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U.S. Sentencing Commission Guidelines Manual
Case Annotations — January-December 1995

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

Fourth Circuit

United States v. Goins, 51 F.3d 400 (4th Cir. 1995). The trial court erred in failing to inform the defendant during the Rule 11 hearing that a guilty plea would result in a mandatory minimum sentence. The defendant had not been aware of the mandatory minimum sentence until the presentence report was prepared, nearly three months after the plea had been accepted. The government argued that the error was harmless, however, the Fourth Circuit held that a violation cannot be considered harmless if the defendant had no knowledge of the mandatory minimum at the time of the plea. In an issue of first impression, the circuit court joined the Fifth and Eleventh Circuits in concluding that a district court's failure to inform the defendant of the mandatory minimum is reversible error. *See* United States v. Watch, 7 F.3d 422 (5th Cir. 1993); United States v. Hourihan, 936 F.2d 508 (11th Cir. 1991).

Part B General Application Principles

§1B1.2 Applicable Guidelines

Second Circuit

United States v. Amato, 46 F.3d 1255 (2d Cir. 1995). The district court erred in sentencing a defendant convicted of a Hobbs Act conspiracy robbery under USSG §2B3.1. The Second Circuit ruled that although the district court should have applied §2X1.1, the conspiracy guideline, instead of §2B3.1, the robbery guideline, the district court's error did not affect the defendant's sentence because §2X1.1 adopts by cross-reference all of the adjustments of §2B3.1. This ruling modified the Second Circuit's holding in United States v. Skowronski, 968 F.2d 242 (2d Cir. 1993). In Skowronski, the Second Circuit had ruled that §2B3.1 was applicable to Hobbs Act robbery conspiracies because §2E1.5 assigned Hobbs Act robberies, including robbery conspiracies, to §2B3.1. Section 2X1.1, which is applicable to conspiracies which are not expressly covered by another guideline section, was therefore inapplicable due to §2E1.5. In revisiting this issue, the Second Circuit ruled that the deletion of §2E1.5 from the guidelines eliminates any suggestion that §2B3.1 covers conspiracies, thus making §2X1.1 the applicable section for Hobbs Act conspiracies. The distinction between §2B3.1 and §2X1.1 is important because §2B3.1 provides adjustments for losses that are realized in contrast to §2X1.1 which provides adjustments for losses that are intended. The defendant in this case argued that the

district court had incorrectly enhanced his sentence by two levels for intended but unrealized loss. The appellate court affirmed the enhancement, ruling that the defendant was liable under §2X1.1 for intended conspiratorial conduct. The court added that the defendant may be entitled to receive a three level decrease under §2X1.1(b)(2) because the conspiracy did not ripen into a substantially completed offense. The appellate court remanded the case to decide this issue and noted that if the sentence calculated under §2X1.1 was higher than under §2B3.1, because of a denial of the reduction while increasing for the intended loss, the defendant would be entitled to be sentenced under §2B3.1 as it existed at the time of the offense, to avoid an ex post facto problem.

United States v. Hourihan, 66 F.3d 458 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 962 (1996). The district court erred in sentencing the defendant for a less severe crime than the crime encompassed by the jury verdict. The jury convicted the defendant of attempting to commit a sexual act by force. 18 U.S.C. § 2246(3). The district judge, characterizing the case as "atypical," calculated the defendant's sentence under the less punitive section for abusive sexual contact (USSG §2A3.4), rather than the guideline for aggravated sexual abuse (USSG §2A3.1). The district court concluded that fellatio was better defined as sexual contact, rather than a sexual act. The government appealed, and the circuit court agreed with the government that 18 U.S.C. § 2246(a)(2)(B) states that fellatio is a sexual act. In addition, the circuit court held that a district court's decision to sentence based on its view of the evidence rather than the jury's is reversible error. The circuit court concluded that because there was sufficient evidence to support the jury verdict, the district court's decision to sentence the defendant for a lesser crime cannot be sustained.

§1B1.3 Relevant Conduct

District of Columbia Circuit

United States v. Pinnick, 47 F.3d 434 (D.C. Cir. 1995). The district court properly included conduct from two dismissed counts as relevant conduct for sentencing, and erred in including the conduct from a third dismissed count. The defendant pleaded guilty to one of four counts of fraud, and the government dismissed the other three counts. Two of the dismissed counts involved counterfeit checks, and were properly included by the district court as relevant conduct at sentencing. The other dismissed count involved the defendant's fraudulent use of a credit card. The circuit court noted that in fraud offenses conduct from dismissed counts which is part of "the same course of conduct" may be considered when determining a guideline range for the offense of conviction. In determining what constitutes "the same course of conduct," the court must consider several factors including "the degree of similarity of the offenses and the time interval between the offenses." Where the defendant's offense of conviction and the acts offered as relevant conduct can be "separately identified" and are of a different "nature," the conduct will not be considered as part of the same course of conduct. The government must demonstrate a connection between the conduct and the offense of conviction; not between the conduct and other relevant conduct. The circuit court ruled that the government failed to demonstrate a connection between the credit card fraud and the offense of conviction. The sentence was vacated and the case was remanded for resentencing.

Eleventh Circuit

United States v. Cannon, 41 F.3d 1462 (11th Cir.), *cert. denied*, 116 S. Ct. 86 (1995). The Eleventh Circuit Court held that acquitted conduct may be considered by a sentencing court in determining a defendant's sentence because "a verdict of acquittal demonstrates a lack of proof sufficient to meet a beyond-a-reasonable-doubt standard"—a standard of proof higher than the preponderance of the evidence standard required for consideration of relevant conduct at sentencing.

§1B1.10 Retroactivity of Amended Guideline Ranges

Second Circuit

United States v. Jackson, 59 F.3d 1421 (2d Cir.), *petition for cert. filed* (U.S. Dec. 11, 1995) (No. 95-7054). The district court did not err by sentencing the defendant to the mandatory minimum ten-year term of imprisonment mandated by 21 U.S.C. § 841(b)(1)(A) for persons convicted of possessing with intent to distribute certain mixtures or substances containing 50 grams or more of cocaine base. The defendant argued on appeal that the district court erred in imposing the sentence because the substance in the defendant's possession was not "crack," and the Sentencing Commission amended the guidelines to define only crack as a "mixture or substance . . . which contains cocaine base." The defendant relied upon the Eleventh's Circuit's ruling in United States v. Munoz-Realpe, 21 F.3d 375, 376-79 (11th Cir. 1994), that the term "cocaine base" would mean "crack" for the purposes of USSG §2D1.1(c). The circuit court refused to join the Eleventh Circuit, and ruled that it was bound to follow its previous ruling in United States v. Palacio, 4 F.3d 150 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994) that amendment 487 "cannot revise the statutory interpretation" already made in the defendant's first case. The circuit court further noted in Palacio that "[e]ven if the Commission's pending view of the term `cocaine base' in the Guidelines might have influenced us to adopt a congruent interpretation of the statutory term as an original matter, once we have construed the statute, we will not interpret it in the absence of new guidance from Congress."

Fourth Circuit

United States v. Capers, 61 F.3d 1100 (4th Cir.), *petition for cert. filed* (U.S. Dec. 4, 1995) (No. 95-7022). The defendant was not eligible for retroactive application of an amendment to the commentary to USSG §3B1.1, enacted several months after his sentence was imposed, which would have prevented the application of the enhancement. The circuit court ruled that the defendant was not entitled to retroactive application of the guideline because the amendment created a substantive change in the circuit's operation of USSG §3B1.1. In making this determination, the circuit court noted that USSG §1B1.10 allows for consideration of a reduced sentence only if the amendment is listed in that guideline. The 1993 amendment to USSG §3B1.1 was not listed in USSG §1B1.10. The circuit court recognized, however, that the courts may give retroactive application to a clarifying (as opposed to substantive) amendment regardless of

whether it is listed in USSG §1B1.10. However, the circuit court determined the amendment to be substantive rather than clarifying, because it changed the law in the circuit. Prior to the amendment, the Fourth Circuit had concluded that a defendant could receive the aggravated role enhancement without having exercised control over persons; the amendment, however, provides that the defendant must have exercised control over other persons to warrant the enhancement. The circuit court noted that its decision is in accord with other circuit courts holding that an amendment would be classified as substantive, and not clarifying when it cannot be reconciled with circuit precedent. *See* United States v. Saucedo, 950 F.2d 1508 (10th Cir. 1991), overruled on other grounds, Stinson v. United States, 113 S. Ct. 1913 (1993). The circuit court recognized and noted its disagreement with the Seventh Circuit's holding in United States v. Fones, 51 F.3d 663, 669 (7th Cir. 1995) that the 1993 amendment to USSG §3B1.1 was a clarifying amendment. The Seventh Circuit applied the amendment retroactively even after acknowledging that the amendment "nullified" its interpretation of the guideline.

Seventh Circuit

United States v. McGee, 60 F.3d 1266 (7th Cir. 1995). The district court did not commit plain error in failing to apply the amended guidelines. The defendant argued that the statute mandating imprisonment for his violation of supervised release terms violated the ex post facto clause. The violations included cocaine possession and failure to submit to urinalysis. The circuit court rejected the defendant's argument that the 1994 amendment to 18 U.S.C. § 3583 altered the punishment for cocaine possession to his detriment. The circuit court followed the reasoning in California Dep't of Corr. v. Morales, 115 S. Ct. 1597 (1995), and held that the defendant was not subject to increased punishment under the amended statute. In that case, the Supreme Court stated that the ex post facto clause does not forbid any legislative change that has any conceivable risk of affecting a prisoner's punishment; rather a court must determine whether the legislative change produces a sufficient risk of increasing the measure of punishment attached to the covered crimes. In the case at bar, the circuit court used this reasoning to hold that the amendment does not produce a detriment to the defendant; rather, it narrows the range of punishment to his benefit. Thus, the circuit court affirmed the district court's sentence of 24 months.

Eighth Circuit

United States v. Douglas, 64 F.3d 450 (8th Cir. 1995). The district court erred in refusing to apply an amendment retroactively by holding that the change was substantive rather than clarifying. The Eighth Circuit had previously held that a "felon in possession of a firearm" conviction constituted a crime of violence within the meaning of the career offender provision of the guidelines. The defendant was originally sentenced to 120 months imprisonment pursuant to this interpretation. Amendment 433, which became effective on November 1, 1991, amended the guidelines commentary to provide that a firearm possession is not a "crime of violence" under USSG §4B1.1 and thus cannot trigger the application of the career offender provision. Amendment 433 also stated that it was a clarifying change rather than a substantive one and was approved by the Sentencing Commission for retroactive use. The Commission also raised the base offense level of the felon in possession guideline such that a firearms offender with the criminal record of this defendant could expect a sentence range partly overlapping that which he

had faced under this circuit's erroneous application of the career offender guideline. The defendant moved for a reduction of his sentence, arguing that he should have been sentenced under the pre-November 1991 felon in possession provision, which would yield a sentence of 27-33 months. Upon resentencing, the district court applied the higher felon in possession guideline and sentenced the defendant to 108 months imprisonment. The circuit court ruled that the defendant is entitled to the retroactive application of the guideline. The circuit court noted that amendments promulgated by the Commission are to be taken at face value unless plainly erroneous or inconsistent with the guidelines provision they explain or amend, citing Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). The government argued that the Amendment's retroactivity provision is a substantive change since its application would result in a sentence of less than three years whereas under the previous application of the current felon in possession guideline, the defendant's sentence range is eight to ten years. The government relied on the Seventh Circuit's ruling in United States v. Lykes, 999 F.2d 1144, 1149 (7th Cir. 1993), for the proposition that the Commission's decision to remove felons in possession from the career offender definition while at the same time stiffening the regular felon in possession guideline was meant to insure consistent punishment for offenders like the defendant both before and after the 1991 amendments. The circuit court noted that no other circuit has followed the Seventh Circuit's approach of refusing to honor Commission retroactivity decisions where those decisions conflict with local precedent. *See* United States v. Garcia-Cruz, 40 F.3d 986, 989-90 (9th Cir. 1994); United States v. Stinson, 30 F.3d 121, 122 (11th Cir. 1994) (on remand from the Supreme Court); United States v. Carter, 981 F.2d 645, 648-49 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1827 (1993). The circuit court vacated the sentence and ruled that the defendant is entitled to be re-sentenced wholly under the Guidelines version employed by the original district court, "but in light of a retroactive amendment clarifying that the court applied the wrong provision of that version."

Eleventh Circuit

United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995). The circuit court remanded the case for the district court to consider whether a reduction in the defendant's sentence is warranted. The defendant was convicted of structuring financial transactions and conspiracy to structure financial transactions. On appeal, the defendant argued that he was eligible to be resentenced according the amended version of USSG §2S1.3 which provides a low base offense level. In determining whether to apply the retroactive amendment, the court joined the holdings of the First, Third, Eighth and Ninth Circuits that the district court, not the appellate court should be the initial forum to exercise the discretion concerning whether or not an adjustment is warranted in light of an ameliorative amendment. *See* United States v. Marcello, 13 F.3d 752, 756-58, 761 (3d Cir. 1994); United States v. Coohey, 11 F.3d 97, 101 (8th Cir. 1993); United States v. Wales, 977 F.2d 1323, 1327-28 (9th Cir. 1992); United States v. Connell, 960 F.2d 191, 197 (1st Cir. 1992). The circuit court noted the First Circuit's ruling that USSG §1B1.10(a) does not mandate the use of the lesser enhancement, but merely affords the sentencing court the discretion to utilize it. Connell, 960 F.2d at 197. In deciding this issue, the circuit court declined to follow the Fifth Circuit's approach in United States v. Park, 951 F.2d 634, 635-56 (5th Cir.

1992). In Park, the Fifth Circuit held that the amendment should be applied retroactively and remanded the case to the district court to resentence the defendant accordingly.

§1B1.11 Use of Guideline Manual in Effect at Sentencing

Second Circuit

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The district court did not violate the ex post facto clause in sentencing the defendant using the guidelines (1993 version) in effect at the time of his sentence. The defendant argued that the district court should have used the 1989 Guidelines Manual instead because that manual was in effect when all the acts were committed by the defendant. The circuit court noted that where application of the guidelines in effect at sentencing would result in a more severe sentence than the version in effect at the time of the commission of the offense, the ex post facto clause requires use of the earlier version of the guidelines. *See* United States v. Rivers, 50 F.3d 1126, 1129 (2d Cir. 1995). The circuit court concluded that the 1993 guidelines provision for §2F1.1(b)(1)(m) was not more severe than the 1989 guidelines for §2F1.1(b)(1)(m), and that the district court did not err in using the 1993 guidelines.

United States v. Keller, 58 F.3d 884 (2d Cir. 1995). The district court improperly sentenced the defendant under guidelines no longer in effect at the time of his sentencing. The defendant argued that the district court failed to credit the time he had served in state prison for armed robbery against his federal sentence for possession of a firearm while a convicted felon. He specifically asserted that his sentence is controlled by an amendment to the sentencing guidelines enacted after the date of his offense, but before he was sentenced. The defendant contended that the guidelines in effect at the time of his sentencing should have been used by the court (1993 guidelines) because they allow for the credit to his sentence. The district court instead applied the 1989 guidelines in effect on the date of the offense, which did not permit sentence credit. The appellate court noted that generally, a sentencing court must use the version of the guidelines in effect at the time of the defendant's sentencing, not at the time of the offense. *See* 18 U.S.C. § 3553(a)(4)(1988); United States v. Reese, 33 F.3d 166 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 756 (1995). However, when the guidelines are amended after the defendant commits a criminal offense, but before he is sentenced, and the amended provision calls for a more severe penalty than the original one, those guidelines in effect at the time the offense was committed govern the imposition of sentence. The use of the guidelines in effect at the time of the offense are used to avoid an ex post facto violation. The circuit court noted that the sentencing guidelines state that "[t]he Guidelines Manual in effect on a particular date shall be applied in its entirety," §1B1.11(b)(2), and that "[i]f the court determines that the use of the Guidelines Manual in effect on the date the defendant is sentenced would violate the ex post facto clause" the guidelines in effect on the date of the offense are to be used §1B1.11(b)(1). *See* Miller v. Florida, 482 U.S. 423 (1987). In the case at bar, the circuit court concluded that no ex post facto violation would have occurred had the district court followed the general rule and used the guidelines in effect at the time of the sentencing. The defendant would not have been disadvantaged under the 1993 guidelines because he would have received credit for the time served. Therefore, the district court's failure to apply the 1993 guidelines in effect at the time of the sentencing was plain error.

Third Circuit

United States v. Corrado, 53 F.3d 620 (3d Cir. 1995). The district court did not err in sentencing the defendant pursuant to the entire guideline manual in effect at the time he committed his offense without reference to the additional one-level reduction for acceptance of responsibility available in the manual in effect at the time of sentencing. The Third Circuit held that in adopting USSG §1B1.11(b)(2), the Commission "effectively overruled" United States v. Seligsohn, 981 F.2d 1418 (3d Cir. 1992), and United States v. Kopp, 951 F.2d 521 (3d Cir. 1991), insofar as those opinions conflict with the codification of the one-book rule.

United States v. Griswold, 57 F.3d 291 (3d Cir.), *cert. denied*, 116 S. Ct. 428 (1995). The district court did not err by using the "one book rule" of USSG §1B1.11(b)(2) to sentence the defendant. The circuit court held that §1B1.11(b)(2) was binding on the court, and that the district court was correct to refuse to mix and match provisions from different versions of the guidelines. The defendant argued that the district court violated the mandate of §1B1.11(a) which requires application of the guidelines in effect on the date that the defendant is sentenced (1993 version). However, because the use of the amended version of §2K2.1 would violate the ex post facto clause, the district court, under §1B1.11(b)(2), applied the guidelines in effect at the time the offense was committed (1990 version). The Third Circuit, in affirming the district court's application of the "one book rule", held that this case was directly on point with the holding in United States v. Corrado, 53 F.3d 620, (3d. Cir. 1995). In Corrado, the Third Circuit joined the majority of the courts of appeals in holding that district courts may not mix and match provisions from different versions of the guidelines in order to tailor a more favorable sentence.

Fifth Circuit

United States v. Domino, 62 F.3d 716 (5th Cir. 1995). The district court violated the ex post facto clause in sentencing the defendant under the 1993 version of the sentencing guidelines. The defendant pleaded guilty to unlawful use of a telephone to facilitate the possession of a listed chemical with intent to manufacture a controlled substance in violation of 21 U.S.C. § 843(b) in 1990. In determining the defendant's base offense level, the probation officer determined that the defendant's guilty plea contained a stipulation that established the more serious offense of possession under 21 U S.C. § 841(d)(1) and calculated a base offense level of 32 instead of 12 under the 1989 version of the guidelines. The defendant objected to this determination and insisted that he did not stipulate that he actually possessed the phenylacetic acid at issue, only that he used the telephone to facilitate possession. The defendant failed to appear for sentencing and was not sentenced until 1994. Prior to the defendant's sentencing in 1994, the presentence report was updated to incorporate the 1993 version of the sentencing guidelines resulting in a base offense level of 28. The defendant was sentenced to 48 months on each count to run consecutively for a maximum of 96 months with a term of supervised release of one year on each count to run concurrently. The defendant argued on appeal that his sentence violated the ex post facto clause because, calculated correctly, it would be more lenient under the 1989 version of the guidelines. The circuit court determined that the stipulated facts did not specifically establish that

the defendant possessed phenylacetic acid with intent to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1), and remanded the case directing the district court to sentence the defendant pursuant to the 1989 version of the guidelines.

Seventh Circuit

United States v. Anderson, 61 F.3d 1290 (7th Cir.), *cert. denied*, 116 S. Ct. 543 (1995). The district court did not err in applying the sentencing guidelines in effect at the time of the defendant's sentencing. The defendant was convicted for knowingly or intentionally possessing piperidine and knowing or having reasonable cause to believe it would be used to manufacture a controlled substance. The district court, using the 1992 version of the sentencing guidelines, enhanced the defendant's sentence for possessing a firearm pursuant to USSG §2D1.1 resulting in a sentence of 120 months imprisonment. On appeal, the defendant challenged the district court's use of the 1992 version of the guidelines as violative of the ex post facto clause because the 1990 version, the guidelines manual in effect at the time the defendant committed his offense, contained a more lenient version of the weapon enhancement. The circuit court ruled that the district court did not err in applying the 1992 guidelines. The circuit court noted that "the Tenth Circuit has held on similar facts that there is no ex post facto problem when the Guideline Manual in effect at sentencing, taken as a whole, cannot possibly generate a sentence more severe than the most lenient sentence available at the time the defendant committed his offense." *See* United States v. Nelson, 36 F.3d 1001, 1004 (10th Cir. 1994) (upholding use of 1992 Guidelines even though defendant would have received lower enhancement under 1988 Guidelines because defendant received equivalent reduction in sentence under different provision of 1992 Guidelines). The circuit court recognized that decisions on this issue clearly indicate that guidelines amendments will not raise ex post facto concerns if, "taken as a whole," they are "ameliorative." *See* Miller v. Florida, 482 U.S. 423 (1987) (concluding that an amendment to Florida's sentencing guidelines violated the ex post facto clause by increasing the petitioner's presumptive sentence after he had committed the offense of conviction).

Ninth Circuit

United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The district court did not violate the ex post facto clause when it relied on application note four to interpret USSG §5G1.3. The defendant challenged the district court's imposition of a sentence to run consecutive to the sentence the defendant was already serving for violating his supervised release. The circuit court ruled that application note four "merely makes explicit what was otherwise implicit in the operation of §5G1.3(b) and §5G1.3(c)" which is that the sentence for any offense committed while on supervised release is to be served consecutive to the sentence for the supervised release violation in order to "achieve reasonable incremental punishment." The circuit court held that application note four confirms a sound prior interpretation of section 5G1.3 and does not violate the ex post facto clause. *See* United States v. Glasener, 981 F.2d 973 (8th Cir. 1992); United States v. Flowers, 13 F.3d 395 (11th Cir. 1994).

United States v. Hamilton, 67 F.3d 761 (9th Cir. 1995). The circuit court held that the district court's application of the guidelines in effect at the time of sentencing violated the ex post

facto clause. The district court had sentenced the defendant under the guidelines in effect at the time of resentencing (1993 guidelines). The defendant contended that the district court had violated the ex post facto clause in resentencing him under the guidelines in effect at the time of resentencing, rather than those in effect at the time of his offense because the 1993 guidelines resulted in a harsher sentence. The appellate court, citing United States v. Warren, 980 F.2d 1300 (9th Cir. 1992), stated that where the application of the amended guidelines results in a harsher sentence, the sentencing court is to apply the guidelines in effect at the time of the offense, but must also consider the clarification provided by Amendment 433. Relying on the holding in United States v. Garcia-Cruz, 40 F.3d 986 (9th Cir. 1994), the appellate court concluded that the sentencing court must apply the guidelines in effect at the time of the offense (1988 guidelines). The court vacated the sentence and remanded for resentencing according to the guidelines in effect at the time of the offense.

United States v. Hamilton, 67 F.3d 761 (9th Cir. 1995). The district court violated the ex post facto clause in sentencing the defendant under the 1993 guidelines in effect at the time of resentencing. The defendant was originally sentenced as a career offender after pleading guilty to being a felon in possession of a firearm. In 1993, the defendant appealed his sentence based on Amendment 433, which provides that "the term `crime of violence' does not include the offense of unlawful possession of a firearm by a felon." At resentencing, although the defendant was not sentenced as a career offender pursuant to Amendment 433, his base offense level was enhanced pursuant to USSG §2K2.1 of the 1993 version of the guidelines, which resulted in a sentencing range of 77 to 96 months instead of the 12 to 18 months under the 1989 version of the guidelines. The defendant argued on appeal that he should be resentenced according to the 1988 guidelines but also pursuant to Amendment 433. The circuit court noted its previous holding in United States v. Garcia-Cruz, 40 F.3d 986, 990 (9th Cir. 1994), that "where the application of the amended Guidelines results in a harsher sentence, the sentencing court is to apply the Guidelines in effect at the time of the offense, but also must consider the clarification provided by Amendment 433." The court ruled that the defendant was entitled to be sentenced by the guidelines in effect at the time of the offense as they are affected by the retroactive application of Amendment 433.

§1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

Ninth Circuit

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995). The sentencing guidelines do not apply to a defendant sentenced under the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042. In considering an issue of first impression, the appellate court held that an adjudicated juvenile delinquent may not be sentenced to a term of supervised release.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A1.1 First Degree Murder

Seventh Circuit

United States v. Prevatte, 66 F.3d 840 (7th Cir. 1995). The district court did not err in imposing a sentence for first degree murder pursuant to USSG §2A1.1 despite its decision to depart downward after finding that the murder was not premeditated. The defendant was convicted for maliciously damaging or destroying property by means of an explosive and was sentenced to 636 months imprisonment. On the defendant's first appeal, the circuit court held that although USSG §2A1.1 was the applicable guideline, the district court erred in imposing a life sentence. The circuit court specifically ruled that the district court had erred in imposing a life sentence absent jury instruction, in failing to examine the mental state of the defendants as mandated by application note one to USSG §2A1.1, and in failing to consider a downward departure based on the mental state of the defendants. On remand, the district court held that the decedent's death was caused by the defendant's recklessness and reckless state of mind and behavior, and departed downward from the sentence called for by the murder statute but not downward in the classification of the crime. The same sentence was imposed. In his second appeal, the defendant argued that although the district court had the discretion to depart or not to depart from the guideline range for first degree murder, it was obliged, once it made the decision to depart, to impose a sentence that would have been imposed for second degree murder. The circuit court ruled that application note one does not instruct a district court to reduce the sentence to the level of second degree murder for every departure. The circuit court noted that to hold a departure must correspond to the base offense level stipulated in USSG 2A1.2 every time the court finds that the defendant's mental state was less than "intentionally or knowingly," would negate the congressional determination that death resulting from certain felonies, such as arson, should be punished as first degree murder instead of second degree murder. The circuit court ruled that the district court's determination that the defendant engaged in conduct that, although not premeditated, involved a high degree of recklessness and warranted punishment between the level for premeditated murder and reckless murder was a permissible determination. The circuit court remanded the case to the district court, however, to consider whether the sentence imposed was a life sentence, directing the district court to consider the standard delineated in United States v. Martin, No. 94-3342, 1995 WL 480635 (7th Cir. Aug. 14, 1995), which held that "where a legislatively enacted sentencing scheme expressly deprived a court of the possiblity of imposing a life sentence, a sentence for a term of years exceeding the defendant's approximate life expectancy would ordinarily constitute an abuse of discretion."

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

Second Circuit

See United States v. Hourihan, 66 F.3d 458 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 962 (1996), §1B1.2, p. 2.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement and Theft

Ninth Circuit

United States v. Zuniga, 66 F.3d 225 (9th Cir. 1995). The district court did not err by enhancing the defendant's sentence pursuant to USSG §2B1.1(b)(5) for being a person in the business of receiving and selling stolen property. The defendant pled guilty to conspiracy to possess stolen goods from an interstate shipment and was sentenced to thirty months imprisonment. On appeal, the defendant challenged the district court's application of the enhancement and argued that the circuit court should join the Fifth, Sixth and Seventh Circuits in adopting the "fence" test to determine whether the defendant was "in the business." *See* United States v. Warshawsky, 20 F.3d 204, 214 6th Cir. 1994); United States v. Esquivel, 919 F.3d 957, 959 (5th Cir. 1990); United States v. Braslawsky, 913 F.2d 466, 468 (7th Cir. 1990) (enhancement does not apply to a defendant who sells property that he himself has stolen). Under the "fence" test, the government must show that the defendant is a person who buys and sells stolen property and, thereby, encourages others to commit property crimes. The circuit court instead joined the First and Third Circuits in adopting the "totality of the circumstances" test. *See* United States v. King, 21 F.3d 1302, 1306 (3d Cir. 1994); United States v. St. Cyr, 977 F.2d 698, 703 (1st Cir. 1992). Under the "totality of the circumstances" test, the sentencing judge undertakes a case-by-case approach with the emphasis on the "regularity and sophistication of a defendant's operation." St. Cyr, 977 F.2d at 703. The circuit court ruled that based on the regularity and sophistication of the defendant's operation, the district court reasonably concluded that the defendant was warehousing and selling merchandise stolen by others, *i.e.*, fencing property, in addition to property he had stolen. The circuit court held that the district court's factual conclusions were not clearly erroneous and the application of the enhancement pursuant to USSG §2B1.1(b)(1)(5) was correct.

§2B3.1 Robbery

Fourth Circuit

United States v. Murray, 65 F.3d 1161 (4th Cir. 1995). The district court did not err in enhancing the defendant's sentence for making an "express threat of death" during a robbery when the defendant was unarmed. The circuit court ruled that "a threat to shoot a firearm at a person during a robbery, created by any combination of statements, gestures or actions that would put an ordinary victim in reasonable fear for his life, is an express threat of death under USSG §2B3.1, even though the person delivering the threat is not in possession of a firearm." The Fourth Circuit joined the interpretation of "express threat of death" adopted by the majority of the circuits that have addressed this issue. *See* United States v. France, 57 F.3d 865, 867 (9th Cir. 1995); United States v. Hunn, 24 F.3d 994, 997 (7th Cir. 1994); United States v. Robinson, 20 F.3d 270,

276-77 (7th Cir. 1994); United States v. Lambert, 995 F.2d 1006, 1008 (10th Cir), *cert. denied*, 114 S. Ct. 333 (1993); United States v. Smith, 973 F.2d 1374 (8th Cir. 1992).

Ninth Circuit

United States v. France, 57 F.3d 865 (9th Cir. 1995). The appellate court upheld the district court's determination that the defendant's statement during a bank robbery that he had dynamite was an "express threat of death" for purposes of USSG §2B3.1(b)(2)(F). The appellate court looked to examples cited in the guidelines commentary, and found that the mention of dynamite met the guideline criteria that the offender "engaged in conduct that would instill in a reasonable person, who is the victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery." The appellate court rejected the Eleventh Circuit's decision in United States v. Tuck, 964 F.2d 1079 (11th Cir. 1993), which held that the threat "don't do anything funny or I'll be back" failed to qualify because it was not sufficiently "direct, distinct, or express." The appellate court noted that the Tuck opinion was written before the United States Supreme Court in Stinson v. United States, 113 S.Ct. 1913, 1915 (1993), made it clear that the guidelines commentary is authoritative. The appellate court joined the Seventh, Eighth, and Tenth Circuits in holding that an "express threat of death" does not require an explicit threat to kill the victim. *See* United States v. Hunn, 24 F.3d 994, 996-98 (7th Cir. 1994); United States v. Bell, 12 F.3d 139, 140 (8th Cir. 1992); United States v. Lambert, 995 F.2d 1006, 1008 (10th Cir.), *cert. denied*, 114 S. Ct. 333 (1993).

§2B5.3 Criminal Infringement of Copyright

Seventh Circuit

United States v. Sung, 51 F.3d 92 (7th Cir. 1995). The appellate court remanded the case for resentencing where the defendant was convicted of selling and attempting to sell counterfeit haircare products in packaging bearing the trademarks and symbols of a recognized commercial haircare manufacturer. At issue was the calculation of the retail value of the infringing products. The defendant bought 1,100 gallons of a liquid to sell, enough to fill 17,600 bottles, with a retail sales value of $4.00 per bottle. However, he also bought 20,000 shipping cartons, which could each hold 12 bottles. The district court sentenced the defendant based on $960,000, the value of 240,000 bottles (20,000 cartons x 12 bottles). The appellate court stated that "§2B5.3 tells the court to impose a sentence based on the retail value of the infringing products; §2F1.1 does not answer the question whether the infringing boxes should be treated as if they represented the retail value of the completed product or only the value of the boxes themselves; to answer that question one visits §2X1.1 and learns that everything depends on how close the defendant came to completing additional crimes." On remand, the district court must determine "if the intent to sell 240,000 bottles has been established `with reasonable certainty'."

Part D Offenses Involving Drugs

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

Second Circuit

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995). The circuit court vacated the defendant's conviction and remanded for retrial. In addressing the defendant's sentence, the court instructed that, if the defendant is convicted on retrial, whether of conspiracy, or possession with intent to distribute, the district court must specify the basis of its drug quantity determination. Although the jury acquitted the defendant of the cospiracy charge in the first trial, "the district court was entitled to make its sentencing determination based upon his conspiratorial acts so long as it determined by a preponderance of the evidence that those conspiratorial acts took place." *See* United States v. Eng, 14 F.3d 165, 170 n.2 (2d Cir.), *cert. denied*, 115 S.Ct. 54 (1994). If the defendant was engaged in a conspiracy, the district court should include the entire amount of heroin the defendant intended to possess—not just the amount of heroin actually possessed by the defendant.

Third Circuit

United States v. Alton, 60 F.3d 1065 (3d Cir.), *cert. denied*, 116 S. Ct. 576 (1995). The district court erred in departing downwards from the applicable guideline sentencing range on the basis that the Sentencing Commission did not adequately consider as a mitigating factor the disparate impact that its policies would have on African-American males when it developed the guideline ranges for crack cocaine convictions. The defendant was convicted for conspiracy to possess and distribute cocaine and cocaine base and possession with intent to distribute in excess of five grams of cocaine base. At sentencing, the district court departed downward from the applicable guideline range, 168-210 months, and imposed a ten year term of imprisonment followed by a five-year term of supervised release. The government appealed the district court's conclusion that the guideline treatment of crack cocaine offenses is arbitrary and capricious and challenged the district court's downward departure based on the disproportionate impact of the severe penalties for crack cocaine offenses on African-Americans. The district court held that the Sentencing Commission acted in an arbitrary and capricious manner by providing for the conversion of one gram of cocaine base to 20 kilograms of marijuana for sentencing purposes. It further concluded that the Sentencing Commission violated the informal rulemaking procedure of the Administrative Procedures Act, 5 U.S.C. § 553, and that the guideline provisions under which the defendant was sentenced were therefore void. The circuit court ruled that the Commission's reliance on the federal drug statutes, 21 U.S.C. §§ 841(b)(1) and 846 as the primary basis for the guideline sentences meets the test set forth by the Supreme Court in Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Ins. Co, 463 U.S. 29, 43 (1983). The Supreme Court held that an agency adopting a rule pursuant to the informal rulemaking procedures "must examine the relevant data and articulate a satisfactory explanation for its action including a `rational connection between the facts found and the choice made.'" *Id*. at 43. The circuit court further held that it had explicitly rejected an equal protection challenge to the relevant statutory and guideline procedures. *See* United States v. Frazier, 981 F.2d 92 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1661 (1993). The circuit court further noted that in rejecting constitutional challenges to the distinction between cocaine base and cocaine powder in the federal sentencing scheme,

courts have consistently found that Congress had a rational basis for treating offenses involving the substances differently. The circuit court ruled that no "improper" agency action was involved in the Sentencing Commission's establishment of the drug equivalency tables. The government also challenged the district court's USSG §5K2.0 downward departure on the basis that the Commission did not adequately consider the disparate impact of the crack cocaine guidelines on African-American males. The circuit court recognized that every circuit court considering the matter has held that the impact of the guideline treatment of crack cocaine is not a proper ground for downward departure. The circuit court ruled that the defendant failed to establish facts or circumstances peculiar to himself for his offense that justify a downward departure and held that the disparate impact of the severe penalties for crack cocaine offenses for African-Americans is not a valid ground for departure from the guideline ranges for crack cocaine offenses.

Fourth Circuit

United States v. Turner, 59 F.3d 481 (4th Cir. 1995). The district court erred in ruling that the 0.4 mg conversion factor in Amendment 488 did not apply to liquid LSD because liquid LSD is not on a carrier medium. The defendant was convicted of conspiracy to possess with intent to distribute in excess of one gram of LSD; distribution of LSD within 1000 feet of a school and aiding and abetting in the possession with the intent to distribute marijuana within 1000 feet of a school. The defendant was sentenced to 108 months imprisonment, six years of supervised release, $220 restitution and $150 special assessment. Amendment 488 instructs courts not to use the weight of the carrier medium in calculating drug quantity for LSD offenses, to treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD and contains an application note which defined liquid LSD as "LSD that has not been placed onto a carrier medium." The defendant argued on appeal that his base offense level should be determined by converting the dosage units of the liquid into LSD quantities using the 0.4 mg conversion factor. The circuit court ruled that ". . . Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level." The court noted that the only reported decision was decided by the Middle District Court of Tennessee in United States v. Jordan, 842 F. Supp. 1031 (M.D. Tenn. 1994). The circuit court noted that the district court in Jordan had correctly recognized that plain language of the amendment authorizes the use of "LSD alone" in cases involving liquid LSD. The circuit court further noted that the intent of the amendment was to "remove sentencing disparities based on the varied weight of LSD carrier media and to harmonize the sentences for LSD distribution with the sentences for offenses involving more dangerous controlled substances, such as PCP." The circuit court further noted that Amendment 488 does not contravene the Supreme Court's holding in Chapman v. United States, 500 U.S. 453 (1991), that the weight of LSD carrier media should be included in determining the appropriate sentence under 21 U.S.C. § 841(b)(1), because the Supreme Court did not address the proper determination of the weight of LSD when the transactions involve liquid LSD.

Fifth Circuit

United States v. Allison, 63 F.3d 350 (5th Cir.), *cert. denied*, 116 S. Ct. 405 (1995). The circuit court held that the district court could properly sentence the defendant based on the size

and capability of the methamphetamine laboratory. The defendant argued that under Amendment 484, he could only be sentenced on the basis of the methamphetamines in his possession at the time of his arrest, and therefore his original sentence must be reduced. The circuit court noted that Amendment 484 does not speak to the situation in which the district court is sentencing the defendant based on the size and capability of the laboratory involved; instead, the amendment instructs the district court that the full weight of mixtures cannot be attributed to the defendant as the amount seized. The circuit court stated that if the district court is sentencing the defendant based on the size and capability of the laboratory, it is the size and production capacity of the laboratory, not the actual amount of methamphetamine seized, that is the touchstone for sentencing purposes. The district court properly sentenced the defendant on this ground.

Eighth Circuit

United States v. Wilson, 49 F.3d 406 (8th Cir.), *cert. denied*, 116 S. Ct. 384 (1995). The district court did not err in its application of the guidelines by using the plant count to weight conversion estimates of USSG §2D1.1(c) instead of the harvested drug weight to determine the defendant's base offense level. The defendant was involved in a large scale marijuana growing and distribution scheme and was convicted of conspiracy to manufacture and distribute marijuana and aiding and abetting possession with intent to distribute marijuana. The defendant claimed that application of the plant count conversion in his case would "drastically extend the scope of the conversion principle" because the marijuana attributed to him was harvested, shucked, packaged and sold months before law enforcement officials intervened. The circuit court held that where the evidence demonstrates that "an offender was involved in the planting, cultivation, and harvesting of marijuana plants, the application of the plant count to drug weight conversion of §2D1.1(c) is appropriate."

Ninth Circuit

United States v. Muschik, 49 F.3d 512 (9th Cir. 1995), *vacated in light of* United States v. Neal, 116 S. Ct. 763 (1996). The appellate court remanded the case for resentencing, holding that the district court erred by failing to use the formula established by Amendment 488, effective November 1, 1993, to guideline §2D1.1 to calculate the amount of LSD the defendant was accountable for at sentencing. Contrary to the Seventh, Fifth, Tenth, and First Circuits, the appellate court agreed with the Eighth Circuit's opinion in United States v. Stoneking, 34 F.3d 651 (1994), that the amendment provided a uniform and rational weight to LSD and its carrier mediums, which should be used to determine both the guideline sentencing range and any mandatory minimum sentence. *Contra* United States v. Neal, No. 94-1773 (7th Cir. Feb. 2, 1995) (*en banc*); United States v. Pardue, 36 F.3d 429 (5th Cir. 1994); United States v. Mueller, 27 F.3d 494 (10th Cir. 1994); United States v. Boot, 25 F.3d 52 (1st Cir. 1994). The appellate court reasoned that its holding follows the Supreme Court's decision in Chapman v. United States, 500 U.S. 453, 468 (1991), because the formula counts the carrier medium, but assigns it a uniform weight. Moreover, because LSD is sold by the dose rather than by weight, this formula incorporates a "market oriented" approach to drug sentencing, a concern noted in the Chapman

opinion. The appellate court further asserted that this approach promotes uniformity because it avoids the dual system of calculating LSD weight in one manner for the sentencing guidelines and another manner for mandatory minimum purposes, while still taking into account Chapman's "mandate" that the weight of the carrier must be included if the carrier "can be said to be bonded or mixed with the drug." "[T]he Sentencing Commission has determined, in effect, that .05 mg of LSD can be absorbed in, or chemically bonded with, a carrier eight times its weight." [**In 1996, the Supreme Court decided United States v. Neal, 116 S. Ct. 763 (1996), and held that the guideline method for determining the weight of LSD is not controlling for any mandatory minimum sentence.**]

United States v. Pinto, 48 F.3d 384 (9th Cir.), *cert. denied*, 116 S. Ct. 125 (1995). The district court did not err in denying the defendants a downward departure under §2D1.1, Application Note 16, based on its finding that the defendants' culpability was not "overrepresented." Application Note 16 allows a downward departure where (A) the amount of the controlled substance for which the defendant is accountable under §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under §3B1.2 (Mitigating Role). The defendants argued that overrepresentation of culpability is determined solely by whether the defendant qualifies for a mitigating role adjustment under §3B1.2. Conversely, the government argued that overrepresentation for purposes of clause (B) is determined by considering the base offense level set by §1B1.3. The circuit court agreed with the government's position, ruling that overrepresentation is determined by the defendant's "accountability" under §1B1.3 and whether this "accountability" is commensurate with the defendant's involvement in the crime. In this case, the district court correctly based its evaluation of culpability on the amounts of controlled substance with which the defendants were involved, and simply determined that the base offense level accurately reflected this culpability. Because the district court's analysis of Application Note 16 was proper, its discretionary denial of a downward departure was unreviewable.

Tenth Circuit

United States v. Decker, 55 F.3d 1509 (10th Cir. 1995). The district court did not err in treating 100% pure d,1-metamphetamine as "metamphetamine (actual)" under the sentencing guidelines. The defendant was convicted for manufacturing a substance consisting of both d,1-methamphetamine and d-methamphetamine. Both substances are isomers of each other, with d,1-methamphetamine having a relatively lower potency. The defendant argued on appeal that his sentence, which was identical to one that he would have received for manufacturing pure d-methamphetamine instead of a mixture, was erroneously calculated and was contrary to the Sentencing Commission's intent to punish more severely those who manufacture either more drugs or more potent drugs. The circuit court ruled that the district court correctly treated pure d,1-methamphetamine as "methamphetamine (actual)" for sentencing purposes. The circuit court discussed the rulings of the Eleventh and Third Circuits on this issue. In United States v. Carroll, 6 F.3d 735 (11th Cir. 1993), *cert. denied sub nom.* Jessee v. United States, 114 S. Ct. 1234 (1994), the Eleventh circuit held that the term "methamphetamine (actual)" refers to the relative purity of the methamphetamine and does not refer to a particular form of the methamphetamine.

In United States v. Bogusz, 43 F.3d 82 (3d Cir. 1994), *cert. denied sub nom.* O'Rourke v. United States, 1995 WL 155340 (April 24, 1995), the Third Circuit agreed that the term "methamphetamine (actual)" refers to the amount of pure illegal product, but disagreed slightly and held that references to "methamphetamine" and "methamphetamine (actual)" in the drug quantity table of USSG §2D1.1(c) refer solely to pure quantities of d-methamphetamine and that in order to calculate a base offense level for d,1-methamphetamine, the substances in question must be converted into its marijuana equivalency. The circuit court recognized the different methods of manufacturing methamphetamine and ruled that the district court correctly calculated the defendant's sentence. Paragraph five in the Application Notes following USSG §2D1.1 directs the court to include all salts, isomers and all salts of isomers in calculating the weight of any given controlled substances thereby precluding the defendant's argument that "methamphetamine (actual)" refers only to pure d-metamphetamine. Furthermore, the guidelines instruct courts to assign the weight of the entire mixture of substance to the controlled substance that results in the greater offense level when the mixture consists of more than one controlled substance, thereby precluding the defendant's claim that his base offense level should have been determined by combining the calculated marijuana equivalents of the amounts of d,1-methamphetamine and d-methamphetamine in the substance.

United States v. Gonzalez, 65 F.3d 814 (10th Cir. 1995). The district court erred in ruling that the defendant's five-year mandatory minimum for using a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1) must be served consecutively to his state sentences arising out of the same conduct. The circuit court ruled that 18 U.S.C. § 924(c)'s mandatory five-year sentence may run concurrently with a previously imposed state sentence that a defendant has already begun to serve. The defendant was convicted of conspiracy to possess and distribute marijuana, possession with intent to distribute marijuana and the use or carrying of a firearm during a drug trafficking crime. The defendants received substantial state sentences for convictions arising out of this same conduct. In making this determination, the circuit court examined the language of 18 U.S.C. § 924(c)(1) which provides in relevant part, "Whoever, during and in relation to any . . . drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . ., be sentenced to imprisonment five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment under this subsection run concurrently with any other term of imprisonment . . . ." The circuit court ruled that the language encompasses only federal offenses and not state offenses. Although that language could be interpreted to encompass federal and state sentences, the appellate court ruled that because the statute is federal, with presumed concern for the treatment of federal crimes, the language could be read more narrowly to apply only to federal sentences, excluding state sentences from its scope. This interpretation is consistent with USSG §5G1.3(b) which allows sentences to run concurrent to undischarged terms of imprisonment where the defendant is prosecuted in federal and state court for the same conduct.

Eleventh Circuit

United States v. Butler, 41 F.3d 1435 (11th Cir. 1995). The defendants were convicted of conspiracy to distribute cocaine base. The probation officer calculated the appellant's base offense levels by approximating the number of cocaine base transactions that took place during the conspiracy. This calculation was based on information provided by a law enforcement officer who surveyed the defendant's crack house on January 17 from 10:59 a.m. to 3:07 p.m. Although the defendants objected to the PSR's findings, the trial court did not hear any testimony at the sentencing hearings nor did it make any factual findings. The government offered exhibits summarizing the method used by the probation officer to calculate the amount of cocaine attributable to each defendant; however, the government did not introduce the evidence on which these exhibits relied. The trial court erred by concluding that January 17 was a "reliable proxy" for drug sales on other days without first making sufficient factual findings based on circumstantial or direct evidence to support that conclusion. The sentences were vacated and remanded for further factual findings.

United States v. Hall, 46 F.3d 62 (11th Cir. 1995). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2D1.1(b)(1) for his possession of a firearm. The defendant argued that the government merely showed the handgun was in the same room as the drug paraphernalia, and did not show it was connected to the offense. Although contrary to the Eighth Circuit, *see* United States v. Khang, 904 F.3d 1219, 1223 n.7 (8th Cir. 1990), the Eleventh Circuit panel agreed with the majority of circuits in holding that "once the government has shown proximity of the firearm to the site of the charged offense, the evidentiary burden shifts to the defense to demonstrate that a connection between the weapons and the offense is clearly improbable." *See* United States v. Cochran, 14 F.3d 1128, 1132 (6th Cir. 1994); United States v. Cantero, 995 F.2d 1407 (7th Cir. 1993); United States v. Corcimiglia, 967 F.2d 724, 727-28 (1st Cir. 1992); United States v. Roberts, 980 F.2d 645, 647 (10th Cir. 1992); United States v. Restrepo, 884 F.2d 1294, 1296 (9th Cir. 1989).

United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995). The district court erred in imposing a sentence based upon D-methamphetamine rather than L-methamphetamine when it failed to make findings as to the type of methamphetamine used in the offense. The defendant was convicted of conspiracy to manufacture amphetamine and was sentenced on the basis of D-methamphetamine. The circuit court noted its prior ruling that because methamphetamine requires a significantly harsher sentence under the guidelines than L-methamphetamine, the government bears the burden of production and persuasion as to the type of methamphetamine involved in the offense. United States v. Patrick, 983 F.2d 206 (11th Cir. 1993). The defendants, however, failed to object at sentencing. In addressing an issue of first impression in the Eleventh Circuit, the court joined the Third Circuit in ruling that a sentence lacking specific findings as to the type of methamphetamine used in the offense was plain error. The Third Circuit reasoned in United States v. Bogusz, 43 F.3d 82, 90 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1812 (1995), that "[c]onsidering the magnitude of the difference in sentencing that could result from the application of the wrong organic isomer, we think the sentencing court's failure to make this determination would result in a grave miscarriage of justice." The Tenth Circuit, however, held that by failing to make any objections to the sentencing court as to the type of methamphetamine, the defendant had waived the issue for appeal. United States v. Dennino, 29 F.3d 572, 580 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1117 (1995). The Eleventh Circuit ruled that to satisfy the plain error

standard, a party must demonstrate that (1) there was an error in the district court's action; (2) such error was plain, clear or obvious, and (3) the error affected substantial rights, in that it was prejudicial and not harmless. United States v. Foree, 43 F.2d 1572, 1578 (11th Cir. 1995) (citing United States v. Olano, 113 S. Ct. 1770, 1777-79 (1993)). The court further noted that the government had conceded that sentencing based upon D-methamphetamine rather then L-methamphetamine makes a substantial difference in the severity of the sentence imposed. The government and the district court should have known that findings as to the type of methamphetamine were required, and that failure to make such findings had a profound impact on the range of possible sentences imposed.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

First Circuit

United States v. Chorney, 63 F.3d 78 (1st Cir. 1995). The district court did not err in its loss calculation under USSG §2F1.1. The defendant engineered a false appraisal of silver dollars, and was convicted of seven counts of making false statements or reports to a federally insured bank. The district court sentenced the defendant to twenty-seven months imprisonment, followed by three years' supervised release, and ordered him to pay $569,469 in restitution to the FDIC. The district court arrived at the $569,469 figure by reducing the amount of the unpaid loan ($2.5 million) by the value of the silver dollars and other assets that the defendant had pledged to secure the loan; and then, the court subtracted the value of unpledged silver dollars ($336,951) that had been seized from the defendant. The defendant unsuccessfully argued that the court should have subtracted the value of the unpledged silver dollars on the date of the discovery of the fraud ($590,602.30) which would reduce his restitution by over $200,000. The district court actually valued the silver dollars from an amount that was in-between the amount the government thought was appropriate (value at time of sentencing) and the value at time the fraud was discovered. The circuit court affirmed the amount computed by the district court and stated that it is the illegal transaction that is to be appraised-not the defendant's overall wealth-and no reason was provided here to make an exception. The circuit court noted that to give the defendant credit for other, unpledged assets is simply a free ride for the wealthy defendant and wholly at odds with the underlying purpose of the guideline.

Third Circuit

United States v. Coyle, 63 F.3d 1239 (3d Cir. 1995). The district court did not err in determining the amount of loss by adopting the "amount taken" or "gross gain" as the measure of fraud loss. The defendant was convicted of three counts of mail fraud and appealed the court's legal interpretation of fraud loss. The circuit court stated that under USSG §2F1.1, fraud loss is the "amount of money the victim has actually lost revised upward to the intended or probable loss if either amount is higher and determinable." United States v. Kopp, 951 F.2d 521 (3d Cir. 1991).

However, the court stated that under the guidelines and case law precedent, the offender's gain from committing the fraud is an alternative estimate to use in cases of embezzlement.
United States v. Badaracco, 954 F.2d 928 (3d Cir. 1992). The circuit court concluded that it was "appropriate for the district court to adopt `amount taken' or gross gain as the measure of fraud loss, *i.e.*, the difference between the amount reported and the amount retained." The circuit court rejected the defendant's contention that the amount of fraud loss should be reduced by the amount of administrative retention attributable to the contract.

Fourth Circuit

United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995). The district court erred in determining the economic loss attributable to the defendant pursuant to USSG §2F1.1. The district court used the defendant's gross sales of some $13.4 million as the economic "loss" caused by the defendant's regulatory fraud, resulting in an 11 level increase in his base offense level. The defendant, co-owner of a pharmaceutical company, submitted a drug application for FDA approval which was deficient, in that it purported to contain records for three batches of a drug when it was based on only one acceptable batch. In addition, after obtaining manufacturing and marketing approval from the FDA for a different drug, the defendant slightly modified the formula to increase its shelf life. There was no dispute that the safety and therapeutic value of the drugs was not affected by these deficiencies in meeting FDA requirements. The appellate court rejected the government's argument that loss under §2F1.1 should be measured by the defendant's gain from the sale of the drugs. Instead, the appellate court held that no quantifiable loss can be attributed to the defendant's conduct, because the drug possessed FDA approval, posed no threat to the health and well-being of the consumer, and met all of the goals of FDA requirements for safety and efficiency. The case was remanded for resentencing.

Fifth Circuit

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). The district court erred in increasing the defendant's base offense level by three levels under USSG §2F1.1(b)(1)(D) based on the finding that the defendant caused losses of over $10,000. The defendant pled guilty to making false statements on immigration documents and education grant applications. He was sentenced to ten months incarceration and was ordered to be deported as a condition of supervised release. The defendant argued on appeal that the court erred in calculating the loss attributable to him because he intended to repay the money. The circuit court ruled that the district court erred in failing to make a finding as to whether the defendant would pay back the loans. The district court erred in calculating loss on the basis of the amount it believed the defendant intended to receive.

United States v. Smithson, 49 F.3d 138 (5th Cir. 1995). The appellate court vacated the defendants' sentences, and remanded for the district court to revisit its valuation of loss under USSG §2F1.1. The defendants purchased options to purchase land, and during the option period, would attempt to make zoning changes and other improvements, and then search for buyers for the land. When the defendant Pyron filed a chapter 7 bankruptcy petition, he failed to reference two options he had owned two days earlier. Rather, prior to filing the petitions, he had his co-defendant Smithson, an attorney, create two corporations for the purpose of receiving the

options. A jury found the defendants guilty of five counts of bankruptcy fraud. In determining loss, the district court attempted to calculate the defendants gain. The PSR calculated the total gain to be $278,730.42 by adding the current value of the defendants' shares in one of corporations, Smithson's legal fees earned in the purchase of a building subject to one of the options, plus expenses Pyron recovered in connection with the sale of other option property. The appellate court noted that what the defendants concealed from the trustee "was an option, not a building." The options were difficult to value at trial, and evidence indicated that the loss to the bankruptcy estate was "for all practical purposes, zero." Although Application Note 8 to §2F1.1 provides that gain can be used as alternative valuation method, the gain was also difficult to calculate. The appellate court noted that "[i]t is imperative, however, that the value ascribed to the options cannot be measured after their first post-petition expiration dates. On remand, the district court must decide the value of the TeamBank option based on this standard; this, and only this, is what the appellants gained by concealing the options from the bankruptcy estate."

Sixth Circuit

United States v. Flowers, 55 F.3d 218 (6th Cir.), *cert. denied*, 116 S. Ct. 261 (1995). In its first published opinion addressing the issue, the appellate court held that the amount of loss in a check kiting case is determined at the time the crime "was detected, rather than at sentencing, and that defendants convicted of bank fraud by check kiting will not be permitted to buy their way out of jail by subsequently making voluntary restitution." The fact that the check kiters made restitution to the bank prior to sentencing cannot alter the "fact of loss." The sentences were affirmed.

Seventh Circuit

United States v. Andersen, 45 F.3d 217 (7th Cir. 1995). The district court did not err in sentencing the defendants under §2F1.1 instead of §2N2.1, where the defendants were convicted of manufacturing and compounding drugs in their basement and failing, with the intent to defraud and mislead, to register the site with the FDA in violation of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 331(p) and 333(a)(2). The defendants recognized that §2N2.1, which applies to food and drug offenses, directs the court to apply §2F1.1 "if the offense involved fraud." However, the defendants argued that §2F1.1 could not be applied because the evidence established only that they defrauded a regulatory agency, not their customers, and that fraud on a regulatory agency does not support the use of §2F1.1. The circuit court disagreed, joining the Fifth and Ninth Circuits in holding that "there is no meaningful distinction between the government as a victim and individual consumer victims," and thus evidence of fraud on a regulatory agency is sufficient to invoke §2F1.1. *See* United States v. Cambra, 933 F.2d 752, 756 (9th Cir. 1991); United States v. Von Mitchell, 984 F.2d 338 (9th Cir. 1992); United States v. Arlen, 947 F.2d 139 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1480 (1992). However, the district court erred in enhancing the defendants' sentence under §2F1.1 based on their profits. The circuit court agreed with the district court that under §2F1.1 gain is usually an appropriate means of estimating loss, but noted that this method of estimation can only be used if it results in a "reasonable estimate of the loss." In the case at bar, there was no clear evidence that the customers or consumers suffered any loss. In fact, the circuit court noted that the defendants' customers were "pleased" with the defendants' services, and that the defendants were "serving a niche in the market not served by others." Accordingly, the circuit court concluded that while an upward departure may be warranted based on the non-monetary risk to human and animal health caused by the defendants' offenses, a sentencing enhancement "of nine points under sec. 2F1.1(b)(1) based on the defendants' financial gain is insupportable." The case was remanded for resentencing.

United States v. Barrett, 51 F.3d 86 (7th Cir. 1995). The defendant asserted that the district court improperly determined the amount of loss, because the company he defrauded did not qualify as a "victim" because his accomplice was an employee of the company. The appellate court affirmed the district court's decision, noting that although the court has not previously defined the "scope of the term `victim' under §2F1.1 of the Guidelines," "common sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions . . . will not be imputed to his employer." The district court also noted that the loss

attributed to a second company was correctly determined in accordance with Application Note 7 to USSG §2F1.1, which states that "the loss in a situation where a defendant fraudulently obtains a loan by misrepresenting the value of his assets is the amount of the loan not repaid, less the amount recovered from the sale of collateral." The sentence was affirmed.

Ninth Circuit

United States v. Mende, 43 F.3d 1298 (9th Cir. 1995). The district court did not err in calculating the amount of loss pursuant to USSG § 2F1.1, when it included $13,000,000 incurred by banks when the defendant's company failed to honor its loan guarantees. The defendant, along with co-conspirators, operated a complex loan fee fraud scheme where advance fees for nonexistent loans and loan guarantees were solicited. The defendant challenged the district court's inclusion of the $13,000,000 as actual loss, claiming the amount should have been considered incidental and consequential damages. The appellate court held the $13,000,000 was a direct result of the defendant's fraudulent misrepresentations and was therefore properly included in the calculation of the amount of loss.

United States v. Yusufu, 63 F.3d 505 (7th Cir.), *cert. denied*, 116 S. Ct. 578 (1995). The district court properly determined that the amount of loss under USSG §2F1.1 was the amount of the intended loss. The defendant was convicted of unlawfully transporting altered securities in interstate commerce, and appealed his sentence arguing that the district court improperly calculated the amount of loss he caused. The court calculated the amount of loss the defendant caused by adding the raised amount of altered money orders to the raised amount of an altered cashier's check. The defendant claimed that only the money orders should be counted in the calculation because the check was discovered before any funds could be drawn on it. The circuit court concluded that USSG §2F1.1 Application Note 7 which states: "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than actual loss," was controlling. The circuit court rejected the defendant's argument that the court should adopt the Sixth Circuit's position that a court can determine intended loss under §2F1.1 only by applying the attempt guidelines of USSG 2X1.1 (b)(1). *See* United States v. Watkins, 994 F.2d 1192, 1196 (6th Cir. 1993). The circuit court concluded that USSG 2X1.1 does not apply to the defendant's case because §2X1.1 has nothing to do with the amount of loss for a completed crime; rather it deals with adding additional offense levels for attempted crimes where the defendant was caught in the middle of a larger scheme and is convicted only of the crimes he had completed up to the point he was caught. The circuit court affirmed the district court's use of the intended loss to calculate the amount of loss.

Eighth Circuit

United States v. Peters, 59 F.3d 732 (8th Cir. 1995). The district court did not err in its calculation of loss pursuant to USSG §2F1.1. The defendant owned and operated an architectural and engineering firm which was hired to assist a school district in obtaining federal funds for an asbestos removal project. Upon discovering that the funds provided were substantially in excess

of what was needed for the asbestos project, the defendant developed and implemented a scheme to submit false claims to the federal government in order to use additional money for other renovation projects in the school district which were unrelated to asbestos removal. The defendant was convicted of various counts of conspiracy to defraud the United States, causing false and fraudulent claims to be filed against the United States and theft of property belonging to the United States. The district court determined the amount of loss to be $153,476—the full amount of the false claims the defendant had submitted. The defendant argued on appeal that because the program was partially a loan program, the district court should have included the amount that the United States was unlikely to recover instead of the full amount of the claims submitted, pursuant to note 7(b) of the commentary to USSG §2F1.1. The circuit court ruled that even if a portion of the $153,476 could be characterized as a loan, it is still an interest free loan and therefore best characterized as a government benefit. The circuit court noted that the commentary accompanying USSG §2F1.1 specifically provides that the loss is the value of the benefits diverted from intended recipients or uses when the case involves diversion of government program benefits, which in this case was correctly determined to be $153,476 by the district court.

Tenth Circuit

United States v. Moore, 55 F.3d 1500 (10th Cir. 1995). The defendant was convicted of aiding and abetting credit card fraud. The government sought a five level enhancement under the fraud guideline, USSG §2F1.1, based on the amount of loss involved. The $40,000 loss amount included the market value of two abandoned rental cars and the rented truck driven at the time of apprehension. The district court based the loss amount on the commentary to USSG §2F1.1, comment. (n.7), which states that if the intended loss was greater than the actual loss inflicted, that amount should be used. The commentary refers to the calculation of loss under the larceny guideline, at §2B1.1, and at §2B1.1, comment. (n.2), the commentary explains that where "a defendant is apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately." The appellate court found "the district court's reliance upon the commentary to 2B1.1 inconsistent with our cases interpreting 2F1.1." Because "the government presented no evidence of actual losses sustained by the owners of the rented vehicles," the district court on remand must make additional findings and determine whether the defendant "intended to inflict a loss that included the entire fair market value of each of the rented vehicles."

Eleventh Circuit

United States v. Goldberg, 60 F.3d 1536 (11th Cir. 1995). The district court erred in calculating loss pursuant to USSG §2F1.1. The defendant was convicted of possession and interstate transportation of stolen securities, bank fraud and attempted escape. The defendant argued on appeal that he deserved an evidentiary hearing to determine the number of bonds attributable to him and their value. The defendant further argued that the stolen bonds were worthless on their face. The circuit court ruled that the district court erred in failing to hold an evidentiary hearing to determine the actual number of bonds for which the defendant was responsible, and the face value of the bonds. The circuit court further ruled that for sentencing purposes the face value of bonds provides a reasonable quantification of the risk to unsuspecting

buyers or lenders. *See* United States v. Jenkins, 901 F.2d 1075, 1084 (11th Cir.), *cert. denied*, 498 U.S. 901 (1990).

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

§2G2.2 Trafficking in Material Involving Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Such Material; Possessing Such Material

First Circuit

United States v. Chapman, 60 F.3d 894 (1st Cir. 1995). The district court erred in interpreting USSG §2G2.2 to include "sexual abuse or exploitation." The defendant argued on appeal that the district court erred in its application of USSG §2G2.2 because the guideline "does not permit the consideration of past sexual abuse or exploitation that is unrelated to the offense of conviction, and because transmission of child pornography by computer is not 'sexual abuse or exploitation' within the meaning of the guideline." The circuit court noted that the terms "sexual abuse" and "sexual exploitation" are not defined in the relevant Sentencing Guidelines or their corresponding statutory provisions, and ruled that sexual exploitation for the purposes of USSG §2G2.2 does not include the computer transmission of child pornography. The court further ruled that the five level "pattern of activity" enhancement in USSG §2G2.2(b)(4) is inapplicable to past sexual abuse or exploitation unrelated to the offense of the conviction.

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release

Eleventh Circuit

United States v. Williams, 59 F.3d 1180 (11th Cir.), *petition for cert. filed* (U.S. Dec. 26, 1995) (No. 95-1562). The Sentencing Commission did not over step its bounds in promulgating USSG §2J1.7. Guideline §2J1.7 calls for a three level enhancement if the defendant commits a federal offense while on release. "18 U.S.C. § 3147 authorizes the Commission to provide for enhancement for crimes committed while on release pursuant to the Bail Reform Act."

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

Eleventh Circuit

United States v. Aduwo, 64 F.3d 626 (11th Cir. 1995). The district court did not err in applying the cross-reference provision in USSG §2K2.1 in calculating the defendant's sentence. The defendant pleaded guilty to making false statements to acquire firearms and possession of a firearm by a convicted felon. The defendant was involved in an attempted armed robbery in which her co-conspirator carried a gun. The district court applied the cross-reference provision in USSG §2K2.1 which directs the court to sentence the defendant according to the guideline for the offense that the defendant committed while in possession of the firearm. The defendant argued on appeal that the cross-reference provision was not applicable because she did not possess a firearm in connection with the attempted armed robbery, because the plan did not include the use of weapons, because she did not have possession of a weapon during the attempted robbery and because she did not know a firearm was present during her participation in the crime. In a matter of first impression, the Eleventh Circuit applied the Pinkerton rule of conspirator liability to USSG §2K2.1. In Pinkerton v. United States, 328 U.S. 640 (1946), the Supreme Court held that conspirators are liable for the reasonably foreseeable acts of their co-conspirators in furtherance of the conspiracy. The circuit court recognized that defendants who illegally possess firearms will be sentenced under USSG §2K2.1(a) and (b), but defendants who then use that weapon in another crime are eligible for a longer sentence under the guideline applicable to the subsequent crime, which allows the sentencing court to impose a sentence that "reflects the magnitude of the crime." The circuit court held that since the co-conspirator's possession of a concealed firearm during the attempted robbery was foreseeable and in furtherance of a "drug rip-off," the possession of the firearm could be imputed to the defendant.

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

Fourth Circuit

United States v. Hamrick, 43 F.3d 877 (4th Cir.), *cert. denied*, 116 S. Ct. 90 (1995). The district court did not err in concluding that the improvised dysfunctional incendiary letter bomb used by the defendant in his attempt to assassinate a United States Attorney was a "destructive device" under 18 U.S.C. § 924(c)(1). The defendant argued that the terms "firearm" and "destructive device" in section 924(c)(1) were interchangeable and thus the district court should have imposed the five year sentence prescribed for use of a "firearm" instead of the 30-year sentence prescribed for use of a "destructive device." The circuit court, convening en banc, ruled that while "firearm" is defined to include "destructive device," the terms are not interchangeable. Rather, a "destructive device" is a subset of "firearm," and the statute is unambiguous that use of a destructive device shall be punished by 30 years imprisonment. The circuit court, however, was divided, with two concurring opinions expressing doubt as to whether the dysfunctional bomb

was a destructive device, and one dissenting opinion concluding that the bomb was not a "deadly or dangerous weapon" for the purpose of sentence enhancement.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

Eleventh Circuit

United States v. Palacios-Casquete, 55 F.3d 557 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 927 (1996). The district court did not err in applying 18 U.S.C. § 1326(b)(2) as a sentencing enhancement provision. The defendant pleaded guilty to being a deported alien found unlawfully in the United States in violation of 18 U.S.C. § 1326. The defendant claimed that because the indictment to which he pleaded guilty did not mention any of his prior convictions, he was not given notice that he was pleading guilty to any offense other than being found in the United States after having been deported. The defendant claimed that the court's use of 18 U.S.C. § 1326(b)(2) as a sentence enhancement provision rather than as a statement of a separate offense violated his due process rights. 18 U.S.C. § 11326(b)(2) applies to any alien who has been deported and is found at any time in the United States after having been convicted of an aggravated felony. The statute mandates a fine and a custodial sentence not to exceed 15 years. The circuit court recognized the line of cases from the Ninth Circuit which interpret 18 U.S.C. § 1326(b)(1) and (b)(2) to state separate crimes, not sentencing enhancements. *See* United States v. Campos-Martinez, 976 F.2d 589 (9th Cir. 1992) (sections 1326(a) and 1326(b) state separate crimes); United States v. Gonzalez-Medina, 976 F.2d 570 (9th Cir. 1992) (same) (citing dicta in United States v. Arias-Granados, 941 F.2d 996 (9th Cir. 1991) (plea bargain)). The court noted that the four other circuits have rejected the Ninth Circuit's line of cases and have applied 18 U.S.C. § 1326(b) as a sentence enhancement provision. *See* United States v. Crawford, 18 F.3d 1173 (4th Cir. 1994) (section 1326(b) is a sentence enhancement provision); United States v. Forbes, 16 F.3d 1294 (1st Cir. 1994) (same); United States v. Vasquez-Olvera, 999 F.2d F.2d 943 (5th Cir. 1993) (King J., dissenting), *cert. denied*, 114 S. Ct. 889 (1994)(same); *see also* United States v. Cole, 32 F.3d 16 (2d Cir. 1994) (a sentence-enhancement provision rather than a separate offense). In making its ruling, the circuit court relied on its holding in United States v. McGatha, 891 F.2d 1520, 1522-23 (11th Cir. 1990), where it treated 18 U.S.C. § 924(e)(1) as a sentence enhancement provision, and not as the creation of a new, separate offense which must be alleged in the indictment and proved at trial. The court joined the other four circuits that discussed the legislative evolution of 18 U.S.C. § 1326 through its various amendments and concluded that Congress intended § 1326 to denounce one substantive crime—unlawful presence in the United States after having been deported, with the sentence to be enhanced incrementally for those aliens who commit the offense after having been deported following convictions for "nonaggravated" or "aggravated" felonies.

§2L2.1 Trafficking in Documents of Naturalization, Citizenship, or Legal Resident Status; False Statement of another's Citizenship or Immigration Status; Fraudulent Marriage

Seventh Circuit

United States v. Munoz-Cerna, 47 F.3d 207 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 927 (1996). The defendant was convicted of attempted armed robbery in March 1990. After serving his sentence the defendant was deported, but soon returned to the United States and was apprehended in May 1993. Congress enacted 8 U.S.C. § 1326 in 1988 to increase the criminal penalty for reentry of an alien to the United States; if the deportation followed commission of a felony, a maximum sentence of five years could be imposed; if it followed commission of an aggravated felony, a maximum sentence of fifteen years could be imposed. When enacted, this statute's definition of aggravated felony did not include attempted armed robbery. Congress amended the definition in 1990 to include attempted armed robbery. This amended definition was not made retroactive. Therefore, the government determined that the defendant's statutory maximum sentence was five years. However, the sentencing guidelines under §2L1.2 provide for a 16-level increase (§2L1.2 was amended to provide for a 16-level increase effective 1991) if deportation followed an aggravated felony conviction, including conviction for attempted armed robbery. The defendant argued that the enhancement under §2L1.2 for an aggravated felony was improper because the statutory enhancement was prospective only, and was thus not applicable to him. The Seventh Circuit disagreed, and held that the "specific structure and language require consideration of the applicability of these two specific offense characteristics of USSG §2L1.2(b) regardless of the statutory subsection applicable to the defendant." The decision of the district court was affirmed.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

Sixth Circuit

United States v. McCullough, 53 F.3d 164 (6th Cir. 1995). In addressing an issue of first impression in the Sixth Circuit, the appellate court held that federal prison work camps are not similar to halfway houses, community corrections centers, or community treatment centers for purposes of USSG §2P1.1(b)(3). The defendant had asserted that he was entitled to a four level reduction in offense level because his escape from a federal prison work camp was "similar" to escape from a non-secure facility. In rejecting this argument, the Sixth Circuit followed five other circuits which have already considered the issue. *See* United States v. Cisneros-Garcia, 14 F.3d 41 (10th Cir. 1994); United States v. Hillstrom, 988 F.2d 448 (3d Cir.), aff'd on remand, 37 F.3d 1490 (1994), *cert. denied*, 63 U.S.L.W. 3690 (Mar. 20, 1995); United States v. Tapia, 981 F.2d 1194 (11th Cir.), *cert. denied*, 113 S.Ct. 2979 (1993); United States v. Shaw, 979 F.2d 41 (5th Cir. 1992); United States v. Brownlee, 970 F.2d 764 (10th Cir. 1992); United States v. McGann, 960 F.2d 846 (9th Cir.), *cert. denied*, 113 S.Ct. 276 (1992).

Seventh Circuit

United States v. Stalbaum, 63 F.3d 537 (7th Cir. 1995). In considering an issue of first impression, the circuit court held that under USSG §2P1.1, "a federal prison camp is not similar to the community institutions referenced in USSG §2P1.1(b)(3)." That section requires a reduction in sentencing for escapes from non-secure "community corrections centers, community treatment centers or halfway houses" or "similar" facilities, but provides no examples of what is "similar." The circuit court joined with six other circuits to conclude that federal prison camps are not similar to "community corrections centers, community treatment centers or halfway houses." United States v. McCullough, 53 F.3d 165 (6th Cir. 1995); United States v. Cisneros-Garcia, 14 F.3d 41 (10th Cir. 1994); United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993), *cert. denied*, 115 S.Ct. 1382 (1995); United States v. Tapia, 981 F.2d 1194 (11th Cir.), *cert. denied*, 113 S. Ct. 2979 (1993); United States v. Shaw, 979 F.2d 41 (5th Cir. 1992); United States v. Brownlee, 970 F.3d 764 (10th Cir. 1992); United States v. McGann, 960 F.2d 846 (9th Cir.), *cert. denied*, 113 S. Ct. 276 (1992).

Part R Antitrust Offenses

§2R1.1 Bid-Rigging, Price Fixing or Market-Allocation Agreements Among Competitors

Second Circuit

United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995). The district court did not err in departing downward one offense level from the guidelines sentence because of the impact imprisonment of the defendant would have on his employees. The defendant was convicted of a Sherman Act violation (USSG §2R1.1), and the district court departed down one level in order to be able to sentence the defendant to probation instead of prison. The government appealed the downward departure, contending that such departure is inconsistent with the deterrence rationale of USSG §2R1.1. The commentary to the antitrust guideline (§2R1.1) reflects the view that to deter potential violators, antitrust offenders should generally be sentenced to prison. The circuit court agreed with the government's position, but held that this case involved mitigating circumstances not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. 18 U.S.C. § 3553(b) (1988). The circuit court analogized this situation to departures for extraordinary family situations. *See* United States v. Johnson, 964 F.2d 124, 128 (2d Cir. 1992). "[B]usiness ownership alone, or even ownership of a vulnerable small business, does not make downward departure appropriate," however, "departure may be warranted where, as here, imprisonment would impose extraordinary hardship on employees." The court noted that without the defendant, two companies would likely end up in bankruptcy, and 150-200 employees would lose their jobs. On this basis, the circuit court concluded that the district court's determination that this was an extraordinary case was not in clear error, and affirmed the sentence.

Part X Other Offenses

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

First Circuit

United States v. Egemonye, 62 F.3d 425 (1st Cir. 1995). The district court did not err in not applying USSG §2X1.1 to determine the amount of loss caused by the defendant's offense. The defendant was convicted of offenses relating to the possession and use of other people's credit cards. The district court computed the loss by including the aggregate credit limit of all the credit cards purchased from the undercover officer, even though many of the cards had not been used. The defendant unsuccessfully argued that only a some of the credit cards should be included in the loss calculation because he had not recovered the amounts from the unused cards. The defendant argued that the court should use USSG §2X1.1 which gives a defendant a three-level discount if he is "some distance from completing the substantive crime." The circuit court rejected this argument and held that USSG §2X1.1 only applies to cases where the substantive offense has not been completed. The court added that §2X1.1 is not relevant to the present case because 14 of the 15 counts against the defendants involved completed substantive offenses. The circuit court noted that under USSG §2F1.1, intended loss should be used if the amount is greater than actual loss. The court concluded that the district court was not in plain error for including "the aggregate limit of $200,000" of all the cards in the amount of loss calculation.

Second Circuit

See United States v. Amato, 46 F.3d 1255 (2d Cir. 1995), §1B1.2, p. 1.

Seventh Circuit

United States v. Maggi, 44 F.3d 478 (7th Cir. 1995). The appellate court remanded the case for resentencing for the district court to determine whether the conspiracy charged was uncompleted, which, under the provisions of USSG §2X1.1(b)(2), would entitle the defendant to a three-level reduction in her base offense level. On appeal, the defendant alleged that she and her co-conspirator did not complete all the acts necessary to complete a money laundering conspiracy. The defendant failed to raise the issue in the district court, but the appellate court found that the failure to make the factual determination constituted plain error.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

Ninth Circuit

United States v. O'Brien, 50 F.3d 751 (9th Cir. 1995). The appellate court rejected the First Circuit's interpretation of USSG §3A1.1 in United States v. Rowe, 999 F.2d 14 (1st Cir. 1993), which held that the commentary requires that a defendant "target" vulnerable victims before the enhancement applies. While noting that the circuits have split on this issue, the court chose to follow its prior holding in United States v. Boise, 916 F.2d 497, 506 (9th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991), which "specifically rejected the argument that §3A1.1 requires a defendant to select a victim intentionally because of his vulnerability." The court noted that it reconciled the commentary to §3A1.1 with the text of the guideline in its opinion in United States v. Caterino, 957 F.2d 681, 683 (9th Cir.), *cert. denied*, 113 S.Ct. 129 (1992), wherein it held that the "commentary's language has a limited purpose—`to exclude those cases where defendants do not know they are dealing with a vulnerable person.'" In this case, the defendants "knew or should have known" that many claimants in their medical insurance scam were vulnerable because they had medical conditions which realistically precluded them from switching insurance companies, and they continued to accept these claimants' premium payments. The appellate court also rejected the defendants' assertion that the victims were not "unusually vulnerable" or "particularly susceptible" to the fraud. "Here, victims who developed medical conditions and could not get their claims paid are, as a group, unusually vulnerable to appellants' continued acceptance of premiums and appellants' promises of payment." The enhancement was affirmed.

Eleventh Circuit

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1058 (1996). The district court did not err in enhancing the defendant's base offense level pursuant to USSG §3A1.1, the vulnerable victim guideline. The defendant was convicted of conspiracy to commit mail and wire fraud, and wire fraud for fraudulent conduct while operating a loan brokerage firm. The defendant argued on appeal that the district court erred in applying USSG §3A1.1 because vulnerablility for sentencing purposes is measured at the time of the commencement of the crime and the victim's vulnerability in this case, which was defined as his absence from the country, occurred after the crime began. The circuit court noted that the two circuits which have addressed this specific issue reached opposite conclusions. The Ninth Circuit held that USSG §3A1.1 does not require defendants to have targeted victims because of their vulnerability, and excludes only those whose vulnerability was not known to defendants. United States v. O'Brien, 50 F.3d 751, 754-55 (9th Cir. 1995). The First Circuit, however, held that USSG §3A1.1 applies only to victims whom the defendant targeted because of their vulnerability. United States v. Rowe, 999 F.2d 14, 17 (1st Cir. 1993). The circuit court recognized that its own

precedent is ambiguous on this issue. Compare United States v. Long, 935 F.2d 1207, 1210 (11th Cir. 1991) ("Section 3A1.1 is intended to enhance the punishment for offenses where the defendant selects the victim due to the victim's perceived susceptibility to the offense") with United States v. Salemi, 26 F.3d 1084, 1088 (11th Cir.) (holding that crime involving six-month old baby automatically justified vulnerable victim enhancement even though defendant apparently did not select victim for that reason), *cert. denied*, 115 S. Ct. 612 (1994). The circuit court ruled that under either interpretation, the enhancement was properly applied in this case because the defendants had "targeted" the victim to take advantage of his vulnerability: his absence from the country. The circuit court limited its ruling in scope, holding "only that in cases where the `thrust of the wrongdoing' was continuing in nature, the defendants' attempt to exploit the victim's vulnerability will result in an enhancement even if that vulnerability did not exist at the time the defendant initially targeted the victim."

Part B Role in the Offense

§3B1.2 Mitigating Role

Second Circuit

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995). The district court "misapprehended the proper circumstances" in which a reduction for a minor role in the offense is warranted. USSG §3B1.2. The government appealed the district court's two level reduction for minor role in the offense. USSG §3B1.2. The district court stated that the defendant's conduct was minor in relation to the other defendants, and noted that the defendant was "a minor participant vis-à-vis the role of his co-conspirators." The circuit court held that "the Sentencing Commission intends for culpability to be gauged relative to the elements of the offense of conviction, not simply to co-perpetrators." *See* United States v. Pena, 33 F.3d 2, 3 (2d Cir. 1994). The circuit court concluded that the fact that the defendant played a minor role in his offense "vis-à-vis the role of his co-conspirators is insufficient, in and of itself, to justify a two-level reduction," and stated that the defendant must have similarly played a minor role in comparison to the average participant in such a drug case.

Fifth Circuit

United States v. Atanda, 60 F.3d 196 (5th Cir. 1995). The district court did not err in refusing to grant the defendant a reduction in offense level pursuant to USSG §3B1.2. The defendant pleaded guilty to conspiracy to defraud the United States by filing false tax claims. The defendant claimed on appeal that the court misapplied USSG §3B1.2 by refusing to consider the defendant's role in the conspiracy and considering instead the fact that he filed a false return in his own name. In a matter of first impression, the Fifth Circuit concluded, "when a sentence is based on an activity in which a defendant was actually involved, USSG §3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." *See* United States v. Lampkins, 47 F.3d 175, 180-81 (7th Cir.), *cert. denied*, 115 S. Ct. 363 (1994); United States v. Olibrices, 979 F.2d 1557, 1561 (D.C. Cir. 1992).

Part C Obstruction

§3C1.1 Obstruction of Justice

Sixth Circuit

United States v. Zajac, 62 F.3d 145 (6th Cir.), *cert. denied*, 116 S. Ct. 681 (1995). The district court did not err in enhancing the defendant's base offense level by two levels for obstruction of justice pursuant to USSG §3C1.1. The defendant argued on appeal that the district court should have used the "clear and convincing" rather than the "preponderance of the evidence" standard of proof when determining whether the defendant had committed perjury. Application Note One to the USSG §3C1.1 Commentary provides in relevant part ". . . in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in the light most favorable to the defendant." The circuit court recognized that as a general rule, where factual findings relevant to sentencing are concerned, district courts apply a preponderance of the evidence standard. United States v. Hill, 973 F.2d 459, 461 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1056 (1993). The circuit court noted that although it has consistently approved district courts' applications of a preponderance of the evidence standard to USSG §3C1.1 enhancements for perjury, there is a split among the courts of appeals regarding this issue. In United States v. Montague, 40 F.3d 1251, 1253-54 (D.C. Cir. 1994), the District of Columbia Circuit held that "the clear-and-convincing" standard is the appropriate standard by which to evaluate defendant testimony for section 3C1.1 perjury enhancements. InUnited States v. Onumonu, 999 F.2d 43, 45 (2d Cir. 1993), the Second Circuit concluded that the Note One instruction "sounds to us indistinguishable from a clear-and-convincing standard." (citing United States v. Cunavelis, 969 F.2d 1419, 1423 (2d Cir. 1992)). The Eighth Circuit in United States v. Willis, 940 F.2d 1136, 1140 (8th Cir. 1991), *cert. denied*, 113 S. Ct. 1411 (1993), interpreted Note One to require that "[n]o enhancement should be imposed based on the defendant's testimony if a reasonable trier of fact could find the testimony true." The Eighth Circuit, however, did not explicitly state that it was departing from the preponderance of the evidence standard. The Sixth Circuit declined to join the District of Columbia, Second, and Eighth Circuits and ruled that a preponderance of the evidence standard continues to be the correct standard for all fact-finding at sentencing, interpreting Note One to require the sentencing judge, as he or she weighs the evidence, to be especially alert for factors that militate in favor of finding alleged false testimony by the defendant actually to be true. "If any circumstances supporting the defendant's denial that he or she committed perjury have sufficient force, when viewed most favorably to the defendant, to prevent the sentencing judge from having a firm conviction that the defendant did give perjurious testimony, the judge should not impose a USSG §3C1.1 enhancement."

Seventh Circuit

United States v. Perez, 50 F.3d 396 (7th Cir. 1995). The district court erred in imposing a two-level upward adjustment for obstruction of justice under USSG §3C1.1. The defendant had

fled the country while state drug charges were pending against him, and then was indicted under federal drug charges when he re-entered the country. The district court reasoned that a §3C1.1 enhancement was proper because both the state and the federal prosecutions involved the same offensive conduct and found irrelevant the fact that the obstructive conduct occurred prior to any federal investigation or prosecution. The circuit court stated that the district court construed the "instant offense" language of §3C1.1 too broadly. An enhancement is proper under §3C1.1 if the obstructive conduct obstructs or impedes the "instant offense." The circuit court held that even though the state offense constituted part of the federal offense, the obstructive conduct only affected the defendant's state prosecution and had no effect on the investigation, prosecution, or sentencing of the defendant's federal offense. The circuit court vacated the enhancement and remanded for resentencing.

Eighth Circuit

Hall v. United States, 46 F.3d 855 (8th Cir. 1995). The district court erred in refusing to increase the defendant's sentence for obstruction of justice based on his conduct in allegedly threatening a potential witness at a party held on an Indian reservation. The presentencing report stated, and the defendant denied, that the defendant and his brother had confronted the witness in a bar and told him that if he testified, "they would get him" and "he would be beaten." The district court denied an enhancement for obstruction of justice because "recognizing reservation life in this context for what it is, ...this type of bar room conversation should [not], when disputed, be elevated to something causing a potential additional 12 months of incarceration." The government contended that the district court erred by failing to find, as required by Federal Rule of Criminal Procedure 32(c)(3)(D), whether a threat occurred. The circuit court agreed, noting that §3C1.1 does not limit the enhancement to particular factual contexts, such as the bar room setting, or make exceptions for social circumstances, such as the realities of reservation life. Accordingly, the circuit court remanded the case to the district court to determine whether the defendant threatened the witness, and if so, to apply the obstruction of justice enhancement.

Tenth Circuit

United States v. Gacnik, 50 F.3d 848 (10th Cir. 1995). The district court erred in applying the provisions of USSG §3C1.1 to obstructive conduct which occurred prior to the commencement of an official investigation of the offense of conviction. The defendant conspired to illegally manufacture explosives, and his co-conspirators hid the explosives following an unrelated shooting incident. At the time they hid the explosives, the defendant was aware that the police were investigating the shooting, but he did not know that the police had received an anonymous tip about the explosives. The appellate court ruled that the clear language of §3C1.1 requires that the obstructive conduct must be undertaken during the investigation, prosecution or sentencing of the offense of conviction, disagreeing with the Eighth Circuit's broader reading of §3C1.1 in United States v. Dortch, 923 F.2d 629 (8th Cir. 1991). In Dortch, the Eighth Circuit ruled that although the offense of conviction may not be what initially attracts police attention, "a defendant obstructing justice with knowledge of an investigation wholly unrelated to the offense of conviction could be found deserving of an adjustment." The sentence was remanded for resentencing.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

Eighth Circuit

United States v. Barris, 46 F.3d 33 (8th Cir. 1995). The district court erred in holding that the insanity defense is inconsistent with acceptance of responsibility as a matter of law. The defendant raised an insanity defense at his trial for threatening to kill the President of the United States in violation of 18 U.S.C. § 871. The insanity defense was rejected by the jury. At sentencing, the defendant requested a two-level reduction for acceptance of responsibility under USSG §3E1.1. The district court held that the insanity defense is inconsistent with acceptance of responsibility. The appellate court held a "defendant who goes to trial on an insanity defense, thus advancing an issue that does not relate to his factual guilt, may nevertheless qualify for an acceptance-of-responsibility reduction under the sentencing guidelines." The circuit court emphasized that USSG §3E1.1, Application Note 2 states that when a defendant goes to trial to assert and preserve issues that do not relate to factual guilt, "a determination that the defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct."

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

Fourth Circuit

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995). The district court erred by enhancing the defendant's criminal history pursuant to USSG §4A1.1(e) based upon his 24-day incarceration pending a state parole revocation hearing that resulted in neither revocation nor reincarceration. The defendant pleaded guilty to being a felon in possession of a firearm in 1992. In 1983 he had been convicted of armed robbery in the state of Maryland, and was paroled after serving five years of his nine-year sentence. The state issued a warrant for his arrest for burglary and trespass eight months after his release, but it was not served until 1992, four years after the alleged parole violations and almost a year after the expiration of the parole period. The defendant was held in detention for 24 days pending his parole revocation hearing. Although he was found guilty of the parole violations, the Parole Commission did not revoke parole or reimpose a sentence, and he was released. The federal district court added two points to the defendant's criminal history pursuant to §4A1.1(e) because it considered this detention to constitute "imprisonment on a sentence." The circuit court, however, construed §4A1.1(e) to apply to the defendant only if his pre-revocation detention amounted to an extension or continuation of the original nine-year sentence for his 1983 conviction. The circuit court ruled

that there was no basis for holding that the detention amounted to an extension of an original "imprisonment on a sentence" within the meaning of the guidelines, particularly since the defendant's parole was not revoked and the defendant was not reincarcerated. The circuit court further held that §4A1.1(e) "does not contemplate the assessment of criminal history points on the basis of detentions of defendants who are awaiting parole revocation hearings when those hearings do not result in reincarceration or revocation of parole." The appellate court vacated the sentence and remanded the case for resentencing.

Eighth Circuit

United States v. Johnson, 43 F.3d 1211 (8th Cir. 1995). The district court erred in assessing an additional criminal history point pursuant to USSG §4A1.1(c) based upon the defendant's Minnesota conviction for obstructing the legal process. The state court "stayed" the imposition of the sentence for one year, and then dismissed the case. The appellate court reasoned that the "real issue is not whether Johnson's stayed sentence is a `prior sentence,' but rather whether or not it is a `countable' sentence under the Guidelines." The appellate court looked to §4A1.1, comment (n.3) and §4A1.2(c)(1), and held that the prior sentence was countable only if it was one of "probation" for at least one year. Because the sentence had been imposed without an accompanying term of probation, it did not constitute a sentence of probation under §4A1.2(c)(1) and should not have been counted.

§4A1.2 Definitions and Instruction for Criminal History

Seventh Circuit

United States v. Joseph, 50 F.3d 401 (7th Cir.), *cert. denied*, 116 S. Ct. 139 (1995). The district court's refusal to decide whether the defendant's prior offenses were "consolidated" for the purpose of determining whether the cases were related for sentencing purposes was harmless error. The defendant had been sentenced on the same day for different crimes committed in different months. In ruling that the prior offenses were unrelated, the district court erred by not first determining whether the cases were consolidated and if so, whether they were separated by an intervening arrest. The district court erroneously thought it need not make this determination because the crimes themselves were unrelated. The defendant asserted that the cases should be treated as consolidated and therefore "related" because he was sentenced for both on the same day. The government responded that a formal order of consolidation is necessary before the cases can be considered consolidated. The appellate court noted that the circuit courts are split on this issue, and joined the majority of the circuits in ruling that a formal consolidation order is probative, but not conclusive in determining whether cases are consolidated. *See* United States v. Russell, 2 F.3d 200, 204 (7th Cir. 1993); United States v. Coleman, 964 F.2d 564, 566-67 (6th Cir. 1992); United States v. Garcia, 962 F.2d 479, 482-83 (5th Cir. 1992). On the other hand, the First Circuit has held that the sine qua non of consolidated sentencing is a formal order of consolidation, United States v. Elwell, 984 F.2d 1289, 1296 (1st Cir. 1993), and the Eighth Circuit has held that a formal order of consolidation is required. United States v. Klein, 13 F.3d 1182 (8th Cir. 1994); United States v. McComber, 996 F.2d 946, 947 (8th Cir. 1993). The

appellate court ruled that the district court's error was harmless in this case because the defendant would not have been able to show that the prior cases were consolidated.

§4A1.3 Adequacy of Criminal History

Seventh Circuit

United States v. Croom, 50 F.3d 433 (7th Cir. 1995). Pursuant to USSG §4A1.3, the district court judge departed upward from Criminal History Category IV to Category VI, but did not explain why category V was not sufficient. In making the departure, the district judge stated that the guidelines did not adequately reflect the seriousness of the defendant's past crimes, some of which were juvenile offenses not counted for criminal history purposes, the fact that he committed his first federal gun offense shortly after release from state imprisonment, and his propensity to commit more crimes in the future. The appellate court stated under 18 U.S.C. § 3553(b), "[a] district judge may give a sentence exceeding the range specified by the Sentencing Guidelines only on account of circumstances `not adequately taken into consideration' by the Sentencing Commission." Two of the reasons given for the upward departure had been considered by the Commission, and therefore the appellate court remanded the case for resentencing under USSG §4A1.3.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

Second Circuit

United States v. Nutter, 61 F.3d 10 (2d Cir. 1995). The Sentencing Commission did not exceed its statutory mandate by including in Application Note 1 of USSG §4B1.1 conspiracies to commit controlled substance crimes. The defendant pleaded guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and was sentenced to 188 months imprisonment. The defendant claimed on appeal that the Sentencing Commission lacked authority to include the crime of conspiracy to commit a controlled substance offense as a predicate for sentencing as a career offender under USSG §4B1.1 and USSG §4B1.2. The circuit court noted that its decision is controlled by United States v. Jackson, 60 F.3d 128 (2d Cir. 1995). In Jackson, the Second Circuit held that the Sentencing Commission's authority to promulgate USSG §4B1.1 was not confined to 28 U.S.C. § 994(h) but could also be found in 28 U.S.C. § 994(a). A narcotics conspiracy conviction, therefore, could be a predicate for a career criminal enhancement.

Fifth Circuit

United States v. Cheramie, 51 F.3d 538 (5th Cir. 1995). The Fifth Circuit held that conspiracy to violate the narcotics laws does not constitute a prior conviction for purposes of the career offender guideline. Title 28 U.S.C. § 994(h) is the statutory authority behind the career

offender guideline. It does not include conspiracy to distribute narcotics as one of the prior offenses that may be counted under the career offender enhancement. Consequently, the Sentencing Commission exceeded its authority by including conspiracy to distribute a controlled substance as a prior offense capable of triggering the career offender enhancement. This holding is not in accordance with United States v. Fiore, 983 F.2d 1 (1st Cir. 1992).

Sixth Circuit

United States v. Williams, 53 F.3d 769 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 928 (1996). The district court did not err in determining that a conspiracy to possess cocaine with intent to distribute may be used to classify defendant as a career offender. USSG §4B1.1. The circuit court, joining with six other circuits, concluded that the Sentencing Commission did not exceed its statutory authority by including conspiracy within the definition of a controlled substance offense under the career offender Guidelines. *See* United States v. Piper, 35 F.3d 611, 615-19 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1118 (1995); United States v. Kennedy, 32 F.3d 876, 889-90 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995); United States v. Damerville, 27 F.3d 254, 256-57 (7th Cir), *cert. denied*, 115 S. Ct. 445 (1994); United States v. Hightower, 25 F.3d 182, 186-87 (3d Cir.), *cert. denied*, 115 S. Ct. 370 (1994); United States v. Allen, 24 F.3d 1180, 1185-87 (10th Cir.), *cert denied*, 115 S. Ct. 493 (1994); United States v. Heim, 15 F.3d 830, 831-32 (9th Cir.), *cert. denied*, 115 S. Ct. 55 (1994). Two circuits have adopted the defendant's argument that drug conspiracies do not trigger the career offender provision because such offenses are not included in 28 U.S.C. § 994(h). *See* United States v. Bellazerius, 24 F.3d 698, 701-02 (5th Cir.), *cert. denied*, 115 S. Ct. 275 (1994); United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). However, the circuit court rejected this argument and concluded that the Sentencing Commission did not exceed its statutory authority by including conspiracy as a triggering offense for purposes of §4B1.1.

Ninth Circuit

United States v. Carr, 56 F.3d 38 (9th Cir.), *cert. denied*, 116 S. Ct. 25 (1995). In a matter of first impression, the Ninth Circuit held that the application of the Sentencing Guidelines' career offender provision resulting in a sentence that is "disproportionate" to the offenses involved does not violate the Eighth Amendment's Cruel and Unusual Punishment clause. The defendant was convicted of possession with intent to distribute 66.92 grams of cocaine base and had two prior felony controlled substance offenses for relatively small quantities of drugs. The circuit court ruled that Supreme Court precedent forecloses the defendant's Eighth Amendment argument. *See* Harmelin v. Michigan, 501 U.S. 957, 961, 996 (1991) (plurality opinion) (upholding against an Eighth Amendment challenge a sentence of life without parole for a first offense possession of 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370-71, 375 (1982) (rejecting a challenge to a 40-year sentence for possession of less than nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265 (1980) (upholding a life sentence imposed under a "recidivist statute" where the three felonies involved were (1) passing a forged check for $28.36, (2) fraudulently using a credit card to obtain $80 worth of goods and services, and (3) obtaining $120.75 by false pretenses). The circuit court noted that although harsh, the defendant's sentence was less severe relative to his offenses than the sentences upheld in these cases. The appellate

court noted precedent in other circuits and held that the defendant's sentence was not so disproportionate to the gravity of his offenses as to violate the Eighth Amendment. *See, e.g.*, United States v. Spencer, 25 F.3d 1105, 1111 (D.C. Cir. 1994); United States v. Garrett, 959 F2d 1005, 1009 (D.C. Cir. 1992); United States v. Gordon, 953, F.2d 1106, 1107 (8th Cir. 1992); United States v. McLean, 951 F.2d 1300, 1303-04 (D.C. Cir. 1991).

Eleventh Circuit

United States v. Weir, 51 F.3d 1031 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 928 (1996). The district court erred in holding that the defendant's conviction for conspiracy to possess with intent to distribute marijuana was not a "controlled substance offense" for purposes of the career offender guideline, USSG §4B1.1. In so deciding, the appellate court joined the majority of the circuits in rejecting the District of Columbia Circuit's opinion in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). *See* United States v. Piper, 35 F.3d 611, 616-17 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1118 (1995) (rejecting Price); United States v. Hightower, 25 F.3d 182, 186-7 (3d Cir.), *cert. denied*, 115 S. Ct. 370 (1994) (same); United States v. Kennedy, 32 F.3d 876, 888 (4th Cir.), *cert. denied*, 115 S. Ct. 939 (1994); United States v. Damerville, 27 F.3d 254, 256-57 (7th Cir.), *cert. denied*, 115 S.Ct. 445 (1994); Dyer v. United States, 23 F.3d 1421, 1424 n.2 (8th Cir.), *cert. denied*, 115 S. Ct. 136 (1994); United States v. Heim, 15 F.3d 830, 831-32 (9th Cir.), *cert. denied*, 115 S.Ct. 55 (1994); United States v. Allen, 24 F.3d 1180, 1186 (10th Cir.), *cert. denied*, 115 S.Ct. 493 (1994). *But see* United States v. Bellazerius, 24 F.3d 698, 701-02 (5th Cir.), *cert. denied*, 115 S. Ct. 375 (1994) (supporting Price). Although the commentary suggests that §4B1.1 implements the mandate of 28 U.S.C. § 994(h), it does not suggest that that section is the only mandate for the career offender provision. The guidelines' enabling statute at 28 U.S.C. § 994(a) provides independent grounds for the career offender provision, "and the language of this section grants sufficient authority to the Commission to include drug conspiracies in its definition of controlled substance offenses." Furthermore, "common sense dictates that conspiring to distribute drugs constitutes a controlled substance offense." The sentence was vacated and remanded for resentencing.

§4B1.2 Definitions for Career Offender

Sixth Circuit

United States v. Arnold, 58 F.3d 1117 (6th Cir. 1995). The district court erred in concluding that the defendant's prior conviction for assault with intent to commit sexual battery constituted a "crime of violence" under USSG §4B1.2 thereby resulting in improper application of USSG §2K2.1. The defendant was convicted for being a felon in possession of a firearm. The defendant argued on appeal that the district court erred in failing to sentence him pursuant to USSG §2K2.1(b)(2), "which authorizes a lower base offense level when a defendant possesses firearms solely for lawful sporting purposes." A "crime of violence," pursuant to the Guidelines, includes those offenses which are enumerated as such, which have as an element, the use, attempted use or threatened use of physical force against another or the conduct involves serious potential risk of physical injury to another. The circuit court noted that a court determining whether a prior offense is a crime of violence is limited to examining the statutory elements of the offense. The circuit court ruled that assault with intent to commit sexual battery under Tennessee law is not a crime involving the use of force, attempted force, or threatened force. In determining whether the conviction involved an offense that presented a serious potential risk of physical injury, the circuit court recognized the limitations placed on the court's discretion to consider conduct other than the statute of conviction in the revised commentary to USSG §4B1.2 and limited its holding in United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989), *cert. denied*, 502 U.S. 882 (1991). The circuit court concluded that "the Guidelines' definition of 'crime of violence' is not intended to include behavior for which the defendant was neither charged nor convicted." The circuit court ruled that it would not longer follow the view "that a sentencing court has broad discretion to consider the underlying facts of a defendant's prior conviction."

Seventh Circuit

United States v. Rutherford, 54 F.3d 370 (7th Cir.), *cert. denied*, 116 S. Ct. 323 (1995). The district court did not err in ruling that the defendant's prior state conviction for first degree assault resulting from a drunk driving charge was a crime of violence under USSC §4B1.1, the Career Offender guideline. On appeal, the defendant argued that the definition of a crime of violence did not encompass vehicular assault. A crime of violence under the Career Offender guideline, USSC §4B1.1, is defined as any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) has an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. In a matter of first impression, the circuit court determined that drunk driving presents a serious risk of physical injury under the "otherwise" clause, and therefore constitutes a crime of violence. The court noted that the otherwise clause focuses on the conduct that created the risk of injury, e.g. the drunk driving. The circuit court ruled that the defendant, by driving intoxicated, presented a serious potential risk of physical injury to another. The circuit court noted that the dangers of drunk driving are well-known and documented, therefore making the defendant's act sufficient to satisfy the "serious risk" standard of the "otherwise" clause.

Eighth Circuit

United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 939 (1996). The district court did not err in treating the defendant's conviction for conspiracy to distribute marijuana as a "controlled substance offense" thereby making him eligible for sentencing as a career offender pursuant to USSG §4B1.1. The defendant pleaded guilty to conspiracy to distribute marijuana and was sentenced to a term of 236 months imprisonment. A divided panel of the Eighth Circuit reversed the district court's ruling, agreeing with the District of Columbia Circuit's ruling in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), that the Sentencing Commission "exceeded the statutory underpinnings of the career offender provisions" by including drug conspiracy offenses in its definition of offenses that qualify a defendant for the career offender enhancement. United States v. Mendoza-Figueroa, 28 F.3d 766 (8th Cir. 1994). The Eighth Circuit granted rehearing en banc, overruled the panel's decision and affirmed the district court's sentence. The issue on appeal was whether conspiracy to distribute marijuana is a "controlled substance offense." Guideline §4B1.1 provides that an individual is a career offender if the defendant was 18 years old at the time of the instant offense, the crime is a felony that is a controlled substance offense or crime of violence and the defendant has two prior convictions of either a crime of violence or a controlled substance offense. USSG §4B1.2 defines the underlying offense of distribution of marijuana as a controlled substance offense. The conspiracy to commit that controlled offense is added to the definition in note one of the commentary to that guideline: "the terms 'crimes of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG §4B1.2, commentary, note one. The circuit court noted the Supreme Court's ruling in Stinson v. United States, 113 S. Ct. 1913 (1993), that interpretive commentary in the Guidelines is authoritative unless it violates the Constitution, a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline. *Id*. at 1919. The circuit court further noted that the Commission's extensive authority to author Sentencing Guidelines includes the discretion to include drug conspiracy offenses in the category of offenses that warrant increased terms for career offenders. The District of Columbia Circuit, however, ruled that since 28 U.S.C. § 994(h) does not include drug conspiracy offenses in its statutory listing of controlled substance offenses for which harsher sentences are mandated, the Sentencing Commission exceeded its authority in including them as qualifying offenses for the career offender provision. The Eighth Circuit ruled that note one must be enforced because it was promulgated within the Commission's full statutory power and is not a plainly erroneous reading of USSG §4B1.2. In addition, the circuit court held that given the interplay between the career offender guideline and the criminal history guidelines, which have a broad anti-recidivist objective, it is unreasonable to conclude that the Commission intended to base USSG §4B1.1 on the limited authority of 28 U.S.C. § 994(h) alone. The circuit court further held that 28 U.S.C. § 994 is ample authority to include drug conspiracies as qualifying offenses and the Commission correctly interpreted the statute as a broad directive to provide harsh penalties for recidivists, rather than a a limited, categorical definition of offenders who warrant recidivist penalties. The Eighth Circuit joined nine circuits in concluding that the District of Columbia Circuit's reasoning in Price is flawed. *See* United States v. Piper, 35 F.3d 611 (1st Cir.), *cert. denied*, 115 S. Ct. 1118 (1995); United States v. Jackson, 60 F.3d 128 (2d Cir. 1995); United States v. Hightower, 25 F.3d 182

(3d Cir.), *cert. denied*, 115 S. Ct. 370 (1994); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 939 (1995); United States v. Williams, 53 F.3d 769 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 928 (1996); United States v. Damerville, 27 F.3d 254 (7th Cir.), *cert. denied*, 115 S. Ct. 445 (1994); United States v. Heim, 15 F.3d 830 (9th Cir.), *cert. denied*, 115 S. Ct. 55 (1994); United States v. Allen, 24 F.3d 1180 (10th Cir.), *cert. denied*, 115 S. Ct. 493 (1994); United States v. Weir, 51 F.3d 1031 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 928 (1996). The only other circuit to join the District of Columbia Circuit's ruling is the Fifth Circuit, in United States v. Bellazerius, 24 F.3d 698 (5th Cir.), *cert. denied*, 115 S. Ct. 375 (1994).

Eleventh Circuit

United States v. Spell, 44 F.3d 936 (11th Cir. 1995). The circuit court erred in determining that the defendant's prior state burglary conviction was a "crime of violence" under the career offender guidelines by relying on the charging documents behind the conviction without first determining whether the defendant pleaded guilty to crimes charged. The defendant argued that his prior Florida burglary conviction did not constitute a "crime of violence" because the state court's judgment was for the "burglary of a structure" under Florida's burglary statute. Because the judgment did not specify that the structure was a dwelling, and because burglaries which do not involve dwellings or occupied structures are not "crimes of violence" under United States v. Smith, 10 F.3d 724, 730 (10th Cir. 1993), the defendant claimed that this conviction was not technically a "crime of violence." Furthermore, the defendant claimed that Supreme Court and Eleventh Circuit precedent establish that a district court may not look behind a conviction to the charging document to determine whether a conviction constitutes a crime of violence. Taylor v. United States, 495 U.S. 575, 601-603 (1990); United States v. Wright, 968 F.2d 1167, 1172 (11th Cir. 1992), *vacated on other grounds*, 113 S. Ct. 2325 (1993); United States v. Gonzalez-Lopez, 911 F.2d 542, 547 (11th Cir. 1990), *cert. denied*, 500 U.S. 933 (1991). Rather, the district court must take a "categorical approach" and look no farther than the judgment of conviction. The circuit court disagreed, concluding that Application Note 2 to §4B1.2 rejects the categorical approach of these cases, which were decided under a previous version of the guidelines, and permits examination of the charging document if "ambiguities in the judgment make the crime of violence determination impossible from the face of the judgment itself." Smith, 10 F.3d at 733. In this case, the charging documents charged the defendant with burglary of a dwelling, and thus the district court had ruled that the defendant's prior conviction was indeed a "crime of violence." The circuit court held, however, that the district court's analysis was improper because it relied on conduct contained in the charging document without first determining whether the defendant was convicted for the charged offense. Because §4B1.2 specifies that "the conduct of which the defendant was convicted is the focus of inquiry," the district court should have established that the crime charged was the same crime for which the defendant was convicted, and then establish whether the offense of conviction was actually a "crime of violence." On remand, the district court should examine the defendant's plea in the state case.

§4B1.4 Armed Career Criminal

Fourth Circuit

United States v. Letterlough, 63 F.3d 332 (4th Cir.), *cert. denied*, 116 S. Ct. 406 (1995). The appellate court affirmed the district court's enhancement of the defendant's sentence under the provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). The defendant pleaded guilty to being a felon in possession of a firearm, and was sentenced to 84 months imprisonment and five years supervised release. On appeal the defendant argued that two of his prior convictions were not "committed on occasions different from one other." The two prior felony convictions consisted of two undercover drug sales made on July 31, 1990, to a single undercover police officer. The appellate court ruled that each of the defendant's drug sales was a complete and final transaction, and therefore, an independent offense, noting that Congress intended to include within the scope of the ACCA only those predicate offenses that constitute an occurrence unto themselves. The circuit court recognized and adopted the test applied by the majority of the circuit courts to determine whether the ACCA applies to a defendant's prior crimes: convictions occur on occasions different from one another "if each of the prior convictions arose out of a `separate and distinct criminal episode.'" United States v. Hudspeth, 42 F.3d 1015, 1019 (7th Cir. 1994)(*en banc*)(collecting cases)(emphasis in original) (citation omitted), *cert. denied*, 115 S. Ct. 2252 (1995). The circuit courts have applied a number of factors to determine when more than one conviction constitutes a separate and distinct criminal episode, including "whether the offenses arose in different geographic locations; whether the nature of the offenses was substantively different; and whether the offenses involved multiple victims and multiple criminal objectives." The circuit court found the Fifth Circuit's decision in United States v. Washington, 898 F.2d 439 (5th Cir.), *cert. denied*, 498 U.S. 842 (1990), to be particularly instructive because of its similar facts. In Washington, the defendant robbed a convenience store and returned to the very same store within a few hours and robbed it again. The Fifth Circuit affirmed the district court's enhancement decision, holding that "where multiple offenses are not part of a continuous course of conduct, they cannot be said to constitute either a criminal spree or a single criminal transaction for purposes of section 924(e)." *Id*. at 441. The circuit court ruled that likewise Letterlough's two convictions did not arise from a continuous course of criminal conduct, but instead constituted two complete and discrete commercial transactions and, therefore two separate and distinct episodes.

Sixth Circuit

United States v. Graves, 60 F.3d 1183 (6th Cir. 1995). The district court erred in sentencing the defendant as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e). The defendant pled guilty to felon in possession of a firearm and was sentenced to 189 months imprisonment. The defendant argued on appeal that he did not qualify as a career criminal because the court erroneously counted two prior convictions arising from a single episode as separate offenses. The defendant was convicted in 1985 for assault and burglary. The facts indicate that the defendant, after successfully completing a burglary, pointed a gun at the police while trying to flee. The district court ruled that the defendant had successfully completed the burglary and had stashed the goods prior to pointing the gun at the officer, therefore constituting two distinct qualifying felonies. The Armed Career Criminal Act, 18 U.S.C. § 924(e) defines career criminals as those who have committed three predicate violent felonies "on occasions

different from one another." The circuit court noted that a career offender is one convicted of three criminal episodes where "an episode is an incident that is part of a series, but forms a separate unit within the whole. Although related to the entire course of events, an episode is a punctuated occurrence with a limited duration." United States v. Hughes, 924 F.2d 1354, 1361 (6th Cir. 1991). The circuit court ruled that the assault and burglary were not committed on "occasions different from one another" and cannot be considered two separate predicate offenses. The facts of this case were similar to the facts in United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991), where the Eleventh Circuit held that a defendant who was burglarizing a home when the police approached and then fled to another home and hid in the closet had engaged in only one criminal episode for the purposes of the Armed Career Criminal Act even though he had been convicted of three different felonies. The circuit court further noted that the case was similar to the facts in United States v. Perry, 798 F.2d 1157 (8th Cir. 1986), where a defendant robbed six victims simultaneously in a restaurant. In Perry, the Eighth Circuit reversed its affirmance of the sentence enhancement after the Supreme Court vacated and remanded the case, suggesting that the circuit court reconsider in light of the Solicitor General's brief which argued that the sentence enhancement should be given based on multiple prior criminal episodes, not multiple convictions arising from one episode. 481 U.S. 1034 (1987). The circuit court recognized that it had dealt with this issue in United States v. Brady, 988 F.2d 664 (6th Cir.), *cert. denied*, 114 S. Ct. 166 (1993), and had determined in that case that while mere proximity in time does not make two crimes a single criminal episode, crimes that occur simultaneously count as only one predicate offense. Because the defendant had not yet left the location of the burglary when he was confronted by the police, the assault was part of the same criminal episode.

Seventh Circuit

United States v. Wright, 48 F.3d 254 (7th Cir. 1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), based on prior felony convictions which were over 15 years old. The defendant claimed that convictions more than 15 years old were stale and should not be considered for ACCA purposes, much like the 15-year limit on the use of felonies for sentencing purposes under USSG §4A1.2(e). In considering an issue of first impression, the Seventh Circuit joined with the Third, Fourth, Fifth, Eighth, and Eleventh Circuits in finding that no time limit exists on prior felony convictions for purposes of the ACCA. The appellate court examined the statute and concluded that if Congress intended a time restriction on the use of felonies under the ACCA it would have attached a time restriction.

Eleventh Circuit

United States v. Cobia, 41 F.3d 1473 (11th Cir.), *cert. denied*, 115 S. Ct. 1986 (1995). The district court did not err in sentencing the defendant as an armed career criminal pursuant to 18 U.S.C. § 924(e) even though the government did not affirmatively seek such an enhancement. The defendant contended that the government must affirmatively seek the enhancement for a court to apply section 924(e). He argued that the commentary to USSG §4B1.4, which sets forth the procedure for imposing a section 924(e) enhancement, specifies that the application of the enhancement is governed by the practice in the jurisdiction where the defendant is sentenced.

Because it had been the practice in the district where the defendant was sentenced for the prosecution to affirmatively seek a section 924(e) enhancement, the defendant claimed that the application of section 924(e) was not mandatory. The circuit court, addressing an issue of first impression, rejected this argument and held that the plain language of section 924(e) establishes that the enhancement is mandatory. The circuit court joined the First and Tenth Circuits in holding that upon reasonable notice to the defendant and an opportunity to be heard, the section 924(e) enhancement should automatically be applied by courts to qualifying defendants regardless of whether the government affirmatively seeks such an enhancement. *See* United States v. Johnson, 973 F.2d 857, 860 (10th Cir. 1992); United States v. Craveiro, 907 F.2d 260, 263 (1st Cir.), *cert. denied*, 498 U.S. 1015 (1990).

United States v. Gilley, 43 F.3d 1440 (11th Cir.), *cert. denied*, 115 S. Ct. 2288 (1995). The district court erred in allowing the defendant to collaterally attack four of the five predicate state convictions to preclude their use for enhancement under the Armed Career Criminal Act and in determining his criminal history score pursuant to USSG §4A1.2. The defendant was convicted of possession of a firearm by a convicted felon. The government appealed the district court's failure to sentence the defendant in accordance with the mandatory requirements of the Armed Career Criminal Act. The appellate court ruled that the Supreme Court's decision in Custis v. United States, 114 S. Ct. 1732 (1993), was dispositive of this issue. Custis precludes collateral attack on prior convictions that are counted for sentencing purposes under 18 U.S.C. § 924(e)(1), "with the sole exception of convictions obtained in violation of the rights of counsel." The sentence was vacated and remanded for resentencing.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

First Circuit

United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995). The district court did not err in denying the "safety valve" provision to the defendant. The defendant argued that he was entitled to a reduction of the ten-year mandatory minimum sentence under 18 U.S.C. § 3553(f), which in certain circumstances gives the trial court authority to impose a sentence shorter than the otherwise mandatory minimum sentence. The circuit court held that the defendant did not meet the fifth requirement of 18 U.S.C. § 3553(f) which requires a defendant to truthfully provide to the government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The defendant contended that by unwittingly being recorded by an undercover agent while discussing his plans to distribute cocaine and admitting the allegations by pleading guilty, he has satisfied the truthfulness requirement of 18 U.S.C. § 3353(f). The circuit court rejected the defendant's argument, holding that a defendant has not "provided" to the government such information and evidence if the sole

manner in which the claimed disclosure occurred was through conversation conducted in furtherance of the defendant's criminal conduct which happened to be tape-recorded by the government as part of its investigation. In addition, the circuit court held that the requirement is not satisfied merely because a defendant pleads guilty.

Fifth Circuit

United States v. Edwards, 65 F.3d 430 (5th Cir. 1995). The district court did not err by refusing to grant a downward departure under USSG §5C1.2 (safety valve). The defendant asserted that the fact that he received a reduction in his offense level based on his acceptance of responsibility under §3E1.1 "suggests that he qualifies" for the §5C1.2 departure. The circuit court did not agree, and affirmed the district court's factual determination that the defendant did not satisfy the requirement that he truthfully provide to the government all relevant information. The circuit court concluded that the defendant offered testimony at sentencing which directly contradicted information gathered by the government, and gave conflicting statements regarding the amount of drugs he had received. Thus, the defendant did not satisfy the requirement that he provide truthful information.

United States v. Rodriguez, 60 F.3d 193 (5th Cir.), *cert. denied*, 116 S. Ct. 542 (1995). The district court did not err in refusing to apply the safety valve provision (USSG §5C1.2) of 18 U.S.C. § 3553(f) to the defendant, because the defendant did not satisfy all the requirements necessary for the court to apply USSG §5C1.2. In addressing an issue of first impression among the courts of appeals, the circuit court held that a probation officer is not, for purposes of §5C1.2, "the Government." The defendant was able to meet the first four requirements of §5C1.2 because: 1) he did not have more than one criminal history point, 2) he did not use violence or a threat of violence, 3) no serious injury or death resulted, 4) he was not a leader, supervisor, manager, or organizer. However, the circuit court ruled that the defendant failed to meet part five of §5C1.2 which states that the defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense. The government argued that §5C1.2 should not apply because the defendant had spoken only to the probation officer, not the Government's case agent. The defendant unsuccessfully argued that his discussion with the probation officer satisfied the requirement to disclose to the Government all information that he knows about the criminal offense. The circuit court rejected this argument, noting that a defendant's statements to a probation officer do not assist the government. The probation officer is not the government for purposes of §5C1.2. The district court's decision was affirmed.

Part D Supervised Release

§5D1.1 Supervised Release

Ninth Circuit

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir.), *cert. denied*, 115 S. Ct. 2289 (1995). The Ninth Circuit ruled that the defendant's rights under the Double Jeopardy Clause were not violated by his prosecution for illegally reentering the United States, even though this reentry

resulted in revocation of his term of supervised release imposed as punishment for an earlier offense. The defendant argued that revocation of supervised release constitutes double jeopardy because, unlike parole or probation revocation, revocation of supervised release constitutes punishment for the act which causes the revocation, not the original crime. He contended that because supervised release is imposed in addition to the original sentence, and not instead of it, any imprisonment resulting from a supervised release violation cannot be part of the original sentence but rather punishment for the new act constituting the violation. The circuit court disagreed, reasoning that the plain language of the supervised release statute states that supervised release, although imposed in addition to incarceration, is still considered "a part of the sentence." 18 U.S.C. § 3583(a). Thus, the circuit court ruled that revocation of the defendant's supervised release did not violate the Double Jeopardy Clause because his entire sentence, including the period of supervised release, was punishment for the original crime. CitingUnited States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993), the Ninth Circuit concluded that "`it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms' of his release."

§5D1.3 Conditions of Supervised Release

Fifth Circuit

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). The district court erred in ordering the defendant to be deported as a condition of supervised release. The defendant pled guilty to making false statements on immigration documents and education grant applications. He was sentenced to ten months incarceration and was ordered to be deported as a condition of supervised release. On appeal, he argued that the district court exceeded its authority in ordering him deported under 18 U.S.C. § 3583(d) as a condition of supervised release. In considering an issue of first impression, the circuit court joined the First Circuit in ruling that 18 U.S.C. § 3583(d) does not authorize district courts to order deportation, but instead permits sentencing courts to order that a defendant be surrendered to immigration officials for deportation proceedings as a condition of supervised release. *See* United States v. Sanchez, 923 F.3d 236, 237 (1st Cir. 1991)(per curiam). The circuit court noted that the language of the statute authorizes district courts to "provide" not "order" that an alien be deported and remain outside the United States. The fact that Congress even used the verb "order" elsewhere in the statute implies that the choice of the verb "provide" was intentional in this situation. Further, the circuit court recognized Congress's tradition of granting the Executive Branch sole power to institute deportation proceedings. The circuit court noted its unwillingness to conclude that Congress intended to change this tradition through silence. The circuit court held that the district court exceeded its statutory power under § 3853(d) in ordering that the defendant be deported as a condition of supervised release. The court noted that the First and Eleventh Circuits have split on this issue. In United States v. Chukwura, 5 F.3d 1420, 1423 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994), the Eleventh Circuit interpreted § 3853(d) to give sentencing courts the power to order deportation as a condition of supervised release. The Eleventh Circuit further held that this authority was not a intrusion upon the Immigration and Naturalization Service's (INS)

authority to deport resident aliens because the INS retains the power to carry out deportations. *See id.* at 1423.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

Tenth Circuit

United States v. Guthrie, 64 F.3d 1510 (10th Cir. 1995). The district court erred in its calculation of restitution. The defendant pleaded guilty to providing prohibited kickbacks from the proceeds of a government contract. He was sentenced to five years probation, including six months home confinement and 250 hours of community services, $27,600 in restitution and a $50 special assessment. On appeal, the defendant argued that he was entitled to offset the amount of restitution by the value of services he allegedly performed under the government contract. The circuit court ruled that the district court applied the wrong standard for determining the amount of restitution by ordering restitution without determining the losses sustained by the victim and agreed with the defendant's argument that the determination of the amount of loss must account for any benefit received by the victim. The circuit court further held that the district court had erred in including in the amount of restitution losses stemming from counts of the indictment to which the defendant did not plead guilty.

§5E1.2 Fines for Individual Defendants

Fourth Circuit

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995). The government challenged the district court's decision not to impose a fine on the defendant under guideline §5E1.2. The Fourth Circuit held that the district court must determine whether the defendant has proved his present and prospective inability to pay a fine, and remanded the case for reconsideration of the defendant's financial situation. The appellate court relied on §5E1.2(a) which states, "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." The appellate court stated that "the defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition."

United States v. O'Quinn, 53 F.3d 329 (4th Cir. 1995). The district court did not err in denying defendants' 28 U.S.C. § 2255 motions challenging the imposition of the costs of their supervised release. The district court ordered defendants to pay the costs of their supervision as a condition of supervised release but did not impose a punitive fine. The defendants argued 1) that the Commission lacked the authority to promulgate §5E1.2(i) directing the imposition of costs of supervision, and 2) that the district court erred in ordering them to pay these costs without making specific findings as to their ability to pay. The Fourth Circuit held that these alleged errors do not constitute fundamental defects resulting in a miscarriage of justice, and therefore could not provide the basis for a collateral attack.

Sixth Circuit

United States v. Watroba, 48 F.3d 933 (6th Cir. 1995). The district court did not err in imposing the cost of the defendant's incarceration as part of his fine pursuant to USSG §5E1.2(i). The defendant was convicted of possessing an unregistered sawed-off shotgun and was sentenced to a term of imprisonment and supervised release. He was also ordered to pay a fine plus the full costs of his imprisonment and supervised release. He challenged the legality of his sentence and claimed that the Sentencing Commission acted outside its authority in promulgating §5E1.2(i). The defendant asked the circuit court to follow the holding of the Third Circuit in United States v. Spiropoulos, 976 F.2d 155 (3d Cir. 1992). In Spiropoulos, the Third Circuit held that the Sentencing Commission lacked the authority to promulgate a sentencing guideline requiring a defendant to pay a fine equal to the cost of his imprisonment because the recovery of costs of imprisonment was not related to the nature or the seriousness of the offense and was therefore not authorized under 18 U.S.C. § 3553(a)(1) or 18 U.S.C. § 3553(a)(2)(A). The Third Circuit further ruled that Congress's failure to specifically address the issue of imposing such a fine until 1988 when it directed the Sentencing Commission to study the feasibility of requiring prisoners to pay for some or all of the costs of imprisonment was evidence that the Sentencing Commission lacked the authority to promulgate such a guideline. The appellate court, however, rejected this view and joined the First, Second, Fifth, Seventh and Tenth Circuits in holding that the Sentencing Commission acted within its authority in promulgating §5E1.2(i). *See* United States v. Orena, 32 F.3d 704, 716-17 (2d Cir. 1994); United States v. Zuleta, No. 92-2430, 1993 U.S. App. LEXIS 31691 at *7 (1st Cir. Sept. 22, 1993); United States v. Turner, 998 F.2d 534 (7th Cir.), *cert. denied*, 114 S. Ct. 639 (1993); United States v. Hagmann, 950 F.2d 175, 186-87 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992); United States v. Doyan, 909 F.2d 412 (10th Cir. 1990). The circuit court adopted the analysis used by the Seventh Circuit in United States v. Turner, 998 F.2d 534 (7th Cir.), *cert. denied*, 114 S.Ct. 639 (1993). In Turner, the Seventh Circuit rejected the Third Circuit's analysis and held that imposing an additional fine based on the cost of imprisonment and supervised release is consistent with 18 U.S.C. § 3553(a)(2)(A) and 18 U.S.C. § 3553(a)(2)(B) because the cost of confinement increases with the seriousness of the crime and a fine based on these costs reflects the seriousness of the crime. The Court further ruled that Congress's instruction to the Commission to study the feasibility of the imposition of fines for the costs of imprisonment did not create a restriction which limited the Sentencing Commission's action to a mere "study."

Seventh Circuit

United States v. Sanchez-Estrada, 62 F.3d 981 (7th Cir. 1995). The district court did not err in its decision to garnish the defendants prison wages to satisfy their fine obligations. *See* USSG §5E1.2. The appellants argued that the imposition of fines on indigent inmates violates one of the fundamental tenets of the Sentencing Reform Act, that of reducing disparity in sentences for conduct similar in nature. The circuit court stated that "this circuit has upheld the authority of the trial court to order that fines imposed may be satisfied by withdrawing sums of money from the inmate's prison earnings." *See* United States v. Gomez, 24 F.3d 924, 926-27 (7th

Cir.), *cert. denied*, 115 S. Ct. 280 (1994); United States v. House, 808 F.3d 508, 510 (7th Cir. 1986).

Ninth Circuit

United States v. Zakhor, 58 F.3d 464 (9th Cir. 1995). The defendant challenged the constitutionality of USSG §5E1.2(i), and the Sentencing Commission's statutory authority to promulgate the guideline. The defendant was sentenced to three years' probation, and ordered to pay more than $20,000 in fines and restitution, including a $6,500 fine under §5E1.2(i) to cover the costs of community supervision. The appellate court upheld the district court's imposition of the fine covering the cost of community supervision. "Section 5E1.2(i) advances the deterrent purpose articulated in the Sentencing Reform Act by establishing the cost of incarceration as another cost a would-be criminal may have to face if he commits the criminal act and is caught. This deters criminal conduct by making the potential criminal internalize all the costs of such conduct." In so holding, the Ninth Circuit declined to follow the Third Circuit's approach in United States v. Spiropoulos, 976 F.2d 155 (3d Cir. 1992), which invalidated the guideline because it did not find that the Sentencing Reform Act made any specific reference to assessing the costs of imprisonment. The appellate court further held that the guideline does not deprive the defendant of his property without due process, in violation of the Fifth Amendment, because it bears a "rational relationship to a legitimate government purpose."

Eleventh Circuit

United States v. Price, 65 F.3d 903 (11th Cir. 1995), *petition for cert. filed* (Apr. 1, 1996) (No. 95-1579). In a matter of first impression, the Eleventh Circuit held that USSG §5E1.2, which imposes fines to pay for incarceration costs, is rationally related to the Sentencing Reform Act. The circuit court joined the Fifth Circuit in holding that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society—is a rational means to assist the victims of crime collectively." United States v. Hagmann, 950 F.2d. 175, 187 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 108 (1992). The defendants argued on appeal that the fines imposed pursuant to USSG §5E1.2 were excessive, violating the Eighth Amendment and due process under the Fifth Amendment because they were not rationally related to the purposes of the Sentencing Reform Act. The circuit courts have split on this issue. In United States v. Spiropoulos, 976 F.2d 155, 165-67 (3d Cir. 1992), the Third Circuit ruled that the Sentencing Reform Act did not authorize fines to cover costs of confinement. Every other circuit that has addressed the issue has rejected the Third Circuit's analysis and has adopted the Fifth Circuit's rationale in Hagmann. *See* United States v. Zakhor, 58 F.3d 464, 466 (9th Cir. 1995) (upholding cost of confinement fines); United States v. May, 52 F.3d 885, 891 (10th Cir. 1995) (finding guideline rationally related to legitimate government interest); United States v. Leonard, 37 F.3d 32, 39 (2d Cir. 1994) (citing Hagmann and holding §5E1.2(i) consistent with 18 U.S.C. § 3553(a); United States v. Turner, 998 F.2d 534, 538 (7th Cir. 1993) (holding that s 5E1.2(i) is authorized by statute), *cert. denied*, 114 S. Ct. 639 (1993). The Eleventh Circuit rejected the constitutional challenges and joined the majority of circuits in upholding §5E1.2(i).

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

District of Columbia Circuit

United States v. Sobin, 56 F.3d 1423 (D.C. Cir.), *cert. denied*, 116 S. Ct. 348 (1995). The appellate court affirmed the district court's decision to impose the six concurrent bankruptcy fraud sentences to run consecutively to the state sentences for sexual offenses involving children. "Because the five sexual offense sentences did not result at all from conduct taken into account here, the district court properly imposed fully consecutive sentences as `reasonable incremental punishment' for the instant offenses."

First Circuit

United States v. Gondek, 65 F.3d 1 (1st Cir. 1995). The circuit court affirmed the district court's decision to run the defendant's federal sentence consecutively to the state sentence imposed after the state parole violation. The defendant was on state parole at the time of the federal firearms possession offense and the district court followed the directive that the sentence for the new offense "should be imposed to be served consecutively to the term imposed for the violation of . . . parole. . . ." The defendant argued that a consecutive sentence was not mandatory and should not have been ordered. The circuit court noted that USSG §5G1.3(c), application note 4 applied directly to this case. Application Note 4 reads: "If the defendant was on federal or state probation, parole, or supervised release at the time of the instant offense, and has had such probation, parole, or supervised release revoked, the sentence for the instant offense should be imposed to be served consecutively to the term imposed for the violation of probation, parole, or supervised release in order to provide an incremental penalty for the violation of probation, parole, or supervised release." The circuit court joined the Ninth Circuit in ruling that the language of application note 4 is mandatory. United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The circuit court held that application note 4 is mandatory because note 4 represents the Commission's determination of what constitutes a "reasonable incremental punishment"; and noted that the situation is closely akin to the case of the defendant who commits a new offense while still in prison, the very situation in which USSG §5G1.3(a) instructs that the new sentence is to be served consecutively.

Second Circuit

United States v. McCormick, 58 F.3d 874 (2d Cir. 1995). The circuit court affirmed the district court's decision to run the defendant's sentence consecutively to his state sentence. The defendant argued that the sentence should be concurrent because the district court was bound by USSG §5G1.3(c) and Application Note 3 to impose a sentence that most closely approximated the sentence he would have received had he been sentenced at one time for all his offenses. The

circuit court stated that while sentencing courts should "consider" the methodology of Note 3 in determining a reasonable incremental punishment, "the commentary's plain language does not make it the exclusive manner in which a court must sentence a defendant serving an undischarged term." United States v. Lagatta, 50 F.3d 124 (2d 1995). The appellate court held that the distict court met the requirements of USSG §5G1.3(c) because the judge expressly stated at sentencing that the consecutive sentence would result in a reasonable incremental punishment and the calculations were presented to the court.

United States v. Thomas, 54 F.3d 73 (2d Cir. 1995). The district court did not err in requiring the defendant's sentences to run consecutively. Although the defendant had two prior convictions that were part of the same course of conduct as the present offense, he also had a conviction that was not. Accordingly, the district court correctly imposed consecutive sentences pursuant to Guideline 5G1.3(b).

United States v. Whiteley, 54 F.3d 85 (2d Cir. 1995). While on parole for a state murder conviction, the defendant disappeared. He resurfaced in Virginia where he was convicted in federal court for armed bank robbery. After his conviction in Virginia, the defendant was charged and convicted of federal bank robbery in Connecticut. Guideline 5G1.3(a) requires the court to apply consecutive sentences if the instant offense was committed while the defendant was on escape status. The defendant was on escape status when he was convicted in Virginia. However, the Virginia federal district court incorrectly imposed a federal sentence concurrent to the Connecticut state sentence. The Connecticut federal district court, aware of the Virginia federal district court's error, decided that the defendant was an escapee when all later federal offenses were committed. Therefore, it applied USSG §5G1.3(a) and imposed consecutive sentences. Because the defendant was subject to multiple undischarged terms of imprisonment, the sentencing court should have determined, for each prior sentence, whether USSG §5G1.3(a), (b) or (c) applied. USSG §5G1.3(a) applied to the defendant's state conviction, thus requiring a consecutive sentence. However, §5G1.3(a) did not apply to the Virginia conviction because the defendant was not on escape status from the Virginia offense when the Connecticut federal offense occurred. Therefore, the court applied §5G1.3(c). USSG §5G1.3(c) is a policy statement that requires the sentence for the instant offense to run consecutive to any prior undischarged term of imprisonment "to the extent necessary to achieve a reasonable incremental punishment for the instant offense." Although other circuits interpreting §5G1.3(c) require the court to perform the 5G1.3 methodology before abandoning it, *see* United States v. Brassell, No. 94-2618 (7th Cir. 1995); United States v. Johnson, 40 F.3d 1079 (10th Cir. 1994); United States v. Wiley-Dunaway, 40 F.3d 67, 70-71 (4th Cir. 1994); United States v. Redman, 35 F.3d 437 (9th Cir. 1994), the Second Circuit only requires consideration of a reasonable incremental penalty, and consideration of the Commission's preferred methodology. In the defendant's case, however the Virginia federal district court's error rendered §5G1.3's commentary inapplicable. Therefore, the Connecticut federal district court had full discretion to determine the defendant's sentence. Remand was not necessary in this case because the district court imposed the minimum term of imprisonment.

Fourth Circuit

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995). The defendant's sentence was vacated and remanded to the district court to apply USSG §5G1.3, where it was not clear from the record or the sentencing order whether the 46-month sentence was imposed to run concurrently or consecutively to the defendant's undischarged state sentence.

United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995). The district court did not err by ordering that the defendant's sentence for the instant offense run consecutively to his parole revocation sentence. The defendant unsuccessfully argued to have the present sentence run concurrently with his 1988 PCP sentence. Under USSG §5G1.3(c), the court must attempt to calculate the reasonable incremental punishment . . . under the commentary methodolgy, but may use another method if there is a reason to abandon the suggested penalty. In addition, the circuit court noted that Application Note 5 of USSG §7B1.3 states: ". . . any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant." The circuit court found that although the district court did not specifically state that it was applying either USSG §§5G1.3(c) or 7B1.3, its reasoning indicates that the appropriate factors were considered under the relevant guidelines. Furthermore, the district court listed several factors that formed the basis of its decision to have the present sentence run consecutively, including the frequency of the defendant's drug convictions, the severity of his PCP offense, and the court's desire not to minimize the punishments for two different, unrelated drug offenses.

Fifth Circuit

United States v. Hernandez, 64 F.3d 179 (5th Cir. 1995). The district court erred in not considering USSG §5G1.3(c), its methodology, or explain why it was not employed in sentencing the defendant. The district court sentenced the defendant to a consecutive 120 month term of imprisonment. The defendant argued that his sentence should be imposed concurrently and not consecutively. The circuit court held that the district court's failure to follow the strictures of USSG §5G1.3, which requires consecutive sentences only "to the extent necessary to achieve a reasonable incremental punishment for the instant offense" amounted to plain error. The circuit court noted that the §5G1.3(c) policy statement is binding on district courts because it completes and informs the application of a particular guideline. The circuit court stated that although the district court maintains discretion to reject the suggested methodology, it must consider the methodology's possible application. If the district court chooses not to follow the methodology, it must explain why the calculated sentence would be impracticable in that case or the reasons for using an alternative method. The circuit court vacated the district court's decision and remanded for resentencing because "the district court did not consider §5G1.3(c), its methodology, or explain why it was not employed."

Seventh Circuit

United States v. Sorensen, 58 F.3d 1154 (7th Cir. 1995). The district court erred in failing to consider the guideline methodology set forth in the commentary to USSG §5G1.3. The defendant pleaded guilty to assaulting federal officers and using a deadly and dangerous weapon in the commission of that offense and argued on appeal that the district court abused its discretion in running his federal prison term consecutive to, rather than concurrent with his state prison terms. The circuit court vacated the defendant's sentence because the district court failed to indicate on the record whether the methodology of USSG §5G1.3 had been considered. A sentencing court is required at the very least to recognize and consider the methodology in USSG §5G1.3. United States v. Brassell, 49 F.3d 274, 278 (7th Cir. 1995). The circuit court noted that the district court is not required to follow the procedure described in the commentary, and that the court retains the discretion to determine whether the methodology would result in an appropriate incremental sentence. The court must, however, provide a reason for its decision not to apply the methodology. The defendant's sentence was vacated and remanded with instructions for the court to consider the methodology of USSG §5G1.3.

United States v. Yahne, 64 F.3d 1091 (7th Cir. 1995). The district court did not err in refusing to group or consolidate the defendant's cases for sentencing purposes. The defendant pleaded guilty to charges of theft of interstate property in Illinois and Indiana. The defendant's Rule 11(e)(1)(c) plea agreement included a downward departure for substantial assistance for the Illinois charges. The district court sentenced the defendant to 18 1/2 months of incarceration, three years supervised release, a fine of $4000 and $580,000 in restitution. The defendant had already served his sentence for the Indiana theft and claimed on appeal that there was a sufficient nexus between the two cases to be consolidated under the guidelines. The defendant argued on appeal that the district court's refusal to group or consolidate the Indiana and Illinois cases resulted in an erroneous guideline range therefore resulting in an incorrect starting point for

calculation of the downward departure. The circuit court ruled that USSG §5G1.3(b) does not apply to a defendant who has completely served his sentence prior to his second sentencing. *See* United States v. Blackwell, 49 F.3d 1232,1241 (7th Cir. 1995); *see also* United States v. Ogg, 992 F.2d 265, 267 (10th Cir. 1993) (interpreting 1991 USSG §5G1.3); United States v. Adeniyi, 912 F.2d 615, 618 (2d Cir. 1990) (explaining in dictum that §5G1.3 did not apply because the defendant had completed his state sentence before his federal sentence was imposed).

Eighth Circuit

United States v. French, 46 F.3d 710 (8th Cir. 1995). The district court did not err when it credited the defendant for time served in connection with a state perjury conviction, because he was serving "an undischarged term of imprisonment" within the meaning of USSG §5G1.3(b) at the time of his federal sentencing. The appellate court also upheld the district court's finding that the defendant's state court perjury conviction was part of the same relevant conduct as the charged conduct for which the defendant was sentenced. Finally, the appellate court rejected the government's contention that the state perjury conviction should be included in defendant's criminal history calculation.

United States v. Marsanico, 61 F.3d 666 (8th Cir. 1995). The circuit court vacated the defendant's sentence because from the record it was unclear what specific factors the district court relied upon when imposing consecutive sentences. The defendant appealed the district court's decision to run the defendant's sentence consecutively to his undischarged Washington sentence. The circuit court concluded that the district court did not follow USSG §5G1.3(c) which states that the court should consider a reasonable incremental penalty to be a sentence for the instant offense that results in a combined sentence of imprisonment that approximates the total punishment that would have been imposed under USSG §5G1.2 had all of the offenses been federal offenses for which sentences were imposed at the same time. The circuit court noted that a court may depart from the guidelines when sufficient justification exists, but the court must provide specific reasons for departing. The circuit court held that the district court did not provide specific reasons for departing upward, and remanded for resentencing.

Ninth Circuit

United States v. Garrett, 56 F.3d 1207 (9th Cir. 1995). The district court erred in failing to properly consider the commentary methodology of §5G1.3(C) or to explain its reasons for using an alternative methodology in sentencing the defendant. The district court calculated a sentence for the single, federal crime and determined that it should run concurrent with the undischarged portion of the defendant's state sentence. The Sixth Circuit vacated the defendant's sentence because the district court did not make a determination on the record that the incremental punishment was reasonable, and because it did not make the necessary preliminary determination of §5G1.3 in which the court should approximate the total punishment that would have been imposed had all the offenses been federal offenses sentenced simultaneously.

United States v. McCary, 58 F.3d 521 (10th Cir. 1995). The case was remanded for resentencing a second time, in order for the district court to impose the 17-month enhancement portion of the subsequent 63-month Oklahoma federal sentence to run consecutively to the 211-month Texas federal sentence. The government, on cross-appeal, asserted that the 17-month portion of the sentence which was designated as an enhancement to sanction the conduct for occurring while the defendant was released on bond, should have been imposed to run consecutively, because it was governed by 18 U.S.C. § 3147. The appellate court agreed, and held that "the more general provisions of USSG 5G1.3(b), even if otherwise applicable, must be limited in the circumstances of this case by the more specific provisions of 18 U.S.C. 3147 and USSG 2J1.7."

United States v. Yates, 58 F.3d 542 (10th Cir. 1995). The appellate court upheld the district court's determination that the court may use the "real or effective" state imprisonment term, rather than the nominal term of imprisonment imposed, in applying USSG §5G1.3 to achieve a reasonable incremental increase in punishment. However, the district court committed clear error in making an assumption of what the effective state sentence would be, without an evidentiary basis. The court applied USSG §5G1.3(c), and imposed a consecutive sentence, based on its opinion that the defendant would serve 12 years of an 18 year state sentence. Although the defense counsel suggested that the actual time served may be 9 to 12 years of an 18-year sentence, the defendant did not stipulate to this fact, nor did he concede that such would be the case, nor did the government obtain evidence from any state sources. On remand for resentencing, the district court may hold a hearing to obtain the evidence. The appellate court also noted that "under the Supremacy Clause, U. S. Const., Art. VI, cl. 2, the guidelines must control over the wishes expressed in the order of the state court judge" that the sentence be served concurrently with the federal sentence.

Part H Specific Offender Characteristics

§5H1.4 Physical Condition

Sixth Circuit

United States v. Thomas, 49 F.3d 253 (6th Cir. 1995). The district court did not err in refusing to grant the defendant a downward departure because he was HIV positive, although he had not yet developed AIDS. The defendant argued that a downward departure was warranted because the guidelines had not taken into account recently available statistics showing the decreased life expectancy and increased cost of caring for people who are HIV positive. The circuit court agreed that these statistics were not available when the guidelines were written, but reasoned that the Commission had already considered the impact of the guidelines on persons who are HIV positive in its creation of USSG §5H1.4. The circuit court, citing a Virginia district court's rationale concerning the relationship between §5H1.4 and a defendant with AIDS, concluded that the defendant would be entitled to a departure "if his HIV has progressed into advanced AIDS, and then only if his health was such that it could be termed as an `extraordinary physical impairment.'" United States v. Pew, 751 F. Supp. 1195, 1199 (E.D. Va. 1990), aff'd on

other grounds, 932 F.2d 324 (4th Cir.), *cert. denied*, 112 S. Ct. 210 (1991). The defendant was still in "relatively good health," and thus was not entitled to a departure.

Part K Departures

§5K1.1 Substantial Assistance to Authorities

Second Circuit

United States v. Gangi, 45 F.3d 28 (2d Cir. 1995). The district court erred in denying the government's Fed. R. Crim. P. 35(b) motion for reduction of the defendant's sentence in light of his post-sentencing cooperation without first affording the defendant an opportunity to respond to or comment on the motion. The defendant argued that because Rule 35(b), which addresses post-sentencing cooperation, is similar in language and function to USSG §5K1.1, which addresses presentencing cooperation, the procedural requirements of Rule 35(b) should be interpreted consistently with those established for §5K1.1. These requirements, the defendant claimed, provide that a defendant be served with the government's §5K1.1 motion and be given an opportunity to respond. The circuit court agreed, joining with the Seventh and Tenth Circuits in finding that Rule 35(b) should be interpreted in light of §5K1.1. *See* United States v. Perez, 955 F.2d 34, 35 (10th Cir. 1992); United States v. Doe, 940 F.2d 199, 203 n.7 (7th Cir.), *cert. denied*, 112 S.Ct. 201 (1991). Additionally, the circuit court cited to Supreme Court and Second Circuit precedent establishing that a defendant must be given the opportunity to respond to a §5K1.1 motion, and to comment on the adequacy of the motion or even the government's refusal to file such a motion. *See* Wade v. United States, 112 S. Ct. 1840, 1843-44 (1992); United States v. Agu, 949 F.2d 63, 66 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 2279 (1992). Thus, the circuit court concluded that just as a defendant has a right to respond to the government's §5K1.1 motion, so too should the defendant be afforded the opportunity to respond to the government's Rule 35(b) motion. The circuit court clarified that this holding does not establish that a defendant is entitled to a full evidentiary hearing, as opposed to a written submission. Whether any hearing is necessary is a determination left to the discretion of the district court judge.

United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995). The district court erred in refusing to conduct an evidentiary hearing to determine whether the government acted in bad faith in refusing to file a §5K1.1 motion in violation of a plea agreement. The defendant pleaded guilty to conspiring to distribute hashish. Upon arrest, the defendant agreed to assist the government thus contributing to the arrest of three drug traffickers. After sending a written agreement indicating satisfaction with the defendant's assistance, the government then determined that the defendant was not being truthful and decided not to execute the plea agreement that had been previously signed by both the defendant and the government. On appeal, the government argued that no binding plea agreement existed and even if it did, that the defendant had breached it by his conduct. The defendant argued that the district court erred in failing to conduct an evidentiary hearing to determine if the government acted in bad faith. The circuit court ruled that the district court had abused its discretion in failing to consider significant evidence and by failing to take

important testimony. The circuit court noted that the circumstances under which a hearing will be granted to a defendant alleging bad faith on the part of the government is outlined in United States v. Knights, 968 F.2d 1483, 1487 (2d Cir. 1992). The Circuit Court further determined that at a minimum a district court should consider any evidence with a significant degree of probative value and should rest its findings on evidence that provides a basis for appellate review. The circuit court concluded that the district court in this case should have conducted a broader inquiry into the government's refusal to make a 5K1.1 motion.

Third Circuit

United States v. King, 53 F.3d 589 (3d Cir. 1995). The district court erred in departing downward pursuant to the government's 5K1.1 substantial assistance motion. The sentencing court incorrectly applied a "sentencing procedure" to determine the extent of the departure. The sentencing court must instead make an "individualized qualitative examination" of the defendant's cooperation. The case was remanded for resentencing.

Fifth Circuit

United States v. Underwood, 61 F.3d 306 (5th Cir. 1995). In considering an issue of first impression, the appellate court held that the promulgation of policy statement §5K1.1 was not an ultra vires act of the United States Sentencing Commission. The defendant pled guilty to possession of counterfeit currency. The plea agreement between the defendant and the government provided that the government retained the discretion whether to file a motion for downward departure for substantial assistance pursuant to USSG §5K1.1. The government chose not to file a motion for downward departure and the defendant was sentenced to a term of 24 months imprisonment. The defendant argued on appeal that the Sentencing Commission exceeded its authority when it promulgated §5K1.1 as a "policy statement" because Congress mandated the creation of a "guideline" in 28 U.S.C. § 994(n). In relevant part, 28 U.S.C. § 994(n) provides that "The Commission shall assure that the Guidelines reflect the general appropriateness of imposing a lower sentence than would be otherwise imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The circuit court noted that Congress's instructions to the Sentencing Commission fall into four general categories: issue guidelines, issue policy statements, issue guidelines or policy statements or implement a certain congressionally determined policy in the guidelines as a whole. The circuit court recognized that the specific language of each subsection of §994 determines into which of the four categories the instruction falls. After comparing the language in the subsections dealing with "guidelines" and "policy statements," the circuit court ruled that Congress was not mandating the promulgation of a specific guideline for downward departure based on substantial assistance in §994(n). Rather, Congress was instructing that guidelines as a whole should "reflect" the appropriateness of a downward departure based on substantial assistance. The circuit court went on to address USSG §5K1.1 and its relationship to 18 U.S.C. § 3553(e), and noted its previous ruling in United States v. Beckett, 996 F.2d 70 (5th Cir. 1993) where the dispositive issue was "whether §3553(e) and USSG §5K1.1 provide separate and distinct methods of departure or whether they are intended to perform the same

function." *Id*. at 72. The Fifth Circuit concluded that "[b]ased on a combined reading of §5K1.1, § 3553(e) and § 994(n)], . . . there is a direct statutory relationship between §5K1.1 and §3553(e) of such character to make §5K1.1 the appropriate vehicle by which §3553(3) may be implemented." *Id*. The circuit court noted that because it had held §5K1.1 to be an appropriate vehicle to implement a statute, by definition, the Sentencing Commission did not exceed the authority given to it by Congress when it enacted §5K1.1.

Seventh Circuit

United States v. Eppinger, 49 F.3d 1244 (7th Cir. 1995). The district court did not abuse its discretion by denying the defendant's request to present evidence in camera in support of her motion for a downward departure under USSG §5K1.1. The defendant pleaded guilty to one count of conspiracy to distribute cocaine and was granted a downward departure of ten percent from the mandatory minimum sentence of ten years. The defendant claimed to be afraid to speak in open court about the circumstances surrounding her involvement in the drug trade because she had received a number of threats prior to the sentencing, and contended that the court may have granted a greater downward departure if it had allowed her to testify in camera. The circuit court ruled that the defendant failed to demonstrate compelling reasons requiring in camera testimony, and that the district court's decision did not constitute plain error.

Eighth Circuit

United States v. Stockdall, 45 F.3d 1257 (8th Cir. 1995). The district court did not err in finding that the government neither violated the defendants' plea agreements nor exceeded its authority under 18 U.S.C. § 3553(e) by limiting its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences. The defendants argued that they were entitled to specific performance of their understanding of the plea agreements, in light of the government's failure to advise them that it might limit any section 3553(e) motion it filed. The defendants claimed that they reasonably construed the agreements as requiring that any section 3553(e) motion the government elected to file would apply to all of their mandatory minimum sentences, and that based on the discussion in United States v. De La Fuente, 8 F.3d 1333, 1337-39 (9th Cir. 1993), their reasonable understanding of the plea agreements was controlling. The circuit court rejected this argument, ruling that the fact that the plea agreements were silent on this issue does not permit a defendant to assume that the government would file an unlimited section 3553(e) motion. Moreover, the circuit court held that the government was permitted to limit its substantial assistance motion because "the plain language of § 3553(e) authorizes the government to make a substantial assistance motion decision for each mandatory minimum sentence to which the defendant is subject." However, the district court erred in allowing the government to limit its substantial assistance motions to only one of the defendants' applicable mandatory minimum sentences based on its interest in reducing the district court's discretion to depart from the government's suggestion of the appropriate total sentences. The circuit court rejected this basis for limiting substantial assistance motions, and cited United States v. Thomas, 930 F.2d 526, 529 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991) in holding that the desire to

control the length of a defendant's sentence for reasons other than his or her substantial assistance is an impermissible basis for limiting a substantial assistance motion.

§5K2.0 Departures

First Circuit

United States v. Morrison, 46 F.3d 127 (1st Cir. 1995). The defendant was sentenced as a career offender. He asserted that he should be granted a downward departure from that sentence because he was not a typical career offender, and the criminal history category overrepresented his criminal history. He argued that the offense of conviction, a robbery, should be merged with one of the predicate offenses, because they were part of a "downward spiral" brought on by alcohol abuse and depression. The defendant argued that the district court judge's statement: "if I felt I had the authority to depart, I would[.]" showed that the district court mistakenly believed that it did not have the authority to depart. The appellate court held that in determining whether the sentencing court believed it lacked authority to depart, or whether it was merely refusing to exercise its power, the appellate court will "consider the totality of the record and the sentencing court's actions reflected therein." "We do not consider any single statement in a vacuum." Viewing the circumstances as a whole, the appellate court ruled that the sentencing judge knew that he had authority to depart in the case at bar, but chose not to exercise that power under the facts presented in the present case.

Second Circuit

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995). The district court erred in departing downward. The defendant was convicted for illegally reentering the United States following deportation and was sentenced to 57 months imprisonment, five years supervised release and a $50 special assessment. The district court corrected the defendant's sentence six months later and re-sentenced the defendant to 24 months imprisonment, two years supervised release and a $50 dollar special assessment. USSG §2L1.2(b)(2) requires a sixteen level enhancement when deportation follows and aggravated felony conviction. The defendant had been previously convicted for possession with intent to distribute cocaine, an aggravated felony. The district court departed downward on the basis that the defendant had received a statutory minimum sentence for the single cocaine offense. The circuit court noted its previous decision on this issue in United States v. Polanco, 29 F.3d 35 (2d Cir. 1994). In Polanco, the circuit court ruled that "because [the defendant's] conviction was for an offense punishable under the Controlled Substances Act, one of the statutes enumerated under §924(c)(2), the offense rises to the level of `aggravated felony' under USSG §2L1.2(b)(2) and 8 U.S.C. § 1326(b)(2), regardless of the quantity of the nature of the contraband or the severity of the sentence imposed." *Id.* at 38 (emphasis added). The circuit court noted its decision in Polanco "left no room for the district court to conclude" that USSG §2L1.2 did not completely account for the circumstances of the defendant's drug offense. The circuit court held that the sentencing enhancement applied to the defendant regardless of the underlying facts of the crime. The circuit court also ruled that the three-year period between the defendant's drug trafficking conviction and deportation was not an approriate reason for a downward departure.

United States v. Broderson, 67 F.3d 452 (2d Cir. 1995). The district court did not err in granting a downward departure based on mitigating circumstances not taken into account by the Guidelines and the fact that the loss overstated the seriousness of the defendant's offense. The circuit court characterized the district court's departure as a "discouraged departure"—a departure where the factors in question were considered by the Commission but may be present in such an "unusual kind or degree" as to take the case out of the "heartland" of the crime in question and to justify a departure. *See* United States v. Rivera, 994 F.2d 942 (1st Cir. 1993). The circuit court ruled that the departure was within the district court's discretion and was reasonable. The circuit court recognized that district courts have a "special competence" in determining if a case is outside the "heartland" as they hear more cases dealing with the guidelines. The circuit court noted that although it may have reached a contrary decision with regard to whether the defendant's conduct was within the "heartland" of fraud cases, the court deferred to the district court's view of the case.

United States v. Cawley, 48 F.3d 90 (2d Cir. 1995). The district court did not err in making an upward departure pursuant to USSG §5K2.0 (18 U.S.C. §3553(b)) for defendant's perjury at his supervised release violations hearing. The defendant claimed that the Guidelines do not authorize an upward departure for perjury at a hearing on revocation of supervised release. Section 5K2.0 allows an upward departure where "there exists an aggravating circumstance of a kind, or degree not adequately taken into consideration . . ." in formulating the guidelines. The Second Circuit held that while the guidelines for sentencing violations of supervised release make no explicit provision for a defendant's perjury at a violation hearing, perjury would constitute "an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration" by the Commission.

See United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995), §2R1.1, p. 29.

United States v. Tropiano, 50 F.3d 157 (2d Cir. 1995). The district court erred in imposing an upward departure under USSG §5K2.0. The appropriate guideline for a departure based on the inadequacy of defendant's criminal history category is USSG §4A1.3. "[A] district court cannot avoid this step-by-step framework [of a §4A1.3 departure] `by classifying a departure based on criminal history as [an offense level departure] involving aggravating circumstances under 5K2.0.' United States v. Deutsch, 987 F.2d 878, 887 (2d Cir. 1993)." The appellate court noted that other circuits "have not adopted so rigid a demarcation . . . and will affirm 5K2.0 departures based on criminal history concerns." *See, e.g.*, United States v. Schmeltzer, 20 F.3d 610, 613 (5th Cir.) (5K2.0 departure affirmed for prior convictions for similar offense), *cert. denied*, 115 S.Ct. 634 (1994); United States v. Nomeland, 7 F3d 744, 747-48 (8th Cir. 1993) (5K2.0 departure affirmed based on extensive violent criminal activity); United States v. Molina, 952 F.2d 514, 518-19 (D.C. Cir. 1992) (5K2.0 departure affirmed based on prior similar offenses). The appellate court stated that the "failure to follow the category-by-category horizontal departure procedure would not matter if the district court had stated on the record an alternative reason other than recidivism for reaching the same result." The case was remanded for resentencing.

United States v. Williams, 65 F.3d 301 (2d Cir. 1995). The district court did not err in departing downward so that the defendant could enter a drug treatment program to which he had been admitted. The defendant was convicted of distributing and possessing with intent to distribute five grams and more of cocaine base. The defendant's guideline range was 130-162 months. At his initial sentencing, the district court departed downward sua sponte based on the defendant's desire to attend a drug treatment program, and sentenced the defendant to two concurrent five-year terms of imprisonment followed by two concurrent ten years terms of supervised release. The government appealed and the circuit court vacated the sentence, ruling that although it recognized that a defendant's rehabilitative efforts in ending his drug dependence may be a permissible grounds for departure, the defendant's "genuine desire to seek rehabilitative treatment in the future" fell short of the "extraordinary" efforts at rehabilitation that justified a departure. United States v. Williams, 37 F.3d 82 (2d Cir. 1994). At resentencing, the district court imposed the same sentence, concluding that the Sentencing Commission could not have considered the particular circumstances of the case, namely that the defendant fit a narrow profile for a selectively available pilot drug treatment program, which in the absence of a downward departure would not be available to him for a significant number of years. The government appealed the sentence a second time. The circuit court ruled that the downward departure was permissible, noting its decision in United States v. Maier, 975 F.3d 944 (2d Cir. 1992), which concluded that rehabilitative endeavors could serve as a basis for downward departure, as 18 U.S.C. § 3553(a)(2)(D) indicated that Congress did not abandon rehabilitation as a permissible goal of sentencing when it passed the Sentencing Reform Act. The circuit court further noted that there was no evidence that the Sentencing Commission had given adequate consideration to a defendant's efforts at drug rehabilitation in formulating the guidelines. The circuit court recognized that the district court's departure was not only based on the fact that the defendant had entered a drug treatment program, but because, on the facts of the case, there was no other sentence that would accord with the requirements of 18 U.S.C. § 3553(a)(2)(D). The circuit court ruled that the district court had the authority to depart downward to facilitate the defendant's rehabilitation given the atypical facts of this case, which placed it outside the "heartland" of usual cases involving defendants who may benefit from drug treatment. The circuit court limited its ruling, noting that its intent is not to imply that downward departures should be granted automatically to defendants in this situation, but to acknowledge that the district court's discretion remains a vital component of individualized sentencing under the sentencing guidelines. The circuit court ruled, however, that although the district court had the authority to depart, the departure was not reasonable because the term of supervised release lacked special conditions to guarantee that the defendant would not withdraw from the program and be released at the end of five years while similar defendants who committed similar crimes would serve another six to nine years, rendering the disparity "unwarranted." The circuit court held that the risk of unwarranted sentencing disparity would be allayed if the district court were to impose the following special conditions: that the defendant must present certification from a drug treatment program at his place of incarceration, that he enter and complete the program, that he remain drug free, submit to drug testing during supervised release, and that the defendant continue to participate in a drug treatment program if directed by the United States Probation Office. The circuit court vacated the sentence to allow these special conditions to be added to the defendant's sentence to ensure that the defendant serves at least his guideline minimum sentence if he does not successfully complete the drug program.

Third Circuit

United States v. Evans, 49 F.3d 109 (3d Cir. 1995). During the presentence investigation the defendant voluntarily revealed his true identity to the probation officer which, because of his criminal history, increased his sentence. The probation officer conceded that he would not have discovered the defendant's true identity if not for the defendant's own admission. Accordingly, the defendant argued that the district court should have departed downward based on his extraordinary acceptance of responsibility, and that the court did not so depart because it mistakenly believed it did not have the authority to do so. The appellate court found the district court's discussion of the departure ambiguous. Therefore, the court considered the issue of whether or not this factor is an appropriate basis for departure. The court held that the disclosure of identity could constitute a "mitigating circumstance" within the meaning of guideline §5K2.0. The appellate court based its holding on the recent amendment to §5K2.0, which allows a judge to use a broad range of factors to depart as long as those factors promote the statutory purposes of sentencing. The case was remanded for resentencing for the district court determine whether a downward departure is appropriate.

Ninth Circuit

United States v. Koon, 45 F.3d 1303 (9th Cir.), *cert. granted*, 116 S. Ct. 132 (U.S. Sept. 27, 1995) (No. 94-1664). The Ninth Circuit voted to reject the defendants' motion for a rehearing en banc of a circuit court panel's decision to reverse the downward departures previously applied to their sentences for the police beating of Rodney King. Nine judges, however, dissented to the rejection of the motion for a rehearing. Those nine judges argued that a rehearing was warranted because the district court had been correct in applying the downward departures. The dissenting judges claimed that the panel's reasons for reversing the downward departures conflicted with established precedent. The panel had rejected the district court's departure for a "combination of factors" by examining each factor individually and concluding that each was not "appropriate" to support a departure. This approach, the dissenting judges argued, ignores precedent establishing that a departure may be based on a combination of circumstances, which individually would not be adequate grounds for departure, but when combined, create a "whole . . . greater than the sum of its parts." The dissenting judges also claimed that the panel's conclusion that a departure may not be based on "personal and professional consequences" was at odds with Ninth Circuit precedent. Finally, the dissenting judges objected to the panel's rejection of a downward departure based on victim misconduct pursuant to §5K2.10. The panel's rejection was based on the finding that, in the context of excessive force cases, "an act provokes only if it precipitates an immediate response," and volatility such as that in this case never constitutes a permissible ground for departure. The dissenting judges disagreed, arguing that this finding was based more on hostility to the downward departure than on the spirit or language of the guidelines.

United States v. Ponce, 51 F.3d 820 (9th Cir. 1995). The district court did not err in departing upward two levels based on the size and sophistication of the defendants' drug

trafficking operation. The defendants claimed the departure improperly considered the quantity of drugs. The appellate court noted that it had already rejected this argument in United States v. Shields, 939 F.2d 780 (9th Cir. 1991), wherein it stated that "Common sense requires the conclusion that duration is not the same thing as quantity. A judge could easily find that a 14-month drug conspiracy is more serious than a single episode of importation." Shields, 939 F.2d at 783. The district court correctly based its departure on the "harm to society, the sophisticated nature of the offense, and the long duration of the conspiracy." 18 U.S.C. § 3443(b). The appellate court ruled that the district court did not abuse its discretion by departing upwards two levels due to the considerable length and sophistication of the drug trafficking operation.

§5K2.1 Death

Fifth Circuit

United States v. Singleton, 49 F.3d 129 (5th Cir.), *cert. denied*, 116 S. Ct. 324 (1995). The appellate court affirmed the district court's upward departure to a sentence of life imprisonment for a defendant who participated in the killing of the victim of a robbery and carjacking conspiracy. In conducting review for plain error, the appellate court noted that the four level enhancement for permanent or life threatening injury awarded under USSG §2B3.1(b)(3)(C) did not preclude an upward departure for the death of the victim. *See* United States v. Billingsley, 978 F.2d 861, 865-66 (5th Cir. 1992).

§5K2.5 Property Damage or Loss

Eleventh Circuit

United States v. Thomas, 62 F.3d 1332 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1058 (1996). The district court erred in departing upward based on the consequential financial damages to the victims beyond the amount they paid in advance fees to the defendant. The defendant was convicted of conspiracy to commit mail and wire fraud and wire fraud stemming from the operation of a loan brokerage firm. The defendants argued on appeal that consequential damages should not have been used as a basis for upward departure because those damages were adequately considered in establishing the defendant's guideline range. The circuit court agreed, ruling that the Sentencing Commission had expressly considered and rejected consequential damages as a factor in determining offense levels under the guidelines, except for government procurement and product substitution cases. The court noted that if the consequential damages in this case were "substantially in excess" of what ordinarily is involved in an advance fee scheme case, then a departure may have been warranted. The circuit court ruled that the consequential damages in this case were not substantially in excess of the typical fraud case and were not so "outside the heartland" for the crime of fraud as to warrant an upward departure.

§5K2.8 Extreme Conduct

Eighth Circuit

United States v. Clark, 45 F.3d 1247 (8th Cir. 1995). The district court did not err in imposing a 24-month upward departure for extreme conduct based on its finding that the defendant degraded and terrorized his victim during the commission of a carjacking. In particular, the defendant had stuck a gun to the victim's head, traveled around with the victim still in the car, robbed him, and repeatedly told him that he was going to die. In the district court's evaluation, the defendant terrorized, abused and debased the victim, conduct sufficiently unusual to warrant an upward departure. The defendant argued that the factors on which the district court relied—abduction of the victim and use of a firearm—had already been taken into account in the carjacking and firearms guidelines under which he was sentenced. The circuit court agreed that these factors had already been into account, but cited §5K2.0 andUnited States v. Joshua, 40 F.3d 948, 951-52 (8th Cir. 1994), in concluding that the upward departure was still justified because these factors were present to a degree substantially in excess of that which is ordinarily involved in the offense. Additionally, the fact that the victim was not physically harmed did not preclude a §5K2.8 upward departure—criminal conduct that does not cause physical harm may nonetheless be "unusually heinous, cruel, brutal or degrading to the victim" such that an upward departure is warranted. *See* United States v. Perkins, 929 F.2d 436 (8th Cir. 1991).

§5K2.11 Lesser Harms

Eleventh Circuit

United States v. Rojas, 47 F.3d 1078 (11th Cir. 1995). The district court erred in granting a downward departure under USSG §5K2.11 to a defendant convicted of knowing possession of unregistered firearms, based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens. On appeal, the government argued that 26 U.S.C. § 5861 seeks to prevent the harms associated with the defendant's conduct and that the defendant's subjective views of foreign policy may not serve as a basis for a sentence reduction. The appellate court agreed that section 5861 was intended to reach the harms connected with the defendant's conduct, and that the downward departure was inappropriate. The appellate court noted that the defendant's conduct did not fall into the "traditional" departure categories for §5K2.11: hunting, sport shooting and protecting the home. The circuit court further ruled that the Sentencing Guidelines clearly indicate that a defendant is not entitled to a downward departure because of a personal belief that the criminal action is furthering a greater political good.

§5K2.13 Diminished Capacity

Tenth Circuit

United States v. Webb, 49 F.3d 636 (10th Cir.), *cert. denied*, 116 S. Ct. 121 (1995). The district court erred in granting the defendant a downward departure based on the defendant's psychiatric condition, his family circumstances and the unsophisticated nature of his crime. It was improper to depart downward based on the defendant's psychiatric condition because the

defendant's psychiatric reports did not address or conclude that the defendant suffered from "significantly reduced mental capacity" as required by §5K2.13. In addition, the defendant's role as sole caretaker of his child is not extraordinary; therefore, this factor cannot justify a departure under §5H1.6. Lastly, although the defendant's silencer was composed of a toilet paper tube loaded with stuffed animals, the unsophisticated nature of the silencer cannot justify a downward departure. The departure was reversed and the case was remanded for resentencing within the guideline range.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

First Circuit

United States v. Claudio, 44 F.3d 10 (1st Cir. 1995). The district court did not abuse its discretion in refusing to postpone the defendant's scheduled sentencing to hear live medical testimony relating to his family circumstances. The district court later offered to accept at the sentencing hearing a proffer of what the absent medical expert's testimony would have been. The circuit court, citing United States v. Tardiff, 969 F.2d 1283, 1286 (1st Cir. 1992), reasoned that there is no automatic right to present live testimony at sentencing, and that testing the value of proposed live testimony by proffer—especially where a postponement would be involved—accords with "common practice and good sense." The circuit court concluded that none of the defendant's arguments showed that the proffer was inadequate in conveying the substance of the medical testimony.

Seventh Circuit

United States v. Ewers, 54 F.3d 419 (7th Cir. 1995). The district court did not err in finding factors justifying an upward departure by a preponderance of the evidence instead of the higher standard of clear and convincing evidence discussed in United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990). The defendant, an attorney, was convicted of maintaining his law office as a place for the distribution of cocaine and sentenced under the 1989 version of section 2D1.8. Because the 1989 version of that guideline did not consider quantity in determining the offense level, the district court departed upward from the defendant's guideline range of 21-27 months to a sentence of 60 months based on the involvement of 3.5 to 5 kilograms of cocaine in the offense. The Eleventh Circuit held that the 33-month departure was not so extreme as to invoke the Kikumura scrutiny, relying, in part, on the fact that the current guidelines would have resulted in a guideline range of 70-87 months.

Ninth Circuit

United States v. Pinto, 48 F.3d 384 (9th Cir.), *cert. denied*, 116 S. Ct. 125 (1995). The district court did not err in considering at the defendant's sentencing hearing evidence that was not included in either the stipulation of facts in his plea agreement or the sentencing report. The district court judge had considered testimony relating to a delivery of cocaine based on the judge's own recollection of evidence presented at a co-defendants' trial. The defendant argued that consideration of this testimony was improper because he was not given notice that it would be used against him at his sentencing hearing. The circuit court acknowledged that the evidence to which the defendant objected clearly came from his co-defendants' trial. However, because the defendant made no objections to use of this evidence at his sentencing hearings, did not challenge the substance of the evidence on appeal, and because the district court relied on evidence of numerous other incidents, the circuit court ruled that consideration of the disputed evidence did not constitute plain error.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release

Sixth Circuit

United States v. Twitty, 44 F.3d 410 (6th Cir. 1995). The district court erred in revoking the defendant's probation pursuant to 18 U.S.C. § 3565 based on conduct which occurred before the defendant was sentenced to probation. The district court had ruled that revocation of the defendant's probation was warranted because she was under an appearance bond at the time of her pre-probationary conduct which specified that she not commit any violation of federal, state or local law while released on bond. The district court held that this condition gave the defendant "fair notice" to remain crime free. The circuit court, while acknowledging that § 3565(a) grants courts authority to revoke probation for pre-probationary conduct, concluded that such revocation can occur only after the defendant has fair notice of the terms of probation that could result in revocation. *But see* United States v. James, 848 F.2d 160 (11th Cir. 1988). Thus, a defendant's probation may be revoked for conduct which occurs prior to the actual commencement of the probationary sentence, but not for conduct, such as the defendant's, which occurs prior to the date on which the defendant was sentenced to probation.

Seventh Circuit

United States v. Hill, 48 F.3d 228 (7th Cir. 1995). The Seventh Circuit held that the policy statements in Chapter Seven are non-binding on district judges. The circuit court reversed its decision in United States v. Lewis, 998 F.2d 497 (7th Cir), which had held that all policy statements in the Guidelines Manual are binding on the sentencing judge unless inconsistent with a guideline or with a federal statute. The policy statement in §7B1.3(f) provides that the judge shall

order any term of imprisonment imposed upon the revocation of supervised release to run consecutively to any prison sentence the defendant is serving. The district court judge, following the holding in Lewis, sentenced the defendant to 21 months and ordered that the sentence be served consecutively to his state sentence. The circuit court reversed and remanded, basing the decision on two factors: 1) that at least six circuits had rejected the holding in Lewis and held that policy statements are non-binding, and 2) the Solicitor General believed that Lewis was decided erroneously and the government recommended that the case be remanded for resentencing. In overruling Lewis, the Seventh Circuit joined the First, Second, Fifth, Sixth, Eighth, and District of Columbia Circuits in holding that policy statements which do not interpret guidelines, including Chapter 7 statements, are non-binding. United States v. Mathena, 234 F.3d 87, 93 (5th Cir. 1994); United States v. Sparks, 19 F.3d 1099, 1101 (6th Cir. 1994); United States v. Anderson, 15 F.3d 278, 283-84 (2d Cir. 1994); United States v. O'Neill, 11 F.3d 292, 301 (1st Cir. 1993); United States v. Levi, 2 F.3d 842, 845 (8th Cir. 1993); United States v. Hooker, 993 F.2d 898, 901 (D.C. Cir. 1993). The circuit court reasoned that Lewis misapplied Stinson v. United States, 113 S. Ct. 1913, 1917 (1993), by incorrectly assuming that Stinson made policy statements binding. Stinson held that commentary labeled "policy statement" is not robbed of its authoritative character if it interprets a guideline. The circuit court stated that Chapter 7 policy statements are entitled to great weight because the Sentencing Commission is the expert body on federal sentencing, but they do not bind the sentencing judge.

Eighth Circuit

United States v. Hartman, 57 F.3d 670 (8th Cir. 1995). The district court did not err in imposing an additional term of supervised release after a term of imprisonment following revocation of the defendant's initial term of supervised release. Following revocation of his initial term of supervised release, the defendant was sentenced to nine months imprisonment and 27 months supervised release. On appeal, the defendant acknowledged that the circuit court has repeatedly held that a revocation sentence imposed under 18 U.S.C. § 3583(e) may include imprisonment and supervised release. *See, e.g.*, United States v. Love, 19 F.3d 415, 416 (8th Cir.), *cert. denied*, 115 S. Ct. 434 (1994); United States v. Schrader, 973 F.3d 623, 625 (8th Cir. 1992). The circuit court noted that it could not overrule another panel's decision and that it had consistently declined to reconsider Schrader en banc. The circuit court rejected the defendant's argument that the express language in 18 U.S.C. § 3583(h) allowing courts to impose a revocation sentence consisting of both imprisonment and supervised release, indicates that the circuit court had previously misinterpreted 18 U.S.C. § 3583(e) which lacked such express language. The court noted that the legislative history of § 3583(h) indicates that the new legislation was intended to confirm the court's interpretation of the prior law.

United States v. Stephens, 65 F.3d 738 (8th Cir. 1995). The district court did not err in applying the mandatory revocation requirement of 18 U.S.C. § 3583(g)(3). The defendant appealed the district court's revocation of his supervised release, arguing that the court erred considering his need for medical treatment for AIDS in deciding to revoke supervised release. The circuit court concluded that it was immaterial that the district court took the defendant's need for medical treatment into account when it ordered revocation of his supervised release. The circuit court stated that this case was controlled by 18 U.S.C. § 3583(g), providing in part: "If the

defendant . . . (3) refuses to comply with drug testing imposed as a condition of supervised release . . . the court shall revoke the term of supervised release." The circuit court held that the defendant's failure to comply with the drug testing conditions imposed by the district court was a knowing and willful violation, and therefore he was subject to the mandatory revocation requirement of 18 U.S.C. § 3583(g)(3).

§7B1.4 Term of Imprisonment

Fourth Circuit

United States v. Davis, 53 F.3d 638 (4th Cir. 1995). In a issue of first impression, the Fourth Circuit held that the Chapter 7 policy statements regarding the revocation of supervised release are advisory in nature and are not binding on the courts. The Fourth Circuit had previously held in United States v. Denard, 24 F.3d 599 (4th Cir. 1994), that the Chapter 7 policy statements are not binding in the context of a probation revocation, and applied that reasoning here, finding no basis for a distinction between a revocation of probation and a revocation of supervised release in determining the mandatory or advisory nature of Chapter 7 policy statements.

Sixth Circuit

United States v. West, 59 F.3d 32 (6th Cir.), *cert. denied*, 116 S. Ct. 486 (1995). The district court did not err in sentencing the defendant to two years imprisonment after the defendant admitted that he violated the conditions of his supervised release. The district court had concluded that the sentencing range set out in the table was too lenient, and imposed the maximum statutory sentence of two years. The defendant argued that 18 U.S.C. § 3553(a)(4) requires that a district court sentence a supervised release violator within the sentencing range prescribed by the Sentencing Commission's "policy statements" concerning violations of probation and supervised release. The circuit court rejected the defendant's argument that Chapter 7 policy statements are binding, and held that the policy statements in Chapter 7 are merely advisory. The circuit court stated that a court only need to consider the policy statements in rendering a decision for sentence.

CONSTITUTIONAL CHALLENGES

Fifth Amendment–Double Jeopardy

Supreme Court

Witte v. United States, 115 S. Ct. 2199 (1995). The Supreme Court, in an 8-1 decision, held that "because consideration of relevant conduct in determining a petitioner's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct," a

second prosecution involving that conduct "does not violate the Double Jeopardy Clauses' s prohibition against the imposition of multiple punishments for the same offense." The Court rejected the petitioner's claim that his indictment for cocaine offenses violated the Double Jeopardy Clause because the cocaine offenses had already been considered as relevant conduct in sentencing for an earlier marijuana offense. The majority relied on the Court's previous decision in Williams v. Oklahoma, 358 U.S. 576 (1959), specifically rejecting the claim that "double jeopardy principles bar a later prosecution or punishment for criminal activity where that criminal activity has been considered at sentencing for a second crime." The majority further noted that the consideration of relevant conduct punishes the offender "for the fact that the present offense was carried out in a manner that warrants increased punishment, not for a different offense (which that related conduct may or may not constitute)."

Third Circuit

United States v. Baird, 63 F.3d 1213 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 909 (1996) (No. 95-630). The district court did not err in denying the defendant's motion to dismiss an indictment on double jeopardy grounds when the indictment followed an administrative forfeiture hearing. The circuit court identified the differences between administrative and civil forfeitures for double jeopardy purposes, noting that administrative forfeitures are allowed only when the value of the property seized is less than a jurisdictional amount and no claim is filed within 20 days of the first publication of a notice of seizure. The circuit court recognized that two recent rulings by the Supreme Court indicate that civil forfeitures may constitute punishment for Eighth Amendment purposes. *See* United States v. Halper, 490 U.S. 435 (1989); Austin v. United States, 113 S. Ct. 2801 (1993). The circuit court ruled that an administrative forfeiture of unclaimed alleged drug proceeds did not constitute "punishment," especially since an administrative forfeiture cannot, by definition, "entail a determination of ownership of the property to be forfeited."

Sixth Circuit

United States v. Usery, 59 F.3d 568 (6th Cir.), *cert. granted*, 116 S. Ct. 762 (1996) (No. 95-345). The district court erred in ruling that the defendant's conviction for manufacturing marijuana following the settlement of a civil forfeiture action based on the same conduct did not constitute double jeopardy. The defendant entered into a settlement in civil forfeiture proceeding instituted by the government after marijuana was found on the defendant's property. The defendant was then convicted of manufacturing marijuana and sentenced to 63 months imprisonment. The defendant argued on appeal that his criminal prosecution following the settlement of the civil forfeiture constituted double jeopardy for the same conduct. In its Double Jeopardy analysis, the circuit court ruled that the consent judgment in the civil forfeiture proceeding was an adjudication because jeopardy attached upon entry of the civil forfeiture judgment. The circuit court further ruled that civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for the purposes of Double Jeopardy. The circuit court found the civil forfeiture and the conviction to be punishment for the same offense "because the forfeiture necessarily requires proof of the criminal offense." The circuit court also rejected the government's argument that the civil and criminal proceedings constituted a single proceeding.

The circuit court held the defendant's criminal conviction following the settlement of a civil forfeiture based on the same conduct to be a second punishment that violates the Double Jeopardy Clause.

Ninth Circuit

United States v. Jernigan, 60 F.3d 562 (9th Cir. 1995). The district court did not violate the double jeopardy clause in sentencing the defendant to consecutive sentences. The defendant failed to appear at trial for counterfeiting and conspiracy charges, and the district court enhanced his sentence for "obstruction of justice" by two levels under USSG §3C1.1. The defendant was separately indicted for failure to appear under 18 U.S.C. § 3146(a)(1), and sentenced to five months on the charge to run consecutively to his sentence for the counterfeit and conspiracy charges. The defendant argued that he was already punished for his failure to appear by the enhancement applied to his earlier sentence, and that the sentence violated double jeopardy. The circuit court, relying on Witte v. United States, 115 S. Ct. 2199 (1995), concluded that the subsequent imposition of a consecutive sentence for the defendant's failure-to-appear offense was not a double jeopardy violation where that offense had been taken into account for previous sentencing on the counterfeit and conspiracy charges. The circuit court stated "[b]ecause the defendant's punishment in the first case fell "within the range authorized by statute," his double jeopardy claim necessarily fails."

Ex Post Facto Clause

Ninth Circuit

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995). The district court violated the ex post facto clause when it considered a provision which was not a part of the 1989 version of the guidelines in calculating the defendant's base offense level. The defendant qualified as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e) which carried a 15-year mandatory minimum sentence. The 1989 version of the guidelines, however, did not mention the Armed Career Criminal Act. The district court departed upward for a number of factors including the defendant's extensive criminal history, and used the armed career criminal section in the 1990 version of the guidelines as a guide in reaching a base offense level of 34, resulting in a sentence of 327 months imprisonment. The circuit court ruled that a departure for violent offenses already considered in calculating the defendant's criminal history is an impermissible basis for departure. The circuit court noted that under the 1989 guidelines, "any upward departure founded on the underrepresented seriousness of their past criminal conduct could not be based merely on the violence of the past crime, and had to be `horizontal'. . . ." The circuit court ruled that although the 1990 version of the guidelines provided for an enhanced offense level for armed career criminals, the district court improperly used USSG §4B1.4 as a guide, subjecting the defendant to the "detrimental ex post facto effect" of USSG §4B1.4. The circuit court rejected the Tenth Circuit's stand on this issue. The Tenth Circuit, in United States v. Tisdale, 7 F.3d 957, 965-68 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1201 (1994), permitted the use of USSG 4B1.4 as a retroactive guide to discretion, ruling that such practice did not violate the ex post facto clause because the court "made it clear that it was not applying the later Guideline, but only using it as a benchmark or analogue."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35

Second Circuit

United States v. Abreu-Cabrera, 64 F.3d 67 (2d Cir. 1995). The district court exceeded its limited authority to resentence the defendant pursuant to Fed. R. Crim. P. 35(c). The defendant pleaded guilty to illegally reentering the United States following deportation, and was sentenced to 57 months imprisonment, two years supervised release, and a $50 special assessment. Four days following sentencing, prior to the entry of judgment reflecting the orally imposed sentence, the district court issued an order stating that it "may not have been apprised of and considered all relevant factors" and wished to consider correcting the sentencing pursuant to Fed. R. Crim. P. 35(c). At a subsequent sentencing hearing, the district court departed downward pursuant to USSG §§4A1.3 and 5K2.0 and resentenced the defendant to 24 months imprisonment, two years supervised release and a $50 special assessment. The government challenged the district court's ruling on appeal, contending that the district court lacked the

authority under Rule 35(c) to resentence the defendant because the decision to depart downwardly does not constitute a correction of the type of arithmetical, technical, or other clear error envisioned by the Rule. The circuit court ruled that the district court clearly exceeded the scope of the rule in correcting the defendant's sentence. Fed. R. Crim. P. 35(c) permits corrections of "arithmetical, technical or other clear error" and is intended to be narrowly applied and extended only in those cases in which an obvious error or mistake has occurred—an error which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The district court's purported error was that it applied the 16-level increase called for by the guidelines due to the defendant's deportation after commission of an aggravated felony, in a fashion "so mechanical as to impose a draconian result." The circuit court ruled that the failure to make a downward departure at the defendant's original sentencing did not constitute an obvious error or mistake that would have resulted in a remand. The original sentence was not illegal, unreasonable, or a result of an incorrect application of the guidelines. The circuit court characterized the distict court's correction as a "change of heart," and not a correction authorized by Rule 35(c).

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 34

Seventh Circuit

United States v. Martin, 63 F.3d 1422 (7th Cir. 1995). The district court abused its discretion in sentencing the defendant to a 50-year sentence, given the knowledge that the time span would extend beyond the defendant's life expectancy. The defendant was convicted of arson (which resulted in the deaths of two firefighters) and was sentenced to fifty years imprisonment. The defendant argued on appeal that the district court abused its discretion because the jury had determined that he was not to be subjected to life imprisonment. 18 U.S.C. § 34 provides that a person convicted of arson where a death results shall be subject to the death penalty or to life imprisonment, "if the jury shall in its discretion so direct." The jury refused to subject the defendant to life imprisonment. The defendant's base offense level was calculated to be 43 which required an imposition of a life sentence. The district court reduced the defendant's base offense level to 42, yielding a sentencing range of 360 months to life and sentenced the defendant to 50 years imprisonment. The circuit court ruled that the district court abused its discretion in imposing such a sentence. The circuit court noted that although the judge and not the jury ultimately sentences the defendant, under this statute, the judge may only impose life imprisonment if the jury so directs. If the jury does not so direct, the circuit court ruled, the sentence is limited to a term of years which must be less than life. The circuit court recognized that sentencing a 45-year-old individual to 50 years in prison (of which at least 42.5 must be served) is equivalent to a life sentence and therefore beyond the power of the judge to impose. The circuit court noted that §2A1.1 authorizes a downward departure where the defendant "did not cause the death intentionally or knowingly." The district court did not appear to have

considered defendant's mental state or other appropriate grounds for departure, and may re-examine these issues on remand.

18 U.S.C. § 924(c)

Supreme Court

Bailey v. United States, 116 S. Ct. 501 (1995). The Supreme Court, in a unanimous opinion, held that 18 U.S.C. § 924(c)(1) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." According to the Court, the term "use" connotes more than mere possession or storage of a firearm by a person who commits a drug offense.

18 U.S.C. § 3583

Sixth Circuit

United States v. Hancox, 49 F.3d 223 (6th Cir. 1995). The district court erred in denying the government's motion for revocation of the defendant's supervised release. The defendant admitted that she had used drugs on numerous occasions while on supervised release. The district court elected not to revoke, because she had been admitted into an in-patient drug treatment program and had been making progress since her arrest. On appeal, the appellate court agreed with the government that 18 U.S.C. § 3583(d) mandates the termination of supervised release upon evidence that the defendant possessed a controlled substance. The appellate court noted that "use" constitutes "possession" for purposes of the statute, joining the First, Third, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits. *See* United States v. McAfee, 998 F.2d 835 (10th Cir. 1993); United States v. Dow, 990 F.2d 22 (1st Cir. 1993); United States v. Rockwell, 984 F.2d 1112 (10th Cir.), *cert. denied*, 113 S.Ct. 2945 (1993); United States v. Courtney, 979 F.2d 45 (5th Cir. 1992); United States v. Baclaan, 948 F.2d 628 (9th Cir. 1991); United States v. Blackston, 940 F.2d 877 (3d Cir.), *cert denied*, 502 U.S. 992 (1991); United States v. Oliver, 931 F.2d 463 (8th Cir. 1991); and United States v. Dillard, 910 F.2d 461 (7th Cir. 1990). The sentence was vacated and the case was remanded for resentencing. "Pursuant to 18 U.S.C. § 3583, the district court was required to revoke Hancox's supervised release and to sentence her to 20 months in prison. Twenty months is one-third of her supervised release term of five years. The district court had no discretion to disregard the mandate of the statute."

21 U.S.C. § 851

Eleventh Circuit

United States v. Brown, 47 F.3d 1075 (11th Cir. 1995). In deciding an issue of first impression in the Eleventh Circuit, the appellate court adopted the reasoning of four other circuits holding that 21 U.S.C. § 851 permits the government to seek an enhanced penalty (here, life imprisonment for a defendant guilty of a drug offense involving more than five kilograms of

cocaine), where the offense was committed after "two or more convictions for felony drug offenses have become final." The defendant argued that the enhancement was inapplicable because his prior offenses had been state offenses, convicted upon the filing of informations, rather than upon indictments or waivers of indictment. The appellate court followed United States v. Espinosa, 827 F.2d 604 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988); United States v. Adams, 914 F.2d 1404 (10th Cir.), *cert. denied*, 498 U.S. 1025 (1990); United States v. Burrell, 963 F.2d 976 (7th Cir.), *cert. denied*, 113 S. Ct. 357 (1992); and United States v. Trevino-Rodriguez, 994 F.2d 533 (8th Cir. 1993), in holding that 21 U.S.C. § 851(a)(2) requires only that the "instant offense" be brought by indictment or waiver of indictment, and not the prior offenses.