.S. v. Kleinebreil,* 966 F.2d 945, 955 (5th Cir. 1992) (same); *U.S. v. Padilla,* 961 F.2d 322, 327 (2d Cir. 1992) (same); *U.S. v. Sanchez,* 914 F.2d 1355, 1362–63 (9th Cir. 1990) (same).

An undercover policeman who was forced to "snort" cocaine at gunpoint during undercover drug deal was not "assaulted" within the meaning of §3A1.2(b)—that defendants believed the officer *might* be a policeman is not sufficient, and there was testimony that the "snort test" has become standard operating procedure in drug deals. *U.S. v. Castillo,* 924 F.2d 1227, 1235–36 (2d Cir. 1991).

3. Restraint of Victim (§3A1.3)

Two circuits have held that the definition of "physically restrained" in Application Note 1(i) of §1B1.1 is not all-inclusive and that the enhancement may be warranted for other forms of restraint. See *Arcoren v. U.S.,* 929 F.2d 1235, 1248 (8th Cir. 1991) (defendant repeatedly pushed and grabbed victims of sexual abuse to prevent them from leaving room); *U.S. v. Roberts,* 898 F.2d 1465, 1470 (10th Cir. 1990) (warranted for a robber who put arm around victim and held a knife to her face while demanding money). See also *U.S. v. Tholl,* 895 F.2d 1178, 1184–85 (7th Cir. 1990) (physical restraint is not element of impersonating a DEA agent, §3A1.3 properly applied to defendant who "arrested" and robbed drug dealers); *U.S. v. Stokley,* 881 F.2d 114, 116 (4th Cir. 1989) (affirmed: defendant pushed victim back into room with bomb when she tried to escape). But cf. *U.S. v. Mikalajunas,* 936 F.2d 153, 155–

56 (4th Cir. 1991) (reversed: holding murder victim in order to stab him was "part and parcel" of the offense, did not warrant enhancement).

The D.C. Circuit held that the enhancement may be given for conduct related to the offense. *U.S. v. Harris,* 959 F.2d 246, 265 (D.C. Cir. 1992) (affirmed: where other members of drug conspiracy assaulted and restrained seller who owed them money, enhancement proper because restraint was in furtherance of conspiracy and reasonably foreseeable to defendant).

B. Role in the Offense (§3B1)

Generally, the same principles apply to aggravating and mitigating role adjustments. Note that under each guideline the findings are fact-intensive and reviewed under the clearly erroneous standard. Note also that one circuit has held that "[n]othing in the Guidelines or . . . the Sentencing Reform Act" would preclude giving a defendant adjustments for both aggravating and mitigating roles. *U.S. v. Tsai,* 954 F.2d 155, 167 (3d Cir. 1992) (remanded: court should consider whether defendant, who received enhancement under §3B1.1(c) for aggravating role, should also receive mitigating role adjustment under §3B1.2(b)). But see §3B1, intro. comment. ("When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply.").

1. Base on Relevant Conduct

Effective Nov. 1, 1990, the Introductory Commentary to §3B1 was amended to clarify that the role in offense adjustment should be based on all relevant conduct. See, e.g., *U.S. v. Holland,* 22 F.3d 1040, 1045–46 (11th Cir. 1994) (remanded: although defendant committed perjury offense alone, court should look to events surrounding the perjury where defendant used others to help hide assets that were subject of perjury); *U.S. v. Rosnow,* 9 F.3d 728, 730–31 (8th Cir. 1993) (affirmed: §3B1.1(b) enhancement properly based on relevant conduct); *U.S. v. Westerman,* 973 F.2d 1422, 1427 (8th Cir. 1992) (reversed: mitigating role adjustment should be based on relevant conduct, not just offense of conviction); *U.S. v. Ruiz-Batista,* 956 F.2d 351, 353 (1st Cir. 1992) (proper to consider relevant conduct for §3B1.1(c)); *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991) (affirmed: minor participant adjustment may be based on relevant conduct); *U.S. v. Lillard,* 929 F.2d 500, 503 (9th Cir. 1991) (affirmed §3B1.1(c) enhancement for role in related conduct). But cf. *U.S. v. Saucedo,* 950 F.2d 1508, 1512–17 (10th Cir. 1991) (Nov. 1990 amendment to §3B1.1 commentary to "clarify" that adjustment should be based on all relevant conduct would not be applied retroactively because it conflicted with circuit precedent and would disadvantage defendant). The Third Circuit has stated that "'criminal activity' in §3B1.1(a) is not synonymous with 'relevant conduct' under §1B1.3(a)." It includes "the offense charged, as well as 'the underlying activities and participants that directly brought about the more limited sphere of the elements of the specific charged offense.'" *U.S. v. Colletti,* 984 F.2d 1339, 1346 (3d Cir. 1992) (citation omitted) [5#5].

The D.C. Circuit held that relevant conduct should be used for a mitigating role adjustment only if it was also used to set the offense level. *U.S. v. Olibrices,* 979 F.2d 1557, 1559–60 (D.C. Cir. 1992) (affirmed: defendant could not receive reduction for mitigating role in overall conspiracy when offense level was not based on that conspiracy) [5#6]. Accord *U.S. v. Neal,* 36 F.3d 1190, 1211 (1st Cir. 1994) (affirmed: defendant did not have minor role in offenses of conviction on which sentence was based); *U.S. v. Gomez,* 31 F.3d 28, 31 (2d Cir.

1994) (affirmed: reduction properly denied for alleged minor role in related conduct not used in sentencing) *U.S. v. Marino*, 29 F.3d 76, 78 (2d Cir. 1994) (affirmed: same); *U.S. v. Lucht*, 18 F.3d 541, 555–56 (8th Cir. 1994) (court properly denied reduction for minor role in larger conspiracy where defendants pled guilty to less serious offense). See also §3B1.2, comment. (n.4) ("If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense.").

However, note that the Ninth Circuit has emphasized that, under the Commentary, the offense of conviction must be "significantly less serious" than defendant's actual criminal conduct to preclude a mitigating role adjustment. Thus, it was error to interpret the Commentary "as establishing a *per se* rule barring a defendant who pleads guilty to a lesser offense from receiving a downward adjustment where his base offense level does not account for the greater charged offense," and it was also error to assume that the dismissed charge necessarily reflected defendant's actual criminal conduct. Rather, the district court must make a "factual determination as to the relative seriousness of the offense to which [defendant] pleaded guilty compared to his actual criminal conduct," and if the offense of conviction is not significantly less serious than his actual criminal conduct, defendant "is entitled to argue for a downward adjustment based on his role in all relevant conduct, charged or uncharged." *U.S. v. Demers*, 13 F.3d 1381, 1384–86 (9th Cir. 1994).

Previously several circuits held that the adjustment should be based only on conduct in the offense of conviction. See *U.S. v. Murillo*, 933 F.2d 195, 199 (3d Cir. 1991); *U.S. v. De La Rosa*, 922 F.2d 675, 680 (11th Cir. 1991); *U.S. v. Rodriguez-Nuez*, 919 F.2d 461, 465 (7th Cir. 1990) [3#17]; *U.S. v. Zweber*, 913 F.2d 705, 708 (9th Cir. 1990) (§3B1.2) [3#12]; *U.S. v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990) [3#11]; *U.S. v. Streeter*, 907 F.2d 781, 792 n.4 (8th Cir. 1990); *U.S. v. Pettit*, 903 F.2d 1336, 1341 (10th Cir. 1990) (aggravating role) [3#8]; *U.S. v. Tetzlaff*, 896 F.2d 1071, 1074–75 (7th Cir. 1990) [3#4]; *U.S. v. Williams*, 891 F.2d 921, 925–26 (D.C. Cir. 1989) [2#19]. Other courts had already held that relevant conduct may be used. See *U.S. v. Riles*, 928 F.2d 339, 343 (10th Cir. 1991) (mitigating role); *U.S. v. Martinez-Duran*, 927 F.2d 453, 458 (9th Cir. 1991); *U.S. v. Fells*, 920 F.2d 1179, 1184–85 (4th Cir. 1990) [3#17]; *U.S. v. Mir*, 919 F.2d 940, 944–45 (5th Cir. 1990) [3#17].

This adjustment cannot be given for a managerial role that is already accounted for in the offense of conviction, but may be applied to a defendant's managerial role in related criminal activity. *Martinez-Duran*, 927 F.2d at 458.

2. Requirement for Other Participants

a. Number of participants

When counting the "five or more participants" required under §3B1.1(a), the defendant may be counted as one of the five. *U.S. v. Colletti*, 984 F.2d 1339, 1346 (3d Cir. 1992) [5#5]; *U.S. v. Rodriguez*, 981 F.2d 1199, 1200 (11th Cir. 1993); *U.S. v. Schweihs*, 971 F.2d 1302, 1318 (7th Cir. 1992); *U.S. v. Fells*, 920 F.2d 1179, 1182 (4th Cir. 1990); *U.S. v. Reid*, 911 F.2d 1456, 1464 (10th Cir. 1990); *U.S. v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990) [3#11]; *U.S. v. Preakos*, 907 F.2d 7, 10 (1st Cir. 1990) [3#9].

The Second Circuit held that the enhancement for manager or supervisor under §3B1.1(b) requires a specific finding of the identities of the "five or more participants" or that the

criminal activity was "otherwise extensive." *U.S. v. Lanese,* 890 F.2d 1284, 1293–94 (2d Cir. 1989) [2#18]. The Fifth Circuit came to the same conclusion for a finding of "organizer or leader" under §3B1.1(a) while also cautioning that the "five or more participants" must have been involved in the offense of conviction, not just related criminal activity. *Barbontin,* 907 F.2d at 1498. Accord *Schweihs,* 971 at 1318 (remanded: "district court must identify five participants in this offense" for §3B1.1(a)). In the same vein, a defendant must be a manager of the criminal activity itself—the enhancement was improper for a defendant who only managed a business that was used in the offense. *U.S. v. Mares-Molina,* 913 F.2d 770, 773–74 (9th Cir. 1990) [3#14].

The Fifth Circuit held that two corporations could not be counted as "participants" when defendant was "the sole shareholder, sole officer, and sole director of each . . . . We cannot bootstrap the existence of a second participant by counting the first participant's alter ego corporation when he is the sole 'agent' whose acts can make the corporation vicariously liable." *U.S. v. Gross,* 26 F.3d 552, 556 (5th Cir. 1994). Cf. *U.S. v. Katora,* 981 F.2d 1398, 1404 (3d Cir. 1992) ("If 'management' does not apply to real property, . . . then it cannot apply to intangible corporate entities").

b. Must be "criminally responsible"

Only "criminally responsible" individuals may be counted as "participants" under §3B1.1. *U.S. v. Jarrett,* 956 F.2d 864, 868 (8th Cir. 1992); *U.S. v. Anderson,* 942 F.2d 606, 614–17 (9th Cir. 1991) (en banc) [4#7]; *U.S. v. Fells,* 920 F.2d 1179, 1182 (4th Cir. 1990); *U.S. v. Markovic,* 911 F.2d 613, 616–17 (11th Cir. 1990); *U.S. v. DeCicco,* 899 F.2d 1531, 1535–36 (7th Cir. 1990) [3#7]; *U.S. v. Carroll,* 893 F.2d 1502, 1507–09 (6th Cir. 1990) [2#20]. Cf. *U.S. v. Katora,* 981 F.2d 1398, 1403–05 (3d Cir. 1992) (remanded: enhancement improper for equally culpable codefendants who did not organize any other culpable participants).

Some circuits have concluded that the participants must be "criminally responsible" for the offense committed by defendant. See *U.S. v. Melendez,* 41 F.3d 797, 800 (2d Cir. 1994) (remanded: three persons who received proceeds of defendant's mail theft were not "participants" under §3B1.1(a)—"None of these three individuals is alleged to have been involved with the [actual theft]; rather, they were convicted of receiving stolen property. There is no evidence that the three individuals had advance knowledge of the theft, much less participated in its planning or execution. Nor does the record indicate that they expected to receive the proceeds of the theft"); *U.S. v. Colletti,* 984 F.2d 1339, 1346 (3d Cir. 1992) (remanded: fifth person assisted robbery defendant by briefly storing stolen goods and was charged for that crime, but was not "criminally responsible" for robbery—he was not and could not properly have been charged with robbery, did not facilitate it, and did not know of it in advance or profit from it); *Jarrett,* 956 F.2d at 868 (reversed: prostitutes that defendant transported were not "responsible" for transportation offense). Application Note 1 to §3B1.1 was amended Nov. 1991 to specify that one who is not criminally responsible, such as an undercover agent, is not a "participant."

However, the other participants need not have been *convicted* of the same offense as defendant or convicted at all. See U.S.S.G. §3B1.1, comment. (n.1) ("A 'participant' . . . need not have been convicted"); *U.S. v. Allemand,* 34 F.3d 923, 931 (10th Cir. 1994) (affirmed: "other defendants were participants even though they were convicted of lesser offenses"); *U.S. v. Freeman,* 30 F.3d 1040, 1042 (8th Cir. 1994) (affirmed: although other persons were neither indicted nor tried, they were criminally responsible for offense); *U.S. v. Belletiere,* 971 F.2d 961, 969 (3d Cir. 1992) ("participants need not each be criminally culpable of the

charged offense, but must be criminally culpable of 'the underlying activities'"); *U.S. v. Manthei*, 913 F.2d 1130, 1136 (5th Cir. 1990) ("Guidelines do not require that a 'participant' be charged in the offense of conviction").

c. Control of persons or property

"The key determinants of section 3B1.1 are control and organization." *U.S. v. Rowley*, 975 F.2d 1357, 1364 (8th Cir. 1992). Some circuits have held that §3B1.1(a) and (b) do not require that the defendant personally or directly control all of the five or more participants. See *U.S. v. Johnson*, 4 F.3d 904, 917–18 (10th Cir. 1993) (§3B1.1(b)); *U.S. v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993) (§3B1.1(a)); *U.S. v. Adipietro*, 983 F.2d 1468, 1473 (8th Cir. 1993) (§3B1.1(b)); *U.S. v. McGuire*, 957 F.2d 310, 315–17 (7th Cir. 1992) (§3B1.1(b)); *U.S. v. Smith*, 924 F.2d 889, 893–95 (9th Cir. 1991) (§3B1.1(a)). Cf. *U.S. v. Young*, 34 F.3d 500, 506 (7th Cir. 1994) (despite "little support to show that Mr. Young exercised control over others," affirmed §3B1.1(b) enhancement because defendant had major role as distributor of marijuana operation's product and recruited buyers); *U.S. v. Johnson*, 906 F.2d 1285, 1291–92 (8th Cir. 1990) (affirmed §3B1.1(b) finding where defendant recruited codefendant and instructed him on techniques of drug dealing, supplied other codefendants, and directed deliveries). A Nov. 1993 amendment to §3B1.1, comment. (n.2), states: "To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." The Fifth Circuit followed this amendment to hold that a defendant need not personally lead five or more participants to receive a §3B1.1(a) enhancement; leading at least one of the five is sufficient. See *U.S. v. Okoli*, 20 F.3d 615, 616 (5th Cir. 1994) [6#17].

The Tenth Circuit has held that the defendant must control the five or more participants to be a §3B1.1(a) organizer or leader, but noted that the control may be indirect. *U.S. v. Reid*, 911 F.2d 1456, 1464–65 & n.8 (10th Cir. 1990) (drug suppliers and customers were not "participants" because they were neither answerable to nor interdependent with defendant). Cf. *U.S. v. Guyton*, 36 F.3d 655, 662 (7th Cir. 1994) (remanded: "fronting drugs" to sellers does not allow §3B1.1(a) enhancement—"without evidence of actual control, evidence of a front arrangement was by itself insufficient to demonstrate the level of control necessary to support a determination that a defendant played a leadership role in the offense"); *U.S. v. Belletiere*, 971 F.2d 961, 969–72 (3d Cir. 1992) (remanded: defendant was not an organizer or leader, §3B1.1(a), where he "made a series of unrelated drug sales" to six people, none of whom were "'led' or 'organized' by, nor 'answerable' to, the defendant") [5#2].

A departure, rather than an aggravating role enhancement, may be appropriate for a defendant who managed or supervised property, rather than people. As of Nov. 1993, new Application Note 2 in §3B1.1 was added to clarify that "the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who . . . exercised management responsibility over the property, assets, or activities of a criminal organization." Prior to new Note 2, the Fourth Circuit held that a defendant who manages or supervises property rather than people may be a manager or supervisor under §3B1.1(b). See *U.S. v. Chambers*, 985 F.2d 1263, 1267–69 (4th Cir. 1993). The Seventh Circuit, again before Note 2, agreed. *U.S. v. Carson*, 9 F.3d 576, 592 (7th Cir. 1993) (although defendant's control over others was uncertain, he clearly distributed large amounts of cocaine and had supervisory duties in conspiracy involving at least five participants). See also *U.S. v. Grady*, 972 F.2d 889,

889 (8th Cir. 1992) (affirmed §3B1.1(a) enhancement—defendant's sole control over access to stolen postal money orders "made him the person most responsible for the crime, [which] was sufficient to make him an organizer or leader"). Contra *U.S. v. Fuentes*, 954 F.2d 151, 153–54 (3d Cir. 1992); *U.S. v. Mares-Molina*, 913 F.2d 770, 776 (9th Cir. 1990); *U.S. v. Fuller*, 897 F.2d 1217, 1220-21 (1st Cir. 1990).

Previously, some circuits upheld enhancement under §3B1.1(c) without a showing of control over others, usually where defendant otherwise had significant control over the drug transactions. See, e.g., *U.S. v. Skinner*, 986 F.2d 1091, 1095–99 (7th Cir. 1993) ("Control over others" is an important, but not essential factor—defendant was "the key figure in the drug distribution scheme"); *U.S. v. Avila*, 905 F.2d 295, 298–99 (9th Cir. 1990) (no finding of control over others, but defendant "coordinated" transactions); *U.S. v. Barreto*, 871 F.2d 511, 512 (5th Cir. 1989) (defendant controlled "quantity, source, and price of the contraband [and] orchestrated the time, place, and manner of delivery"). But cf. *U.S. v. Castellone*, 985 F.2d 21, 26 (1st Cir. 1993) (vacated §3B1.1(c) enhancement—although defendant may have "determined who purchased, when and where sales took place, prices and profit . . . , the same can be said of any independent, street-level dealer"; there was "no evidence that . . . [he] organized or exercised control over others").

See also cases in section III.B.4.

d. Mitigating role for sole "participant"?

Because role adjustments are to be determined on the basis of all relevant conduct, a defendant who is the sole participant in the offense of conviction may qualify for a reduction under §3B1.2. The D.C. Circuit held that the evidence "must, at a minimum, show (i) that the 'relevant conduct' for which the defendant would . . . be otherwise accountable involved more than one participant (as defined in section 3B1.1, comment. (n.1)) and (ii) that the defendant's culpability for such conduct was relatively minor compared to that of the other participant(s)." *U.S. v. Caballero*, 936 F.2d 1292, 1299 (D.C. Cir. 1991). Accord *U.S. v. Webster*, 996 F.2d 209, 212 (9th Cir. 1993) [6#1].

When the only other participants are government agents, acting undercover or in a sting operation, the adjustment may not be given, but the circuits are split on whether a departure by analogy to §3B1.2 is permissible. The Second and Third Circuits held that departure may be appropriate. See *U.S. v. Speenburgh*, 990 F.2d 72, 74–76 (2d Cir. 1993) (mitigating role adjustment under §3B1.2 requires other criminally responsible participants; however, departure may be appropriate); *U.S. v. Bierley*, 922 F.2d 1061, 1065 (3d Cir. 1990) (same) [3#18]. The Eleventh Circuit held departure was prohibited. *U.S. v. Costales*, 5 F.3d 480, 486 (11th Cir. 1993) (may not depart by analogy to §3B1.2 where only other participants in child pornography offense were government agents).

The Ninth Circuit originally followed *Bierley* to depart for a drug courier. See *U.S. v. Valdez-Gonzalez*, 957 F.2d 643, 648–50 (9th Cir. 1992) (if a drug-smuggling "mule" is the only "participant" in the offense of conviction and thus cannot qualify for the mitigating role adjustment, downward departure may be appropriate) [4#18]. However, the court later held that the Nov. 1, 1990 amendment that states role in offense adjustments are based on relevant conduct effectively overturned the reasoning of *Valdez-Gonzalez*: "In light of [the amendment] it can no longer be said that the Commission has not taken into account the extent of a defendant's participation in unlawful conduct, and a downward departure on this ground alone is no longer appropriate." *Webster*, 996 F.2d at 210–11 (district court

should consider whether defendant courier qualifies for §3B1.2 reduction based on all relevant conduct) [6#1]. See also summaries of *Olibrices, Lucht,* and *Demers* in section III.B.1.

3. "Otherwise Extensive"

Under the "otherwise extensive" prong of §3B1.1(a) and (b), no set number of criminally responsible "participants" is required. See §3B1.1, comment. (n.3) (formerly n.2) ("all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive"). See also *U.S. v. Ellis,* 951 F.2d 580, 585 (4th Cir. 1991) (citing note); *U.S. v. Dietz,* 950 F.2d 50, 53 (1st Cir. 1991) ("so long as a defendant and at least one other criminally responsible person are involved in the offense of conviction, the sentencing court is free to consider the use of unwitting outsiders" for §3B1.1(a) enhancement); *U.S. v. West,* 942 F.2d 528, 530–31 (8th Cir. 1991) (may include "'outsiders' who did not have knowledge of the facts"); *U.S. v. Boula,* 932 F.2d 651, 654 (7th Cir. 1991) ("otherwise extensive" applies to "the number of people involved in the operation, not the extent of the criminal activity").

Note, however, that for any role in the offense adjustment it appears that at least two participants are required. See U.S.S.G. Ch.3, Pt.B, intro. comment. ("When an offense is committed by more than one participant, §3B1.1 or §3B1.2 . . . may apply."); §3B1.1, comment. (n.2) (Nov. 1993) ("To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants"). See also *U.S. v. Gross,* 26 F.3d 552, 554–55 (5th Cir. 1994) (remanded: following commentary, §3B1.1 "only applies if an offense was committed by more than one criminally responsible person"); *U.S. v. Rodgers,* 951 F.2d 1220, 1222 (11th Cir. 1992) (§3B1.1 inapplicable to offense that, "by its nature, involves no more than one participant"). The Seventh Circuit held that if the number of persons is the sole basis for finding that an organization was "otherwise extensive," that number must be more than five. *U.S. v. Tai,* 41 F.3d 1170, 1174 (7th Cir. 1994) (remanded: §3B1.1(a) enhancement for being organizer of an "otherwise extensive" criminal activity could not be based solely on fact that five persons—defendant, two other criminally responsible participants, and two "outsiders"—were involved in extortion scheme) [7#6].

A criminal activity that involved four conspirators, two drug suppliers, and hundreds of customers was "otherwise extensive" under §3B1.1(a). *U.S. v. Reid,* 911 F.2d 1456, 1466 (10th Cir. 1990) [3#13]. A criminal enterprise that brought in over $250,000 was "otherwise extensive," and the value of the operation was not limited to money personally taken in by defendant. *U.S. v. Morphew,* 909 F.2d 1143, 1145 (8th Cir. 1990). See also *U.S. v. Rose,* 20 F.3d 367, 374 (9th Cir. 1994) (affirmed: fraud scheme "involved approximately $3 million, sixty knowing or unwitting employees . . . , an untold but no doubt considerable number of bank employees and other outsiders, and scores of duped investors"); *U.S. v. Roberts,* 5 F.3d 365, 371 (9th Cir. 1993) (fraud involving three participants along with four individual and two corporate outsiders was extensive); *U.S. v. Stouffer,* 986 F.2d 916, 927 (5th Cir. 1993) (affirmed: fraud involved over 2,000 investors and $11 million); *West,* 942 F.2d at 531 (affirmed: fraud scheme involving two "participants" and "at least eight employees").

The Eleventh Circuit held that "section 3B1.1(a)'s plain language requires *both* a leadership role *and* an extensive operation. Without proof of the defendant's leadership role, evidence of the [drug] operation's extensiveness is insufficient as a matter of law to warrant the

adjustment." *U.S. v. Yates*, 990 F.2d 1179, 1181–82 (11th Cir. 1993) (reversed: no evidence that drug supplier was leader or organizer).

4. Drug "Steerers," Middlemen, Distributors

Drug "steerers" have been defined as persons who "direct buyers to sellers in circumstances in which the sellers attempt to conceal themselves from casual observation." *U.S. v. Colon*, 884 F.2d 1550, 1552 (2d Cir. 1989). Whether a steerer may qualify for an aggravating role adjustment depends on the specific facts. For example, the First Circuit reversed a finding that a steerer was a "manager or supervisor" under §3B1.1(b). *U.S. v. Sostre*, 967 F.2d 728, 733 (1st Cir. 1992) (although defendant brought buyers to sellers and controlled a lookout, he did not control the drugs, was not the principal in the drug transaction, and had to contact the sellers before making representations to buyers) [5#1]. But cf. *U.S. v. Cochran*, 955 F.2d 1116, 1124–26 (7th Cir. 1992) (affirmed: defendant who coordinated five defendants in drug transactions, linked supplier with purchaser, attended all planning meetings and drug sales, and allowed his home to be purchase site was an "organizer" under §3B1.1(c)). See also cases in section III.B.6.

On the other hand, courts have generally held that a steerer does not qualify for a mitigating role adjustment. The Seventh Circuit held that "[a] person who directs a buyer to a seller cannot be considered a minor participant [under §3B1.2(b)] because that person also plays an important role in the distribution of the drugs." *U.S. v. Brick*, 905 F.2d 1092, 1095 (7th Cir. 1990) (affirmed: defendant received minimal profits compared with drug supplier, but arranged two drug transactions by telephone, conducted first transaction, was contact person in second and third transactions, and brought government agents to drug supplier twice). See also *U.S. v. Boyer*, 931 F.2d 1201, 1205 (7th Cir. 1991) (affirmed: drug coconspirator who pursued initial contact with buyer, introduced buyer to seller, and set up the drug transaction "played an indispensable role" and was not a minor participant); *U.S. v. Foley*, 906 F.2d 1261, 1263 (8th Cir. 1990) (rejecting defendant's contention that she was "minimal" rather than just "minor" participant—even though remuneration was slight, she arranged three drug sales and accepted purchase price in two sales).

Similarly, the Second Circuit concluded that a "steerer" in a typical heroin distribution scheme could not be a "minimal participant," §3B1.2(a). The court explained that "'[s]teerers' play an important role in street-level drug transactions .... Without 'steerers,' buyers would either find it difficult to locate sellers or sellers would have to risk exposure to public view." *Colon*, 884 F.2d at 1551–52 (affirmed: defendant handled neither money nor drugs, but he directed buyer to drug seller and knew about others' activities). However, in a later case the court stated that "we did not hold that a steerer or a facilitator never receive a reduction pursuant to section 3B1.2," and remanded for "a factual determination as to whether LaValley's role as a steerer or facilitator was that of a minor participant." *U.S. v. LaValley*, 999 F.2d 663, 666 (2d Cir. 1993).

Being a drug middleman or distributor does not by itself support an aggravating role enhancement. Buying and selling drugs, even as part of a conspiracy, does not necessarily indicate control over the activities of other participants. See, e.g., *U.S. v. Mustread*, 42 F.3d 1097, 1103–05 (7th Cir. 1994) (remanded: although defendant was large-scale marijuana distributor and worked closely with others in conspiracy, he acted independently and did not exercise control over others required by §3B1.1(a)) [7#6]; *U.S. v. Yates*, 990 F.2d 1179, 1182 (11th Cir. 1993) (remanded: while dilaudid seller may have been involved in organization that was "otherwise extensive," there was "no evidence that Yates was an organizer or

leader of the dilaudid distribution network controlled by" his buyer); *U.S. v. Brown,* 944 F.2d 1377, 1380–82 (7th Cir. 1991) (remanded: "status as a distributor, standing alone, does not warrant an enhancement under §3B1.1"; defendant purchased drugs from larger distributors and sold to smaller distributors and users, but there was no evidence that he supervised or controlled others); *U.S. v. Fuller,* 897 F.2d 1217, 1221 (1st Cir. 1990) (remanded: fact that defendant may have distributed large amounts of marijuana to several buyers did not support §3B1.1(c) enhancement—these were "private drug distributions, in which he essentially did all the work himself" and there was no evidence that he "exercised control or was otherwise responsible for organizing others"). Cf. *U.S. v. Young,* 34 F.3d 500, 507–08 (7th Cir. 1994) (although "a very close call," §3B1.1(b) enhancement affirmed for middleman distributor where three of seven factors listed in §3B1.1, comment. (n.3), were present).

5. Drug Couriers

Application Note 2 to §3B1.2 states that a mitigating role adjustment "would be appropriate . . . where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." All circuits addressing the issue have held that drug couriers or "mules" are not automatically entitled to a §3B1.2 mitigating role adjustment. See *U.S. v. Lopez-Gil,* 965 F.2d 1124, 1131 (1st Cir. 1992); *U.S. v. Rossy,* 953 F.2d 321, 326 (7th Cir. 1992); *U.S. v. Cacho,* 951 F.2d 308, 309–10 (11th Cir. 1992); *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991); *U.S. v. Garcia,* 920 F.2d 153, 155 (2d Cir. 1990); *U.S. v. Zweber,* 913 F.2d 705, 710 (9th Cir. 1990); *U.S. v. Calderon-Porras,* 911 F.2d 421, 423–24 (10th Cir. 1990); *U.S. v. Williams,* 890 F.2d 102, 104 (8th Cir. 1989); *U.S. v. White,* 875 F.2d 427, 434 (4th Cir. 1989); *U.S. v. Buenrosto,* 868 F.2d 135, 138 (5th Cir. 1989), all affirming denials of a §3B1.2 adjustment, and *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991) (remanding sentence adjusted solely because of courier status).

Rather, "the issue is whether the defendant is 'substantially less culpable' than his coconspirators." *Rossy,* 953 F.2d at 326. Accord *Cacho,* 951 F.2d at 310; *U.S. v. Headley,* 923 F.2d 1079, 1084 (3d Cir. 1991); *Garcia,* 920 F.2d at 155; *Zweber,* 913 F.2d at 710; *Williams,* 890 F.2d at 104; *White,* 875 F.2d at 434; *Buenrosto,* 868 F.2d at 138. The Second Circuit explained "[t]he culpability of a defendant courier must depend necessarily on such factors as the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." *Garcia,* 920 F.2d at 155. Accord *U.S. v. Carr,* 25 F.3d 1194, 1208 (3d Cir. 1994). Cf. *Calderon-Porras,* 911 F.2d at 423–24 ("the commentary directs us to focus upon the defendant's knowledge *and* the activities of others").

6. Other Aggravating Role Issues

A defendant can be an organizer or supervisor even though another codefendant is also one. *U.S. v. Revel,* 971 F.2d 656, 660 (11th Cir. 1992); *U.S. v. Monroe,* 943 F.2d 1007, 1019 (9th Cir. 1991); *U.S. v. Ramos,* 932 F.2d 611, 619 (7th Cir. 1991); *Morphew v. U.S.,* 909 F.2d 1143, 1145 (8th Cir. 1990). See also §3B1.1, comment. (n. 3) ("There can, of course, be more than one person who qualifies as a leader or organizer . . . ."). However, the Third Circuit held that the enhancement was improperly given to equally culpable codefendants who did not organize at least one other culpable "participant." *U.S. v. Katora,* 981 F.2d 1398, 1402–05 (3d Cir. 1992) [5#7].

The First Circuit held that a sentencing court may, but is not required to, compare

defendant's role to an "average" participant in that type of offense. *U.S. v. Rotolo,* 950 F.2d 70, 71 (1st Cir. 1991) [4#13]. Cf. *U.S. v. Daughtrey,* 874 F.2d 213, 216 (4th Cir. 1989) and other cases at III.B.7.

Being "essential" or "necessary" to a criminal enterprise does not, without more, qualify a defendant for §3B1.1 enhancement. See, e.g., *U.S. v. Sostre,* 967 F.2d 728, 733 (1st Cir. 1992) (reversed §3B1.1(b) enhancement for a drug "steerer"; although he played "essential role" in drug deal he did not act as manager or supervisor) [5#1]; *U.S. v. Sherrod,* 964 F.2d 1501, 1505–06 (5th Cir. 1992) (chemist or "cook" in methamphetamine conspiracy may have been "necessary" member, but district court properly held he had no managerial role); *U.S. v. Litchfield,* 959 F.2d 1514, 1523 (10th Cir. 1992) (reversed §3B1.1(a) enhancement: "Section 3B1.1(a) is an enhancement for organizers or leaders, not for important or essential figures"). See also *U.S. v. Parmelee,* 42 F.3d 387, 395 (7th Cir. 1994) (remanded §3B1.1(a) enhancement: although pilot "certainly was an important player in the smuggling ring," there was no evidence "that shows he controlled or coordinated any of his codefendants' activities"). Cf. *U.S. v. Hoac,* 990 F.2d 1099, 1111 (9th Cir. 1993) (that defendant may be one of more culpable defendants insufficient for §3B1.1(c)).

Courts should be careful to distinguish a familial or other intimate relationship between participants from a true leadership role. See, e.g., *U.S. v. McGregor,* 11 F.3d 1133, — (2d Cir. 1993) (remanded: defendant should not have received §3B1.1(c) increase for the one occasion he asked his wife to give two packages of drugs to men who would come to their home—"[o]ne isolated instance of a drug dealer husband asking his wife to assist him in a drug transaction is not the type of situation that section 3B1.1 was designed to reach"); *U.S. v. Roberts,* 14 F.3d 502, 524 (10th Cir. 1993) (remanded: fact that defendant was in intimate relationship with leader of conspiracy did not support §3B1.1(b) enhancement without further "evidence defendant acted in a supervisory or managerial capacity *independent* of any intimate connection to the major player in the criminal activity").

The Fourth Circuit reversed as clearly erroneous a district court's decision not to give a §3B1.1(c) enhancement where the district court did not articulate reasons for its ruling and where the defendant drove to and from the drug purchase site, purchased the drugs, and instructed a codefendant to hide the drugs on her person and make the return trip by train. *U.S. v. Harriott,* 976 F.2d 198, 202 (4th Cir. 1992).

When §3B1.1(b) applies, the court may not increase the base offense level by two points rather than three points. *U.S. v. Cotto,* 979 F.2d 921, 923 (2d Cir. 1992) [5#6]. Accord *U.S. v. Kirkeby,* 11 F.3d 777, 778–79 (8th Cir. 1993) (if criminal activity involves five or more participants, "trial court's only options" under §3B1.1 are enhancements of four, three, or zero levels—court has no discretion to impose two-level enhancement).

The First Circuit held that notice is not required before the court sua sponte adjusts a sentence upwards for role in the offense—the guidelines themselves provide notice. *U.S. v. Canada,* 960 F.2d 263, 266–68 (1st Cir. 1992) [4#22]. See also III.E.4. Acceptance of Responsibility—Procedural Issues; VI.G. Departures—Notice Required Before Departure; IX.E. Sentencing Procedure—Procedural Requirements.

Most circuits to decide the issue have held that enhancements for both aggravating role and more than minimal planning may be given. The Guidelines also now specify that both may be applied. See section II.E for cases and guideline language.

7. Other Mitigating Role Issues

The Background Commentary to §3B1.2 states that the adjustment may be awarded if the defendant is "substantially less culpable than the average participant." Some circuits have held that mitigating role should be determined in comparison to the role of both other defendants and an "average participant" in such a crime. *U.S. v. Lopez,* 937 F.2d 716, 728 (2d Cir. 1991); *U.S. v. Caruth,* 930 F.2d 811, 815 (10th Cir. 1991) [4#2]; *U.S. v. Ocasio,* 914 F.2d 330, 333 (1st Cir. 1990); *U.S. v. Daughtrey,* 874 F.2d 213, 216 (4th Cir. 1989). As the Fourth Circuit explained: "Whether a role in the offense adjustment is warranted 'is to be determined not only by comparing the acts of each participant in relation to the relevant conduct for which the participant is held accountable, . . . but also by measuring each participant's individual acts and relative culpability against the elements of the offense of conviction.' [*Daughtrey,* 874 F.2d] at 216. The critical inquiry is thus not just whether the defendant has done fewer 'bad acts' than his codefendants, but whether the defendant's conduct is material or essential to committing the offense." *U.S. v. Palinkas,* 938 F.2d 456, 460 (4th Cir. 1991), vacated on other grounds, 112 S. Ct. 1464 (1992). See also *U.S. v. Thomas,* 932 F.2d 1085, 1092 (5th Cir. 1991) ("It is improper for a court to award a minor participation adjustment simply because a defendant does less than the other participants. Rather, the defendant must do enough less so that he at best was peripheral to the advancement of the illicit activity.").

The Ninth Circuit temporarily followed *Daughtrey,* but in an amended opinion decided it did not have to resolve the issue because the adjustment was proper under either test. See *U.S. v. Andrus,* 925 F.2d 335, 338 (9th Cir. 1991) [3#20 and 4#4]. The Ninth Circuit later stated that "while comparison to the conduct of a hypothetical average participant may be appropriate in determining whether downward departure . . . is warranted, the relevant comparison in determining whether a four-level adjustment [under §3B1.2(a)] is appropriate is to the conduct of co-participants in the case at hand." *U.S. v. Petti,* 973 F.2d 1441, 1447 (9th Cir. 1992). See also *U.S. v. Benitez,* 34 F.3d 1489, 1498 (9th Cir. 1994) (same for minor participant, §3B1.2(b)).

For an aggravating role enhancement under §3B1.1, however, the First Circuit has distinguished *Daughtrey* and held that a sentencing court "may," but is not required to, compare defendant's role to an "average" participant in that type of offense. *U.S. v. Rotolo,* 950 F.2d 70, 71 (1st Cir. 1991) (language requiring comparison to "the average participant" in commentary to §3B1.2 is not found in commentary to §3B1.1) [4#13]. See III.B.6.

Other circuits have held that the reduction is not warranted solely because other codefendants are more culpable. See, e.g., *U.S. v. Thomas,* 963 F.2d 63, 65 (5th Cir. 1992) ("[e]ach participant must be separately assessed"); *U.S. v. West,* 942 F.2d 528, 531 (8th Cir. 1991) ("mere fact that defendant was less culpable than his codefendants does not entitle the defendant to 'minor participant' status"); *Lopez,* 937 F.2d at 728 ("intent of the Guidelines is not to 'reward' a guilty defendant with an adjustment merely because his coconspirators were even more culpable"); *Andrus,* 925 F.2d at 337–38 (stipulation in plea agreement that defendant was "less culpable" than other codefendants did not preclude government from arguing against minor participant status at sentencing—"being less culpable than one's co-participants does not automatically result in minor status"); *U.S. v. Zaccardi,* 924 F.2d 201, 203 (11th Cir. 1991) ("fact that a particular defendant may be least culpable among those who are actually named as defendants does not establish that he performed a minor role in the conspiracy"). The Third Circuit held that "the application of sections 3B1.1 and 3B1.2 has two prerequisites: multiple participants and some differentiation in their relative culpabilities." *U.S. v. Katora,* 981 F.2d 1398, 1405 (3d Cir. 1992) [5#7].

A reduction is not ordinarily warranted if the defendant is convicted of and given an offense level for an offense significantly less serious than the *actual* conduct warrants. See §3B1.2, comment n.4 (Nov. 1, 1992). The D.C. Circuit cited this note approvingly when it held that a defendant who played a major role in the offense of conviction cannot receive a reduction for minor role in the larger offense that was not taken into account in setting the base offense level. *U.S. v. Olibrices*, 979 F.2d 1557, 1560 (D.C. Cir. 1992) [5#6]. See also other cases cited in section III.B.1.

The Fourth Circuit reversed a finding that defendant was a minor, rather than minimal, participant. The district court only considered defendant's active role in the context of the limited arson conspiracy—on which he was not convicted—rather than his clearly minimal role in the broader context of the mail fraud conspiracy to which he pled guilty. *U.S. v. Westerman*, 973 F.2d 1422, 1428 (8th Cir. 1992).

Courts differ on whether the court must state for the record its finding of fact as to mitigating role. Compare *U.S. v. Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991) (required), with *U.S. v. Donaldson*, 915 F.2d 612, 615–16 (10th Cir. 1990) (not required). See also *U.S. v. Flores-Payon*, 942 F.2d 556, 561 (9th Cir. 1991) (not required to make factual finding of relative culpability among codefendants).

8. Abuse of Position of Trust (§3B1.3)

a. Generally

The definition of "public or private trust" in §3B1.1, comment. (n.1), was amended Nov. 1993. In addition to the factors listed in the guideline itself, courts should look for "professional or managerial discretion" and "significantly less supervision" than other employees. See, e.g., *U.S. v. Viola*, 35 F.3d 37, 45 (2d Cir. 1994) (remanded: amended Note 1 is clarifying, shows defendant sentenced before amendment did not occupy position of trust—defendant abused his position, but it "did not involve a substantial amount of discretionary judgment, and he was not subject to relaxed supervision because of the position"); *U.S. v. Smaw*, 22 F.3d 330, 332–34 (D.C. Cir. 1994) (remanded: although "time and attendance clerk" clearly abused her position, it was not "a position of public or private trust characterized by professional or managerial discretion" and she was not "subject to significantly less supervision than employees whose responsibilities are primarily nondiscretionary in nature"; amendment is clarifying, rather than substantive, and should be applied even though defendant was sentenced before Nov. 1, 1993) [6#16].

Previously, some circuits set forth two prerequisites for imposition of the abuse of trust enhancement under §3B1.3. First, the offender must have abused a position of public or private trust. Second, that abuse must have "significantly facilitated the commission or concealment of the crime." See, e.g., *U.S. v. Brelsford*, 982 F.2d 269, 271 (8th Cir. 1992); *U.S. v. Brown*, 941 F.2d 1300, 1304 (5th Cir. 1991); *U.S. v. Rehal*, 940 F.2d 1, 5 (1st Cir. 1991) (police officer subject to enhancement because he used his position of public trust to conceal his illegal narcotic dealings). The Third Circuit announced a similar standard: "(1) whether the authority conferred and the absence of controls indicated that the employer relied on the integrity of the defendant to protect against the loss occasioned by the crime; and (2) whether the trust aspect of the job made the commission or concealment of the crime significantly easier." *U.S. v. Craddock*, 993 F.2d 338, 343 (3d Cir. 1993).

Other circuits have, in practice, used such a two-level analysis in applying this enhancement. See, e.g., *U.S. v. Stewart*, 33 F.3d 764, 768–70 (7th Cir. 1994) (remanded: licensed insurance broker held position of trust and that position facilitated fraudulent funeral ex-

penses annuity scheme) [7#2]; *U.S. v. Castagnet,* 936 F.2d 57, 59–62 (2d Cir. 1991) (airline employee used code to access computers to get tickets during and after employment); *U.S. v. Young,* 932 F.2d 1035 (2d Cir. 1991) (informant retained Customs Service identification card and used it without authorization to facilitate his impersonation of a federal officer); *U.S. v. Foreman,* 926 F.2d 792, 796 (9th Cir. 1991) (police officer showed police badge and identification in attempt to avoid investigation and arrest) (amending 905 F.2d 1335 [3#10]); *U.S. v. McMillen,* 917 F.2d 773, 776 (3d Cir. 1990) (bank manager used his position of trust to substantially facilitate and conceal offense of misapplication of funds) [3#15]; *U.S. v. Hill,* 915 F.2d 502, 507–08 (9th Cir. 1990) (moving company driver was in "superior position" to steal shipments entrusted to him) [3#15]; *U.S. v. Parker,* 903 F.2d 91, 104 (2d Cir. 1990) (security guard used knowledge of payroll car route to facilitate robbery).

The Third and Ninth Circuits define a person in a position of trust as having the freedom to commit a "difficult-to-detect wrong." *U.S. v. Lieberman,* 971 F.2d 989, 993–94 (3d Cir. 1992) (bank vice-president conducted 36 undiscovered, unlawful transactions over four years); *Hill,* 915 F.2d at 506. The Tenth Circuit looks at this and other factors, including "defendant's duties as compared to those of other employees; defendant's level of specialized knowledge; defendant's level of authority in the position; and the level of public trust." *U.S. v. Williams,* 966 F.2d 555, 557 (10th Cir. 1992). Accord *U.S. v. Shyllon,* 10 F.3d 1, 5 (D.C. Cir. 1993) (adopting Tenth Circuit test).

The Eighth Circuit held that a position of trust is determined by the nature of the defendant's position, not community attitude toward that position. *U.S. v. Claymore,* 978 F.2d 421, 423 (8th Cir. 1992) (rejecting police officer's claim that because public opinion of police was so poor, no one trusted police).

It has been held that the position of trust is viewed in relation to the victim of the offense. See *U.S. v. Hathcoat,* 30 F.3d 913, 919 (7th Cir. 1994) ("analyze the situation from the perspective of the victim" whether defendant held position of trust); *U.S. v. Moore,* 29 F.3d 175, 179–80 (4th Cir. 1994) (remanded: defendants had position of trust only in their own company, had ordinary commercial relationship with victim) [7#1]; *U.S. v. Queen,* 4 F.3d 925, 929–30 (10th Cir. 1993) (affirmed: defendant created position of trust with victims of offense by posing as investment advisor/broker—"defendant's victims were led objectively to believe that the defendant occupied a formal position of trust with regard to them"); *U.S. v. Moored,* 997 F.2d 139, 144–45 (6th Cir. 1993) ("the evidence must show that the defendant's position [of trust] with the victim of the offense significantly facilitated the commission of the offense"); *U.S. v. Castagnet,* 936 F.2d 57, 62 (2d Cir. 1991) ("whether the defendant was in a position of trust must be viewed from the perspective of the victim"). Cf. *Stewart,* 33 F.3d at 768–70 (remanded: defendant's position as licensed insurance broker facilitated fraudulent funeral expenses annuity scheme that targeted elderly; although annuities were sold through funeral directors, they acted as defendant's agents) [7#2]; *U.S. v. Pardo,* 25 F.3d 1187, 1192 (3d Cir. 1994) (defendant's friendship with manager of bank he defrauded may have made crime easier, but was not sufficient for abuse of trust—defendant "had no authority over anyone or anything necessary to the commission of his crimes" and "he was not placed by the bank in any position that gave him the wherewithal to commit the fraud").

Note that, like other Chapter 3 adjustments, relevant conduct may be included in determining whether there was an abuse of trust. See, e.g., *U.S. v. Duran,* 15 F.3d 131, 133–34 (9th Cir. 1994) (affirmed: although jury failed to reach verdict on count charging sheriff's deputy with stealing money seized from arrested drug dealers, which admittedly involved abuse of trust, enhancement could be applied to conviction for structuring financial transactions to avoid reporting requirements that involved the stolen funds). However, the Fourth

Circuit held that the defendant must personally hold and abuse the position of trust—the enhancement cannot be based on the actions of a coconspirator. "By its own terms, §1B1.3 holds a defendant responsible only for reasonably foreseeable 'acts and omissions' of his co-conspirators . . . . [T]he abuse of trust enhancement is premised on the defendant's *status* of having a relationship of trust with the victim. . . . A co-conspirator's status cannot be attributed to other members of the conspiracy under §1B1.3." *Moore,* 29 F.3d at 178–79 (remanded: defendants could not receive enhancement because third conspirator violated his position of trust in victim company) [7#1].

Two circuits reached different conclusions in deciding whether a §3B1.3 enhancement precludes an upward departure for abuse of trust. Compare *U.S. v. Barr,* 963 F.2d 641, 654–55 (3d Cir. 1992) (upward departure proper on ground that criminal activity by high-ranking public official eroded public confidence in government even though defendant also received abuse of trust enhancement), with *U.S. v. Zamarripa,* 905 F.2d 337, 340 (10th Cir. 1990) (improper to depart under §5K2.0 because baby-sitter sexually abused children entrusted to his care—court should have applied §3B1.3 enhancement).

Note: Amendments to the assault and prostitution guidelines account for abuse of position of trust over minors. See, e.g., U.S.S.G. §§2A3.1, 2A3.2, 2A3.4, 2G1.2, and 2G2.1 (Nov. 1991). But cf. *U.S. v. Johns,* 15 F.3d 740, 744 (8th Cir. 1994) (affirmed enhancement for defendant convicted of two counts of carnal knowledge of female under age sixteen, rape, and five counts of sexual abuse involving female from the time she was fourteen to age twenty-one).

b. Specific examples

A Nov. 1993 amendment to Application Note 1 of §3B1.3 now provides that the abuse of position of trust adjustment "will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail." See also *U.S. v. Lamb,* 6 F.3d 415, 420–21 (7th Cir. 1993) (in pre-amendment case, held it was error to refuse to give adjustment to letter carrier who embezzled U.S. mail) [6#5]. Previously, some circuits had applied §3B1.3 to some postal employees. See, e.g., *U.S. v. Melendez,* 41 F.3d 797, 799 (2d Cir. 1994) (affirmed: defendant who stole mail bags from locked room was entrusted with access and lack of accounting that postal employees in general did not have); *U.S. v. Ajiboye,* 961 F.2d 892, 895 (9th Cir. 1992) ("it is evident that a postal carrier who delivers ordinary mail is in a position of trust"); *U.S. v. Milligan,* 958 F.2d 345, 347 (11th Cir. 1992) (affirmed enhancement: post office window clerk embezzler, who had access to computerized accounting system and was audited quarterly, was given more trust than ordinary bank teller); *U.S. v. Lange,* 918 F.2d 707, 710 (8th Cir. 1990) (reversed failure to give enhancement: unlike ordinary bank tellers and other postal employees, defendant had direct access to express and certified mail). But cf. *U.S. v. Cuff,* 999 F.2d 1396, 1398 (9th Cir. 1993) (error to apply enhancement to employee who simply unloaded mail at post office loading dock and moved it into workroom for other employees—"we fail to see any significant distinction between the bank teller who embezzles funds and Cuff").

Section 3B1.3 does not apply if "an abuse of trust . . . is included in the base offense level or specific offense characteristic." The Ninth Circuit distinguished "abuse" and "breach" of trust, holding that while "breach of trust is essential to an embezzlement conviction," §3B1.3 may be "applied to embezzlers when the breach of trust was particularly egregious" and could be termed an "abuse." *U.S. v. Christiansen,* 958 F.2d 285, 287 (9th Cir. 1992) (affirmed: manager of credit union abused position of trust to substantially facilitate embezzle-

ment in manner not accounted for in underlying offense) [4#19]. See also *U.S. v. Georgiadis,* 933 F.2d 1219, 1225 (3d Cir. 1990) (affirmed: abuse of position of trust is neither element of statutory offense nor incorporated into §2B1.1—enhancement proper for embezzler who abused, rather than breached, position of trust). Other circuits have agreed that abuse of trust is not an element of embezzlement or misapplication of banks funds and the enhancement may be applicable. See *U.S. v. Dion,* 32 F.3d 1147, 1149–50 (7th Cir. 1994); *U.S. v. Hathcoat,* 30 F.3d 913, 915–18 (7th Cir. 1994); *U.S. v. Fisher,* 7 F.3d 69, 70 (5th Cir. 1993); *Milligan,* 958 F.2d at 347 (conceded by defendant); *U.S. v. McElroy,* 910 F.2d 1016, 1027 (2d Cir. 1990).

Similarly, the Eighth Circuit rejected a district court's reason for not giving the enhancement—that in all postal theft cases trust is built into the guidelines—because while trust is built into the statute under which the defendant was convicted, the *guideline* for the offense did not account for abuse of trust. *Lange,* 918 F.2d at 709–10.

The First Circuit held that the base offense level for RICO offenses, §2E1.1(a)(1), includes no particular offense characteristic and therefore applying an abuse of trust enhancement is not double-counting. *U.S. v. McDonough,* 959 F.2d 1137, 1142 (1st Cir. 1992). The Seventh Circuit has held that the §3B1.3 enhancement requires a "special element of private trust" not found in the standard commercial relationship between a bank and its ordinary merchant customer. *U.S. v. Kosth,* 943 F.2d 798, 800 (7th Cir. 1991) (reversing enhancement given to businessman who used his merchant account with bank to commit credit card fraud) [4#11].

Three circuits have held that it is not double-counting to impose the abuse of trust enhancement on an embezzler who also received enhancement for more than minimal planning under §2B1.1(b)(5) (current designation). *Christiansen,* 958 F.2d at 287; *U.S. v. Marsh,* 955 F.2d 170, 171 (2d Cir. 1992); *Georgiadis,* 933 F.2d at 1225–27. The Seventh Circuit upheld an abuse of trust enhancement and vulnerable victim enhancement for a defendant who abused her position of trust (power of attorney in financial matters) to defraud an elderly woman in defendant's care. *U.S. v. Haines,* 32 F.3d 290, 293 (7th Cir. 1994) (may apply both §3A1.1 and §3B1.3 "even if there is some overlap in the factual basis . . . so long as there is sufficient factual basis for each").

9. Use of Special Skill (§3B1.3)

The D.C. Circuit held that "the 'special skill' necessary to justify the §3B1.3 enhancement must be more than the mere ability to commit the offense; it must constitute an additional, pre-existing skill that the defendant uses to facilitate the commission or concealment of the offense." *U.S. v. Young,* 932 F.2d 1510, 1512–15 (D.C. Cir. 1991) (mere fact that defendant had learned how to manufacture PCP insufficient to justify enhancement for use of special skill). Accord *U.S. v. Mainard,* 5 F.3d 404, 406–07 (9th Cir. 1993) (remanded: defendant had no preexisting legitimate skill or training, and "being skilled at the clandestine manufacturing of methamphetamine is not a 'legitimate' skill" under §3B1.3) [6#3]; *U.S. v. Green,* 962 F.2d 938, 944–45 (9th Cir. 1992) (remanded: mere fact that negatives for counterfeit bills were skillfully produced does not warrant enhancement—defendant was not professional photographer and record did not indicate he possessed greater photography skills than most individuals).

The enhancement does not apply if the defendant has a special skill but does not actually use it to commit the crime. For example, the Third Circuit held that "the special skill must . . . be used to commit or conceal the crime, rather than merely to establish trust in a victim

upon whom the defendant then perpetrates a garden variety fraud." *U.S. v. Hickman*, 991 F.2d 1110, 1113 (3d Cir. 1993) (reversed: licensed general contractor did not use special skill to dupe clients into believing he was building their house). See also *U.S. v. Gandy*, 36 F.3d 912, 915–16 (10th Cir. 1994) (remanded because district court opinion "does not specifically explain how Defendant used his podiatric skill" in falsifying health insurance claim forms—"If the government does not show that the defendant employed his skill to facilitate the commission of his offense, then the court may not properly enhance the defendant's sentence under 3B1.3"); *U.S. v. Garfinkel*, 29 F.3d 1253, 1261 (8th Cir. 1994) (court properly refused to enhance defendant's sentence—defendant used his managerial skills, not special skill as psychiatrist, in submitting false statements to government); *U.S. v. Foster*, 876 F.2d 377, 378 (5th Cir. 1989) (reversed: defendant convicted on counterfeiting charge did have special printing skills but did not use those skills where he only photographed federal reserve notes).

Similarly, it has been held that specialized knowledge learned on the job is not, without more, "use of a special skill." See *U.S. v. Harper*, 33 F.3d 1143, 1151–52 (9th Cir. 1994) (remanded: defendant's "knowledge of ATM service procedures, her knowledge of how ATM technicians enter ATM rooms and open ATM vaults, her knowledge of how to disarm ATM alarm systems, and her knowledge of when ATM vaults are likely to contain large amounts of cash . . . is not sufficient").

"'Special skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." U.S.S.G. §3B1.3, comment. (n.2). See, e.g., *U.S. v. Lewis*, 41 F.3d 1209, 1214–15 (7th Cir. 1994) (affirmed for licensed, long-time eighteen-wheel truck driver); *U.S. v. Muzingo*, 999 F.2d 361, 362–63 (8th Cir. 1993) (defendant used special skill "acquired during his ten-year employment with a company that manufactures safe-deposit boxes and keys" to break into safe-deposit boxes) [6#3]; *U.S. v. Aubin*, 961 F.2d 980, 984 (1st Cir. 1992) (defendant's training in operation of automatic teller machines facilitated bank robbery); *U.S. v. Hubbard*, 929 F.2d 307, 309–10 (7th Cir. 1991) (affirming special skill enhancement for defendant whose electrical and engineering background provided expertise to construct bombs); *U.S. v. Sharpsteen*, 913 F.2d 59, 62 (2d Cir. 1990) (expertise as printer was special skill that facilitated counterfeiting).

Note that the "special skill" does not have to be obtained through formal education or training. See, e.g., *U.S. v. Spencer*, 4 F.3d 115, 120 (2d Cir. 1993) (self-taught chemist convicted of methamphetamine offenses "presents the unusual case where factors other than formal education, training, or licensing persuade us that he had special skills in the area of chemistry") [6#3]; *U.S. v. Malgoza*, 2 F.3d 1107, 1110–11 (11th Cir. 1993) (expertise in two-way radio operation developed through experience); *U.S. v. Hummer*, 916 F.2d 186, 191–92 (4th Cir. 1990) (self-taught inventor, who had obtained patents for inventions, had acquired "special skill" through his experience that was not possessed by general public and that facilitated the offense). See also *U.S. v. Fairchild*, 940 F.2d 261, 266 (7th Cir. 1991) (affirmed for defendant whose self-taught knowledge of chemistry enabled him to manufacture methamphetamine—although defendant was not a chemist, he had degree in biology and had worked as chief lab technician in hospital).

The Second Circuit held that "[t]he fact that the same offenses could have been committed by a person without the defendant's special training is immaterial; a §3B1.1 adjustment is proper where the defendant's special skills increase his chances of succeeding or of avoiding detection." *U.S. v. Fritzson*, 979 F.2d 21, 22–23 (2d Cir. 1992) (affirmed enhancement for accountant who filed false payroll tax returns with IRS).

"This adjustment may not be employed if [use of a special] skill is included in the base offense level or specific offense characteristic." The First Circuit affirmed that the specialized knowledge required of a stockbroker, combined with the ability to access financial markets directly, can qualify as a special skill when they are not elements of the offense. *U.S. v. Connell,* 960 F.2d 191, 198–99 (1st Cir. 1992) [4#19]. Accord *U.S. v. Ashman,* 979 F.2d 469, 490 (7th Cir. 1992). See also *U.S. v. Harris,* 38 F.3d 95, 99 (2d Cir. 1994) (not double counting to give §3B1.3 enhancement to disbarred attorney who "used lawyering skills instrumental to his [fraud] schemes"—status as attorney was not included in offense level and was not basis of enhancement).

When a §3B1.3 enhancement for use of a special skill is given, a court may not also depart upward because of those same skills. *U.S. v. Eagan,* 965 F.2d 887, 892–93 (10th Cir. 1992).

C. Obstruction of Justice (§3C1)

1. Willfulness and Materiality

In general, evidence, facts, statements, or information must be "material" for the enhancement to apply. See Application Notes 3(d), (f), (g), and (h); 4(c); 5. See also *U.S. v. Savard,* 964 F.2d 1075, 1078–79 (11th Cir. 1992) (reversed: secreting boarding slip at time of arrest did not materially hinder investigation because Coast Guard already possessed information on slip); *U.S. v. Gardiner,* 955 F.2d 1492, 1499 (11th Cir. 1992) (reversed: as a matter of law, enhancement may not be based on presentence assertions that contradict the jury verdict because probation officer would have to ignore verdict and believe assertions for sentencing to be affected) [4#21]; *U.S. v. Tabares,* 951 F.2d 405, 410 (1st Cir. 1991) (reversed: no evidence that giving false Social Security number to probation officer materially impeded presentence investigation) [4#13]; *U.S. v. De Felippis,* 950 F.2d 444, 447 (7th Cir. 1991) (reversed: improper for defendant who lied to probation officer about employment history because misstatements were not "material" and could not have influenced sentence) [4#13]; *U.S. v. Howard,* 923 F.2d 1500, 1504 (11th Cir. 1991) (reversed: failure to reveal prior drug convictions at presentence interview was not material falsehood where defendant had already informed DEA agents). Cf. *U.S. v. Smaw,* 993 F.2d 902, 904 (D.C. Cir. 1993) (affirmed: although court ultimately determined defendant had no equity in a house, she originally lied about real estate interest—"material in this context means relevant—not outcome determinative"); *U.S. v. St. Cyr,* 977 F.2d 698, 705–06 (1st Cir. 1992) (affirmed: concealment of criminal history delayed completion of PSR); *U.S. v. Dedeker,* 961 F.2d 164, 166–68 (11th Cir. 1992) (affirmed: enhancement proper where defendant failed to disclose prior uncounseled misdemeanor even though it was not used to calculate criminal history—it was material to sentencing within guidelines range); *U.S. v. Baker,* 894 F.2d 1083, 1084 (9th Cir. 1990) (affirmed: misstating number of prior convictions was material even though probation officer could have secured defendant's "rap sheet"—misstatements caused delay and possibility of inaccurate sentence).

Note that not all forms of obstruction have a separate materiality requirement. See Application Notes 3(a)–(c), (e), and (i). See also *U.S. v. Draper,* 996 F.2d 982, 986 n.2 (9th Cir. 1993) (simple attempt to "abscond from pretrial release" sufficient under Note 3(e)); *U.S. v. Cox,* 985 F.2d 427, 433 (8th Cir. 1993) ("Application Note 3(b) is not limited to 'material' perjury [because] materiality is an essential element of perjury"); *U.S. v. Snider,* 976 F.2d 1249, 1251–52 (9th Cir. 1992) (threatening witness warrants enhancement regardless of whether threat results in material hindrance). But cf. *U.S. v. Parker,* 25 F.3d 442, 448 (7th

Cir. 1994) ("the law is clear that perjury requires proof that the witness's false testimony concerned a material matter"); *U.S. v. Crousore,* 1 F.3d 382, 385 (6th Cir. 1993) (indicating that perjury must be material and nontrivial).

False statements to law enforcement officers not made under oath must be material and significantly obstruct or impede the official investigation or prosecution of the instant offense. U.S.S.G. §3C1.1, comment. (nn. 3(g), 4(a) and (b)). See also *U.S. v. Alpert,* 28 F.3d 1104, 1107–08 (11th Cir. 1994) (en banc) (remanded: "district court applying the enhancement because a defendant gave a false name at arrest must explain how that conduct significantly hindered the prosecution or investigation of the offense," may not simply infer that false name "slowed down the criminal process") (superseding opinion at 989 F.2d 454) [7#2]; *U.S. v. Robinson,* 978 F.2d 1554, 1566 (10th Cir. 1992) (remanded: not clear from record that use of aliases actually hindered investigation); *U.S. v. Manning,* 955 F.2d 770, 774–75 (1st Cir. 1992) (reversed: arresting officers knew defendant's true identity at time of arrest or shortly after); *U.S. v. Williams,* 952 F.2d 1504, 1515–16 (6th Cir. 1991) (reversed: "Application Note 4(b) specifically permits lies to investigating agents provided they do not significantly obstruct or impede the investigation"; held it was clearly erroneous to find defendant's false statements did so) [4#15]; *U.S. v. Moreno,* 947 F.2d 7, 9–10 (1st Cir. 1991) (reversed: no showing defendant's use of different versions of his name actually impeded investigation) [4#15]. Cf. *U.S. v. Bell,* 953 F.2d 6, 8–9 (1st Cir. 1992) (reversed: use of alias to obtain post office box while avoiding arrest did not actually hinder investigation) [4#15].

The obstruction of justice must be willful, and one court held that it was error not to allow medical testimony bearing on a defendant's mental state. *U.S. v. Altman,* 901 F.2d 1161, 1164–65 (2d Cir. 1990) [3#8]. See also *U.S. v. Monroe,* 990 F.2d 1370, 1375–76 (D.C. Cir. 1993) (reversed: defendant missed arraignment because notification letter arrived day late, and she failed to appear afterwards because she received confusing information); *U.S. v. Gardner,* 988 F.2d 82, 83–84 (9th Cir. 1993) (remanded: "section 3C1.1 enhancement must be premised on willful conduct that has the purpose of obstructing justice"); *U.S. v. Belletiere,* 971 F.2d 961, 965–66 (3d Cir. 1992) (reversed: no indication defendant transferred property to estranged wife to avoid forfeiture) [5#2]; *Tabares,* 951 F.2d at 411 (reversed: no evidence that defendant's giving false Social Security number to probation officer was willful) [4#13]; *U.S. v. Romulus,* 949 F.2d 713, 717 (4th Cir. 1991) (district court did not make specific finding as to defendant's intent in giving false information to magistrate judge, but remand unnecessary where defendant admitted intent to obstruct on the record); *U.S. v. Stroud,* 893 F.2d 504, 507–08 (2d Cir. 1990) (remanded: §3C1.1 requires intent, and "mere flight [from arrest] in the immediate aftermath of a crime, without more, is insufficient") [2#20].

Note that *attempts* to obstruct justice are also covered under §3C1.1. See, e.g., *Jackson,* 974 F.2d at 106 ("it is irrelevant to a finding of attempted obstruction that [the witness] testified in spite of Jackson's threats"); *U.S. v. Keats,* 937 F.2d 58, 67 (2d Cir. 1991) (affirmed for attempt to flee before trial); *U.S. v. Osborne,* 931 F.2d 1139, 1151–54 (7th Cir. 1991) (affirmed for attempts to hire persons to kill potential government witnesses); *U.S. v. Gaddy,* 909 F.2d 196, 199 (7th Cir. 1990) (affirmed for giving false name after arrest and lying about arrest and fingerprint records for two days even though impact on investigation was minimal) [3#11]; *U.S. v. Blackman,* 904 F.2d 1250, 1259 (8th Cir. 1990) (affirmed for use of alias even though police knew real name) [3#11]; *U.S. v. Baker,* 894 F.2d 1083, 1084 (9th Cir. 1990) (enhancement proper where defendant misstated number of prior convictions even though probation officer could have secured his "rap sheet"). Cf. *U.S. v. Cotts,* 14 F.3d 300, 307 (7th Cir. 1994) (affirmed: "That [defendant] and his coplotters ultimately could not

have murdered the fictitious informant does not diminish the sincerity of any efforts to accomplish that end. Futile attempts because of factual impossibility are attempts still the same") [6#10]; *U.S. v. Hicks,* 948 F.2d 877, 885 (4th Cir. 1991) (not inconsistent to apply §3C1.1 to defendant, who threw cocaine out of car during high-speed chase but later helped recover cocaine, and then grant §3E1.1 reduction for cooperation) [4#13].

Note that a "denial of guilt" by defendant that does not constitute perjury does not warrant enhancement. See §3C1.1, comment. (n.1), and section III.C.2.c below.

2. Examples

Courts have identified a variety of actions that constitute obstruction of justice under §3C1.1, including testifying untruthfully, lying to authorities, fleeing arrest, disposing of evidence, and influencing witnesses. Following are citations to several varieties of obstructive conduct. Note that some of these cases were decided before the materiality requirements outlined in the preceding subsection went into effect. See §3C1.1, comment. (nn. 3(d), (f), (g), (h), and 4(a), (b), (c)).

a. False testimony during a judicial proceeding

U.S. v. Soto-Lopez, 995 F.2d 694, 699–700 (7th Cir. 1993) (false testimony at suppression hearing); *U.S. v. Ransom,* 990 F.2d 1011, 1014 (8th Cir. 1993) (lying to grand jury, but remanded for specific findings); *U.S. v. Bennett,* 975 F.2d 305, 308 (6th Cir. 1992) (false testimony during trial); *U.S. v. Johnson,* 968 F.2d 208, 215–16 (2d Cir. 1992) (suborning perjury); *U.S. v. McDonald,* 964 F.2d 390, 392–93 (5th Cir. 1992) (use of alias while under oath before magistrate judge and in filing affidavit); *U.S. v. Thompson,* 962 F.2d 1069, 1071–72 (D.C. Cir. 1992) (false testimony at trial) [4#22]; *U.S. v. McDonough,* 959 F.2d 1137, 1141 (1st Cir. 1992) (same); *U.S. v. Contreras,* 937 F.2d 1191, 1194 (7th Cir. 1991) (same); *U.S. v. Fu Chin Chung,* 931 F.2d 43, 45 (11th Cir. 1991) (same); *U.S. v. Hassan,* 927 F.2d 303, 309 (7th Cir. 1991) (lying repeatedly at detention hearing and sentencing); *U.S. v. Matos,* 907 F.2d 274, 276 (2d Cir. 1990) (false testimony at suppression hearing) [3#10]. See also *U.S. v. Acuna,* 9 F.3d 1442, 1445–46 (9th Cir. 1993) (false testimony at trial of another where plea agreement required defendant to testify truthfully) [6#9].

Application Note 1 to §3C1.1 states that a defendant's alleged false testimony or statements should be evaluated "in a light most favorable to the defendant." The D.C. Circuit held that Note 1 "raises the standard of proof—above the 'preponderance of the evidence' . . . —but it does not require proof of something more than ordinary perjury." *Thompson,* 962 F.2d at 1071 ("sentencing court must determine whether the defendant testified (1) falsely, (2) as to a material fact, and (3) willfully in order to obstruct justice, not merely inaccurately as the result of confusion or a faulty memory") [4#22]. The court later specified "that when a district court judge makes a finding of perjury under section 3C1.1, he or she must make independent findings based on clear and convincing evidence. The nature of the findings necessarily depends on the nature of the case. Easy cases, in which the evidence of perjury is weighty and indisputable, may require less in the way of factual findings, whereas close cases may require more." *U.S. v. Montague,* 40 F.3d 1251, 1253–56 (D.C. Cir. 1994) [7#5]. See also *U.S. v. Onumonu,* 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 1 "'is obviously different—and more favorable to the defendant—than the preponderance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard"). Cf. *U.S. v. Cabbell,* 35 F.3d 1255, 1261 (8th Cir. 1994) (remanded: "dis-

trict court did not evaluate Cabbell's testimony in a light most favorable to him as required by" Note 1); *U.S. v. Hilliard,* 31 F.3d 1509, 1520 (10th Cir. 1994) (enhancement may not be imposed for alleged perjury that "would not tend to influence or affect the issue" even if believed); *U.S. v. Parker,* 25 F.3d 442, 449 (7th Cir. 1994) (remanded: defendant's "false swearing at his plea hearing did not amount to perjury because [the subject matter] was not 'material' within the meaning of the federal perjury statute"); *U.S. v. Willis,* 940 F.2d 1136, 1140 (8th Cir. 1991) ("No enhancement should be imposed based on the defendant's testimony if a reasonable trier of fact could find the testimony true."). But see *McDonough,* 959 F.2d at 1141 ("due process is not violated where perjury is established by a preponderance of the evidence").

See also cases in section III.C.5.

b. False name

After Nov. 1, 1990, providing a false name or identification at arrest does not warrant enhancement unless it "actually resulted in a significant hindrance to the investigation or prosecution of the instant offense." §3C1.1, comment. (n.4(a)). See, e.g., *U.S. v. McCoy,* 36 F.3d 740, 742 (8th Cir. 1994) (affirmed: use of alias significantly hindered investigation and arrest); *U.S. v. Pofahl,* 990 F.2d 1456, 1482 (5th Cir. 1993) (before arrest defendant assumed new name in new state); *U.S. v. Rodriguez,* 942 F.2d 899, 902 (5th Cir. 1991) (use of alias at time of arrest and during police investigation did not hinder investigation, but enhancement proper because defendant provided co· with a fraudulent birth certificate, Application Note 3(c)). See also *U.S. v. Rodriguez-Macias,* 914 F.2d 1204, 1205 (9th Cir. 1990) (giving false name at time of arrest) [3#14]; *U.S. v. Saintil,* 910 F.2d 1231, 1232–33 (1st Cir. 1990) (using false name at arrest and until arraignment) [3#14]; *U.S. v. Brett,* 872 F.2d 1365, 1372–73 (8th Cir. 1989) (giving false name when arrested) [2#5]. See also section 1. Willfulness and Materiality, above.

c. False statements and failure to disclose

U.S. v. St. James, 38 F.3d 987, 988 (8th Cir. 1994) (providing materially false information to pretrial services officer investigating defendant's pretrial release); *U.S. v. Benitez,* 34 F.3d 1489, 1497 (9th Cir. 1994) (attempts to conceal an outstanding escape warrant, not discovered until after the plea was entered—knowledge of warrant would have affected government's handling of plea agreement and bail); *U.S. v. Thomas,* 11 F.3d 1392, 1399–1401 (7th Cir. 1993) (giving false information concerning prior arrests to probation officer), *U.S. v. Thompson,* 944 F.2d 1331, 1347–48 (7th Cir. 1991) (lied to probation officer about violation of condition of release while awaiting sentencing) [4#10]; *U.S. v. Duke,* 935 F.2d 161, 162 (8th Cir. 1991) (did not provide truthful information as required by plea agreement); *U.S. v. Edwards,* 911 F.2d 1031, 1033–34 (5th Cir. 1990) (failure to disclose location of coconspirator after instructed to do so) [3#14]; *U.S. v. Lofton,* 905 F.2d 1315, 1316–17 (9th Cir. 1990) (lied to probation officer by claiming to have accepted responsibility for crimes but continued criminal activity while in jail awaiting sentencing) [3#10]; *U.S. v. Dillon,* 905 F.2d 1034, 1039 (7th Cir. 1990) (gave false name for source of drugs) [3#10]; *U.S. v. Baker,* 894 F.2d 1083, 1084 (9th Cir. 1990) (misstatements to probation officer regarding criminal history) [3#2]; *U.S. v. Penson,* 893 F.2d 996, 998 (8th Cir. 1990) (provided false information) [3#2].

However, a "refusal to admit guilt or provide information to a probation officer" is not a basis for the obstruction enhancement. See U.S.S.G. §3C1.1, comment. (n.1) (Nov. 1990); *U.S. v. Surasky,* 976 F.2d 242, 245 (5th Cir. 1992); *Thompson,* 944 F.2d at 1347–48 (improper to give enhancement to defendants who falsely denied, during presentence investigations, drug use while on bail; contrary holding in *U.S. v. Jordan,* 890 F.2d 968, 973 (7th Cir. 1989), is now invalid), [4#10]. See also *U.S. v. Johns,* 27 F.3d 31, 35 (2d Cir. 1994) (error to apply §3C1.1 to defendant who during presentence interview falsely denied involvement in any drug transactions other than those charged in indictment—"There is no principled basis for distinguishing between laconic noes and the same lies expressed in full sentences. . . . [A]bsent perjury, a defendant may not suffer an increase in his sentence solely for refusing to implicate himself in illegal activity, irrespective of whether that refusal takes the form of silence or some affirmative statement denying his guilt") [6#17]. But see *U.S. v. Rodriguez-Razo,* 962 F.2d 1418, 1420–21 (9th Cir. 1992) (upheld for failure to volunteer three prior convictions during presentence interviews, (n.4(c)). See also section 1. Willfulness and Materiality, above.

Going beyond a simple denial of guilt, however, may warrant enhancement. See, e.g., *U.S. v. Osuorji,* 32 F.3d 1186, 1192 (7th Cir. 1994) (affirmed: enhancement proper for giving false exculpatory explanation under oath).

d. Refusal to testify

U.S. v. Morales, 977 F.2d 1330, 1331 (9th Cir. 1992) (refusal to testify at trial of coconspirator after being granted immunity); *U.S. v. Williams,* 922 F.2d 737, 739-40 (11th Cir. 1991) ("refusal to testify at a co-conspirator's trial after an immunity order had been issued clearly constituted" obstruction, but §3C1.1 cannot be applied because defendant was sentenced for contempt for same action). But see *U.S. v. Partee,* 31 F.3d 529, 531–33 (7th Cir. 1994) (remanded: refusal to testify with immunity at coconspirator's trial was not part of defendant's "instant offense" and thus §3C1.1 enhancement was improper) [7#2].

e. Flight and failure to appear

U.S. v. Shinder, 8 F.3d 633, 635 (8th Cir. 1993) (flight before sentencing); *U.S. v. McCarthy,* 961 F.2d 972, 979–80 (1st Cir. 1992) (same); *U.S. v. Lyon,* 959 F.2d 701, 707 (8th Cir. 1992) (used false driver's license and alias while fugitive for about a year; violated probation); *U.S. v. Sanchez,* 928 F.2d 1450, 1458–59 (6th Cir. 1991) (fleeing apartment to avoid arrest before warrant issued after learning coconspirator was arrested); *U.S. v. Mondello,* 927 F.2d 1463, 1465–67 (9th Cir. 1991) (defendant hid for two weeks and then fled to avoid capture after he had been arrested three weeks earlier and was expected to turn himself in); *U.S. v. St. Julian,* 922 F.2d 563, 571 (10th Cir. 1990) (failure to appear for sentencing) [3#19]; *U.S. v. Teta,* 918 F.2d 1329, 1333–34 (7th Cir. 1990) (intentional failure to appear for arraignment) [3#17]; *U.S. v. Perry,* 908 F.2d 56, 59 (6th Cir. 1990) (jumping bond and thereby delaying sentencing for eight months) [3#11]; *U.S. v. Pierce,* 893 F.2d 669, 677 (5th Cir. 1990) (attempting to flee arrest) [2#19]; *U.S. v. Galvan-Garcia,* 872 F.2d 638, 641 (5th Cir. 1989) (throwing marijuana out of car during flight, high-speed chase) [2#7].

Following Note 4(d), the Eleventh Circuit reversed an enhancement for two defendants who disappeared during plea negotiations but before indictment. "We conclude that the §3C1.1 enhancement does not apply to persons engaged in criminal activity who learn of an investigation into that activity and simply disappear to avoid arrest, without more. Such

persons do not face a two-level enhancement for failing to remain within the jurisdiction or for failing to keep the Government apprised of their whereabouts during its pre-indictment investigation." *U.S. v. Alpert,* 28 F.3d 1104, 1106–07 (11th Cir. 1994) (en banc) (superseding opinion at 989 F.2d 454) [7#2].

Note that attempting to escape arrest is now covered under §3C1.2. See section III.C.3. Reckless Endangerment During Flight.

f. Destroying or concealing evidence

Application Note 3(d) states that destroying or concealing material evidence "contemporaneously with arrest" warrants enhancement only if it also "resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender." See, e.g., *U.S. v. Curtis,* 37 F.3d 301, 308 (7th Cir. 1994) (affirmed: defendant received approximately $225,000 in drug proceeds from other conspirators who were evading police, temporarily concealed the money, and later released funds to courier); *U.S. v. Garcia,* 34 F.3d 6, 12 (1st Cir. 1994) (drugs defendant threw out car window were never recovered, hindering prosecution's ability to pursue conviction on drug count); *U.S. v. Kenyon,* 7 F.3d 783, 786 (8th Cir. 1993) (affirmed: flushing cocaine down toilet during arrest caused four-month delay in investigation and prosecution); *U.S. v. Sykes,* 4 F.3d 697, 699 (8th Cir. 1993) (attempting to destroy stolen checks by tearing them up warranted enhancement "because investigators were forced to send the check pieces to a government crime laboratory to be reassembled"); *U.S. v. Brown,* 944 F.2d 1377, 1383 (7th Cir. 1991) (defendant turned over proceeds of marijuana sales to another person "for safekeeping" after he became aware he was subject of criminal investigation). Cf. *U.S. v. Perry,* 991 F.2d 304, 311–12 (6th Cir. 1993) (remanded: attempt to hide robbery proceeds "was not, in any way, 'a material hindrance' to the investigation or prosecution"); *U.S. v. Savard,* 964 F.2d 1075, 1078–79 (11th Cir. 1992) (reversed: secreting boarding slip at time of arrest did not materially hinder investigation because Coast Guard already possessed information on slip).

g. Threatening or influencing witnesses

U.S. v. Pofahl, 990 F.2d 1456, 1481–82 (5th Cir. 1993) (affirmed: asked husband not to incriminate her, as prohibited by 18 U.S.C. §1512(b), Application Note 3(i)); *U.S. v. Larson,* 978 F.2d 1021, 1026 (8th Cir. 1992) (post-arrest letter from jail asking friend to manufacture testimony); *U.S. v. Woods,* 976 F.2d 1096, 1103 (7th Cir. 1992) (threatened witness during presentence investigation); *U.S. v. Snider,* 976 F.2d 1249, 1251–52 (9th Cir. 1992) (pre-arrest attempt to intimidate possible witness into staying quiet); *U.S. v. Ashers,* 968 F.2d 411, 413 (4th Cir. 1992) (providing falsified voice exemplar to expert witness to influence testimony) [5#2]; *U.S. v. Hershberger,* 956 F.2d 954, 957 (10th Cir. 1992); *U.S. v. Sabatino,* 943 F.2d 94, 100 (1st Cir. 1991); *U.S. v. McCann,* 940 F.2d 1352, 1360 (10th Cir. 1991); *U.S. v. Shoulberg,* 895 F.2d 882, 885–86 (2d Cir. 1990); *U.S. v. Penson,* 893 F.2d 996, 998 (8th Cir. 1990) [3#2]; *U.S. v. Pierce,* 893 F.2d 669, 677 (5th Cir. 1990) [2#19].

There is some disagreement as to when indirect threats, such as those made to third parties, constitute obstruction. The Fourth Circuit reversed an enhancement based on a threat made to a third party but not heard by the target of the threat. *U.S. v. Brooks,* 957 F.2d 1138, 1149–50 (4th Cir. 1992) (defendant must threaten target in her presence or issue threat with likelihood that target will learn of it) [4#19]. Other circuits have affirmed the enhancement in similar circumstances, often reasoning that "since the adjustment applies to attempts . . .

it is not essential that the threat was communicated to [the target]." *U.S. v. Capps,* 952 F.2d 1026, 1028–29 (8th Cir. 1991) (affirmed enhancement based on defendant's statement to third party that defendant was going to "deal" with an informant, even though statement was never communicated to informant) [4#18]. See also *U.S. v. Jackson,* 974 F.2d 104, 106 (9th Cir. 1992) (sending copies of government informant's cooperation agreement, with words "snitch" and "rat" written at top, to third parties was properly deemed attempt to influence: "Where a defendant's statements can be reasonably construed as a threat, even if they are not made directly to the threatened person, the defendant has obstructed justice"); *U.S. v. Tallman,* 952 F.2d 164, 168–69 (8th Cir. 1991) (affirmed: defendant tried to hire someone to harm any cooperating witnesses that might come forward); *Shoulberg,* 895 F.2d at 885–86 (affirmed: note to codefendant asking for address of another codefendant and voicing intent to harm that codefendant for cooperating with government was sanctionable as attempt to obstruct).

Some courts have affirmed upward departures for serious threats or acts of physical harm that were held to be not adequately covered under §3C1.1. See, e.g., *U.S. v. Wint,* 974 F.2d 961, 970–71 (8th Cir. 1992) (death threats against codefendant and innocent third parties) [5#4]; *U.S. v. Baez,* 944 F.2d 88, 90 (2d Cir. 1991) (abducting and threatening to kill informant); *U.S. v. Wade,* 931 F.2d 300, 306 (5th Cir. 1991) (defendant had coconspirator threaten and shoot at person); *U.S. v. Drew,* 894 F.2d 965, 974 (8th Cir. 1990) (attempt to murder witness) [3#2].

Citing the "light most favorable to defendant" language in Application Note 1, the Second Circuit reversed an enhancement where defendant's statement to a codefendant could have been interpreted as either an invitation to fabricate a defense or a warning not to make up a false story. *U.S. v. Lew,* 980 F.2d 855, 857 (2d Cir. 1992) (defendant's statement was "highly ambiguous" and district court referred to evidence in support of enhancement as a "slim reed") [5#6]. But see *U.S. v. Robinson,* 14 F.3d 1200, 1204 n.3 (7th Cir. 1994) (Note 1 applies to false testimony or false statements, not to attempts to persuade a codefendant to lie or withhold information).

3. Attempting to Escape Arrest, Reckless Endangerment

Because of the willfulness requirement, there was some question as to whether an attempt to escape arrest, without more, warranted enhancement. Five circuits held that it did not. See *U.S. v. John,* 935 F.2d 644, 648 (4th Cir. 1991); *U.S. v. Burton,* 933 F.2d 916, 917–18 (11th Cir. 1991) ("mere flight," without more, does not warrant enhancement); *U.S. v. Hagan,* 913 F.2d 1278, 1284–85 (7th Cir. 1990) ("instinctive flight" from arrest not obstruction) [3#14]; *U.S. v. Garcia,* 909 F.2d 389, 392 (9th Cir. 1990) (reversing enhancement based on brief attempt to evade arresting officers) [3#11]; *U.S. v. Stroud,* 893 F.2d 504, 507–08 (2d Cir. 1990) (§3C1.1 requires intent, and "mere flight [from arrest] in the immediate aftermath of a crime, without more, is insufficient") [2#20]. See also *U.S. v. Alpert,* 28 F.3d 1104, 1106–07 (11th Cir. 1994) (en banc) ("enhancement does not apply to persons engaged in criminal activity who learn of an investigation into that activity and simply disappear to avoid arrest, without more") (superseding opinion at 989 F.2d 454) [7#2]; *U.S. v. Madera-Gallegos,* 945 F.2d 264, 266–68 (9th Cir. 1991) (reversing enhancement given to defendants who fled country to avoid arrest when they suspected something went wrong with drug deal) [4#8]. Cf. *U.S. v. White,* 903 F.2d 457, 461–62 (7th Cir. 1990) ("mere flight . . . might not constitute" obstruction, but enhancement was proper where lengthy high-speed chase while fleeing arrest clearly endangered police and innocent bystanders) [3#8].

Two changes to the Guidelines, effective Nov. 1, 1990, effectively codified these cases. Application Note 4(d) to §3C1.1 excludes "avoiding or fleeing from arrest," but new §3C1.2 requires a two-level increase for "reckless endangerment during flight." For examples, see *U.S. v. Bell,* 28 F.3d 615, 618 (7th Cir. 1994) (affirmed: firing shot at detective during escape attempt "falls squarely within" §3C1.2); *U.S. v. Washington,* 12 F.3d 1128, 1139 (D.C. Cir. 1994) (affirmed: defendant "drove in a fast and reckless manner through a series of neighborhood alleys and ended up flipping his car") [6#10]; *U.S. v. Chandler,* 12 F.3d 1427, 1433–34 (7th Cir. 1994) (affirmed for leading police on chase along two-lane highway through residential areas, at 35 to 55 mph, swerving to prevent police from passing him); *U.S. v. Luna,* 21 F.3d 874, 885 (9th Cir. 1994) (affirmed: ran three stop signs in getaway car, abandoned still-running car in residential area); *U.S. v. Sykes,* 4 F.3d 697, 700 (8th Cir. 1993) (affirmed: defendant sped away from officer and had to be forced off road); *U.S. v. Mills,* 1 F.3d 414, 423 (6th Cir. 1993) (affirmed finding that "driving recklessly at speeds up to 100 miles per hour on mountain roads . . . evinced a 'wanton disregard for the safety of other motorists'"); *U.S. v. Frazier,* 981 F.2d 92, 96 (3d Cir. 1992) (affirmed: defendant fled from DEA agents at high speed, swerved around DEA cars attempting to block him and struck one).

The First Circuit held that an armed defendant who briefly hesitated before obeying arresting officers' orders to freeze and get down did not, without more, qualify for enhancement under §3C1.2. *U.S. v. Bell,* 953 F.2d 6, 10 (1st Cir. 1992) (reversed) [4#15].

The Ninth Circuit has held that defendants who did not drive the getaway car during a high-speed chase may be given the enhancement, but only if it is shown that they "aided or abetted, counseled, commanded, induced, procured, or willfully caused" the reckless conduct. See §3C1.2, comment. (n.5). The government "must establish that the defendants did more than just willfully participate in the getaway chase." *U.S. v. Young,* 33 F.3d 31, 32–33 (9th Cir. 1994) (remanded: "Such conduct may be inferred from the circumstances of the getaway, . . . and the enhancement may be based on conduct occurring before, during, or after the high-speed chase"; district court must engage in fact-specific inquiry and specify reasons for holding passengers responsible for driver's conduct) [6#16]. Cf. *U.S. v. Jones,* 32 F.3d 1512, 1520 (11th Cir. 1994) (affirmed §3C1.2 enhancement: defendant recklessly drove getaway car in high-speed chase during which codefendant aimed gun at police—facts indicated defendant "reasonably could have foreseen that a weapon might be brandished to facilitate their escape").

Without holding that it was actually required (because the government did not dispute the point), the Ninth Circuit set forth a test to determine whether a sufficient "nexus" exists between the crime of conviction and the reckless behavior that endangers others. "A sufficient nexus exists to warrant enhancement under U.S.S.G. §3C1.2 if a substantial cause for the defendant's reckless escape attempt was to avoid detection for the crime of conviction. In applying the nexus test, we look to the state of mind of the defendant when he recklessly attempted to avoid capture, not to why the police were pursuing him. The factors of geographic and temporal proximity give some indication of causation, but are not controlling determinates, particularly when the defendant's state of mind is established." *U.S. v. Duran,* 37 F.3d 557, 559–60 (9th Cir. 1994) (affirmed: although dangerous car chase occurred four days after bank robbery and in different vehicle than the one defendant originally escaped in, "the car chase was 'in efforts to avoid apprehension due to his commission of the bank robbery, as well as stealing the motor vehicle.' The district court's findings are not clearly erroneous. There was sufficient nexus between the bank robbery and the car chase") [7#4].

Note that an upward departure beyond the two-level enhancement may be warranted

"where a higher degree of culpability [than recklessness] was involved" or where "death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person." §3C1.2 comment. (nn.2 & 6). See cases in section VI.B.1.b.

In a case to which §3C1.2 did not apply, the Ninth Circuit held not only that fleeing arrest "by itself is not covered by §3C1.1," but also that "whether a defendant recklessly endangers others while fleeing bears no logical relation to whether [he] was obstructing the law enforcement officers who were attempting to apprehend him." The court reversed an enhancement given to a defendant who engaged in a twenty-five-mile high-speed chase even though it was "uncontroverted" that he endangered the lives of pursuing agents, agents at roadblocks, and residents of villages he sped through. *U.S. v. Christoffel*, 952 F.2d 1086, 1089 (9th Cir. 1991).

4. Procedural Issues

"Instant offense": The obstruction must occur during the investigation, prosecution, or sentencing of "the instant offense," which has been interpreted to mean the offense of conviction. See *U.S. v. Bagwell*, 30 F.3d 1454, 1458–59 (11th Cir. 1994); *U.S. v. Levy*, 992 F.2d 1081, 1083–84 (10th Cir. 1993); *U.S. v. Ford*, 989 F.2d 347, 352 (9th Cir. 1993); *U.S. v. Yates*, 973 F.2d 1, 4–5 (1st Cir. 1992) [5#2]; *U.S. v. Belletiere*, 971 F.2d 961, 967–68 (3d Cir. 1992) [5#2]; *U.S. v. Barry*, 938 F.2d 1327, 1332–35 (D.C. Cir. 1991) [4#7]; *U.S. v. Perdomo*, 927 F.2d 111, 118 (2d Cir. 1991); *U.S. v. Dortch*, 923 F.2d 629, 632 (8th Cir. 1991); *U.S. v. Roberson*, 872 F.2d 597, 609 (5th Cir. 1989).

The D.C. Circuit held that alleged false testimony before a grand jury regarding defendant's drug use could only be used for a §3C1.1 enhancement in a later drug possession conviction if the earlier testimony was related to the offense of conviction. *Barry*, 938 F.2d at 1335. See also *U.S. v. Woods*, 24 F.3d 514, 516–18 (3d Cir. 1994) (remanded: enhancement may not be given to defendant who lied to FBI and grand jury about whether two friends participated in robbery that he was not convicted of—he was not indicted for that robbery and pled guilty to two others; departure is not proper either, because the Sentencing Commission "appears to have considered false statements like those involved here, and elected not to punish them as part of the conviction for the instant offense") [6#17]; *U.S. v. Haddad*, 10 F.3d 1252, 1266 (7th Cir. 1993) (reversed: alleged threat to prosecutor was not committed "in the course of attempting to avoid detection or responsibility for th[e] offense" of conviction) [6#9]; *U.S. v. Cox*, 985 F.2d 427, 432 (8th Cir. 1993) (remanded: cannot base enhancement on discrepancies between previous statements and grand jury testimony relating to investigation of drug trafficking by others—alleged discrepancies "had no impact" on defendant's case, the "instant offense"). Cf. *U.S. v. Crousore*, 1 F.3d 382, 384–85 (6th Cir. 1993) (whether defendant's lie was about offense of conviction, it occurred during detention and sentencing hearings for instant offense and enhancement was proper—"the test is not whether the false statement was about the actual crime charged, but whether it was made during the investigation, prosecution, or sentencing of the 'instant offense'").

The Tenth Circuit held that "'offense' may include the concerted criminal activity of multiple defendants. See U.S.S.G. Ch. 3, Pt. B, Intro. comment. Consequently, the section 3C1.1 enhancement applies . . . in a case closely related to [defendant's] own, such as that of a codefendant." *U.S. v. Bernaugh*, 969 F.2d 858, 860–62 (10th Cir. 1992) (affirming adjustment where district court found defendant extensively perjured himself under oath at his guilty plea hearing regarding the participation of codefendants, who were proceeding to trial, in drug transaction) [5#1]. See also *U.S. v. Acuna*, 9 F.3d 1442, 1445–46 (9th Cir. 1993)

(false testimony at trial of another where plea agreement required defendant to testify truthfully) [6#9]. But cf. *U.S. v. Partee,* 31 F.3d 529, 531–33 (7th Cir. 1994) (remanded: refusal to testify under immunity at coconspirator's trial was not part of defendant's "instant offense" and thus §3C1.1 enhancement was improper; however, conduct may be punished as contempt) [7#2].

Investigation or prosecution: The Fifth Circuit has held that because the language of §3C1.1 requires that the obstruction occur "during the investigation or prosecution of the instant offense," the enhancement may not be based on a defendant's attempts to conceal the crime prior to the investigation or prosecution. See *U.S. v. Luna,* 909 F.2d 119, 120 (5th Cir. 1990) (concealing weapon used in assault before crime reported and investigation begun) [3#11]; *U.S. v. Wilson,* 904 F.2d 234, 235–36 (5th Cir. 1990) (use of alias when illegally shipping firearms) [3#11]. See also *U.S. v. Fiala,* 929 F.2d 285, 289–90 (7th Cir. 1991) (false statement to trooper when stopped on highway that defendant had nothing illegal in car was "no more than a denial of guilt" and thus fell within exception in §3C1.1, comment. (n.1)). The commentary to §3C1.1, notes 3(d) and 4(a) (effective Nov. 1, 1990), has been revised along these same lines, stating that if such conduct occurred at the time of arrest it shall not warrant an adjustment for obstruction unless it actually hindered the investigation or prosecution of the instant offense. Cf. *U.S. v. Polland,* 994 F.2d 1262, 1269 (7th Cir. 1993) (affirmed for defendant who concealed contraband prior to investigation—"focus is not on timing but on materiality"); *U.S. v. Stout,* 936 F.2d 433, 435 (9th Cir. 1991) (enhancement proper for defendant who attempted to flush counterfeit bill down toilet at police station after arrest because "substantial period of time had passed" after arrest and attempt was willful). See also section III.C.2.f.

The Eleventh Circuit held that, under §3C1.1, comment. (n.3(d)), the obstructive conduct must occur during an "official investigation." Thus, defendant's attempt to hide embezzlement during investigation by bank investigators, prior to any law enforcement activity, did not qualify. *U.S. v. Kirkland,* 985 F.2d 535, 537–38 (11th Cir. 1993) [5#10]. Similarly, the Eighth Circuit held that the enhancement was properly refused for a defendant who made a threat when he was under investigation but did not know it. "We believe that the term 'willfully' should be reserved for the more serious case, where misconduct occurs with knowledge of an investigation, or at least with a correct belief that an investigation is probably underway." *U.S. v. Oppedahl,* 998 F.2d 584, 585–86 (8th Cir. 1993).

The Eighth Circuit held that a defendant's perjury at his first trial could be used to enhance the sentence at his second sentencing after the first conviction was reversed and defendant then pled guilty. "A defendant's attempt to obstruct justice does not disappear merely because his conviction has been reversed on grounds having nothing to do with the obstruction. The trial was part of the prosecution of the offense to which defendant pleaded guilty on remand. . . . We hold that the reversal of a conviction on other grounds does not limit the ability of a sentencing judge to consider a defendant's conduct prior to the reversal in determining a sentence on remand." *U.S. v. Has No Horse,* 42 F.3d 1158, 1159–60 (8th Cir. 1994) [7#5].

State offenses: The Ninth Circuit affirmed the enhancement in a federal fraud conviction where, prior to federal action, defendant had attempted to obstruct an earlier state investigation into the same scheme, holding that "there is no state–federal distinction for obstruction of justice" and enhancement is not limited to acts aimed at federal authorities. *U.S. v. Lato,* 934 F.2d 1080, 1082–83 (9th Cir. 1991) [4#7]. Accord *U.S. v. Smart,* 41 F.3d 263, 265–66 (6th Cir. 1994) (affirmed: defendant obstructed justice by twice using false name to make bail and flee after arrests by state authorities on charges later prosecuted in

federal court); *U.S. v. Adediran,* 26 F.3d 61, 64–65 (8th Cir. 1994) (affirmed for failure to appear in state court after originally being charged under state law for conduct underlying federal offense—"this circuit does not prohibit obstruction enhancements in federal prosecutions merely because state entities were involved"); *U.S. v. Emery,* 991 F.2d 907, 911–12 (1st Cir. 1993) (agreeing with *Lato* and affirming enhancement for obstruction for attempted escape from state authorities prior to federal investigation: "so long as some official investigation is underway at the time of the obstructive conduct, the absence of a federal investigation is not an absolute bar to" enhancement) [5#13].

If obstruction is an element of the offense: The enhancement is not applicable to conduct that is an element of the offense. *U.S. v. Werlinger,* 894 F.2d 1015, 1016–18 (8th Cir. 1990) (concealment is element of embezzlement and may not provide basis for obstruction enhancement) [3#2]. Nor is it applicable when defendant receives a jail term for contempt for the same conduct. *U.S. v. Williams,* 922 F.2d 737, 739–40 (11th Cir. 1991) [3#20].

However, Application Note 6 states that the enhancement may still be applied in such cases "where a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself." See, e.g., *U.S. v. Fredette,* 15 F.3d 272, 275–76 (2d Cir. 1994) (affirmed: defendants convicted of witness retaliation offenses properly given §3C1.1 enhancements for additional attempt to obstruct justice: "We conclude that Application Note 6 applies to cases in which a defendant attempts to further obstruct justice, provided that the obstructive conduct is significant and there is no risk of double counting. Regardless of whether the defendants in this were successful in their efforts to obstruct justice, the fact remains that they used a false affidavit in an effort to derail the investigation and prosecution of their respective cases") [6#12]; *U.S. v. Agoro,* 996 F.2d 1288, 1292–93 (1st Cir. 1993) (affirmed: although obstruction is element of failure to appear, defendant committed further obstruction by making materially false statements to probation officer); *U.S. v. Lueddeke,* 908 F.2d 230, 234–35 (7th Cir. 1990) (defendant convicted of perjury and obstruction of justice properly received the §3C1.1 enhancement for additional acts of interference with the investigation of these offenses) [3#11].

Other: Once the court finds facts sufficient to constitute obstruction of justice, the enhancement is mandatory, regardless of other mitigating behavior. *U.S. v. Ancheta,* 38 F.3d 1114, 1118 (9th Cir. 1994) ("enhancement is mandatory, not discretionary, once a district court determines that a defendant has obstructed justice"); *U.S. v. Shonubi,* 998 F.2d 84, 87–88 (2d Cir. 1993) (remanded: once trial court found "defendant clearly lied willfully" during sworn trial testimony, enhancement required); *U.S. v. Ashers,* 968 F.2d 411, 414 (4th Cir. 1992) (when facts support enhancement it must be applied); *U.S. v. Austin,* 948 F.2d 783, 788–89 (1st Cir. 1991) (reversing failure to impose enhancement although district court found defendant committed perjury) [4#12]; *U.S. v. Alvarez,* 927 F.2d 300, 303 (6th Cir. 1991) (if court finds defendant testified untruthfully as to a material fact, no discretion in applying enhancement); *U.S. v. Avila,* 905 F.2d 295, 297 (9th Cir. 1990) (mandatory, but subsequent mitigating actions may be accounted for in making other adjustments and sentencing within range); *U.S. v. Roberson,* 872 F.2d 597, 609 (5th Cir. 1989) (enhancement is mandatory).

Application Note 7, added Nov. 1, 1992, provides that "the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." See also section III.C.2. Examples: Threatening or influencing witnesses.

Note that obstructive conduct may warrant departure if present to a degree not taken into account in formulating the Guidelines. See cases in section VI.B.1.b.

5. Constitutional Issues

The Supreme Court upheld the constitutionality of applying §3C1.1 to a defendant who commits perjury at trial. *U.S. v. Dunnigan,* 113 S. Ct. 1111, 1117–18 (1993), *rev'g* 944 F.2d 178 (4th Cir. 1991) [5#9]. Most circuits had previously reached the same conclusion. See *U.S. v. Collins,* 972 F.2d 1385, 1414 (5th Cir. 1992); *U.S. v. Contreras,* 937 F.2d 1191, 1194 (7th Cir. 1991); *U.S. v. Batista-Polanco,* 927 F.2d 14, 22 (1st Cir. 1991); *U.S. v. Matos,* 907 F.2d 274, 276 (2d. Cir. 1990); *U.S. v. Barbosa,* 906 F.2d 1366, 1369–70 (9th Cir. 1990); *U.S. v. Wallace,* 904 F.2d 603, 604–05 (11th Cir. 1990); *U.S. v. Keys,* 899 F.2d 983, 988–89 (10th Cir. 1990); *U.S. v. Wagner,* 884 F.2d 1090, 1098 (8th Cir. 1989); *U.S. v. Acosta-Cazares,* 878 F.2d 945, 953 (6th Cir. 1989).

The Court also held that, if defendant objects, "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same. . . . [I]t is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." *Dunnigan,* 113 S. Ct. at 1117. Several circuits have held that a finding of guilt by the jury alone is insufficient, that the district court must make a specific, independent finding that the defendant willfully lied about a material matter. See, e.g., *U.S. v. Markum,* 4 F.3d 891, 897 (10th Cir. 1993); *U.S. v. Burnette,* 981 F.2d 874, 879 (6th Cir. 1992); *U.S. v. Lawrence,* 972 F.2d 1580, 1583 (11th Cir. 1992); *U.S. v. Cunavelis,* 969 F.2d 1419, 1423 (2d Cir. 1992); *U.S. v. Benson,* 961 F.2d 707, 709 (8th Cir. 1992) [4#21]; *U.S. v. Lozoya-Morales,* 931 F.2d 1216, 1218–19 (7th Cir. 1991). Cf. *U.S. v. Ransom,* 990 F.2d 1011, 1013–14 (8th Cir. 1993) (remanded: although district court found that defendant lied before grand jury, it merely relied on presentence report without making findings on any specific instances of perjury).

The D.C. Circuit stated that "[t]he admonition in Application Note 1 [to §3C1.1] to evaluate the defendant's testimony 'in a light most favorable to the defendant' apparently raises the standard of proof—above the 'preponderance of the evidence' . . . —but it does not require proof of something more than ordinary perjury." *U.S. v. Thompson,* 962 F.2d 1069, 1071 (D.C. Cir. 1992) ("the sentencing court must determine whether the defendant testified (1) falsely, (2) as to a material fact, and (3) willfully in order to obstruct justice, not merely inaccurately as the result of confusion or a faulty memory") [4#22]. The court later specified that Note 1 requires clear and convincing evidence of perjury to apply the enhancement. *U.S. v. Montague,* 40 F.3d 1251, 1253–56 (D.C. Cir. 1994) [7#5]. See also *U.S. v. Onumonu,* 999 F.2d 43, 45 (2d Cir. 1993) (evidence standard under Note 1 "'is obviously different—and more favorable to the defendant—than the preponderance-of-evidence standard' [and] sounds to us indistinguishable from a clear-and-convincing standard") Cf. *U.S. v. Hilliard,* 31 F.3d 1509, 1519 (10th Cir. 1994) ("Perjury provisions are not to be construed broadly," and §3C1.1 enhancement for perjury "should not rest upon vague or ambiguous questions, rather precise questioning is required"); *U.S. v. Crousore,* 1 F.3d 382, 385 n.3 (6th Cir. 1993) (under Note 1, "if the meaning of the defendant's statement is ambiguous, the ambiguity should be resolved in his favor to prevent a finding of perjury when the defendant's statement, taken another way, would not have been perjurious"); *U.S. v. Rojo-Alvarez,* 944 F.2d 959, 969 (1st Cir. 1991) (Note 1 "'does not mandate the resolution of every conflict in testimony in favor of the defendant'; rather, it 'simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction'"); *U.S. v. Willis,* 940 F.2d 1136, 1140 (8th Cir. 1991) ("No enhancement should be imposed based on the defendant's testimony if a reasonable trier of fact could find the testimony true."). But see *U.S. v. McDonough,* 959 F.2d 1137, 1141 (1st

Cir. 1992) ("due process is not violated where perjury is established by a preponderance of the evidence").

It has been held that a court should also make explicit findings when, over the government's objection, it refuses to make an obstruction adjustment for perjury. See *U.S. v. Humphrey,* 7 F.3d 1186, 1190–91 (5th Cir. 1993) (remanded for specific finding on whether defendant committed perjury); *U.S. v. Tracy,* 989 F.2d 1279, 1290 (1st Cir. 1993) (same; also stating that district court cannot require "something more than basic perjury to justify [the] enhancement"). However, the Second Circuit held that "*Dunnigan* does not say that every time a defendant is found guilty despite his exculpatory testimony, the court must hold a hearing to determine whether or not the defendant committed perjury." *Dunnigan* requires findings to *impose* the enhancement, but "does not suggest that the court make findings to support its decision against the enhancement." *U.S. v. Vegas,* 27 F.3d 773, 782–83 (2d Cir. 1994) (affirmed: where jury apparently rejected defendant's "innocent explanation" by finding him guilty, district court was not required to make a finding as to whether defendant had committed perjury) [6#17].

Before *Dunnigan,* the Third Circuit stated that "the perjury of the defendant must not only be clearly established, and supported by evidence other than the jury's having disbelieved him, but also must be sufficiently far-reaching as to impose some incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury." *U.S. v. Colletti,* 984 F.2d 1339, 1348 (3d Cir. 1992) [5#5]. Without specifically referring to *Colletti,* the Sixth Circuit rejected an "incremental burden" claim, holding that *Dunnigan* "unanimously rejected this view." *U.S. v. Seymour,* 38 F.3d 261, 263–64 (6th Cir. 1994) (affirmed enhancement for defendant who "committed simple perjury by denying involvement in all aspects of the crime and offering innocent explanations for certain actions").

Note that Application Note 1 states that §3C1.1 "is not intended to punish a defendant for the exercise of a constitutional right," such as denying or refusing to admit guilt. See also *U.S. v. Urbanek,* 930 F.2d 1512, 1515 (10th Cir. 1991) (actions that are equivalent to "exculpatory no's," or denials of guilt, are not grounds for §3C1.1 enhancement). See also cases in section III.C.2.c.

D. Multiple Counts—Grouping (§3D1)

1. Decision to Group

"All counts involving substantially the same harm shall be grouped together . . . ." U.S.S.G. §3D1.2. See, e.g., *U.S. v. Chischilly,* 30 F.3d 1144, 1160–61 (9th Cir. 1994) (remanded: murder and aggravated sexual abuse should have been grouped where "they [we]re inflicted contemporaneously on a single victim or result[ed] in an essentially single composite harm") [7#1]; *U.S. v. Bruder,* 945 F.2d 167, 170–71 (7th Cir. 1991) (en banc) (reversing failure to group offense of being a convicted felon in possession of a firearm with possession of same unregistered firearm—counts "involved substantially the same harm" and were "closely intertwined") [4#11]; *U.S. v. Riviere,* 924 F.2d 1289, 1306 (3d Cir. 1991) (unlawful delivery of firearms should be grouped with unlawful possession of weapon by felon); *U.S. v. Cain,* 881 F.2d 980, 982–83 (11th Cir. 1989) (retaining and concealing stolen U.S. Treasury checks, §2B5.2, may be grouped with count of willfully possessing those checks, §2B1.1) [2#12].

Counts that "involve the same victim and . . . acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan" are considered to

involve the same harm. U.S.S.G. §3D1.2(b). See also *U.S. v. Sneezer*, 983 F.2d 920, 925 (9th Cir. 1992) (reversed: two rapes of same victim within minutes of each other should have been grouped—"decision of whether to group independent offenses . . . turns on timing") [5#8]; *U.S. v. Norman*, 951 F.2d 1182, 1185 (10th Cir. 1991) (reversed: group two counts of giving false information regarding firearms and explosives to airline on different days where defendant's motive was to harm wife's boyfriend, not the airline); *U.S. v. Wilson*, 920 F.2d 1290, 1294 (6th Cir. 1991) (reversed: five counts involving telephone discussions and one count of mailing a letter, all related to an attempt to kill one person, should be grouped) [3#19].

Counts are also considered to involve the same harm "[w]hen the offense level is determined . . . [by] the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm." U.S.S.G. §3D1.2(d). Two circuits held that grouping under this subsection is not proper when the guidelines measure the harm differently. See *U.S. v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (reversed: guidelines for wire fraud and money laundering measure harm differently) [5#9]; *U.S. v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992) (same).

On the other hand, courts should avoid "bootstrapping" dissimilar counts that may arise from the same transaction. See, e.g., *U.S. v. Lombardi*, 5 F.3d 568, 570–71 (1st Cir. 1993) (proper not to group three mail fraud counts with two money laundering counts even though same funds were involved—the different offenses involved distinct acts and different victims, and the frauds did not "embod[y] conduct that is treated as a specific offense characteristic" of money laundering) [6#6]; *U.S. v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992) (proper not to group drug trafficking and money laundering offenses—they are neither crimes "of the general same type," §3D1.2, comment. (n.6), nor closely related); *U.S. v. Patterson*, 962 F.2d 409, 415–17 (5th Cir. 1992) (remanded: offenses involving receipt or possession of stolen vehicles are one group, offenses involving alteration of VINs are another, but the two groups do not involve "substantially the same harm" and cannot be combined; also, related offense of obtaining money by false pretenses cannot be grouped with others); *U.S. v. Gallo*, 927 F.2d 815, 823–24 (5th Cir. 1991) (do not group money laundering and drug offenses, as in *Harper* above); *U.S. v. Astorri*, 923 F.2d 1052, 1056–57 (3d Cir. 1991) (proper not to group fraud count with tax evasion count that involved proceeds from fraud scheme); *U.S. v. Barron-Rivera*, 922 F.2d 549, 554–55 (9th Cir. 1991) (do not group count of illegal alien in possession of firearm with count of being unlawful alien—harms are different) [3#19]; *U.S. v. Bakhtiari*, 913 F.2d 1053, 1062 (2d Cir. 1990) (offenses arising from same transaction not grouped because not "closely related"); *U.S. v. Porter*, 909 F.2d 789, 792–93 (4th Cir. 1990) (same) [3#13]; *U.S. v. Egson*, 897 F.2d 353, 354 (8th Cir. 1990) (same) [3#4]; *U.S. v. Pope*, 871 F.2d 506, 509–10 (5th Cir. 1989) (possession of pistol by felon need not be grouped with unlawful possession of silencer, §3D1.2(d)) [2#5]. Cf. *U.S. v. Beard*, 960 F.2d 965, 967–69 (11th Cir. 1992) (proper not to group two obstruction of justice convictions for acts that arose out of same scheme but occurred two years apart and involved different harms—one involved interfering with proper sentencing of another defendant in district court and the other involved attempt to suborn perjury before grand jury).

The Fifth Circuit held that the "questions of whether and how to group a defendant's offenses are legal questions," subject to de novo review. *Patterson*, 962 F.2d at 416.

For a discussion of the interaction of multiple counts and amendments, see section I.E.

2. Application of Adjustments

Note that when counts are grouped, courts should "[d]etermine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole." U.S.S.G. §3D1.3, comment. (n.3). See also §1B1.1(c) and (d) (indicating that adjustments from Chapter Three, parts A, B, and C should be applied to individual counts). The Ninth Circuit held it was error to apply two "vulnerable victim" enhancements under §3A1.1 for two separate fraud counts that were grouped. *U.S. v. Caterino*, 957 F.2d 681, 684 (9th Cir. 1992) (offense characteristics apply to overall scheme, not individual victims or counts) [4#19]. Cf. *U.S. v. Kleinebreil*, 966 F.2d 945, 954–55 (5th Cir. 1992) (enhancement for assault on official victim, §3A1.2 added to offense level for assault count should not also be added to offense level of marijuana counts that were related to, but not grouped with, assault; similarly, leadership role enhancement applicable to marijuana counts should not be added to offense level for assault).

However, the acceptance of responsibility reduction in §3E1.1 is applied *after* multiple counts are combined, not to each offense or each group. Thus, responsibility must be accepted for all counts to get a two-level reduction to the combined offense level. See *Kleinebreil*, 966 F.2d at 953; *U.S. v. McDowell*, 888 F.2d 285, 293 (3d Cir. 1989).

E. Acceptance of Responsibility (§3E1.1)

1. Examples of Denials

District courts have broad discretion to grant or deny the reduction for acceptance of responsibility. See U.S.S.G. §3E1.1, comment. (n.5); *U.S. v. Lghodaro*, 967 F.2d 1028, 1031–32 (5th Cir. 1992) (review is more deferential than clearly erroneous standard). It is most frequently denied for failure to cooperate with authorities or simply a failure, in the sentencing court's view, to accept responsibility for the criminal conduct. It has also been properly denied where a defendant continued a course of unlawful conduct after arrest. See, e.g., *U.S. v. Olvera*, 954 F.2d 788, 793 (2d Cir. 1992) (smuggling marijuana into jail while awaiting sentencing); *U.S. v. Reed*, 951 F.2d 97, 99–100 (6th Cir. 1991) (continued credit card fraud while in jail awaiting sentencing) [4#13]; *U.S. v. Snyder*, 913 F.2d 300, 305 (6th Cir. 1990) (used jail phone to continue drug dealing during pretrial detention); *U.S. v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990) (continued course of fraudulent activity); *U.S. v. Sanchez*, 893 F.2d 679, 681 (5th Cir. 1990) (firearms offense and drug use while on pretrial release) [3#1]; *U.S. v. Wivell*, 893 F.2d 156, 159 (8th Cir. 1990) (continued drug activity after indictment); *U.S. v. Jordan*, 890 F.2d 968, 974 (7th Cir. 1989) (continued drug dealing and use). See also *U.S. v. Jessup*, 966 F.2d 1354, 1356–57 (10th Cir. 1992) (properly denied for defendant who continued similar criminal activity, even though evidence of that activity was obtained in violation of state law) [4#24].

Note that the Sixth Circuit held that additional criminal conduct "committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced," may not be used as the basis for denial of a §3E1.1 reduction. The criminal conduct must be related or similar to the offense of conviction. *U.S. v. Morrison*, 983 F.2d 730, 733–35 (6th Cir. 1993) (noting that most other cases affirming denials involved such related or similar conduct) [5#8]. However, other circuits have affirmed denials based on unrelated criminal conduct. See, e.g., *U.S. v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994) (drug use by counterfeiting defendant—"the broad language of

Note 1(b) indicates that the criminal conduct or associations referred to relate not only to the charged offense, but also to criminal conduct or associations generally"); *U.S. v. Pace,* 17 F.3d 341, 343 (11th Cir. 1994) (marijuana use by false claims defendant; disagreed with *Morrison*); *U.S. v. O'Neil,* 936 F.2d 599, 600–01 (1st Cir. 1991) (affirmed denial based on defendant's drug use before sentencing for postal offenses: "We can find nothing unlawful about a court's looking to a defendant's later conduct in order to help the court decide whether the defendant is truly sorry for the crimes he is charged with"); *U.S. v. Watkins,* 911 F.2d 983, 984 (5th Cir. 1990) (affirmed denial of reduction based solely on fraud defendant's drug use while on release pending sentencing) [3#12]; *U.S. v. Scroggins,* 880 F.2d 1204, 1215–16 (11th Cir. 1989) (continued drug use after theft arrest) [2#11].

The reduction has been properly denied for a refusal to provide financial information needed by the court to levy an appropriate fine. *U.S. v. Cross,* 900 F.2d 66, 70 (6th Cir. 1990) [3#5]. And false information given to a probation officer, even if not material, may warrant denial of the reduction. *U.S. v. De Felippis,* 950 F.2d 444, 447 (7th Cir. 1991) [4#13].

Denial is also proper if defendant testifies untruthfully at trial. See, e.g., *U.S. v. Payne,* 962 F.2d 1228, 1236 (6th Cir. 1992) (district court found defendant had testified untruthfully at trial that he withdrew from conspiracy); *U.S. v. Zayas,* 876 F.2d 1057, 1060 (1st Cir. 1989) (committing perjury at trial) [2#9]. However, denial on the ground that the district court did not believe defendant's reason for committing the crime was held to be improper. Defendant otherwise accepted responsibility, and "[n]either §3E1.1 nor any cases we have found state or otherwise indicate that a defendant's claimed reason or motivation for committing a crime is a dispositive factor in determining whether to grant the adjustment unless the claim was intended as a defense to liability for the charged offense." *U.S. v. Gonzalez,* 16 F.3d 985, 991 (9th Cir. 1993) (superseding 6 F.3d 1415) [6#7]. See also *U.S. v. Khang,* 36 F.3d 77, 80 (9th Cir. 1994) (affirmed: lying about their motive for the crime in an attempt to get downward departure is not "relevant conduct," which would require denial of reduction, and, following *Gonzalez,* reduction could be given to defendants because "the lie would not establish a defense to the crime or avoid criminal liability").

Although proper to focus on defendant's pre-arrest rehabilitative efforts, the Eighth Circuit reversed the reduction where defendant's reconciliation with his mother and getting his job back were outweighed by his insistence on his factual innocence at trial and sentencing and on his drug use while on probation for another crime. *U.S. v. Speck,* 992 F.2d 860, 862–63 (8th Cir. 1993) (rehabilitation is relevant to §3E1.1 only if it manifests acceptance of responsibility for offense of conviction). See also section VI.C.2. Drug Addiction or Rehabilitation.

The lack of timeliness of a defendant's acceptance of responsibility may provide a reason for denial, and the district court "has substantial discretion on the issue." *U.S. v. Ochoa-Fabian,* 935 F.2d 1139, 1142 (10th Cir. 1991) (reduction properly refused defendant who denied essential elements of offense, was convicted at trial, and only afterward admitted guilt and expressed remorse). Accord *U.S. v. Osborne,* 931 F.2d 1139, 1155 (7th Cir. 1991) (affirmed: lack of remorse until "the final hour" proper basis for denial); *U.S. v. Rios,* 893 F.2d 479, 481 (2d Cir. 1990) (affirming denial of reduction based partly on defendant's "delay in taking a plea until just before jury selection"). The Fifth Circuit has noted that the addition of an extra-point reduction under §3E1.1(b), which focuses on the timeliness of a defendant's cooperation or guilty plea, does not mean that lack of timeliness is no longer a reason for denying the two-point reduction under §3E1.1(a). See *U.S. v. Diaz,* 39 F.3d 568, 572 (5th Cir. 1994) (affirmed: "While the terms of subsection (b) mandate consideration of

timeliness, the terms of subsection (a) do not forbid it. Indeed, the consideration of timeliness is expressly allowed").

2. Constitutional Issues

Courts have generally rejected facial challenges to §3E1.1 on Fifth and Sixth Amendment grounds. See, e.g., *U.S. v. Saunders,* 973 F.2d 1354, 1362–63 (7th Cir. 1992); *U.S. v. Cordell,* 924 F.2d 614, 619 (6th Cir. 1991); *U.S. v. Ross,* 920 F.2d 1530, 1537 (10th Cir. 1990); *U.S. v. Parker,* 903 F.2d 91, 106 (2d Cir. 1990); *U.S. v. Henry,* 883 F.2d 1010, 1011 (11th Cir. 1989); *U.S. v. Paz Uribe,* 891 F.2d 396, 400 (1st Cir. 1989) (Fifth Amendment).

There is a split, however, as to whether denial of the reduction for refusal to reveal or admit to potentially self-incriminating information may violate the Fifth Amendment. The Fourth, Fifth, and Sixth Circuits held that it does not. See *U.S. v. Clemons,* 999 F.2d 154, 158–61 (6th Cir. 1993) (affirmed denial to defendant who admitted conduct in offense of conviction but refused to admit to related conduct); *U.S. v. Frazier,* 971 F.2d 1076, 1080–87 (4th Cir. 1992) (affirmed denial to defendant who refused to assist government in locating stolen money orders) [4#24]; *U.S. v. Mourning,* 914 F.2d 699, 705 (5th Cir. 1990) (affirmed: requiring defendant to accept responsibility for uncharged conduct does not violate Fifth Amendment). Cf. *U.S. v. March,* 999 F.2d 456, 463–64 (10th Cir. 1993) (affirmed denial for defendant who refused to discuss offense with probation officer, claiming he might incriminate himself and destroy basis for appeal—defendant put government to proof at trial and did not prove entitlement to reduction) [6#1].

The Ninth Circuit held that "a sentencing court cannot consider *against* a defendant any constitutionally protected conduct." The court reversed a denial that was based on defendant's failure to voluntarily surrender to authorities or assist in the recovery of the "fruits and instrumentalities of the offense," factors that are listed in the commentary to §3E1.1 as to be used in "determining whether a defendant qualifies for this provision." *U.S. v. Watt,* 910 F.2d 587, 590–93 (9th Cir. 1990) [3#10]. See also *U.S. v. La Pierre,* 998 F.2d 1460, 1467–68 (9th Cir. 1993) (remanded: may not deny reduction because defendant refused to discuss facts with probation officer and planned to appeal where defendant otherwise accepted responsibility) [6#1]. Similarly, the Eleventh Circuit held that a court "may *not* balance the exercise of [statutory or constitutional] rights against the defendant's expression of remorse to determine whether the 'acceptance [of responsibility]' is adequate." *U.S. v. Rodriguez,* 959 F.2d 193, 195–98 (11th Cir. 1991) (remanded for reconsideration of denial to defendants who exercised Fifth Amendment rights and right to appeal) [4#23]. Note that the Ninth Circuit later held that an assertion of Fifth Amendment rights does not *entitle* a defendant to the reduction, and it cannot be granted to a defendant who refuses to make any statement, because an affirmative acceptance of responsibility is required. *U.S. v. Skillman,* 922 F.2d 1370, 1378–79 (9th Cir. 1990) (reversing reduction because "there was no indication of contrition . . . before or after" conviction). See also *U.S. v. Carroll,* 6 F.3d 735, 739 (11th Cir. 1993) (clear error to award reduction because of Fifth Amendment concerns when defendants "never admitted guilt nor expressed any remorse"); *Rodriguez,* 959 F.2d at 195–98 ("sentencing court is justified in considering the defendant's conduct prior to, during, and after the trial to determine if the defendant has shown any remorse").

The Third Circuit held that the Fifth Amendment protection against self-incrimination applies to related conduct, and the reduction may not be denied when a defendant refuses to admit conduct beyond the offense of conviction. *U.S. v. Frierson,* 945 F.2d 650, 658–60

(3d Cir. 1991) [4#11]. In ruling so, the appellate court agreed with the First and Second Circuits' holdings that denial of the reduction is a "penalty" rather than a "denied benefit." See *U.S. v. Oliveras,* 905 F.2d 623, 627–28 (2d Cir. 1990); *U.S. v. Perez-Franco,* 873 F.2d 455, 463–64 (1st Cir. 1989). Contra *U.S. v. Cojab,* 978 F.2d 341, 343 (7th Cir. 1992); *Mourning,* 914 F.2d at 706–07; *U.S. v. Trujillo,* 906 F.2d 1456, 1461 (10th Cir. 1990); *U.S. v. Gordon,* 895 F.2d 932, 936–37 (4th Cir. 1990); *Henry,* 883 F.2d at 1011–12. The *Frierson* court held, however, that this right "is not self-executing"; the reduction was properly refused, based on defendant's denial of possession of a gun in a count that was dismissed, because he volunteered the denial to his probation officer instead of remaining silent and claiming the privilege. 945 F.2d at 661–62. Accord *U.S. v. Corbin,* 998 F.2d 1377, 1390 (7th Cir. 1993) (affirmed: defendant failed to claim privilege, and denial was based on other, voluntarily made statements).

See also section III.E 3.

3. For Relevant Conduct or Offense of Conviction?

Must a defendant accept responsibility for all relevant criminal conduct, including counts that were dismissed, or only for conduct in the offense of conviction? The Background Commentary to §3E1.1 was amended Nov. 1, 1990, to clarify that "related conduct" should be considered. However, effective Nov. 1, 1992, that commentary was deleted and the language of the guideline and commentary changed. Now, defendant must accept responsibility "for his offense," §3E1.1(a). Application Note 1(a) was changed to list as an "appropriate consideration" for the reduction "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3. Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction .... However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." Thus, it would appear that relevant conduct may still come into play under §3E1.1. See e.g., *U.S. v. Rutledge,* 28 F.3d 998, 1002 (9th Cir. 1994) (affirmed: under amended Note 1(a), "a defendant has the right to remain silent regarding relevant, uncharged conduct; but, once he relinquishes that right and falsely denies such conduct, the district court may weigh the false denial in considering a reduction for acceptance of responsibility"); *U.S. v. Anderson,* 15 F.3d 979, 980–981 (10th Cir. 1994) (following Note 1, affirmed denial because defendant falsely denied possessing a knife, conduct that was relevant to his offense of conviction); *U.S. v. Gonzales,* 12 F.3d 298, 300 (1st Cir. 1993) (citing 1992 amendment, defendant need not admit conduct beyond offense of conviction, but "a court may properly consider whether a defendant who mendaciously denies relevant conduct has acted in a manner inconsistent with accepting responsibility"); *U.S. v. White,* 993 F.2d 147, 150–51 (7th Cir. 1993) (noting 1992 amendment, finding sentencing court properly considered defendant's false denials of relevant conduct to deny reduction). See also *U.S. v. Hammick,* 36 F.3d 594, 600–01 (7th Cir. 1994) (reduction could not be denied for refusal to discuss source of cash in excess of that received from charged offenses, but was properly denied for refusal to discuss means of travel to location of crime and source of counterfeit credit cards and other documents used in crime) [7#3]; *U.S. v. Meacham,* 27 F.3d 214, 217 (6th Cir. 1994) (holding that defendant who refused, on the advice of counsel,

to discuss his role in narcotics conspiracy with his probation officer failed to demonstrate acceptance of responsibility).

Previously, the circuits split on whether to consider relevant conduct. Compare *U.S. v. Piper,* 918 F.2d 839, 840–41 (9th Cir. 1990) (for count of conviction only) [3#16], *U.S. v. Oliveras,* 905 F.2d 623, 626–27 (2d Cir. 1990) (same) [3#9], and *U.S. v. Perez-Franco,* 873 F.2d 455, 463–64 (1st Cir. 1989) (same) [2#6], with *U.S. v. Frierson,* 945 F.2d 650, 655–56 (3d Cir. 1991) (for all criminal conduct, not just count of conviction) [4#11], *U.S. v. Mourning,* 914 F.2d 699, 705 (5th Cir. 1990) (same), *U.S. v. Munio,* 909 F.2d 436, 439–40 (11th Cir. 1990) (same), and *U.S. v. Gordon,* 895 F.2d 932, 936–37 (4th Cir. 1990) (same) [3#2]. See also *U.S. v. Ruth,* 946 F.2d 110, 113 (10th Cir. 1991) (affirmed refusal for defendant who did not accept responsibility for conduct in dismissed, related count); *U.S. v. Herrera,* 928 F.2d 769, 774–75 (6th Cir. 1991) (reduction properly refused for defendant who accepted responsibility only for quantity of drugs in indictment, not for larger amount in related conduct). Cf. *U.S. v. Shipley,* 963 F.2d 56, 58–60 (5th Cir. 1992) (reduction properly denied for defendant who accepted full responsibility for offense but refused to admit leadership role: "Even though leadership role in the offense of conviction is covered in [§3B1.1], such a role is conduct related to the offense and thus proper grist for the 'acceptance of responsibility' mill.") [4#24].

The D.C. Circuit, noting the split on this issue, stated that the Nov. 1, 1992 amendment to §3E1.1 "seems to resolve the confusion" by indicating that "the Guideline requires the showing of contrition only with respect to the offense of conviction." *U.S. v. Hicks,* 978 F.2d 722, 726 (D.C. Cir. 1992) (remanded, in light of amendment, to reconsider whether defendant, who was convicted of and admitted to one count, should have been denied reduction for claiming innocence of second count on which jury could not reach verdict) [5#5]. *U.S. v. Clemons,* 999 F.2d 154, 161 n.3 (6th Cir. 1993) (agreeing with *Hicks* that amendment should resolve Fifth Amendment issue) [6#1].

The Fourth Circuit held that there is "no legal impediment to considering . . . conduct which goes beyond the offense of conviction, but which is not sufficiently relevant to increase the sentencing range and/or the sentence chosen within the range. . . . A tenuous connection to the uncharged conduct may still lead a district court to view the conduct as 'related' for the purpose of determining the propriety of reducing the sentence for acceptance of responsibility, even if that same conduct is not 'relevant' to either an increase in the offense level or to the choice of a higher point in an established guideline range." *U.S. v. Choate,* 12 F.3d 1318, 1320 (4th Cir. 1993) (proper to consider failure to accept responsibility for role in two dismissed counts).

4. Procedural Issues

Most courts have specifically held that a plea of guilty by itself is insufficient, that a defendant must affirmatively demonstrate acceptance of responsibility. See, e.g., *U.S. v. Ruth,* 946 F.2d 110, 113 (10th Cir. 1991); *U.S. v. Fields,* 906 F.2d 139, 142 (5th Cir. 1990); *U.S. v. Guarin,* 898 F.2d 1120, 1122 (6th Cir. 1990); *U.S. v. Gonzalez,* 897 F.2d 1018, 1020 (9th Cir. 1990); *U.S. v. Blanco,* 888 F.2d 907, 911 (1st Cir. 1989); *U.S. v. Ortiz,* 878 F.2d 125, 128 (3d Cir. 1989); *U.S. v. Spraggins,* 868 F.2d 1541, 1542–43 (11th Cir. 1989). See also U.S.S.G. §3E1.1(c) ("A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right."); *U.S. v. Reed,* 951 F.2d 97, 100 (6th Cir. 1991) (mere willingness to accept punishment is insufficient). Cf. *U.S. v. Harriott,* 976 F.2d 198, 202 (4th

Cir. 1992) (reversed: "the district court's sole reason for finding that [defendant] had accepted responsibility . . . was that [defendant] agreed that he had been convicted").

The Eighth Circuit held that a guilty plea may be sufficient if the defendant also "'demonstrates a recognition and affirmative responsibility for the offense' and 'sincere remorse.'" *U.S. v. Knight,* 905 F.2d 189, 192 (8th Cir. 1990). See also *U.S. v. Furlow,* 980 F.2d 476, 477 (8th Cir. 1992) (en banc) ("while the guilty plea does not entitle a defendant to the reduction as a matter of right, . . . the guilty plea under all the circumstances [may] entitle [] a defendant to the credit").

Similarly, a defendant who enters an *Alford* plea may still qualify for the §3E1.1 reduction. See *U.S. v. Tucker,* 925 F.2d 990, 992–93 (6th Cir. 1991) (reduction is not per se precluded by use of *Alford* plea, but denial affirmed because defendant did not otherwise demonstrate acceptance of responsibility for her actions) [3#20]. Other circuits have basically agreed, indicating that the *Alford* plea is a factor that may be considered and that without a further demonstration of acceptance of responsibility the reduction may be denied. See, e.g., *U.S. v. Harlan,* 35 F.3d 176, 181 (5th Cir. 1994) (reduction properly denied to *Alford* defendant who refused to admit essential element of offense and persisted in explanation of conduct that the court did not find credible); *U.S. v. Burns,* 925 F.2d 18, 20–21 (1st Cir. 1991) (affirmed: "district court did not rely upon a per se rule regarding *Alford* pleas" to deny reduction); *U.S. v. Rodriguez,* 905 F.2d 372, 374 (11th Cir. 1990) (denial proper where court considered other evidence "tending to show that Rodriguez had not fully accepted responsibility").

The Sixth Circuit held that the reduction is not automatically precluded for a defendant using a defense of entrapment. *U.S. v. Fleener,* 900 F.2d 914, 918 (6th Cir. 1990) [3#6]. See also *U.S. v. Corral-Ibarra,* 25 F.3d 430, 440–41 (7th Cir. 1994) ("an entrapment defense, if pleaded in good faith," may not disqualify defendant from §3E1.1 reduction, but "it remains the defendant's task to manifest in some way that he has in fact acknowledged the wrongfulness of his conduct"); *U.S. v. Davis,* 36 F.3d 1424, 1435–36 (9th Cir. 1994) (same) (replacing opinion at 15 F.3d 902). But cf. *U.S. v. Simpson,* 995 F.2d 109, 112 (7th Cir. 1993) ("Where a defendant persists in asserting entrapment, she cannot also claim acceptance of responsibility"); *U.S. v. Hansen,* 964 F.2d 1017, 1021 (10th Cir. 1992) (same). The reduction was improperly denied for lack of timeliness for defendants who went to trial because plea agreements were not available, claimed duress as a defense, and maintained a claim of incomplete duress after trial. *U.S. v. Johnson,* 956 F.2d 894, 904–05 (9th Cir. 1992) [4#16].

The reduction is not automatically precluded by a decision to go to trial, §3E1.1, comment. (n.2), and the court should consider defendant's reasons for doing so. See, e.g., *U.S. v. McKinney,* 15 F.3d 849, 852–54 (9th Cir. 1994) (remanded: "this is one of the unusual cases"—defendant attempted to plead guilty, was rebuffed by court, was confused about his plea status, only put on "the most minimal and perfunctory of defenses," cooperated with authorities, and expressed sincere remorse); *U.S. v. Broussard,* 987 F.2d 215, 224 (5th Cir. 1993) (remanded: error to deny reduction to defendant who refused plea agreement and went to trial to contest whether law applied to his conduct—he did not deny "essential factual elements of guilt") [5#13]; *U.S. v. Rodriguez,* 975 F.2d 999, 1008–09 (3d Cir. 1992) (remanded for reconsideration of defendants' choices to reject plea agreements and contest issues on which they prevailed either at trial or on appeal) [5#5]. See also *U.S. v. Fields,* 39 F.3d 439, 447 (3d Cir. 1994) (remand required where denial of extra-point reduction under §3E1.1(b) "was based at least in part on the defendant's refusal to plead guilty to count III, on which he was acquitted"). Cf. *U.S. v. Castillo-Valencia,* 917 F.2d 494, 501 (11th Cir. 1990) (affirmed denial: "a defendant's decision to go to trial may properly be considered

along with other factors in determining whether there has been an acceptance of responsibility"). However, the reduction should not be given to a defendant who withdraws a guilty plea and then denies guilt at trial. *U.S. v. Amos,* 952 F.2d 992, 995 (8th Cir. 1991) (reversed) [4#18]. Note that one circuit has held that, after the reduction has been granted for a defendant who went to trial, the decision to go to trial may be used as the reason for selecting a higher sentence within the guideline range. See *U.S. v. Jones,* 997 F.2d 1475, 1477–80 (D.C. Cir. 1993) (en banc) [6#2].

The Seventh Circuit held that going to trial and steadfastly denying guilt does not preclude the reduction if there is an independent basis for granting it. "Application Note 1(c) to §3E1.1 lists 'voluntary payment of restitution prior to adjudication of guilt' as an independent reason for a two-level acceptance-of-responsibility reduction. Bean repaid the bank before the adjudication of guilt, and the district court therefore was entitled to award a reduction for acceptance of responsibility even though Bean denied guilt." *U.S. v. Bean,* 18 F.3d 1367, 1368 (7th Cir. 1994) (remanded: departure for "extraordinary acceptance of responsibility" by repaying fraudulently obtained funds before trial was improper, but court should consider reduction under §3E1.1). Cf. *U.S. v. Bennett,* 37 F.3d 687, 695 (1st Cir. 1994) (remanded: restitution paid as part of settlement of civil lawsuit "was not a 'voluntary payment of restitution prior to adjudication of guilt' . . . that justifies a reduction for acceptance of responsibility" via Note 1(c)).

The Fourth Circuit has held that rehabilitation prospects are not an element of acceptance of responsibility, and it was error to deny the reduction to a defendant whose mental condition made rehabilitation unlikely. *U.S. v. Braxton,* 903 F.2d 292, 296 (4th Cir. 1990), rev'd on other grounds, 111 S. Ct. 1854 (1991) [3#8]. But cf. *Reed,* 951 F.2d at 100 (reduction denied because defendant did not show contrition, "which may be the best predictor for rehabilitation").

If the denial of the acceptance of responsibility reduction is based on an improper ground, it may still be upheld if there is a valid ground for denial. *U.S. v. Diaz,* 39 F.3d 568, 571 (5th Cir. 1994); *U.S. v. Ramirez,* 910 F.2d 1069, 1071 (2d Cir. 1990) [3#12].

Note that the reduction may be given even if an obstruction of justice enhancement was imposed. U.S.S.G. §3E1.1, comment. (n.4). See also *U.S. v. Lallemand,* 989 F.2d 936, 938 (7th Cir. 1993) (affirming §3C1.1 enhancement based on defendant's instructing friend to destroy evidence before defendant's arrest even though defendant received §3E1.1 reduction for post-arrest contrition); *U.S. v. Hicks,* 948 F.2d 877, 885 (4th Cir. 1991) (affirming reduction for helping authorities retrieve cocaine, even when §3C1.1 obstruction enhancement was given for discarding same cocaine during high-speed chase) [4#13]. But cf. *U.S. v. Amos,* 984 F.2d 1067, 1072–73 (10th Cir. 1993) (affirmed denial of §3E1.1 reduction where defendant's escape attempt before sentencing hearing earned §3C1.1 enhancement for this offense—not an "extraordinary case" warranting both adjustments).

A district court may not give a one-point reduction for a defendant's "partial acceptance of responsibility" or for "being halfway convinced that a defendant accepted responsibility." *U.S. v. Valencia,* 957 F.2d 153, 156 (5th Cir. 1992) ("plain language of §3E1.1 indicates that a district court *must* reduce the offense level by *two* levels if it finds that the defendant has *clearly* accepted responsibility") [4#21]. Accord *U.S. v. Carroll,* 6 F.3d 735, 740–41 (11th Cir. 1993).

A stipulation in a plea agreement by the government and defendant that the defendant accepted responsibility is not binding on the sentencing court. *U.S. v. Nunley,* 873 F.2d 182, 187 (8th Cir. 1989) [2#5]. Also, due process does not require the court or the probation officer to inform a defendant that his or her sentence may be favorably adjusted for accep-

tance of responsibility. *U.S. v. Simpson,* 904 F.2d 607, 610–11 (11th Cir. 1990) [3#10]. For cases regarding notice to defendant that the court intends to deny the reduction, see section IX.E. Sentencing Procedure—Procedural Requirements.

5. Additional Reduction for Timely Assistance to Authorities, §3E1.1(b)

A Nov. 1992 amendment added §3E1.1(b)(1) and (2) to grant an additional one-level reduction for certain timely acceptances of responsibility. This amendment is not listed in §1B1.10(d), and every circuit to rule on the issue has held that the amendment may not be applied retroactively. See *U.S. v. Rodriguez-Diaz,* 19 F.3d 1340, 1341 (11th Cir. 1994); *U.S. v. Dullen,* 15 F.3d 68, 70–71 (6th Cir. 1994); *Ebbole v. U.S.,* 8 F.3d 530, 539 (7th Cir. 1993); *U.S. v. Aldana-Ortiz,* 6 F.3d 601, 603 (9th Cir. 1993) [6#6]; *U.S. v. Avila,* 997 F.2d 767, 768 (10th Cir. 1993); *U.S. v. Dowty,* 996 F.2d 937, 939 (8th Cir. 1993); *Desouza v. U.S.,* 995 F.2d 323, 324 (1st Cir. 1993); *U.S. v. Cacedo,* 990 F.2d 707, 710 (2d Cir. 1993). Cf. *U.S. v. Cassidy,* 6 F.3d 554, 556–57 (8th Cir. 1993) (error to refuse to consider §3E1.1(b)(2) for defendant who pled guilty before its effective date but was sentenced after—date of sentencing controls).

The Fifth Circuit has held that a defendant may not be denied the §3E1.1(b) reduction once a three-part test is met. The test, based on the guideline itself, is: "1) the defendant qualifies for the basic 2-level decrease for acceptance of responsibility under subsection (a); 2) the defendant's offense level is 16 or higher before reduction . . . under subsection (a); and 3) the defendant *timely* 'assisted authorities' by taking one—but not necessarily both—of two 'steps': either (a) 'timely' furnishing information to the prosecution about defendant's own involvement in the offense (subsection (b)(1)); or (b) 'timely' notifying the authorities that the defendant will enter a guilty plea (subsection (b)(2))." The issue in this case was whether defendant satisfied step 3(b). The court determined, based on the language of the guideline and Application Note 6, that "the timelines required . . . applies specifically to the governmental efficiency recognized in two—but only two—discrete areas: 1) the *prosecution's* not having to prepare for trial, and 2) the *court's* ability to manage its own calendar and docket." The timeliness requirement "does *not* implicate . . . any other governmental function," such as the time required for the probation office to prepare its reports or when defendant begins serving his sentence. Thus, it was error to deny the reduction to this defendant for having obstructed justice under §3C1.1 by lying to the probation officer and possibly delaying the presentence report. "[A]s long as the obstruction does not cause the prosecution to prepare for trial or prevent the court . . . from managing its docket efficiently, obstruction of justice is not an element to be considered." *U.S. v. Tello,* 9 F.3d 1119, 1124–28 (5th Cir. 1993) [6#8]. Accord *U.S. v. Talladino,* 38 F.3d 1255, 1265–66 (1st Cir. 1994) (remanded: once §3E1.1(a) reduction is granted, if defendant satisfies subsection (b)'s requirements court may not deny extra reduction because of defendant's obstruction of justice—"The language of subsection (b) is absolute on its face. It simply does not confer any discretion on the sentencing judge to deny the extra one-level reduction so long as the subsection's stated requirements are satisfied") [7#5].

The Fifth Circuit used "the *Tello* test" to reverse another denial of a §3E1.1(b) reduction. Defendant satisfied the first two steps, and the appellate court determined that defendant "clearly took the step defined in subsection (b)(2)" when he timely notified the authorities of his intention to plead guilty. "Having thus satisfied all three prongs, Mills was entitled—as a matter of right—to the third 1-level reduction . . . . [T]he court was without any sen-

tencing discretion whatsoever to deny" the decrease. *U.S. v. Mills,* 9 F.3d 1132, 1137–39 (5th Cir. 1993) [6#8]. See also *U.S. v. Colussi,* 22 F.3d 218, 219–20 (9th Cir. 1994) (remanded: following *Tello,* when defendant qualifies for reduction under §3E1.1(a), "the district court must consider whether" defendant also qualifies for reduction under subsection (b)) [6#14]; *U.S. v. Keppler,* 2 F.3d 21, 23 (2d Cir. 1993) (dicta: When a defendant is entitled to §3E1.1(a) reduction, "the court must then determine whether the conditions of Guidelines §3E1.1(b) have been met, and if they have, the court must grant the third level of reduction").

The Ninth Circuit held that once defendant gave multiple day-of-arrest confessions and led police to evidence, he qualified under §3B1.1(b)(1) by timely providing complete information to authorities, and he could later challenged the admissibility of the confession without losing the reduction. *U.S. v. Stoops,* 25 F.3d 820, 822–23 (9th Cir. 1994) [6#15]. The court also rejected the government's claim that defendant did not actually "assist[]authorities" because the information he provided was "readily available" to the police without the confessions. Subsection (b) "does not require that the defendant timely provide information that the authorities would not otherwise discover or would discover only with difficulty; it requires merely that the defendant 'assist' the authorities by timely providing complete information or by timely notifying them of his intent to plead guilty." Cf. *U.S. v. Francis,* 39 F.3d 803, 809 (7th Cir. 1994) (affirmed denial of §3E1.1(b)(1) reduction: although defendant initially provided the FBI with details of his involvement in conspiracy, he later retracted portions of his statement concerning involvement of coconspirators).

The Third Circuit held that the reduction could not, without more, be denied to a defendant who would not accept responsibility for a count on which he was acquitted. Defendant was refused a plea agreement because he was willing to plead guilty to two counts but not a third. He was convicted at trial on two counts, which he did not contest, but acquitted on the third. He received the two-point reduction under §3E1.1(a), but was denied the extra point under §3E1.1(b). The appellate court remanded because, while there may be a legitimate ground for denying the reduction, "it appears that the court may have incorrectly considered the defendant's refusal to admit conduct not comprising part of the offenses of conviction." *U.S. v. Fields,* 39 F.3d 439, 446–47 (3d Cir. 1994).

Just as the above cases show that the extra reduction cannot be denied for reasons outside of the specific requirements in §3E1.1(b), it also cannot be *given* for other mitigating factors outside of §3E1.1(b). See, e.g., *U.S. v. Narramore,* 36 F.3d 845, 846–47 (9th Cir. 1994) ("Narramore raises two other grounds that he alleges entitle him to the third-level reduction under §3E1.1(b). These are (1) the fact that his guilty plea allowed the government to secure the guilty pleas of his co-defendants, and (2) Narramore's remarkable rehabilitation since his incarceration. We, however, cannot expand upon the two discrete grounds for reduction outlined by the Commission in U.S.S.G. §3E1.1(b)."); *U.S. v. Khang,* 36 F.3d 77, 80 (9th Cir. 1994) (remanded: "The guideline states what criteria determine eligibility for the third point. Equalization of sentences is not among them.").

Other cases have elaborated further on the timeliness requirement. The Eleventh Circuit held that §3B1.1(b)(2) is not facially unconstitutional, but held that to avoid an unconstitutional *application* of §3E1.1(b)(2) the district court must determine whether defendant's notification was timely in light of the circumstances. "Avoiding trial preparation and the efficient allocation of the court's resources are descriptions of the desirable consequences and objectives of the guideline. They are not of themselves precise lines in the sand that solely determine whether notification was timely. . . . Application must bear in mind the extent of trial preparation, the burden on the court's ability to allocate its resources efficiently, and reasonable opportunity to defense counsel to properly investigate." *U.S. v.*

McConaghy, 23 F.3d 351, 353–54 (11th Cir. 1994) [6#15]. Cf. *U.S. v. Robinson,* 14 F.3d 1200, 1203 (7th Cir. 1994) (affirmed denial of reduction: guilty plea four days before trial was insufficient where government "had expended 'considerable funds and effort preparing for a five-to-six-week trial'" and district court's docket was affected).

The Eighth Circuit affirmed denial of the reduction to defendants who pled guilty after their initial convictions were reversed. "Even though each defendant pleaded guilty within approximately three months of the reversal of his convictions on initial appeal, we do not agree that the government was saved much effort by those pleas, since the bulk of preparation by the government was for the initial trial and could relatively easily have been applied to the second trial as well. . . . There is no clear error . . . in the court's refusal to grant an additional one-level reduction in base offense level." *U.S. v. Vue,* 38 F.3d 973, 975 (8th Cir. 1994) [7#5].

The Ninth Circuit also indicated that all circumstances should be considered, including delays caused by a defendant's constitutional challenges. Without evidence that the government had prepared for trial, it was error to deny the reduction on the grounds that over a year passed before defendant entered a guilty plea and he had filed a pretrial motion to suppress evidence. Constitutionally protected conduct should not be considered against the defendant, and his "exercise of those rights at the pretrial stage should not in and of itself preclude a reduction for timely acceptance." The court also stated that "we do not consider the length of time that has passed in isolation," and here, in a complex case, there were "at least four continuances," the government filed two superseding indictments, defendant's pretrial motions were not frivolous or filed for purposes of delay, and no trial date had been set. *U.S. v. Kimple,* 27 F.3d 1409, 1412–15 & n.4 (9th Cir. 1994) (also noting that determination whether "the use of judicial resources would preclude an additional one-point reduction . . . should be made on a case-by-case basis") [6#15].

The Ninth Circuit later cautioned defendants that they should notify the government that they intend to plead guilty once constitutional or procedural challenges are resolved—if the government prepares for trial the plea is not timely and the reduction cannot be granted. See *Narramore,* 36 F.3d at 846–47 (defendant properly denied extra reduction because he did not plead guilty until one week before trial and "after the government had begun seriously to prepare for trial. . . . While Narramore may well have intended to plead guilty in the event that his motion to dismiss [for double jeopardy] was denied, he at no time approached the government with this information so the trial preparation could have been avoided. Nothing prevented him from doing so.") [7#3]. Cf. *U.S. v. McClain,* 30 F.3d 1172, 1174 (9th Cir. 1994) (affirmed: fact that defendant notified his attorney that he wanted to plead guilty insufficient—by time government was informed it had prepared for trial).

The First Circuit affirmed a denial of the reduction for a defendant who indicated a willingness to plead guilty except for a dispute as to the weight of the drugs—"notification of an intention to enter a guilty plea, subject to a major condition, [does not] meet the standard of section 3E1.1(b)(2)." *U.S. v. Morillo,* 8 F.3d 864, 871–72 (1st Cir. 1993). The Seventh Circuit stated that "an early notification of an intention to plead guilty does not by itself entitle a defendant to a reduction under subsection (b)(2) unless it served the purpose of conserving government and court resources." Here, defendants claimed that they had earned the reduction by giving early notice, but they "did not plead guilty until approximately one week before the trial, after various pre-trial conferences were held, and after the trial was rescheduled several times. . . . Until the defendants actually pleaded guilty, they could still change their minds and the government still had to prepare for the contingency that the defendants might elect to go to trial." *U.S. v. Francis,* 39 F.3d 803, 808 (7th Cir. 1994).

The Eighth Circuit stated in a §3E1.1(b) case that it "gives great deference to a district court's refusal to grant a reduction for acceptance of responsibility and will reverse only for clear error." *U.S. v. McQuay,* 7 F.3d 800, 801 (8th Cir. 1993). In *McQuay* and another recent case the court affirmed denials where defendant's actions were not "timely." See 7 F.3d at 802–03 (denial proper where defendant did not plead guilty until two days before second trial—he had been through one mistrial, he did not provide any information to government to assist its investigation, and the court had already rescheduled the second trial); *U.S. v. Schau,* 1 F.3d 729, 731 (8th Cir. 1993) (denial proper where "the authorities had recovered the stolen money and the government had already prepared for trial before [defendant] confessed and pleaded guilty"). Cf. *U.S. v. Booth,* 996 F.2d 1395, 1397 (2d Cir. 1993) (affirmed denial of defendant's claim to §3E1.1(b) reduction on basis of "extraordinary circumstances" of his cooperation, stating that "whether there are extraordinary circumstances warranting such an award is committed to the sound discretion of the district court").

IV. Criminal History

A. Calculation

1. Consolidated or Related Cases

"Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c)." U.S.S.G. §4A1.2(a)(2). Application Note 3 provides: "Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing." Note that the intervening arrest exception was added Nov. 1991, and see *U.S. v. Bishop,* 1 F.3d 910, 912 (9th Cir. 1993) (addition of intervening arrest language was substantive change that "carries no weight in construing the 1990 version of §4A1.2(a)(2)"). See also §4A1.1(f) (add one point for violent offenses not counted because they were related to another crime of violence).

"In determining whether cases are related, the first question is always whether the underlying offenses were punctuated by an intervening arrest; by the logic and ordering of Note 3, that inquiry is preliminary to any consideration of consolidated sentencing." *U.S. v. Gallegos-Gonzalez,* 3 F.3d 325, 327 (9th Cir. 1993) ("sentences for offenses separated by an intervening arrest are always unrelated under section 4A1.2 as amended in 1991, regardless of whether the cases were consolidated for sentencing"). Accord *U.S. v. Boonphakdee,* 40 F.3d 538, 544 (2d Cir. 1994) ("As the word 'otherwise' makes clear, whether an intervening arrest was present constitutes a threshold question that, if answered in the affirmative, precludes any further inquiry"); *U.S. v. Hallman,* 23 F.3d 821, 825 (3d Cir. 1994); *U.S. v. Springs,* 17 F.3d 192, 196 (7th Cir. 1994). Beyond that point, as the examples below indicate, whether sentences are related is often a fact-intensive inquiry.

a. "Occurred on the same occasion"

The Seventh Circuit rejected a claim that the pre-1991 version reading "single occasion" required the cases to be "factually related and inextricably intertwined" and held that the test is temporal proximity. *U.S. v. Connor*, 950 F.2d 1267, 1270–71 (7th Cir. 1991) (possession of weapons and possession of stolen goods at and prior to same date occurred on "single occasion"). But cf. *U.S. v. Manuel*, 944 F.2d 414, 416 (8th Cir. 1991) (federal forgeries over 14-month period not related to state forgery 5 months later); *U.S. v. Jones*, 899 F.2d 1097, 1101 (11th Cir. 1990) (bank robbery and attempted bank robbery occurring within 90 minutes were "temporally distinct" and therefore unrelated).

The Tenth Circuit found upward departure appropriate where defendant's criminal history did not reflect the "exceedingly serious nature" of the related murder and kidnapping offenses perpetrated on the same day. *U.S. v. Rivas*, 922 F.2d 1501, 1503–04 (10th Cir. 1991) (but remanded for court to explain on record degree of departure). The Seventh Circuit, however, rejected a similar ground for departure where the related cases were not as serious. *Connor*, 950 F.2d at 1272–73.

b. "Single common scheme or plan"

In applying this language, most courts look for "factual commonality. Factors such as temporal and geographical proximity as well as common victims and a common criminal investigation are dispositive." *U.S. v. Shewmaker*, 936 F.2d 1124, 1129 (10th Cir. 1991) (drug smuggling offense and conviction for failure to appear six months later to serve sentence for that offense were not part of common scheme or plan). See also *U.S. v. Butler*, 970 F.2d 1017, 1022–27 (2d Cir. 1992) (question of fact whether separate robberies committed fifteen minutes apart were related) [4#25]. The Ninth Circuit looks at several factors to determine whether prior offenses were part of a common scheme or plan: "(1) whether the crimes were committed 'within a short period of time'; (2) whether the crimes involved the same victim; (3) whether the defendant was arrested by the same law enforcement agency for both crimes; and (4) when the arrests occurred and whether both crimes were solved during the course of one investigation. . . . [T]he court will also examine the similarities in the offenses." Also, "whether two prior offenses are related under §4A1.2 is a mixed question of law and fact subject to de novo review." *U.S. v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992).

Other examples: *U.S. v. Garcia*, 962 F.2d 479, 481–82 (5th Cir. 1992) (although temporally and geographically alike—occurring within nine-day period in same area—prior two heroin sales were not part of common scheme or plan); *U.S. v. Yeo*, 936 F.2d 628, 630 (1st Cir. 1991) (prior unrelated thefts of rented machinery all occurred within six weeks but were on different dates and involved different victims); *U.S. v. Walling*, 936 F.2d 469, 471 (10th Cir. 1991) (counterfeiting offenses that occurred months apart, in different states, and involved different individuals and counterfeiting equipment were not related); *U.S. v. Veteto*, 920 F.2d 823, 825 (11th Cir. 1991) (burglary of residence and armed robbery of hotel not part of common scheme despite imposition of concurrent sentences—distinct crimes were committed over a month apart); *U.S. v. Kinney*, 915 F.2d 1471, 1472 (10th Cir. 1990) (Nevada bank robbery not related to California bank robberies despite concurrent sentences—defendant was convicted in different jurisdictions for robberies of different banks over three-month period); *U.S. v. Jones*, 899 F.2d 1097, 1101 (11th Cir. 1990) (concurrent sentences for bank robbery and attempted bank robbery committed 90 minutes apart not related—involved different banks, separate trials, and different sentences).

The fact that the prior crimes were similar or fit a pattern does not mean they were related. See, e.g., *U.S. v. Chartier,* 970 F.2d 1014–16 (2d Cir. 1992) (although four similar robberies committed to support heroin addiction "fit a pattern, . . . they were not part of a single common scheme or plan") [4#25]; *U.S. v. Brown,* 962 F.2d 560, 564 (7th Cir. 1992) ("relatedness finding requires more than mere similarity of crimes, . . . common criminal motive or *modus operandi*"); *U.S. v. Lowe,* 930 F.2d 645, 647 (8th Cir. 1991) (convictions for check forgery not related even though they shared same modus operandi and motive—they were committed over two years, involved different victims and different locations); *U.S. v. Davis,* 922 F.2d 1385, 1389–90 (9th Cir. 1991) (crimes of issuing bad checks and theft not related simply because they shared same modus operandi—they were committed thirteen months apart, involved different victims, and arrests were made by two different law enforcement agencies two years apart); *U.S. v. Rivers,* 929 F.2d 136, 139–40 (4th Cir. 1991) (reversed: two robberies committed within twelve days in adjacent jurisdictions because defendant needed money for drugs, where second sentence made concurrent with first, not related—offenses occurred on different dates and in different locations, defendant was convicted and sentenced in different courts) [4#6]; *Kinney,* 915 F.2d at 1472 (three bank robberies in three months to support drug addiction). But cf. *U.S. v. Houser,* 929 F.2d 1369, 1374 (9th Cir. 1990) (reversed: two prior drug offenses within short period of time involving one undercover agent, tried and sentenced separately only because they occurred in different counties, were in fact related) [4#6].

However, the First Circuit has held that "the 'common scheme or plan' language should be given its ordinary meaning," and found that five separate bank robberies were "related" because they were committed as part of an overarching scheme to rob banks. The court concluded that the Commission intended "to adopt 'binding rules of thumb,' such as this one, as well as the even more mechanical rule that convictions for entirely separate crimes should be treated as one if they happen to be consolidated for trial or sentencing" (see section IV.A.1.c below). The court noted that having such strict rules, along with the ability to depart if the criminal history is thereby understated, see Application Note 3, actually increases district court discretion. *U.S. v. Elwell,* 984 F.2d 1289, 1294–96 (1st Cir. 1993) [5#9].

The Seventh Circuit held that "[a] crime merely suggested by or arising out of the commission of a previous crime is not . . . related to the earlier crime . . . [as] part of a common scheme or plan." *U.S. v. Ali,* 951 F.2d 827, 828 (7th Cir. 1992) (robbery of a supermarket and forgery of a money order taken from the heist were unrelated since "the decision to commit the forgery arose only after the robber discovered what he had taken"). However, if a crime is committed for the purpose of committing another crime, they may be considered related. A defendant's prior sentence for check forgery was held to be related to his conviction for possession of stolen mail—from which the forged check came—because "the mail was stolen to find checks or other instruments that could be converted to use through forgery." *U.S. v. Hallman,* 23 F.3d 821, 825–26 (3d Cir. 1994) (remanded: case distinguishable from *Ali* because of defendant's intent) [6#16].

c. "Consolidated for trial or sentencing"

As of Nov. 1991, new §4A1.1(f) adds points for crimes of violence that are treated as related under §4A1.2(a)(2). Accompanying Application Note 6 specifies that §4A1.1(f) applies to "two or more prior sentences as a result of convictions for crimes of violence that are treated as related cases but did not arise from the same occasion (*i.e.,* offenses committed on different occasions that were . . . consolidated for trial or sentencing; *See* Application Note 3 of

[§4A1.2])." The Seventh Circuit held that this guideline and application note "show that cases that are consolidated for sentencing are meant to be considered related." *U.S. v. Woods,* 976 F.2d 1096, 1100–01 (7th Cir. 1992) [5#5]. The court limited to pre-amendment cases *U.S. v. Elmendorf,* 945 F.2d 989, 997–98 (7th Cir. 1991), which had held that unrelated offenses that were consolidated for convenience could be counted as separate convictions. See also *U.S. v. Smith,* 991 F.2d 1468, 1473 (9th Cir. 1993) (under §4A1.2(a)(2) & comment. (n.3), prior convictions are related if they were consolidated for sentencing, despite factual differences) [5#12]. But cf. *U.S. v. McComber,* 996 F.2d 946, 947 (8th Cir. 1993) (affirmed treating as unrelated under §4A1.2(a)(2) consolidated sentences that "resulted from different offenses committed over a lengthy period of time. They were imposed on the same day because sentencing some of the offenses had been postponed to allow restitution, while sentencing for others followed the revocation of probation. Most of the final sentences were made concurrent, but the cases remained under separate docket orders and no order of consolidation was entered") [5#15].

In a later case, however, the Seventh Circuit gave "consolidated" a narrow definition, "requiring either a formal order of consolidation or a record that shows the sentencing court considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions. . . . Consolidation should not occur by accident through the happenstance of the scheduling of a court hearing or the kind of papers filed in the case or the administrative handling of the case." The court affirmed a ruling that one robbery was not related to two others, despite "many characteristics of a consolidated sentencing." The cases were otherwise treated separately, there was no formal consolidation order, and there was "nothing in the record to indicate that . . . the cases were so related that they should be consolidated for sentencing." *U.S. v. Russell,* 2 F.3d 200, 201–04 (7th Cir. 1993) [6#4].

Earlier cases have also interpreted "consolidated for sentencing" narrowly. For example, the fact that sentences were imposed in a single sentencing proceeding does not necessarily mean they were consolidated. See *U.S. v. Lopez,* 961 F.2d 384, 386–87 (2d Cir. 1992) ("imposition of concurrent sentences at the same time by the same judge does not establish that the cases were 'consolidated for sentencing' . . . unless there exists a close factual relationship between the underlying convictions"); *U.S. v. Villarreal,* 960 F.2d 117, 120 (10th Cir. 1992) (two factually unrelated cases sentenced on same day under different docket numbers and without consolidation order were not "consolidated"); *U.S. v. Metcalf,* 898 F.2d 43, 45–46 (5th Cir. 1990) (concurrent sentences given on same day were not consolidated—offenses were factually unrelated, retained separate docket numbers, and there was no consolidation order). See also *U.S. v. Aubrey,* 986 F.2d 14, 14–15 (2d Cir. 1993) (following *Lopez,* holding that prior sentences were unrelated even though imposed pursuant to single plea bargain). But see *U.S. v. Watson,* 952 F.2d 982, 990 (8th Cir. 1991) (decision to consolidate is expressed when punishment for verdicts rendered in separate trials is imposed in a single proceeding).

Similarly, courts have held that imposition of concurrent sentences alone does not mean the offenses were consolidated for purposes of §4A1.2. See *U.S. v. Manuel,* 944 F.2d 414, 417 (8th Cir. 1991); *U.S. v. Chartier,* 933 F.2d 111, 115–16 (2d Cir. 1991); *U.S. v. Rivers,* 929 F.2d 136, 139–40 (4th Cir. 1991); *U.S. v. Veteto,* 920 F.2d 823, 825 (11th Cir. 1991); *U.S. v. Kinney,* 915 F.2d 1471, 1472 (10th Cir. 1990); *U.S. v. Flores,* 875 F.2d 1110, 1113–14 (5th Cir. 1989). See also *U.S. v. Ainsworth,* 932 F.2d 358, 361 (5th Cir. 1991) (concurrent sentencing, even at same hearing, is "only one factor").

Some circuits had also indicated that whether sentences were "consolidated" may depend

on the specific facts of the case. See, e.g., *U.S. v. Chapnick,* 963 F.2d 224, 228–29 (9th Cir. 1992) (remanded: identical concurrent sentences for burglaries committed within two-week period, imposed by same judge at same hearing as a result of a transfer order, were "consolidated for sentencing" even though cases retained separate files and docket numbers and sentences were recorded on separate minute orders—stay of imprisonment to allow defendant to complete drug rehabilitation "indicates that the state judge imposed identical concurrent sentences because the burglaries were related enough to justify treating them as one crime"); *U.S. v. Garcia,* 962 F.2d 479, 482–83 (5th Cir. 1992) (affirmed: cases not related even though they had consecutive indictment numbers, were scheduled for same day and time, and concurrent sentences were imposed—state did not move to consolidate cases and separate judgments, sentences, and plea agreements were entered). Cf. *U.S. v. Alberty,* 40 F.3d 1132, 1135 (10th Cir. 1994) ("Our precedents uniformly require, at least in cases not involving a formal order of consolidation or transfer, the defendant to show a factual nexus between the prior offenses to demonstrate they are 'related'").

When a defendant is sentenced for an offense and at the same time sentence is imposed after revocation of probation for a different offense, those sentences are not considered consolidated. *U.S. v. Palmer,* 946 F.2d 97, 99 (9th Cir. 1991) (under Application Note 11, prior sentence for probation revocation merged into underlying conviction and is not related to sentence imposed at same time for separate burglary conviction); *U.S. v. Jones,* 898 F.2d 1461, 1463–64 (10th Cir. 1990) (consolidation of probation revocation and resentencing for two dissimilar offenses committed on different days and not previously consolidated did not render the offenses "related").

d. Departure

Most circuits have held that upward departure may be warranted under §4A1.3 when counting consolidated sentences as one sentence underrepresents the seriousness of a defendant's criminal history. See, e.g., *U.S. v. Hines,* 943 F.2d 348, 354 (4th Cir. 1991); *U.S. v. Ocasio,* 914 F.2d 330, 338 (4th Cir. 1990); *U.S. v. Medved,* 905 F.2d 935, 942 (6th Cir. 1990); *U.S. v. Williams,* 901 F.2d 1394, 1397–98 (7th Cir. 1990), vacated on other grounds, 111 S. Ct. 2845 (1991); *U.S. v. White,* 893 F.2d 276, 279–80 (10th Cir. 1990) [3#1]; *U.S. v. Geiger,* 891 F.2d 512, 513–14 (5th Cir. 1989) [2#19]; *U.S. v. Dorsey,* 888 F.2d 79, 81 (11th Cir. 1989) [2#16]; *U.S. v. Anderson,* 886 F.2d 215, 216 (8th Cir. 1989). See also cases discussed in section VI.A.1.a, below.

Note that two amendments, effective Nov. 1, 1991, may affect whether departure is warranted. Application Note 3 to §4A1.2 was amended to state that prior sentences are not related if the offenses were separated by an intervening arrest. New §4A1.1(f) requires that one point be added for "each prior sentence resulting from a crime of violence" that did not receive criminal history points because it was related to another sentence for a crime of violence, unless the sentences were related because they occurred on the same occasion.

2. "Prior Sentence"

To count as a "prior sentence" under §4A1.2(a)(1), the sentence must have been imposed "for conduct not part of the instant offense." The Fifth, Sixth, Eighth, and Tenth Circuits held that if the conduct of the present offense is "severable" from that of the prior offense, the prior offense may be considered. The Sixth and Eighth Circuits look for temporal and geographical proximity, common victims, societal harms, and criminal plan or intent. *U.S.*

v. Blumberg, 961 F.2d 787, 792 (8th Cir. 1992) (proper to count 1973 burglary conviction that involved different accomplice and victim than did 1990 conspiracy to transport and possess stolen property); *U.S. v. Beddow,* 957 F.2d 1330, 1337–39 (6th Cir. 1992) (proper to count state conviction of carrying concealed weapon even though gun was found at time of arrest for instant federal money laundering offense). See also *U.S. v. Thomas,* 973 F.2d 1152, 1158 (5th Cir. 1992) ("critical inquiry is whether the prior conduct constitutes a 'severable, distinct offense'"—state and federal convictions for theft and altering VINs had different elements and involved different vehicles); *U.S. v. Banashefski,* 928 F.2d 349 (10th Cir. 1991) (proper to enhance federal sentence for being a felon in possession of a firearm with state conviction for possession of stolen car, even though gun was found at time of arrest for driving stolen car).

Conduct that is part of the instant offense should be considered in the offense level as relevant conduct. See *U.S. v. Query,* 928 F.2d 383, 385 (11th Cir. 1991) (state sentence that was imposed before instant federal sentence that was part of same course of conduct properly considered as relevant conduct rather than added to criminal history score) [4#2]. See also §4A1.2, comment. (n.1) ("'Prior sentence' means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense.").

Courts should count crimes that were committed after the instant offense but for which sentence was imposed before the sentence in the instant offense. U.S.S.G. § 4A1.2(a)(1), comment. (n.1); *U.S. v. Flowers,* 995 F.2d 315, 317–18 (1st Cir. 1993); *U.S. v. Tabaka,* 982 F.2d 100, 102 (3d Cir. 1992); *U.S. v. Lara,* 975 F.2d 1120, 1129 (5th Cir. 1992); *U.S. v. Hoy,* 932 F.2d 1343, 1345 (9th Cir. 1991); *U.S. v. Walker,* 912 F.2d 1365, 1366 (11th Cir. 1990); *U.S. v. Smith,* 900 F.2d 1442, 1446–47 (10th Cir. 1990). See also *U.S. v. Elwell,* 984 F.2d 1289, 1298 (1st Cir. 1993); *U.S. v. Espinal,* 981 F.2d 664, 667–68 (2d Cir. 1992) (offense that occurred after beginning of instant conspiracy offense properly included as prior conviction).

A state court conviction that postdated the initial federal sentencing but predated a second sentencing after remand was properly included in the criminal history score where the original PSR mentioned the pending state proceedings and defendant did not object to inclusion of the conviction at the second sentencing. *U.S. v. Bleike,* 950 F.2d 214, 220 (5th Cir. 1991). See also *U.S. v. Lillard,* 929 F.2d 500, 503–04 (9th Cir. 1991) (count state sentence imposed before commission of instant federal offense even though defendant had not begun serving sentence).

The Ninth Circuit held that sentences for earlier convictions that are pending appeal may be counted under §4A1.1; if the prior conviction is reversed the defendant "would have the right to petition for resentencing." *U.S. v. Mackbee,* 894 F.2d 1057, 1058–59 (9th Cir. 1990) [3#2]. Accord *Beddow,* 957 F.2d at 1337–39. See also *U.S. v. Allen,* 24 F.3d 1180, 1187 (10th Cir. 1994) (affirmed: rejecting argument that prior sentence that is under collateral attack cannot be used for enhancement under career offender guideline—if attack is successful defendant may challenge the enhancement under 28 U.S.C. §2255).

If a prior sentence is suspended, only the portion that was served should be considered in the criminal history calculation. See §4A1.2(b)(2) ("If part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended"); *Tabaka,* 982 F.2d at 102–03 (remanded: error to consider maximum sentence of 15 months instead of two days actually served before sentence was suspended) [5#7].

In determining whether a prior sentence falls outside the time limits in §4A1.2(e), a district court is not bound by the date in the indictment but should "consider all relevant conduct pertaining to the conspiracy in determining when that conspiracy began." *U.S. v.*

Kennedy, 32 F.3d 876, 891 (4th Cir. 1994) (remanded: look to relevant conduct to determine actual start of conspiracy) [7#2]. Accord *U.S. v. Harris,* 932 F.2d 1529, 1538 (5th Cir. 1991); *U.S. v. Eske,* 925 F.2d 205, 207–08 (7th Cir. 1991); U.S.S.G. §4A1.2, comment. (n.8) ("the term 'commencement of the instant offense' includes any relevant conduct"). See also *U.S. v. Kayfez,* 957 F.2d 677, 678 (9th Cir. 1992) (date alleged in indictment does not control for §4A1.2(d) and (e) purposes). Cf. *U.S. v. Cornog,* 945 F.2d 1504, 1509–10 (11th Cir. 1991) (count back from date "when the defendant began the 'relevant conduct'" if there is adequate proof—otherwise use last date of conspiracy alleged in indictment or date of substantive offense).

The First Circuit held that the fact that a defendant is resentenced after the original conviction and sentence are reversed does not affect the time limitation for including prior sentences in the criminal history score, §4A1.2(e). The period begins when defendant is resentenced, not when defendant was first sentenced. *U.S. v. Perrotta,* 42 F.3d 702, 704 (1st Cir. 1994) (affirmed: although original 1976 conviction and sentence—which were reversed on appeal—occurred more than ten years before instant drug conspiracy began, 1978 sentence imposed after defendant pled guilty on remand occurred within ten years of beginning of conspiracy; also rejecting claim that adding point because of 1978 sentence is unconstitutional burden on defendant's right to appeal his original conviction).

3. Challenges to Prior Convictions

In a case where defendant was subject to a mandatory minimum term under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), the Supreme Court held that there is only a limited right to collaterally attack prior convictions. The Court concluded that nothing in §924(e) authorizes such attacks and that the Constitution requires that challenges be allowed only for a complete denial of counsel, not for claims such as defendant's—ineffective assistance of counsel and involuntary guilty pleas. *Custis v. U.S.,* 114 S. Ct. 1732, 1735–39 (1994) [6#13]. See also *U.S. v. Daly,* 28 F.3d 88, 89 (9th Cir. 1994) (following *Custis,* rejecting collateral attacks by ACCA defendant: "A sole exception to the prohibition against collateral attack of previous state convictions is for the indigent defendant who was not appointed counsel at his state trial. . . . Claims of denial of effective assistance of counsel, where counsel was appointed, and involuntarily pleading guilty do not fall within this exception"). The *Custis* Court also noted, however, that defendant may have a right to "attack his state sentences in Maryland or through federal habeas review," and if he "is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences." 114 S. Ct. at 1739. See also *U.S. v. Fondren,* 43 F.3d 1228, 1229 (9th Cir. 1994) ("adopt[ing] the position advanced by the *Custis* court" that defendant may apply to reopen federal sentence if prior convictions are reversed).

Although *Custis* concerns §924(e) rather than the Guidelines, several circuits have followed it in Guidelines cases, concluding that a challenge under the Guidelines is not legally distinguishable from a challenge under ACCA. See *U.S. v. Thomas,* 42 F.3d 823, 824 (3d Cir. 1994); *U.S. v. Garcia,* 42 F.3d 573, 581 (10th Cir. 1994) (also noting, as *Custis* indicated, that "[i]f a defendant is able to effectively attack his prior convictions, 'he may then apply for reopening of any federal sentence enhanced by the state sentences'"); *U.S. v. Munoz,* 36 F.3d 1229, 1237 (1st Cir. 1994); *U.S. v. Burrows,* 36 F.3d 875, 885 (9th Cir. 1994) [7#3]; *U.S. v. Jones,* 28 F.3d 69, 70 (8th Cir. 1994); *U.S. v. Jones,* 27 F.3d 50, 52 (2d Cir. 1994). See also *U.S. v. Killion,* 30 F.3d 844, 846 (7th Cir. 1994) ("we find it difficult to detect a principled distinction" between cases under §924(e) and §4B1.1). Even before *Custis* some circuits did not

distinguish between Guidelines cases and §924(e) cases. See, e.g., *U.S. v. Medlock,* 12 F.3d 185, 187–88 n.4 (11th Cir. 1994) ("The rationale underlying our decision is equally applicable to both Sentencing Guidelines cases and those originating in 18 U.S.C. §924(e)"); *U.S. v. Byrd,* 995 F.2d 536, 540 (4th Cir. 1993) (holding that its earlier decision in *Custis* "is controlling of our disposition" in challenge under Guidelines). But cf. *U.S. v. Paleo,* 9 F.3d 988, 989 (1st Cir. 1992) (in rejecting challenge under §924(e), finding citation to Guidelines cases inapposite because "the Guideline provision arises in a different legal context and uses language critically different from" §924(e)).

The *Custis* decision may also affect application of the Armed Career Criminal provision in §4B1.4 of the Guidelines, which applies to defendants who are "subject to an enhanced sentence under the provisions of 18 U.S.C. §924(e)." See, e.g., *U.S. v. Wicks,* 995 F.2d 964, 975, 978 & n.15 (10th Cir. 1993).

Up to *Custis,* the circuits were split on whether defendants may attack the use of prior sentences in guideline sentencing. Originally, courts allowed defendants to contest the validity of prior convictions at the sentencing hearing because Application Note 6 of §4A1.2 stated that prior convictions "which the defendant shows to have been constitutionally invalid" should not be included in the criminal history score. See, e.g., *U.S. v. Bradley,* 922 F.2d 1290, 1297 (6th Cir. 1991); *U.S. v. Unger,* 915 F.2d 759, 761–62 (1st Cir. 1990) (1991); *U.S. v. Newman,* 912 F.2d 1119, 1122 (9th Cir. 1990); *U.S. v. Jones,* 907 F.2d 456, 464 (4th Cir. 1990); *U.S. v. Dickens,* 879 F.2d 410, 411 (8th Cir. 1989); *U.S. v. Miller,* 874 F.2d 466, 469 n. 5 (7th Cir. 1989).

Note 6 was amended as of Nov. 1990, however, to state that "sentences resulting from convictions that a defendant shows to have been *previously ruled* constitutionally invalid are not to be counted" (emphasis added). New background commentary, added at the same time, states: "The Commission leaves for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." Note 6 was amended again in Nov. 1993 to specify that "this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law." The Background Note added in 1990 was deleted.

After the 1990 amendments, the circuits split on whether the amendments affected a defendant's right to attack prior convictions. The Second, Third, and Fifth Circuits held that those amendments did not restrict district courts' existing discretion to allow defendants to challenge prior convictions. See *U.S. v. McGlockin,* 8 F.3d 1037, 1042–46 (6th Cir. 1993) (en banc) (see below for limitations) [6#3]; *U.S. v. Brown,* 991 F.2d 1162, 1165–66 (3d Cir. 1993) [5#13]; *U.S. v. Canales,* 960 F.2d 1311, 1315–16 (5th Cir. 1992) [4#22]; *U.S. v. Jakobetz,* 955 F.2d 786, 805 (2d Cir. 1992). The Ninth Circuit held that "the Constitution requires that defendants be given the opportunity to collaterally attack prior convictions," and that the 1990 amendments "cannot have limited" that right. *U.S. v. Vea-Gonzales,* 999 F.2d 1326, 1332–34 (9th Cir. 1993) (remanded: defendant should be allowed to challenge prior conviction for ineffective assistance of counsel) [5#10]. However, the court later held that "as far as its constitutional holding goes, *Vea-Gonzales* is no longer good law" in light of *Custis. U.S. v. Burrows,* 36 F.3d 875, 885 (9th Cir. 1994) [7#3].

In contrast, the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits held that amended Application Note 6 prohibits a defendant from collaterally attacking a prior sentence at the sentencing hearing unless the Constitution or a federal statute requires that the challenge be allowed. See *U.S. v. Garcia,* 42 F.3d 573, 580 (10th Cir. 1994); *U.S. v. Mitchell,* 18 F.3d 1355, 1360–61 (7th Cir. 1994) [6#11]; *U.S. v. Isaacs,* 14 F.3d 106, 110–12 (1st Cir. 1994) (replacing opinion of June 22, 1993, reported at [5#15]) [6#10]; *U.S. v. Byrd,* 995 F.2d

536, 539–40 (4th Cir. 1993) [5#15]; *U.S. v. Elliott,* 992 F.2d 853, 855–56 (8th Cir. 1993) (reaffirming *U.S. v. Hewitt,* 942 F.2d 1270, 1276 (8th Cir. 1991)) [5#13]; *U.S. v. Roman,* 989 F.2d 1117, 1119–20 (11th Cir. 1993) (en banc) [5#13]. But cf. *U.S. v. Day,* 949 F.2d 973, 980 (8th Cir. 1991) (Note 6 amendment does not affect defendant's right to collaterally attack prior state convictions under 18 U.S.C. §924(e)(1)).

The Eleventh Circuit stated that the Constitution requires hearing a challenge when the defendant "sufficiently asserts facts that show that an earlier conviction is 'presumptively void.'" *Roman,* 989 F.2d at 1120 (defendant failed to make adequate proffer so hearing was not required). In a similar vein, the Fourth Circuit concluded that a challenge must be heard "only when prejudice can be presumed from the alleged constitutional violation, regardless of the facts of the case; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." *Byrd,* 995 F.2d at 540 (affirmed: defendant had no right to challenge voluntariness of prior counseled guilty plea). The First Circuit agreed with *Roman* and defined "presumptively void" as when "a constitutional violation can be found on the face of the prior conviction, without further factual investigation." The court added that allegations of "structural errors"—which may not appear on the face of the prior conviction—may also require a hearing. Such errors include deprivation of certain trial rights and judicial bias. *Isaacs,* 14 F.3d at 112 (remanded: district court should not have heard claim of ineffective assistance of counsel, which is neither facial invalidity nor structural error). Accord *Mitchell,* 18 F.3d at 1361 ("a district court should not entertain a collateral attack at sentencing except for those challenges that manifest, from a facial review of the record, a presumptively void prior conviction").

The Fifth Circuit set forth factors a district court should consider in deciding whether to allow a collateral attack: (1) the scope of the inquiry to determine validity, (2) comity, and (3) whether the defendant has an alternative remedy to challenge the prior conviction. *Canales,* 960 F.2d at 1316.

The Sixth Circuit held that "a narrow window of challenge to prior convictions is available." The defendant must properly object to inclusion of the challenged conviction, "state specifically the grounds claimed for the prior conviction's constitutional invalidity . . . and 'the anticipated means by which proof of invalidity will be attempted.'" District courts should also "consider whether the defendant has available an alternative method for attacking the prior conviction either through state post-conviction remedies or federal habeas relief. . . . [T]he availability of an alternative method should play a significant role in the district court's decision" to allow the challenge. The court agreed with the Fourth Circuit's approach in *Byrd* that challenges must be heard "only when prejudice can be presumed from the alleged constitutional violation . . . ; and when the right asserted is so fundamental that its violation would undercut confidence in the guilt of the defendant." Also, "the validity of that conviction must be determined solely as a matter of federal law." *McGlockin,* 8 F.3d at 1042–46 (remanded: prior convictions were valid under federal law, so it was error to find them invalid under state law) [6#3].

The Fourth Circuit has noted that the sentencing court's power to impose procedural requirements for sentencing challenges, see §6A1.2, gives it "broad discretion . . . to control the manner" of a challenge to a prior conviction. *Jones,* 907 F.2d at 465. Later, the Fourth Circuit set forth a general procedure: First, the defendant must identify "the precise constitutional challenge." Next, the court should ascertain whether proof will be testimonial or documentary, and then make a preliminary decision as to whether to allow the challenge to continue. If proof will involve "historical facts likely to be in dispute; . . . testimonial evidence from witnesses not yet located or verified; . . . events distant in time and place; and the

estimate of time required to obtain proof indicates a protracted delay in imposing sentence, a discretionary decision not to entertain the proposed challenge obviously would be justified." *U.S. v. Jones*, 977 F.2d 105, 110–11 (4th Cir. 1992) (remanded: vague, inconclusive, self-serving testimony concerning ineffective assistance of counsel over ten years ago was insufficient to prove prior conviction was invalid). The Third Circuit endorsed the *Jones* procedure in *Brown*, 991 F.2d at 1167.

In a case under the original Note 6, the Ninth Circuit held a defendant was entitled to be resentenced after he succeeded in having a state court vacate an earlier state conviction that a federal district court had ruled valid and factored into the criminal history score at sentencing for the federal crime. *U.S. v. Guthrie*, 931 F.2d 564, 572–73 (9th Cir. 1991) (reversing: "When a defendant files a section 2255 petition based on a state court decision vacating his prior state conviction, the district court will simply have to verify the authenticity of the judgment and adjust the defendant's sentence downward accordingly.").

Once the government establishes the existence of a prior conviction, the burden is on defendant to show that it was invalid. See *U.S. v. Boyer*, 931 F.2d 1201, 1204 (7th Cir. 1991); *Bradley*, 922 F.2d at 1297; *Unger*, 915 F.2d at 761; *Newman*, 912 F.2d at 1122; *U.S. v. Davenport*, 884 F.2d 121, 123–24 (4th Cir. 1989) [2#13]; *Dickens*, 879 F.2d at 410–11. If there is no record of the plea-taking from the challenged conviction, testimony that it was the "custom and practice" of the trial court to follow proper procedures may be sufficient to refute defendant's claim of procedural infirmities. See *U.S. v. Dickerson*, 901 F.2d 579, 582 (7th Cir. 1990) (strong presumption of regularity in Illinois state court proceedings); *Dickens*, 879 F.2d at 411–12. When a defendant presents only conclusory challenges that lack both a factual and legal basis, however, the court and the government are not under any duty to make a further inquiry into the constitutional validity of the prior conviction. *U.S. v. Hope*, 906 F.2d 254, 263 (7th Cir. 1990).

4. Juvenile Convictions and Sentences

Juvenile convictions and sentences may be considered in computing a defendant's criminal history score, U.S.S.G. §4A1.2(d). See *U.S. v. Johnson*, 27 F.3d 151, 154–55 (D.C. Cir. 1994); *U.S. v. Chanel*, 3 F.3d 372, 373 (11th Cir. 1993); *U.S. v. Daniels*, 929 F.2d 128, 130 (4th Cir. 1991); *U.S. v. Bucaro*, 898 F.2d 368, 371–72 (3d Cir. 1990) [3#5]; *U.S. v. Kirby*, 893 F.2d 867, 868 (6th Cir. 1990) [2#20]; *U.S. v. Williams*, 891 F.2d 212, 215–16 (9th Cir. 1989) [2#18]. The Ninth Circuit held that if a juvenile defendant was convicted as an adult but committed to a state juvenile detention center, that sentence is counted under §4A1.2(d)(1). *U.S. v. Carillo*, 991 F.2d 590, 592–94 (9th Cir. 1993) ("adult sentences" in Application Note 7 refers to "defendants who were 'convicted as an adult and received a sentence of imprisonment'") [5#13]. See also *U.S. v. Birch*, 39 F.3d 1089, 1095 (10th Cir. 1994) ("placement into the custody of the state secretary of social and rehabilitation services was a 'confinement' within the meaning of U.S.S.G. 4A1.2(d)(2)(A)"); *U.S. v. Fuentes*, 991 F.2d 700, 702 (11th Cir. 1993) (detention for more than 60 days at juvenile confinement center was "sentence" under §4A1.2(d)(2)); *U.S. v. Hanley*, 906 F.2d 1116, 1120 (6th Cir. 1990) (commitment to juvenile facility constitutes "imprisonment" for purposes of §4A1.1(e) enhancement for committing current offense "less than two years after release from imprisonment") [3#10].

A court should look to federal law rather than state law to determine if a prior juvenile conviction should be counted under §4A1.2(c), and it may look to the substance of the juvenile offense. *U.S. v. Unger*, 915 F.2d 759, 762–63 (1st Cir. 1990) [3#15]. See also *U.S. v.*

Baker, 961 F.2d 1390, 1392–93 (8th Cir. 1992) (classification of prior conviction under state law as misdemeanor or juvenile crime not controlling).

Generally, juvenile sentences too old to be counted in the criminal history score under §4A1.2(d) may not be used as a basis for departure under §4A1.3. The two exceptions had been sentences that provide evidence of similar misconduct or of criminal livelihood, §4A1.2, comment. (n.8). *U.S. v. Samuels*, 938 F.2d 210, 215–16 (D.C. Cir. 1991) [4#8]. Application Note 8 (Nov. 1992) now states that departure may be appropriate if the outdated conduct "is evidence of similar, or serious dissimilar, criminal conduct."

There is some disagreement over whether juvenile sentences that were "set aside" under the Youth Corrections Act (or similar state statutes) should be considered "expunged" under §4A1.2(j) and not counted in the criminal history score. Compare *U.S. v. Ashburn*, 20 F.3d 1336, 1342–43 (5th Cir. 1994) ("the 'set aside' provision should not be interpreted to be an expungement under §4A1.2(j)") [6#13] and *U.S. v. McDonald*, 991 F.2d 866, 871–72 (D.C. Cir. 1993) ("set aside" in D.C. statute similar to YCA is not "expunged" under Guidelines) with *U.S. v. Kammerdiener*, 945 F.2d 300, 301 (9th Cir. 1991) (conviction "set aside" under YCA was "expunged" under §4A1.2(j)). See also *U.S. v. Doe*, 980 F.2d 876, 881–82 (3d Cir. 1992) (reversing denial of a motion for expungement, holding that "set aside" in YCA means "a complete expungement").

The Second Circuit held that the district court improperly included in defendant's criminal history score a prior burglary conviction that had been sealed pursuant to a state juvenile law because it was an "expunged" sentence, §4A1.2(j). *U.S. v. Beaulieau*, 959 F.2d 375, 380 (2d Cir. 1992).

5. Other Sentences or Convictions

A prior uncounseled misdemeanor conviction for which no term of imprisonment was given may be counted in the criminal history score. U.S.S.G. §4A1.2, comment. (backg'd). See, e.g., *U.S. v. Thomas*, 20 F.3d 817, 823 (8th Cir. 1994) (en banc) [6#11]; *U.S. v. Falesbork*, 5 F.3d 715, 718 (4th Cir. 1993); *U.S. v. Nichols*, 979 F.2d 402, 415–18 (6th Cir. 1992); *U.S. v. Castro-Vega*, 945 F.2d 496, 499–500 (2d Cir. 1991); *U.S. v. Niven*, 952 F.2d 289, 292 (9th Cir. 1991) (but only if defendant knowingly waived right to counsel); *U.S. v. Eckford*, 910 F.2d 216, 220 (5th Cir. 1990) [3#12]. The Supreme Court affirmed the Sixth Circuit in *Nichols v. U.S.*, 114 S. Ct. 1921, 1927–28 (1994) [6#14].

It has been held that §4A1.1(d) may be applied to an offense committed while on supervised probation for a traffic offense, *U.S. v. McCrudden*, 894 F.2d 338, 339 (9th Cir. 1990) [3#2], or while on "bench probation" for a prior conviction, *U.S. v. Martinez*, 905 F.2d 251, 254 (9th Cir. 1990), or on unsupervised release for a prior conviction, *U.S. v. Knighten*, 919 F.2d 80, 82 (8th Cir. 1990) (Guidelines do not distinguish between supervised and unsupervised probation). Other sentences or convictions that may properly be counted in the criminal history score: *U.S. v. Vela*, 992 F.2d 1116, 1117–18 (10th Cir. 1993) (deferred sentence under Oklahoma law); *U.S. v. Jakobetz*, 955 F.2d 786, 804–06 (2d Cir. 1992) (driving-while-ability-impaired conviction—it is not a "minor traffic infraction"); *U.S. v. Avala-Rivera*, 954 F.2d 1275, 1277 (7th Cir. 1992) (reckless driving); *U.S. v. Wilson*, 927 F.2d 1188, 1189–90 (10th Cir. 1991) (AWOL conviction); *U.S. v. Hatchett*, 923 F.2d 369, 376–77 (5th Cir. 1991) (deferred adjudication of probation under Texas law); *U.S. v. Vanderlaan*, 921 F.2d 257, 258–60 (10th Cir. 1991) (sentence under 18 U.S.C. §§4251–55, Narcotic Addict Rehabilitation Act) [3#19]; *U.S. v. Giraldo-Lara*, 919 F.2d 19, 23 (5th Cir. 1990) ("deferred adjudication probation" when there was a finding of guilt); *U.S. v. Williams*, 919 F.2d 1451, 1457

(10th Cir. 1990) (domestic violence offense with one-year probation); *U.S. v. Locke,* 918 F.2d 841, 842 (9th Cir. 1990) (AWOL conviction); *U.S. v. Crosby,* 913 F.2d 313, 314–15 (6th Cir. 1990) (prior conviction that is element of instant CCE offense) [3#14]; *U.S. v. Aichele,* 912 F.2d 1170, 1171 (9th Cir. 1990) (reckless driving) [3#13]; *U.S. v. Jones,* 910 F.2d 760, 761 (11th Cir. 1990) (conviction on plea of nolo contendere) [3#14]. See also *U.S. v. Lloyd,* 43 F.3d 1183, 1187–88 (8th Cir. 1994) (§4A1.2(c)(1)(A) includes Illinois's "conditional discharge"); *U.S. v. Caputo,* 978 F.2d 972, 976–77 (7th Cir. 1992) (same); *U.S. v. Rasco,* 963 F.2d 132, 134–36 (6th Cir. 1992) (detention in halfway house upon revocation of parole should be added to original term of imprisonment, §4A1.2(k)). But see *U.S. v. Latimer,* 991 F.2d 1509, 1512–13 (9th Cir. 1993) (confinement in community treatment center is not incarceration under §4A1.2(e)(1)).

6. Application of §4A1.1(d) and (e) to Relevant Conduct and Escapees

Under §4A1.1(d), two points are added to the criminal history score if the defendant "committed the instant offense while under any criminal justice sentence." Section 4A1.1(e) adds two points (one if subsection (d) is also used) if the instant offense was committed "less than two years after release from imprisonment . . . or while in imprisonment or escape status." Defendants have argued that applying these sections to defendants convicted of escape amounts to improper double-counting because being imprisoned or in some form of custody is already an element of the offense of escape. Every appellate court that has considered this challenge has rejected it, however, and upheld the application of either or both of these sections to escapees. See *U.S. v. Thomas,* 930 F.2d 12, 13–14 (8th Cir. 1991); *U.S. v. Goolsby,* 908 F.2d 861, 863–64 (11th Cir. 1990); *U.S. v. Jimenez,* 897 F.2d 286, 287–88 (7th Cir. 1990) [3#5]; *U.S. v. Carroll,* 893 F.2d 1502, 1509–11 (6th Cir. 1990) [2#20]; *U.S. v. Wright,* 891 F.2d 209, 211–12 (9th Cir. 1989) [2#18]; *U.S. v. Vickers,* 891 F.2d 86, 87–88 (5th Cir. 1989) [2#18]; *U.S. v. Goldbaum,* 879 F.2d 811, 812–14 (10th Cir. 1989) [2#10]; *U.S. v. Ofchinick,* 877 F.2d 251, 255–57 (3d Cir. 1989) [2#9]. The Sixth Circuit has upheld the application of §4A1.1(d) to a failure to report defendant, §2J1.6. *U.S. v. Lewis,* 900 F.2d 877, 880–81 (6th Cir. 1990) [3#5].

Note that relevant conduct should be used when determining whether defendant committed the "instant offense" while under any criminal justice sentence or less than two years after release from prison under §§4A1.1(d) and (e). See *U.S. v. Smith,* 991 F.2d 1468, 1470–72 (9th Cir. 1993) (affirmed: although actual counts of conviction occurred before sentencing on prior offenses, relevant conduct occurred after that sentencing and §4A1.1(d) and (e) apply); *U.S. v. Harris,* 932 F.2d 1529, 1538–39 (5th Cir. 1991) (affirmed: charge on which defendant was convicted occurred after that period, but there was evidence he engaged in relevant conduct earlier); §4A1.1, comment. (nn.4–5) ("Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) . . .").

A deferred or suspended sentence with no supervisory component is not a "criminal justice sentence" under §4A1.1(d). See *U.S. v. Kipp,* 10 F.3d 1463, 1466–67 (9th Cir. 1993) (remanded: error to count state deferred sentence that had no supervisory component and was treated by district court as suspended sentence—"a suspended sentence, standing alone without an accompanying term of probation, is not a 'criminal justice sentence,' as that term is used in §4A1.1(d)") [6#9]. But cf. *U.S. v. Ramsey,* 999 F.2d 348, 351 (8th Cir. 1993) (proper to count sentence that was suspended and the charge ultimately dismissed after

defendant testified in another case—Note 10 states that previous convictions set aside "for reasons unrelated to innocence or errors of law . . . are to be counted").

B. Career Offender Provision (§4B1.1)

1. "Crime of Violence"

a. General determination

One issue is whether the determination that an offense is a "crime of violence" should be based solely on the elements of the offense or can be based on the underlying factual circumstances. The Supreme Court held that when determining whether a prior offense was a "violent felony" under the Career Criminals Amendment Act, 18 U.S.C. §924(e), a trial court is required "to look only to the fact of conviction and the statutory definition of the prior offense," not to the facts underlying the conviction. *Taylor v. U.S.*, 110 S. Ct. 2143, 2160 (1990).

The circuit courts have been applying this categorical approach to the career offender provision, some before *Taylor*, and generally hold that if an offense is listed in §4B1.2, or an element of the offense involves force under §4B1.2(1)(i), the underlying facts should not be considered. See, e.g., *U.S. v. Bell*, 966 F.2d 703, 704–06 (1st Cir. 1992) (following *Taylor*); *U.S. v. Telesco*, 962 F.2d 165, 166–67 (2d Cir. 1992) (do not look at actual conduct because burglary of a dwelling is listed in §4B1.2); *U.S. v. Alvarez*, 960 F.2d 830, 837–38 (9th Cir. 1992) (evaluate crime on statutory definition); *U.S. v. Wright*, 957 F.2d 520, 521–22 (8th Cir. 1992) (look at elements of offense; robbery listed in §4B1.2); *U.S. v. Parson*, 955 F.2d 858, 862–73 (3d Cir. 1992) (do not look to underlying conduct if statute of conviction indicates offense involved "serious potential risk of physical injury to another") [4#17]; *U.S. v. Wilson*, 951 F.2d 586, 588 (4th Cir. 1991) (do not look into circumstances of offense listed in §4B1.2) [4#13]; *U.S. v. McAllister*, 927 F.2d 136, 138–39 (3d Cir. 1991) (following *Taylor*); *U.S. v. Selfa*, 918 F.2d 749, 751 (9th Cir. 1990) (elements of crime, not actual conduct, control crime of violence inquiry) [3#9]; *U.S. v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990) (look to elements or generic nature of offense) [3#13]; *U.S. v. Carter*, 910 F.2d 1524, 1532–33 (7th Cir. 1990) (need not inquire into facts if offense listed in §4B1.2) [3#13]. Cf. *U.S. v. Garcia*, 42 F.3d 573, 577–78 (10th Cir. 1994) (rejecting defendant's claim that district court should look to circumstances of prior felony and depart because defendant was innocent).

For an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," §4B1.2(1)(ii), some conduct may be considered. Since Nov. 1991, Application Note 2 of §4B1.2 has read: "Other offenses are included where . . . (B) the conduct set forth (*i.e.*, expressly charged) in the count of which defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of the inquiry." Several circuits have read this note to allow looking at the conduct alleged in the count of the indictment charging the offense of conviction, but not other conduct. See *U.S. v. Young*, 990 F.2d 469, 471–72 (9th Cir. 1993) ("courts may consider the statutory definition of the crime and . . . the conduct 'expressly charged'" in the count of conviction); *U.S. v. Joshua*, 976 F.2d 844, 856 (3d Cir. 1992) ("look solely to the conduct alleged in the count of the indictment charging the offense of conviction"); *U.S. v. Fitzhugh*, 954 F.2d 253, 254 (5th Cir. 1992) ("consider conduct expressly charged in the count of which defendant was con-

victed, but not any other conduct"); *U.S. v. Johnson,* 953 F.2d 110, 113–15 (4th Cir. 1991) (look only to conduct charged in indictment, even for offenses not listed in §4B1.2) [4#17]. Cf. *U.S. v. Smith,* 10 F.3d 724, 731–32 (10th Cir. 1993) (in dicta, indicating that the "otherwise" clause should be narrowly interpreted and applied). Cf. *U.S. v. Hayes,* 7 F.3d 144, 145 (9th Cir. 1993) (possession of unregistered sawed-off shotgun "otherwise involves conduct that presents a serious risk of physical injury to another") [6#4].

Prior to the 1991 amendment to Note 2, several circuits had held that the factual circumstances underlying an offense could be considered, and some of these cases may still be the law of that circuit. See *U.S. v. John,* 936 F.2d 764, 769–70 (3d Cir. 1991); *U.S. v. Walker,* 930 F.2d 789, 794–95 (10th Cir. 1991); *U.S. v. Goodman,* 914 F.2d 696, 698–99 (5th Cir. 1990) [3#14]; *U.S. v. McVicar,* 907 F.2d 1, 1–2 (1st Cir. 1990) [3#13]; *U.S. v. Terry,* 900 F.2d 1039, 1042–43 (7th Cir. 1990) [3, #13]; *U.S. v. Maddalena,* 893 F.2d 815, 820 (6th Cir. 1989) [2#19]; *U.S. v. Baskin,* 886 F.2d 383, 388–90 (D.C. Cir. 1989) [2#14].

Attempted burglary, *U.S. v. Guerra,* 962 F.2d 484, 485–86 (5th Cir. 1992), and conspiracy to commit breaking and entering of a commercial building, *U.S. v. Fiore,* 983 F.2d 1, 4 (1st Cir. 1992), are crimes of violence under the categorical approach (§4B1.2, comment (n.1)). Cf. *U.S. v. Gaitan,* 954 F.2d 1005, 1008–11 (5th Cir. 1992) (remanded: conduct underlying state possession convictions should not be considered to determine if they were "controlled substance offenses" under §4B1.2(2)).

Following are some of the cases that have found offenses that, by their nature, "present a serious potential risk of physical injury to another" under §4B1.2(1)(ii): *U.S. v. Gosling,* 39 F.3d 1140, 1142–43 (10th Cir. 1994) ("willfully, unlawfully and feloniously escap[ing] from . . . [a] County Jail" (using §4B1.2 definition of crime of violence for §2K2.1(a)(2) enhancement)); *U.S. v. De Jesus,* 984 F.2d 21, 24-25 (1st Cir. 1993) ("the crime of larceny from the person under Massachusetts law bears an inherent risk of violent outbreak"); *U.S. v. Huffhines,* 967 F.2d 314, 321 (9th Cir. 1992) (unlawful possession of a silencer); *U.S. v. Thompson,* 891 F.2d 507, 509–510 (4th Cir. 1989) (under previous version of §4B1.2(1), there is "substantial risk that physical force may be used" in state offense of pointing a firearm at a person).

b. Unlawful possession of firearm by felon

A Nov. 1991 amendment to §4B1.2, Application Note 2, is intended to clarify that "'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." The Supreme Court held that this change is binding: "Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision . . . as to those defendants to whom [the amendment] applies." The court did not, however, determine whether the amendment should be given retroactive effect. *Stinson v. U.S.,* 113 S. Ct. 1913, 1920 (1993). A Nov. 1992 amendment to §1B1.10(d) added the 1991 amendment to the list of amendments that may be considered for retroactive application. After *Stinson* was remanded the Eleventh Circuit held that the amendment would be applied retroactively, accepting the Sentencing Commission's view of the amendment as a clarification rather than a substantive change in the law. *U.S. v. Stinson,* 30 F.3d 121, 122 (11th Cir. 1994). See also *U.S. v. Garcia-Cruz,* 40 F.3d 986, 989–90 (9th Cir. 1994) (remanded: amendment should be applied retroactively despite contrary circuit precedent). See also section I.E. Amendments.

Previously, two circuits had held that unlawful possession of a firearm by a felon is "by its nature" a crime of violence. See *U.S. v. Stinson,* 943 F.2d 1268, 1271–72 (11th Cir. 1991) [4#10]; *U.S. v. O'Neal,* 937 F.2d 1369, 1375 (9th Cir. 1990) (applying pre-1989 version of

§4B1.2) (amending and superseding 910 F.2d 663 [3#13]). After the §4B1.2 definition of crime of violence was amended in 1989, the Ninth Circuit held that "being a felon in possession of a firearm is not a crime of violence." *U.S. v. Sahakian,* 965 F.2d 740, 742 (9th Cir. 1992) [4#23]. Accord *U.S. v. Fitzhugh,* 954 F.2d 253, 254–55 (5th Cir. 1992); *U.S. v. Johnson,* 953 F.2d 110, 113 (4th Cir. 1991); *U.S. v. Caballero,* 936 F.2d 1292, 1299 (D.C. Cir. 1991).

After the 1991 amendment but before the Supreme Court's decision in *Stinson,* the Eleventh Circuit reaffirmed its earlier holding that unlawful possession is a crime of violence, stated that the amendment to the commentary did not nullify circuit precedent, and declined to apply the amendment retroactively. *U.S. v. Stinson,* 957 F.2d 813, 814–15 (11th Cir. 1992) [4#19]. Similarly, the Third Circuit refused to apply the amendment to a defendant sentenced before the amendment, but whose appeal was heard after it, because it conflicted with circuit precedent. Instead, it vacated the sentence based on the career offender guideline because the indictment did not allege "a serious potential risk of physical injury to another." *U.S. v. Joshua,* 976 F.2d 844, 850–56 (3d Cir. 1992) [5#5].

Prior to the 1991 amendment, courts had held that unlawful possession of a gun *plus* some other threatening action may be a crime of violence. See *U.S. v. Cornelius,* 931 F.2d 490, 493 (8th Cir. 1991) (possession while hiding in house of person defendant previously threatened); *Walker,* 930 F.2d at 794–95 (possession plus firing weapon); *Alvarez,* 914 F.2d at 918–19 (possession plus struggling with arresting officer) [3#14]; *McNeal,* 900 F.2d at 123 (possession plus firing); *Williams,* 892 F.2d at 304 (same); *U.S. v. Thompson,* 891 F.2d 507, 509 (4th Cir. 1989) (pointing firearm at a person is "by its nature" crime of violence). See also *Johnson,* 953 F.2d at 113–15 (absent aggravating circumstances charged in indictment, felon in possession of firearm is not a per se crime of violence) [4#17]; *U.S. v. Chapple,* 942 F.2d 439, 441–42 (7th Cir. 1991) ("simple possession of a weapon, without more," is not a crime of violence) [4#8].

2. "Controlled Substance Offense"

The circuits are split over whether the career offender provision covers drug conspiracies. Most circuits to decide the issue have held that it does, concluding that the Commission properly used its general authority under 28 U.S.C. §994(a) to include conspiracy as a predicate offense in §4B1.2, comment. (n.1). See *U.S. v. Piper,* 35 F.3d 611, 616–19 (1st Cir. 1994) [7#2]; *U.S. v. Kennedy,* 32 F.3d 876, 888–90 (4th Cir. 1994) [7#2]; *U.S. v. Damerville,* 27 F.3d 254, 257 (7th Cir. 1994) [6#14]; *U.S. v. Hightower,* 25 F.3d 182, 186–87 (3d Cir. 1994) [6#14]; *U.S. v. Allen,* 24 F.3d 1180, 1186–87 (10th Cir. 1994) [6#14]; *U.S. v. Heim,* 15 F.3d 830, 832 (9th Cir. 1994) [6#11]. Two circuits have held that it does not, because the enabling statute section that the provision was based on, 28 U.S.C. §994(h), does not specifically include conspiracy. *U.S. v. Bellazerius,* 24 F.3d 698, 701–02 (5th Cir. 1994) [6#14]; *U.S. v. Price,* 990 F.2d 1367, 1369–70 (D.C. Cir. 1993) [5#12]. Accord *U.S. v. Mendoza-Figueroa,* 28 F.3d 766, 767–68 (8th Cir. 1994) (holding that conspiracy should not be included, but opinion has been vacated for rehearing en banc) [6#14].

The Tenth Circuit held that defendant's instant offense of possessing a "listed chemical" with intent to manufacture a controlled substance, 21 U.S.C. §841(d), was not "a controlled substance offense" for career offender purposes. Even though a controlled substance was involved in defendant's relevant conduct, §4B1.1 "refers to the charged offense" only, and the Guidelines "specifically distinguish possession of a controlled substance from possession of a listed chemical with the intent to manufacture a controlled substance." *U.S. v. Wagner,* 994 F.2d 1467, 1475 (10th Cir. 1993) (remanded) [5#14]. The Fifth Circuit dis-

agreed with *Wagner*, holding that a court "may examine the elements of the offense—though not the underlying criminal conduct—to determine whether the offense is substantially equivalent to one of the offenses specifically enumerated in §4B1.2 and its commentary." The court concluded that "possession of a listed chemical with intent to manufacture a controlled substance . . . is substantially similar to attempted manufacture of a controlled substance, and is therefore a controlled substance offense within the meaning of" §4B1.2. *U.S. v. Calverley*, 11 F.3d 505, 509–12 (5th Cir. 1993) (note: on rehearing en banc, 37 F.3d 160, the court determined that it would not review defendant's claims because they were not raised in the district court and there was no showing of plain error; thus, the precedential value of the original opinion is uncertain) [6#8].

As *Calverley* indicates, courts may have to look to the elements of an offense to determine whether it is a controlled substance offense under §4B1.1. The Ninth Circuit held that unlawful use of a communication facility in furtherance of a drug offense, 21 U.S.C. §843(b), was a predicate "controlled substance offense" for career offender purposes. As an element of §843(b), the defendant "must either commit an independent drug crime, or cause or facilitate such a crime." *U.S. v. Vea-Gonzales*, 999 F.2d 1326, 1329–30 (9th Cir. 1993). See also *U.S. v. Dolt*, 27 F.3d 235, 238–39 (6th Cir. 1994) (remanded: Florida offense of solicitation to traffic in cocaine was not "controlled substance offense"—it is not listed in guideline and is distinct from "the offenses of aiding and abetting, conspiring, and attempting to commit" such an offense); *U.S. v. Baker*, 16 F.3d 854, 857–58 (8th Cir. 1994) (remanded: defendant's 21 U.S.C. §856 conviction for managing or controlling "crack house" may not be construed as a "controlled substance offense"—although managing residence for purpose of *distributing* controlled substance would qualify, managing residence for purpose of *using* drugs does not, and because jury's verdict was ambiguous as to whether defendant was convicted of possession or distribution, "he may not be sentenced based upon the alternative producing the higher sentencing range") [6#11]; *U.S. v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991) (reversed: prior state conviction for "criminal facilitation" was not controlled substance offense—crime did not involve intent to commit underlying substantive offense, and career offender guidelines must be interpreted strictly).

The Fifth Circuit held that "neither the plain wording of §4B1.2(2), nor its commentary, allows consideration of underlying conduct. Therefore, the district court erred in considering the conduct underlying [defendants'] state possession convictions in order to expand them to possession with intent to distribute." *U.S. v. Gaitan*, 954 F.2d 1005, 1008–11 (5th Cir. 1992). Accord *U.S. v. Lipsey*, 40 F.3d 1200, 1201 (11th Cir. 1994) (affirmed: "court should look at the elements of the convicted offense, not the conduct underlying the conviction").

Note that simple possession of drugs is not included in the category "controlled substance offense." *U.S. v. Neal*, 27 F.3d 90, 92 (4th Cir. 1994); *Vea-Gonzales*, 999 F.2d at 1329 n. 1; *U.S. v. Gaitan*, 954 F.2d 1005, 1011 (5th Cir. 1992); *U.S. v. Galloway*, 937 F.2d 542, 549 (10th Cir. 1991); *U.S. v. Tremble*, 933 F.2d 925, 929 (11th Cir. 1991).

3. Procedural Issues

The Eighth Circuit determined that the career offender guideline is ambiguous as to whether a defendant who has pleaded guilty to two prior violent felonies, but not yet been sentenced on them, may be sentenced as a career offender. The court held that the "rule of lenity" precluded sentencing under §4B1.1 but that the district court could depart upward because

of the unusual circumstances and use the career offender provision to guide the extent of departure. *U.S. v. Jones,* 908 F.2d 365, 367 (8th Cir. 1990) [3#11]. A separate conviction for an offense that occurred during a conspiracy offense and was related to it could be counted as a "prior felony conviction" at the sentencing hearing on the conspiracy conviction. *U.S. v. Belton,* 890 F.2d 9, 10–11 (7th Cir. 1989) [2#17]. See also *U.S. v. Delvecchio,* 920 F.2d 810, 812–13 (11th Cir. 1991) (consolidated sentences cannot be counted separately for career offender purposes, but departure may be appropriate).

A prior violent felony committed as a juvenile may be counted for career offender purposes if defendant was tried as an adult and received a sentence exceeding one year and one month, even if commitment was to a state juvenile authority. See *U.S. v. Coleman,* 38 F.3d 856, 861 (7th Cir. 1994) (following §4B1.2, comment. (n.3), defendant who was convicted as adult of two drug felonies at age 17 was career offender; fact that he received concurrent sentences of 18 months on probation, which would have counted for only one criminal history point each under §4A1.2(d)(2)(B), did not matter); *U.S. v. Pinion,* 4 F.3d 941, 944–45 (11th Cir. 1993) (affirmed: offense committed at age 17 properly counted because defendant was convicted in adult court and served 27 months—categorization as "youthful offender" under state law not controlling; see §4A1.2(d) and comment. (n.7)); *U.S. v. Carillo,* 991 F.2d 590, 592–94 (9th Cir. 1993) (defendants properly sentenced as career offenders even though one prior violent felony was committed at age seventeen and they were committed to California Youth Authority—defendants had been tried as adults and received sentences exceeding one year and one month) [5#13]. See also §4B1.2, comment. (n.3) ("offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted"); *U.S. v. Hazelett,* 32 F.3d 1313, 1320 (7th Cir. 1994) (following Note 3); *U.S. v. Fonville,* 5 F.3d 781, 785 & n.11 (4th Cir. 1993) (same, and rejecting equal protection claim); *U.S. v. Muhammad,* 948 F.2d 1449, 1459 (6th Cir. 1991) (following Note 3).

Courts have held that "crime of violence" should be determined according to federal law, not state law. *U.S. v. John,* 936 F.2d 764, 770 n.4 (3d Cir. 1991) [4#7]; *U.S. v. Brunson,* 907 F.2d 117, 120–21 (10th Cir. 1990). See also *U.S. v. Baker,* 961 F.2d 1390, 1392–93 (8th Cir. 1992) (classification of conviction under state law is not controlling—defendant's armed robbery conviction was "felony" despite California's classification of it as misdemeanor (§4B1.2, comment. (n.3)); also defendant was adult at time of prior conviction because he was nineteen years old, even though he was sentenced as juvenile in California, see §4A1.2, comment. (n.7)); *U.S. v. Nimrod,* 940 F.2d 1186, 1188–89 (8th Cir. 1991) (whether second-degree burglary is "violent felony" is to be defined independent of state characterization) [4#7]; *U.S. v. Baskin,* 886 F.2d 383, 389 (D.C. Cir. 1989) (actual elements of offense control, not how state may characterize offense) [2#14]. But see *U.S. v. Thompson,* 891 F.2d 507, 510 (4th Cir. 1989) (using state law to determine whether pointing a firearm was crime of violence).

The Tenth Circuit agrees that offenses are to be defined under federal law. In determining whether a prior state offense was a burglary of a "dwelling," however, the court stated that "[j]ust because we are not bound by a state's definition of dwelling . . . does not mean that state definitions are useless for career offender purposes. . . . [A] court can look beyond the statutory count of conviction in order to resolve a patent ambiguity caused by a broad state statute . . . . However, . . . we limit that examination to the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judges." Any ambiguities are

resolved "in favor of narrowly interpreting the career offender provisions." *U.S. v. Smith,* 10 F.3d 724, 733–34 (10th Cir. 1993) (remanded: office defendant burglarized was not a "dwelling"). Inquiry into underlying conduct is not necessary when the statute of conviction clearly indicates there was a serious risk of injury. See, e.g., *U.S. v. Parson,* 955 F.2d 858, 872–873 (3d Cir. 1992) (state conviction for "recklessly engag[ing] in conduct which creates a substantial risk of death to another person" "so closely tracks the language of the Guideline that the defendant's conviction necessarily meets the Guideline standard") [4#17].

Most circuits have held that the government is not required to file an information under 21 U.S.C. §851(a)(1) before prior convictions may be used for the career offender determination. *U.S. v. Allen,* 24 F.3d 1180, 1184 (10th Cir. 1994); *U.S. v. Koller,* 956 F.2d 1408, 1417 (7th Cir. 1992); *U.S. v. Meyers,* 952 F.2d 914, 918–19 (6th Cir. 1992); *U.S. v. Whitaker,* 938 F.2d 1551, 1552–53 (2d Cir. 1991); *Young v. U.S.,* 936 F.2d 533, 535–36 (11th Cir. 1991); *U.S. v. McDougherty,* 920 F.2d 569, 574 (9th Cir. 1990); *U.S. v. Sanchez,* 917 F.2d 607, 616 (1st Cir. 1990); *U.S. v. Marshall,* 910 F.2d 1241, 1244–45 (5th Cir. 1990); *U.S. v. Wallace,* 895 F.2d 487, 489–90 (8th Cir. 1990) [3#3]. Cf. *U.S. v. Novey,* 922 F.2d 624, 627–28 (10th Cir. 1991) (§851(a)(1) satisfied when government provided notice of one conviction and guideline sentence was within statutory maximum authorized on basis of that conviction).

District courts may consider downward departure for career offenders. *U.S. v. Beckham,* 968 F.2d 47, 54–55 (D.C. Cir. 1992); *U.S. v. Bowser,* 941 F.2d 1019, 1023 (10th Cir. 1991) [4#7]; *U.S. v. Adkins,* 937 F.2d 947, 952 (4th Cir. 1991) [4#7]; *U.S. v. Lawrence,* 916 F.2d 553, 554–55 (9th Cir. 1990) [3#15]; *U.S. v. Smith,* 909 F.2d 1164, 1169–70 (8th Cir. 1990) [3#11]; *U.S. v. Brown,* 903 F.2d 540, 545 (8th Cir. 1990) [3#8]. Cf. *Baskin,* 886 F.2d at 389–90 (indicating departure could be appropriate for career offender). See also section VI.A.2.

Some circuits have held that the "Offense Statutory Maximum" in the §4B1.1 Offense Level Table includes any applicable statutory sentencing enhancements that increase the maximum sentence. *U.S. v. Garrett,* 959 F.2d 1005, 1009–11 (D.C. Cir. 1992) [4#21]; *U.S. v. Amis,* 926 F.2d 328, 329–30 (3d Cir. 1991); *U.S. v. Sanchez-Lopez,* 879 F.2d 541, 559–60 (9th Cir. 1989). In *Garrett,* the defendant's maximum sentence under 21 U.S.C. §841(b)(1)(B)(iii) was life due to his prior drug convictions. Thus his "Offense Statutory Maximum" was life. Note, however, that this would change under a proposed amendment to §4B1.1, comment. (n.2), to take effect Nov. 1, 1994. The amendment states that "Offense Statutory Maximum" does "not includ[e] any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." This amendment will also be retroactive under §1B1.10.

Several courts have rejected double jeopardy and other constitutional challenges to the career offender statutes. See, e.g., *U.S. v. Piper,* 35 F.3d 611, 620 (1st Cir. 1994); *U.S. v. Spencer,* 25 F.3d 1105, 1111–12 (D.C. Cir. 1994); *U.S. v. Guajardo,* 950 F.2d 203, 207 (5th Cir. 1991); *U.S. v. Foote,* 920 F.2d 1395, 1401 (8th Cir. 1990); *U.S. v. McDougherty,* 920 F.2d 569, 576 (9th Cir. 1990); *U.S. v. Alvarez,* 914 F.2d 915, 919–20 (7th Cir. 1990); *U.S. v. O'Neal,* 910 F.2d 663 (9th Cir. 1990) amended, 937 F.2d 1369, 1376 (9th Cir. 1991); *U.S. v. Hughes,* 901 F.2d 830, 832 (10th Cir. 1990); *U.S. v. Williams,* 892 F.2d 296, 304–05 (3d Cir. 1989); *U.S. v. Sanchez-Lopez,* 879 F.2d 541, 560–61 (9th Cir. 1989) [2#9]. Claims that it was improper to include prior state drug convictions as predicate convictions have been rejected on the ground that inclusion of state offenses is not inconsistent with the statutory mandate. See *U.S. v. Brown,* 23 F.3d 839, 841 (4th Cir. 1994); *U.S. v. Consuegra,* 22 F.3d 788, 789–90 (8th Cir. 1994); *U.S. v. Beasley,* 12 F.3d 280, 283–84 (1st Cir. 1993); *U.S. v. Rivera,* 996 F.2d 993, 995–996 (9th Cir. 1993); *U.S. v. Whyte,* 892 F.2d 1170, 1174 (3d Cir. 1989).

Note that some circuits have stated that the prior convictions requirement "is to be inter-

preted strictly." *U.S. v. Dolt,* 27 F.3d 235, 240 (6th Cir. 1994). Accord *U.S. v. Liranzo,* 944 F.2d 73, 79 (2d Cir. 1991); *U.S. v. Delvecchio,* 920 F.2d 810, 812 (11th Cir. 1991).

C. Criminal Livelihood Provision (§4B1.3)

The term "pattern of criminal conduct" in §4B1.3 does not require separate criminal offenses but may involve planned acts over a period of time during a single course of criminal conduct. *U.S. v. Hearrin,* 892 F.2d 756, 760 (8th Cir. 1990) [2#20]. A period of several months has been held to be a "substantial period of time" within the definition of "pattern of criminal conduct." See *U.S. v. Irvin,* 906 F.2d 1424, 1426 (10th Cir. 1990) (five to seven months) [3#10]; *Hearrin,* 892 F.2d at 760 (eight months); *U.S. v. Luster,* 889 F.2d 1523, 1531 (6th Cir. 1989) (three months). See also *U.S. v. Cryer,* 925 F.2d 828, 830 (5th Cir. 1991) (affirmed application of §4B1.3 to conduct that lasted four months—§4B1.3 "requires only that '[the pattern of] criminal conduct' be the defendant's 'primary occupation' during the relevant twelve-month span, not that the defendant engage in crime for an entire year").

When determining defendant's income in "any twelve-month period," §4B1.3, comment. (n.2), a district court is not limited to considering income in distinct calendar years. "Rather, the district judge was justified in examining figures from the twelve-month period that began with the initiation of the defendant's criminal activities, because those figures are a more accurate indication of whether proceeds from crime served as the defendant's primary source of income during that time." *U.S. v. Kellams,* 26 F.3d 646, 648–49 (6th Cir. 1994) (affirmed: for defendant whose mail fraud began in Nov. 1991 and ended June 30, 1992, proper "twelve-month period" for defendant's activities was Nov. 1, 1991 to October 31, 1992).

The Eighth Circuit held that the offense of conviction must be part of or related to the pattern of criminal conduct. "Section 4B1.3 was not intended to punish individuals who are merely frequent offenders; rather, it was designed to punish the defendant whose current crime was part of a larger pattern of illegal pecuniary activities." *U.S. v. Oliver,* 908 F.2d 260, 266 (8th Cir. 1990) (remanded: defendant has long history of criminal conduct, but it does not "appear[] to be even remotely related to her present crime" of forgery).

Before §4B1.3 and its application notes were amended, effective Nov. 1, 1989, there was some question as to whether the term "from which he derived a substantial portion of his income" required that a certain minimum amount of income be derived from the criminal activity. See, e.g., *U.S. v. Cianscewski,* 894 F.2d 74, 77–79 (3d Cir. 1990) (holding earlier version of §4B1.3 inapplicable to defendants whose yearly profit from crime is less than 2,000 times the hourly minimum wage) [3#2]; *U.S. v. Nolder,* 887 F.2d 140, 142 (8th Cir. 1989) (same) [2#15]. Contra *U.S. v. Munster-Ramirez,* 888 F.2d 1267, 1270 (9th Cir. 1989) (no minimum required, rather "sentencing court must determine a defendant's income and then determine what percentage or proportion of his income is derived from criminal activity"). The amendment settled the issue by replacing that language in the guideline with "engaged in as a livelihood" and stating in Note 2 that "income from the pattern of criminal conduct" must exceed 2,000 times the federal minimum wage in any twelve-month period.

In computing the amount of income derived from criminal activity, the Fifth Circuit has included the value of a stolen car which contained stolen mail and was found to be conduct related to defendant's offense of possession of stolen mail, *Cryer,* 925 F.2d at 830, and the value of stolen checks that defendant had not yet cashed, *U.S. v. Quertermous,* 946 F.2d 375, 377 (5th Cir. 1991).

D. Armed Career Criminal (§4B1.4)

Sentencing as an Armed Career Criminal under §4B1.4 is determined by whether defendant is subject to an enhanced sentence under 18 U.S.C. §924(e) by virtue of three prior convictions for a "violent felony" or "serious drug offense." Definitions relating to prior convictions or career offender in §§4A1.2 and 4B1.2 do not apply. See §4B1.4, comment. (n.1) ("definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. §924(e) are not identical to the definition of 'crime of violence' and 'controlled substance offense' used in §4B1.1 . . . , nor are the time periods for the counting of prior sentences under §4A1.2 . . . applicable"). See also *U.S. v. Lujan,* 9 F.3d 890, 893 (10th Cir. 1993) (§4A1.2 time limits for prior convictions do not apply); *U.S. v. Ford,* 996 F.2d 83, 85 (5th Cir. 1993) (affirmed: defendant properly sentenced under §4B1.4(b)(3)(A) for possessing firearm "in connection with a crime of violence"—§4B1.1's exclusion of firearm possession by felon as crime of violence does not apply to armed career criminal who fatally shot another with the weapon); *U.S. v. Maxey,* 989 F.2d 303, 308 (9th Cir. 1993) (affirmed: "section 4B1.4 does not incorporate section 4A1.2's definition of 'related' offenses in determining whether a defendant is subject to . . . its provisions, and . . . the Guidelines do not displace section 924(e) and case law interpreting it") [5#11]; *U.S. v. Medina-Gutierrez,* 980 F.2d 980, 982–83 (5th Cir. 1992) (affirmed: three burglary convictions committed within weeks of one another and sentenced on same day are to be treated as separate offenses for §4B1.4—"what matters under §924(e) is whether three violent felonies were committed on different occasions; whether they are considered 'related cases' under §4A1.2 is irrelevant.") [5#7].

However, the Eleventh Circuit held that because possession of a firearm by a convicted felon is not a "crime of violence" under the Guidelines, it is not a "violent felony" under §924(e). Although acknowledging Note 1 in §4B1.4, quoted above, the court held that "the two expressions are not conceptually distinguishable for purposes of the narrow question raised in this appeal" and "conduct which does not pose a 'serious potential risk of physical injury to another' for purposes of §§4B1.1 and 4B1.2 similarly cannot pose such a risk with respect to §924(e) and §4B1.4." *U.S. v. Oliver,* 20 F.3d 415, 417–18 (11th Cir. 1994) (remanded: 1980 conviction for possession of firearm by felon cannot be used as predicate "violent felony") [6#14].

If a defendant's instant conviction of being a felon in possession of a firearm is found to be "in connection with a crime of violence" pursuant to §4B1.4(b)(3)(A) & (c)(2), the Sixth Circuit held that defendant need not have been actually convicted of that crime of violence to apply the enhancements. *U.S. v. Rutledge,* 33 F.3d 671, 673–74 (6th Cir. 1994) (affirmed) [7#3].

Note that no Chapter 3 adjustments other than acceptance of responsibility are to be applied if the offense level is set under §4B1.3(b)(3). See text of guideline and *U.S. v. Fitzhugh,* 954 F.2d 253, 255 (5th Cir. 1992).

Upward departure for an armed career criminal may be appropriate. See *U.S. v. Brown,* 9 F.3d 907, 912–13 (11th Cir. 1993) (affirming departure based on inadequate reflection of criminal past and threat to public welfare, §5K2.14).

V. Determining the Sentence

A. Consecutive or Concurrent Sentences

1. Multiple Counts of Conviction

When concurrent sentences are required under §5G1.2, consecutive sentences can be imposed if the procedures for departure are followed. *U.S. v. Quinones,* 26 F.3d 213, 216 (1st Cir. 1994) [6#17]; *U.S. v. Perez,* 956 F.2d 1098, 1102–03 (11th Cir. 1992) [4#20]; *U.S. v. Pedrioli,* 931 F.2d 31, 32 (9th Cir. 1991) [4#20].

If a defendant is convicted of both Guidelines and pre-Guidelines offenses, §5G1.2 does not apply to the earlier offense and district courts have discretion to impose consecutive or concurrent sentences. *U.S. v. Preston,* 28 F.3d 1098, 1099 (11th Cir. 1994); *U.S. v. Hicks,* 997 F.2d 594, 599–600 (9th Cir. 1993); *U.S. v. Pollen,* 978 F.2d 78, 91–92 (3d Cir. 1992); *U.S. v. Hershberger,* 962 F.2d 1548, 1550–52 (10th Cir. 1992); *U.S. v. Ewings,* 936 F.2d 903, 910 (7th Cir. 1991); *U.S. v. Lincoln,* 925 F.2d 255, 256–57 (8th Cir. 1991); *U.S. v. Garcia,* 903 F.2d 1022, 1025–226 (5th Cir. 1990) [3#9]; *U.S. v. Watford,* 894 F.2d 665, 668–70 (4th Cir. 1990) [2#20]. This may be so even if pre-Guidelines conduct is used to set the offense level for the Guidelines offense. See *U.S. v. Parks,* 924 F.2d 68, 72–74 (5th Cir. 1991); *Watford,* 894 F.2d at 669. Contra *U.S. v. Niven,* 952 F.2d 289, 293–94 (9th Cir. 1991) (if losses from pre-Guidelines count are used to calculate Guidelines offense level, must impose concurrent sentences).

Under 18 U.S.C. §3584(a) and (b), a court must specify that sentences on multiple counts are to run consecutively if the total sentence is longer than the statutory maximum for any count, unless another statute requires consecutive terms. *U.S. v. Joetzki,* 952 F.2d 1090, 1097–98 (9th Cir. 1991) (remanded: 65-month sentence exceeded 60-month maximum for fraud counts, and court did not specify whether or to what extent sentences were to be consecutive).

2. State Sentences

Under 18 U.S.C. §3584(a) a federal sentence may be imposed to run consecutive to any previously imposed state sentence. There is disagreement in the circuits as to whether this applies to a state sentence that has not yet been imposed. Compare *U.S. v. Clayton,* 927 F.2d 491, 492–93 (9th Cir. 1991) (district court had no authority to impose federal sentence to run consecutive to state sentence that was not yet imposed, but could have delayed sentencing until state sentence was imposed and then used discretion to impose consecutive sentence) with *U.S. v. Ballard,* 6 F.3d 1502, 1505–10 (11th Cir. 1993) (proper to make defendant's sentence for federal offense—committed while in state jail awaiting trial for unrelated state offense—consecutive to whatever state sentence defendant receives) [6#7] and *U.S. v. Brown,* 920 F.2d 1212 (5th Cir. 1991) (court may order Guideline sentence to run consecutive to any later related state sentence) [3#19]. See also *U.S. v. Mun,* 41 F.3d 409, 413 (9th Cir. 1994) (affirmed denial of request for reduction of sentence after state sentence for same underlying conduct: following language of §5G1.3 (1987), section "5G1.3's provision mandating concurrent sentences applies only if 'the defendant is already serving one or more unexpired sentences.' At the time the federal court sentenced Mun he was not serving another sentence. The state sentence was imposed after the federal sentence. Therefore, §5G1.3

did not require the district court to alter its sentence to make it run concurrently with the state sentence.") (as amended Dec. 19, 1994) [7#1 and #5].

3. District Court Discretion Under §5G1.3

As of Nov. 1, 1992, §5G1.3 provides:

(a) If the instant offense was committed while the defendant was serving a term of imprisonment . . . or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall . . . run consecutively to the undischarged term . . . .

(b) If subsection (a) does not apply, and the undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in . . . the instant offense, the sentence for the instant offense shall be imposed to run concurrently to the undischarged term . . . .

(c) (Policy Statement) In any other case, the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense.

The current version also "provides additional commentary explaining, and providing examples of" subsection (c). U.S.S.G. App. C, amendment 465.

Note that §5G1.3(c) is now a policy statement, but several circuits have held that it must be followed like a guideline unless it is impractical to do so or departure is warranted. See, e.g., *U.S. v. Johnson,* 40 F.3d 1079, 1083–84 (10th Cir. 1994) (remanded: "district court should employ the methodology under §5G1.3(c). If the district court departs from the analysis required pursuant to §5G1.3(c), it must explain its rationale for doing so"); *U.S. v. Wiley-Dunaway,* 40 F.3d 67, 70–72 (4th Cir. 1994) (remanded: holding it is "appropriate to enforce subsection (c) as if it were a guideline, but in a manner that affords the degree of discretion spelled out by the commentary and illustrations," adding that §5G1.3(c) and Note 3 "only require[] that the district court 'consider' such a sentence 'to the extent practicable' to fashion a 'reasonable incremental punishment'"); *U.S. v. Redman,* 35 F.3d 437, 440–42 (9th Cir. 1994) (departure affirmed: "court must attempt to calculate the reasonable incremental punishment that would be imposed under the commentary methodology. If that calculation is not possible or if the court finds that there is a reason not to impose the suggested penalty, it may use another method to determine what sentence it will impose. The court must, however, state its reasons for abandoning the commentary methodology in such a way as to allow us to see that it has considered the methodology") [7#3]; *U.S. v. Brewer,* 23 F.3d 1317, 1322 (8th Cir. 1994) (remanded: district court must follow §5G1.3(c) and accompanying commentary unless it follows proper procedures for departure); *U.S. v. Coleman,* 15 F.3d 610, 612–13 (6th Cir. 1994) (remanded: courts must consider §5G1.3(c) and "to the extent practicable" utilize methodology in comment. (n.3)). See also *U.S. v. Whiting,* 28 F.3d 1296, 1311 (1st Cir. 1994) (vacating defendant's sentence because district court failed to follow same methodology in previous version of §5G1.3(c)). Cf. *U.S. v. Torrez,* 40 F.3d 84, 87–88 (5th Cir. 1994) (affirmed under harmless error analysis: although it was plain error for district court not to have considered §5G1.3(c), the method in Note 3 for calculating incremental penalty is not binding and evidence indicates it is "entirely likely that the district court would impose consecutive sentences expressly upon remand").

Prior versions of §5G1.3 had directed that the current sentence be imposed to run con-

secutively to any "unexpired sentences" being served "at the time of sentencing" on the instant offense. The circuits had split on whether the Guidelines could impose such a requirement in light of 18 U.S.C. §3584(a), which gives courts discretion to impose consecutive or concurrent sentences. Most courts have held that the conflict between guideline and statute may be resolved by allowing courts to depart from the requirements of §5G1.3 when appropriate; courts should follow the usual procedures for departure. See *U.S. v. Flowers,* 995 F.2d 315, 316–17 (1st Cir. 1993); *U.S. v. Gullickson,* 981 F.2d 344, 349 (8th Cir. 1992); *U.S. v. Shewmaker,* 936 F.2d 1124, 1127–28 (10th Cir. 1991); *U.S. v. Pedrioli,* 931 F.2d 31, 32 (9th Cir. 1991); *U.S. v. Stewart,* 917 F.2d 970, 972–73 (6th Cir. 1990); *U.S. v. Miller,* 903 F.2d 341, 349 (5th Cir. 1990) [3#9]; *U.S. v. Rogers,* 897 F.2d 134, 137–38 (4th Cir. 1990) [3#3]; *U.S. v. Fossett,* 881 F.2d 976, 980 (11th Cir. 1989) [2#11]. But see *U.S. v. Nottingham,* 898 F.2d 390, 393–95 (3d Cir. 1990) (§5G1.3 conflicts with 18 U.S.C. §3584(a), district courts retain discretion to impose concurrent or consecutive sentences) [3#5]; *U.S. v. Wills,* 881 F.2d 823, 826–27 (9th Cir. 1989) (same, but appears to be superseded by *Pedrioli,* supra) [2#11]. See also *U.S. v. Vega,* 11 F.3d 309, 315 (2d Cir. 1993) (affirmed federal sentence to run consecutively to unexpired state sentence—if district court did not retain discretion under §3584(a), it properly departed from §5G1.3).

The Eighth Circuit has held that, where concurrent sentences are called for under §5G1.3(b) and credit should be given for time served on a related state sentence, the guideline should be applied even if the resulting time served on the federal sentence would fall below the mandatory minimum required by 18 U.S.C. §924(e). "Unlike a §924(c)(1) mandatory minimum sentence, which cannot be made concurrent with the sentence for any other offense, §924(e)(1) does not forbid concurrent sentencing for separate offenses that were part of the same course of conduct. In these circumstances, although the issue is not free from doubt, we conclude that time previously served under concurrent sentences may be considered time 'imprisoned' under §924(e)(1) if the Guidelines so provide." *U.S. v. Kiefer,* 20 F.3d 874, 876–77 (8th Cir. 1994) (remanded) [6#12].

The First Circuit held that in determining "whether a sentence imposed pursuant to §5G1.3(c) represents a departure from the Guidelines, we do not consider time [already] served in state custody." Defendant received a concurrent 240-month federal sentence. He claimed that this was a departure because, added to the 46–48 months he had already served in state custody, it exceeded his guideline maximum of 262 months. The appellate court concluded that "when determining whether the sentencing judge departed from the guideline range, we look at the sentence imposed for the instant offense, not the total punishment." *U.S. v. Parkinson,* 44 F.3d 6, 8–9 (1st Cir. 1994) (affirmed).

B. Probation (§5B1)

It has been held that probation with community service cannot be substituted for intermittent confinement when confinement is required under §5C1.1. *U.S. v. Delloiacono,* 900 F.2d 481, 483–84 (1st Cir. 1990) [3#6]. When determining the possible length of a term of probation under §5B1.2, "the offense level" means the adjusted offense level, not the base offense level. *U.S. v. Harry,* 874 F.2d 248, 249 (5th Cir. 1989) [2#7].

C. Supervised Release (§5D1)

Length of term: The Eighth Circuit upheld a ten-year term of supervised release agreed to in a plea bargain, although §5D1.2(a) set a five-year limit. The court held that if the term of supervised release authorized in §5D1.2(a) was construed as a guideline range, then it was subject to departure, and departure to a ten-year term was justified in this case. *U.S. v. LeMay,* 952 F.2d 995, 998 (8th Cir. 1991) [4#14]. See also *U.S. v. Eng,* 14 F.3d 165, 171–72 (2d Cir. 1994) (affirming upward departure to life term of supervised release). Cf. *U.S. v. Amaechi,* 991 F.2d 374, 379 (7th Cir. 1993) (remanded departure to life term of supervised release because defendant did not receive adequate notice; also noted that "a life term of supervised release is extraordinary and not often warranted"); *U.S. v. Pico,* 966 F.2d 91, 92 (2d Cir. 1992) (remanding imposition of life term of supervised release when guideline maximum was five years; court has authority to depart for supervised release, but it failed to follow proper procedures for departure) [5#1]; *U.S. v. Marquez,* 941 F.2d 60, 64 (2d Cir. 1991) (court should give reasons for departure in supervised release terms where it does not also depart in length of imprisonment).

Note that a departure above the term limits in the Guidelines may be limited by 18 U.S.C. §3583(b), which sets maximum terms of one, three, or five years, depending on the seriousness of the offense of conviction. See, e.g., *U.S. v. Saunders,* 957 F.2d 1488, 1494 (8th Cir. 1992) (remanded: departure to five-year term improper where statutory maximum was three years) [4#20]. These limits apply "except as otherwise provided," and some statutes clearly require longer terms for serious offenses by repeat offenders. There is a split in the circuits as to whether a statute that requires a term of "at least" a certain term of years falls within the "otherwise provided" language and allows for a term of release longer than §3583(b)'s maximums. The Second and Eighth Circuits hold that longer terms are allowed. See *U.S. v. Mora,* 22 F.3d 409, 412 (2d Cir. 1994)(remanded because facts did not support extent of departure, but life term of supervised release would not violate §3583(b)(1)'s five-year limit because 21 U.S.C. §841(b)(1)(B)'s required term of "at least 4 years" overrides §3583(b)(1)); *Eng,* 14 F.3d at 172–23 (same, affirming departure to life term where required term was "at least 5 years" in §841(b)(1)(A)); *LeMay,* 952 F.2d at 998 (affirmed ten-year term where §841(b)(1)(A) required "at least 5 years"). The Fifth Circuit holds that the "at least" language sets the minimum term but does not override the maximums set in §3583(b). See *U.S. v. Kelly,* 974 F.2d 22, 24 (5th Cir. 1992) (remanded: where 21 U.S.C. 841(b)(1)(C) requires term of "at least 3 years," error to impose five-year term because §3583(b) set limit of three years).

A Nov. 1994 amendment to §5G1.2's commentary states that "even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. *See* 18 U.S.C. §3624(e)." Previously, there has been some disagreement on whether supervised release terms on multiple counts can run consecutively. Compare *U.S. v. Shorthouse,* 7 F.3d 149, 152 (9th Cir. 1993) (periods of supervised release can run consecutively when one sentence is required to be consecutive to the other) and *U.S. v. Maxwell,* 966 F.2d 545, 550–51 (10th Cir. 1992) (same) [5#1], with *U.S. v. Gullickson,* 982 F.2d 1231, 1235–36 (8th Cir. 1993) (terms must be concurrent, "dictum" in *Saunders* to contrary should not be followed) [5#8]. See also *U.S. v. Ravoy,* 994 F.2d 1332, 1337–38 (8th Cir. 1993) (error to impose term of "inactive supervised release" that exceeded maximum statutory term and had effect of imposing consecutive terms of release prohibited by *Gullickson*) [5#15].

Conditions: The Fifth Circuit held that forbidding defendant to work in the car sales field during a period of supervised release, §5F1.5, was not a departure subject to advance notice. *U.S. v. Mills,* 959 F.2d 516, 518–20 (5th Cir. 1992) (remanding, however, because court exceeded discretion in ordering defendant to close and sell car sales business).

The Eleventh Circuit held that 18 U.S.C. §3583(d) "authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." *U.S. v. Chukwura,* 5 F.3d 1420, 1423–24 (11th Cir. 1993) (affirmed deportation order for convicted foreign national) [6#6].

One court has held that when home detention is available under §5C1.1(d) and (e)(3) as a condition of supervised release, it must be served in a location where adequate supervision of defendant is possible. See *U.S. v. Porat,* 17 F.3d 660, 670–71 (3d Cir. 1994) (remanded: error to allow home detention to be served in Israel: "Having determined that home detention is suitable in this particular instance, there must be assurance that the defendant complies with his sentence.... It is not clear that the probation office could properly insure that Porat is complying with his sentence if he is allowed to serve his term of supervised release in Israel") [6#11]. Cf. *U.S. v. Pugliese,* 960 F.2d 913, 915–16 (10th Cir. 1992) (affirmed: not an abuse of discretion to deny defendant's request to serve supervised release in Thailand because required monitoring by probation officer would not be possible).

Other: It has been held that §§5D1.1 and 5D1.2, which require a term of supervised release, do not conflict with 18 U.S.C. §3583(a), which states that a court "may" impose supervised release. "U.S.S.G. §§5D1.1 and 5D1.2 can be read consistently with 18 U.S.C. §3583.... [The guidelines] allow for departure if... the trial judge determines no post-release supervision is necessary," and thus "do not take away the trial judge's ultimate discretion in ordering supervised release" granted by §3583(a). *U.S. v. Chinske,* 978 F.2d 557, 558–59 (9th Cir. 1992) [5#6]. See also *U.S. v. West,* 898 F.2d 1493, 1503 (11th Cir. 1990) (28 U.S.C. §994(a) provides authority for Guidelines' mandatory provisions for supervisory release).

The Sixth Circuit held that the Anti-Drug Abuse Act of 1986 did not limit district court discretion to end supervised release after one year. Although some provisions in 21 U.S.C. §841(b) require imposition of specific terms of supervised release, district courts still retain the discretion to terminate a defendant's supervised release after one year pursuant to 18 U.S.C. §3583(e)(1). *U.S. v. Spinelle,* 41 F.3d 1056, 1059–61 (6th Cir. 1994) (affirmed: when Congress enacted ADAA "it only partially limited a court's discretionary authority to *impose* the sentence. Congress did not alter the court's separate authority to *terminate* a sentence of supervised release, under 18 U.S.C. §3583(e)(1), if the conduct of the person and the interest of justice warranted it.") [7#6].

D. Restitution (§5E1.1)

1. Ability to Pay and Calculation

An order of restitution must account for the defendant's ability to pay. *U.S. v. Colletti,* 984 F.2d 1339, 1348 (3d Cir. 1992); *U.S. v. Bailey,* 975 F.2d 1028, 1031–32 (4th Cir. 1992); *U.S. v. Rogat,* 924 F.2d 983, 985 (10th Cir. 1991); *U.S. v. Mitchell,* 893 F.2d 935, 936 (8th Cir. 1990). Some circuits require specific findings to facilitate review. See *U.S. v. Jackson,* 978 F.2d 903, 915 (5th Cir. 1992); *U.S. v. Logar,* 975 F.2d 958, 961 (3d Cir. 1992); *U.S. v. Sharp,* 927 F.2d 170, 174 (4th Cir. 1991); *U.S. v. Owens,* 901 F.2d 1457, 1459–60 (8th Cir. 1990) [3#7]. Contra *U.S. v. Blanchard,* 9 F.3d 22, 25 (6th Cir. 1993) ("This court has refused... to

require the district court to make factual findings on the record regarding the financial ability to pay"); *U.S. v. Ahmad,* 2 F.3d 245, 246–47 (7th Cir. 1993) ("Restitution is the norm, and a judge who *declines* to order full restitution must make explicit findings. . . . No comparable provision requires findings for ordering restitution."); *U.S. v. Savoie,* 985 F.2d 612, 618 (1st Cir. 1993) (specific findings not required); *U.S. v. Smith,* 944 F.2d 618, 623 (9th Cir. 1991) (same). Cf. *U.S. v. Tortora,* 994 F.2d 79, 81 (2d Cir. 1993) (detailed findings not necessary but record must demonstrate that court considered factors listed in 18 U.S.C. §3664(a)) (pre-Guidelines case); *U.S. v. Hairston,* 888 F.2d 1349, 1352–53 (11th Cir. 1989) (same).

Restitution must be determined at the time of sentencing. See *U.S. v. Prendergast,* 979 F.2d 1289, 1293 (8th Cir. 1992) (no authority to leave restitution order for later date); *U.S. v. Sasnett,* 925 F.2d 392, 398–99 (11th Cir. 1991) (same). See also *U.S. v. Porter,* 41 F.3d 68, 71 (2d Cir. 1994) (remanded: amount and scheduling of restitution must be set by district court at time of sentencing; defendant may petition later for modification); *U.S. v. Ramilo,* 986 F.2d 333, 335–36 (9th Cir. 1993) (remanded: "restitution will be determined at the time of sentencing, based upon the financial needs and earning ability of the defendant"; "at the time restitution is ordered the record must reflect some evidence the defendant may be able to pay restitution in the amount ordered in the future").

Several circuits have held that indigency does not bar restitution. See, e.g., *U.S. v. Newman,* 6 F.3d 623, 631 (9th Cir. 1993) ("sentencing court is not prohibited from imposing restitution even on a defendant who is indigent at the time of sentencing so long as the record indicates that the court considered the defendant's future ability to pay"); *U.S. v. Seligsohn,* 981 F.2d 1418, 1423 (3d Cir. 1992) (but "should make additional findings to justify [restitution] order"); *Bailey,* 975 F.2d at 1032 (but "must make a factual determination that the defendant can feasibly comply with the order without undue hardship to himself or his dependents"); *U.S. v. Grimes,* 967 F.2d 1468, 1473 (10th Cir. 1992) (restitution order will not stand absent evidence defendant is able to pay); *U.S. v. Owens,* 901 F.2d 1457, 1459–60 (8th Cir. 1990) [3#7] (court should make specific finding as to defendant's ability to pay). The *Owens* court also held that restitution is not mandatory under the Guidelines, but remains within the discretion of the sentencing court. 901 F.2d at 1459.

An indigent defendant's earning potential may be considered in setting restitution, including income that may be earned in prison. See, e.g., *Blanchard,* 9 F.3d at 25 (despite present indigency, defendant and his wife demonstrated earning potential; also, district court can later reassess defendant's ability to pay the restitution ordered); *U.S. v. Narvaez,* 995 F.2d 759, 764–65 (7th Cir. 1993) (present indigency does not bar restitution where defendant has some earning potential and thus may be able to pay the amount ordered—defendant had recently started job and did not have to pay all at once); *U.S. v. Williams,* 996 F.2d 231, 233–35 (10th Cir. 1993) (but there must be "an objectively reasonable possibility that the restitution can be paid . . . more than a mere chance"; court cited Bureau of Prisons "Inmate Financial Responsibility Program," which helps inmates meet court-ordered financial obligations); *U.S. v. Paden,* 908 F.2d 1229, 1237 (5th Cir. 1990) (restitution may be based on defendant's earning potential).

A restitution order may not be based on future earnings that will come from illegal activity. See *U.S. v. Myers,* 41 F.3d 531, 534 (9th Cir. 1994) (remanded: "district court erred by basing its restitution order solely on Myers' ability to defraud people rather than on her ability to earn money lawfully"); *U.S. v. Gilbreath,* 9 F.3d 85, 86–87 (10th Cir. 1993) (remanded: district court cannot anticipate that restitution will be satisfied from future loansharking activities). On the other hand, an order partly based on a reasonable inference that defendant still had access to stolen funds was upheld. "Where there is evidence that a

defendant's criminal conduct caused the loss and the missing funds cannot be accounted for, the district court may reasonably infer that the defendant knows their whereabouts. In such cases, it is appropriate . . . to fashion a restitution order that prevents the defendant from reaping any gain from his criminal activities after being released." *U.S. v. Boyle,* 10 F.3d 485, 492 (7th Cir. 1993) (restitution order for $2 million was not unreasonably premised on defendant's future earning potential and access to $1.7 million of the missing money). Cf. *Blanchard,* 9 F.3d at 24 (in affirming restitution order, noted that defendant had successfully concealed assets worth $118,000 in a bankruptcy case).

The Tenth Circuit held that Fed. R. Crim. P. 32 was violated where the district court relied on a letter from the victim to assess the amount of restitution and the defendant was not notified of the letter until after sentencing. *U.S. v. Burger,* 964 F.2d 1065, 1072–73 (10th Cir. 1992) (remanded to allow defendant to comment on the letter).

2. Relevant Conduct

There may be some instances when restitution may be ordered for losses from relevant conduct. Restitution is to be made in accordance with the Victim Witness and Protection Act, (VWPA), 18 U.S.C. §§3663–3664. See also *U.S. v. Snider,* 957 F.2d 703, 706 (9th Cir. 1991) (court does not have inherent power to order restitution in absence of VWPA authority). The Supreme Court held that restitution under the VWPA is limited to "the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. U.S.,* 110 S. Ct. 1979, 1981 (1990) (decided prior to 1990 amendments to 18 U.S.C. §3663). See also *U.S. v. Levy,* 992 F.2d 1081, 1085 (10th Cir. 1993) (remanded: error to impose restitution beyond two counts of conviction); *U.S. v. Clark,* 957 F.2d 248, 253–54 (6th Cir. 1992) (remanded: restitution limited to damage to two FBI vehicles, which were recovered, that defendant was convicted of stealing; may not include value of other cars stolen but not charged); *U.S. v. Daniel,* 956 F.2d 540, 543–544 (6th Cir. 1992) (remanded: restitution to United States could not include civil liabilities from statutory penalties associated with unreported taxes due—only liability from offense of conviction is proper); *U.S. v. Garcia,* 916 F.2d 556, 556–67 (9th Cir. 1990) (restitution may not be imposed on dismissed count). Where, however, the only "victim of the offense," 18 U.S.C. §3663(a)(1), was a bank, restitution was properly ordered paid to innocent holders of fraudulent cashiers checks who had reimbursed the bank for the monies collected when they cashed the checks: 18 U.S.C. §3663(e)(1) provides "that the court may, in the interest of justice, order restitution to any person who has compensated the victim for [the] loss." *U.S. v. Koonce,* 991 F.2d 693, 698–99 (11th Cir. 1993).

However, the VWPA was amended after *Hughey* by the Crime Control Act of 1990 (effective Nov. 29, 1990), to allow restitution "to the extent agreed to by the parties in a plea agreement." 18 U.S.C. §3663(a)(3). See *U.S. v. Arnold,* 947 F.2d 1236, 1237–38 (5th Cir. 1991) (restitution not limited by loss from count of conviction where defendant admitted in plea agreement that larger loss was attributable to fraudulent scheme). Cf. *U.S. v. Bailey,* 975 F.2d 1028, 1033-34 (4th Cir. 1992) (where defendant pled guilty to "defraud[ing] investors of monies in excess of fifteen million dollars," restitution order of $16.2 million to victims not specified in indictment is proper). Note that there is a split on whether retroactive application of this amendment violates the ex post facto clause. Compare *U.S. v. Rice,* 954 F.2d 40, 44 (2d Cir. 1992) (no ex post facto problem) and *U.S. v. Arnold,* 947 F.2d 1236, 1237 n.1 (5th Cir. 1991) (same) with *Snider,* 957 F.2d at 706 n.2 (ex post facto problem). Previously, some circuits stated that district courts lack authority to order restitution in an amount greater than damages from the crime of conviction, even if defendant agreed to the

larger amount in a plea agreement. *Snider*, 957 F.2d at 706–07 (remanded); *U.S. v. Young*, 953 F.2d 1288, 1290 (11th Cir. 1992) (remanded); *U.S. v. Braslawsky*, 951 F.2d 149, 151 (7th Cir. 1991) (dicta). But cf. *U.S. v. Marsh*, 932 F.2d 710, 713 (8th Cir. 1991) (restitution is limited to specific conduct underlying offense of conviction, but affirmed imposition of restitution for full amount of loss that was allowed under terms of pre-*Hughey* plea agreement).

The definition of "victim" in §3663(a)(2) was also amended in 1990, and for "an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity," a victim is "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." The Sixth and Seventh Circuits have noted that this appears to authorize restitution for an entire fraudulent scheme, not just the count of conviction. See *U.S. v. Jewett*, 978 F.2d 248, 252–53 (6th Cir. 1992) (but cannot be applied retroactively); *U.S. v. Brothers*, 955 F.2d 493, 496 n.3 (7th Cir. 1992) (same). See also *U.S. v. Haggard*, 41 F.3d 1320, 1329 (9th Cir. 1994) (affirmed: citing amendment, holding that family harmed by false claims scheme were victims entitled to restitution for loss of income).

For pre-amendment offenses involving mail or wire fraud, where the entire fraudulent scheme is an element of the offense making up a single count of fraud, it has been held that restitution may not encompass the entire scheme, but rather, is limited to the loss attributable to the specific conduct that forms the count for which defendant is convicted. See *U.S. v. Cronin*, 990 F.2d 663, 666 (1st Cir. 1993); *U.S. v. Seligsohn*, 981 F.2d 1418, 1421 (3d Cir. 1992); *Jewett*, 978 F.2d at 250–51 (6th Cir. 1992); *U.S. v. Stone*, 948 F.2d 700, 704 (11th Cir. 1991); *U.S. v. Sharp*, 941 F.2d 811, 815 (9th Cir. 1991); *U.S. v. Wainwright*, 938 F.2d 1096, 1098 (10th Cir. 1991).

However, the Fifth and Seventh Circuits have given a more expansive reading to *Hughey*, holding that it allows restitution for the entire scheme described in counts to which defendant pled guilty. See *U.S. v. Stouffer*, 986 F.2d 916, 928–29 (5th Cir. 1993); *U.S. v. Bennett*, 943 F.2d 738, 740 (7th Cir. 1991).

May a defendant be ordered to pay restitution to cover the government's costs of investigation? One circuit has said yes, allowing "a condition in the nature of restitution on a sentence of supervised release" that ordered defendant to repay the government's cost of purchasing drugs from him. The court reasoned that this payment is valid under the supervised release statute's "catch-all provision," 18 U.S.C. §3583(d), and is not subject to the limitations of the VWPA. *U.S. v. Daddato*, 996 F.2d 903, 904–06 (7th Cir. 1993). However, other circuits have held that such restitution falls under, and is prohibited by, the VWPA. See *U.S. v. Meacham*, 27 F.3d 214, 218–19 (6th Cir. 1994) (VWPA "does not authorize a district court to order restitution for the government's costs of purchasing contraband while investigating a crime, even if the defendant explicitly agreed to such an order in a plea agreement .... [T]he repayment of the cost of investigation is not 'restitution' within the meaning of the Act") [6#15]; *U.S. v. Gibbens*, 25 F.3d 28, 32–36 (1st Cir. 1994) (although government may be a "victim" under VWPA, "a government agency that has lost money as a consequence of a crime that it actively provoked in the course of carrying out an investigation may not recoup that money through a restitution order imposed under the VWPA; however, "other methods of recovery remain open to the government, notably fines or voluntary agreements for restitution incident to plea bargains") [6#16]; *Gall v. U.S.*, 21 F.3d 107, 111–12 (6th Cir. 1994) ("such investigative costs are not losses, but voluntary expenditures by the government for the procurement of evidence"; also, restitution imposed as a condition of supervised release is still subject to the provisions of VWPA); *U.S. v. Salcedo-Lopez*, 907 F.2d

97, 98 (9th Cir. 1990) (improper to order restitution for the government's cost of investigating and prosecuting the offense: "Any loss for which restitution is ordered must result directly from the defendant's offense"). Cf. *U.S. v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992) ("an award of restitution under the VWPA cannot include consequential damages such as attorney's and investigators' fees expended to recover the property").

Note: Some of the cases above are pre-Guidelines cases, because generally the same restitution rules apply to pre- and post-Guidelines offenses.

E. Fines (§5E1.2)

1. Ability to Pay and Calculation

District courts must consider a defendant's ability to pay a fine, and the burden is on the defendant to prove an inability to pay. See *U.S. v. Demes*, 941 F.2d 220, 223 (3d Cir. 1991); *U.S. v. Marquez*, 941 F.2d 60, 64 (2d Cir. 1991); *U.S. v. Bradley*, 922 F.2d 1290, 1298 (6th Cir. 1991); *U.S. v. Rafferty*, 911 F.2d 227, 232 (9th Cir. 1990); *U.S. v. Rowland*, 906 F.2d 621, 623 (11th Cir. 1990); *U.S. v. Walker*, 900 F.2d 1201, 1205–06 (8th Cir. 1990); U.S.S.G. §5E1.2(d) and (f). Cf. *U.S. v. Doyan*, 909 F.2d 412, 414–15 (10th Cir. 1990) (court must *consider* defendant's financial resources, but "Guidelines impose no obligation to tailor the fine to the defendant's ability to pay"; it is not abuse of discretion to impose fine "that is likely to constitute a significant financial burden"). Note that several circuits allow defendant to rely on facts in the PSR to establish inability to pay; the burden is then on the government to show that defendant can in fact pay the fine. See *U.S. v. Fair*, 979 F.2d 1037, 1041 (5th Cir. 1992) [5#7]; *U.S. v. Rivera*, 971 F.2d 876, 895 (2d Cir. 1992); *U.S. v. Cammisano*, 917 F.2d 1057, 1064 (8th Cir. 1990); *U.S. v. Labat*, 915 F.2d 603, 606 (10th Cir. 1990). See also *U.S. v. Soyland*, 3 F.3d 1312, 1315 (9th Cir. 1993) (defendant contended she was "unable to pay the assessed $25,000 fine. She refused to provide financial information to the probation officer and thus failed to carry the burden of showing an inability to pay the fine. U.S.S.G. §5E1.2(f)").

The Ninth Circuit has held that "the district court, *before* imposing any fine, must determine whether the defendant has established [the] inability" to pay a fine. It cannot impose community service as an alternative sanction should defendant prove unable to pay the fine after release from prison. *U.S. v. Robinson*, 20 F.3d 1030, 1034 (9th Cir. 1994) [6#12].

Current indigency, or inability to pay, is not an absolute barrier to a fine. Whether defendant can or will become able to pay are factors to be considered under §5E1.2. See, e.g., *U.S. v. Wong*, 40 F.3d 1347, 1383 (2d Cir. 1994) ("It is clear that a fine may constitutionally be imposed upon an indigent defendant, who may assert his continuing indigence as a defense if the government subsequently seeks to collect the fine"); *U.S. v. Altamirano*, 11 F.3d 52, 53–54 (5th Cir. 1993) (but remanding because district court could not probate fine in this case); *U.S. v. Favorito*, 5 F.3d 1338, 1339 (9th Cir. 1993) ("court may impose a fine upon even an indigent defendant if it finds that the defendant 'has sufficient earning capacity to pay the fine following his release from prison'").

Some circuits have held that courts may consider the income defendants can earn while in prison. See, e.g., *U.S. v. Haggard*, 41 F.3d 1320, 1329 (9th Cir. 1994) (affirmed: defendant "can earn the money to pay a fine by working in the Inmate Financial Responsibility Program while incarcerated"); *U.S. v. Fermin*, 32 F.3d 674, 682 n.4 (2d Cir. 1994) (same); *U.S. v. Gomez*, 24 F.3d 924, 927 (7th Cir. 1994) (affirmed: fines could be imposed on indigent defendants based on their likely future wages in prison) [6#17]; *U.S. v. Tosca*, 18 F.3d 1352,

1355 (6th Cir. 1994) (fine may properly be imposed on indigent defendant because "he can make installment payments from prisoner pay earned under the Inmate Financial Responsibility Program"); *U.S. v. Turner*, 975 F.2d 490, 498 (8th Cir. 1992) (same).

Keeping a defendant from profiting from the crime may also be considered. The Third Circuit held that the potential future earnings from the sale of rights to the story of defendant's crime may be considered in setting the fine—including a departure to a larger fine—but the value of those rights must be supported by evidence. *U.S. v. Seale*, 20 F.3d 1279, 1284–87 (3d Cir. 1994) (remanded: "given the facts and circumstances surrounding this highly publicized crime, the district court was realistic in finding that the Seales might become able to pay a fine in the future," but the evidence did not support the size of the fines after departure") [6#12]. Cf. *U.S. v. Orena*, 32 F.3d 704, 716 (2d Cir. 1994) (affirming $2.25 million fine where sentencing court found "beyond a reasonable doubt that [defendant was] concealing significant assets" derived from long-time loansharking activities); *U.S. v. Wilder*, 15 F.3d 1292, 1300–01 (5th Cir. 1994) (affirmed: departure to $4 million fine was proper to "ensure that Wilder disgorged any gain from his criminal activities" where evidence showed defendant gained at least $2 million and caused over $5 million in losses). See also §5E1.2, comment. (n.4) (upward departure from fine guideline range may be warranted in some cases). However, a "suspicion" that defendant has assets is not a proper basis for setting the amount of a fine. See *U.S. v. Anderson*, 39 F.3d 331, 358–59 (D.C. Cir. 1994) (remanded: court improperly based $1 million fine on suspicion that defendant had assets in Panama—government must show that assets actually exist before burden falls on defendant to show inability to pay fine).

District courts must consider the factors set out in the fine statute and Guidelines before imposing a fine, but most circuits have held that specific findings are not required as long as the record shows the court considered each of the factors in setting the fine. See, e.g., *U.S. v. Margano*, 39 F.3d 1358, 1372–73 (7th Cir. 1994); *Lombardo*, 35 F.3d at 530; *U.S. v. Washington-Williams*, 945 F.2d 325, 327–28 (10th Cir. 1991); *Marquez*, 941 F.2d at 64; *U.S. v. Matovsky*, 935 F.2d 719, 722 (5th Cir. 1991); *U.S. v. Mastropierro*, 931 F.2d 905, 906 (D.C. Cir. 1991). Cf. *Tosca*, 18 F.3d at 1354–55 (indicating record need only show court considered required factors—more particularized findings not required absent request by defendant). Other circuits require specific findings showing that the factors affecting defendant's ability to pay were considered. See, e.g., *Demes*, 941 F.2d at 223; *Walker*, 900 F.2d at 1206. The Fifth Circuit later held that "specific findings are necessary if the court adopts a PSR's findings, but then decides to depart from the PSR's recommendation on fines or cost of incarceration." *Fair*, 979 F.2d at 1041–42 [5#7]. The Eleventh Circuit vacated a $100,000 fine because the trial court did not explicitly discuss the factors justifying its imposition. *U.S. v. Paskett*, 950 F.2d 705, 709 (11th Cir. 1992) (PSR was inconclusive on defendant's wealth; that over $1 million was found in defendant's bedroom did not justify fine).

It was clearly erroneous to find that a defendant with a net worth of at least $50,000, with another $200,000 in a spendthrift trust, was unable to pay a fine. *U.S. v. Hickey*, 917 F.2d 901, 907 (6th Cir. 1990) [3#15]. In appropriate circumstances, the court may consider the financial resources of defendant's family. See *U.S. v. Fabregat*, 902 F.2d 331, 334 (5th Cir. 1990). It was also clearly erroneous to base a fine on the equity defendant had before she sold her property to pay her attorney, without evidence that defendant "stripp[ed] herself of property" to avoid paying the fine. *Washington-Williams*, 945 F.2d at 326–27. Courts may consider the defendant's earning potential, *U.S. v. Ruth*, 946 F.2d 110, 114 (10th Cir. 1991), and the fact that a monetary judgment is owed to defendant, *U.S. v. Joshua*, 976 F.2d 844, 856 (3d Cir. 1992).

2. Miscellaneous

The circuits are split on whether the cost-of-imprisonment fine under §5E1.2(i) is valid and whether it may only be imposed after a punitive fine under §5E1.2(a) and (c). The Third Circuit invalidated §5E1.2(i), holding that it was not authorized by statute. *U.S. v. Spiropoulos,* 976 F.2d 155, 164–68 (3d Cir. 1992) [5#3]. The Fifth Circuit held that the required cost-of-imprisonment fine is constitutional and does not violate the Sentencing Reform Act. *U.S. v. Hagmann,* 950 F.2d 175, 186–87 (5th Cir. 1991) (upholding two-level fine system—punitive plus cost-of-imprisonment—and rejecting argument that because latter fine actually goes to crime victim fund it is irrational and violates Fifth Amendment) [4#15]. See also *U.S. v. Leonard,* 37 F.3d 32, 40–41 (2d Cir. 1994) (§5E1.2(i) is authorized by statute; also, §5E1.2(i) fine is not upward departure from §5E1.2(c) fine table but separate fine under separate guideline); *U.S. v. Turner,* 998 F.2d 534, 538 (7th Cir. 1993) (§5E1.2(i) is authorized by statute); *U.S. v. Doyan,* 909 F.2d 412, 414–16 (10th Cir. 1990) ("Sections 5E1.2(e) and 5E1.2(i) . . . mandate a punitive fine that is at least sufficient to cover the costs of the defendant's incarceration and supervision," and §5E1.2(i) does not violate the equal protection component of the due process clause of the Fifth Amendment).

Note that Congress seems to have explicitly authorized the cost-of-imprisonment fine in the Violent Crime Control and Law Enforcement Act of 1994 (effective Sept. 13, 1994) by enacting new 18 U.S.C. §3572(a)(6), which states that in imposing a fine a court shall consider "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence." Furthermore, new 28 U.S.C. §994(y) authorizes the Sentencing Commission to "include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered."

Four circuits have held that a punitive fine under §5E1.2(a) and (c) must be imposed before a cost-of-imprisonment fine under §5E1.2(i) is imposed. See *U.S. v. Norman,* 3 F.3d 368, 369 (11th Cir. 1993) [6#5]; *U.S. v. Fair,* 979 F.2d 1037, 1042 (5th Cir. 1992) [5#7]; *U.S. v. Corral,* 964 F.2d 83, 84 (1st Cir. 1992); *U.S. v. Labat,* 915 F.2d 603, 606–07 (10th Cir. 1990) [3#15]. Three circuits have held that the punitive fine is not an absolute prerequisite. *U.S. v. Sellers,* 42 F.3d 116, 119 (2d Cir. 1994) (affirmed: "the total fine is the significant figure. . . . If the defendant is not able to pay the entire fine amount that the court would otherwise impose pursuant to subsections (c) and (i), the district court may exercise its sound discretion in determining which of the two subsections (or which combination of them) to rely upon in pursuing the goals of sentencing") [7#6]; *U.S. v. Favorito,* 5 F.3d 1338, 1340 (9th Cir. 1993) (affirmed imposition of cost-of-imprisonment fine without punitive fine) [6#5]; *Turner,* 998 F.2d at 538 (refusing to hold cost-of-imprisonment fine may never be imposed without first imposing punitive fine, but concluding that if defendant "cannot pay such a fine, then he cannot be expected to pay anything computed under §5E1.2(i)") [6#2].

The Eleventh Circuit held that a defendant convicted of criminal contempt under 18 U.S.C. §401(3) cannot be fined under §5E1.2(a) if a term of imprisonment was imposed. *U.S. v. White,* 980 F.2d 1400, 1401 (11th Cir. 1993) [5#8].

VI. Departures

A. Criminal History

1. Upward Departure

"If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range." U.S.S.G. §4A1.3. The Third Circuit held that departures under §4A1.3 are not subject to the "not adequately taken into consideration" requirement of §5K2.0 and 18 U.S.C. §3553(b). *U.S. v. Shoupe,* 988 F.2d 440, 444–47 (3d Cir. 1993) (in determining whether defendant's criminal history is inadequately reflected, district court may consider "factors which the Commission may have otherwise considered") [5#10]. Cf. *U.S. v. Pinckney,* 938 F.2d 519, 521 (4th Cir. 1991) (noting that departure under §4A1.3 "is not to be confused" with departure under §5K2.0). But see *U.S. v. Bowser,* 941 F.2d 1019, 1024 (10th Cir. 1991) (may consider downward departure under §4A1.3 only if "the mitigating circumstances, in kind or degree, were not adequately considered by the Sentencing Commission").

Note that a defendant's criminal history score must "significantly" over- or underrepresent defendant's criminal past or likelihood of recidivism in order to warrant departure under §4A1.3. See *Shoupe,* 988 F.2d at 447 (for downward departure); *U.S. v. Beckham,* 968 F.2d 47, 55 (D.C. Cir. 1992) (same); *U.S. v. Brady,* 928 F.2d 844, 853 (9th Cir. 1991) (uncounted misdemeanor tribal convictions were "simply not serious enough" for upward departure) [4#1].

Also, a prior "uncounseled conviction where defendant did not waive counsel" may not be used for departure purposes. *Brady,* 928 F.2d at 854. Accord *U.S. v. Norquay,* 987 F.2d 475, 482 (8th Cir. 1993).

When even criminal history category VI did not adequately reflect defendant's criminal record, departure above that level has been permitted. See, e.g., *U.S. v. Lee,* 955 F.2d 14, 15 (5th Cir. 1992); *U.S. v. Jordan,* 890 F.2d 968, 974–77 (7th Cir. 1989) [2#18]; *U.S. v. Joan,* 883 F.2d 491, 494–96 (6th Cir. 1989) [2#13]; *U.S. v. Roberson,* 872 F.2d 597, 607 (5th Cir. 1989) [2#6]. Some circuits, however, have cautioned that the circumstances must be compelling or egregious to warrant departure above category VI. See, e.g., *U.S. v. Carillo-Alvarez,* 3 F.3d 316, 320–23 (9th Cir. 1993) (remanded departure for defendant with 19 criminal history points because defendant's history "is simply not serious enough"—a high number of criminal history points is not by itself sufficient, and "departure from category VI is warranted only in the highly exceptional case") [6#5]; *U.S. v. Cervantes,* 878 F.2d 50, 55 (2d Cir. 1989) ("Only the most compelling circumstances . . . would justify a [§4A1.3] departure above Category VI."); *U.S. v. Thomas,* 961 F.2d 1110, 1115 (3d Cir. 1992) (remanded: citing *Cervantes,* held that criminal history score of fifteen points was not so "extraordinary" as to warrant departure above category VI). The Seventh Circuit affirmed a departure above category VI because of the seriousness of defendant's criminal history and also because he "fit the classic profile of a career recidivist" who is a threat to the public welfare, §5K2.14. *U.S. v. Spears,* 965 F.2d 262, 278–79 (7th Cir. 1992) [4#24]. Cf. *U.S. v. Thomas,* 24 F.3d 829, 832–33 (6th Cir. 1994) (criminal history score of 43, "one of the highest we could find in reported cases, is clearly sufficiently unusual to warrant departure") [6#15]; *U.S. v. Chappell,* 6 F.3d

1095, 1102 (5th Cir. 1993) (affirmed: defendant's "criminal history score of 25 far exceeded the minimum score for Criminal History Category VI and did not take into account several stale" convictions for similar offenses).

See also cases below in section 4. Computation—Departure Above Category VI.

a. Consolidation of related prior sentences

Departures have been affirmed under Application Note 3 of §4A1.2, which advises that consolidation of related prior sentences may result in the underrepresentation of defendant's criminal history. See, e.g., *U.S. v. Williams,* 922 F.2d 578, 581–82 (10th Cir. 1990) [3#17]; *U.S. v. Ocasio,* 914 F.2d 330, 334 (1st Cir. 1990) (remanded because extent of departure unreasonable); *U.S. v. Williams,* 901 F.2d 1394, 1396–97 (7th Cir. 1990), vacated on other grounds, 111 S. Ct. 2845 (1991); *U.S. v. White,* 893 F.2d 276, 279–80 (10th Cir. 1990) [3#1]; *U.S. v. Geiger,* 891 F.2d 512, 513–14 (5th Cir. 1989) [2#19]; *U.S. v. Dorsey,* 888 F.2d 79, 80–81 (11th Cir. 1989) [2#16]; *U.S. v. Jackson,* 883 F.2d 1007, 1008–09 (11th Cir. 1989) [2#14]; *U.S. v. Roberson,* 872 F.2d 597, 606–07 (5th Cir. 1989) [2#6]. But note that when the related prior crimes were violent offenses, §4A1.1(f) (Nov. 1991) applies and departure may be inappropriate.

The Seventh Circuit held that consolidated offenses that occurred on the same day and that were not "extraordinary" did not warrant a departure under Note 3. *U.S. v. Connor,* 950 F.2d 1267, 1272–73 (7th Cir. 1991) (remanded).

b. Remote convictions

Convictions too old to include in the criminal history calculation may provide a basis for departure if they are "evidence of similar, or serious dissimilar, criminal conduct." U.S.S.G. §4A1.2, comment. (n.8) (1992). See also *U.S. v. Wyne,* 41 F.3d 1405, 1408–09 (10th Cir. 1994) (remanding departure because remote convictions did not make up "serious dissimilar" criminal conduct: "little, if any, weight should have been given to the eight misdemeanor convictions which occurred more than 30 years prior to defendant's arrest in the instant case," and there was insufficient evidence that conduct in other remote convictions was, in fact, serious; burden of proof is on government to demonstrate seriousness) [7#6]; *U.S. v. Gentry,* 31 F.3d 1039, 1041 (10th Cir. 1994) (remanded because "district court failed to specifically find that Defendant's ten uncounted [remote] convictions were evidence of 'similar' or 'serious dissimilar' criminal conduct"); *U.S. v. Eve,* 984 F.2d 701, 704–05 (6th Cir. 1993) (remanding departure based in part on remote conviction because they did not fit in the "very narrow exception to the exclusion of old sentences" in Note 8); *U.S. v. Leake,* 908 F.2d 550, 554 (9th Cir. 1990) (before 1992 amendment, may only use similar convictions). See also *U.S. v. Smallwood,* 35 F.3d 414, 417–18 & n.8 (9th Cir. 1994) (remanded: change to Note 8 allowing consideration of dissimilar conduct may not be applied retroactively—amendment was not simply clarifying but "changes the substantive law and the meaning and effect of the guidelines in this circuit").

Before Note 8 was amended Nov. 1, 1992, most circuits had allowed the use of dissimilar conduct in limited situations. See, e.g., *U.S. v. Diaz-Collado,* 981 F.2d 640, 643–44 (2d Cir. 1992) (assuming dissimilar, outdated convictions can be grounds for departure, affirmed upward departure based on frequency of and lenient sentences for outdated convictions); *U.S. v. Rusher,* 966 F.2d 868, 881–82 (4th Cir. 1992) (dissimilar old convictions may be used

as "reliable information" to depart); *U.S. v. Aymelek,* 926 F.2d 64, 73 (1st Cir. 1991) (may use dissimilar remote convictions only if they are evidence of an "unusual penchant for serious criminality") [3#20]; *U.S. v. Williams,* 910 F.2d 1574, 1578–79 (7th Cir. 1990) (in "appropriate circumstances," remote convictions may be considered as part of "overall assessment" of whether criminal history score adequately reflects defendant's past) [3#13], rev'd on other grounds, 112 S. Ct. 1112 (1992) [4#17]; *U.S. v. Russell,* 905 F.2d 1439, 1443–44 (10th Cir. 1990) (departure partly based on dissimilar conviction beyond 15-year period proper where defendant was incarcerated for most of that period); *U.S. v. Carey,* 898 F.2d 642, 646 (8th Cir. 1990) (affirmed departure based in part on remote, dissimilar convictions because of seriousness of criminal history and defendant's "incorrigibility") [3#5]; *U.S. v. Harvey,* 897 F.2d 1300, 1305–06 (5th Cir. 1990) (affirmed upward departure based partly on dissimilar, remote convictions). Cf. *Nichols* in VI.A.1.g.

c. Prior unlawful conduct not accounted for

When prior unlawful conduct is not adequately factored into the criminal history score, an upward departure may be appropriate. See, e.g., *U.S. v. Fadayini,* 28 F.3d 1236, 1242 (D.C. Cir. 1994) ("non-conviction misconduct may be a proper basis for departure . . . if it reveals extensive immersion in criminality similar in type to the charged offense"); *U.S. v. Korno,* 986 F.2d 166, 168–69 (7th Cir. 1993) (under §4A1.3(a), Canadian convictions that were not counted under §4A1.2(h)); *U.S. v. Cash,* 983 F.2d 558, 561 (4th Cir. 1992) (prior conviction later held constitutionally invalid where underlying conduct was not in dispute) [5#7]; *U.S. v. Doucette,* 979 F.2d 1042, 1047–48 (5th Cir. 1992) (sentences for three unrelated prior convictions were consolidated); *U.S. v. Schweihs,* 971 F.2d 1302, 1318–19 (7th Cir. 1992) (reversed conviction that provided reliable evidence of past criminal activity); *U.S. v. O'Dell,* 965 F.2d 937, 938 (10th Cir. 1992) (uncharged conduct); *U.S. v. Lee,* 955 F.2d 14, 16 (5th Cir. 1992) (similar offenses not prosecuted to conviction); *U.S. v. Thornton,* 922 F.2d 1490, 1493 (10th Cir. 1991) (prior uncharged criminal conduct) [3#19]; *U.S. v. Thomas,* 914 F.2d 139, 144 (8th Cir. 1990) (seriousness of earlier offenses not accounted for) [3#14]; *U.S. v. McKenley,* 895 F.2d 184, 186–87 (4th Cir. 1990) (past acquittals by reason of insanity for serious offenses not accounted for) [3#2]; *U.S. v. Sturgis,* 869 F.2d 54, 57 (2d Cir. 1989) (other criminal conduct not accounted for) [2#2]; *U.S. v. Spraggins,* 868 F.2d 1541, 1543–44 (11th Cir. 1989) (evidence of uncharged criminal conduct) [2#4]. See also §4A1.2, comment. (n.6) (reversed, vacated, or invalidated convictions not counted in criminal history may be considered for departure under §4A1.3).

The Seventh Circuit, however, reversed an upward departure based on the sentencing judge's belief that defendant's criminal history category was "seriously underestimated" because the severity of a prior crime—a "brutal, execution-style murder"—was not accounted for. The court held that the Sentencing Commission "consciously chose to award defendants three criminal history points for every [felony conviction], regardless of the nature of the underlying offense conduct." *U.S. v. Morrison,* 946 F.2d 484, 496 (7th Cir. 1991) [4#10]. Accord *U.S. v. Henderson,* 993 F.2d 187, 189 (9th Cir. 1993) [5#13].

Pending charges may also be considered in the departure decision. See, e.g., *U.S. v. Morse,* 983 F.2d 851, 854 (8th Cir. 1993) (in circumstances of case, use of pending charges in combination with other factors was warranted); *U.S. v. Gaddy,* 909 F.2d 196, 201 (7th Cir. 1990) ("The Guidelines permit consideration of prior similar adult criminal conduct not resulting in conviction, which covers pending charges"). The Eighth Circuit later cautioned, however, that "[t]he Guidelines do not allow the district court to consider pending charges un-

less the conduct underlying those charges is admitted" or otherwise proved. *U.S. v. Joshua,* 40 F.3d 948, 953 (8th Cir. 1994).

d. History of arrests

A history of arrests, without more, is not a basis for departure. See *U.S. v. Ramirez,* 11 F.3d 10, 13 (1st Cir. 1993); *U.S. v. Williams,* 989 F.2d 1137, 1142 (11th Cir. 1993); *U.S. v. Williams,* 910 F.2d 1574, 1579 (7th Cir. 1990) [3#13], rev'd on other grounds, 112 S. Ct. 1112 (1992) [4#17]; *U.S. v. Cota-Guerrero,* 907 F.2d 87, 90 (9th Cir. 1990); *U.S. v. Cantu-Dominguez,* 898 F.2d 968, 970–71 (5th Cir. 1990) [3#6]; U.S.S.G. §4A1.3 ("a prior arrest record itself shall not be considered under §4A1.3").

A court may look beyond the arrest record, however, and depart if there is reliable evidence of prior criminal conduct that is not otherwise accounted for. See *Ramirez,* 11 F.3d at 13; *Williams,* 989 F.2d at 1142; *U.S. v. Terry,* 930 F.2d 542, 545–46 (7th Cir. 1991); *Williams,* 910 F.2d at 1579; *U.S. v. Gaddy,* 909 F.2d 196, 201 (7th Cir. 1990) [3#11]; *U.S. v. Russell,* 905 F.2d 1450, 1455 (10th Cir. 1990); *U.S. v. Gayou,* 901 F.2d 746, 748 (9th Cir. 1990); U.S.S.G. §4A1.3(e) (departure may be considered if there is reliable evidence of "prior similar adult criminal conduct not resulting in a conviction"). Courts should identify the sources describing prior criminal conduct and comment on their reliability. *Terry,* 930 F.2d at 546.

e. Similarity to prior offense

The Background Commentary to §4A1.1 indicates that similarity of the current offense to prior offenses may be a ground for criminal history departure under §4A1.3. Departures on this ground have been upheld in part because such similarity indicates a greater likelihood defendant will commit future crimes. See, e.g., *U.S. v. Molina,* 952 F.2d 514, 519 (D.C. Cir. 1992) ("very likely that an alien who surreptitiously enters the country on five occasions, despite criminal sanctions and repeated deportation, will do so again"); *U.S. v. Madrid,* 946 F.2d 142, 143–44 (1st Cir. 1991); *U.S. v. Dzielinski,* 914 F.2d 98, 101–02 (7th Cir. 1990); *U.S. v. Barnes,* 910 F.2d 1342, 1345 (6th Cir. 1990) [3#12]; *U.S. v. Rodriguez-Castro,* 908 F.2d 438, 442 (9th Cir. 1990) (for use of alias when arrested and for high-speed chase in escape attempt because defendant had engaged in same conduct in prior offenses); *U.S. v. Chavez-Botello,* 905 F.2d 279, 281 (9th Cir. 1990) [3#9]; *U.S. v. Jackson,* 903 F.2d 1313, 1319–20 (10th Cir.), rev'd on other grounds, 921 F.2d 985 (1990) (en banc); *U.S. v. Carey,* 898 F.2d 642, 646 (8th Cir. 1990) [3#5]; *U.S. v. Coe,* 891 F.2d 405, 411–12 (2d Cir. 1989) (four bank robberies in two-week period while an escapee and prior criminal conduct indicated likelihood of future crimes) [2#18]; *U.S. v. Fisher,* 868 F.2d 128, 130 (5th Cir. 1989) (for "egregious" criminal history of repeat offenses) [2#3]; *U.S. v. De Luna-Trujillo,* 868 F.2d 122, 124–25 (5th Cir. 1989) [2#2]. See also *U.S. v. Fadayini,* 28 F.3d 1236, 1242 (D.C. Cir. 1994) ("longstanding and extensive" involvement in misconduct similar to charged offense); *U.S. v. Gaddy,* 909 F.2d 196, 201 (7th Cir. 1990) (five outstanding arrest warrants for prior similar conduct) [3#11].

f. Criminal conduct while awaiting sentencing

Departures have been affirmed when reliable evidence indicated that a defendant continued to commit unlawful acts after arrest or conviction on the current offense but before sentencing, on the ground that this additional criminal conduct is not included in the criminal

history score but should be accounted for. See, e.g., *U.S. v. Myers,* 41 F.3d 531, 533–34 (9th Cir. 1994) (committing similar fraud while on release awaiting sentencing); *U.S. v. Fahm,* 13 F.3d 447, 451 (1st Cir. 1994) (among other reasons, committing fraud offense while awaiting sentencing on similar charges); *U.S. v. Keats,* 937 F.2d 58, 66–67 (2d Cir. 1991) (additional frauds committed after release on bail); *U.S. v. George,* 911 F.2d 1028, 1030–31 (5th Cir. 1990) (fled jurisdiction while on bond awaiting sentencing) [3#14]; *U.S. v. Franklin,* 902 F.2d 501, 506 (7th Cir. 1990) (continued drug use or dealing while on bond) [3#8]; *U.S. v. Fayette,* 895 F.2d 1375, 1379–80 (11th Cir. 1990) (post-plea criminal conduct) [3#4]; *U.S. v. Sanchez,* 893 F.2d 679, 681 (5th Cir. 1990) (continued unlawful conduct while on pretrial release) [3#1]; *U.S. v. White,* 893 F.2d 276, 279–80 (10th Cir. 1990) (current offense committed while out on bail) [3#1]; *U.S. v. Geiger,* 891 F.2d 512, 513–14 (5th Cir. 1989) (same) [2#19]; *U.S. v. Jordan,* 890 F.2d 968, 976–77 (7th Cir. 1989) (continued use of and dealing in drugs) [2#18]. Cf. *U.S. v. Fortenbury,* 917 F.2d 477, 479 (10th Cir. 1990) (improper to depart upward by offense level instead of criminal history category for illegal possession of guns after conviction but before sentencing—commission of crime is element of criminal history).

It is also proper to depart if defendant committed the instant offense while awaiting trial or sentencing for another offense that is not counted in the criminal history score. See *U.S. v. Polanco-Reynoso,* 924 F.2d 23, 25 (1st Cir. 1991) (while on bail awaiting sentencing for uncounted state charge) [3#20]; *U.S. v. Matha,* 915 F.2d 1220, 1222 (8th Cir. 1990) (current drug offense while awaiting state trial on four-count drug charge); *U.S. v. Gaddy,* 909 F.2d 196, 200–01 (7th Cir. 1990) (seven uncounted burglary convictions on which defendant was not sentenced because he jumped bail were reliable evidence of prior similar criminal conduct) [3#11]; *U.S. v. Jones,* 908 F.2d 365, 367 (8th Cir. 1990) (departure appropriate because ambiguity in career offender guideline precluded its use for defendant who pled guilty to but was not yet sentenced for two prior violent felonies) [3#11].

However, the Second Circuit distinguished the situation where defendant is awaiting sentencing under the Guidelines for another federal offense. Because the instant offense will be accounted for when defendant is sentenced for the other federal offense, upward departure under §4A1.3 would constitute impermissible double counting. *U.S. v. Stevens,* 985 F.2d 1175, 1186–87 (2d Cir. 1993).

g. Juvenile convictions

Effective Nov. 1, 1992, Application Note 8 to §4A1.2 was amended to allow departures for "similar, or serious dissimilar, criminal conduct" outside the time period. See *U.S. v. Williams,* 989 F.2d 1136, 1141 (11th Cir. 1993) (following amended Note 8, affirmed departure for "serious dissimilar" remote juvenile convictions). The Eighth Circuit cautioned that such conduct must be shown by the facts—a mere record of arrests or criminal charges is not sufficient. See *U.S. v. Joshua,* 40 F.3d 948, 953 (8th Cir. 1994) (remanded: only two of several instances of defendant's juvenile criminal conduct used for departure were adequately demonstrated by facts). The court also noted that when prior dissimilar conduct is not serious, if defendant received lenient treatment "such [treatment] may be used to enhance a sentence on the basis that a defendant's criminal history is inadequately rated, for [it] may be evidence that leniency has not been effective." 40 F.3d at 953.

In cases decided before the amendment, there was disagreement as to when prior juvenile convictions may provide grounds for departure. The D.C. Circuit held that juvenile sentences not counted under §4A1.2(d) because they are too old may not be used for departure

under §4A1.3 unless the sentences provide evidence of similar misconduct or criminal livelihood under former Application Note 8 of §4A1.2. *U.S. v. Samuels,* 938 F.2d 210, 215–16 (D.C. Cir. 1991) [4#8]. Accord *U.S. v. Thomas,* 961 F.2d 1110, 1115–17 (3d Cir. 1992) (rejecting departure based on non-similar juvenile misconduct; adopted *Samuels* as rule of circuit, distinguished *Nichols* and partially distinguished *Gammon* below). Cf. *U.S. v. Beck,* 992 F.2d 1008, 1009 (9th Cir. 1993) (citing *Thomas, Samuels,* and Note 8, held departure based on similar juvenile misconduct may justify departure). The First Circuit specifically disagreed with *Samuels* and *Thomas,* holding that Guidelines do not prohibit departure for dissimilar juvenile conduct in unusual case. *U.S. v. Doe,* 18 F.3d 41, 45–47 (1st Cir. 1994) (affirmed departure based on juvenile criminal conduct). See also *U.S. v. Gammon,* 961 F.2d 103, 107–08 (7th Cir. 1992) (affirming departure based partly on defendant's criminal history score not taking into account numerous old and dissimilar juvenile convictions—they showed serious history of criminality and likelihood of recidivism) [4#19]; *U.S. v. Nichols,* 912 F.2d 598, 604 (2d Cir. 1990) (affirming upward departure based on "lenient treatment" defendant received for violent juvenile offenses, see Background Commentary to §4A1.3). Cf. *U.S. v. Greiss,* 971 F.2d 1368, 1374 (8th Cir. 1992) (court has discretion under §5K2.0 to consider outdated juvenile offenses as valid factor for departure).

h. Discipline problems in prison

Two circuits have held that evidence of disciplinary problems during incarceration for a prior offense may be considered in departure decisions. *U.S. v. Montenegro-Rojo,* 908 F.2d 425, 429 (9th Cir. 1990) (replacing withdrawn opinion at 900 F.2d 1376 [3#7]) [3#11]; *U.S. v. Keys,* 899 F.2d 983, 989 (10th Cir. 1990) [3#5].

2. Downward Departure

If minor offenses "exaggerate" a defendant's criminal history score, downward departure may be appropriate. *U.S. v. Summers,* 893 F.2d 63, 67 (4th Cir. 1990) [2#19]. Departure for a first-time offender may be appropriate when the offense is the result of "aberrant behavior," U.S.S.G. Chapter 1 at 7. *U.S. v. Dickey,* 924 F.2d 836, 838–39 (9th Cir. 1991) [3#18]. See also section VI.C.1.c.

Several circuits have held that downward departure may be considered for career offenders if that category overrepresents the seriousness of defendant's criminal history. *U.S. v. Beckham,* 968 F.2d 47, 54–55 (D.C. Cir. 1992); *U.S. v. Adkins,* 937 F.2d 947, 952 (4th Cir. 1991) [4#7]; *U.S. v. Lawrence,* 916 F.2d 553, 554–55 (9th Cir. 1990) [3#15]; *U.S. v. Brown,* 903 F.2d 540, 545 (8th Cir. 1990) (remanded because district court erroneously believed it could not depart downward for career offender) [3#8]. See also *U.S. v. Reyes,* 8 F.3d 1379, 1383–87 (9th Cir. 1993) (court had authority to depart because defendant's criminal history and offense were minor compared to most career offenders) [6#7]; *U.S. v. Brown,* 985 F.2d 478, 482 (9th Cir. 1993) (remanded: although age is not ordinarily relevant to departure, §5H1.1, departure for career offender may be considered if nature of prior offenses and youth at time of one prior conviction "render his criminal past significantly less serious than that of a typical career offender") [5#9]; *U.S. v. Bowser,* 941 F.2d 1019, 1024–25 (10th Cir. 1991) ("unique combination of factors"—youth, proximity in time of prior offenses, imposition of concurrent sentences—none of which "standing alone may have warranted departure," provided proper basis for departure; reasonable to sentence within range that applied absent career offender status) [4#7]; *U.S. v. Senior,* 935 F.2d 149, 151 (8th Cir. 1991)

(proper to depart from 292–365-month career offender range to 120-month statutory minimum, based on defendant's age at time of prior felonies, proximity in time of prior felonies, consolidation of prior felonies, and short length of time served; reasonable to base sentence on 92–115-month range that applied absent career offender classification); *U.S. v. Smith,* 909 F.2d 1164, 1169–70 (8th Cir. 1990) (downward departure, from 292–365-month range to 240-month term, justified by "relatively minor nature" of prior offenses and defendant's youth when he committed those crimes) [3#11]. The Second and Ninth Circuits have also held that career offender status would not bar downward departure for "extraordinary acceptance of responsibility." *Brown,* 985 F.2d at 482–83; *U.S. v. Rogers,* 972 F.2d 489, 494 (2d Cir. 1992) [5#4].

The Sixth Circuit affirmed a downward departure—to the offense level and criminal history category that applied absent career offender status—because defendant's extraordinary family responsibilities, the age of his prior convictions (1976 and 1985), the time between convictions, and his attempts to deal with his drug and alcohol problems "indicate that the seriousness of [his] record and his likelihood of recidivism was over-stated by an offense level of 32 and a criminal history category of VI." Defendant had "specifically requested the court to compare him 'to other defendants who would typically be career offender material.' [He] also argued that the court should consider his 'likelihood of recidivism' in light of his success in rehabilitating himself." The appellate court noted that, while "the age of Fletcher's convictions, standing alone, does not warrant a downward departure, a district court may take the age of prior convictions into account when considering a defendant's likelihood of recidivism." *U.S. v. Fletcher,* 15 F.3d 553, 556–57 (6th Cir. 1994) [6#11].

Other courts have held that downward departures for career offenders were not appropriate when based on the small amount of drugs in the current offense or length of time since the prior offenses, *U.S. v. Richardson,* 923 F.2d 13, 17 (2d Cir. 1991) [3#20]; the fact that the prior offenses involved only threatened, not actual, violence, *U.S. v. Gonzalez-Lopez,* 911 F.2d 542, 549–50 (11th Cir. 1990) [3#13]; or for the small amount of drugs involved and non-violent criminal history of defendant, *U.S. v. Hays,* 899 F.2d 515, 519–20 (6th Cir. 1990) [3#5]. The Tenth Circuit rejected a defendant's claim that a district court could base a departure under §5K2.0 on the ground that defendant was actually innocent of one of the predicate violent felonies to which he pled nolo contendere. Following the categorical approach, the district court may not look to "the conduct and circumstances surrounding" the prior conviction, but only "what was actually adjudicated in the prior proceeding." *U.S. v. Garcia,* 42 F.3d 573, 577–78 (10th Cir. 1994) (record of plea established that defendant committed burglary).

3. Computation—Use Category That Best Represents Defendant's Prior Criminal History

a. Generally

"In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable." U.S.S.G. §4A1.3. Most of the circuits have explicitly adopted this procedure as the rule for sentencing courts to follow in determining the length of departures based on inadequate criminal history category. See *U.S. v. Hickman,* 991 F.2d 1110, 1114 (3d Cir. 1993); *U.S. v. Lambert,* 984 F.2d 658, 662–63 (5th Cir. 1993) (en banc) [5#10];

U.S. v. Rusher, 966 F.2d 868, 884 (4th Cir. 1992); *U.S. v. Johnson,* 934 F.2d 1237, 1239 (11th Cir. 1991); *U.S. v. Richison,* 901 F.2d 778, 781 (9th Cir. 1990) [3#8]; *U.S. v. Allen,* 898 F.2d 203, 204–05 (D.C. Cir. 1990) [3#5]; *U.S. v. Kennedy,* 893 F.2d 825, 829 (6th Cir. 1990) [3#1]; *U.S. v. White,* 893 F.2d 276, 280 (10th Cir. 1990) [3#1]; *U.S. v. Summers,* 893 F.2d 63, 68 (4th Cir. 1990) [2#19]; *U.S. v. Anderson,* 886 F.2d 215, 216 (8th Cir. 1989) [2#14]; *U.S. v. Cervantes,* 878 F.2d 50, 54–55 (2d Cir. 1989) [2#8]; *U.S. v. Miller,* 874 F.2d 466, 470–71 (7th Cir. 1989); *U.S. v. Lopez,* 871 F.2d 513, 515 (5th Cir. 1989) [2#5].

The Second Circuit held that this procedure does not require courts to assign criminal history point values to the conduct warranting departure; such comparisons may assist the appellate court's evaluation of the reasonableness of the departure, but for some conduct comparisons may be unavailable. *U.S. v. Jakobetz,* 955 F.2d 786, 806 (2d Cir. 1992). On the other hand, assigning points to the conduct that is the basis of departure may provide a reasonable way to determine the extent of the departure. See, e.g., *U.S. v. Tai,* 41 F.3d 1170, 1176–77 (7th Cir. 1994) (affirmed: reasonable to increase criminal history category by assigning three points to extortionate conduct that likely would have resulted in sentence greater than one year).

The Seventh Circuit held that where the district court boosted defendant's criminal history category from I to III, remand was not required because the record revealed why category II was skipped. *U.S. v. Newman,* 965 F.2d 206, 211 (7th Cir. 1992). See also *Lambert,* 984 F.2d at 663 ("we do not . . . require the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category that it selects. Ordinarily the district court's reasons for rejecting intermediate categories will clearly be implicit, if not explicit, in the court's explanation for its departure from the category calculated under the Guidelines and its explanation for the category it has chosen as appropriate.").

In a departure under §4A1.3(d), imposed because defendant committed the instant offense while awaiting trial for an earlier crime, it was reasonable for the sentencing court to add two points to the criminal history score by analogizing to §4A1.1(d), which adds two points for an offense committed while under any criminal justice sentence. *U.S. v. Little,* 938 F.2d 1164, 1166 (10th Cir. 1991) [4#7].

To calculate the extent of an upward departure where category V did not adequately represent a defendant's criminal history and 18 U.S.C. §924(e)'s 180-month mandatory minimum already superseded defendant's 33–41-month guideline range, the district court located the offense level under category V that included a 180-month sentence, increased the offense level two points, and then imposed a 230-month sentence within that level. Although the Fifth Circuit did "not ratify this methodology," it affirmed the sentence as reasonable in light of the "unique aspects" of defendant's criminal history. *U.S. v. Carpenter,* 963 F.2d 736, 743–46 (5th Cir. 1992). The Ninth Circuit, however, remanded a criminal history departure above the 120-month mandatory minimum because the district court did not explain how it calculated the departure above defendant's 63–78 month guideline range. The mandatory minimum is not a substitute for the guideline range, which is the starting point for calculating departures. *U.S. v. Rodriguez-Martinez,* 25 F.3d 797, 799–800 (9th Cir. 1994) ("the existence of a mandatory minimum sentence does not alter the manner in which a district court determines the appropriate extent of a departure") [6#15].

Some circuits have held that it is reasonable to calculate the extent of a downward departure for a career offender by departing from both the offense level and criminal history category and using the guideline range that would have applied absent the career offender classification. See *U.S. v. Fletcher,* 15 F.3d 553, 557 (6th Cir. 1994) [6#11]; *U.S. v. Clark,* 8

F.3d 839, 846 (D.C. Cir. 1993) [6#7]; *U.S. v. Reyes,* 8 F.3d 1379, 1389 (9th Cir. 1993) [6#7]; *U.S. v. Bowser,* 941 F.2d 1019, 1026 (10th Cir. 1991) [4#7]; *U.S. v. Senior,* 935 F.2d 149, 151 (8th Cir. 1991). See also *U.S. v. Shoupe,* 35 F.3d 835, 837–38 (3d Cir. 1994) (remanded because district court concluded it could not depart by offense level for career offender: "Because career offender status enhances both a defendant's criminal history category and offense level, . . . a sentencing court may depart in both under the proper circumstances") [7#4].

The Seventh Circuit has held that a criminal history departure may not exceed the length of the sentence defendant could have received if the facts underlying the departure had been expressly counted in the criminal history. *U.S. v. Fonner,* 920 F.2d 1330, 1332 (7th Cir. 1990) [3#19]. In a case involving multiple convictions and an unexpired sentence, the court recommended on remand that the sentencing court impose consecutive sentences, rather than depart upward and impose concurrent sentences, when the same amount of punishment would result. *U.S. v. Schmude,* 901 F.2d 555, 560–61 (7th Cir. 1990) [3#6].

Note that courts must distinguish between departures based on criminal history and those based on aggravating or mitigating circumstances. Except for departures within category VI (see section 4 below), it is error to calculate the extent of a criminal history departure by reference to offense levels. *U.S. v. Harvey,* 2 F.3d 1318, 1325 (3d Cir. 1993); *U.S. v. Dawson,* 1 F.3d 457, 463–64 (7th Cir. 1993); *U.S. v. Deutsch,* 987 F.2d 878, 887 (2d Cir. 1993); *U.S. v. Thornton,* 922 F.2d 1490, 1494 (10th Cir. 1991) [3#19]; *U.S. v. Fortenbury,* 917 F.2d 477, 479–80 (10th Cir. 1990) [3#15]. But cf. *U.S. v. Hines,* 26 F.3d 1469, 1478 n.7 (9th Cir. 1994) (district court could properly depart by offense levels because departure was based on both §§5K2.0 and 4A1.3) [6#17].

The guideline sentencing range must be properly calculated before departure. See *U.S. v. Emery,* 991 F.2d 907, 910 (1st Cir. 1993) ("decision to depart does not . . . render moot questions concerning" whether guideline range is properly calculated); *U.S. v. Mondaine,* 956 F.2d 939, 943 (10th Cir. 1992) (same, remanded).

b. Upward departure to career offender level

There is some question whether a district court may depart to career offender levels on the basis that defendant's prior criminal conduct, while technically not meeting the requirements of §4B1.1, indicates defendant is in fact a career offender. Some circuits have held such a departure may be appropriate. See, e.g., *U.S. v. Cash,* 983 F.2d 558, 562 (4th Cir. 1992) (proper because defendant would have been career offender but for constitutional invalidity of prior conviction) [5#7]; *U.S. v. Hines,* 943 F.2d 348, 354–55 (4th Cir. 1991) (proper where defendant missed career offender status only because prior violent felonies were consolidated); *U.S. v. Jones,* 908 F.2d 365, 367 (8th Cir. 1990) (departure appropriate because ambiguity in career offender guideline precluded its use for defendant who had pled guilty to two prior violent felonies but was not yet sentenced for them) [3#11]; *U.S. v. Dorsey,* 888 F.2d 79, 80–81 (11th Cir. 1989) (departure to career offender status proper because several prior, unrelated bank robberies had been consolidated for sentencing) [2#16]. Cf. *U.S. v. Delvecchio,* 920 F.2d 810, 814–15 (11th Cir. 1991) (court should not automatically depart to career offender levels if defendant was not career offender solely because prior convictions were consolidated—must analyze actual criminal history and purpose of guideline) [3#19].

Other circuits have found it inappropriate. See, e.g., *U.S. v. Ruffin,* 997 F.2d 343, 347 (7th Cir. 1993) (remanded departure to career offender level because defendant did not have

required two prior felony convictions as defined in guideline—"Only *real* convictions support a sentence under sec. 4B1.1. Reconstructions and other efforts to approximate the seriousness of a criminal history . . . must be treated as sec. 4A1.3 provides") [5#15]; *U.S. v. Faulkner,* 952 F.2d 1066, 1072–73 (9th Cir. 1991) (inappropriate to use career offender provision as departure guide) (amending 934 F.2d 190 [4#8]); *U.S. v. Robison,* 904 F.2d 365, 372–73 (6th Cir. 1990) (may not depart to career offender status because court feels defendant "got a break" in prior sentencing) [3#8]; *U.S. v. Hawkins,* 901 F.2d 863, 866–67 (10th Cir. 1990) (improper to depart on the ground that defendant "narrowly missed" career offender status) [3#7]. Cf. *U.S. v. Thomas,* 961 F.2d 1110, 1122 (3d Cir. 1992) (agreeing with reasoning of *Faulkner,* holding that without actual conviction it was improper to depart by analogy to 18 U.S.C. §924(e), the armed career criminal statute).

4. Computation—Departure Above Category VI

As of the Nov. 1992 amendments, §4A1.3 contains a method for departing upward when defendant is already in category VI: "[T]he court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case." Some circuits have approved this method and directed that it be used. See, e.g., *U.S. v. Pennington,* 9 F.3d 1116, 1118–19 (5th Cir. 1993) (courts must use vertical method to depart above CHC VI); *U.S. v. Carr,* 5 F.3d 986, 994 (6th Cir. 1993) (courts must look to higher offense levels, may no longer hypothesize to categories above VI; court must also explain why it chooses particular offense level) [6#5]; *U.S. v. Cash,* 983 F.2d 558, 561 n.6 (4th Cir. 1992) (prior to amendment, indicating approval of using higher offense levels). See also *U.S. v. Thomas,* 24 F.3d 829, 833–36 (6th Cir. 1994) (district court need not specifically consider and reject each intermediate offense level between original guideline range and range in which departure sentence falls) [6#15]; *U.S. v. Harris,* 13 F.3d 555, 558–59 (2d Cir. 1994) (same: district court need not follow "rigid step-by-step approach"). But cf. *U.S. v. Streit,* 962 F.2d 894, 907–08 (9th Cir. 1992) (prior to 1992 amendment, disapproved of "vertical" method of analogy to higher offense levels).

The Fifth Circuit affirmed as "reasonable and not an abuse of discretion" a departure where the district court "add[ed] one offense level for each criminal history point above the thirteen points required to reach category VI, and assess[ed] four additional levels for [other] reasons." *U.S. v. Rosogie,* 21 F.3d 632, 634 (5th Cir. 1994) (from offense level 12 and 23 criminal history points, a guideline range of 30–37 months, court departed to 150-month sentence) [6#14].

Previously, some courts had extrapolated from the criminal history categories. The Seventh Circuit, noting that sentencing ranges increase approximately 10%–15% from one criminal history category to another, instructed a sentencing court to "use this ten to fifteen percent increase to guide the departure" of a category VI defendant. *U.S. v. Schmude,* 901 F.2d 555, 560 (7th Cir. 1990) [3#6]. Some circuits also allowed the creation of hypothetical categories above VI, extrapolating from the guidelines based on defendant's criminal history points. See *Cash,* 983 F.2d at 561 [5#7]; *Streit,* 962 F.2d at 905–06 (remanded: proper to use hypothetical categories to depart upward for career offender, but calculation to category IX was not adequately explained) [4#24]; *U.S. v. Glas,* 957 F.2d 497, 498–99 (7th Cir. 1992) (creating new criminal history category XIV for defendant with 39 criminal history points by adding one category for every three points above thirteen and increasing minimum sen-

tence by three months for each new category) [4#20]; *U.S. v. Jackson,* 921 F.2d 985, 993 (10th Cir. 1991) (en banc).

The First, Ninth, Tenth, Eleventh, and D.C. Circuits have declined to impose any sort of formula and review departures above category VI for reasonableness. See *U.S. v. Brown,* 9 F.3d 907, 913 (11th Cir. 1993); *Streit,* 962 F.2d at 906; *U.S. v. Molina,* 952 F.2d 514, 522 (D.C. Cir. 1992) [4#14]; *U.S. v. Ocasio,* 914 F.2d 330, 336–37 (1st Cir. 1990); *U.S. v. Russell,* 905 F.2d 1450, 1455–56 (10th Cir. 1990) [3#9]; *U.S. v. Bernhardt,* 905 F.2d 343, 346 (10th Cir. 1990) [3#9].

Some circuits had also held that the career offender guideline could be used as a reference for departure above category VI. *Cash,* 983 F.2d at 562 [5#7]; *U.S. v. Williams,* 922 F.2d 578, 583 (10th Cir. 1990) [3#17]; *U.S. v. Gardner,* 905 F.2d 1432, 1437–39 (10th Cir. 1990) [3#9].

B. Aggravating Circumstances

While departures for aggravating circumstances depend largely on the individual circumstances of each case, see U.S.S.G. §5K2.0, some patterns have emerged concerning what circumstances are, or are not, valid grounds for departure. Selected examples in several categories are listed below.

1. Upward Departure Permissible

Unless otherwise noted, upward departures were affirmed in these cases.

a. Defendant's conduct not adequately covered by—

Offense guideline: *U.S. v. Haggard,* 41 F.3d 1320, 1328 (9th Cir. 1994) (three-level adjustment under §2J1.2(b)(2) did not adequately account for $89,000 cost to FBI of investigating false claims, §5K2.5); *U.S. v. Joshua,* 40 F.3d 948, 951–52 (8th Cir. 1994) (dangerous nature of weapon—a semiautomatic pistol—involved in possession of firearm in school zone, §5K2.6) [7#6]; *U.S. v. Rainone,* 32 F.3d 1203, 1209 (7th Cir. 1994) (RICO defendants were part of large, longstanding, very successful "organized crime" gang); *U.S. v. Cherry,* 10 F.3d 1003, 1009–10 (3d Cir. 1993) (departure by analogy to §3C1.1 warranted for fleeing to Cuba for 20 years to avoid prosecution for murder, even though offense guideline used, §2J1.6, usually precludes use of §3C1.1); *U.S. v. Anderson,* 5 F.3d 795, 804 (5th Cir. 1993) (frequency and nature of sexual abuse of kidnapping victim); *U.S. v. McAninch,* 994 F.2d 1380, 1387–89 (9th Cir. 1993) (racist motivation in committing mail fraud and threatening communications offenses) [5#14]; *U.S. v. Flinn,* 987 F.2d 1497, 1505 (10th Cir. 1993) (defendant convicted of fraudulent phone-card use falsely reported hostage situation at hotel, causing hotel property damage, §5K2.5); *U.S. v. Willey,* 985 F.2d 1342, 1349 (7th Cir. 1993) (arsonist destroyed another's business, ruined the owner's reputation, endangered lives); *U.S. v. Medina-Gutierrez,* 980 F.2d 980, 983–84 (5th Cir. 1992) (frequent purchases of weapons) [5#7]; *U.S. v. Claymore,* 978 F.2d 421, 424–25 (8th Cir. 1992) (police officer, charged with one count of sexual abuse, forcibly raped minor several times and fathered her child); *U.S. v. Schweihs,* 971 F.2d 1302, 1316–17 (7th Cir. 1992) (using organized crimes connections in extortion offense); *U.S. v. Ponder,* 963 F.2d 1506, 1509–10 (11th Cir. 1992) (neither offense level nor §4A1.1(d) adequately accounted for possession of drugs with intent to distribute inside jail); *U.S. v. Roth,* 934 F.2d 248, 251–52 (10th Cir. 1991) (inter alia, amount

of theft twice upper limit in guideline) [4#4]; *U.S. v. Loveday,* 922 F.2d 1411, 1416–17 (9th Cir. 1991) (weapons possession offense did not account for dangers of homemade bomb and giving bomb to another to use) [3#18]; *U.S. v. Harotunian,* 920 F.2d 1040, 1044–45 (1st Cir. 1990) (amount embezzled far above highest amount in guideline) [3#17]; *U.S. v. Baker,* 914 F.2d 208, 211 (10th Cir. 1990) (use of explosives for intimidation in bank robbery; abduction at gunpoint during explosives offense) [3#14]; *U.S. v. Thomas,* 914 F.2d 139, 144 (8th Cir. 1990) (dangerous nature of fully loaded firearms in illegal possession of weapons offense) [3#14]; *U.S. v. Pridgen,* 898 F.2d 1003, 1004 (5th Cir. 1990) (enhancement for kidnapping during robbery, §2B3.1(b)(4), inadequately reflected seriousness of conduct and statutory penalties for kidnapping) [3#7]; *U.S. v. Mahler,* 891 F.2d 75, 76–77 (4th Cir. 1989) (use of handgun replica in robbery not covered in Guidelines) [2#18]; *U.S. v. Lucas,* 889 F.2d 697, 700–01 (6th Cir. 1989) (robbery guideline addresses physical injury to victims but not psychological injury) [2#17]; *U.S. v. Warters,* 885 F.2d 1266, 1275 (5th Cir. 1989) (remanded: fact that misprision defendant may be guilty of underlying offense not accounted for in misprision guideline) [2#15].

Adjustments (except obstruction): *U.S. v. McAninch,* 994 F.2d 1380, 1388 (9th Cir. 1993) (where victims were vulnerable to racist conduct but defendant did not have requisite state of mind for §3A1.1 adjustment) [5#14]; *U.S. v. Bartsh,* 985 F.2d 930, 934–35 (8th Cir. 1993) (abuse of trust by U.S. bankruptcy trustee embezzling funds not accounted for in §3B1.3) [5#9]; *U.S. v. Fousek,* 912 F.2d 979, 981 (8th Cir. 1990) (bankruptcy trustee embezzling estate funds) [3#13]; *U.S. v. Chase,* 894 F.2d 488, 491 (1st Cir. 1990) (multiple counts adjustment, §3D1.1–1.4, inadequate to account for fifteen robbery counts) [3#1]; *U.S. v. Crawford,* 883 F.2d 963, 966 (11th Cir. 1989) (role in offense that "did not rise to the level of an aggravating role, as defined by guideline 3B1.1") [2#14].

b. Obstructive conduct not adequately covered under §3C1

Generally: *U.S. v. Merino,* 44 F.3d 749, 756 (9th Cir. 1994) (repeated flights and use of aliases to avoid prosecution and extradition); *U.S. v. Wint,* 974 F.2d 961, 970–71 (8th Cir. 1992) (death threats against codefendant and family) [5#4]; *U.S. v. Baez,* 944 F.2d 88, 90 (2d Cir. 1991) (abducting and threatening to kill informant); *U.S. v. Wade,* 931 F.2d 300, 306 (5th Cir. 1991) (defendant had coconspirator threaten and shoot at person); *U.S. v. Ward,* 914 F.2d 1340, 1348 (9th Cir. 1990) (defendant's perjury at trial was "significantly more egregious than the ordinary cases of obstruction listed in . . . §3C1.1); *U.S. v. Drew,* 894 F.2d 965, 974 (8th Cir. 1990) (§3C1.1, does not adequately account for attempt to murder witness) [3#2].

Dangerous conduct during escape attempt: Guideline §3C1.2 (Nov. 1990) provides a two-level increase if a defendant "created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." However, Application Notes 2 and 6 provide that an upward departure may also be warranted "where a higher degree of culpability [than recklessness] was involved" or if "death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person." See, e.g., *U.S. v. Lee,* 989 F.2d 180, 182–83 (5th Cir. 1993) (§3C1.2 and §3A1.2(b) enhancements did not preclude §5K2.6 departure where defendant led police on a high-speed chase and recklessly attempted to shoot out civilians' car tires and ignite truck's gas tank); *U.S. v. Hernandez-Rodriguez,* 975 F.2d 622, 625–27 (9th Cir. 1992) (§3C1.2 does not preclude upward departure for three-hour high-speed chase while transporting illegal aliens). But cf. *U.S. v. Torres-Lopez,* 13 F.3d 1308, 1312 (9th Cir. 1994) (remanded: defendant's

flight "was only a few minutes and less than five miles long . . . was not unusually fast or reckless," and was "within the boundaries of 3C1.2") [6#10].

Before the addition of §3C1.2, several courts had departed upward to account for dangerous escape attempts. See, e.g., *U.S. v. Chiarelli,* 898 F.2d 373, 380–82 (3d Cir. 1990) (high-speed chase threat to public safety, §5K2.14) [3#5]; *U.S. v. Bates,* 896 F.2d 912, 914 (5th Cir. 1990) (dangerous conduct during attempt to escape arrest) [3#5]; *U.S. v. Jordan,* 890 F.2d 968, 976 (7th Cir. 1989) (fleeing arrest resulted in injury to government agent) [2#18]; *U.S. v. Ramirez-de Rosas,* 873 F.2d 1177, 1179–80 (9th Cir. 1989) (high-speed chase fleeing arrest) [2#7]; *U.S. v. Salazar-Villarreal,* 872 F.2d 121, 122–23 (5th Cir. 1989) (reckless conduct while fleeing arrest) [2#5].

c. Drug-related factors and conduct in dismissed counts

U.S. v. Legarda, 17 F.3d 496, 501–02 (1st Cir. 1994) (purity of cocaine and having children present during transaction); *U.S. v. Thomas,* 956 F.2d 165, 167 (7th Cir. 1992) (drug-house guard facilitated management of drug house, §5K2.9); *U.S. v. Martinez-Duran,* 927 F.2d 453, 456 (9th Cir. 1991) (presence at sale and actual possession of drugs in telephone offense; rev'd on other grounds); *U.S. v. Sardin,* 921 F.2d 1064, 1066 (10th Cir. 1990) (amount of drugs in offense of operating crack house; rev'd on other grounds) [3#17]; *U.S. v. Wylie,* 919 F.2d 969, 980 (5th Cir. 1990) (drug use in front of children, chief money supplier for drug buys, concealing role through intimidation and bribery) [3#18]; *U.S. v. Crawford,* 883 F.2d 963, 964–66 (11th Cir. 1989) (amount of drugs in simple possession offense) [2#14]; *U.S. v. Ryan,* 866 F.2d 604, 606–10 (3d Cir. 1989) (amount, purity, and packaging of drugs in simple possession offense) [2#1]; *U.S. v. Juarez-Ortega,* 866 F.2d 747, 748–49 (5th Cir. 1989) (possession of weapon in drug case despite acquittal on weapon charge) [2#1].

Note: U.S.S.G. §2D1.6, "Use of Communication Facility in Committing Drug Offense," was amended so that the base offense level is that which is applicable to the underlying offense. Previously, courts had departed upward to account for the amount of drug in the underlying offense. See, e.g., *U.S. v. Citro,* 938 F.2d 1431, 1443–45 (1st Cir. 1991); *U.S. v. Asseff,* 917 F.2d 502, 506 (11th Cir. 1991) (also purity of drugs); *U.S. v. Perez,* 915 F.2d 947, 948–49 (5th Cir. 1990); *U.S. v. Bennett,* 900 F.2d 204, 206 (9th Cir. 1990) [3#7]; *U.S. v. Anders,* 899 F.2d 570, 581 (6th Cir. 1990); *U.S. v. Williams,* 895 F.2d 435, 437–38 (8th Cir. 1990) [3#1]; *U.S. v. Correa-Vargas,* 860 F.2d 35, 37–40 (2d Cir. 1988) (large quantity of drugs involved in telephone offense) [1#18].

d. Extreme psychological injury to victims, §5K2.3

U.S. v. Haggard, 41 F.3d 1320, 1326–27 (9th Cir. 1994) (targeting family with false stories of child's killer and location of body) [7#5]; *U.S. v. Anderson,* 5 F.3d 795, 804–05 (5th Cir. 1993) (effects of extended and brutal kidnapping and rape); *U.S. v. Miller,* 993 F.2d 16, 21 (2d Cir. 1993) ("inordinate psychological harm" to victim of threatening communications); *U.S. v. Passmore,* 984 F.2d 933, 936–37 (8th Cir. 1993) (for harm to minor induced by defendant into sexual relationship and joining his criminal schemes—although §5K2.3 by its terms only applies to victims of offense, this was unusual case); *U.S. v. Newman,* 965 F.2d 206, 209–10 (7th Cir. 1992) (serious psychological and physical harm to victim in fraud case); *U.S. v. Ellis,* 935 F.2d 385, 396 (1st Cir. 1991) (extreme pyschological harm to child victim of sexual abuse); *U.S. v. Pergola,* 930 F.2d 216, 219 (2d Cir. 1991) (repeatedly threatening ex-girlfriend) [4#2]; *U.S. v. Benskin,* 926 F.2d 562, 565–66 (6th Cir. 1991) (long dura-

tion of fraud scheme, amount of money and number of victims, emotional harm to victims) [3#20]; *U.S. v. Astorri*, 923 F.2d 1052, 1058–59 (3d Cir. 1991) (extreme psychological injury to fraud victims) [3#20]; *U.S. v. Lucas*, 889 F.2d 697, 700–01 (6th Cir. 1989) (psychological injury to robbery victims) [2#17].

e. Death, physical injury, abduction, or extreme conduct, §§5K2.1, 5K2.2, 5K2.8

U.S. v. Haggard, 41 F.3d 1320, 1327–28 (9th Cir. 1994) (false claims of knowing identity of child's killer and location of body "was in fact unusually cruel and degrading to [child's] family") [7#5]; *U.S. v. Davis*, 30 F.3d 613, 615–16 (5th Cir. 1994) (death indirectly caused by defendant during robbery, even though unintended) [7#2]; *U.S. v. Menzer*, 29 F.3d 1223, 1235 (7th Cir. 1994) (multiple deaths and extreme violence in arson); *U.S. v. Anderson*, 5 F.3d 795, 805 (5th Cir. 1993) (unusually heinous and degrading conduct during two-day kidnapping and rape); *U.S. v. Roston*, 986 F.2d 1287, 1293 (9th Cir. 1993) (defendant convicted of second-degree murder beat victim, choked her into unconsciousness, and threw her into sea, §5K2.8); *U.S. v. Yankton*, 986 F.2d 1225, 1229–30 (8th Cir. 1993) (pregnancy resulting from rape not accounted for as "serious bodily injury" under §2A3.1(b)(4), may warrant departure) [5#10]; *U.S. v. White*, 979 F.2d 539, 544–45 (7th Cir. 1992) (death of victim defendant transported for prostitution—finding that defendant "knowingly risked his victim's death" sufficient for §5K2.1); *U.S. v. Billingsley*, 978 F.2d 861, 866–67 (5th Cir. 1992) (defendant killed victim and stole victim's treasury check, §5K2.1; enhancement for risk of serious bodily injury, §2F1.1(4), did not preclude departure); *U.S. v. Newman*, 965 F.2d 206, 209–10 (7th Cir. 1992) (serious psychological and physical harm to victim in fraud case, §§5K2.2, 5K2.3); *U.S. v. Uccio*, 940 F.2d 753, 759–60 (2d Cir. 1991) (kidnapping and assault of coconspirator—§5K2.4 not limited to innocent bystanders or victims) [4#10]; *U.S. v. Gomez*, 901 F.2d 728, 729 (9th Cir. 1990) (dangerous and inhumane treatment of illegal aliens being transported) [3#7]; *U.S. v. Velasquez-Mercado*, 872 F.2d 632, 637–38 (5th Cir. 1989) (molested female illegal aliens being transported) [2#6].

See also section VI.B.2.e.

f. Disruption of governmental function, §5K2.7

U.S. v. Heckman, 30 F.3d 738, 743 (6th Cir. 1994) ("substantial disruption" to IRS by false tax filings); *U.S. v. Flinn*, 987 F.2d 1497, 1505 (10th Cir. 1993) (defendant convicted of fraudulent phone-card use falsely reported hostage situation at hotel causing SWAT team to be dispatched); *U.S. v. Sarault*, 975 F.2d 17, 19–21 (1st Cir. 1992) (extortionate acts disrupted city's public works bidding process); *U.S. v. Kramer*, 943 F.2d 1543, 1550 (11th Cir. 1991) (attempted prison escape causing helicopter crash, delayed airlift of prisoners, lockdown of prison, and extra prisoner count); *U.S. v. Roth*, 934 F.2d 248, 251–52 (10th Cir. 1991) (inter alia, caused military morale to deteriorate by selling stolen military equipment) [4#4]; *U.S. v. Hatch*, 926 F.2d 387, 397 (5th Cir. 1991) (fraudulent payments depleting sheriff's operating budget causing disruption in services); *U.S. v. Pulley*, 922 F.2d 1283, 1289 (6th Cir. 1991) (disruption of governmental function by persuading others to commit perjury and codefendant to retract confession) [3#19]; *U.S. v. Murillo*, 902 F.2d 1169, 1174 (5th Cir. 1990) (disruption of governmental function by helping illegal aliens fraudulently apply for

amnesty program) [3#8]; *U.S. v. Garcia*, 900 F.2d 45, 48–49 (5th Cir. 1990) (large scale mail theft by government employee).

g. Endangering public welfare or national security, terrorism, §§5K2.14, 5K2.15

U.S. v. Brown, 9 F.3d 907, 912–13 (11th Cir. 1993) (illegal possession of weapon by §4B1.4 armed career criminal); *U.S. v. Hicks*, 996 F.2d 594, 598–99 (9th Cir. 1993) (series of "terroristic" attacks on IRS, "potential destructiveness" of bombings); *U.S. v. Dempsey*, 957 F.2d 831, 834 (11th Cir. 1992) (homemade pipe bombs and hand grenade posed significant public safety risk, §5K2.14); *U.S. v. Johnson*, 952 F.2d 565, 583–84 (1st Cir. 1991) ("cool, deliberative, calculated" conversations about terrorist weapons, §5K2.8; endangering public welfare, §5K2.14; and "planning and sophistication," "multiple occurrences," and threat to national security in relation to arms exporting, §§2M5.2, 5K2.0); *U.S. v. Roth*, 934 F.2d 248, 251–52 (10th Cir. 1991) (inter alia, danger to national security, §5K2.14) [4#4]; *U.S. v. Kikumura*, 918 F.2d 1084, 1114–15 (3d Cir. 1990) (terrorism) [3#15]; *U.S. v. Carpenter*, 914 F.2d 1131, 1135 (9th Cir. 1990) (giving weapon to juveniles, risk to others) [3#13]; *U.S. v. Schular*, 907 F.2d 294, 298 (2d Cir. 1990) (knowingly selling illegal firearms to drug traffickers and other criminals, risk to public safety under §5K2.14).

h. Failure to return proceeds of crime

U.S. v. Merritt, 988 F.2d 1298, 1310–11 (2d Cir. 1993) (defendant's "elaborate fraudulent manipulation . . . designed to preserve the huge benefits of his crime after service of jail time," which went beyond simple failure to pay restitution and concealment of assets) [5#10]; *U.S. v. Bryser*, 954 F.2d 79, 89–90 (2d Cir. 1992) (departure may be appropriate for failure to return stolen money, but court must find defendants still controlled money); *U.S. v. Valle*, 929 F.2d 629, 631–32 (11th Cir. 1991) (refusal to return almost $17 million from robbery) [4#3].

Departure to a larger fine may also be appropriate to prevent defendants from profiting from their crime by selling the story rights. See *U.S. v. Seale*, 20 F.3d 1279, 1287–89 (3d Cir. 1994) (remanded: while there was evidence defendants could receive large sums of money for story rights, evidence was not sufficient to support departures to levels district court imposed) [6#12]. Cf. *U.S. v. Wilder*, 15 F.3d 1292, 1300–01 (5th Cir. 1994) (departure to $4 million fine was proper to "ensure that Wilder disgorged any gain from his criminal activities" where evidence showed defendant gained at least $2 million and caused over $5 million in losses).

i. Specific offender characteristics (§5H1)

U.S. v. Hines, 26 F.3d 1469, 1477–78 (9th Cir. 1994) (under §§5K2.0 and 4A1.3 for defendant's "extremely dangerous mental state" and resulting "significant likelihood he will commit additional serious crimes") [6#17]; *U.S. v. Richison*, 901 F.2d 778, 781 (9th Cir. 1990) (remanded: alcohol and drug abuse only if "extraordinary," §5H1.4) [3#8]; *U.S. v. Guarin*, 898 F.2d 1120, 1122–23 (6th Cir. 1990) (extent of cocaine dealing and dependence on it for livelihood, §5H1.9) [3#5].

j. Immigration offenses

(Note that §2L1.1 was amended Nov. 1, 1992, to account for offenses involving large numbers of aliens.)

U.S. v. Fan, 36 F.3d 240, 245–46 (2d Cir. 1994) (inhumane and dangerous conditions in smuggling 150 aliens on fishing vessel ill-equipped for passengers; also, likelihood that, had scheme succeeded, illegal aliens would have been subject to "involuntary servitude" to pay off debts to smugglers) [7#3]; *U.S. v. Cruz-Ventura,* 979 F.2d 146, 147 (9th Cir. 1992) (dangerous high-speed chase with four aliens locked in trunk); *U.S. v. Huang,* 977 F.2d 540, 544 (11th Cir. Nov. 1992) (smuggled approximately 100 aliens); *U.S. v. Lara,* 975 F.2d 1120, 1124–27 (5th Cir. 1992) (extortionate behavior toward illegal aliens, inhumane treatment, use of firearm); *U.S. v. Hernandez-Rodriguez,* 975 F.2d 622, 625–27 (9th Cir. 1992) (§3C1.2 does not preclude upward departure for three-hour high-speed chase while transporting illegal aliens); *U.S. v. Martinez-Gonzalez,* 962 F.2d 874, 876 (9th Cir. 1992) (smuggled large number of aliens, §2L1.1); *U.S. v. Murillo,* 902 F.2d 1169, 1174 (5th Cir. 1990) (disruption of governmental function, §5K2.7, by helping illegal aliens fraudulently apply for amnesty program) [3#8]; *U.S. v. Gomez,* 901 F.2d 728, 729 (9th Cir. 1990) (dangerous and inhumane treatment of illegal aliens being transported) [3#7]; *U.S. v. Lopez-Escobar,* 884 F.2d 170, 173 (5th Cir. 1989) (unusually large number of aliens in illegal immigration offense) [2#13]; *U.S. v. Rodriguez,* 882 F.2d 1059, 1067–68 (6th Cir. 1989) (illegal entry into United States while serving foreign sentence, dependence on criminal activity) [2#12]; *U.S. v. Velasquez-Mercado,* 872 F.2d 632, 637–38 (5th Cir. 1989) (transported unusually large number of illegal aliens, molested female passengers) [2#6].

But cf. *U.S. v. Torres-Lopez,* 13 F.3d 1308, 1312 (9th Cir. 1994) (remanded: flight from arrest by defendant transporting illegal aliens "was only a few minutes and less than five miles long, . . . was not unusually fast or reckless," and was "within the boundaries of 3C1.2," and defendant did not otherwise treat alien passengers in dangerous or inhumane manner so as to warrant departure under §2L1.1, comment. (n.8)—"In sum, there is nothing here, aside from the bare presence of illegal aliens, to suggest that Torres-Lopez's flight from authority was in any way extraordinary") [6#10].

k. Influencing family members to commit crimes

U.S. v. Jagim, 978 F.2d 1032, 1042 (8th Cir. 1992) (partly for influencing nephew to join tax fraud conspriracy); *U.S. v. Ledesma,* 979 F.2d 816, 822 (11th Cir. 1992) (upward departure or abuse of position of trust enhancement proper for parent who involved adult daughter in drug trade); *U.S. v. Porter,* 924 F.2d 395, 399 (1st Cir. 1991) (defendant urged son to rob bank); *U.S. v. Christopher,* 923 F.2d 1545, 1556 (11th Cir. 1991) (drug dealer involved own children in drug offenses); *U.S. v. Shuman,* 902 F.2d 873, 875–76 (11th Cir. 1990) (defendant's drug trafficking business allowed son easy access to drugs and caused his drug dependency) [3#8]. Cf. *U.S. v. Legarda,* 17 F.3d 496, 502 (1st Cir. 1994) (affirmed for defendant who involved his children by having them present during drug transaction). But cf. *U.S. v. Monaco,* 23 F.3d 793, 800–01 (3d Cir. 1994) (small downward departure was appropriate for defendant's extreme anguish and remorse at having involved his otherwise law-abiding son in fraud offense) [6#13].

l. Other appropriate upward departures

U.S. v. Hines, 26 F.3d 1469, 1477–78 (9th Cir. 1994) (defendant's "extremely dangerous mental state" and resulting "significant likelihood he will commit additional serious crimes," §§5K2.0 and 4A1.3) [6#17]; *U.S. v. Merritt,* 988 F.2d 1298, 1305–11 (2d Cir. 1993) (defendant's "profound corruption and dishonesty," combined with other factors) [5#10]; *U.S. v. Barnes,* 910 F.2d 1342, 1345 (6th Cir. 1990) (guideline sentence would be less than that received for prior conviction for same offense) [3#12]; *U.S. v. Reeves,* 892 F.2d 1223, 1229 (5th Cir. 1990) (intended bribe to be much larger than amount actually paid) [3#2].

2. Upward Departure Not Warranted

Upward departures may be inappropriate for a wide variety of reasons. Some examples follow. Unless otherwise noted, the sentence imposed by the district court was remanded for resentencing.

a. Conduct or circumstance underlying departure already accounted for in—

Offense level: *U.S. v. Cherry,* 10 F.3d 1003, 1012 (3d Cir. 1993) (§5K2.9 not applicable because unlawful flight was committed to avoid prosecution, not conceal murder; also, underlying crime accounted for by §2J1.6(b)(1) adjustment); *U.S. v. Roston,* 986 F.2d 1287, 1293 (9th Cir. 1993) (§5K2.1 not applicable to defendant convicted of second-degree murder); *U.S. v. Medina-Gutierrez,* 980 F.2d 980, 983 (5th Cir. 1992) (using §5K2.6, for transportation of firearms offense) [5#7]; *U.S. v. Riviere,* 924 F.2d 1289, 1307–09 (3d Cir. 1991) (disruption in marshal's duties inherent in offense of assaulting federal marshal); *U.S. v. Kikumura,* 918 F.2d 1084, 1116 (3d Cir. 1990) (§5K2.7 not applicable to attempt to influence American anti-terrorist policies by bombing federal building); *U.S. v. Singleton,* 917 F.2d 411, 414 (9th Cir. 1990) (same, for fleeing arrest and causing police to search for defendant twice); *U.S. v. Barone,* 913 F.2d 46, 51 (2d Cir. 1990) (same—disruption of government inherent in perjury conviction); *U.S. v. Colon,* 905 F.2d 580, 586–87 (2d Cir. 1990) (for drugs in relevant conduct—must be used to calculate base offense level instead) [3#8]; *U.S. v. McDowell,* 902 F.2d 451, 453–54 (6th Cir. 1990) (dangers of crack house; conduct in dismissed count was relevant conduct so use in offense level) [3#6]; *U.S. v. Chiarelli,* 898 F.2d 373, 381 (3d Cir. 1990) ("magnitude of the thievery" accounted for in offense guideline) [3#5]; *U.S. v. Uca,* 867 F.2d 783, 787–90 (3d Cir. 1989) (number of guns, traceability, unlawful purpose) [2#1].

Adjustments: *U.S. v. Torres-Lopez,* 13 F.3d 1308, 1312 (9th Cir. 1994) (flight from arrest that "was only a few minutes and less than five miles long [and] was not unusually fast or reckless" was "within the boundaries of 3C1.2") [6#10];*U.S. v. Cherry,* 10 F.3d 1003, 1010–11 (3d Cir. 1993) ("victim" of unlawful flight offense was government, which does not warrant §3A1.2 increase—may not use official victims of underlying offense for departure by analogy to §3A1.2); *U.S. v. Eagan,* 965 F.2d 887, 892–93 (10th Cir. 1992) ("special skill" included in §3B1.3 enhancement; amount of precursor drugs already used in setting base offense level); *U.S. v. Castro-Cervantes,* 927 F.2d 1079, 1081–82 (9th Cir. 1990) (bank robber part of organized group—implicitly accounted for in §3B1) [3#13]; *U.S. v. Cox,* 921 F.2d 772, 774 (8th Cir. 1990) (escape charge merged into bank robbery sentence—multiple convictions accounted for in §3D1) [3#17]; *U.S. v. Zamarippa,* 905 F.2d 337, 340–41 (10th

Cir. 1990) (abuse of trust enhancement should be applied to baby-sitter who sexually abused children); *U.S. v. Miller,* 903 F.2d 341, 350–51 (5th Cir. 1990) (several convictions consolidated for sentencing under §§3D1.4 and 5G1.3) [3#8].

Otherwise considered in formulating the Guidelines: *U.S. v. Gray,* 982 F.2d 1020, 1023–24 (6th Cir. 1993) (greed and danger to society from drug distribution) [5#9]; *U.S. v. Klotz,* 943 F.2d 707, 710 (7th Cir. 1991) (refusal to assist authorities—§5K1.2 precludes departure but judge may consider failure to assist when selecting sentence within guideline range); *U.S. v. Enriquez-Munoz,* 906 F.2d 1356, 1359–62 (9th Cir. 1990) (to equalize sentence with codefendant's; for type and number of weapons; greed) [3#9]; *U.S. v. Hawkins,* 901 F.2d 863, 864–66 (10th Cir. 1990) (false claim of weapon; threat to harm bank teller) [3#7]; *U.S. v. Ceja-Hernandez,* 895 F.2d 544, 545 (9th Cir. 1990) (immigration defendant's anticipated deportation) [3#1]; *U.S. v. Coe,* 891 F.2d 405, 409–11 (2d Cir. 1989) (short time span in which robberies were committed; false claim to have weapon) [2#18]; *U.S. v. Missick,* 875 F.2d 1294, 1301–02 (7th Cir. 1989) (for weapon possessed by others when defendant not present or charged as coconspirator) [2#9].

b. Charges dismissed or not brought

U.S. v. Thomas, 961 F.2d 1110, 1122 (3d Cir. 1992) (defendant could have been charged with more serious crime) [4#25]; *U.S. v. Faulkner,* 952 F.2d 1066, 1069–70 (9th Cir. 1991) (charges dismissed and not brought as part of plea agreement) (amending 934 F.2d 190) [4#8]; *U.S. v. Castro-Cervantes,* 927 F.2d 1079, 1081 (9th Cir. 1990) (charges dismissed under plea agreement). See also *U.S. v. Robinson,* 898 F.2d 1111, 1117–18 (6th Cir. 1990) (incriminating information provided during plea negotiations and prohibited by §1B1.8) [3#4].

c. Mental health status or chemical addictions

U.S. v. Fonner, 920 F.2d 1330, 1334 (7th Cir. 1991) (mental health, §5H1.3) [3#19]; *U.S. v. Doering,* 909 F.2d 392, 395 (9th Cir. 1990) (need for psychiatric treatment, §§5H1.3, and 5K2.13) [3#11]; *U.S. v. Miller,* 903 F.2d 341, 350–51 (5th Cir. 1990) (alcohol dependency, §5H1.4) [3#8]; *Hawkins,* 901 F.2d at 864–66 (drug addiction) [3#7]; *U.S. v. Lopez,* 875 F.2d 1124, 1126–27 (5th Cir. 1989) (drug addiction) [2#8].

d. Community sentiment/local conditions

U.S. v. Barbontin, 907 F.2d 1494, 1498–99 (5th Cir. 1990) (local community's intolerance toward drug trafficking); *U.S. v. Thomas,* 906 F.2d 323, 327 (7th Cir. 1990) (degree of violence in community); *U.S. v. Aguilar-Pena,* 887 F.2d 347, 351–53 (1st Cir. 1989) ("community sentiment" against drug trafficking, local airport's inadequate security) [2#15]. See also *U.S. v. Hadaway,* 998 F.2d 917, 920–21 (11th Cir. 1993) (in context of downward departure, agreeing with *Barbontin* and *Aguilar-Pena* that "departures based on 'community standards' are not permitted") [6#4].

e. Psychological harm to victim, §5K2.3

U.S. v. Pelkey, 29 F.3d 11, 15–16 (1st Cir. 1994) (fraud victims' "feelings of lack of trust, frustration, shock, and depression" were not "so far beyond the heartland of fraud offenses as to constitute psychological harm" under §5K2.3 or §2F1.1, comment. (n.10(c))); *U.S. v.*

Mandel, 991 F.2d 55, 58–59 (2d Cir. 1993) (factual findings of harm insufficient); *U.S. v. Lara,* 975 F.2d 1120, 1128 (5th Cir. 1992) (same); *U.S. v. Fawbush,* 946 F.2d 584, 586 (8th Cir. 1991) (harm to victim was not "much more serious" than that normally resulting from offense); *U.S. v. Morin,* 935 F.2d 143, 144–45 (8th Cir. 1991) (same); *U.S. v. Zamarripa,* 905 F.2d 337, 340–41 (10th Cir. 1990) (same); *U.S. v. Hoyungawa,* 930 F.2d 744, 747 (9th Cir. 1991) (for extreme psychological injury to family of murder victim—§5K2.3 applies only to direct victims of offense) [4#2].

f. Other circumstances not meeting upward departure criteria

U.S. v. Zamora, 37 F.3d 531, 533–34 (9th Cir. 1994) ("danger of violence associated with a fraudulent drug sale" already accounted for in conviction for possessing firearm during drug trafficking offense and should not also be reflected in sentence on drug distribution charge) [7#4]; *U.S. v. Schweitzer,* 5 F.3d 44, 48 (3d Cir. 1993) (media interviews and appearing on Oprah Winfrey Show, calling attention to how easy it was to obtain confidential information from government) [6#5]; *U.S. v. Ferra,* 900 F.2d 1057, 1061 (7th Cir. 1990) (fact that fencing operation involved drugs and stolen weapons should be taken into account in relevant conduct) [3#7]; *U.S. v. Rivalta,* 892 F.2d 223, 231–33 (2d Cir. 1989) ("death of victim," §5K2.1, requires explicit finding) [2#20]; *U.S. v. Hernandez-Vasquez,* 884 F.2d 1314, 1316 (9th Cir. 1989) (high-speed chase where defendant was not driver) [2#13]; *U.S. v. Rodriguez,* 882 F.2d 1059, 1066 (6th Cir. 1989) (affirmed: national origin, inability to speak English improper grounds, but other grounds provided sufficient basis for departure) [2#12]; *U.S. v. Lopez,* 875 F.2d 1124, 1126–27 (5th Cir. 1989) (sentencing court's opinion that guideline is "weak and ineffectual" for the offense) [2#8].

C. Mitigating Circumstances

Note that a Nov. 1994 addition to the Introductory Commentary to Chapter 5, Part H, states that factors that are "not ordinarily relevant" to departure "may be relevant to this determination in exceptional cases." Similarly, a proposed new paragraph to §5K2.0 states that an "offender characteristic or circumstance that is not ordinarily relevant" to departure may be relevant if that factor "is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing."

1. Personal Circumstances

a. Family and community ties, §5H1.6; "prior good works," §5H1.11

When downward departure permissible: The majority of the circuits have held that a downward departure based on defendant's family ties and responsibilities and community ties may be proper, but only in "extraordinary" circumstances. The First Circuit stated that it may not be unusual, for example, for a drug offender to be a single mother with family responsibilities, "but at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the 'ordinary' case . . . into a case that is not at all ordinary." *U.S. v. Rivera,* 994 F.2d 942, 948 (1st Cir. 1993) (remanded) [5#14]. The Seventh Circuit noted that the case law has "generally indicated that the disintegration of existing family life or relationships is insufficient to

warrant a departure, as that is to be expected when a family member engages in criminal activity that results in a period of incarceration. . . . To warrant a departure, therefore, the courts have required a showing that the period of incarceration set by the Guidelines would have an effect on the family or family members beyond the disruption to family and parental relationships that would be present in the usual case." *U.S. v. Canoy,* 38 F.3d 893, 907 (7th Cir. 1994) (remanding for clearer explanation of why departure warranted) [7#4]. Previously, the Seventh Circuit had rejected family responsibilities as a ground for departure and held such responsibilities may only be considered when probation or determination of a fine or restitution is at issue. *U.S. v. Thomas,* 930 F.2d 526, 529–30 (7th Cir. 1991) (remanded: sole parent of three mentally disabled adult children and custodian of four-year-old grandson should not receive departure) [4#1].

The Second and Fourth Circuits remanded cases where it was unclear if the district court thought it lacked authority to depart in extraordinary family situations or exercised its discretion not to depart. *U.S. v. Ritchey,* 949 F.2d 61, 63 (2d Cir. 1991) (extraordinary family ties); *U.S. v. Deigert,* 916 F.2d 916, 919 (4th Cir. 1990) (defendant's "tragic personal background and family history").Cf. *U.S. v. Brown,* 29 F.3d 953, 961 (5th Cir. 1994) (vacated departure: "nothing extraordinary" about fact that defendant's two children were under five years old and cared for by defendant's 65-year-old grandmother with limited financial resources—"Unless there are unique or extraordinary circumstances, a downward departure . . . based on the defendant's parental responsibilities is improper").

The First Circuit indicated that a defendant should be compared with other defendants with similar characteristics, not simply with others who commit the same crime. It held that it was improper to depart because a defendant's "charitable work and community service stood apart from what one would expect of 'the typical bank robber.'" Rather, he should have been compared with "defendants from other cases who similarly had commendable community service records. . . . A court should survey those cases where the discouraged factor is present, without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd." *U.S. v. DeMasi,* 40 F.3d 1306, 1323–24 (1st Cir. 1994) [7#4].

The following cases are examples of "extraordinary" situations where departure was affirmed: *U.S. v. Monaco,* 23 F.3d 793, 800–01 (3d Cir. 1994) (small downward departure—which might allow for probation—was appropriate for defendant's extreme anguish and remorse at having involved, perhaps unintentionally, his otherwise law-abiding son in fraud offense) [6#13]; *U.S. v. One Star,* 9 F.3d 60, 61 (8th Cir. 1993) (combination of factors for Indian defendant—strong family ties, employment record, community support) [6#8]; *U.S. v. Johnson,* 964 F.2d 124, 128–30 (2d Cir. 1992) (sole responsibility for raising four young children) [4#23]; *U.S. v. Alba,* 933 F.2d 1117, 1122 (2d Cir. 1991) (12-year marriage, two children, living with disabled, dependent father and grandmother) [4#5]; *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991) (single parent of infant and sole supporter of 16-year-old daughter and daughter's infant); *U.S. v. Big Crow,* 898 F.2d 1326, 1331–32 (8th Cir. 1990) (solid family and community ties, and "consistent efforts to lead a decent life in [the] difficult environment" of an Indian reservation) [3#4].

Some circuits have held that departure may be warranted for a defendant who plays a crucial role in the care of someone with severe mental or emotional problems. See, e.g., *U.S. v. Haversat,* 22 F.3d 790, 797–98 (8th Cir. 1994) (remanded: proper to depart downward for "truly exceptional family circumstances"—defendant's wife "suffered severe psychiatric problems, which have been potentially life threatening," and his presence was crucial to her treatment; however, court abused its discretion by imposing only a fine and declining to impose

any kind of confinement or probation, including intermittent confinement or home detention) [6#14]; *U.S. v. Sclamo,* 997 F.2d 970, 973–74 (1st Cir. 1993) (defendant's special relationship with young boy, who had psychological and behavioral problems and "would risk regression and harm if defendant were incarcerated") [6#2]; *U.S. v. Gaskill,* 991 F.2d 82, 84–86 (3d Cir. 1993) (remanded: district court may consider departure for defendant who is sole caretaker of seriously mentally ill wife and other factors indicated benefits of noncustodial sentence and lack of any threat to community) [5#12].

Downward departure held improper: In the following cases, the appellate court reversed or remanded a downward departure for family circumstances or community ties: *U.S. v. Kohlbach,* 38 F.3d 832, 837–39 (6th Cir. 1994) (not unusual for white-collar defendant to be leader in community charities, civic organizations, church efforts, and have performed prior good works) [7#3]; *U.S. v. White Buffalo,* 10 F.3d 575, 577 (8th Cir. 1993) (facts not sufficient to support departure under *Big Crow* analysis, but affirmed on other grounds) [6#9]; *U.S. v. Mogel,* 956 F.2d 1555, 1565 (11th Cir. 1992) (two minor children to support and mother who lives with defendant); *U.S. v. O'Brien,* 950 F.2d 969, 971 (5th Cir. 1991) (community ties and "redeeming characteristics"); *U.S. v. Berlier,* 948 F.2d 1093, 1096 (9th Cir. 1991) (defendant's efforts to keep family together); *U.S. v. Carr,* 932 F.2d 67, 72 (1st Cir. 1991) (codefendants were parents of young child); *U.S. v. Prestemon,* 929 F.2d 1275, 1277–78 (8th Cir. 1991) (adopted, biracial child); *U.S. v. Shoupe,* 929 F.2d 116, 121 (3d Cir. 1991) (father who frequently spoke with young son living with ex-wife, regularly made child support payments); *U.S. v. McHan,* 920 F.2d 244, 248 (4th Cir. 1990) (drug dealer's extensive contributions to town); *U.S. v. Deane,* 914 F.2d 11, 14 (1st Cir. 1990) (exemplary employee and father) [3#14]; *U.S. v. Brand,* 907 F.2d 31, 33 (4th Cir. 1990) (sole custodial parent of two young children) [3#10]; *U.S. v. Neil,* 903 F.2d 564, 566 (8th Cir. 1990) (stable family life); *U.S. v. Pozzy,* 902 F.2d 133, 139 (1st Cir. 1990) (husband's imprisonment) [3#5]; *U.S. v. Brewer,* 899 F.2d 503, 508–09 (6th Cir. 1990) (family ties, mothers of young children) [3#5].

Appellate courts affirmed a refusal to grant a downward departure in the following cases: *U.S. v. Cacho,* 951 F.2d 308, 311 (11th Cir. 1992) (mother of four small children); *U.S. v. Headley,* 923 F.2d 1079, 1083 (3d Cir. 1991) (mother of five children); *U.S. v. Johnson,* 908 F.2d 396, 398–99 (8th Cir. 1990) (single mother of infant).

b. Diminished capacity, §§5K2.13, 5H1.3

Several circuits have stated that significantly reduced mental capacity, §5K2.13, must be a contributing, but not the sole, cause of the offense in order to warrant a downward departure. *U.S. v. Cantu,* 12 F.3d 1506, 1515 (9th Cir. 1993) (remanded to consider departure: "degree to which the impairment contributed to . . . the offense constitutes the degree" of departure that may be appropriate) [6#9]; *U.S. v. Soliman,* 954 F.2d 1012, 1014 (5th Cir. 1992) (but affirmed district court conclusion that condition did not warrant departure); *U.S. v. Glick,* 946 F.2d 335, 338 (4th Cir. 1991) (affirmed departure) [4#11]; *U.S. v. Lauzon,* 938 F.2d 326, 331 (1st Cir. 1991) (but affirmed refusal to depart, holding person with borderline intelligence or mild retardation who is easily persuaded to follow others is not entitled to departure) [4#7]; *U.S. v. Ruklick,* 919 F.2d 95, 97–98 (8th Cir. 1990) (remanded to allow court to consider defendant's diminished capacity as contributing factor) [3#16]. The Seventh Circuit requires a finding that the defendant's reduced mental capacity contributed to the commission of the crime; the link cannot be assumed. *U.S. v. Frazier,* 979 F.2d 1227,

1230 (7th Cir. 1992) (remanded: no finding that defendant's "depressed mood" resulted in a significantly reduced mental capacity or contributed to the offense) [5#7].

The Ninth Circuit affirmed a §5K2.13 departure even though defendant's diminished capacity during the first half of his criminal activity was caused in part by voluntary drug use; during the latter part of the activity defendant was drug-free and still experienced diminished capacity. *U.S. v. Lewinson*, 988 F.2d 1005, 1006–07 (9th Cir. 1993). The court also rejected the government's argument that the "qualifying mental disease be severe, [and] that it affect the defendant's ability to perceive reality." *Id.* at 1006 ("the plain language of this section authorizes departure on a showing of 'significantly reduced mental capacity' without qualification as to the nature or cause of the reduced capacity (except with respect to voluntary drug use)") [5#12]. See also *Cantu*, 12 F.3d at 1512–14 (remanded to consider departure for veteran with post-traumatic stress disorder; also, alcohol use does not disqualify defendant for departure if reduced mental capacity was caused by other factor or caused the alcohol abuse) [6#9].

Several circuits have affirmed that there is no discretion to depart for diminished capacity under §5K2.13 in violent offenses. *U.S. v. Fairman*, 947 F.2d 1479, 1481–82 (11th Cir. 1991) [4#13]; *U.S. v. Sanchez*, 933 F.2d 742, 747 (9th Cir. 1991); *U.S. v. Poff*, 926 F.2d 588, 591 (7th Cir. 1991) (en banc) [3#20]; *U.S. v. Rosen*, 896 F.2d 789, 791 (3d Cir. 1990); *U.S. v. Maddalena*, 893 F.2d 815, 818–19 (6th Cir. 1989). However, the circuits are split on how to define "nonviolent offense" under §5K2.13. The D.C. Circuit held that courts should not refer to the definition of "crime of violence" in §4B1.2. The Guidelines do not equate the two and "significant policy concerns support the view that [the sections] should be interpreted independently." The sentencing court "should consider all the facts and circumstances surrounding the commission of the crime." *U.S. v. Chatman*, 986 F.2d 1446, 1448–53 (D.C. Cir. 1993) (citing other cases that used §4B1.2) [5#11]. Accord *U.S. v. Weddle*, 30 F.3d 532, 537–40 (4th Cir. 1994) (affirming departure) [7#1]. Other circuits have used "crime of violence" as a reference. See *U.S. v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994); *Cantu*, 12 F.3d at 1513–14; *Poff*, 926 F.2d at 592; *Rosen*, 896 F.2d at 791; *Maddalena*, 893 F.2d at 819.

Although the Sixth Circuit recognizes departures for diminished mental capacity, it has rejected downward departures in several circumstances. See *U.S. v. Johnson*, 979 F.2d 396, 400–01 (6th Cir. 1992) (severe adjustment disorder); *U.S. v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991) (suicidal tendencies); *U.S. v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991) (gambling disorder). See also *U.S. v. Walker*, 27 F.3d 417, 419 (9th Cir. 1994) (following reasoning of *Harpst*, affirming that "post-arrest emotional trauma" is not valid departure ground) [6#17].

The Ninth Circuit reversed a downward departure for diminished capacity, holding that even if defendant's crack use could be termed "involuntary," unarmed bank robbery by a drug abuser is not extraordinary and §5H1.4 precludes departure. *U.S. v. Anders*, 956 F.2d 907, 912 (9th Cir. 1992).

In another case, the Ninth Circuit remanded a decision that defendant's severe childhood abuse was not so "extraordinary" as to warrant departure. *U.S. v. Roe*, 976 F.2d 1216, 1217–18 (9th Cir. 1992) (§5H1.3 covers "psychological effects of childhood abuse" but does not preclude departure in extraordinary circumstances) [5#4]. See also *U.S. v. Desormeaux*, 952 F.2d 182, 185–86 (8th Cir. 1991) (indicating spouse abuse is covered by §5H1.3). Cf. *U.S. v. Brown*, 985 F.2d 478, 481 (9th Cir. 1993) (may consider for career offender) [5#9]; *U.S. v. Vela*, 927 F.2d 197, 199 (5th Cir. 1991) (psychological effects of abuse covered by §5H1.3, so departure warranted only in extraordinary circumstances).

The Ninth Circuit affirmed a departure that was based in part on defendant's mental condition—"panic disorder with agoraphobia"—under §§5H1.3 and 5K2.0, noting that it was not based on §5K2.13. "The language in section 5H1.3, 'Mental and emotional conditions are not *ordinarily* relevant' (emphasis supplied) indicates that the Commission intended these factors to play a part in some cases, albeit a limited number." *U.S. v. Garza-Juarez,* 992 F.2d 896, 913 (9th Cir. 1993) [5#12]. But see *Cantu,* 12 F.3d at 1511 ("§5K2.13 is the proper policy statement under which to consider whether a mental ailment makes a defendant eligible for a downward departure").

The Eleventh Circuit has held that, for a defendant who otherwise did not qualify for a substantial assistance departure under §5K1.1, district court could not depart downward under §5K2.13 on the ground that defendant's diminished capacity rendered him incapable of providing substantial assistance to the government. "Guidelines §5K2.13 does not authorize consideration of the effect of a defendant's diminished capacity on his ability to provide substantial assistance." *U.S. v. Munoz-Realpe,* 21 F.3d 375, 379–80 (11th Cir. 1994) (remanded "for a determination whether Munoz-Realpe's mental incapacity contributed to the commission of his offense" sufficiently to warrant departure under §5K2.13) [6#13].

c. Single act of aberrant behavior

Downward departure may be proper when defendant's conduct is a "single act of aberrant behavior." U.S.S.G. Ch.1, Pt.A.4(d). See *U.S. v. Tsosie,* 14 F.3d 1438, 1441–42 (10th Cir. 1994) (affirmed: aberrational conduct combined with steady employment and economic support of family warranted departure) [6#10]; *U.S. v. Andruska,* 964 F.2d 640, 644–46 (7th Cir. 1992); *U.S. v. Garlich,* 951 F.2d 161, 164 (8th Cir. 1991) [4#15]; *U.S. v. Ritchey,* 949 F.2d 61, 63 (2d Cir. 1991) (remanded: district court thought it had no discretion to consider aberrant behavior); *U.S. v. Glick,* 946 F.2d 335, 338 (4th Cir. 1991) [4#11]; *U.S. v. Takai,* 941 F.2d 738, 743–44 (9th Cir. 1991) (amending and superseding 930 F.2d 1427 [4#3]); *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991) (affirmed: extraordinary family responsibilities and aberrational nature of conduct); *U.S. v. Dickey,* 924 F.2d 836, 838–39 (9th Cir. 1991) (remanded: permissible for "aberrant behavior" by first-time offender) [3#18]; *U.S. v. Russell,* 870 F.2d 18, 20 (1st Cir. 1989) (remanded for district court to clarify whether it understood it had authority to depart).

First-time offender status is not, by itself, sufficient. See, e.g., *U.S. v. Marcello,* 13 F.3d 752, 761 (3d Cir. 1994) ("no consideration is given to whether the defendant is a first-time offender") [6#10]; *U.S. v. Williams,* 974 F.2d 25, 26 (5th Cir. 1992) (without discussing whether such departure is appropriate for violent crimes, court stated aberrant behavior "requires more than an act which is merely a first offense or 'out of character' for the defendant"); *U.S. v. Mogel,* 956 F.2d 1555, 1565–66 (11th Cir. 1992) (may not depart downward for category I defendant based on a "troublefree past" because placement in category I already reflects that); *U.S. v. Bolden,* 889 F.2d 1336, 1339–41 (4th Cir. 1989) (remanded: lack of prior criminal record already accounted for) [2#17].

A "single act of aberrant behavior" has been defined by some circuits as an act that is "spontaneous and seemingly thoughtless," and as such cannot include a series of actions related to the criminal conduct. See, e.g., *Marcello,* 13 F.3d at 760–61 (affirmed: "Aberrant behavior must involve a lack of planning; it must be a single act that is spontaneous and thoughtless"); *Andruska,* 964 F.2d at 645–46 (remanded: continued efforts to help fugitive

evade authority and refusal to acknowledge wrongful conduct was not "aberrant behavior"); *Glick,* 946 F.2d at 338–39 (remanded: conduct over ten-week period involving number of actions and extensive planning was not "single act of aberrant behavior"). See also *Garlich,* 951 F.2d at 164 (affirmed: fraud spanning one year and several transactions was not "single act of aberrant behavior"); *U.S. v. Carey,* 895 F.2d 318, 324–25 (7th Cir. 1990).

The Ninth Circuit, however, held that multiple incidents occurring over a six-week period aimed at obtaining green cards for immigrant relatives and friends were "a single act of aberrant behavior" that warranted downward departure. 941 F.2d at 743–44. In a later case, the Ninth Circuit ruled the lower court erred in (1) believing it had no authority to depart downward based on aberrant behavior for a first-time offender and (2) holding there were no facts supporting such a departure. *U.S. v. Morales,* 972 F.2d 1007, 1011 (9th Cir. 1992) (remanded for court to consider evidence that drug courier had no criminal history, that he was convicted of one isolated criminal act, and that there was no evidence showing he was a regular participant in ongoing criminal enterprise) (amending 961 F.2d 1428).

Note that two circuits have held that the "totality of the circumstances" should be considered in determining whether a defendant's conduct was a single act of aberrant behavior. See section VI.C.3.

d. Extreme vulnerability or physical impairment, §5H1.4

The Second Circuit has affirmed departures based on an extreme vulnerability to victimization in prison due to a male defendant's youthful and feminine appearance. See *U.S. v. Gonzalez,* 945 F.2d 525, 526–27 (2d Cir. 1991) (evidence of bisexuality or prior victimization not needed) [4#10]; *U.S. v. Lara,* 905 F.2d 599, 603–04 (2d Cir. 1990) (defendant was also bisexual) [3#9]. A Nov. 1991 amendment to §5H1.4 clarified that "physique" is "not ordinarily relevant" to the decision to depart.

Similarly, the Eighth Circuit concluded that "an extraordinary physical impairment that results in extreme vulnerability is a legitimate basis for departure." The court affirmed a downward departure for an "extraordinary physical impairment" which would have left defendant "exceedingly vulnerable to possible victimization and resultant severe and possibly fatal injuries" if incarcerated. *U.S. v. Long,* 977 F.2d 1264, 1277–78 (8th Cir. 1992). However, the Eighth Circuit later reversed a downward departure that was based on the possibility of victimization in prison—expert testimony at sentencing revealed that it is rare for a 67-year-old female inmate to be victimized and that her alleged dependent personality disorder was not confirmed. *U.S. v. Tucker,* 986 F.2d 278, 280 (8th Cir. 1993).

The Tenth Circuit held that departure under §5H1.4 is not limited to physical impairments so severe as to warrant a non-custodial sentence—an impairment may be "extraordinary" yet warrant only a reduction in, not elimination of, the term of imprisonment. *U.S. v. Slater,* 971 F.2d 626, 634–35 (10th Cir. 1992) (remanded) [5#4]. The court also set out a two-part test: "the district court should first make a factual finding to decide whether [the defendant's] physical and mental disabilities constitute 'an extraordinary physical impairment.' . . . [I]t should then consider whether the condition warrants a shorter term of imprisonment or an alternative to confinement." The Ninth Circuit agreed, and added that a court "may consider any number of circumstances," not just whether the Bureau of Prisons can accommodate defendant's disability. *U.S. v. Martinez-Guerrero,* 987 F.2d 618, 620–21 (9th Cir. 1993) (affirmed: departure properly denied—prison could accommodate legally blind defendant).

e. Employment/Restitution

Three circuits have affirmed downward departures based in part on employment history. *U.S. v. Tsosie,* 14 F.3d 1438, 1442–43 (10th Cir. 1994) (steady employment and economic support of family indicated defendant's conduct was aberration) [6#10]; *U.S. v. One Star,* 9 F.3d 60, 61 (8th Cir. 1993) (combination of factors, including employment history for Indian defendant) [6#8]; *U.S. v. Jagmohan,* 909 F.2d 61, 65 (2d Cir. 1990) (affirmed: inter alia, solid employment record, naiveté displayed in committing offense) [3#10]; *U.S. v. Big Crow,* 898 F.2d 1326, 1331–32 (8th Cir. 1990) (affirmed: unusual personal circumstances under §§5H1.5 and 5H1.6, including excellent employment history) [3#4].

Others have held that departure is not warranted on the ground that incarceration would make future employment and/or restitution less likely. *U.S. v. Seacott,* 15 F.3d 1380, 1388–89 (7th Cir. 1994) (remanded: "a defendant's ability to make restitution is not grounds for a downward departure under the Guidelines"); *U.S. v. Harpst,* 949 F.2d 860, 863 (6th Cir. 1991) (reversed: incarceration would make restitution and future employment less likely) [4#14]; *U.S. v. Bolden,* 889 F.2d 1336, 1339–41 (4th Cir. 1989) (remanded: inter alia, possible loss of employment would make restitution more difficult) [2#17]. The First Circuit agreed that departure cannot be based on "the simple facts that restitution is desirable and that a prison term will make restitution harder." However, "a special need of a victim for restitution, and the surrounding practicalities, might, in an unusual case, justify departure." *U.S. v. Rivera,* 994 F.2d 942, 956 (1st Cir. 1993) (remanded: court should consider fact that defendant would lose job only if imprisoned more than one year, which would only require three-month departure) [5#14].

Similarly, it has been held that departure is not warranted where defendant's incarceration could cause economic harm to others. See, e.g., *U.S. v. Sharapan,* 13 F.3d 781, 784–85 (3d Cir. 1994) (remanded: §5H1.2 precludes departure on ground that imprisoning defendant "would cause his business to fail and thereby result in the loss of approximately 30 jobs and other economic harm to the community"—"we see nothing extraordinary in the fact that the imprisonment of [the business's] principal for mail fraud and filing false corporate tax returns may cause harm to the business and its employees. The same is presumably true in a great many cases in which the principal of a small business is jailed for comparable offenses") [6#11]; *U.S. v. Rutana,* 932 F.2d 1155, 1158–59 (6th Cir. 1991) (remanded: imprisonment of employer could cause hardship on employees and their families). Cf. *U.S. v. Mogel,* 956 F.2d 1555, 1564 (11th Cir. 1994) (remanding departure partly based on fact that defendant had business "that might go under" if she were imprisoned).

The Ninth Circuit reversed a downward departure because the fact that defendant held a full-time job until crack addiction "took over his life," and thus was a better candidate for successful rehabilitation, was not "extraordinary." *U.S. v. Anders,* 956 F.2d 907, 912 (9th Cir. 1992).

The Fifth Circuit remanded a departure based on defendant's post-conviction community service because such activities reflect skills he developed as a professional musician, and educational and vocational skills and employment record do not support departure under §§5H1.2 and 5H1.5. *U.S. v. O'Brien,* 18 F.3d 301, 302–03 (5th Cir. 1994) [6#13].

f. Age, §5H1.1

Generally, defendant's age is not a proper ground for departure, §5H1.1. See, e.g., *U.S. v. Fierro,* 38 F.3d 761, 775 (5th Cir. 1994) (remanded: improper to depart from life sentence to

20 years for 43-year-old defendant because, in district court's opinion, "20 years is life"); *U.S. v. Jackson,* 30 F.3d 199, 202–03 (1st Cir. 1994) (remanded: fact that 30-year sentence may be tantamount to life sentence for 40-year-old improper ground); *U.S. v. Anders,* 956 F.2d 907, 912 (9th Cir. 1992) (remanded: belief that drug rehab may be harder for 46-year-old who would not be released till over age 50 improper ground); *U.S. v. White,* 945 F.2d 100, 102 (5th Cir. 1991) (reversed: defendant's youth) [4#12]; *U.S. v. Carey,* 895 F.2d 318, 322–25 (7th Cir. 1990) (remanded: cumulative effect of personal characteristics, including old age) [2#20]; *U.S. v. Summers,* 893 F.2d 63, 69 (4th Cir. 1990) (reversed: departure for young age clear error). But cf. *U.S. v. Bowser,* 941 F.2d 1019, 1024–25 (10th Cir. 1991) (affirmed downward departure for career offender based on "unique combination of factors," including defendant's youth) [4#7].

g. Other personal circumstances that may warrant downward departure

U.S. v. Floyd, 945 F.2d 1096, 1099–1102 (9th Cir. 1991) (affirmed: neither §5H1.6 nor §5H1.2 precludes downward departure for "youthful lack of guidance" based on lack of guidance and education, abandonment by parents, imprisonment at age seventeen—but see * below) [4#10]; *U.S. v. Lopez,* 938 F.2d 1293, 1298 (D.C. Cir. 1991) (remanded: limitation on "socio-economic status" in §5H1.10 does not preclude consideration of defendant's tragic personal history) [4#5]; *U.S. v. Alba,* 933 F.2d 1117, 1122 (2d Cir. 1991) (remanded on other grounds: "less than minimal" role in offense) [4#5]; *U.S. v. Jagmohan,* 909 F.2d 61, 65 (2d Cir. 1990) (affirmed: inter alia, naiveté displayed in committing offense) [3#10].

*Note that a new policy statement, §5H1.12 (Nov. 1, 1992), states that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for [departure]." Two circuits have held, however, that departure may occur for defendants whose offense preceded the amendment. See *U.S. v. Clark,* 8 F.3d 839, 844–45 (D.C. Cir. 1993) (remanded: lack of guidance as a youth and exposure to domestic violence may warrant departure if there is "some plausible causal nexus" to offense; application of amendment to defendant's disadvantage would violate ex post facto clause) [6#7]; *U.S. v. Johns,* 5 F.3d 1267, 1269–72 (9th Cir. 1993) (same re ex post facto) [6#7].

h. Personal circumstances that do not warrant downward departure

U.S. v. Walker, 27 F.3d 417, 419 (9th Cir. 1994) (affirmed: "post-arrest emotional trauma") [6#17]; *U.S. v. Haversat,* 22 F.3d 790, 795 (8th Cir. 1994) (remanded: "good character" as demonstrated by charitable or volunteer activities, unless "those activities are truly exceptional"); *U.S. v. Talk,* 13 F.3d 369, 371 (10th Cir. 1993) (affirmed: "forcible rape is not a crime where sophistication or lack thereof would justify any departure"); *U.S. v. Baker,* 4 F.3d 622, 623–24 (8th Cir. 1993) (remanded: departure for substantial assistance in absence of §5K1.1 motion improper despite defendant's "subjective belief" that she complied with plea agreement by assisting investigation of close relatives, which "exposed her to 'ostracism' and 'suspicion' within her extended family") [6#7]; *U.S. v. Haynes,* 985 F.2d 65, 68–69 (2d Cir. 1993) (affirmed: youthful lack of guidance, §5H1.12); *U.S. v. Desormeaux,* 952 F.2d 182, 185–86 (8th Cir. 1991) (abused by different boyfriend three years earlier, §5H1.3; post-arrest attainment of GED, §5H1.2); *U.S. v. Harpst,* 949 F.2d 860, 863 (6th Cir. 1991) (reversed: suicidal tendencies—Bureau of Prisons must provide adequate facilities) [4#14]; *U.S. v. Prestemon,* 929 F.2d 1275, 1277–78 (8th Cir. 1991) (remanded: adopted, biracial child, §§5H1.6, 5H1.10) [4#5]; *U.S. v. Diegert,* 916 F.2d 916, 919 n.2 (4th Cir. 1990) (re-

manded: personal financial difficulty); *U.S. v. Pozzy,* 902 F.2d 133, 138–40 (1st Cir. 1990) (remanded: pregnancy, husband's incarceration, lack of nearby halfway house; may not use "totality of circumstances") [3#8]; *U.S. v. Brewer,* 899 F.2d 503, 508–10 (6th Cir. 1990) (remanded: inter alia, degree of remorse and promptness of restitution, victim's recommendation of clemency) [3#5]; *U.S. v. Rosen,* 896 F.2d 789, 791–92 (3d Cir. 1990) (affirmed: combination of typical factors, compulsive gambling) [3#3]; *U.S. v. Carey,* 895 F.2d 318, 322–25 (7th Cir. 1990) (remanded: cumulative effect of personal characteristics—age and physical condition, voluntary restitution, uncharacteristic nature of behavior) [2#20]; *U.S. v. Williams,* 891 F.2d 962, 965–66 (1st Cir. 1989) (remanded: cocaine addiction, desire to reform, lack of weapon, "ineffectiveness" as bank robber) [2#18]; *U.S. v. Natal-Rivera,* 879 F.2d 391, 393 (8th Cir. 1989) (affirmed: cultural heritage) [2#11].

2. Drug Addiction or Rehabilitation

a. Departure versus acceptance of responsibility

The First, Fourth, Seventh, Eighth, Tenth, and D.C. Circuits have stated that a defendant's post-offense, presentencing rehabilitation is equivalent to acceptance of responsibility, §3E1.1, and therefore does not merit downward departure. *U.S. v. Zeigler,* 1 F.3d 1044, 1047–48 (10th Cir. 1993) [6#2]; *U.S. v. Desormeaux,* 952 F.2d 182, 186 (8th Cir. 1991); *U.S. v. Harrington,* 947 F.2d 956, 962 (D.C. Cir. 1991) [4#12]; *U.S. v. Bruder,* 945 F.2d 167, 173 (7th Cir. 1991) (en banc); *U.S. v. Sklar,* 920 F.2d 107, 115–16 (1st Cir. 1990) [3#18]; *U.S. v. Van Dyke,* 895 F.2d 984, 987 (4th Cir. 1990). See also *U.S. v. Chubbuck,* 32 F.3d 1458, 1461–62 (10th Cir. 1994) (still not warranted when combined with "a very significant change in the defendant's conduct and attitudes towards life" resulting from participation in religious activities) [7#2].

Some of these courts also stated, however, that departure may still be warranted in "extraordinary" circumstances. *Harrington,* supra; *Sklar,* supra at 116. See also *U.S. v. Williams,* 948 F.2d 706, 710–11 (11th Cir. 1991) (truly extraordinary post-arrest, presentence recovery may justify downward departure and is not prohibited by §5H1.4). The Second Circuit concluded that neither §3E1.1 nor §5H1.4 account for drug rehabilitation and therefore do not preclude departure. *U.S. v. Maier,* 975 F.2d 944, 946–49 (2d Cir. 1992) (affirmed downward departure) [5#4]. Cf. *U.S. v. Williams,* 37 F.3d 82, 86 (2d Cir. 1994) (remanded: where defendant had "simply attended a drug education program" and expressed desire to enroll in drug treatment program, "this was not the rehabilitative effort we contemplated in *Maier*" and is insufficient ground for departure); *U.S. v. Rogers,* 972 F.2d 489, 494–95 (2d Cir. 1992) (remanded departure for "extraordinary acceptance of responsibility" by drug defendant who sought rehabilitation) [5#4].

Other courts have held that drug or alcohol addiction or recovery is never grounds for downward departure. See *Zeigler,* 1 F.3d at 1049; *U.S. v. Martin,* 938 F.2d 162, 163–64 (9th Cir. 1991) (§5H1.4) (1992); *U.S. v. Pharr,* 916 F.2d 129, 133–34 (3d Cir. 1990) (§5H1.4); *Van Dyke,* supra (adequately taken into consideration under §3E1.1). Relying on §5H1.4, the Eighth Circuit declined to review a district court's refusal to grant a downward departure for defendant's drug dependence and prospects for rehabilitation. *U.S. v. Laird,* 948 F.2d 444, 447 (8th Cir. 1991).

b. Downward departures proper under circumstances

U.S. v. Maier, 975 F.2d 944, 946–49 (2d Cir. 1992) (affirmed: post-offense progress in drug rehabilitation) [5#4]; *U.S. v. Whitehorse*, 909 F.2d 316, 319–20 (8th Cir. 1990) (affirmed: proper for escape defendant with alcohol problem because authorities should not have granted unsupervised furlough; alcoholism itself, however, not valid ground for departure) [3#12]; *U.S. v. Maddalena*, 893 F.2d 815, 818 (6th Cir. 1989) (remanded: may consider defendant's pre-arrest efforts to avoid drugs) [2#19]. Cf. *U.S. v. Ragan*, 952 F.2d 1049, 1049–50 (8th Cir. 1992) (affirmed: "not plain error" to grant downward departure to defendant who had stopped using drugs for over a year before indictment and maintained steady employment, where government failed to object).

c. Downward departures improper under circumstances

U.S. v. Chubbuck, 32 F.3d 1458, 1461–62 (10th Cir. 1994) (remanded: post-offense drug rehabilitation combined with "significant change in the defendant's conduct and attitudes towards life" resulting from religious activities) [7#2]; *U.S. v. O'Brien*, 18 F.3d 301, 302–03 (5th Cir. 1994) (remanded: drug defendant's post-conviction community service) [6#13]; *U.S. v. Baker*, 965 F.2d 513, 516 (7th Cir. 1992) (affirmed: substantial progress in drug rehabilitation not ground for departure below mandatory minimum); *U.S. v. Anders*, 956 F.2d 907, 912 (9th Cir. 1992) (remanded: concern that drug treatment may be more difficult when 46-year-old defendant released after age 50); *U.S. v. Williams*, 948 F.2d 706, 710–11 (11th Cir. 1991) (affirmed: partial drug recovery in court-ordered program); *U.S. v. Harrington*, 947 F.2d 956, 962–63 (D.C. Cir. 1991) (reversed, remanded for district court to consider acceptance of responsibility adjustment) [4#12]; *U.S. v. Bruder*, 945 F.2d 167, 173 (7th Cir. 1991) (en banc) (affirmed: acceptance of responsibility reduction already given for obtaining employment, changing associates, and reducing alcohol consumption post-offense); *U.S. v. Citro*, 938 F.2d 1431, 1440 (1st Cir. 1991) (affirmed: involuntary drug addiction, §§5H1.4, 5K2.13); *U.S. v. Martin*, 938 F.2d 162, 163–64 (9th Cir. 1991) (affirmed: post-arrest drug rehabilitation, §§5H1.3–1.4); *U.S. v. Page*, 922 F.2d 534, 535 (9th Cir. 1991) (affirmed: alcoholism, "irrespective of its extreme nature"); *U.S. v. McHan*, 920 F.2d 244, 247–48 (4th Cir. 1990) (remanded: charitable activities of drug dealer) [3#17]; *U.S. v. Sklar*, 920 F.2d 107, 115–16 (1st Cir. 1990) (reversed: post-offense drug rehabilitation was required by pretrial release agreement); *U.S. v. Pharr*, 916 F.2d 129, 132–33 (3d Cir. 1990) (remanded: effort to overcome heroin addiction, possibility incarceration would hinder rehabilitation, §5H1.4) [3#15]; *U.S. v. Goff*, 907 F.2d 1441, 1445–47 (4th Cir. 1990) (remanded: drug addiction and other factors) [3#10]; *U.S. v. Van Dyke*, 895 F.2d 984, 987 (4th Cir. 1990) (remanded: "rehabilitative conduct" after arrest and before sentencing—drug abuse treatment and counseling others against drug use) [3#2].

3. Combination of Factors or Totality of the Circumstances

A Nov. 1, 1994, addition to §5K2.0's commentary makes a limited allowance for a totality of circumstances departure: "The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare."

Previously, the Tenth Circuit held that a "unique combination of factors," none of which "standing alone may have warranted departure," provided a proper basis for departure for a career offender. *U.S. v. Bowser,* 941 F.2d 1019, 1024–25 (10th Cir. 1991) [4#7]. The Ninth Circuit has also held "that a combination of factors [may] together constitute a 'mitigating circumstance.'" *U.S. v. Cook,* 938 F.2d 149, 153 (9th Cir. 1991) (remanded). The Eighth Circuit affirmed a departure based on a combination of factors and "the unusual mitigating circumstances of life on an Indian reservation." *U.S. v. One Star,* 9 F.3d 60, 61 (8th Cir. 1993) [6#8].

Before *Cook,* the Ninth Circuit held in *U.S. v. Takai,* 930 F.2d 1427 (9th Cir. 1991) [4#3], that a unique combination of factors "may together constitute a 'mitigating circumstance'" that warrants departure, but deleted that language in an amended opinion. See *U.S. v. Takai,* 941 F.2d 738, 743–44 (9th Cir. 1991). The amended opinion held a court may "look to the totality of circumstances in determining whether there were single acts of aberrant behavior . . . that justify departure." The Tenth Circuit upheld a similar analysis in *U.S. v. Peña,* 930 F.2d 1486, 1494–95 (10th Cir. 1991), holding that defendant's long-time employment, economic support for her family, and lack of substance abuse or prior involvement with drugs supported the conclusion that her conduct was aberrant behavior. See also *U.S. v. Tsosie,* 14 F.3d 1438, 1441–42 (10th Cir. 1994) (affirmed: same—"totality of circumstances must be viewed to see whether the offense fits within Tsosie's normal conduct or if it is a complete shock and out of character"). The Ninth Circuit later reaffirmed the principle of a departure for "a combination of factors that do not individually justify a departure," but also stated that some factors "should not be part of the consideration." The court rejected downward departures based on "personal and professional consequences that stem from a criminal conviction," "the vulnerability of a police officer in prison," "the fact that appellants are neither dangerous nor likely to commit crimes in the future," and "the 'spectre of unfairness'" of successive prosecutions in state and federal court. *U.S. v. Koon,* 34 F.3d 1416, 1452–57 (9th Cir. 1994) [7#2].

Other circuits have specifically rejected such an approach when the individual factors were not proper grounds for departure. See *U.S. v. Dalecke,* 29 F.3d 1044, 1048 (6th Cir. 1994) (remanded: "district court erred by accumulating typical factors 'already taken into account' by the sentencing guidelines") [7#1]; *U.S. v. Minicone,* 26 F.3d 297, 302 (2d Cir. 1994) (remanded: "where independent factors have been adequately considered by the Sentencing Commission and each factor considered individually fails to warrant a downward departure, the sentencing court may not aggregate the factors in an effort to justify a downward departure under a 'totality of circumstances' test") [6#15]; *U.S. v. Mogel,* 956 F.2d 1555, 1566 (11th Cir. 1992) (remanded); *U.S. v. Goff,* 907 F.2d 1441, 1447 (4th Cir. 1990) (remanded: cumulation of typical factors does not warrant departure) [3#10]; *U.S. v. Pozzy,* 902 F.2d 133, 138–40 (1st Cir. 1990) (remanding departure based on totality of circumstances) [3#8]; *U.S. v. Rosen,* 896 F.2d 789, 791–92 (3d Cir. 1990) (affirmed: "combination of typical factors does not present an unusual case" warranting departure) [3#3]; *U.S. v. Carey,* 895 F.2d 318, 322–25 (7th Cir. 1990) (vacating downward departure partly based on "cumulative effect" of factors that individually would not justify departure) [2#20].

4. Coercion and Duress; Victim's Conduct; Government Misconduct

a. Coercion and duress

"If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may [depart downward]." U.S.S.G. §5K2.12. See also *U.S. v. Henderson-Durand,* 985 F.2d 970, 976 (8th Cir. 1993) (in dicta: "This ground for departure is broader than the defense of duress, as it does not require immediacy of harm or inability to escape, and allows the district court to consider the subjective mental state and personal characteristics of the defendant"). The Third and Ninth Circuits have held that a jury's rejection of duress or coercion as a complete defense to the crime of conviction does not preclude their consideration in sentencing for downward departure under §5K2.12. *U.S. v. Johnson,* 956 F.2d 894, 901–03 (9th Cir. 1992) (remanded) [4#16]; *U.S. v. Cheape,* 889 F.2d 477, 478–79 (3d Cir. 1989) (remanded) [2#16]. Similarly, the Eighth Circuit held that evidence of "battered woman syndrome" may be considered for downward departure even though the jury rejected it as a complete defense, §5K2.10. *U.S. v. Whitetail,* 956 F.2d 857, 862–64 (8th Cir. 1992) (remanded) [4#16]. See also *U.S. v. Amparo,* 961 F.2d 288, 292 (1st Cir. 1992) (in dicta, citing the preceding cases: "a jury's rejection of a duress defense does not necessarily preclude a . . . departure under section 5K2.12").

The Second Circuit affirmed a departure for duress for a defendant convicted of multiple, related counts even though the duress did not directly cause the most serious count that, under the grouping rules, controlled the offense level. Defendant was clearly under duress in relation to the less serious counts, and there was a sufficient "causal nexus" between that duress and the more serious offense for the district court to conclude it was committed "because of" the duress as required by §5K2.12. *U.S. v. Amor,* 24 F.3d 432, 438–40 (2d Cir. 1994) ("there was a causally related chain of circumstances" connecting the duress to all counts) [6#17].

b. Victim's conduct

Victim's conduct warranted a downward departure under §5K2.10: *U.S. v. Dailey,* 24 F.3d 1323, 1327–28 (11th Cir. 1994) (affirmed: for defendant convicted of extortion offense after making threat of harm to victim because the "victim had defrauded him out of tens of thousands of dollars. Dailey only threatened physical harm after he and his family came under financial distress.") [7#1]; *U.S. v. Tsosie,* 14 F.3d 1438, 1442–43 (10th Cir. 1994) (affirmed: victim's conduct "contributed significantly to provoking the offense behavior" and "was of a greater physical size and strength than the defendant"; also, defendant "attempted to provide aid and medical care to the victim" after fight, "a factor that is not considered by the guidelines") [6#10]; *U.S. v. Yellow Earrings,* 891 F.2d 650, 653–55 (8th Cir. 1989) (affirmed: victim "substantially provoked" assault) [2#18].

Victim's conduct did not warrant departure: *U.S. v. Koon,* 34 F.3d 1416, 1458–60 (9th Cir. 1994) (remanded: inappropriate in police brutality case because victim misconduct already factored into statute and guideline) [7#2]; *U.S. v. Desormeaux,* 952 F.2d 182, 186 (8th Cir. 1991) (remanded: defendant saw victim on back of defendant's boyfriend's motorcycle); *U.S. v. Shortt,* 919 F.2d 1325, 1328 (8th Cir. 1990) (remanded: adultery by victim did not warrant departure under §5K2.10 for explosives offense) [3#16]; *U.S. v. Bigelow,*

914 F.2d 966, 975 (7th Cir. 1990) (remanded: fact that victim refused to pay business debt could not excuse extortion and beating of victim).

c. Government misconduct or entrapment

The Ninth Circuit upheld a departure under §5K2.12 for "coercive" government conduct during the investigation of the offense. A government agent initiated the illegal activity and persisted for several months to persuade defendants to commit the offenses. The appellate court affirmed that "[t]his sort of aggressive encouragement of wrongdoing, although not amounting to a complete defense, may be used as a departure under section 5K2.12," and noted that "threats of violence are not a prerequisite to application of the guidelines in cases of 'imperfect entrapment.'" *U.S. v. Garza-Juarez,* 992 F.2d 896, 910–12 & n.2 (9th Cir. 1993) [5#12]. The Ninth Circuit later held that a departure for "sentence factor manipulation" was warranted where defendant was pressured by a confidential informant and undercover agent to sell a far larger amount of LSD than he ever had. The court reasoned that although defendant "might have been predisposed to supply drugs 'only on a very small level for his friends,' he was not predisposed 'to involve himself in what turned out to be, from the standpoint of the Sentencing Guidelines, an immense amount of drugs.'" The court also noted that this was not a reverse sting that might warrant departure under §2D1.1, comment. (n.17) (Nov. 1993), but that its holding "in the instant case is motivated by the same concerns, and, as such, is fully consistent both with the Amendment and with the sentencing factors prescribed by Congress." *U.S. v. Staufer,* 38 F.3d 1103, 1107–08 (9th Cir. 1994) (remanded). But cf. *U.S. v. Dickey,* 924 F.2d 836, 839 (9th Cir. 1991) (rejecting "imperfect entrapment" as ground for downward departure where defendant pled guilty) [3#18].

The Eighth Circuit held that nonviolent conduct by the government not rising to the level of entrapment is not "victim conduct" warranting departure, §5K2.10. Nor does the conduct warrant a departure under 5K2.12 where the government made no threats to defendant. *U.S. v. Martinez,* 951 F.2d 887, 889 (8th Cir. 1991). See also *U.S. v. Nelson,* 988 F.2d 798, 809 (8th Cir. 1993) (affirmed: although government allowed fraudulent scheme to continue and accrue larger losses before stopping it, defendants failed to show they were not predisposed to the crime).

In a later case the Eighth Circuit upheld the principle of a departure for "sentencing entrapment" based on "impermissible conduct" by the government, but reversed on the facts and declined to "determine in the abstract what is permissible and impermissible conduct on the part of government agents." *U.S. v. Barth,* 990 F.2d 422, 424–25 (8th Cir. 1993) (defendant "failed to demonstrate that the government's conduct was outrageous or that the undercover officer's conduct overcame his predisposition to sell small quantities of crack cocaine") [5#11]. The court also stated that it "share[d] the confidence of the First Circuit that when a sufficiently egregious case arises, the sentencing court may deal with the situation by excluding the tainted transaction or departing." *Id.* at 425 (citing *U.S. v. Connell,* 960 F.2d 191, 196 (1st Cir. 1992), also noting that "sentencing entrapment" is more accurately called "sentencing factor manipulation")). But cf. *U.S. v. Williams,* 954 F.2d 668, 673 (11th Cir. 1992) (rejecting sentencing entrapment theory "as a matter of law"); *U.S. v. Riles,* 928 F.2d 339, 342 (10th Cir. 1991) (defendant not allowed to argue entrapment for sentencing purposes after pleading guilty to drug offense).

Note that new Application Note 17 to §2D1.1 allows for the possibility of a downward departure if, "in a reverse sting . . . , the court finds that the government agent set a price for the controlled substance that was substantially below the market value," thereby leading

defendant to purchase "a significantly greater quantity" of the drug than was otherwise possible. Cf. *U.S. v. Hulett,* 22 F.3d 779, 782 (8th Cir. 1994) (rejecting entrapment claim, finding that although undercover agent offered four kilos of cocaine to defendant at roughly half price, defendant was already predisposed to buy large quantities of cocaine and Note 17 did not warrant departure).

The Third Circuit affirmed a departure on the basis of "inappropriate manipulation of the indictment." *U.S. v. Lieberman,* 971 F.2d 989, 995–96 (3d Cir. 1992) (charging embezzlement and tax evasion for the same funds resulted in unusual situation because offenses could not be grouped) [5#1].

Two circuits have held that the government's perjury before a grand jury is not a basis for downward departure. See *U.S. v. Williams,* 978 F.2d 1133, 1136 (9th Cir. 1992) (affirmed) [5#6]; *U.S. v. Valencia-Lucena,* 925 F.2d 506, 515 (1st Cir. 1991) (remanded).

5. Other Circumstances

a. Downward departure permissible

Guidelines do not account for circumstances: *U.S. v. Monaco,* 23 F.3d 793, 798–99 (3d Cir. 1994) (amount of loss under §2F1.1 overstated defendant's culpability) [6#13]; *U.S. v. Stuart,* 22 F.3d 76, 83–84 (3d Cir. 1994) (remanded: departure may be considered if amount of loss under §2B1.1 overstates culpability of defendant who was paid $2,000 to deliver $129,000 in stolen bonds); *U.S. v. Tsosie,* 14 F.3d 1438, 1442–43 (10th Cir. 1994) (affirmed: attempting to assist victim of offense) [6#10]; *U.S. v. Miller,* 991 F.2d 552, 554 (9th Cir. 1993) (remanded: departure may be considered for "time erroneously served") [5#12]; *U.S. v. Concepcion,* 983 F.2d 369, 389 (2d Cir. 1992) (use of acquitted conduct to increase sentence from maximum of three years to almost 22 years was not adequately considered by Commission); *U.S. v. Valdez-Gonzalez,* 957 F.2d 643, 648–50 (9th Cir. 1992) (affirmed: solo drug-smuggling "mules" who were ineligible for §3B1.2 mitigating role adjustment) [4#18]; *U.S. v. Restrepo,* 936 F.2d 661, 667 (2d Cir. 1991) (affirmed: nine-level enhancement under §2S1.1(b)(2)(J) for $18.3 million in money laundering offense so overstated culpability of defendants who merely loaded boxes of money that departure beyond four-level minimal participant reduction was warranted); *U.S. v. Garcia,* 926 F.2d 125, 127–28 (2d Cir. 1991) (affirmed: assistance to judicial system beyond that contemplated in §3E1.1 or §5K1.1) [3#20]; *U.S. v. Bierley,* 922 F.2d 1061, 1068–69 (3d Cir. 1990) (remanded: for defendant who could not qualify as minor participant, §3B1.2, because other "participant" was government agent) [3#18].

Other: *U.S. v. Monk,* 15 F.3d 25, 28–29 (2d Cir. 1994) (remanded: "the sentencing judge failed to appreciate his authority to depart under [18 U.S.C.] §3553(b)" where relevant conduct guideline would require extraordinary increase in sentence by reason of conduct for which defendant was acquitted by jury—"when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered") [6#11]; *U.S. v. Mickens,* 977 F.2d 69, 73 (2d Cir. 1992) (remanded: may not base departure solely on jury recommendation, but jury's request may be taken into account if factors considered by jury are appropriate bases for departure) [5#7].

b. Downward departure not warranted

Guidelines account for circumstances: *U.S. v. Crook,* 9 F.3d 1422, 1425–26 (9th Cir. 1993) (remanded: loss of home through civil forfeiture) [6#8]; *U.S. v. Clark,* 8 F.3d 839, 842 (D.C. Cir. 1993) (remanded: "unique status of the District of Columbia" and U.S. Attorney's control of prosecution in local or federal court) [6#7]; *U.S. v. Thornbrugh,* 7 F.3d 1471, 1474 (10th Cir. 1993) (remanded: cannot depart downward to lessen effect of added consecutive sentences under 18 U.S.C. §924(c)(1), which here added 45 years to career offender's sentence); *U.S. v. Benish,* 5 F.3d 20, 27 (3d Cir. 1993) (affirmed: age and sex of marijuana plants accounted for) [6#4]; *U.S. v. Costales,* 5 F.3d 480, 486 (11th Cir. 1993) (remanded: may not depart by analogy to §3B1.2 where only other participants in child pornography offense were government agents); *U.S. v. Upthegrove,* 974 F.2d 55, 56 (7th Cir. 1992) (affirmed: poor quality of marijuana); *U.S. v. Rutana,* 932 F.2d 1155, 1158–59 (6th Cir. 1991) (remanded: concern that fines were "harsh" in combination with guideline range); *U.S. v. Medeiros,* 884 F.2d 75, 78–79 (3d Cir. 1989) (affirmed: "walking away" from non-secure facility versus escape from secure prison, §2P1.1) [2#12].

Alien status, possible deportation: *U.S. v. Pacheco-Osuna,* 23 F.3d 269, 272 (9th Cir. 1994) (remanded: possibility that immigration defendant's arrest was invalid because he "may have been stopped because he was Mexican looking" rather than for good cause) [6#14]; *U.S. v. Mendoza-Lopez,* 7 F.3d 1483, 1487 (10th Cir. 1993) (affirmed: "unduly harsh consequences of imprisonment for deportable aliens"); *U.S. v. Nnanna,* 7 F.3d 420, 422 (5th Cir. 1993) (affirmed: collateral consequences, such as deportation, that defendant may face due to alien status); *U.S. v. Restrepo,* 999 F.2d 640, 644 (2d Cir. 1993) (remanded: same, but "alienage" may, in extraordinary case, warrant departure) [6#2]; *U.S. v. Soto,* 918 F.2d 882, 884–85 (10th Cir. 1990) (affirmed: possible deportation); *U.S. v. Alvarez-Cardenas,* 902 F.2d 734, 737 (9th Cir. 1990) (affirmed: same) [3#7]. But cf. *U.S. v. Smith,* 27 F.3d 649, 651–55 (D.C. Cir. 1994) (remanded: downward departure based on deportable alien's severity of confinement may be proper, but "difference in severity must be substantial and the sentencing court must have a high degree of confidence that it will in fact apply for a substantial portion of the defendant's sentence [and] that the greater severity is undeserved") [7#1].

Other invalid reasons: *U.S. v. Zeigler,* 39 F.3d 893, 906 (10th Cir. 1994) (prison overcrowding) [[7#4]; *U.S. v. Newby,* 11 F.3d 1143, 1148–49 (3d Cir. 1993) (affirmed: loss of good time credits as administrative sanction for same conduct underlying offense) [6#8]; *U.S. v. Hadaway,* 998 F.2d 917, 920–21 (11th Cir. 1993) (downward departure based on "community standards" is not permitted) [6#4]; *U.S. v. Deitz,* 991 F.2d 443, 447–48 (8th Cir. 1993) (affirmed: disparity between theoretical state and actual federal sentence for same crime); *U.S. v. Haynes,* 985 F.2d 65, 69–70 (2d Cir. 1993) (same); *U.S. v. Frazier,* 979 F.2d 1227, 1231 (7th Cir. 1992) (remanded: district court opinion that there was "nothing to be gained" by imprisonment) [5#7]; *U.S. v. Brooks,* 966 F.2d 1500, 1505 (D.C. 1992) (remanded: weakness in government's case despite guilty verdict); *U.S. v. Mason,* 966 F.2d 1488, 1495–98 (D.C. Cir. 1992) (remanded: defendant apprehended after being shot by gunmen, injury was "punishment"); *U.S. v. Wright,* 924 F.2d 545, 548–49 (4th Cir. 1991) (remanded: delay in parole date for earlier, unrelated crimes) [3#19]; *U.S. v. Deane,* 914 F.2d 11, 13–14 (1st Cir. 1990) (remanded: degree of seriousness of child pornography offense, lack of counseling program in prison) [3#14];

c. Extraordinary acceptance of responsibility

Several circuits have held that downward departure may be warranted for "unusual" or "extraordinary" acceptance of responsibility. See *U.S. v. Gaither,* 1 F.3d 1040, 1043 (10th Cir. 1993) (remanded: departure possible if "the district court finds the acceptance of responsibility to be so exceptional that it is 'to a degree' not considered by U.S.S.G. §3E1.1") [6#2]; *U.S. v. Brown,* 985 F.2d 478, 482-83 (9th Cir. 1993) (remanded: "The mere existence of section 3E1.1(a) does not preclude . . . an additional departure [for] an extraordinary acceptance of responsibility") [5#9]; *U.S. v. Rogers,* 972 F.2d 489, 494 (2d Cir. 1992) (remanded: consider defendant's voluntary surrender, confession, desire for drug rehabilitation) [5#4]; *U.S. v. Lieberman,* 971 F.2d 989, 995–96 (3d Cir. 1992) (affirmed: extraordinary, post-offense restitution and other ameliorative conduct) [5#1]; *U.S. v. Garlich,* 951 F.2d 161, 163 (8th Cir. 1991) (remanded: "extraordinary restitution" may warrant departure) [4#15]; *U.S. v. Brewer,* 899 F.2d 503, 509 (6th Cir. 1990) (remanded: only "unusual" restitution may warrant departure); *U.S. v. Carey,* 895 F.2d 318, 323–24 (7th Cir. 1990) (same). But cf. *U.S. v. Aslakson,* 982 F.2d 283, 284 (8th Cir. 1992) (affirmed: willingness to cooperate and testify against codefendant is not extraordinary acceptance of responsibility and can be awarded only by §5K1.1 motion) [5#7]; *U.S. v. Arjoon,* 964 F.2d 167, 171 (2d Cir. 1992) (remanded: partial return of property before embezzlement discovered is covered by §3E1.1). See also *U.S. v. Hendrickson,* 22 F.3d 170, 176 (7th Cir. 1994) (remanded: payment of mandatory forfeiture can never be ground for departure for extraordinary acceptance of responsibility").

See also section VI.C.2 on drug rehabilitation.

d. Lesser harms, §5K2.11

Where "conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the conduct at issue . . . a reduced sentence might be warranted." U.S.S.G. §5K2.11. See *U.S. v. White Buffalo,* 10 F.3d 575, 576–77 (8th Cir. 1993) (affirmed: under the circumstances, defendant's unlawful possession of unregistered firearm was less "not the kind of misconduct or danger sought to be prevented by the gun statute) [6#9]; *U.S. v. Hadaway,* 998 F.2d 917, 919–20 (11th Cir. 1993) (remanded to consider whether departure may be warranted for possession of unregistered sawed-off shotgun) [6#4]. But cf. *U.S. v. Marcello,* 13 F.3d 752, 759–60 (3d Cir. 1994) (affirmed: because defendant intentionally evaded reporting requirements by structuring financial deposits, he did not qualify for departure under §5K2.11 even though he was not illegally laundering money or avoiding taxes, the harms sought to be prevented by the statute of conviction).

Note that the Tenth Circuit stated that "[t]he lesser harms rationale for departing from the Sentencing Guidelines should be interpreted narrowly." *U.S. v. Warner,* 43 F.3d 1335, 1338 (10th Cir. 1994) (reversed: defendant's conduct did not fall within limited circumstances for which departure permitted under §5K2.11).

D. Extent of Departure for Aggravating or Mitigating Circumstances

The Guidelines recommend a procedure for departures based on criminal history, see §4A1.3, and as noted in section VI.A.3 above most circuits have adopted that procedure as a rule for criminal history departures. The Guidelines do not, however, recommend procedures for departures based on aggravating or mitigating circumstances under §5K2.0. Several circuits have begun to do so, generally finding that the extent of §5K departures should be guided by analogy to relevant guidelines. Some of these circuits have held that, because the standard of review for extent of departure is whether it is "unreasonable," 18 U.S.C. §3742(e)(3), there must be some standard by which to determine what is "reasonable."

The Supreme Court stated that "[t]he reasonableness determination looks to the amount and extent of the departure in light of the grounds for departing. In assessing reasonableness . . . a court of appeals [should] examine the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence." *Williams v. U.S.*, 112 S. Ct. 1112, 1121 (1992) (remanded to determine whether district court would have imposed same sentence if it had not relied on invalid factor).

The Ninth Circuit is the first to explicitly require departure by analogy, holding that the extent of departure for atypical circumstances must be determined by reference to "the structure, standards and policies" of the Guidelines; the extent of departure should "be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines," and courts "should include a reasoned explanation of the extent of the departure" with reference to these principles. *U.S. v. Lira-Barraza*, 941 F.2d 745, 747–51 (9th Cir. 1991) (en banc) [4#6]. An earlier case had held that district courts should be guided by analogy to relevant guidelines when possible, although the court added that it did "not imply that a departure by analogy always must be on a strict proportional basis to the guidelines sentence." That court also held that courts should *not* analogize to pre-Guideline sentences. *U.S. v. Pearson*, 913 F.2d 186, 189–90 (9th Cir. 1990) (multiple counts guideline provides specific enhancements for up to six additional offenses—departures for more than six should be based on the same incremental increase of one offense level per additional offense) [3#6]. See also *U.S. v. MacDonald*, 992 F.2d 967, 971 (9th Cir. 1993) (an analogous guideline need not be rigidly applied). Cf. *U.S. v. Landry*, 903 F.2d 334, 340–41 (5th Cir. 1990) (link extent of departure to analogous guideline—extent of departure for involving juvenile in drug offense should be based on §2D1.2, which enhances the offense level for drug offenses involving minors) [3#8]; *U.S. v. Shuman*, 902 F.2d 873, 877 (11th Cir. 1990) (finding extent of departure reasonable as compared with guideline enhancements for similar aggravating factors) [3#8].

The Seventh Circuit stated that "[i]n departing the judge should compare the seriousness of the aggravating factors at hand with those the Commission considered," and suggested two approaches for calculating the length of departures based on the seriousness of the offense. Courts could analogize to guideline factors that are similar to the factor warranting departure: for example, buying a gun with drugs—not covered by the Guidelines—could be compared with possession of a gun during a drug sale and the offense level adjusted accordingly. The court could also "treat the aggravating factor as a separate crime and ask how the defendant would be treated if convicted of it." In that case, the departure should not exceed the sentence a defendant would receive if convicted of the analogous offense. *U.S. v. Ferra*,

900 F.2d 1057, 1062–63 (7th Cir. 1990) [3#7]. See also *U.S. v. Rodriguez,* 968 F.2d 130, 140 (2d Cir. 1992) ("the court should not arrive at a penalty that exceeds the penalty that would have been imposed had the defendant been sentenced under other Guidelines provisions that do take the same or similar conduct into account. This goal is accomplished when the court looks to analogous Guidelines provisions to determine the extent of departure").

The Second Circuit has advised courts to use the multiple counts procedure in §3D1 to guide departures that are based on criminal activity that did not result in conviction. Sentencing courts are not strictly bound by that computation, however, and may sentence above or below the resulting range. See *U.S. v. Baez,* 944 F.2d 88, 90–91 (2d Cir. 1991) ("multi-count analysis is to provide only guidance . . . [it is] not a rigid formula") [4#11]. Generally, for upward departures under §5K, courts "should consider the next higher [offense] levels in sequence to determine if they adequately reflect the seriousness of the defendant's conduct." *U.S. v. Kim,* 896 F.2d 678, 683–85 (2d Cir. 1990) [3#3]. Note that the procedure in *Kim* is not an absolute requirement: "*Kim* quite carefully indicated that district courts 'should' use this procedure; *Kim* did not mandate it. . . . [F]or §5K2.0 departures, the district courts need not make talismanic reference to the *Kim* procedures, so long as there is careful explanation in the record of the reasons for the extent of the departure. . . . *Williams* indicates that once the district court has done so, the only question that remains is whether the departure is reasonable in light of the justification given." *U.S. v. Campbell,* 967 F.2d 20, 25–27 (2d Cir. 1992). See also *U.S. v. Pergola,* 930 F.2d 216, 220 (2d Cir. 1991) (sentencing court should make clear it has considered lesser departures first, but "the requirement of a specific step-by-step calculation and comparison is not particularly apt where, as here, (a) harm to the victim is at issue, and (b) the type of harm at issue is psychological rather than physical, making observation difficult and quantification nearly impossible") [4#2]. Cf. *U.S. v. Aymelek,* 926 F.2d 64, 70 (1st Cir. 1991) ("where a departure is warranted, the emphasis should be on ascertaining a fair and reasonable sentence, not on subscribing slavishly to a particular formula"). But cf. *U.S. v. Alter,* 985 F.2d 105, 107–08 (2d Cir. 1993) (remanded: *Kim* grouping analysis must be applied at least initially—district court must provide specific reasons for not using the result).

The Third Circuit has endorsed the use of analogies to calculate the extent of departures for aggravating circumstances, while recognizing that this method cannot always be "mechanically applied" and that analogies to guidelines "are necessarily more open-textured than applications of the guidelines." *U.S. v. Kikumura,* 918 F.2d 1084, 1113 (3d Cir. 1990) [3#15]. See also *U.S. v. Bierley,* 922 F.2d 1061, 1068–69 (3d Cir. 1990) (for defendant who could not technically qualify for mitigating role adjustment, departure should be made and limited by analogy to §3B1.2) [3#18].

The Tenth Circuit has declined to require use of analogies, but has stressed that "courts should look to the Guidelines for guidance in characterizing the seriousness of the aggravating circumstances to determine the proper degree of departure," and recommended the approach outlined in *Ferra,* supra. *U.S. v. Jackson,* 921 F.2d 985, 990–91 (10th Cir. 1990) (en banc) (also agreeing that sentence cannot exceed that which could be imposed if defendant had been convicted of aggravating conduct as separate crime). See also *U.S. v. Peña,* 930 F.2d 1486, 1496 (10th Cir. 1991) ("The issue is not whether we would have departed to the exact extent that the sentencing judge did, but whether the judge's statement reflects a reasoned, persuasive review of the statutory considerations."). In a later case the court indicated that use of analogies may be necessary in order for the appellate court to review the extent of a departure for reasonableness. See *U.S. v. Roth,* 934 F.2d 248, 252 (10th Cir. 1991).

Note that the guideline range for the offense of conviction is the point of reference for

any departure and therefore must be correctly calculated. *U.S. v. Emery,* 991 F.2d 907, 910 (1st Cir. 1993); *U.S. v. Rosado-Ubiera,* 947 F.2d 644, 646 (2d Cir. 1991) [4#13]; *U.S. v. McCall,* 915 F.2d 811, 813–16 (2d Cir. 1990); *U.S. v. Talbott,* 902 F.2d 1129, 1134 (4th Cir. 1990); *U.S. v. Roberson,* 872 F.2d 597, 608 (5th Cir. 1989) [2#6]. But cf. *U.S. v. Dutcher,* 8 F.3d 11, 12 (8th Cir. 1993) (although defendant challenged role in offense enhancement that had resulted in higher guideline range from which district court made substantial assistance departure to "fifty percent of that called for under the guidelines," appellate court will not review extent of departure because even if it upheld defendant's challenge the sentence "would still represent a downward departure from the [adjusted] guideline range").

E. Disparity in Sentences of Codefendants

Most circuits have held that disparate sentences among codefendants, without more, are not a proper basis for departure. See *U.S. v. Ives,* 984 F.2d 649, 650–51 (5th Cir. 1993); *U.S. v. Williams,* 980 F.2d 1463, 1467 (D.C. Cir. 1992); *U.S. v. Higgins,* 967 F.2d 841, 845 (3d Cir. 1992) [4#24]; *U.S. v. Mejia,* 953 F.2d 461, 467–68 (9th Cir. 1991); *U.S. v. Jackson,* 950 F.2d 633, 637–38 (10th Cir. 1991); *U.S. v. Wogan,* 938 F.2d 1446, 1448–49 (1st Cir. 1991) [4#6]; *U.S. v. Joyner,* 924 F.2d 454, 459–61 (2d Cir. 1991); *U.S. v. Hendrieth,* 922 F.2d 748, 752 (11th Cir. 1991); *U.S. v. Torres,* 921 F.2d 196, 197 (8th Cir. 1990); *U.S. v. Parker,* 912 F.2d 156, 158 (6th Cir. 1990) [3#12]; *U.S. v. Goff,* 907 F.2d 1441, 1445–47 (4th Cir. 1990) [3#10]. See also *U.S. v. Nelson,* 918 F.2d 1268, 1272–73 (6th Cir. 1990) (courts "are not precluded *as a matter of law* from departing . . . in order to generally conform one conspirator's sentence" to coconspirators' sentences, but such departure would be permitted only in "the unusual case" to avoid "unreasoned disparity") [3#16]; *U.S. v. Carpenter,* 914 F.2d 1131, 1135–36 (9th Cir. 1990) (no right to equal sentences among codefendants—court may depart upward for one to create disparity if circumstances warrant departure); *U.S. v. Schular,* 907 F.2d 294, 299 (2d Cir. 1990) ("A co-defendant's sentencing range is irrelevant in determining the defendant's sentence where there are differing circumstances.").

It has also been held that departure is not appropriate for a defendant who is sentenced more severely under the Guidelines than a coconspirator or "co-accused" who was tried and sentenced in state court. See, e.g., *U.S. v. Hall,* 977 F.2d 861, 864 (4th Cir. 1992) (affirmed); *U.S. v. Vilchez,* 967 F.2d 1351, 1353–55 (9th Cir. 1992) (remanded) [4#24]; *U.S. v. Reyes,* 966 F.2d 508, 509–10 (9th Cir. 1992) (affirmed) [4#24]. Cf. *U.S. v. Minicone,* 26 F.3d 297, 302 (2d Cir. 1994) (remanded: "any disparity between the sentence a defendant would receive pursuant to the Guidelines and the sentence he would receive for the same offense under a state law sentencing scheme cannot be a basis for departure"); *U.S. v. Sitton,* 968 F.2d 947, 961–62 (9th Cir. 1992) (affirmed: departure not warranted because defendants might have received shorter sentences had they been tried in state court) [4#24].

Prosecutorial decisions that may result in disparity, absent abuse, are not grounds for departure. See, e.g., *U.S. v. Haynes,* 985 F.2d 65, 69–70 (2d Cir. 1993) (affirmed: prosecutor's decision to bring case in federal rather than state court not grounds for departure); *U.S. v. Dockery,* 965 F.2d 1112, 1117–18 (D.C. Cir. 1992) (reversed: may not depart because U.S. Attorney dropped charges brought in D.C. Superior Court and then recharged defendant in federal court to take advantage of harsher penalties) [4#24]; *U.S. v. Butt,* 955 F.2d 77, 90 (1st Cir. 1992) (affirming refusal to depart to correct alleged disparity between codefendants resulting from prosecutorial charging decisions); *U.S. v. Stanley,* 928 F.2d 575, 582–83 (2d Cir. 1991) (reversed: departure may not be based on disparities that may result from

prosecutorial plea-bargaining practices) [4#2]. But cf. *U.S. v. Melton,* 930 F.2d 1096, 1099 (5th Cir. 1991) (remanded for court to determine if "gross disparities between defendants similarly situated as a result of differences in the government's performance of its obligation to move for a downward departure under plea agreement" were inappropriate).

In some unusual situations, courts have affirmed departures to lessen disparity among codefendants. See *U.S. v. Boshell,* 952 F.2d 1101, 1106–09 (9th Cir. 1991) (affirming downward departure for defendant who faced much longer sentence under Guidelines than comparable and more culpable coconspirators who, unlike defendant, were allowed to plead to pre-Guideline offenses) [4#18]; *U.S. v. Citro,* 938 F.2d 1431, 1442 (1st Cir. 1991) (affirming upward departures that were based partly on concern for uniformity of sentences among coconspirators) (1992); *U.S. v. Ray,* 930 F.2d 1368, 1372–73 (9th Cir. 1991) (affirming downward departure in the "highly unusual" circumstance where other defendants had previously received much lower sentences during period before *Mistretta* when Ninth Circuit did not follow Guidelines); *Nelson,* 918 F.2d at 1272 (affirmed departure based on "unreasoned disparity" in codefendants' sentences but remanded because of unreasonable extent) [3#16].

If similarly situated codefendants all receive departures for the same reason, they should receive similar departures. *U.S. v. Sardin,* 921 F.2d 1064, 1067–68 (10th Cir. 1990) (remanding defendant's upward departure that was twice as great as departures for codefendants) [3#17].

Four circuits have held that, in general, a defendant cannot challenge the sentence solely because a codefendant received a lesser sentence. *Jackson,* 950 F.2d at 637–38; *U.S. v. Arlen,* 947 F.2d 139, 147 (5th Cir. 1991); *U.S. v. Guerrero,* 894 F.2d 261, 267–68 (7th Cir. 1990); *Carpenter,* 914 F.2d at 1135; *U.S. v. Boyd,* 885 F.2d 246, 249 (5th Cir. 1989). Cf. *U.S. v. Sanchez-Solis,* 882 F.2d 693, 699 (2d Cir. 1989) (greater guideline sentence for defendant who exercised right to trial than for coconspirator who pled guilty did not violate Sentencing Reform Act).

Note that perceived disparity between defendants in unrelated cases is not a proper basis for departure. *U.S. v. Arjoon,* 964 F.2d 167, 170–71 (2d Cir. 1992) (remanded: may not depart downward because sentence for embezzler seemed too harsh in light of lesser sentence given on same day to gun trafficker in different case); *U.S. v. Prestemon,* 929 F.2d 1275, 1278 (8th Cir. 1991) (remanded: cannot depart downward because of perceived disparity between bank robbery defendant and bank fraud defendant in unrelated case).

F. Substantial Assistance (§5K1.1, 18 U.S.C. §3553(e))

1. Requirement for Government Motion

a. Generally

Departures for substantial assistance pursuant to §3553(e) and §5K1.1 may not be made absent a motion by the government. See, e.g., *U.S. v. Spears,* 965 F.2d 262, 281 (7th Cir. 1992) (both); *U.S. v. Kelley,* 956 F.2d 748, 751–57 (8th Cir. 1992) (en banc) (5K1.1) [4#16]; *U.S. v. Romolo,* 937 F.2d 20, 23 (1st Cir. 1991) (5K1.1); *U.S. v. Brown,* 912 F.2d 453, 454 (10th Cir. 1990) (5K1.1); *U.S. v. Levy,* 904 F.2d 1026, 1034–35 (6th Cir. 1990) (5K1.1); *U.S. v. Ortez,* 902 F.2d 61, 64 (D.C. Cir. 1990) (5K1.1); *U.S. v. Bruno,* 897 F.2d 691, 694–95 (3d Cir. 1990) (both) [3#4]; *U.S. v. Alamin,* 895 F.2d 1335, 1337 (11th Cir. 1990) (both) [3#4]; *U.S. v. Francois,* 889 F.2d 1341, 1343–45 (4th Cir. 1989) (both) [2#17]; *U.S. v. Huerta,* 878 F.2d 89, 91 (2d Cir. 1989) (both); *U.S. v. Justice,* 877 F.2d 664, 666–69 (8th Cir. 1989) (both)

[2#8]; *U.S. v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989) (both) [2#7]; *U.S. v. White*, 869 F.2d 822, 829 (5th Cir. 1989) (both) [2#3]. Some courts have specifically held that the motion requirement in §5K1.1 does not conflict with 21 U.S.C. §994(n). See, e.g., *U.S. v. Doe*, 934 F.2d 353, 358–60 (D.C. Cir. 1991) [4#4]; *U.S. v. Gutierrez*, 908 F.2d 349, 350–52 (8th Cir. 1990); *U.S. v. Lewis*, 896 F.2d 246–47 (7th Cir. 1990) [3#3]; *Ayarza*, 874 F.2d at 653 n.2.

Note that the Third Circuit held that the §5K1.1 motion requirement applies to assistance given to state as well as federal authorities. *U.S. v. Love*, 985 F.2d 732, 734–36 (3d Cir. 1993) (assistance to state authorities not ground for departure under §5K2.0) [5#10]. Accord *U.S. v. Emery*, 34 F.3d 911, 913 (9th Cir. 1994).

A confidential memo or letters from the government merely outlining a defendant's cooperation are not the "functional equivalent" of a motion. *Brown*, 912 F.2d at 454 [3#12]; *U.S. v. Coleman*, 895 F.2d 501, 504–05 (8th Cir. 1990) [3#2]. See also *U.S. v. Brick*, 905 F.2d 1092, 1099 (7th Cir. 1990) (court properly refused to construe as equivalent of motion government statements at sentencing that defendant assisted in prosecution and conviction of another). However, the Fifth Circuit held that the government's commitment, contained in a cover letter to the plea agreement, to move for departure if defendant provided substantial assistance, was enforceable, *U.S. v. Melton*, 930 F.2d 1096, 1098–99 (5th Cir. 1991) [4#5], as was an oral commitment made at rearraignment that "effectively amended" the plea agreement, *U.S. v. Hernandez*, 17 F.3d 78, 80–81 (5th Cir. 1994) (replacing opinion at 996 F.2d 62 [6#1]).

In the absence of a government motion, a defendant's cooperation may still be considered for sentencing within the guideline range. *Doe*, 934 F.2d at 357 [4#4]; *U.S. v. LaGuardia*, 902 F.2d 1010, 1013 n.4 (1st Cir. 1990); *Bruno*, 897 F.2d at 693 (must consider it) [3#4]; *Alamin*, 895 F.2d at 1338 [3#4]. Similarly, if a defendant has provided assistance but no motion is filed, and there is an upward departure for other reasons, defendant's cooperation should be considered in fixing the extent of the upward departure. *U.S. v. Ocasio*, 914 F.2d 330, 337–38 (1st Cir. 1990).

The Eleventh Circuit has held that, for a defendant who otherwise did not qualify for a substantial assistance departure under §5K1.1, district court could not depart downward under §5K2.13 on the ground that defendant's diminished capacity rendered him incapable of providing substantial assistance to the government. *U.S. v. Munoz-Realpe*, 21 F.3d 375, 379–80 (11th Cir. 1994) (but remanded to determine whether defendant's mental incapacity contributed to commission of offense sufficiently to warrant departure under §5K2.13) [6#13].

b. Possible exceptions

i. Assistance outside scope of §5K1.1

Two circuits have determined that §5K1.1 is limited "by its plain language" to assistance in the investigation or prosecution of another; therefore, departures from the guideline range for other forms of assistance are not prohibited by §5K1.1. See *U.S. v. Sanchez*, 927 F.2d 1092, 1093–94 (9th Cir. 1991) (upheld decision not to depart, but affirmed that the "district court correctly concluded that assistance provided in a civil forfeiture proceeding is not 'substantial assistance' within the meaning of Section 5K1.1. . . . [B]y its plain language, Section 5K1.1 applies only to assistance provided in the investigation or prosecution of another."); *U.S. v. Garcia*, 926 F.2d 125, 127–28 (2d Cir. 1991) ("As written, §5K1.1 focuses on assistance that a defendant provides to the government, rather than to the judicial sys-

tem"; affirming downward departure absent government motion for defendant whose cooperation with authorities "broke the log jam in a multi-defendant case" and thereby helped the district court's "seriously overclogged docket," thus providing assistance to the judicial system beyond that contemplated in §3E1.1 or §5K1.1) [3#20]. See also *U.S. v. Khan*, 920 F.2d 1100, 1106–07 (2d Cir. 1990) (while "theoretically possible" to depart under §5K2.0 for substantial assistance absent a §5K1.1 motion, the Sentencing Commission clearly considered a situation where defendant cooperates; "only exception" is where defendant shows evidence of assistance "which could not be used by the government to prosecute other individuals . . . but which could be construed as a 'mitigating circumstance'"). But cf. *U.S. v. Haversat*, 22 F.3d 790, 795 (8th Cir. 1994) (remanded: early nolo plea and assistance in settling related civil suit relate to acceptance or responsibility and do not warrant §5K2.0 departure for substantial assistance outside scope of §5K1.1); *U.S. v. Lockyer*, 966 F.2d 1390, 1391–92 (11th Cir. 1992) (affirmed: downward departure for "substantial assistance to the judiciary" not warranted for defendant who pled guilty at initial appearance and waived pretrial motions—conduct only demonstrated acceptance of responsibility, §3E1.1; distinguished *Garcia*) [5#2].

The Eighth Circuit reversed a departure made under §5K2.0 that was based on defendant's "subjective belief" that she had complied with the plea agreement by assisting in the investigation of close relatives, which "exposed her to 'ostracism' and 'suspicion' within her extended family." The court held it was "clear that all aspects of Baker's assistance to the government fit squarely within the boundaries of §5K1.1." *U.S. v. Baker*, 4 F.3d 622, 623–24 (8th Cir. 1993) [6#7].

ii. Violation of plea agreement

In general, the district court may not inquire into the government's refusal to file a motion for departure. However, if the plea agreement contains a commitment by the government to file a motion in return for the defendant's cooperation, the defendant may be able to seek specific performance of the agreement. See *U.S. v. De la Fuente*, 8 F.3d 1333, 1340–41 (9th Cir. 1993); *U.S. v. Watson*, 988 F.2d 544, 551–53 (5th Cir. 1993); *U.S. v. Wade*, 936 F.2d 169, 173 (4th Cir. 1991) [4#5], aff'd on other grounds, 112 S. Ct. 1840 (1992) [4#22]; *U.S. v. Melton*, 930 F.2d 1096, 1098–99 (5th Cir. 1991) (agreement contained in cover letter to plea agreement) [4#5]; *U.S. v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) [3#2]. See also *U.S. v. Smith*, 953 F.2d 1060, 1066 (7th Cir. 1992) (dicta: "if the prosecutor makes and does not keep a promise to file a §5K1.1 motion, and the promise is material to the plea, the court must allow the defendant to withdraw the plea"); *U.S. v. Romolo*, 937 F.2d 20, 23 n.3 (1st Cir. 1991) (noting possibility of judicial review when plea agreement involved); *U.S. v. Conner*, 930 F.2d 1073, 1075–76 (4th Cir. 1991) ("Where the bargain represented by the plea agreement is frustrated, the district court is best positioned to determine whether specific performance, other equitable relief, or plea withdrawal is called for. We perceive no reason why this same principle should not apply with respect to a conditional promise to make a §5K1.1 motion").

The Tenth Circuit stated that plea agreements are governed by contract principles, "and if any ambiguities are present, they will be resolved against the drafter, in this case the government." *U.S. v. Massey*, 997 F.2d 823, 824 (10th Cir. 1993) (but affirmed refusal to make motion because agreement plainly did not obligate government). The Ninth Circuit resolved an ambiguity against the government in affirming a §5K1.1 departure below the statutory minimum. It was uncertain whether the plea agreement required the government to move for departure below the statutory minimum or only the guideline range, but "the

government 'ordinarily must bear responsibility for any lack of clarity'" in a plea agreement. *De la Fuente,* 8 F.3d at 1337–39 [6#6]. The court was also persuaded by the fact that accepting the government's argument would mean concluding that defendant agreed to cooperate in exchange for no benefit. Id. at 1339–40. See also *Hernandez* below.

The Second Circuit has held that a plea agreement giving the government discretion to move for a substantial assistance departure may be reviewed for bad faith and enforced by the court. *U.S. v. Rexach,* 896 F.2d 710, 714 (2d Cir. 1990) [3#3]. Cf. *U.S. v. Lee,* 989 F.2d 377, 380 (10th Cir. 1993) ("When a Defendant asserts that the government breached an agreement that leaves discretion to the prosecutor, the district court's role is limited to deciding whether the government made the determination in good faith."). In a later case the Second Circuit remanded for such a review. Even though the plea agreement gave the government "sole and unfettered discretion" to determine whether defendant's cooperation was satisfactory, defendant appeared to have fulfilled his part of the bargain and the government had not presented any legitimate reasons for refusing the §5K1.1 motion. *U.S. v. Knights,* 968 F.2d 1483, 1487–88 (2d Cir. 1992) ("The district court is of course obligated in most cases to allow considerable deference to the government's evaluation of a defendant's cooperation. But where the contemplated cooperation involves solely in-court testimony, as it apparently did here, the district court is well-situated to review the defendant's performance of his obligations under the plea agreement.") [4#24].

The Fifth Circuit has held that if a defendant relied on the government's promise and "accepted the government's offer and did his part, or stood ready to perform but was unable to do so because the government had no further need or opted not to use him, the government is obligated to move for a downward departure." *Melton,* 930 F.2d at 1098–99 (remanded for consideration of departure) [4#5]. See also *Watson,* 988 F.2d at 553 (when plea agreement does not reserve discretion for government to determine whether defendant's cooperation merits motion, "district court has authority to determine whether a defendant has satisfied the terms of his plea agreement"). The Fifth Circuit also remanded a refusal to file a §5K1.1 motion where "significant ambiguities" in the plea agreement required a determination of the intent of the parties, in this case "the parties' interpretation of what might constitute substantial assistance." On remand, the district court should consider, in light of *Melton,* whether defendant provided all the assistance he could and whether the value of that assistance was diminished by the government's failure to follow up on the information provided. *U.S. v. Hernandez,* 17 F.3d 78, 81–82 (5th Cir. 1994) (replacing opinion at 996 F.2d 62 [6#1]). See also *De la Fuente* above. The Fifth Circuit has also stated, however, that when the plea agreement "expressly provides that the government retains absolute discretion to move for a downward departure under §5K1.1 . . . the defendant is not entitled to relief . . . unless the government's refusal to file a §5K1.1 motion was based on an unconstitutional motive." *U.S. v. Garcia-Bonilla,* 11 F.3d 45, 47 (5th Cir. 1993). See also *Sullivan v. U.S.,* 11 F.3d 573, 575 (6th Cir. 1993) (affirmed refusal to make motion where qualified promise was made in plea agreement: "In the absence of any specific requirement, made on the record, obliging the government under any circumstances to make a departure request, and absent an allegation that the government was acting out of unconstitutional motives, petitioner's request for relief was properly denied").

The Fourth Circuit held that the government breached a plea agreement by refusing to file a §5K1.1 motion until defendant assisted in a future trial. The agreement provided that defendant would assist in the investigation *or* prosecution of another, and the government "repeatedly conceded" that defendant substantially assisted the investigation; the government "has no right to insist on assistance in both investigation and prosecution under the

plea agreement." *U.S. v. Dixon,* 998 F.2d 228, 230–31 (4th Cir. 1993) (also noting: "Though plea agreements are generally interpreted under the law of contracts, the constitutional basis of the defendant's 'contract' right and concerns for the honor and integrity of the government require holding the government responsible for imprecisions or ambiguities in the agreement") [6#1]. The Fourth Circuit has also held that, where the government agreed during the sentencing hearing that defendant had rendered substantial assistance and effectively promised to make a substantial assistance motion "within the next year," this was "tantamount to and the equivalent of a modification of the plea agreement." The government wanted to defer a decision on §5K1.1 and file a Rule 35(b) motion later, but since this is not permitted (see section VI.F.3 & 4 below) defendant "is entitled to specific performance of the government's promise to reward him for his presentence substantial assistance." *U.S. v. Martin,* 25 F.3d 211, 216–17 (4th Cir. 1994) (remanded) [6#14].

The D.C. Circuit held that "review by the district court remains available in cases where the government's refusal to move for departure violates the terms of a cooperation agreement, is intended to punish the defendant for exercising her constitutional rights, or is based on some unjustifiable standard or classification such as race." *U.S. v. Doe,* 934 F.2d 353, 358 (D.C. Cir. 1991) [4#4]. Note that the district courts have discretion to reject a plea agreement that is unsatisfactory and allow defendant to withdraw the guilty plea. U.S.S.G. §§6B1.2, 6B1.3; Fed. R. Crim. P. 11(e).

iii. Violation of constitutional rights or bad faith

The Supreme Court held that district courts have authority to review the government's refusal to file a substantial assistance motion for constitutional violations. *Wade v. U.S.,* 112 U.S. 1840, 1843–44 (1992) [4#22]. The Court gave as an example of a constitutional violation the refusal to file the motion "because of the defendant's race or religion." Also, a defendant would be entitled to relief "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." The Ninth Circuit has held that a sentencing court had the authority to review sua sponte a prosecutor's decision not to file the motion. *U.S. v. Delgado-Cardenas,* 974 F.2d 123, 125–26 (9th Cir. 1992) (remanded for clarification of constitutional violations) [5#2].

The *Wade* Court also indicated that "a defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'" Id. at 1844. (Note: The Supreme Court affirmed the lower court ruling, *U.S. v. Wade,* 936 F.2d 169 (4th Cir. 1991) [4#5], because the defendant failed to raise and support a claim that the government's failure to file the motion violated his constitutional rights.) The Fifth Circuit affirmed a district court's refusal to hold an evidentiary hearing on defendant's assistance to the government where the defendant claimed the government's failure to make a §5K1.1 motion was arbitrary but defendant did not make "a substantial threshold showing of . . . a constitutionally improper motive." *U.S. v. Urbani,* 967 F.2d 106, 108–10 (5th Cir. 1992) [5#1]. The Eighth Circuit held that *Wade* foreclosed a claim that defendant's "assistance was so valuable that the government's refusal to file a §5K1.1 motion amounted to bad faith and violated due process." Defendant must show an enforceable promise or that the government's refusal was motivated by "constitutionally impermissible concerns." *U.S. v. Favara,* 987 F.2d 538, 540 (8th Cir. 1993). See also *U.S. v. Forney,* 9 F.3d 1492, 1502 (11th Cir. 1993) (defendant must make "an allegation *and* a substantial showing that the prosecution failed to file a substantial assistance motion because of a constitutionally impermissible motivation"); *U.S. v. Bagnoli,* 7 F.3d 90, 92 (6th Cir. 1993) (must make "substantial threshold showing of an unconstitutional motive"); *U.S. v. Romsey,* 975 F.2d 556, 558 (8th Cir. 1992) ("bare asser-

tion" insufficient); *U.S. v. Egan,* 966 F.2d 328, 332 (7th Cir. 1992) (burden is on defendant to show that government acted arbitrarily in refusing to make motion).

The Ninth Circuit remanded a case where the government's improper behavior authorized the district court to grant §5K1.1 departure in the absence of a government motion. Before and during the plea proceedings, defendant's counsel attempted to negotiate a plea agreement to have defendant testify against codefendants in exchange for a §5K1.1 departure. The government refused the offer, but then, without notifying defendant's counsel, subpoenaed defendant to testify at a grand jury hearing and did not return the counsel's phone calls. Counsel could not contact defendant either, because the government had moved defendant to another prison. Assuming a deal had been reached, defendant testified before the grand jury. At defendant's sentencing the government refused to file a §5K1.1 motion, but it did file one for a codefendant who testified before the same grand jury. The appellate court held that the government's "potentially unconstitutional *behavior*" (interfering with defendant's Sixth Amendment rights) was an "unconstitutional motive" within the meaning of *Wade.* The defendant "has shown that he provided substantial assistance, and that the government's improper conduct deprived him of an opportunity to negotiate a favorable bargain before testifying." *U.S. v. Treleaven,* 35 F.3d 458, 461–62 (9th Cir. 1994) [7#3].

The Third Circuit held that denying a §5K1.1 motion to penalize a defendant for exercising the right to trial would be an unconstitutional motive, and remanded a case to allow defendant to try to show government vindictiveness. *U.S. v. Paramo,* 998 F.2d 1212, 1219–21 (3d Cir. 1993) (however, government gave other, legitimate reasons for its refusal, so defendant "must prove actual vindictiveness" by showing that government's stated reasons are pretextual and "that the prosecutor withheld a §5K1.1 motion solely to penalize him for exercising his right to trial") [6#1].

The Tenth Circuit dismissed a defendant's claim that the government refused to file a §5K1.1 motion because he was the only conspirator to request a jury trial. Because defendant did not raise his claim in the district court it is reviewed for plain error, but plain error review is not appropriate when the error involves factual disputes, i.e., whether defendant in fact provided substantial assistance and the prosecutor's motive in refusing to file the motion. *U.S. v. Easter,* 981 F.2d 1549, 1555–56 (10th Ciovernment to es

blish *the ini*tial offense level, and the bu the government's refusal may be reviewed for consitutional violations, bad faith, and/or arbitrariness. See, e.g., *U.S. v. Drown,* 942 F.2d 55, 59–60 (1st Cir. 1991) (if refusal to file motion "is based on unacceptable standards, such as the infringement of protected statutory or constitutional rights, a federal court is empowered to intervene") [4#8]; *U.S. v. Doe,* 934 F.2d 353, 358 (D.C. Cir. 1991) (review available if refusal to move "is intended to punish the defendant for exercising her constitutional rights, or is based on some unjustifiable standard or classification such as race") [4#4]; *U.S. v. Mena,* 925 F.2d 354, 356 (9th Cir. 1991) (noting possibility of "extreme situations in which the defendant's reliance on the government's inducements may permit a downward departure in the absence of a government motion"); *U.S. v. Bayles,* 923 F.2d 70, 72 (7th Cir. 1991) (suggesting in dicta that refusal may be reviewable "to ensure that the prosecutor did not base a decision on prohibited criteria such as race or speech"); *U.S. v. Khan,* 920 F.2d 1100, 1106 (2d Cir. 1990) (outlining procedure for alleging bad faith by government) [3#18]; *U.S. v. Kuntz,* 908 F.2d 655, 657 (10th Cir. 1990) (in "egregious case" court might "be justified in taking some corrective action"); *U.S. v. Smitherman,* 889 F.2d 189, 191 (8th Cir. 1989) (indicating question of prosecutorial bad faith or arbitrariness may present due process issue).

Other circuits have held that review for bad faith is not available. See *U.S. v. Smith,* 953

F.2d 1060, 1063–64 (7th Cir. 1992) (no review for bad faith or arbitrariness); *U.S. v. Romolo,* 937 F.2d 20, 24 (1st Cir. 1991) (without government motion court cannot depart "despite meanspiritedness, or even arbitrariness, on the government's part"). Cf. *U.S. v. Goroza,* 941 F.2d 905, 909 (9th Cir. 1991) (reversing departure under §5K2.0 for defendant's cooperation after government refused to file §5K1.1 motion because it believed defendant made false statements despite acquittal on perjury charge based on those statements: "cooperation with the government . . . is a circumstance that has been adequately taken into account," and "so long as the government does not exceed the bounds of its discretion, departure under §5K2.0 for cooperation with the government is inappropriate") [4#7]. Note that the Fourth Circuit had held in *Wade* that "the defendant may not inquire into the government's reasons and motives." 936 F.2d at 172.

2. Extent of Departure

Several circuits have held that there is no lower limit on a departure under §3553(e), and a court may impose a term of probation as long as the sentence is "reasonable." See *U.S. v. Baker,* 4 F.3d 622, 624 (8th Cir. 1993); *U.S. v. Snelling,* 961 F.2d 93, 96–97 (6th Cir. 1992); *U.S. v. Pippin,* 903 F.2d 1478, 1485 (11th Cir. 1990); *U.S. v. Wilson,* 896 F.2d 856, 858–60 (4th Cir. 1990) [3#3]. The Fourth Circuit also held that probation for Class A and B felonies may be imposed under §3553(e), despite the prohibition in 18 U.S.C. §3561(a)(1). *U.S. v. Daiagi,* 892 F.2d 31, 32–33 (4th Cir. 1989) [2#18]. The Seventh Circuit agreed with these principles, but held that probation may not be imposed if the statute of conviction specifically prohibits it. *U.S. v. Thomas,* 930 F.2d 526, 528 (7th Cir. 1991) (probation prohibition in 18 U.S.C. §841(b) serves to "trump" §3553(e)) [4#1]. Accord *U.S. v. Roth,* 32 F.3d 437, 440 (9th Cir. 1994); *Snelling,* 961 F.2d at 96–97 (cannot disregard "a *statutory ban* on probation").

The *Thomas* court also stated that the extent of substantial assistance departures "must be linked to the structure of the guidelines," courts should use analogies to other guideline provisions, and the government's recommended sentence "should be the starting point." Id. at 530–31. Also, "only factors relating to a defendant's cooperation" may be considered—it was improper to factor in family responsibilities when choosing the extent of departure. Id. at 529–30. Accord *U.S. v. Campbell,* 995 F.2d 173, 175 (10th Cir. 1993); *U.S. v. Rudolph,* 970 F.2d 467, 470 (8th Cir. 1992); *U.S. v. Chestna,* 962 F.2d 103, 106–07 (1st Cir. 1992); *U.S. v. Valente,* 961 F.2d 133, 134–35 (9th Cir. 1992) (affirmed departure below mandatory minimum on basis of substantial assistance but held no authority to further depart for aberrant behavior where guideline range was below mandatory minimum) [4#20]; *Snelling,* 961 F.2d at 97. See also *U.S. v. Aponte,* 36 F.3d 1050, 1052 (11th Cir. 1994) (because departure under §3553(e) should only reflect defendant's substantial assistance, district court properly used 60-month mandatory minimum term as starting point for departure, rather than offense level—including mitigating adjustments—that would have applied absent the minimum). Cf. *U.S. v. Mariano,* 983 F.2d 1150, 1156–57 (1st Cir. 1993) (factors other than those directly relating to defendant's substantial assistance may be used to *limit* extent of departure or deny it); *U.S. v. Hall,* 977 F.2d 861, 865 (4th Cir. 1992) (affirmed: only consider circumstances that are permissible for downward departure when determining extent of substantial assistance departure).

Most circuits have held that, once the motion is made, the decision of whether or to what extent to depart is the district court's, not the government's. See, e.g., *U.S. v. Foster,* 988 F.2d 206, 208 (D.C. Cir. 1993) ("sentencing judge is not required to grant a departure just be-

cause the government requests one"); *Mariano,* 983 F.2d at 1156 (after motion is made, "it remains the district judge's decision—not the prosecutor's—whether to depart, and if so, to what degree"); *U.S. v. Spiropoulos,* 976 F.2d 155, 162–63 (3d Cir. 1992) (affirmed departure below government recommendation because defendant's cooperation proved unhelpful—"Having set the section 5K1.1 downward departure process in motion, the government cannot dictate the extent to which the court will depart.") [5#3]; *U.S. v. Udo,* 963 F.2d 1318, 1319 (9th Cir. 1992) (remanded: district court erred in concluding it had no authority to depart below government recommendation—"government has no control over the extent of the departure"); *U.S. v. Munoz,* 946 F.2d 729, 730 (10th Cir. 1991) (decision to depart "rests in the sound discretion" of court); *U.S. v. Carnes,* 945 F.2d 1013, 1014 (8th Cir. 1991) (extent of departure within court's discretion); *U.S. v. Richardson,* 939 F.2d 135, 139 (4th Cir. 1991) (affirmed refusal to depart—decision is within discretion of court); *U.S. v. Hayes,* 939 F.2d 509, 511–12 (7th Cir. 1991) (same); *U.S. v. Damer,* 910 F.2d 1239, 1241 (5th Cir. 1990) (after motion, court retains discretion whether to depart) [3#13]; *U.S. v. Pippin,* 903 F.2d 1478, 1485–86 (11th Cir. 1990) (affirmed: government cannot limit §5K1.1 motion to depart only for fine portion of sentence and not for length or type of incarceration—"Once it has made a 5K1.1 motion, the government has no control over whether and to what extent the district court departs from the Guidelines, except that if a departure occurs, the government may argue on appeal that the sentence imposed was 'unreasonable.'").

The Second and Ninth Circuits follow this general principle, but hold that when there is a binding plea agreement under Fed. R. Crim. P. 11(e)(1)(C) that limits the extent of a substantial assistance departure, the district court is bound by that limitation once the agreement is accepted. See *U.S. v. Mukai,* 26 F.3d 953, 955–56 (9th Cir. 1994) (remanded: error to make §5K1.1 departure below minimum sentence in Rule 11(e)(1)(C) plea agreement—must accept or reject agreement in its entirety); *U.S. v. Cunavelis,* 969 F.2d 1419, 1422–23 (2d Cir. 1992) (affirmed: district court properly departed four offense levels required by plea agreement).

The Fifth Circuit stressed that district courts are not limited by the government's recommended sentence but must make an independent determination of the extent of a §5K1.1 departure. "The court is charged with conducting a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence. While giving appropriate weight to the government's assessment and recommendation, the court must consider all other factors relevant to this inquiry." *U.S. v. Johnson,* 33 F.3d 8, 10 (5th Cir. 1994) (remanded) [7#3].

The Third Circuit emphasized that "cooperation need not result in a prosecution or conviction to justify a large downward departure. In some cases, assistance to an investigation may be sufficient in and of itself." *Spiropoulos,* 976 F.2d at 162.

3. Procedure

Several circuits have held that a §5K1.1 motion allows departure below the statutory minimum, not just the guideline range, because that policy statement simply implements the statutory directive of 18 U.S.C. §3553(e) and 28 U.S.C. §994(n). See *U.S. v. Wills,* 35 F.3d 1192, 1194–96 (7th Cir. 1994); *U.S. v. Beckett,* 996 F.2d 70, 72–75 (5th Cir. 1993) (even if government specifies motion is made under §5K1.1 and not §3553(e)) [6#1]; *U.S. v. Ah-Kai,* 951 F.2d 490, 492–94 (2d Cir. 1991); *U.S. v. Keene,* 933 F.2d 711, 715 (9th Cir. 1991) [4#3]. See also *U.S. v. Wade,* 936 F.2d 169, 171 (4th Cir. 1991) (agreeing with *Keene* in dicta) [4#5], aff'd on other grounds, 112 S. Ct. 1840 (1992) [4#22]. The Eighth Circuit, however,

disagreed with *Keene* and *Ah-Kai* and reversed a departure below the mandatory minimum where only a §5K1.1 motion was made, holding that a §5K1.1 motion is not the equivalent of a §3553(e) motion. *U.S. v. Rodriguez-Morales,* 958 F.2d 1441, 1442–47 (8th Cir. 1992) [4#19].

The Fourth Circuit held that a substantial assistance motion may not be denied based on statements made by a defendant while assisting the government under a plea agreement which provided that any self-incriminating evidence revealed as part of his cooperation would not be used against him in any further criminal proceedings, §1B1.8(a). *U.S. v. Malvito,* 946 F.2d 1066, 1067–68 (4th Cir. 1991) (reversing district court) [4#12].

The First Circuit held that the government may not defer consideration of whether to file a §5K1.1 motion until after sentencing because the defendant's cooperation was not yet complete; such a strategy would "impermissibly merge" the boundaries of §5K1.1, designed to recognize and reward cooperation before sentencing, and Fed. R. Crim. P. 35(b), which covers cooperation after sentencing. *U.S. v. Drown,* 942 F.2d 55, 59–60 (1st Cir. 1991) [4#8]. Accord *U.S. v. Martin,* 25 F.3d 211, 216 (4th Cir. 1994) [6#14]. Similarly, a court may not postpone a ruling on a §5K1.1 motion, but must rule on it at the sentencing hearing. *U.S. v. Mittelstadt,* 969 F.2d 335, 337 (7th Cir. 1992) [5#2]; *U.S. v. Mitchell,* 964 F.2d 454, 461–62 (5th Cir. 1992) [4#25]; *U.S. v. Howard,* 902 F.2d 894, 896–97 (11th Cir. 1990) [3#9]. And the sentencing judge must specifically rule on a §5K1.1 motion before imposing sentence, even one that includes a downward departure. *U.S. v. Robinson,* 948 F.2d 697, 698 (11th Cir. 1991) (vacating and remanding sentence) [4#13].

The First Circuit held that "the legal standard for departure is materially different under U.S.S.G. §5K1.1 than under §5K2.0." The §5K2.0 requirement for factors not adequately considered by the Commission does not apply to departures under §5K1.1, and "the limitations on the variety of considerations that a court may mull in withholding or curtailing a substantial assistance departure are not nearly so stringent as those which pertain when a court in fact departs downward." *U.S. v. Mariano,* 983 F.2d 1150, 1154–57 (1st Cir. 1993) (remanded: district court improperly used more restrictive standard governing §5K2.0 departures in refusing to depart after government's §5K1.1 motion).

The Seventh Circuit held that it was not a violation of the ex post facto clause to apply the stricter version of §5K1.1 that was in effect when defendant attempted to provide substantial assistance, after Nov. 1, 1989, rather than the earlier version in effect when defendant committed her offenses. "Section 5K1.1 speaks to the assistance a defendant provides to the government, rather than the criminal conduct for which the defendant was convicted. Thus, the retroactivity analysis turns on which version of 5K1.1 was in effect when she participated in the numerous briefings with federal agents—not when she committed the unlawful conduct to which she pled guilty." *U.S. v. Gerber,* 24 F.3d 93, 97 (10th Cir. 1994) [6#13].

4. Fed. R. Crim. P. 35(b)

A government motion is a prerequisite to lowering a defendant's sentence for substantial assistance under Rule 35(b). *U.S. v. Perez,* 955 F.2d 34, 35 (10th Cir. 1992) (comparing Rule 35(b) to §5K1.1 and 18 U.S.C. §3553(e)). The Eighth Circuit affirmed a district court's refusal to grant a government's Rule 35(b) motion for a further reduction in defendant's sentence, based on defendant's post-sentence testimony before a grand jury, on the grounds that the district court had already anticipated further cooperation when it granted the government's §5K1.1 motion at sentencing. The court also noted that it is "within the discretion of the district court to decide whether it will grant or deny" a Rule 35(b) motion.

Goff v. U.S., 965 F.2d 604, 605 (8th Cir. 1992). However, if the court accepted a plea agreement that obligated the government to move for a Rule 35(b) reduction, it may not foil the purpose of the plea agreement by rejecting the motion without hearing evidence. *U.S. v. Hernandez*, 34 F.3d 998, 1000–01 & n.6 (11th Cir. 1994) (remanded: under circumstances here, refusal to grant evidentiary hearing on Rule 35(b) motion "effectively prevented the government from presenting its Rule 35 motion [and] forced a breach of the plea agreement"; however, whether a hearing is needed depends on facts of case and "a written motion outlining the defendant's cooperation may suffice to satisfy the plea agreement") [7#4].

Several courts have noted that Rule 35(b) is designed to recognize assistance rendered *after* the defendant is sentenced. See, e.g., *U.S. v. Martin*, 25 F.3d 211, 216 (4th Cir. 1994) [6#14]; *U.S. v. Robinson*, 948 F.2d 697, 698 (11th Cir. 1991); *U.S. v. Drown*, 942 F.2d 55, 58 (1st Cir. 1991). See also *U.S. v. Mittelstadt*, 969 F.2d 331, 337 (7th Cir. 1992) (Rule 35(b) is not a substitute for a §5K1.1 motion) [5#2].

The First Circuit held that defendants may appeal the extent of a reduction made pursuant to Fed. R. Crim. P. 35(b). The court reasoned that Rule 35 appeals are governed by 28 U.S.C. §1291, which allows appeals of post-judgment motions, rather than 18 U.S.C. §3742, which controls Guidelines appeals. On the merits, however, the appellate court upheld the extent of the reduction and the district court's decision not to hold an evidentiary hearing. *U.S. v. McAndrews*, 12 F.3d 273, 276–80 (1st Cir. 1993).

The Seventh Circuit upheld the extent of a Rule 35(b) departure that was calculated by giving a two-level departure from the lowest offense level that encompassed defendant's mandatory 60-month sentence and criminal history category I. *U.S. v. Hayes*, 5 F.3d 292, 294–95 (7th Cir. 1993) ("this departure is entirely consistent with the method we endorsed in *U.S. v. Thomas*, 930 F.2d 526 (7th Cir. 1991)," for §3553(e) departures; rejecting defendant's argument that resulting sentence must be within guideline range that would apply absent mandatory sentence).

As several circuits have held for §5K2.0, the Eleventh Circuit held that it was error to consider mitigating factors other than defendant's substantial assistance in departing under Rule 35(b). "The plain language of Rule 35(b) indicates that the reduction shall reflect the assistance of the defendant; it does not mention any other factor that may be considered." *U.S. v. Chavarria-Herrara*, 15 F.3d 1033, 1037 (11th Cir. 1994) [6#12].

G. Notice Required Before Departure

The Supreme Court held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government, [Fed. R. Crim. P.] 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. This notice must specifically identify the ground on which the district court is contemplating an upward departure." *Burns v. U.S.*, 501 U.S. 129, 135–39 (1991) [4#4], rev'g 893 F.2d 1343 (D.C. Cir. 1990) [3#1]. See also *U.S. v. Moore*, 37 F.3d 169, 175 (5th Cir. 1994) (although record shows court notified defendants that it contemplated upward departure on fines, there is no evidence that it gave notice of the basis for such departure). The Court left "the question of the *timing* of the reasonable notice . . . to the lower courts." Id. at 139 n.6. See *U.S. v. Valentine*, 21 F.3d 395, 397–98 (11th Cir. 1994) (remanded: departing on ground raised for first time at sentencing hearing violated reasonable notice requirement of *Burns*: "Contemporaneous—as opposed to advance—notice of a departure, at least in this case, is 'more a formality than a

substantive benefit,' . . . and therefore is inherently unreasonable") [6#17]; *U.S. v. Wright,* 968 F.2d 1167, 1173–74 (11th Cir. 1992) (remanded: opportunity to object to sua sponte departure at sentencing hearing was not sufficient—*Burns* and Rule 32 make clear that defendant must receive "both an opportunity to comment upon the departure, and *reasonable notice* of the contemplated decision to depart"); *U.S. v. Andrews,* 948 F.2d 448, 449 (8th Cir. 1991) (citing *Burns,* holding notice was sufficient because factors warranting departure were expressly noted in PSR and government request for departure). Cf. *U.S. v. Lowenstein,* 1 F.3d 452, 454 (6th Cir. 1993) (affirmed: defendant did not receive notice prior to sentencing hearing of district court's intention to depart, but he failed to object—appellate court reviews for plain error and defendant failed to show prejudice from lack of notice).

Note that the Guidelines were amended to reflect the holding in *Burns*—if the court intends to depart "on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure." §6A1.2, comment. (n.1) (Nov. 1991). Several circuits had already held that defendants must receive some form of notice and opportunity to comment before an upward departure is imposed, and that this requirement is satisfied when notice is given at the sentencing hearing. See, e.g., *U.S. v. Jordan,* 890 F.2d 968, 975–76 (7th Cir. 1989) [2#18]; *U.S. v. Cervantes,* 878 F.2d 50, 56 (2d Cir. 1989) [2#8]; *U.S. v. Nuno-Para,* 877 F.2d 1409, 1415 (9th Cir. 1989) [2#9]; *U.S. v. Otero,* 868 F.2d 1412, 1415 (5th Cir. 1989) [2#3].

Three circuits have held that the government must receive notice before the district court departs downward on grounds not raised by either party. *U.S. v. Edelin,* 996 F.2d 1238, 1245 (D.C. Cir. 1993); *U.S. v. Andruska,* 964 F.2d 640, 643–44 (7th Cir. 1992) [4#22]; *U.S. v. Jagmohan,* 909 F.2d 61, 64 (2d Cir. 1990) [3#10]. See also *Burns,* 111 S. Ct. at 2185 n.4 ("Under Rule 32, it is clear that the defendant and the Government enjoy equal procedural entitlements"). In *Jagmohan,* however, "the failure of the district court to give the government notice of its intention to depart was harmless error," because the government's arguments against departure would have been unavailing.

Some courts have held that the court need not personally notify the defendant that departure is under consideration—sufficient notice is given when the factors warranting departure are identified in the presentence report and the defendant receives the report before sentencing, or the defendant receives notice at the sentencing hearing and opportunity to comment. See *U.S. v. Hill,* 951 F.2d 867, 868 (8th Cir. 1992); *U.S. v. Contractor,* 926 F.2d 128, 131–32 (2d Cir. 1991); *U.S. v. Williams,* 901 F.2d 1394, 1400 (7th Cir. 1990), vacated, 111 S. Ct. 2845 (1991) (remanded in light of *Burns*); *U.S. v. Anders,* 899 F.2d 570, 575–77 (6th Cir. 1990) [3#6]; *U.S. v. Hernandez,* 896 F.2d 642, 644 (1st Cir. 1990) [3#3]; *U.S. v. Acosta,* 895 F.2d 597, 600–01 (9th Cir. 1990) [3#2]. The Third Circuit, citing *Burns,* held that the reference in the PSR to the government's implied request for upward departure did not provide adequate notice that the court would depart on similar grounds where the PSR did not endorse the departure and the court adopted the PSR's findings. *U.S. v. Barr,* 963 F.2d 641, 655–56 (3d Cir. 1992) (remanded).

H. Statement of Reasons for Departure

Several circuits require district courts to clearly identify the factors warranting departure and give specific reasons for the extent of the departure. See *U.S. v. Brady,* 928 F.2d 844, 848–49 (9th Cir. 1991) [4#1]; *U.S. v. Jackson,* 921 F.2d 985, 989–90 (10th Cir. 1990) (en

banc); *U.S. v. Ocasio,* 914 F.2d 330, 336 & n.1 (1st Cir. 1990); *U.S. v. Gayou,* 901 F.2d 746, 749–50 (9th Cir. 1990) [3#1]; *U.S. v. Cervantes,* 878 F.2d 50, 54 (2d Cir. 1989) [2#8]. But see *U.S. v. Huddleston,* 929 F.2d 1030, 1031 (5th Cir. 1991) (not required to give specific reasons for extent of departure). Others have required courts at least to specify the reasons for departure. See *U.S. v. Perkins,* 963 F.2d 1523, 1527–28 (D.C. Cir. 1992); *U.S. v. Thomas,* 961 F.2d 1110, 1118–19 (3d Cir. 1992); *U.S. v. Suarez,* 939 F.2d 929, 933 (11th Cir. 1991); *U.S. v. Fields,* 923 F.2d 358, 361 (5th Cir. 1990); *U.S. v. Newsome,* 894 F.2d 852, 856–57 (6th Cir. 1990) [3#2]; *U.S. v. Kennedy,* 893 F.2d 825, 828–29 (6th Cir. 1990) [3#1] (and must explain reason for going beyond next higher criminal history category).

The court should state its reasons in open court at the time of sentencing. *U.S. v. Carey,* 895 F.2d 318, 325–26 (7th Cir. 1990) [2#20]; *Newsome,* 894 F.2d at 857. See also *U.S. v. Feinman,* 930 F.2d 495, 501 (6th Cir. 1991) (court must provide "specific reason" in a "short clear written statement or a reasoned statement from the bench"). Accord *U.S. v. Rusher,* 966 F.2d 868, 882 (4th Cir. 1992).

The reasons for departure must be supported by evidence in the record, *U.S. v. Michael,* 894 F.2d 1457, 1459 (5th Cir. 1990) [3#2], and it has been held that the court may base its departure solely on the basis of information contained in the presentence report, *U.S. v. Terry,* 916 F.2d 157, 160 (4th Cir. 1990); *U.S. v. Murillo,* 902 F.2d 1169, 1172 (5th Cir. 1990) [3#8]. See also *U.S. v. Ramirez-Jiminez,* 967 F.2d 1321, 1328–29 (9th Cir. 1992) (remanded: court relied only on proposed amendment that was subsequently withdrawn).

VII. Violation of Probation and Supervised Release

Several provisions of the Violent Crime Control and Law Enforcement Act of 1994 (hereinafter "1994 Crime Bill"), effective Sept. 13, 1994, affect revocation of probation and supervised release. Most are discussed below in the appropriate section. Courts should be aware of possible ex post facto problems.

The 1994 Crime Bill amended 18 U.S.C. §3553(a)(4) by adding subsection (B), which requires courts to consider "the kinds of sentence and the sentencing range established for . . . (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to" 28 U.S.C. §994(a)(3). This seems to indicate that courts should follow the Chapter 7 policy statements when sentencing defendants after revocation of probation or supervised release.

Previously, only the Seventh Circuit has held that the Chapter 7 policy statements are binding and must be followed "unless they contradict a statute or the Guidelines." See *U.S. v. Lewis,* 998 F.2d 497, 499 (7th Cir. 1993) (following statement in *Stinson v. U.S.,* 113 S. Ct. 1913, 1917 (1993), that indicates policy statements are binding) [6#1]. See also section I.G. Policy Statements. However, the Seventh Circuit recently overruled *Lewis* and joined other circuits in holding that the Chapter 7 policy statements are not binding because, unlike the policy statement at issue in *Williams v. U.S.,* 112 S. Ct. 1112 (1992), upon which *Stinson* relied, they "are neither guidelines nor interpretations of guidelines. . . . Such policy statements are entitled to great weight . . . , but they do not bind the sentencing judge. Although they are an element in his exercise of discretion and it would be an abuse of discretion for him to ignore them, they do not replace that discretion by a rule." *U.S. v. Hill,* – F.3d – (7th Cir. Jan. 30, 1995). Accord *U.S. v. Milano,* 32 F.3d 1499, 1503 (11th Cir. 1994) (reaffirming

pre-*Stinson* holding that Chapter 7 is not binding); *U.S. v. Mathena,* 23 F.3d 87, 93 (5th Cir. 1994); *U.S. v. Forrester,* 19 F.3d 482, 484 (9th Cir. 1994) [6#10]; *U.S. v. Sparks,* 19 F.3d 1099, 1101 n.3 (6th Cir. 1994) (reaffirming pre-*Stinson* holding) [6#12]; *U.S. v. Anderson,* 15 F.3d 278, 285–86 & n.6 (2d Cir. 1994) [6#11]; *U.S. v. Levi,* 2 F.3d 842, 845 (8th Cir. 1993) (in context of whether a Chapter 7 policy statement is a "law" for ex post facto purposes); *U.S. v. Hooker,* 993 F.2d 898, 900–02 (D.C. Cir. 1993).

Before *Stinson* and *Williams,* most circuits held that Chapter 7 must be considered, but is not binding. See *U.S. v. Thompson,* 976 F.2d 1380, 1381 (11th Cir. 1992) (sentence on revocation of supervised release above maximum range in §7B1.4, p.s. was proper—Chapter Seven policy statements are advisory, not binding); *U.S. v. Bermudez,* 974 F.2d 12, 14 (2d Cir. 1992) (remanded: although not mandatory, court should have considered Chapter Seven after revocation of supervised release even though defendant was originally sentenced before Guidelines took effect) [5#4]; *U.S. v. Cohen,* 965 F.2d 58, 60–61 (6th Cir. 1992) (affirmed sentence where district court considered, then rejected, §7B1.4, p.s., sentence) [4#22]; *U.S. v. Headrick,* 963 F.2d 777, 780 (5th Cir. 1992) (same); *U.S. v. Lee,* 957 F.2d 770, 773 (10th Cir. 1992) (affirmed: should have considered Chapter Seven policy statements but not doing so was harmless error in this case) [4#16]; *U.S. v. Fallin,* 946 F.2d 57, 58 (8th Cir. 1991) (harmless error not to consider Chapter Seven where it was defendant's second identical violation and, given blatant defiance of release terms, sentence imposed was appropriate) [4#10]. Cf. *U.S. v. Baclaan,* 948 F.2d 628, 630–31 (9th Cir. 1991) (remanded for district court to consider §7B1.4(b)(2) after revocation of supervised release for drug possession under 18 U.S.C. 3583(g)) (see summary in sec. VII.B.2).

Following this reasoning, several circuits have held that a "departure" from the range in §7B1.4 is not subject to the strict rules governing guideline departures. See, e.g., *U.S. v. Mathena,* 23 F.3d 87, 93 n.13 (5th Cir. 1994) ("A sentence which diverges from advisory policy statements is not a departure such that a court has to provide notice or make specific findings normally associated with departures"); *U.S. v. Anderson,* 15 F.3d 278, 285–86 (2d Cir. 1994) (need not follow usual departure procedures, sentence will be affirmed "provided (1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable") [6#11]; *U.S. v. Jones,* 973 F.2d 605, 607–08 (8th Cir. 1992) ("court is not required to make the explicit, detailed findings required when it departs upward from a binding guideline"); *U.S. v. Blackston,* 940 F.2d 877, 893 (3d Cir. 1991) (court did not have to justify departure when sentencing above §7B1.4, p.s. range, but merely give general reasons for higher sentence—Chapter Seven policy statements "are merely advisory" and need only be "considered"). If defendant's probation sentence was the result of a downward departure, Note 1 to §7B1.4 advises that an upward departure may be warranted. See, e.g., *U.S. v. Forrester,* 19 F.3d 482, 484–85 (9th Cir. 1994) (affirmed: after considering Chapter 7 and recommended range of 3–9 months, district court properly relied on Note 4 to sentence defendant, who was originally subject to 33–41-month guideline range but received five years' probation after departure, to 33 months after revocation) [6#10]. Cf. *U.S. v. Denard,* 24 F.3d 599, 602 (4th Cir. 1994) (remanded: for defendant subject to 15–21 month range before departure to probation, court may impose sentence above 3–9-month range in §7B1.4; appellate court stated this is not a departure because Chapter 7 is not binding).

Some circuits have held that the amended Chapter 7 policy statements are applicable to defendants who were sentenced before Nov. 1990, but whose violation of supervised release occurred after that date. See, e.g., *U.S. v. Schram,* 9 F.3d 741, 742–43 (9th Cir. 1993) [6#4]; *U.S. v. Levi,* 2 F.3d 842, 844–45 (8th Cir. 1993) [6#4]; *Bermudez,* 974 F.2d at 13–14.

Note that many of the cases discussed below involved revocations before the Nov. 1990 amendments.

A. Revocation of Probation

1. Sentencing

Note: The 1994 Crime Bill amended the "available . . . at the time of initial sentencing" language in 18 U.S.C. §3565(a)(2) discussed below. Now, after revocation of probation a defendant should be resentenced under 18 U.S.C. §§3551–3559, indicating that courts are no longer limited to the guideline range that applied at defendant's original sentencing, as most circuits have held. Ex post facto problems may limit the application of this change for defendants whose original offense occurred before the effective date of the amendment, Sept. 13, 1994. The following discussion covers case law before the crime bill change.

Before the 1990 amendments to §7B1, four circuits held that when probation is revoked under 18 U.S.C. §3565(a)(2), any sentence of imprisonment is limited by the guideline range that applied to the original offense of conviction. The conduct that caused the revocation may be considered only in deciding whether to continue or revoke probation and in determining the appropriate sentence within the applicable guideline range. The court may also consider whether to depart from the guideline sentence, but only if the facts supporting a departure were present at the initial sentencing. *U.S. v. Alli,* 929 F.2d 995, 998 (4th Cir. 1991) [4#3]; *U.S. v. White,* 925 F.2d 284, 286–87 (9th Cir. 1991) [3#20]; *U.S. v. Von Washington,* 915 F.2d 390, 391–92 (8th Cir. 1990) [3#14]; *U.S. v. Smith,* 907 F.2d 133, 135 (11th Cir. 1990) [3#11]. See also *U.S. v. Tellez,* 915 F.2d 1501, 1502 (11th Cir. 1990) (revocation sentence limited by guideline range for original offense even though defendant was sentenced under pre-Guidelines law when district court held Guidelines unconstitutional) [3#15]. In cases involving imposition and revocation of probation after the 1990 amendments were in effect, the Third and Fifth Circuits agreed with this interpretation. *U.S. v. Williams,* 961 F.2d 1185, 1187 (5th Cir. 1992) (remanded: departure may not be based on conduct that occurred after original sentencing); *U.S. v. Boyd,* 961 F.2d 434, 437–39 (3d Cir. 1992) (12-month sentence improper where guideline maximum at original sentencing was six months) [4#21].

Note that, because a sentence following probation revocation must be one that was "available . . . at the time of the original sentencing" pursuant to §3565(a)(2), §7B1 may not be used for defendants sentenced before Nov. 1, 1990, even if revocation was after that date. See *U.S. v. Maltais,* 961 F.2d 1485, 1486–87 (10th Cir. 1992) [4#21]; *U.S. v. Williams,* 943 F.2d 896, 896 (8th Cir. 1991) [4#10].

The Ninth Circuit held that to the extent that §7B1.4, p.s. conflicts with the plain language of §3565(a)(2) by directing the sentencing court to take into account the conduct that violated probation, the policy statement is invalid. *U.S. v. Dixon,* 952 F.2d 260, 261–62 (9th Cir. 1991) (remanding 15-month sentence for resentencing within original range of 4–10 months) [4#16]. The Third Circuit, rather than invalidating §7B1.4, reconciled the policy statement with the statute. It held that where the original guideline range was 0–6 months, and the Revocation Table prescribed 3–9 months, the appropriate resentencing range is 3–6 months. *Boyd,* 961 F.2d at 438–39 (remanded).

2. Revocation for Drug Possession

Note: The amendment to 18 U.S.C. §3565(a)(2) discussed above will also affect sentences imposed after revocation for drug possession. In addition, the "not less than one-third of the original sentence" language has been deleted from §3565(a). Now, a "term of imprisonment" is required, and probation must also be revoked for possession of firearms or refusal of required drug testing, but no minimum term is specified. Again, ex post facto problems may arise, and the following caselaw predates these changes.

The "time of the original sentencing" rule noted above also applies when probation is revoked for drug possession under 18 U.S.C. §3565(a), which requires that defendant be sentenced "to not less than one-third of the original sentence." The Supreme Court resolved a circuit split by holding that "original sentence" should be read to mean the original guideline range. Thus, the minimum revocation sentence under this provision "is one-third the maximum of the originally applicable Guidelines range, and the maximum revocation sentence is the Guidelines maximum." *U.S. v. Granderson*, 114 S. Ct. 1259, 1263–69 (1994) [6#11]. Note that this ruling also applies when the term of probation resulted from a downward departure. See *U.S. v. Denard*, 24 F.3d 599, 601–02 (4th Cir. 1994) (remanded: for defendant subject to 15–21 month range before departure, minimum required sentence under §3565(a) is seven months, not one third of 36-month probation).

Before *Granderson*, most circuits to decide the issue held that "original sentence" refers to the maximum original guideline sentence. See *U.S. v. Penn*, 17 F.3d 70, 74 (4th Cir. 1994) [6#10]; *U.S. v. Alese*, 6 F.3d 85, 86–87 (2d Cir. 1993) [6#5]; *U.S. v. Diaz*, 989 F.2d 391, 392–93 (10th Cir. 1993) (reversed) [5#11]; *U.S. v. Clay*, 982 F.2d 959, 962–63 (6th Cir. 1993) (remanded) [5#8]; *U.S. v. Granderson*, 969 F.2d 980, 983–84 (11th Cir. 1992) (vacated); *U.S. v. Gordon*, 961 F.2d 426, 430–33 (3d Cir. 1992) (remanded) [4#21]. Three circuits had held that it included the term of probation that was imposed. See *U.S. v. Sosa*, 997 F.2d 1130, 1133 (5th Cir. 1993) [6#2]; *U.S. v. Byrkett*, 961 F.2d 1399, 1400–01 (8th Cir. 1992) (affirming eight-month prison term where original guideline range was 0–6 months but original sentence was two years' probation) [4#23]; *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) (affirming one-year sentence imposed on defendant originally sentenced to three-year term of probation; also noting that one-year sentence was supported by district court's use of §§7B1.1, 7B1.3, and 7B1.4, p.s., which called for 12–18-month term) [4#15].

B. Revocation of Supervised Release

1. Sentencing

A sentence imposed upon revocation of supervised release is *not* limited by the original guideline sentence—the court may impose the full term of supervised release. 18 U.S.C. §3583(e)(3). See also *U.S. v. Mandarelli*, 982 F.2d 11, 12–13 (1st Cir. 1992); *U.S. v. Smeathers*, 930 F.2d 18, 19 (8th Cir. 1991) [4#3]; *U.S. v. Scroggins*, 910 F.2d 768, 769–70 (11th Cir. 1990) [3#13]; *U.S. v. Lockard*, 910 F.2d 542, 544 (9th Cir. 1990) [3#11]; *U.S. v. Dillard*, 910 F.2d 461, 466–67 (7th Cir. 1990). (Note: In *Dillard*, the Seventh Circuit originally held that the maximum term that may be imposed is the term of supervised release minus any time served on the original sentence. See 3#12. The opinion was subsequently amended.)

The 1994 Crime Bill added new 18 U.S.C. §3583(h), which authorizes the reimposition of a term of supervised release to follow imprisonment after revocation. "The length of such

term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation." This essentially codifies the position of a minority of the circuits, which had held that supervised release may be reimposed, provided that the combined length of the prison sentence for the revocation and the new term of release does not exceed the length of the original term of release. See *U.S. v. O'Neil,* 11 F.3d 292, 293–302 (1st Cir. 1993) (error to impose two-year prison term plus new three-year term of release after revoking original three-year term) [6#7]; *U.S. v. Stewart,* 7 F.3d 1350, 1352 (8th Cir. 1993) (error to impose 18-month prison term and two-year release term after revoking original three-year term); *U.S. v. Schrader,* 973 F.2d 623, 625 (8th Cir. 1992) (after revocation, court may reimpose term that will end on date original term of release would have ended) [5#6].

To date, most circuits have held that when supervised release is revoked, 18 U.S.C. §3583(e) does not allow a court to impose a new term of supervised release to follow completion of the revocation sentence. See *U.S. v. Malesic,* 18 F.3d 205, 206–07 (3d Cir. 1994) [6#12]; *U.S. v. Truss,* 4 F.3d 437, 438 (6th Cir. 1993) [6#3]; *U.S. v. Tatum,* 998 F.2d 893, 895 (11th Cir. 1993) [6#3]; *U.S. v. Rockwell,* 984 F.2d 1112, 1115–17 (10th Cir. 1993) (overruling *U.S. v. Bolling,* 947 F.2d 1461 (10th Cir. 1991)) [5#8]; *U.S. v. McGee,* 981 F.2d 271, 273–75 (7th Cir. 1992) [5#6]; *U.S. v. Koehler,* 973 F.2d 132, 133–36 (2d Cir. 1992) [5#4]; *U.S. v. Cooper,* 962 F.2d 339, 341 (4th Cir. 1992) [4#23]; *U.S. v. Holmes,* 954 F.2d 270, 272 (5th Cir. 1992) [4#23]; *U.S. v. Behnezhad,* 907 F.2d 896, 898–900 (9th Cir. 1990) (nor may it impose a fine or restitution) [3#11]. See also *U.S. v. Williams,* 958 F.2d 337, 338–39 (11th Cir. 1992) (may not reimpose supervised release when maximum term was previously imposed). Ex post facto problems may preclude reimposition of supervised release for defendants who committed their offenses before the effective date of new §3583(h), Sept. 13, 1994.

Where defendant was sentenced for a supervised release violation, and then sentenced for the offense causing the violation, the Eighth Circuit held that consecutive sentences were required. *U.S. v. Glasener,* 981 F.2d 973, 975–76 (8th Cir. 1992) (affirmed: had the order of sentencing hearings been reversed, §7B1.3(f), would have required consecutive sentences) [5#8]. Accord *U.S. v. Flowers,* 13 F.3d 395, 397 (11th Cir. 1994). However, the Sixth Circuit held that the district court erred in concluding that, under §7B1.3(f), a revocation sentence *must* be consecutive to state sentences previously imposed for the conduct that caused the revocation. The Chapter 7 policy statements regarding post-revocation sentencing must be considered, but they are not binding. *U.S. v. Sparks,* 19 F.3d 1099, 1100–01 (6th Cir. 1994) (remanded) [6#12].

As noted above, the usual procedures for departure have been held not to apply when sentencing above the range recommended in §7B1.4, p.s. The Second Circuit also held that the prohibition in 18 U.S.C. §3582(a), "that imprisonment is not an appropriate means of promoting correction and rehabilitation," see also 28 U.S.C. §994(k), does not apply to sentences under §3583(e). Defendant was subject to a range of 6–12 months under Chapter 7, but the district court sentenced defendant to 17 months because she needed "intensive substance abuse and psychological treatment in a structured environment." Because "a district court may consider such factors as the medical and correctional needs of an offender" in determining the length of the period of supervised release, "and because a district court may require a person to serve in prison the period of supervised release, the statute contemplates that the medical and correctional needs of the offender will bear on the length of time an offender serves in prison following revocation . . . . We conclude, therefore, that a court may consider an offender's medical and correctional needs when requiring that offender to

serve time in prison upon the revocation of supervised release." *U.S. v. Anderson,* 15 F.3d 278, 282–83 (2d Cir. 1994) [6#11]. The Fifth Circuit reached the same conclusion in affirming a sentence under §3583(g). "We now hold that the language of 18 U.S.C. §3583(g), and the purposes and intent behind the statute, is best served by permitting a district judge to consider a defendant's need for rehabilitation in arriving at a specific sentence of imprisonment upon revocation of supervised release. While we do not decide whether rehabilitative needs can be used to determine whether to *impose* imprisonment as an initial matter, once imprisonment is mandated by 18 U.S.C. §3583(g) rehabilitative needs may be considered to determine the length of incarceration within the sentencing range." *U.S. v. Giddings,* 37 F.3d 1091, 1096–97 (5th Cir. 1994) (may impose maximum permissible sentence because of need for drug rehabilitation) [7#4].

The Sixth Circuit held that the obligation to pay restitution as a condition of supervised release does not end if release is revoked. Restitution is "an independent term of the sentence of conviction, without regard to whether incarceration, probation, or supervised release were ordered," and "a district court's decision to revoke supervised release does not affect the obligation to pay restitution if such obligation was authorized under 18 U.S.C. §§3551, 3556." *U.S. v. Webb,* 30 F.3d 687, 689–91 (6th Cir. 1994) [7#2].

2. Revocation for Drug Possession

Note: 18 U.S.C. § 3583(g) has been revised by the 1994 Crime Bill. Revocation is now required for possession of firearms or refusal of required drug testing as well as for drug possession. While a term of imprisonment is still required in these situations, the requirement for a prison term of "not less than one-third of the term of supervised release" was deleted.

Under the prior law, the Ninth Circuit held that the Nov. 1990 amendments to §7B1.4, p.s. must be considered in sentencing after revocation. Defendant was originally sentenced to a three-year term of release before the amendments, but he had his release revoked and was resentenced after them. The district court did not use the 4- to 10-month range in §7B1.4(a) because it was less than the one-year term required by statute, and actually sentenced defendant to two years after finding one year was not adequate. The Ninth Circuit remanded, holding that §7B1.4(b)(2) "mandates a prison term of one year" because it substitutes the statutory minimum when the guideline range is smaller. *U.S. v. Baclaan,* 948 F.2d 628, 630–31 (9th Cir. 1991).

The Ninth Circuit also upheld the finding that defendant's positive drug tests and admission of drug use constituted "possession" under §3583(g), and it noted that the Guidelines "explicitly gave the courts discretion to determine whether positive drug tests constitute 'possession.'" Id. at 630 (citing §7B1.4, comment. (n.5). Accord *U.S. v. Young,* 41 F.3d 1184, 1186 (7th Cir. 1994); *U.S. v. Battle,* 993 F.2d 49, 50 (4th Cir. 1993); *U.S. v. Almand,* 992 F.2d 316, 318 (11th Cir. 1993); *U.S. v. Dow,* 990 F.2d 22, 24 (1st Cir. 1993); *U.S. v. Rockwell,* 984 F.2d 1112, 1114 (10th Cir. 1993) [5#8]; *U.S. v. Courtney,* 979 F.2d 45, 49–50 (5th Cir. 1992) (but evidence must show positive test did not result from passive inhalation). See also *U.S. v. Blackston,* 940 F.2d 877, 891 (3d Cir. 1991) (possession adequately evidenced by three positive tests and admission of use). Some of these circuits have also held that proof of knowing and voluntary use equals possession and supervised release must be revoked under §3583(g). See *Young,* 41 F.3d at 1186; *U.S. v. Clark,* 30 F.3d 23, 26 (4th Cir. 1994); *Rockwell,* 984 F.2d at 1114; *Courtney,* 979 F.2d at 50.

In setting the length of sentence after revocation for drug possession, the Fifth Circuit held that a defendant's need for rehabilitation may be considered. *U.S. v. Giddings,* 37 F.3d

1091, 1096–97 (5th Cir. 1994) (may impose maximum permissible sentence because of need for drug rehabilitation) [7#4].

Some circuits have held that the mandatory term under 18 U.S.C. §3583(g) may not be required if the original offense was committed before the original effective date of §3583(g), Dec. 31, 1988. See *U.S. v. Meeks*, 25 F.3d 1117, 1121–23 (2d Cir. 1994) [6#15]; *U.S. v. Paskow*, 11 F.3d 873, 877 (9th Cir. 1993) [6#7]; *U.S. v. Parriett*, 974 F.2d 523, 526–27 (4th Cir. 1992).

VIII. Sentencing of Organizations

[This section is reserved for future use relating to U.S.S.G. Chapter 8—Sentencing of Organizations, effective Nov. 1, 1991.]

IX. Sentencing Procedure

A. Plea Bargaining

1. Dismissed Counts

Most circuits have held that the sentencing court may take into account criminal conduct in counts that were dismissed as part of a plea bargain. See, e.g., *U.S. v. Fine*, 975 F.2d 596, 601–04 (9th Cir. 1992) (en banc) (to determine base offense level) [5#2]; *U.S. v. Quintero*, 937 F.2d 95, 97 (2d Cir. 1991); *U.S. v. Rodriguez-Nunez*, 919 F.2d 461, 464 (7th Cir. 1990); *U.S. v. Williams*, 917 F.2d 112, 114 (3d Cir. 1990); *U.S. v. Rutter*, 897 F.2d 1558, 1562 (10th Cir. 1990); *U.S. v. Alston*, 895 F.2d 1362, 1371–72 (11th Cir. 1990); *U.S. v. Blanco*, 888 F.2d 907, 909–11 (1st Cir. 1989); *U.S. v. Smith*, 887 F.2d 104, 106–07 (6th Cir. 1989) [2#14]; *U.S. v. Williams*, 880 F.2d 804, 805 (4th Cir. 1989); *U.S. v. Taplette*, 872 F.2d 101, 106–07 (5th Cir. 1989). See also §6B1.2(a) ("plea agreement that includes the dismissal of a charge or a plea agreement not to pursue a potential charge shall not preclude the conduct underlying such charge from being considered under the provisions of §1B1.3"). The Eighth Circuit held that a calculation of loss could not be based on an unwritten plea agreement that incorporated by reference a large number of cars sold with altered odometers that had been charged in a dismissed count, but remanded for the court to make factual findings on relevant conduct that might include those cars. *U.S. v. Morton*, 957 F.2d 577, 579–80 (8th Cir. 1992) [4#18].

The Ninth Circuit has held that counts dismissed as part of a plea bargain may not be used as the basis for departure. The court concluded that the "plain implication" of U.S.S.G. §6B1.2(a) "is that if the sentencing court believes that the remaining charges do not adequately reflect the seriousness of the defendant's behavior, the court should not accept the plea agreement." Thus, "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 then later count dismissed charges in calculating the defendant's sentence." *U.S. v. Castro-Cervantes*, 927 F.2d 1079, 1082 (9th Cir. 1990) (reversing departure based in part on five robberies admitted to by defendant but dismissed as part of plea bargain) (amending and superseding opinion at 911 F.2d 222). See also *U.S. v. Faulkner*, 952 F.2d 1066, 1069–71 (9th

Cir. 1991) (may not depart on basis of charges dismissed or not brought pursuant to plea agreement) (amending 934 F.2d 190 [4#8]). The Third Circuit cited *Faulkner* in holding that departure cannot be based on criminal conduct that the government agreed not to charge as part of the plea bargain. *U.S. v. Thomas,* 961 F.2d 1110, 1120–22 (3d Cir. 1992) [4#25]. But cf. *U.S. v. Kim,* 896 F.2d 678, 682–84 (2d Cir. 1990) (counts dismissed as part of plea bargain may be used for departure if they "relate in some way to the offense of conviction, even though not technically covered by the definition of relevant conduct") [3#3]; *U.S. v. Zamarippa,* 905 F.2d 337, 341–42 (10th Cir. 1990) (following *Kim*). A panel of the Fifth Circuit followed *Castro-Cervantes,* see *U.S. v. Ashburn,* 20 F.3d 1336 (5th Cir. 1994) [6#13], but on rehearing en banc the full court vacated that opinion and held that prior criminal conduct in counts dismissed as part of a plea bargain may be used to justify an upward departure. *U.S. v. Ashburn,* 38 F.3d 803, 807–08 (5th Cir. 1994) (en banc) [7#5].

2. Estimate of Sentence Before Accepting Plea

Does a sentencing court have an obligation to give a defendant an estimate of the likely guideline sentence before accepting a guilty plea? The appellate courts have said no, holding that informing defendant of the statutory maximum and, if applicable, minimum sentences satisfies due process and Fed. R. Crim. P. 11. See, e.g., *U.S. v. Watley,* 987 F.2d 841, 846 (D.C. Cir. 1993); *U.S. v. DeFusco,* 949 F.2d 114, 118 (4th Cir. 1991); *U.S. v. DeFusco,* 930 F.2d 413, 415 (5th Cir. 1991); *U.S. v. Rhodes,* 913 F.2d 839, 843 (10th Cir. 1990); *U.S. v. Salva,* 902 F.2d 483, 487–88 (7th Cir. 1990) (amending 894 F.2d 225 [3#1]); *U.S. v. Thomas,* 894 F.2d 996, 997 (8th Cir. 1990); *U.S. v. Henry,* 893 F.2d 46, 48–49 (3d Cir. 1990); *U.S. v. Turner,* 881 F.2d 684, 685–86 (9th Cir. 1989) [2#12]; *U.S. v. Fernandez,* 877 F.2d 1138, 1142–43 (2d Cir. 1989) [2#9]. See also *U.S. v. Selfa,* 918 F.2d 749, 752 (9th Cir. 1990) (government not obligated to compute sentencing range in advance). Cf. *U.S. v. Watch,* 7 F.3d 422, 426–29 (5th Cir. 1993) (remanded: although district court is not required to calculate sentence before accepting plea, it violated Rule 11 by not informing defendant at the plea colloquy that he could be subject to mandatory minimum, even though the indictment purposely omitted alleging drug quantity in order to avoid a mandatory minimum) [6#6].

The Second Circuit recommended, however, that "where feasible" courts should advise defendants of the likely sentence before accepting the plea, *Fernandez,* 877 F.2d at 1144, and the Seventh Circuit recommended withholding acceptance of a guilty plea until after the release of the presentence report, *Salva,* 902 F.2d at 488. Note that U.S.S.G. §6B1.1(c), p.s., cited approvingly in *Salva,* states: "The court shall defer its decision to accept or reject [a plea agreement] until there has been an opportunity to consider the presentence report." One court has suggested that plea agreements should "explicitly address" the possibility of departure, even if departure is not recommended by the government or probation officer. *U.S. v. Burns,* 893 F.2d 1343, 1349 (D.C. Cir. 1990) [3#1], rev'd on other grounds, 111 S. Ct. 2182 (1991) [4#4].

Courts have held that a defense attorney's underestimation of the probable guideline range is not grounds for withdrawal of a guilty plea. See *U.S. v. Lambey,* 974 F.2d 1389, 1393–96 (4th Cir. 1992) (en banc); *U.S. v. Jones,* 905 F.2d 867, 868 (5th Cir. 1990); *Turner,* 881 F.2d at 686–87; *U.S. v. Sweeney,* 878 F.2d 68, 69–70 (2d Cir. 1989) [2#9]. However, in a case where all parties firmly agreed that the maximum sentence would be less than ten years, and defendant based his guilty plea on that, he was allowed to withdraw his plea when an unexpectedly high offense level resulted in a *minimum* sentence of ten years. *Watley,* 987 F.2d at 846–48.

3. Deferring Acceptance of Plea Agreement

Fed. R. Crim. P. 11(e)(2) allows the court to accept a plea agreement immediately or defer acceptance pending consideration of the presentence report. U.S.S.G. §6B1.1(c), p.s., however, states that the court "shall defer its decision to accept or reject" plea agreements or nonbinding recommendations "until there has been an opportunity to consider the presentence report." The Sixth Circuit held that when a court accepts a plea agreement before the PSR is available, the acceptance is contingent on the court's consideration of the report. *U.S. v. Kemper,* 908 F.2d 33, 36 (6th Cir. 1990). Accord *U.S. v. Foy,* 28 F.3d 464, 471 (5th Cir. 1994) ("We conclude that section 6B1.1(c) makes a district court's acceptance of a guilty plea contingent upon the court's review of the PSR. . . . Even so, the better practice would certainly be for the district court to expressly point out at the Rule 11 hearing that although the plea met all the requirements for acceptance under Rule 11(e)(1)(B), or in the absence of an agreement, and was provisionally accepted, final acceptance was contingent on the court's review of the PSR"). See also Commentary to §6B1.1: "Section 6B1.1(c) reflects the changes in practice required by §6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report."

The Seventh Circuit noted §6B1.1(c), p.s., favorably in dicta in *U.S. v. Salva,* 902 F.2d 483, 488 (7th Cir. 1990) (amending 894 F.2d 225 [3#1]). But the circuit later clarified that *Salva* did not set forth a "procedural rule" requiring that the defendant see his PSR before the district court accepts his guilty plea. *U.S. v. Elmendorf,* 945 F.2d 989, 992–93 (7th Cir. 1991). In a similar vein, the D.C. Circuit "recommend[ed] that, wherever feasible, the district courts make their presentence reports available to defendants before taking their pleas," but noted that this is not a requirement and confers no right on defendants. *U.S. v. Horne,* 987 F.2d 833, 839 (D.C. Cir. 1993).

The Fourth Circuit held that §§6B1.1–1.3, p.s., do not change the standards by which a defendant may withdraw a guilty plea. Once the court accepts the plea, even if it delays acceptance of the plea agreement, Rules 11 and 32(d) still control withdrawal of the plea. *U.S. v. Ewing,* 957 F.2d 115, 117–19 (4th Cir. 1992) (defendant could not withdraw guilty plea accepted by court, even though court had deferred acceptance of plea agreement pending PSR—§6B1.1(c) applies to plea agreements, not guilty pleas) [4#18].

4. Stipulations

The parties may make a binding sentencing recommendation under Fed. R. Crim. P. 11(e)(1)(C), which the court may accept or reject and allow withdrawal of the plea. U.S.S.G. §6B1.2(c). See, e.g., *U.S. v. Mukai,* 26 F.3d 953, 955–56 (9th Cir. 1994) (remanded: district court could not sentence below minimum agreed to in Rule 11(e)(1)(C) plea agreement without allowing government to withdraw from agreement).

There is no similar provision in the Rules or Guidelines for binding *factual* stipulations. However, under some circumstances courts have held that a factual stipulation that affected the length of the sentence should have been followed or the defendant allowed to withdraw the plea. See *U.S. v. Torres,* 926 F.2d 321, 325–26 (3d Cir. 1991) (stipulation between defendant and government that kilogram of cocaine, which had been illegally seized and suppressed, would not be used in calculating the offense level should be honored by sentencing court or defendant allowed to withdraw plea because parties had relied on court's acceptance of agreement) [4#1]; *U.S. v. Kemper,* 908 F.2d 33, 36–37 (6th Cir. 1990) (construing

stipulation to amount of drugs in offense as binding recommendation for specific sentence under Fed. R. Crim. P. 11(e)(1)(C), held district court could reject stipulation as incorrect but should have allowed withdrawal of plea); *U.S. v. Jeffries,* 908 F.2d 1520, 1525–27 (11th Cir. 1990) (plea agreement stipulated to 13 grams of cocaine in offense; sentencing court must follow or allow withdrawal of plea agreement); *U.S. v. Mandell,* 905 F.2d 970, 971–73 (6th Cir. 1990) (plea agreement that "clearly state[d]" offense level would be 20 was violated when court sentenced defendant on basis of offense level of 27 after it had accepted agreement, even though resulting sentence was within general range contemplated in agreement; defendant entitled to specific performance or withdrawal of plea).

In a case where the district court imposed a stiffer fine than that stipulated to in a plea agreement, the Second Circuit held remand was proper to either allow withdrawal of the guilty plea or enforcement of the fine stipulation. Because the court was free to impose a term of imprisonment on remand (the agreement was silent as to imprisonment), the appellate court gave the defendant the opportunity to withdraw the appeal and accept the original sentence that did not include imprisonment. *U.S. v. Bohn,* 959 F.2d 389, 394–95 (2d Cir. 1992) [4#20].

Otherwise, U.S.S.G. §6B1.4(d) states that the sentencing court is not bound by stipulations in plea agreements, but is free to determine the facts relevant to sentencing. See also *U.S. v. Velez,* 1 F.3d 386, 389 (6th Cir. 1993) (court not bound by stipulation that relevant conduct was limited to defendant's activities in Iowa); *U.S. v. Bennett,* 990 F.2d 998, 1002–03 (7th Cir. 1993) (not bound by stipulation that defendant was not career offender); *U.S. v. Lewis,* 979 F.2d 1372, 1374–75 (9th Cir. 1992) (same) [5#6]; *U.S. v. Westerman,* 973 F.2d 1422, 1426 (8th Cir. 1992) (not bound by stipulation that defendant was minimal participant); *U.S. v. Hernandez,* 967 F.2d 456, 459 (10th Cir. 1992) (not bound by stipulation that acceptance of responsibility reduction applied); *U.S. v. Telesco,* 962 F.2d 165, 167–68 (2d Cir. 1992) (not bound by inaccurate drug quantity stipulation—noting that inaccurate quantity in agreement violated §6B1.4(a)); *U.S. v. Mason,* 961 F.2d 1460, 1462 (9th Cir. 1992) (same); *U.S. v. McCann,* 940 F.2d 1352, 1357–58 (10th Cir. 1991) (remanded: court required to consider drugs even though stipulation indicated it should not); *U.S. v. Medina-Saldana,* 911 F.2d 1023, 1024 (5th Cir. 1990) (need not follow government recommendation to sentence at lower end of range); *U.S. v. Garcia,* 902 F.2d 324, 326–27 (5th Cir. 1990) (court may find larger quantity of drugs than stipulated); *U.S. v. Forbes,* 888 F.2d 752, 754 (11th Cir. 1989) (court not bound to find defendant played a "minor role" as stipulated).

Although courts are not bound by stipulations, the government's arguing a position contrary to that agreed upon may violate the plea agreement and defendant should be given the opportunity to withdraw his plea. For example, the First Circuit remanded a case for resentencing before a different judge where the government, although reciting the terms of the plea agreement to the court, argued for a longer sentence than it stipulated to and failed to inform the court of defendant's cooperation. *U.S. v. Canada,* 960 F.2d 263, 268–73 (1st Cir. 1992) (holding government violated terms of plea agreement, citing *Santobello v. New York,* 404 U.S. 257, 262–63 (1971)). Similarly, the Fifth Circuit remanded for resentencing before a different judge a case where the government argued at sentencing that the acceptance of responsibility reduction should not be given, even though it had stipulated that defendant was entitled to it. *U.S. v. Valencia,* 985 F.2d 758, 760–61 (5th Cir. 1993). Accord *U.S. v. Enriquez,* 42 F.3d 769, 771–73 (2d Cir. 1994) (same, government agreed to vacating sentence, remanding for new sentence before new judge, and new presentence report; however, government may argue in favor of obstruction of justice enhancement, even though that

may lessen chance of §3E1.1 adjustment, because there was no stipulation on that issue). See also *U.S. v. Myers,* 32 F.3d 411, 413 (9th Cir. 1994) (remanded: "It was insufficient that the court, by reading the presentence report and the plea agreement, was aware that the government had agreed to recommend a sentence at the low end of the guideline range"—government made no recommendation before sentencing and merely confirmed agreement when defendant objected after sentence was pronounced).

A district court properly refused to accept a plea agreement because it concluded that the resulting sentence, which included a substantial downward departure, would have been too low compared with sentences of less culpable defendants. *U.S. v. LeMay,* 952 F.2d 995, 997 (8th Cir. 1991) [4#14].

5. Waiver of Rights in Plea Agreement

The Eleventh Circuit held that defendants may validly waive their right to appeal a Guidelines sentence, but the waiver must be specifically addressed in the plea colloquy. The waiver "must be knowing and voluntary," which in most instances means that "the district court must have specifically discussed the sentence appeal waiver with the defendant during the Rule 11 hearing." The court also held that "the remedy for an unknowing and involuntary waiver is essentially severance"—the waiver "is severed or disregarded . . . while the rest of the plea agreement is enforced as written and the appeal goes forward." *U.S. v. Bushert,* 997 F.2d 1343, 1350–54 (11th Cir. 1993) (waiver invalid because record does not show that defendant clearly understood full significance of waiver, but sentence affirmed because defendant's claims of error were meritless) [6#3]. See also *U.S. v. Baty,* 980 F.2d 977, 978–80 (5th Cir. 1992) (waiver of appeal invalid because court did not adequately explain consequences to defendant; however, sentence affirmed because no error was made); *U.S. v. Wessells,* 936 F.2d 165, 168 (4th Cir. 1991) (where waiver was held invalid, appellate court addressed merits of appeal). Cf. *U.S. v. Michlin,* 34 F.3d 896, 898 (9th Cir. 1994) (affirmed waiver even though district court did not specifically advise defendant he was giving up right to appeal—prosecutor "read the plea agreement in open court, and the plea agreement clearly stated that Michlin waived his right to appeal. We have held that so long as the plea agreement contains an express waiver of appellate rights, a Rule 11 colloquy concerning the waiver is not required.").

Other circuits have also held that sentence appeal waivers made knowingly and voluntarily will be enforced. See, e.g., *U.S. v. Melancon,* 972 F.2d 566, 567–68 (5th Cir. 1992); *U.S. v. Rutan,* 956 F.2d 827, 829 (8th Cir. 1992); *U.S. v. Navarro-Botello,* 912 F.2d 318, 321 (9th Cir. 1990); *U.S. v. Wiggins,* 905 F.2d 51, 53 (4th Cir. 1990). See also *U.S. v. Salcido-Contreras,* 990 F.2d 51, 51–53 (2d Cir. 1993) (upholding waiver of right to appeal sentence that was imposed within range specified in plea agreement). The Fourth Circuit stated that "a waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver." *U.S. v. Marin,* 961 F.2d 493, 496 (4th Cir. 1992). The *Marin* court upheld a waiver where defendant received an upward departure—the possibility of departure was part of the plea agreement, and the final sentence was within the agreed upon range.

The Second Circuit has held that defendants may validly waive the right to request a downward departure. *U.S. v. Braimah,* 3 F.3d 609, 611–13 (2d Cir. 1993). Cf. *U.S. v. Livingston,* 1 F.3d 723, 725 (8th Cir. 1993) (defendant waived right to challenge 10-year

mandatory minimum by agreeing to it in plea agreement—"by consenting to a specific sentence in a plea agreement, the defendant waives the right to challenge that sentence on appeal").

However, note that a waiver may not be enforceable if an unconstitutional factor is used in sentencing. See *U.S. v. Jacobson,* 15 F.3d 19, 22–23 (2d Cir. 1994) ("Although an agreement not to appeal a sentence within the agreed Guidelines range is enforceable, . . . we see nothing in such an agreement that waives the right to appeal from an arguably unconstitutional use of naturalized status as the basis for a sentence"); *Marin,* 961 F.2d at 496 ("a defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race"). See also *U.S. v. Attar,* 38 F.3d 727, 732 (4th Cir. 1994) ("Nor do we think such a defendant can fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations").

Note that the Ninth Circuit held that if one aspect of the sentence is not in accordance with the plea agreement, a waiver of appeal is no longer valid and defendant may appeal the entire sentence, not just the one aspect. *U.S. v. Haggard,* 41 F.3d 1320, 1325 (9th Cir. 1994) (where defendant waived right to appeal sentence that was within guideline range but district court departed upward, defendant could appeal factors involved in calculation of guideline range as well as the departure).

B. Burden of Proof

Generally, the burden of proof for all factual matters at sentencing is preponderance of the evidence, the burden is on the government to establish the initial offense level, and the burden is then on the party seeking any adjustment to the offense level. See, e.g., *U.S. v. Salmon,* 948 F.2d 776, 778–79 (D.C. Cir. 1991); *U.S. v. Fonner,* 920 F.2d 1330, 1333 (7th Cir. 1990); *U.S. v. Alfaro,* 919 F.2d 962, 965 (5th Cir. 1990); *U.S. v. Ocasio,* 914 F.2d 330, 332–33 (1st Cir. 1990); *U.S. v. Williams,* 905 F.2d 217, 218 (8th Cir. 1990); *U.S. v. Frederick,* 897 F.2d 490, 491–93 (10th Cir. 1990) [3#3]; *U.S. v. Rodriguez,* 896 F.2d 1031, 1032–33 (6th Cir. 1990) [3#3]; *U.S. v. Alston,* 895 F.2d 1362, 1373 (11th Cir. 1990) [3#5]; *U.S. v. Kirk,* 894 F.2d 1162, 1163–64 (10th Cir. 1990) [3#1]; *U.S. v. Howard,* 894 F.2d 1085, 1088–90 (9th Cir. 1990) [3#1]; *U.S. v. McDowell,* 888 F.2d 285, 290–91 (3d Cir. 1989) [2#17]; *U.S. v. Guerra,* 888 F.2d 247, 250 (2d Cir. 1989); *U.S. v. Urrego-Linares,* 879 F.2d 1234, 1238–39 (4th Cir. 1989) [2#10]. But cf. *U.S. v. Restrepo,* 884 F.2d 1294, 1296 (9th Cir. 1989) (burden on defendant to prove it is "clearly improbable" weapon connected to offense so as to avoid enhancement under §2D1.1(b)(1)) [2#13]; *U.S. v. McGhee,* 882 F.2d 1095, 1097–99 (6th Cir. 1989) (same) [2#12]. The Commentary to §6A1.3 was amended Nov. 1991 to indicate the Sentencing Commission's approval of the preponderance standard for "resolving disputes regarding application of the guidelines to the facts of a case."

The Ninth Circuit held that a preponderance standard is required for factors that would enhance a defendant's sentence but emphasized that such a standard is a "meaningful" one: it is a "misinterpretation [of the preponderance test] that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has pro-

duced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." *U.S. v. Restrepo,* 946 F.2d 654, 661 (9th Cir. 1991) (en banc) [4#9], replacing partially withdrawn opinion at 903 F.2d 648 (9th Cir. 1990) [3#7]. Cf. *U.S. v. Gigante,* 39 F.3d 42, 47–48 (2d Cir. 1994) (dicta: "we believe that the weight of the evidence is at some point a factor to be considered by a court with regard to both adjustments and upward departures. With regard to adjustments, we believe that a district judge would be entitled to depart downward when faced with a situation in which a series of adjustments, each of which involves conduct proven by a bare preponderance, lead[s] to substantial enhancement. The magnitude of the possibility of factual error increases as each adjustment is added to the base offense level. A district judge convinced that the weight of the factual record and ultimate sentence are substantially misaligned would be entitled to conclude that the Commission had not taken this into account and to depart downward.").

One court has suggested and one has held that extreme departures require a higher standard of admissibility for facts underlying the departure. See *U.S. v. St. Julian,* 922 F.2d 563, 569 n.1 (10th Cir. 1990) (court should consider whether higher standard warranted); *U.S. v. Kikumura,* 918 F.2d 1084, 1100–02 (3d Cir. 1990) (clear and convincing standard required) [3#15]. See also *U.S. v. Bertoli,* 40 F.3d 1384, 1409–10 (3d Cir. 1994) (remanded: departure in fine "by a factor in excess of 50" must meet clear and convincing standard); *U.S. v. Seale,* 20 F.3d 1279, 1288 (3d Cir. 1994) (remanded: following *Kikumura,* seven-fold, $1.5 million departure in fine must meet clear and convincing standard) [6#12]. Two other circuits have suggested that a clear and convincing standard may be appropriate when relevant conduct would dramatically increase the sentence. See *Restrepo,* 946 F.2d at 661; *U.S. v. Townley,* 929 F.2d 365, 370 (8th Cir. 1991). But cf. *U.S. v. Washington,* 11 F.3d 1510, 1516 (10th Cir. 1993) (although there are "strong arguments that relevant conduct causing a dramatic increase in sentence ought to be subject to a higher standard of proof," for calculating the guideline range "the issue of a higher than a preponderance standard is foreclosed in this circuit").

The burden is on defendant to prove that a prior sentence was unconstitutionally imposed and should not be considered for sentencing purposes. *U.S. v. Unger,* 915 F.2d 759, 761 (1st Cir. 1990) [3#14]; *U.S. v. Newman,* 912 F.2d 1119, 1122 (9th Cir. 1990) [3#14]; *U.S. v. Davenport,* 884 F.2d 121, 123–24 (4th Cir. 1989) [2#13].

When the plea agreement establishes facts relevant to sentencing, no further proof of those facts is required. *U.S. v. Parker,* 874 F.2d 174, 177–78 (3d Cir. 1989) [2#7]. And "facts that are uncontested at the sentencing hearing may be relied upon by the court and do not require production of evidence at the hearing." *U.S. v. O'Dell,* 965 F.2d 937, 938 (10th Cir. 1992).

See also section IX.D. Evidentiary Issues.

C. Presentence Interview

Note: As amended effective Dec. 1, 1994, Fed. R. Crim. P. 32(b)(2) states: "Presence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

Previously, all circuits to rule specifically on the issue have held that defendants do not have a constitutional right to have an attorney present at the presentence interview. See *U.S.*

v. Hicks, 948 F.2d 877, 885 (4th Cir. 1991) (no Sixth Amendment rights at presentence interview) [4#13]; *U.S. v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990) (defendant's Fifth and Sixth Amendment rights not violated by not allowing counsel at presentence interview); *U.S. v. Jackson*, 886 F.2d 838, 845 (7th Cir. 1989) (no right to counsel at presentence interview). The Ninth Circuit used its supervisory power to hold that probation officers must honor requests by defendants to have an attorney present. *U.S. v. Herrera-Figueroa*, 918 F.2d 1430, 1433 (9th Cir. 1990) [3#16]. The Sixth Circuit agreed with the majority view that there is no Sixth Amendment right to counsel at a presentence interview but, citing the Ninth Circuit's approach, recommended that probation officers honor such a request from defendant or counsel. *U.S. v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1991) [4#14]. See also *U.S. v. Saenz*, 915 F.2d 1046, 1048 (6th Cir. 1990) (suggesting in dicta that defendant's attorney should not be excluded from presentence interview).

In the context of an ineffective assistance of counsel case, the Tenth Circuit agreed that defendants have no right to counsel at a presentence interview. See *U.S. v. Gordon*, 4 F.3d 1567, 1571–72 (10th Cir. 1993) ("Because the probation officer does not act on behalf of the government, we join those circuits that have concluded that the presentence interview is not a critical stage of the proceeding within the meaning of the Sixth Amendment. . . . Given that Defendant had no Sixth Amendment right to the presence or advice of counsel during the presentence interview, he cannot obtain relief for original counsel's failure to inform him of his Fifth Amendment right to refuse to answer the probation officer's presentence interview questions.").

Miranda warnings are not required at a routine presentence interview. *Hicks*, 948 F.2d at 885; *U.S. v. Cortes*, 922 F.2d 123, 126–27 (2d Cir. 1990) [3#20]; *U.S. v. Rogers*, 921 F.2d 975, 979–80 (10th Cir. 1990); *U.S. v. Davis*, 919 F.2d 1181, 1186–87 (6th Cir. 1990); *U.S. v. Jackson*, 886 F.2d 838, 841–42 n.4 (7th Cir. 1989).

Several courts have held that under the Guidelines, the probation officer is still a neutral information-gatherer for the court, not an agent of the government. See, e.g., *Johnson*, 935 F.2d at 50; *U.S. v. Miller*, 910 F.2d 1321, 1326 (6th Cir. 1990); *Woods*, 907 F.2d at 1543–44; *U.S. v. Belgard*, 894 F.2d 1092, 1096–99 (9th Cir. 1990) [3#2]; *Jackson*, 886 F.2d at 844.

D. Evidentiary Issues

1. Hearsay

Generally, hearsay evidence may be used in sentencing, provided the evidence is reliable and the defendant is afforded the opportunity to challenge it. See, e.g., *U.S. v. Petty*, 982 F.2d 1365, 1367–69 (9th Cir. 1993) (Confrontation Clause does not apply, and court may consider reliable hearsay); *U.S. v. Silverman*, 976 F.2d 1502, 1513 (6th Cir. 1992) (en banc) (same; following Fed. R. Crim. P. 32 is sufficient) [5#4]; *U.S. v. Helton*, 975 F.2d 430, 434 (7th Cir. 1992) (Confrontation Clause not violated when defendant is given opportunity to rebut evidence); *U.S. v. Wise*, 976 F.2d 393, 396–403 (8th Cir. 1992) (en banc) (Confrontation Clause does not apply at sentencing; consider hearsay if parties have opportunity to present reliable information on disputed facts) [5#3]; *U.S. v. Figaro*, 935 F.2d 4, 8 (1st Cir. 1991) ("reliability" is the essential evidentiary requirement at sentencing); *U.S. v. Query*, 928 F.2d 383, 384–85 (11th Cir. 1991) (may "consider reliable hearsay evidence at sentencing" provided defendant given opportunity to challenge reliability) [4#2]; *U.S. v. Frondle*, 918 F.2d 62, 64–65 (8th Cir. 1990) (court is "entitled to consider uncorroborated evidence, even hearsay, provided that the defendant is given an opportunity to explain or rebut the

evidence"); *U.S. v. Byrd,* 898 F.2d 450, 452–53 (5th Cir. 1990) (defendant's confrontation and cross-examination rights not violated by reliance on hearsay in PSR if given opportunity to present evidence and witnesses); *U.S. v. Sciarrino,* 884 F.2d 95, 96–97 (3d Cir. 1989) (use of reliable hearsay does not offend due process) [2#13]; *U.S. v. Beaulieu,* 893 F.2d 1177, 1180–81 (10th Cir. 1990) (same) [2#20]. See also *U.S. v. Ushery,* 968 F.2d 575, 583 (6th Cir. 1992) (use of hearsay does not violate due process).

The Third Circuit agrees, but has held that hearsay statements relied on to make extreme departures must meet a higher, "intermediate standard" of admissibility. *U.S. v. Kikumura,* 918 F.2d 1084 (3d Cir. 1990) [3#15].

The Third Circuit has also stated that the "sufficient indicia of reliability" standard in §6A1.3(a) "should be applied rigorously." *U.S. v. Miele,* 989 F.2d 659, 664 (3d Cir. 1993) [5#11]. The court remanded the case because the district court based the drug quantity on the testimony of an addict-informant without determining whether it met the reliability standard. *Id.* at 666–67 ("Because of the questionable reliability of an addict-informant, we think it is crucial that a district court receive with caution and scrutinize with care drug quantity or other precise information provided by such a witness"). See also *U.S. v. Simmons,* 964 F.2d 763, 776 (8th Cir. 1992) (remanded quantity determination—testimony by addict informant "marred by memory impairment" was not sufficiently reliable); *U.S. v. Robison,* 904 F.2d 365, 371–72 (6th Cir. 1990) (same for addict-witness with admittedly "hazy" memory).

The Seventh Circuit agreed with the Third that "section 6A1.3(a)'s reliability standard must be rigorously applied," and also that addict-witness testimony should be closely scrutinized. *U.S. v. Beler,* 20 F.3d 1428, 1433–36 (7th Cir. 1994) (remanded: district court included as relevant conduct amounts from one witness's higher estimates, but did not "directly address the contradiction and explain why it credit[ed] one statement rather than" lower estimates from that witness—"Before the court relies on the higher estimate, it must provide some explanation for its failure to credit the inconsistent statement"; also, "district court should have subjected any information provided by [addict-witness] to special scrutiny in light of his dual status as a cocaine addict and government informant") [6#12].

2. Evidence from Another Trial

Several circuits have held that reliable evidence from the trial of a third party may be used for sentencing purposes as long as defendant has notice and the opportunity to challenge it. See *U.S. v. Linnear,* 40 F.3d 215, 219 (7th Cir. 1994); *U.S. v. Ramirez,* 963 F.2d 693, 708 (5th Cir. 1992); *U.S. v. Coonce,* 961 F.2d 1268, 1281 (7th Cir. 1992) (statements at others' guilty plea hearings); *U.S. v. Berzon,* 941 F.2d 8, 19 (1st Cir. 1991) (role in offense, remanded because defendant was denied opportunity to challenge codefendant's testimony); *U.S. v. Pimental,* 932 F.2d 1029, 1032 (2d Cir. 1991) (drug quantity); *U.S. v. Notrangelo,* 909 F.2d 363, 364–66 (9th Cir. 1990) (obstruction of justice and more than minimal planning) [3#10]; *U.S. v. Castellanos,* 904 F.2d 1490, 1496 (11th Cir. 1990) (dispute over quantity of drugs; vacating and clarifying earlier opinion at 882 F.2d 474) [3#9]; *U.S. v. Beaulieu,* 893 F.2d 1177, 1179–81 (10th Cir. 1990) (role in offense finding) [2#20]. The Eleventh Circuit held that the sentencing court should follow the procedural safeguards in §6A1.3. *Castellanos,* 904 F.2d at 1496. See also *U.S. v. Falesbork,* 5 F.3d 715, 722 (4th Cir. 1993) (affirmed use of "hearsay accounts of testimony presented at other trials as evidence of the conduct relevant to sentencing"—district court may consider reliable hearsay).

3. Factual Disputes

Under Fed. R. Crim. P. 32(c)(3)(D), disputes over facts relevant to the sentence must be specifically resolved before imposition of sentence. See also U.S.S.G. §6A1.3. The following cases were remanded because the district court failed to resolve factual disputes: *U.S. v. Moore,* 977 F.2d 1227, 1228 (8th Cir. 1992); *U.S. v. Rosado-Ubiera,* 947 F.2d 644, 646 (2d Cir. 1991) [4#13]; *U.S. v. Edgecomb,* 910 F.2d 1309, 1313 (6th Cir. 1990); *U.S. v. Alvarado,* 909 F.2d 1443, 1444–45 (10th Cir. 1990); *U.S. v. Fernandez-Angulo,* 897 F.2d 1514, 1516 (9th Cir. 1990) (en banc); *U.S. v. Rosa,* 891 F.2d 1071, 1072–73 (3d Cir. 1989) [2#18]; *U.S. v. Burch,* 873 F.2d 765, 767–68 (5th Cir. 1989) [2#7]. The decision to hold an evidentiary hearing on a disputed guideline issue is within the discretion of the district court. *U.S. v. Cantero,* 995 F.2d 1407, 1412–13 (7th Cir. 1993); *U.S. v. Harrison-Philpot,* 978 F.2d 1520, 1525 (9th Cir. 1992); *U.S. v. Gerante,* 891 F.2d 364, 367 (1st Cir. 1989).

The Fifth Circuit held that remand to resolve a dispute is not necessary if the district court expressly adopted the facts set forth in defendant's PSR. *U.S. v. Sherbak,* 950 F.2d 1095, 1099 (5th Cir. 1992) (in adopting PSR, court implicitly "weighed the positions of the probation department and the defense and credited the probation department's facts"). Cf. *U.S. v. Morgan,* 942 F.2d 243, 245–46 (4th Cir. 1991) (remanded: "if the district court decides to adopt the proposed findings in the presentence report as its resolution of disputed facts, the record must be clear regarding which disputed issues were resolved by the adoption"; statement that court adopted PSR "in toto" not sufficient); *U.S. v. Villarino,* 930 F.2d 1527, 1529 (11th Cir. 1991) (remand not necessary where district court adopted PSR and "meaningful appellate review" of court's disposition of disputes was possible). The Ninth Circuit has held that "where the district court has received the PSR and the defendant's objections to it, allowed argument to be made and then adopted the PSR, no more is required under Rule 32(c)(3)(D)." However, "while a district court may adopt the factual findings of the PSR, it may not 'adopt conclusory statements unsupported by facts or the Guidelines.'" *U.S. v. Williams,* 41 F.3d 496, 499 (9th Cir. 1994).

Other courts have held that the district court must make an independent finding when defendant disputes facts. See, e.g., *U.S. v. Pedraza,* 27 F.3d 1515, 1530–31 (10th Cir. 1994) (remanded: "When faced with specific allegations of factual inaccuracy by the defendant, the court cannot satisfy Rule 32(c)(3)(D) by simply stating that it adopts the factual findings and guideline application in the presentence report"); *U.S. v. Fortier,* 911 F.2d 100, 103 (8th Cir. 1990) ("court may rely solely upon a presentence report for findings relevant to sentencing only if the facts in the presentence report are not disputed by the defendant"); *U.S. v. Mandell,* 905 F.2d 970, 974 (6th Cir. 1990) (same).

The Fifth Circuit has also held that the district court need not furnish tentative factual findings before a sentencing hearing to comply with §6A1.3, p.s., when it simply adopts the PSR. *U.S. v. Mueller,* 902 F.2d 336, 347 (5th Cir. 1990). Note, however, that the evidence in the PSR must be reliable. See *U.S. v. Patterson,* 962 F.2d 409, 414–15 (5th Cir. 1992) (remand required where court applied §3B1.1(c) enhancement based on recommendation in PSR addendum that relied on government attorney's unsworn statement).

As part of the defendant's right to challenge the reliability of facts in the PSR, the Tenth Circuit held that defendant "was entitled, upon request, to be informed by the probation office preparing his presentence report, of the factual basis or source of any information contained in the report which may have had an adverse effect on him during the sentencing process." *U.S. v. Wise,* 990 F.2d 1545, 1549–50 (10th Cir. 1992) (remanded: defendant should have been allowed to question probation officer about factual basis for conclusions in PSR) [5#11].

If resolution of a factual dispute would not change the criminal history category, and there would thus be no change in the sentence, the court need not resolve the dispute. *U.S. v. Fields*, 39 F.3d 439, 447 (3d Cir. 1994); *U.S. v. Woods*, 976 F.2d 1096, 1102 (7th Cir. 1992) [5#5]; *U.S. v. Williams*, 919 F.2d 1451, 1458 (10th Cir. 1990); *U.S. v. Lopez-Cavasos*, 915 F.2d 474, 476 (9th Cir. 1990). Disputes involving overlapping guideline ranges may also be left unresolved if the sentence would be the same regardless of the range chosen. See cases cited in Section IX.D. Overlapping Guideline Ranges Dispute.

The First and Ninth Circuits have remanded cases for sentencing courts to make appropriate findings when the courts did not attach a written record of findings to the PSR. See *U.S. v. Cruz*, 981 F.2d 613, 619 (1st Cir. 1992); *U.S. v. Roberson*, 917 F.2d 1158, 1161 (9th Cir. 1990) (modifying 896 F.2d 388) (failure to append findings is "ministerial error not requiring resentencing"—"the appropriate remedy is a limited remand . . . with instructions [to] append"). Other circuits have held, however, that remand is not required if the district court resolves factual disputes but does not append its findings to the PSR. *U.S. v. Pless*, 982 F.2d 1118, 1128–29 (7th Cir. 1992) (limited remand to attach written findings); *U.S. v. Musa*, 946 F.2d 1297, 1307–06 (7th Cir. 1991) (government is directed to attach findings to PSR before it is sent to the Bureau of Prisons); *U.S. v. Wach*, 907 F.2d 1038, 1041 (10th Cir. 1990) (remanded this case but, in future, Rule 36 motion before district court is proper remedy).

The First Circuit held that evidence presented at trial does not control for sentencing purposes, and that courts are required "independently to consider proffered information that is relevant to . . . the sentencing determination." *U.S. v. Tavano*, 12 F.3d 301, 305–07 (1st Cir. 1993) (error to refuse to consider evidence proffered by defendant because it differed from evidence at trial) [6#9].

The Tenth Circuit held that defendants seeking to show that their circumstances are outside the "heartland" of a guideline have no right to discovery of the Sentencing Commission's data used to formulate the guideline; 18 U.S.C. §3553(b) states "the court shall consider only the sentencing guidelines, policy statements, and official commentary." *U.S. v. LeRoy*, 984 F.2d 1095, 1098 (10th Cir. 1993) (also noting "numerous and apparent" practical problems) [5#8].

4. Unlawfully Seized Evidence

The Guidelines state that sentencing courts "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. §6A1.3(a). Several circuits have held that unlawfully seized evidence that would be excluded at trial may be considered in sentencing under the Guidelines. See *U.S. v. Kim*, 25 F.3d 1426, 1433–36 (9th Cir. 1994) [6#16]; *U.S. v. Montoya-Ortiz*, 7 F.3d 1171, 1181–82 (5th Cir. 1993); *U.S. v. Jenkins*, 4 F.3d 1338, 1344–45 (6th Cir. 1993) (distinguishing as dicta conclusion in *U.S. v. Nichols*, 979 F.2d 402, 410–11 (6th Cir. 1992) [5#5], that unlawfully seized evidence should not be used in setting base offense level) [6#3]; *U.S. v. Lynch*, 934 F.2d 1226, 1234–37 (11th Cir. 1991); *U.S. v. McCrory*, 930 F.2d 63, 68 (D.C. Cir. 1991) [4#1]; *U.S. v. Torres*, 926 F.2d 321, 325 (3d Cir. 1991) [4#1]. The D.C. Circuit noted that evidence that is unlawfully seized for the purpose of increasing the base offense level may require suppression at sentencing. *McCrory*, 930 F.2d at 69.

The Second Circuit held that illegally seized evidence *must* be considered at sentencing, absent a showing that it was seized to enhance the sentence. *U.S. v. Tejada*, 956 F.2d 1256,

1263 (2d Cir. 1992) [4#18]. However, before a hearing on whether evidence was unlawfully seized in order to enhance the sentence can be held, the defendant must first establish a Fourth Amendment violation. *U.S. v. Arango*, 966 F.2d 64, 66–67 (2d Cir. 1992) (by pleading guilty, defendant waived right to object to illegal search of van and thus was not entitled to evidentiary hearing at sentencing).

The Tenth Circuit held that evidence seized in violation of state law that showed defendant continued similar criminal activity after his arrest may be used to deny a reduction for acceptance of responsibility. *U.S. v. Jessup*, 966 F.2d 1354, 1356–57 (10th Cir. 1992) (affirmed) [4#24].

E. Procedural Requirements

The requirement for a statement of reasons for the imposition of the particular sentence, 18 U.S.C. §3553(c), is met when the reasons appear on the record of the sentencing proceedings in open court. *U.S. v. Wivell*, 893 F.2d 156, 158 (8th Cir. 1990) [3#1]. However, in order to avoid unnecessary appeals, the Eighth Circuit advised sentencing courts to "refer to the facts of each case and explain why they choose a particular point in the sentencing range" to meet the requirement of 18 U.S.C. §3553(c)(1) for ranges exceeding 24 months. *U.S. v. Dumorney*, 949 F.2d 997 (8th Cir. 1991) [4#13]. See also *U.S. v. Wilson*, 7 F.3d 828, 839–40 (9th Cir. 1993); *U.S. v. Georgiadis*, 933 F.2d 1219, 1223 (3d Cir. 1991); *U.S. v. Chartier*, 933 F.2d 111, 117 (2d Cir. 1991); *U.S. v. Veteto*, 920 F.2d 823, 826 & n.4 (11th Cir. 1991). Cf. *U.S. v. Knapp*, 955 F.2d 566, 568–69 (8th Cir. 1992) (court not required "to give an individualized statement of reasons when the same reasons may apply to two or more codefendants").

Similarly, the Eleventh Circuit has directed district courts to "elicit fully articulated objections" to the court's findings of fact and conclusions of law in order to facilitate appellate review. *U.S. v. Jones*, 899 F.2d 1097, 1102–03 (11th Cir. 1990) [3#8]. See also *U.S. v. White*, 888 F.2d 490, 495–96 (7th Cir. 1989) (because of the "dominant role of the sentencing judge's findings and reasons," it will aid the appellate court "if district judges marshal their findings and reasons in sentencing cases in the same way they do when making oral findings and conclusions under Fed. R. Civ. P. 52(a)"). Cf. *U.S. v. Range*, 982 F.2d 196, 198 (6th Cir. 1992) (remanded: findings below were not sufficiently specific to each defendant to review enhancement); *U.S. v. Harris*, 959 F.2d 246, 264–65 (D.C. Cir. 1992) (remanded for verification of correct drug amount where sentencing memorandum purported to rely on PSR but PSR contradicted memorandum).

The courts are split on whether the district court must notify the defendant in advance that it intends to reject the PSR's recommendation for an acceptance of responsibility adjustment. In a case where the district court denied the reduction at the sentencing hearing, the Ninth Circuit held that the sentencing court "should have articulated its reasons and justifications for denying the §3E1.1 reduction, should have notified the defendant before the sentencing hearing of these tentative findings, and should have held a hearing on the . . . issue." *U.S. v. Brady*, 928 F.2d 844, 848 (9th Cir. 1991) [4#1]. In a later case, without citing *Brady*, the Ninth Circuit held that the district court's finding of no acceptance of responsibility was not clearly erroneous, even though the defendant claimed he had no notice of the court's intention to deny the adjustment, because the denial was "based on evidence clearly available to the defense counsel" and the defendant "had 'ample opportunity . . . to take up the matters, put on evidence, and present an argument.'" *U.S. v. Palmer*, 946 F.2d 97, 100

(9th Cir. 1991). Other circuits have held that a district court need not give defendant advance notice that it intends to deny the reduction even though the PSR recommends the reduction and the government does not contest it. See *U.S. v. Patrick,* 988 F.2d 641, 645–46 (6th Cir. 1993) (affirmed, specifically rejected *Brady*) [5#13]; *U.S. v. McLean,* 951 F.2d 1300, 1302–03 (D.C. Cir. 1991) (PSR indicated acceptance of responsibility would be considered—defendant has burden of showing he accepted responsibility); *U.S. v. White,* 875 F.2d 427, 431–32 (4th Cir. 1989) (defendant was on notice that evidence surrounding obstruction might be introduced).

Two courts have upheld role in offense adjustments where defendant did not receive advance notice, concluding that the requirement for notice of departures mandated by *Burns v. U.S.,* 501 U.S. 129 (1991), does not apply to adjustments. See *U.S. v. Adipietro,* 983 F.2d 1468, 1473–74 (8th Cir. 1993) (PSR recommended enhancement under §3B1.1(c), court sua sponte enhanced under §3B1.1(b)—"fact that the presentence report provides a section pertaining to 'adjustment for role in the offense' constitutes sufficient due process notice"); *U.S. v. Canada,* 960 F.2d 263, 266–67 (1st Cir. 1992) (PSR made no recommendation as to role, court imposed §3B1.1(b) enhancement—"the guidelines themselves provide notice . . . of the issues about which [defendant] may be called upon to comment").

However, the Second Circuit held that a defendant was entitled to notice before the sentencing hearing that the district court planned to sentence her under a harsher guideline than that used in the presentence report. Remanding, the court concluded that because the factors that determined which guideline section to use were "reasonably in dispute," §6A1.3(a), defendant "was entitled to advance notice of the district court's ruling and the guideline upon which it was based." *U.S. v. Zapatka,* 44 F.3d 112, 115–16 (2d Cir. 1994) [7#5]. See also *U.S. v. Jackson,* 32 F.3d 1101, 1106–09 (7th Cir. 1994) (remanding sua sponte abuse of trust adjustment at sentencing hearing because defendant had no notice it was contemplated—"When the trial judge relies on a Guideline factor not mentioned in the PSR nor in the prosecutor's recommendation, contemporaneous notice at the sentencing hearing . . . fails to satisfy the dictates of Rule 32") (note: although concurring in the result, two judges on the panel did not join this part of the opinion).

The Seventh Circuit advised that where a defendant has been convicted on one count of an indictment before conviction on the other counts, the district court should not sentence the defendant until all counts have been resolved, because the Guidelines require that the combined offense level for multiple counts be determined under §3D1.1. *U.S. v. Kaufmann,* 951 F.2d 793, 795–96 (7th Cir. 1992) [4#14].

See section I.C for some issues regarding resentencing after remand.

F. Fed. R. Crim. P. 35(a) and (c)

In 1987, Fed. R. Crim. P. 35(a) was amended to delete the provision allowing district courts to "correct an illegal sentence at any time." The current version refers to correcting illegal sentences "on remand." However, several courts held that district courts retained inherent authority to correct illegal sentences in some situations despite the amendment. The Seventh Circuit held it was proper for a district court to act on its own motion and vacate a sentence two weeks after it was imposed where the district court realized its grounds for departure in the original sentence were not proper. *U.S. v. Himsel,* 951 F.2d 144, 144–47 (7th Cir. 1991). The Fourth Circuit has allowed a "very narrow" exception to Fed. R. Crim.

P. 35 to correct "an acknowledged and obvious mistake" made by a district court in imposing a Guideline sentence, but "only during that period of time in which either party may file a notice of appeal." The court had to remand for resentencing in the defendant's presence, however, because the correction increased the penalty. *U.S. v. Cook,* 890 F.2d 672, 674–75 (4th Cir. 1989) [2#17]. Accord *U.S. v. Strozier,* 940 F.2d 985, 987 (6th Cir. 1991) (interpreting *Cook* as allowing corrections to conform sentence to *mandatory* Guidelines provisions only); *U.S. v. Smith,* 929 F.2d 1453, 1457 (10th Cir. 1991) (district court has authority to rectify incorrect application of Guidelines before defendant begins serving sentence and while government can fil appeal); *U.S. v. Rico,* 902 F.2d 1065, 1068 (2d Cir. 1990) (same, even though here defendant had already been released for time served—court meant to impose sentence agreed to in written plea agreement, but received incorrect information at sentencing hearing and mistakenly imposed shorter term). But cf. *U.S. v. Arjoon,* 964 F.2d 167, 170 (2d Cir. 1992) (no inherent authority to alter sentence merely because judge has change of heart).

However, the addition of Rule 35(c), effective Dec. 1, 1991, has restricted, if not eliminated, any inherent authority to correct sentences. Rule 35(c) allows a court, "within 7 days after the imposition of sentence, [to] correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The Fourth Circuit recognized that this effectively codified its holding in *Cook,* but restricted any corrections to seven days following imposition of sentence. *U.S. v. Fraley,* 988 F.2d 4, 6–7 (4th Cir. 1993). See also *U.S. v. Lopez,* 26 F.3d 512, 519–20 & n.8 (5th Cir. 1994) (seven-day limit constitutes jurisdictional restraint on district court's power and language strictly limits corrections); *U.S. v. Fahm,* 13 F.3d 447, 453–54 (1st Cir. 1994) (district court had no authority to correct mistake in offense level calculation three months after sentencing—"we conclude that the court had no inherent power to increase its original sentence. The 1991 amendment to Rule 35(c) was intended to codify the result reached in *Rico* and *Cook* but requires as well that the sentencing court act *within* the time frame prescribed in the rule"); *U.S. v. Daddino,* 5 F.3d 262, 265 (7th Cir. 1994) (no authority in Rule 35(c) or elsewhere to correct sentencing error two months after imposition).

The Ninth Circuit held that Rule 35(c) "authorizes the district court to correct obvious sentencing errors, but not to reconsider, to change its mind, or to reopen issues previously resolved under the Guidelines, where there is no error." *U.S. v. Portin,* 20 F.3d 1028, 1029–30 (9th Cir. 1994) (remanded: district court exceeded its authority by increasing defendants' fines when it granted their Rule 35(c) motion to reduce their prison sentences to conform to Rule 11(e)(1)(C) plea agreement—the original fines were properly imposed and neither defendants nor the government challenged them on appeal) [6#12]. Similarly, Rule 35(c) precluded resentencing a defendant to a longer term for refusing to testify for the government after he had received a §5K1.1 departure based largely on his promise that he would testify against codefendants. *Lopez,* 26 F.3d at 515–22 (remanded: after 1987 and 1991 amendments to Rule 35, district court had no authority to change sentence that was properly imposed three months earlier).

Rule 35(a) also serves to limit consideration of new matters on resentencing when the case has been remanded only for reconsideration of specific issues. See, e.g., *U.S. v. Gomez-Padilla,* 972 F.2d 284, 285–86 (9th Cir. 1992) (affirmed: where remand was limited to issue concerning defendant's role in offense, district court properly concluded that Rule 35(a) prohibited consideration of defendant's post-sentencing conduct at resentencing after remand); *U.S. v. Apple,* 962 F.2d 335, 336–37 (4th Cir. 1992) (as per revised Rule 35, proper to reconsider on remand only issues appellate court specified might be incorrect and not to

consider mitigating rehabilitative conduct since the original sentencing). The Tenth Circuit held that Rule 35(a) precludes consideration of new conduct that occurred after the first sentencing even when the remand that was not limited to specific issues. *U.S. v. Warner,* 43 F.3d 1335, 1339–40 (10th Cir. 1994) (remanded: whether or not a defendant's post-sentencing rehabilitative conduct may ever provide ground for downward departure, it was improper to consider it when resentencing defendant after remand) [7#5]. See also cases in section I.C.

Note that Rule 35(c) "may operate as readily in favor of the defendant as against him" and result in a higher sentence after correction of a mistake. See, e.g., *U.S. v. Goldman,* 41 F.3d 785, 789 (1st Cir. 1994) (affirmed: where government discovered error in calculating career offender sentencing range, proper to increase sentence from 262 months to 360 months three days after sentencing).

The Seventh Circuit held that former Rule 35 could not be used to resentence defendant under the Guidelines when he originally could have been, but instead had been sentenced under pre-Guidelines law. Defendant's conspiracy extended past Nov. 1, 1987, but no such finding was made at trial or sentencing. The court held "that the district court lacked jurisdiction under old Rule 35(a) to resentence Corbitt under the Sentencing Guidelines based on a new finding as to the termination date of his conspiracy." Rule 35(a) does not confer jurisdiction "to make new findings at the government's request in order to declare a defendant's theretofore unimpeachable sentence illegal." *U.S. v. Corbitt,* 13 F.3d 207, 212–14 (7th Cir. 1993).

Note that corrections or modifications of supervised release terms are covered under 18 U.S.C. §3583(e)(2) and Fed. R. Crim. P. 32.1(b) and are not limited by Rule 35(c). See *U.S. v. Navarro-Espinosa,* 30 F.3d 1169, 1171 (9th Cir. 1994) (where conditions of Rule 32.1(b) were met, Rule 35(c) did not preclude addition of conditions of supervised release that were inadvertently omitted at original sentencing hearing four weeks earlier).

For Rule 35(b), see section VI.F.4.

X. Appellate Review

A. Procedure for Review of Departures

1. In General

Several circuits have developed procedures for reviewing departures. The First Circuit, for example, developed a three-step procedure in *U.S. v. Diaz-Villafane,* 874 F.2d 43, 49 (1st Cir. 1989) [2#6]. The court will (1) "assay the circumstances relied on by the district court in determining that the case is sufficiently 'unusual' to warrant departure," (2) "determine whether the circumstances . . . actually exist in the particular case," and (3) review "the direction and degree of departure . . . by a standard of reasonableness." This procedure has been adopted by some of the other circuits. See *U.S. v. Lira-Barraza,* 941 F.2d 745, 746–47 (9th Cir. 1991) (en banc) (dropping five-part test set forth in earlier opinion, at 897 F.2d 981) [4#6]; *U.S. v. Lang,* 898 F.2d 1378, 1379–80 (8th Cir. 1990) [3#6]; *U.S. v. White,* 893 F.2d 276, 277 (10th Cir. 1990); *U.S. v. Rodriguez,* 882 F.2d 1059, 1067 (6th Cir. 1989) [2#12]. See also *U.S. v. Valle,* 929 F.2d 629, 631 (11th Cir. 1991) (similar three-step analysis); *U.S. v.*

Gaddy, 909 F.2d 196, 199 (7th Cir. 1990) (same). The Fourth Circuit uses a similar, four-part "test of 'reasonableness.'" See *U.S. v. Palinkas*, 938 F.2d 456, 461 (4th Cir. 1991) (citing *U.S. v. Hummer*, 916 F.2d 186, 192 (4th Cir. 1990), vacated on other grounds, 112 S. Ct. 1464 (1992)).

The First Circuit has revised the first part of the *Diaz-Villafane* procedure in order to provide more "leeway" for district courts in determining whether to depart. Originally it held that appellate review of the first part was "essentially plenary." The court now limits plenary review to determine whether circumstances "are of the 'kind' that the Guidelines, in principle, permit the sentencing court to consider at all," or to determine "the nature of [a] guideline's 'heartland' (to see if the allegedly special circumstance falls within it)." Otherwise, if the district court's decision involves "a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent," the appellate court "should review the district court's determination . . . with 'full awareness of, and respect for, the trier's superior "feel" for the case,' . . . not with the understanding that review is 'plenary.'" The court also stated that "by definition" a case "that falls outside the linguistically applicable guideline's 'heartland' is . . . an 'unusual case'" and thus a "candidate for departure." *U.S. v. Rivera*, 994 F.2d 942, 947–52 (1st Cir. 1993) [5#14]. See also *U.S. v. Canoy*, 38 F.3d 893, 908 (7th Cir. 1994) (citing *Rivera* approvingly, concluding that because "district courts may have a better feel for what is or is not unusual or extraordinary . . . when a district court clearly explains the basis for its finding of an extraordinary family circumstance, that finding is entitled to considerable respect on appeal"); *U.S. v. Simpson*, 7 F.3d 813, 820–21 (8th Cir. 1993) (citing *Rivera* approvingly). Cf. *U.S. v. Monk*, 15 F.3d 25, 29 (2d Cir. 1994) ("when there are compelling considerations that take the case out of the heartland factors upon which the Guidelines rest, a departure should be considered") [6#11].

2. Proper and Improper Grounds

The Supreme Court resolved a split in the circuits when it set forth a two-step inquiry to determine when a sentence based on both valid and invalid departure factors must be remanded. The Court held that an appellate court must answer the question: Would the district court have imposed the same sentence had it not relied on the invalid factors? If yes, then a remand is not required if the degree of departure was reasonable. If the answer is no or indeterminable, then remand is required without proceeding to the reasonableness inquiry. *Williams v. U.S.*, 112 S. Ct. 112, 1118–19 (1992) [4#17]. See also *U.S. v. White Buffalo*, 10 F.3d 575, 577–78 (8th Cir. 1993) (affirmed because valid ground "provided a legally sufficient justification for departure" and extent was reasonable) [6#9]; *U.S. v. Sellers*, 975 F.2d 149, 152 (5th Cir. 1992) (following *Williams*, remanded sentence partly based on invalid departure rather than "speculating" whether same sentence would have been imposed without invalid factor); *U.S. v. Estrada*, 965 F.2d 651, 654 (8th Cir. 1992) (following *Williams*, affirmed "minimal" upward departure of three months even though two of three grounds were invalid).

Before *Williams*, two circuits held that remand was automatic. See *U.S. v. Zamarripa*, 905 F.2d 337, 342 (10th Cir. 1990) [3#10]; *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314, 1315–16 (9th Cir. 1989) [2#13]. Others have held that such departures may be upheld on a case-by-case basis if the remaining grounds warrant departure and it appears the same sentence would have been imposed absent improper factors. See *U.S. v. Jones*, 948 F.2d 732, 741 (D.C. Cir. 1991) [4#12]; *U.S. v. Glick*, 946 F.2d 335, 339–40 (4th Cir. 1991) [4#11]; *U.S. v.*

Alba, 933 F.2d 1117, 1122 (2d Cir. 1991) [4#5]; *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991) [4#3]; *U.S. v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990) [3#10]; *U.S. v. Franklin*, 902 F.2d 501, 508 (7th Cir. 1990) [3#8]; *Rodriguez*, 882 F.2d at 1068. Cf. *U.S. v. Michael*, 894 F.2d 1457, 1460 (5th Cir. 1990) (remanded because appellate court could not determine whether improper factor was "necessary part of the basis for departure") [3#2].

B. Discretionary Refusal to Depart Downward

1. Not Appealable

Every circuit has held that, unless the decision involves an incorrect application of the Guidelines or is otherwise in violation of the law, a district court's discretionary refusal to depart downward is not appealable. See *U.S. v. Ortez*, 902 F.2d 61, 63–64 (D.C. Cir. 1990); *U.S. v. Davis*, 900 F.2d 1524, 1529–30 (10th Cir. 1990); *U.S. v. Bayerle*, 898 F.2d 28, 30–31 (4th Cir. 1990) [3#4]; *U.S. v. Morales*, 898 F.2d 99, 101 (9th Cir. 1990) [3#4]; *U.S. v. Evidente*, 894 F.2d 1000, 1004 (8th Cir. 1990) [3#2]; *U.S. v. Denardi*, 892 F.2d 269, 272 (3d Cir. 1989) [2#19]; *U.S. v. Tucker*, 892 F.2d 8, 10–11 (1st Cir. 1989) [2#19]; *U.S. v. Draper*, 888 F.2d 1100, 1105 (6th Cir. 1989) [2#16]; *U.S. v. Franz*, 886 F.2d 973, 976–78 (7th Cir. 1989) [2#15]; *U.S. v. Colon*, 884 F.2d 1550, 1552–56 (2d Cir. 1989) [2#13]; *U.S. v. Fossett*, 881 F.2d 976, 978–79 (11th Cir. 1989) [2#13]; *U.S. v. Buenrostro*, 868 F.2d 135, 139 (5th Cir. 1989) [2#2].

Similarly, a discretionary refusal to make downward departure for substantial assistance under §5K1.1 is not appealable. See *U.S. v. Munoz*, 946 F.2d 729, 730–31 (10th Cir. 1991); *U.S. v. Richardson*, 939 F.2d 135, 139–40 (4th Cir. 1991); *U.S. v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir. 1990).

In a revocation of probation case, the Second Circuit extended this rule to discretionary refusals to depart from the Revocation Table, §7B1.4, p.s. *U.S. v. Grasso*, 6 F.3d 87, 88 (2d Cir. 1993).

If it cannot be determined whether the sentencing court exercised its discretion or wrongly believed it could not depart, the case will be remanded. See, e.g., *U.S. v. Mummert*, 34 F.3d 201, 205 (3d Cir. 1994); *U.S. v. Brown*, 985 F.2d 478, 481 (9th Cir. 1993); *U.S. v. Ritchey*, 949 F.2d 61, 63 (2d Cir. 1991); *U.S. v. Diegert*, 916 F.2d 916, 919 (4th Cir. 1990). Cf. *U.S. v. Russell*, 870 F.2d 18, 21 (1st Cir. 1989) (retaining appellate jurisdiction while asking district court for clarification of ambiguity). However, the Tenth Circuit held that it would "no longer [be] willing to assume that a judge's ambiguous language means that the judge erroneously concluded that he or she lacked authority to downward depart. . . . Accordingly, unless the judge's language unambiguously states that the judge does not believe he has authority to downward depart, we will not review his decision. Absent such a misunderstanding on the sentencing judge's part, illegality, or an incorrect application of the Guidelines, we will not review the denial of a downward departure." *U.S. v. Rodriguez*, 30 F.3d 1318, 1319 (10th Cir. 1994) [7#1].

2. Extent of Departure Not Appealable

Most circuits have also held that the extent of a downward departure may not be appealed by the defendant. See *U.S. v. Bromberg*, 933 F.2d 895, 896 (10th Cir. 1991); *U.S. v. Hazel*, 928 F.2d 420, 424 (D.C. Cir. 1991); *U.S. v. Pomerleau*, 923 F.2d 5, 6–7 (1st Cir. 1991); *U.S. v. Vizcarra-Angulo*, 904 F.2d 22, 23 (9th Cir. 1990) [3#10]; *U.S. v. Gant*, 902 F.2d 570, 572 (7th Cir. 1990); *U.S. v. Left Hand Bull*, 901 F.2d 647, 650 (8th Cir. 1990); *U.S. v. Pighetti*, 898 F.2d

3. 4–5 (1st Cir. 1990) [3#4]; *U.S. v. Wright,* 895 F.2d 718, 721–22 (11th Cir. 1990) [3#4].

This rule also applies to departures for substantial assistance under §5K1.1 and 18 U.S.C. §3553(e). *U.S. v. Doe,* 996 F.2d 606, 607 (2d Cir. 1993); *U.S. v. Gregory,* 932 F.2d 1167, 1168–69 (6th Cir. 1991); *U.S. v. Sharp,* 931 F.2d 1310, 1311 (8th Cir. 1991); *U.S. v. Dean,* 908 F.2d 215, 217–18 (7th Cir. 1990) [3#11]; *U.S. v. Erves,* 880 F.2d 376, 382 (11th Cir. 1989). See also *U.S. v. Dutcher,* 8 F.3d 11, 12 (8th Cir. 1993) (may not review extent of departure even though defendant challenged role in offense enhancement that had resulted in higher offense level and from which district court departed "fifty percent of that called for under the guidelines").

However, note that the First Circuit has held that defendants may appeal the extent of a reduction made pursuant to Fed. R. Crim. P. 35(b). *U.S. v. McAndrews,* 12 F.3d 273, 276–79 (1st Cir. 1993) (Rule 35 appeals are governed by 28 U.S.C. §1291, not 18 U.S.C. §3742).

C. Factual Issues

A sentencing court's factual decisions, such as role in the offense, acceptance of responsibility, and obstruction of justice, are reviewed under the clearly erroneous standard. See, e.g., *U.S. v. Sanchez-Lopez,* 879 F.2d 541, 557 (9th Cir. 1989) (minimal or minor participant) [2#9]; *U.S. v. Ortiz,* 878 F.2d 125, 126–27 (3d Cir. 1989) (aggravating role) [2#9]; *U.S. v. White,* 875 F.2d 427, 431 (4th Cir. 1989) (acceptance of responsibility) [2#7]; *U.S. v. Daughtrey,* 874 F.2d 213, 217–18 (4th Cir. 1989) (minimal or minor participant) [2#7]; *U.S. v. Franco-Torres,* 869 F.2d 797, 799–801 (5th Cir. 1989) (acceptance of responsibility, obstruction of justice) [2#4]; *U.S. v. Spraggins,* 868 F.2d 1541, 1543 (11th Cir. 1989) (acceptance of responsibility) [2#4]; *U.S. v. Buenrostro,* 868 F.2d 135, 138 (5th Cir. 1989) (minimal participant) [2#2]; *U.S. v. Mejia-Orosco,* 867 F.2d 216, 221 (5th Cir. 1989) (role in offense) [2#2].

D. Overlapping Guideline Ranges Dispute

Most circuits have held that a dispute involving overlapping guideline ranges may be left unresolved and the sentence affirmed, but only if it appears that the same sentence would have been imposed regardless of the outcome of the dispute. See *U.S. v. Simpkins,* 953 F.2d 443, 446 (8th Cir. 1992); *U.S v. De La Torre,* 949 F.2d 1121, 1122 (11th Cir. 1991); *U.S. v. Urbanek,* 930 F.2d 1512, 1516 (10th Cir. 1991); *U.S. v. Lopez,* 923 F.2d 47, 51 (5th Cir. 1991); *U.S. v. Dillon,* 905 F.2d 1034, 1037–38 (7th Cir. 1990) [3#9]; *U.S. v. Williams,* 891 F.2d 921, 923 (D.C. Cir. 1989) [2#19]; *U.S. v. Munster-Ramirez,* 888 F.2d 1267, 1273 (9th Cir. 1989); *U.S. v. Turner,* 881 F.2d 684, 688 (9th Cir. 1989) [2#11]; *U.S. v. White,* 875 F.2d 427, 432–33 (4th Cir. 1989); *U.S. v. Bermingham,* 855 F.2d 925, 926 (2d Cir. 1988) [1#14].

If it appears that the district court intentionally sentenced the defendant at the bottom of the higher of the disputed ranges, however, the case must be remanded for resolution of the dispute. See *U.S. v. Ortiz,* 966 F.2d 707, 717–18 (1st Cir. 1992); *U.S. v. Luster,* 896 F.2d 1122, 1130 (8th Cir. 1990) [3#3]; *U.S. v. Tetzlaff,* 896 F.2d 1071, 1073 (7th Cir. 1990); *Williams,* 891 F.2d at 923; *Bermingham,* 855 F.2d at 926. Cf. *U.S. v. Fuente-Kolbenschlag,* 878 F.2d 1377, 1379 (11th Cir. 1989) (overlapping ranges dispute appealable if either party alleges the Guidelines were incorrectly applied, 18 U.S.C. §3742(a)(2)) [2#11]. Also, a court may not deliberately avoid resolving a factual dispute by sentencing within an overlap unless it makes "an express determination that the sentence would be the same under either of the

potentially applicable ranges in the absence of any dispute as to which range applies." *U.S. v. Willard,* 909 F.2d 780, 781 (4th Cir. 1990) [3#11].

The Fifth Circuit relied on *Williams v. U.S.,* 112 S. Ct. 1112, 1120–21 (1992) [4#17], to hold that any error in calculating the defendant's criminal history points did not require remand for resentencing because it appeared "from the record as a whole, that 'the district court would have imposed the same sentence' and that the erroneous calculation of points 'did not affect the district court's selection of the sentence imposed.'" *U.S. v. Johnson,* 961 F.2d 1188, 1189 (5th Cir. 1992) (*Williams* superseded prior circuit precedent that required remand for all incorrect applications of the guidelines). The Fourth Circuit noted that the *Williams* analysis did not apply to review of an obstruction of justice enhancement that was based on both valid and invalid grounds because once obstruction is found the enhancement is mandatory. *U.S. v. Ashers,* 968 F.2d 411, 414 (4th Cir. 1992) (remand not required) [5#2]. The Seventh Circuit reached an identical result, but did use the *Williams* harmless error analysis. *U.S. v. Jones,* 983 F.2d 1425, 1429–32 (7th Cir. 1993) (no remand required—although sentencing court may have relied on factual errors in PSR for §3C1.1 enhancement, but it also cited other, proper grounds).

The Ninth Circuit has noted that *Williams* "imposes a greater and more exacting burden" on the party attempting to show harmless error. "No longer is it sufficient to point to remarks by the district court indicating that it considered the appropriateness of the sentence under either *range* urged by the parties . . . . Under *Williams,* . . . the party defending the sentence[ ] must now show that the error did not affect the district court's selection of a specific sentence; that is, that even without the error the district court would have imposed the same sentence and not a lower sentence within the appropriate range." *U.S. v. Rodriguez-Razo,* 962 F.2d 1418, 1423–25 (9th Cir. 1992) (remanded: government failed to show district court would not have imposed lower sentence absent erroneous obstruction of justice enhancement).

Note: The cases in this section apply to misapplications of the Guidelines; a sentence imposed in violation of law must be remanded. See 18 U.S.C. §3742(f)(1).

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The Federal Judicial Center

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Federal Judicial Center
Thurgood Marshall Federal Judicial Building, One Columbus Circle, N.E., Washington, DC 20002-8003

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