TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 117 S. Ct. 82 (1996)

United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 773 (1996)

United States v. Brannan, 74 F.3d 448 (3d Cir. 1996)

United States v. Brechner, 99 F.3d 96 (2d Cir. 1996)

United States v. Bruce, 78 F.3d 1506 (10th Cir.), *cert. denied*, 117 S. Ct. 149 (1996)

United States v. Burdex, 100 F.3d 882 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1283 (1997)

United States v. Burke, 91 F.3d 1052 (8th Cir. 1996)

United States v. Cali, 87 F.3d 571 (1st Cir. 1996)

United States v. Campbell, 94 F.3d 125 (4th Cir. 1996), *cert. denied*, 1997 WL 274271 (1997)

United States v. Carrington, 96 F.3d 1 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997)

United States v. Carvell, 74 F.3d 8 (1st Cir. 1996)

United States v. Casterline, 103 F.3d 76 (9th Cir. 1996), *petition for cert. filed* (U.S. Jan. 2, 1997) (No. 96-9211)

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1094 (1997)

United States v. Cefalu, 85 F.3d 964 (2d Cir. 1996)

United States v. Charry Cubillos, 91 F.3d 1342 (9th Cir. 1996)

United States v. Chastain, 84 F.3d 321 (9th Cir. 1996)

United States v. Cheng, 96 F.3d 654 (2d Cir. 1996)

United States v. Choi, 101 F.3d 92 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1255 (1997)

United States v. Coffman, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1425 (1997)

United States v. Cohen, 99 F.3d 69 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997)

United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996)

United States v. Conley, 92 F.3d 157 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1244 (1997)

United States v. Conte, 99 F.3d 60 (2d Cir. 1996)

United States v. Copple, 74 F.3d 479 (3d Cir. 1996)

United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996)

United States v. Damico, 99 F.3d 1431 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1086 (1997)

United States v. Delmarle, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1097 (1997)

United States v. Disanto, 86 F.3d 1238 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1109 (1997)

United States v. Doe, 93 F.3d 67 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 944 (1997)

United States v. Dorrough, 84 F.3d 1309 (10th Cir.), *cert. denied*, 117 S. Ct. 446 (1996)

United States v. Doss, 79 F.3d 76 (7th Cir. 1996)

United States v. Dunn, 80 F.3d 402 (9th Cir. 1996)

United States v. Dyce, 78 F.3d 610 (D.C. Cir. 1996)

United States v. Eureka Laboratories, 103 F.3d 908 (9th Cir. 1996)

United States v. Felix, 87 F.3d 1057 (9th Cir. 1996

United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996)

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996)

United States v. Fonts, 95 F.3d 372 (5th Cir 1996)

United States v. Forte, 81 F.3d 215 (D.C. Cir. 1996)

United States v. Fountain, 83 F.3d 946 (8th Cir.), *cert. denied*, 1996 WL 547024 (1997)

United States v. Fuller, 99 F.3d 926 (9th Cir. 1996)

United States v. Gallagher, 99 F.3d 329 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1274 (1997)

United States v. Gifford, 90 F.3d 160 (6th Cir. 1996)

United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996)

United States v. Giwah, 84 F.3d 109 (2d Cir. 1996)

United States v. Goggins, 99 F.3d 116 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1347 (1997)

United States v. Goudy, 78 F.3d 309 (7th Cir. 1996)

United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996)

United States v. Griffith, 85 F.3d 284 (7th Cir), *cert. denied*, 117 S. Ct. 272 (1996)

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997)

United States v. Hallum, 103 F.3d 87 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1710 (1997)

United States v. Hardy, 99 F.3d 1242 (1st Cir. 1996)

United States v. Hascall, 76 F.3d 902 (8th Cir.), *cert. denied*, 117 S. Ct. 358 (1996)

United States v. Henoud, 81 F.3d 484 (4th Cir. 1996)

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996)

United States v. Hernandez, 79 F.3d 584 (7th Cir. 1996), *cert. denied*, 1996 WL 375444 (1997)

United States v. Hicks, 103 F.3d 837 (9th Cir. 1996), *cert. denied*, (U.S. Apr. 21, 1997) (No. 96-8383)

United States v. Hines, 88 F.3d 661 (8th Cir. 1996)

United States v. Hurst, 78 F.3d 482 (10th Cir. 1996)

United States v. Hurtado-Gonzalez, 74 F.3d 1147 (11th Cir.), *cert. denied*, 116 S. Ct. 2513 (1996)

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996)

United States v. Ivester, 75 F.3d 182 (4th Cir. 1996), *cert. denied*, 116 S. Ct. 2537 (1997)

United States v. Jackson, 95 F.3d 500 (7th Cir.), *cert. denied*, 117 S. Ct. 532 (1996)

United States v. Jones, 80 F.3d 436 (10th Cir.), *cert. denied*, 117 S. Ct. 139 (1996)

United States v. Kelley, 76 F.3d 436 (1st Cir. 1996)

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996)

United States v. Kones, 77 F.3d 66 (3d Cir.), *cert. denied*, 117 S. Ct. 172 (1996)

United States v. Lampien, 89 F.3d 1316 (7th Cir. 1996)

United States v. Lee, 78 F.3d 1236 (7th Cir. 1996)

United States v. Londono, 76 F.3d 33 (2d Cir. 1996)

United States v. Long, 77 F.3d 1060 (8th Cir.), *cert. denied*, 117 S. Ct. 161 (1996)

United States v. Maduka, 104 F.3d 891 (6th Cir. 1996)

United States v. Magana-Guerrero, 80 F.3d 398 (9th Cir.), *cert. denied*, 117 S. Ct. 141 (1996)

United States v. Malone, 78 F.3d 518 (11th Cir. 1996)

United States v. Marcus, 82 F.3d 606 (4th Cir. 1996)

United States v. Marshall, 83 F.3d 866 (7th Cir. 1996)

United States v. Martinez, 83 F.3d 488 (1st Cir. 1996)

United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996)

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1008 (1997)

United States v. McDermot, 102 F.3d 1379 (5th Cir. 1996)

United States v. McMahon, 91 F.3d 1394 (10th Cir.), *cert. denied*, 117 S. Ct. 533 (1996)

United States v. McNeil, 90 F.3d 298 (8th Cir.), *cert. denied*, 117 S. Ct. 596 (1996)

United States v. McQuilken, 97 F.3d 723 (3d Cir. 1996), *cert. denied*, 1996 WL 693529 (1997)

United States v. Miller, 71 F.3d 813 (11th Cir.), *cert. denied*, 117 S. Ct. 123 (1996)

United States v. Miller, 78 F.3d 507 (11th Cir. 1996)

United States v. Montanez, 82 F.3d 520 (1st Cir. 1996)

United States v. Morris, 80 F.3d 1151 (7th Cir.), *cert. denied*, 117 S. Ct. 181 (1996)

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996)

United States v. Mullanix, 99 F.3d 323 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1457 (1997)

United States v. Muschik, 89 F.3d 641 (9th Cir. 1996)

United States v. Novey, 78 F.3d 1483 (10th Cir. 1996), *cert. denied*, 1996 WL 226781 (1997)

United States v. Pacheco-Rijo, 96 F.3d 517 (1st Cir. 1996)

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996)

United States v. Plantan, 102 F.3d 953(7th Cir. 1996)

United States v. Plunkett, 94 F.3d 517 (9th Cir. 1996)

United States v. Pratt, 87 F.3d 811 (6th Cir. 1996)

United States v. Pullen, 89 F.3d 368 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 706 (1997)

United States v. Raposa, 84 F.3d 502 (1st Cir. 1996)

United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996)

United States v. Reed, 80 F.3d 1419 (9th Cir.), *petition for cert. filed* (U.S. Jul. 9, 1996) (No. 96-5156)

United States v. Resto, 74 F.3d 22 (2d Cir. 1996)

United States v. Restrepo Aguilar, 74 F.3d 361 (1st Cir. 1996)

United States v. Richards, 87 F.3d 1152 (10th Cir.), *cert. denied*, 117 S. Ct. 540 (1996)

United States v. Richardson, 87 F.3d 706 (5th Cir. 1996)

United States v. Robertson, 73 F.3d 249 (9th Cir.), *cert. denied*, 116 S. Ct. 1557 (1996)

United States v. Robinson, 94 F.3d 1325 (9th Cir. 1996)

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996)

United States v. Royal, 100 F.3d 1019 (1st Cir. 1996)

United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996)

United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 117 S. Ct. 201 (1996)

United States v. Sanchez, 88 F.3d 1243 (D.C. Cir. 1996)

United States v. Sanders, 95 F.3d 449 (6th Cir. 1996)

United States v. Scarano, 76 F.3d 1471 (9th Cir. 1996)

United States v. Schmidt, 99 F.3d 315 (9th Cir. 1996)

United States v. Scott, 74 F.3d 107 (6th Cir. 1996)

United States v. Senn, 102 F.3d 327 (7th Cir. 1996)

United States v. Shannon, 94 F.3d 1065 (7th Cir. 1996)

United States v. Shenberg, 90 F.3d 438 (11th Cir. 1996)

United States v. Sherpa, 97 F.3d 1239 (9th Cir. 1996)

United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996)

United States v. Silvers, 84 F.3d 1317 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 742 (1997)

United States v. Sloan, 97 F.3d 1378 (11th Cir. 1996), *cert. denied*, 1997 WL 120865 (1997)

United States v. Sparks, 88 F.3d 408 (6th Cir. 1996)

United States v. Spiers, 82 F.3d 1274 (3d Cir. 1996)

United States v. St. John, 92 F.3d 761 (8th Cir. 1996)

United States v. Stewart, 93 F.3d 189 (5th Cir. 1996)

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996)

United States v. Sweeney, 90 F.3d 55 (2d Cir. 1996)

United States v. Taylor, 88 F.3d 938 (11th Cir. 1996)

United States v. Taylor, 98 F.3d 768 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1016 (1997)

United States v. Thomas, 77 F.3d 989 (7th Cir. 1996)

United States v. Throneburg, 87 F.3d 851 (6th Cir.), *cert. denied*, 117 S. Ct. 411 (1996)

United States v. Toussaint, 84 F.3d 1406 (11th Cir. 1996)

United States v. Valdez, 103 F.3d 95 (10th Cir. 1996)

United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996)

United States v. Verners, 103 F.3d 108 (10th Cir. 1996)

United States v. Versaglio, 85 F.3d 943 (2d Cir. 1996)

United States v. Versaglio, 96 F.3d 637 (2d Cir. 1996)

United States v. Walker, 98 F.3d 944 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1012 (1997)

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996)

United States v. Weise, 89 F.3d 502 (8th Cir. 1996)

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996)

United States v. Wester, 90 F.3d 592 (1st Cir. 1996)

United States v. Wilson, 98 F.3d 281 (7th Cir. 1996)

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1996), *cert. denied*, 1997 WL 220974 (1997)

United States v. Woodrup, 86 F.3d 359 (4th Cir.), *cert. denied*, 117 S. Ct. 332 (1996)

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1325 (1997)

U.S. Sentencing Commission Guidelines Manual
Case Annotations—1996

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

Second Circuit

United States v. Doe, 93 F.3d 67 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 944 (1997). In this case of first impression, the Second Circuit joined with the Fourth, Ninth and Eleventh Circuits in holding that an appeal from a Rule 35(b) motion is governed by 18 U.S.C. § 3742, which confers limited appellate jurisdiction over otherwise final sentences. United States v. Pridgen, 64 F.3d 147 (4th Cir. 1995); United States v. Arishi, 54 F.3d 596 (9th Cir. 1995); United States v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994). This decision reflects a split with the First Circuit, which holds that an appeal of a Rule 35(b) motion is governed by 28 U.S.C. § 1291, which grants broad appellate jurisdiction over final decisions of the district court. United States v. McAndrews, 12 F.3d 273 (1st Cir. 1993) (holding that a Rule 35(b) motion is not a sentence because a sentence is already imposed before Rule 35 can be invoked). The Second Circuit's decision is premised upon the similarity between Rule 35(b) and USSG §5K1.1. The only difference between the two is their timing; §5K1.1 is a reduction based on substantial assistance prior to sentencing and Rule 35(b) is a reduction based on substantial assistance after sentencing. Because §5K1.1 orders are governed by 18 U.S.C. § 3742, the court found no reason to treat Rule 35(b) motions differently. In support of this conclusion, the court noted that applying the more lenient requirements of section 1291 "would have the deleterious effect of encouraging defendants to postpone their assistance to the Government to manipulate the timing of the motion in order to receive a more favorable standard of review."

Seventh Circuit

United States v. Griffith, 85 F.3d 284 (7th Cir), *cert. denied*, 117 S. Ct. 272 (1996). The appellate court affirmed the defendant's conviction and sentence, and held that the sentencing guidelines were not unconstitutional as applied. The defendant asserted that the Commission's actions in promulgating the guidelines were invalid because they violated the separation of powers; the due process clause; the bicameral passage and presentment requirements; and were inconsistent with statutory mandates which dictate the powers of the Commission. The court rejected the separation of powers and presentment clause issues because the defendant failed to demonstrate that the Commission's exercise of legislative power was more extensive than already acknowledged by the Supreme Court in Mistretta v. United States, 488 U.S. 361, 109 S. Ct. 647 (1989). The court rejected the due process argument stating that Sentencing Reform Act did not require the Commission to adopt rules and regulations governing its procedure. The court also

rejected the defendant's statutory mandate argument, concluding that he had not explained how he had been specifically injured by any of the alleged failings of the Commission. Furthermore, the court noted that the defendant's suggestion that the money laundering guideline violated 28 U.S.C. § 994(j) by not prescribing a sentence other than a term of imprisonment for cases such as his was contradicted by Congress's rejection of the Commission's prior attempts to provide lower sentences for that offense.

Part B General Application Principles

Ninth Circuit

United States v. Robertson, 73 F.3d 249 (9th Cir.), *cert. denied*, 116 S. Ct. 1557 (1996). In considering an issue of first impression, the Ninth Circuit held that a RICO violation under 18 U.S.C. § 1962(a) may constitute a continuing course of criminal conduct for sentencing under the guidelines if the government shows that the proceeds were used or invested to acquire or operate the enterprise both before and after November 1, 1987. The circuit court noted that RICO offenses under section 1962(c), which prohibits engaging in racketeering activity to conduct an enterprise affecting interstate commerce, have been deemed as such "straddle" offenses warranting sentencing under the guidelines. *See, e.g.,* United States v. Moscony, 927 F.2d 742, 754 (3d Cir.), *cert. denied*, 501 U.S. 1211 (1991); United States v. Cusack, 901 F.2d 29, 32 (4th Cir. 1990) (same). Noting that section 1962(a) prohibits the use or investment of RICO proceeds to acquire, establish or operate that enterprise, the circuit court stated that the government must show that such use or investment occurred both before and after November 1, 1987 to be sentenced under the guidelines. In this case, the only charged conduct occurring after November 1, 1987, was a section 1956(a)(1)(B) structuring offense. While this conduct is considered an act of racketeering under RICO, it, by itself, does not demonstrate use or investment for section 1962(a) purposes and, therefore, does not support sentencing under the guidelines. The circuit court also stated that the defendant's application for a bank loan in 1988, while perhaps indicative of a continued RICO enterprise, was not evidence of use or investment of income derived from racketeering activity. The circuit court stated that unless the government could prove that conduct occurring after November 1, 1987, made up a complete chargeable offense, sentencing under the guidelines would pose an ex post facto problem. Because the government failed to meet this burden, the district court's refusal to sentence under the guidelines was affirmed.

§1B1.1 Application Instructions

Eleventh Circuit

United States v. Adams, 74 F.3d 1093 (11th Cir. 1996). The district court erred in refusing to apply USSG §2S1.1 to defendants' convictions under 18 U.S.C. § 1956. Given the proposition that "a district court cannot use the post-trial sentencing process to call the jury's verdict into question," a district court may not refuse to consider convictions listed in the PSR. In this case, the district court did not apply the section 1956 convictions, reducing the defendant's base offense level by ten levels in this case. The appellate court reviewed the choice of base offense level and the issue of whether the district court had authority to make a downward

departure de novo. The appellate court held that the jury found the defendants guilty of violating section 1956, and guideline section 2S1.1 must be applied. It rejected the district court's rationale that the gravamen of the defendants' unlawful conduct was fraud and misapplication of RTC funds, holding that "Congress intended to criminalize a broad array of money laundering activity, and included within this broad array is the activity committed" by the defendants. However, the appellate court remanded for further findings with respect to the district court's second justification that the sentence reflected a downward departure under §5K2.11. The appellate court noted that the First and Eighth Circuits have rejected downward departures in similar situations. *See* United States v. Pierro, 32 F.3d 611, 620 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 919 (1995); United States v. Morris, 18 F.3d 562, 569 (8th Cir. 1994). On remand, the district court must identify how or why the defendants' conduct "caused or threatened less harm than typical money laundering."

§1B1.2 Applicable Guidelines

Second Circuit

United States v. Versaglio, 85 F.3d 943 (2d Cir. 1996). The district court erred in applying USSG §2X4.1, misprision of a felony, rather than USSG §2J1.2, obstruction of justice, to defendant's failure to testify at trial. The circuit court rejected the district court's determination that application of the obstruction of justice guideline is appropriate for conduct that threatens a witness with violence, as opposed to a less serious refusal to testify. The circuit court agreed with the government's contention that more serious forms of obstruction are properly sentenced by applying additional sanctions and not by disregarding the obstruction guideline.

United States v. Versaglio, 96 F.3d 637 (2d Cir. 1996). The district court did not err in applying USSG §2X4.1, misprision of a felony, rather than USSG §2J1.2, obstruction of justice, to defendant's failure to testify at trial. The circuit court stated that although the government offered plausible reasons why the obstruction guideline is more appropriate than the misprision guideline for criminal contempt, the district court judge was entitled to apply the misprision guideline in this case. The court concluded that the sentencing judge's decision in determining which guideline was the most analogous offense guideline in this case was predominately an application of a guideline to the facts, a decision "to which we should give due deference." *See* United States v. Koon, 116 S. Ct. 2035, 2047 (1996).

Third Circuit

United States v. Boggi, 74 F.3d 470 (3d Cir.), *cert. denied*, 117 S. Ct. 82 (1996). Upon the government's appeal, the appellate court remanded the case for the district court to resentence the defendant using guideline §2B3.2 instead of §2C1.1. The appellate court agreed that the district court erred in applying USSG §2C1.1 to determine the base offense level of the extortion counts. The district court applied §2C1.1 to these offenses over the government's objection that §2B3.2 should ordinarily be applied to a threat to cause labor problems. In agreeing with the government's position, the appellate court noted that section 2B3.2's commentary states that the

guideline applies to situations in which the "threat ... to injure a person or physically damage property, or any comparably serious threat" may be inferred from the circumstances or the reputation of the person making the threat. Section 2C1.1 is inapplicable because it applies to public officials, and the Sentencing Commission did not intend to characterize union officials as public officials. Based upon these distinctions, the appellate court found that it was error for the district court to apply USSG §2C1.1. In remanding for resentencing, the appellate court instructed the district court to "make the necessary factual findings to determine" the type of harm involved in this case. Application of §2B3.2 requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. If the district court finds that the threat in this case did not rise to the level required under §2B3.2, application of §2B3.3 is appropriate.

United States v. Conley, 92 F.3d 157 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1244 (1997). The district court's determination of the objectives of the defendant's conspiracy did not violate the defendant's sixth amendment right to a jury, nor impinge upon his due process rights. The jury convicted the defendant of a single count of conspiracy under 18 U.S.C. § 371. The defendant asserted that because the jury did not specify the object of the conspiracy for which it convicted him, it was unconstitutional to sentence him under the money laundering guideline because those provisions were more severe than the gambling guidelines. The appellate court held that because the maximum sentence for general conspiracy did not depend upon the penalties authorized for the underlying substantive offenses, the defendant's statutory maximum sentence on the count, as distinguished from the maximum sentence under the guidelines, did not depend upon whether the jury found the defendant guilty of either or both objects of the conspiracy. Furthermore, the court relied on the decision in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct 2411 (1986), in holding that the sixth amendment did not guarantee a right to jury sentencing, even where the sentence turned on specific findings of fact. The court maintained that because the guidelines did not alter the maximum sentence for the offense for which the defendant was convicted, but merely limited the sentencing court's discretion in selecting a penalty within the permissible range, there was no constitutional violation in permitting the district court to consider relevant conduct for which the defendant was neither charged nor convicted. In conclusion, the court noted that by determining the objects of the conspiracy beyond a reasonable doubt, the sentencing court met whatever procedural standard might have been required.

§1B1.10 Retroactivity of Amended Guideline Ranges

Ninth Circuit

United States v. Felix, 87 F.3d 1057 (9th Cir. 1996). The district court erred by failing to apply USSG §2D1.1 Application Note 12 retroactively for the purpose of calculating drug amounts at sentencing. The appellate court noted that the prior version of Note 12 applied only to incomplete transactions, in which the amount under negotiation would determine a defendant's sentence, unless evidence indicated that the defendant was unwilling or incapable of producing the amount. The appropriate amount of drugs for consideration in a completed transaction was ambiguous, because the court could base its sentence upon either the amount negotiated or delivered. In contrast to the prior version of Note 12 which was silent with respect to the calculation of sentences for completed transactions, the current version of Note 12 specifies the amount to be considered with respect to a completed transaction. The appellate court held that

the current version of Application Note 12 should be treated as a clarifying amendment and given retroactive effect. The sentencing court should consider first whether the transaction is completed and then whether the amount delivered more accurately reflects the scale of the offense than the amount negotiated. In this case, the court noted that the transaction was completed because the cocaine was present at the negotiation and all conspirators were ready to sell the cocaine. The amount of cocaine delivered was easily calculated and no further delivery was contemplated. The sentence should be calculated based upon the amounts of drugs seized because it accurately reflects the scale of the offense.

United States v. Mullanix, 99 F.3d 323 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1457 (1997). The district court did not err in denying the defendant's request for resentencing under 18 U.S.C. § 3582(c)(2). The defendant pleaded guilty to manufacturing marijuana and was sentenced to the mandatory minimum term of 60 months in prison. The "safety valve" provision, USSG §5C1.2, 18 U.S.C. § 3553(f), became effective on September 23, 1994, allowing imposition of sentences below mandatory minimums when certain criteria are met. On November 1, 1995, Amendment 516 to USSG §2D1.1 became effective reducing the weight equivalence of a marijuana plant, for purposes of sentencing, from one kilogram to one hundred grams. The defendant asserts Amendment 516 is retroactive and requires resentencing, whereupon the safety valve would be applicable to reduce his sentence. In order for the court to modify a sentence pursuant to §3582(c)(2), the defendant must show that he was sentenced by a "sentencing range that has subsequently been lowered." While the defendant's presentence report did set a range of 57-71 months, the defendant was sentenced pursuant to a statutorily mandated minimum of 60 months, which was not affected by the amendment to the equivalency tables. Thus, the district court lacked the authority to reduce the defendant's sentence pursuant to §3582(c)(2).

United States v. Muschik, 89 F.3d 641 (9th Cir. 1996). The district court did not err in calculating the amount of LSD attributable to the defendant for sentencing purposes by including the weight of the carrier medium in determining the defendant's minimum sentence mandated by 21 U.S.C. § 841, despite the language of USSG 2D1.1, amendment 488 which recommends excluding the carrier weight in calculating LSD quantities. The district court adhered to the definition of "mixture" as set forth by the Supreme Court in Chapman v. United States, 500 U.S. 453 (1991), which held that LSD on blotter paper is a "mixture" because "the LSD is diffused among the fibers of the paper . . . cannot be distinguished from the blotter paper, nor easily separated from it." The Supreme Court recently resolved the conflict between the Chapman decision and amendment 488 by holding that "the Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute." Neal v. United States, 116 S. Ct. 763 (1996). In reaching this decision, the Court noted that it doubted whether the Commission intended to displace the Chapman decision, because it cited that decision in its commentary. Regardless of the Commission's intent in adopting amendment 488, the Supreme Court's approach as set forth in Chapman is controlling under the doctrine of stare decisis; an agency's later interpretation of a statute must be assessed against that settled law.

Tenth Circuit

United States v. Dorrough, 84 F.3d 1309 (10th Cir.), *cert. denied*, 117 S. Ct. 446 (1996). The court did not err in refusing to apply retroactively the amended definition of "mixture" as provided by Amendment 484 to USSG §2D1.1 commentary. The amendment reflected a change in the calculation of drug amounts for sentencing purposes based upon "the entire weight of any mixture or substance containing a detectable amount of the controlled substance" to a calculation based upon a definition of "mixture" which "does not include materials that must be separated from the controlled substance before the substance can be used." The court upheld the defendant's sentence because the retroactive application of amendment 484 is within the discretion of the court upon consideration of the following factors: 1) the nature of the offense and the characteristics of the defendant, 2) the need for the sentence imposed, 3) the kinds of sentences available, 4) the applicable guidelines sentencing range, 5) any relevant Sentencing Commission policy statement, 6) the need to avoid sentencing disparity among defendants, and 7) the need to provide restitution to victims. The court deferred to the sentencing court's findings that the guidelines take into account a percentage of waste in P2P as evidenced by a sizeable decrease in the drug equivalency ratios and that using alternative sentencing under USSG §2D1.1 would result in the same offense level in finding that the sentencing court did not abuse its discretion in imposing the sentence.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A6.1 Threatening Communication

Eleventh Circuit

United States v. Taylor, 88 F.3d 938 (11th Cir. 1996). The district court's application of a six-level enhancement for conduct evidencing an intent to carry out a threat was proper because there was a direct correlation between the pre-threat conduct and the threats for purposes of §2A6.1(b)(1). The defendant urged the appellate court to follow the Second Circuit's opinion in United States v. Hornick, 942 F.2d 105 (2d Cir. 1991), that only evidence of post-threat conduct can be considered in determining whether to apply the §2A6.1(b)(1) specific offense characteristic enhancement. The appellate court rejected the Second Circuit's interpretation of the guideline and instead joined the Fourth, Seventh, and Ninth Circuits in holding that pre-threat conduct may be considered when applying the enhancement but only when there is a direct connection between the defendant's acts and the threat. The appellate court noted that in determining the probative value of pre-threat conduct courts may consider: 1) "the proximity in time between the threat and the prior conduct"; 2) "the seriousness of the defendant's prior conduct"; and 3)"the extent to which the pre-threat conduct has progressed toward carrying out the threat." Therefore, the essential inquiry for §2A6.1(b)(1) purposes is not related to whether the act took place before of after the threat was made but, whether the facts of the case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and the threat.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement and Theft

First Circuit

United States v. Carrington, 96 F.3d 1 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1328 (1997). The circuit court affirmed the district court's calculation of loss under USSG §2B1.1 based on the market value of the items the defendant obtained. The defendant argued that the district court erred in its calculation of loss by relying on the values assigned by the presentencing report instead of using the actual amount of money that the defendant obtained in the sale and the fair wholesale value of the vehicles he bought. Under §2B1.1, comment. note 2, a product's fair market value is ordinarily the appropriate value of the victim's loss. The defendant noted, however, that market value is often difficult to ascertain and therefore, alternative methods of valuation should be employed. The appellate court rejected the defendants argument, and held that it was reasonable for the district court to calculate the market value of each vehicle as the price the defendant negotiated with each dealership. The appellate court joined the Sixth Circuit in equating the market value of a particular item with the price a willing buyer would pay a willing seller at the time and place the property was taken. *See* United States v. Warshawsky, 20 F.3d 204, 213 (6th Cir. 1994). Additionally, the court noted that it was proper for the court to adopt the retail, rather than the wholesale, value of the cars, since all the dealerships from whom the defendant obtained the cars were engaged in the retail sale of automobiles.

Ninth Circuit

United States v. Choi, 101 F.3d 92 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1255 (1997). The district court did not err in its calculation of loss under USSG §2B1.1 by using the market value of the stolen goods. The defendant pleaded guilty to possession of stolen goods with a market value of $351,643. The police were able to recover the goods. The defendant asserted that because the interstate freight company from whom he stole the shoes and CD players had limited its liability under its insurance contract to $2,894.50, that amount should have been used to calculate the guidelines. Note 2 to USSG §2B1.1 states that when property is taken or destroyed, the amount of loss is the fair market value of the property or, when fair market value is an inadequate measure, the amount of loss may be valued by other means, such as a reasonable replacement cost to the victim. The defendant contended that had the goods not been recovered, the freight company's loss would have been limited to the liability amount, which would be a "reasonable replacement cost" under §2B1.1. The circuit court rejected this argument, noting that the loss amount not covered by the insurance would still be borne by the manufacturers of the goods. The replacement cost to the manufacturer would be the liability amount plus the remaining loss, and it is equal to the market value. Therefore, market value was appropriate even though the property was recovered and returned to the victim. Relying on precedent, the court stated that "the amount of loss can mean potential loss had [the defendant] not been apprehended." *See* United States v. Robinson, 94 F.3d 1325, 1329 (9th Cir. 1996).

§2B3.1 Robbery

Ninth Circuit

United States v. Fuller, 99 F.3d 926 (9th Cir. 1996). The district court did not err in applying a six-level enhancement under USSG §2B3.1(b)(2)(B) for "otherwise using" a firearm in the commission of a robbery, rather than the five-level enhancement for "brandishing" a firearm, where the defendant placed a gun to a post office teller's head and threatened her. During the robbery, the defendant pressed a gun to the head of a teller and pointed the firearm at another teller, threatening to kill her if she did not stand. The circuit court concluded that the defendant's conduct exceeded mere brandishing which is defined as "the weapon was pointed or waved about, or displayed in a threatening manner." USSG §1B1.1, comment (n.1(c)). The circuit court, relying on precedent from other circuits, upheld the six-level departure for "otherwise using" a weapon. *See* United States v. Elkins, 16 F.3d 952 (8th Cir. 1994) (defendant who placed a knife to the throat of a patron during a bank robbery "otherwise used" the weapon); United States v. Johnson, 931 F.3d 238 (3d Cir.) (pointing a gun at the head of a robbery victim and threatening her constituted "otherwise using" a weapon), *cert. denied*, 502 U.S. 886 (1991); United States v. Seavoy, 995 F.2d 1414 (7th Cir.) (waving a firearm in the air and pointing it at the bank tellers and customers forcing them to lie down on the floor was "otherwise using" a weapon), *cert. denied*, 502 U.S. 886 (1991).

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

Tenth Circuit

United States v. Bruce, 78 F.3d 1506 (10th Cir.), *cert. denied*, 117 S. Ct. 149 (1996). In an issue of first impression, the circuit court held that application of a five-level enhancement under USSG §2B3.2(b)(3)(A)(iii) was warranted where defendant possessed weapons at home when he mailed an extortion letter threatening their use. With no guidance as to the meaning of "possession" in the §2B3.2 context, the district court enhanced defendant's sentence based on the fact that the weapons were in defendant's possession when he mailed the threatening notes. The defendant contended that the enhancement was intended to apply only when the victim believes the extortionist has a weapon or when there is a risk, due to potential use of a weapon, to law enforcement personnel. The facts show that defendant admitted to possessing the weapons prior to his arrest and the police found weapons in defendant's home upon searching it. Noting that the district court's finding that the defendant possessed weapons at the time he wrote the letters, the circuit court held that this case "demonstrates why such an enhancement is warranted." The circuit court went on to state that the defendant's weapons possession demonstrated that defendant was prepared to follow through with his threats if his monetary demands were not met.

§2B4.1 Bribery in Procurement of Bank Loan and Commercial Bribery

First Circuit

United States v. Wester, 90 F.3d 592 (1st Cir. 1996). The district court erred in calculating loss under USSG §2B4.1 based upon the defendant's release from personal liability on a $12.4 million NEFR loan (obtained in exchange for arranging the $2.3 million loan to his partners in a land development project). The defendant made the following arguments for

excluding the value of the $12.4 million loan from the loss calculation: 1) the $12.4 million should not be considered because the $2.3 million loan was not a quid pro quo, and 2) the valuation of the release at $12.4 million was incorrect because this represented the full amount of the loan. The court rejected the defendant's first argument, but accepted his second argument. The commentary to the sentencing guidelines indicates that the face value of the loan is not necessarily an appropriate figure to use for the purpose of calculating loss because, depending upon the circumstances, the value of a loan may be no greater than the difference in the interest rate obtained through the bribe. At least one court has found that "the value of a transaction is often quite different than the face amount of that transaction." United States v. Fitzhugh, 78 F.3d 1326, 1331 (8th Cir. 1996). The court concluded that it was plain error for neither the parties nor the probation officer to make any attempt to estimate reasonably the value of the release.

Part D Offenses Involving Drugs

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

First Circuit

United States v. Raposa, 84 F.3d 502 (1st Cir. 1996). The circuit court declined to decide the question of whether the Fourth Amendment exclusionary rule was applicable in the context of guideline sentencing proceedings. The court upheld the sentence imposed by the district court based solely on the conclusion that it was adequately supported by the facts established in the unobjected-to portions of the pre-sentencing report. The defendant argued that the district court erroneously included as "relevant conduct" his possession of a substantial quantity of cocaine that the court had earlier suppressed as the product of an illegal search. The district court held that the defendant's possession of the cocaine found at his apartment constituted "part of the same course of conduct . . . as the offense of conviction pursuant to USSG §1B1.3(a)(2). The district court, relying on cases from other circuits, held that the exclusionary rule did not apply in the sentencing context. *See* United States v. Tejada, 956 F.2d 1256, 1262 (2d Cir. 1992); United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991); United States v. Nichols, 979 F.2d 402, 410-11 (6th Cir. 1993). The appellate court declined to decide this case based on this issue because it did not think that the case presented a proper occasion to decide such an important question. Instead, the court held that the exclusionary rule did not bar the district court from considering the defendant's own voluntary statements included in the pre-sentencing report. The portion of the pre-sentencing report that recounted the defendants statements, to which he declined to object, provided an independently sufficient ground for the district court's finding at sentencing that the defendant possessed the cocaine at issue.

United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 117 S. Ct. 201 (1996). The circuit court held that Amendment 515 which added a new subsection (4) to guideline §2D1.1(b) would not be applied retroactively. Section 2D1.1(b)(4) states that if a defendant meets the requirements of USSG §5C1.2 and has an offense level of 26 or greater, the sentence will be decreased by two levels. The circuit court noted that guideline amendments are applied

retroactively if they clarify a guideline but are not retroactive if they substantively change a guideline. *See* United States v. LaCroix, 28 F.3d 223, 227 (1st Cir. 1994). The circuit court concluded that Amendment 515 is substantive because "[i]t added an additional and wholly new part to USSG §2D1.1(b)." Furthermore, the circuit court noted that the Sentencing Commission did not consider this amendment to be retroactive as it was not included in USSG §1B1.10(c).

Third Circuit

United States v. Goggins, 99 F.3d 116 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1347 (1997). The district court did not err when it imposed a two-level enhancement under USSG §2D1.1(b)(1) for possession of a firearm, although the defendant's 18 U.S.C. § 924(c) conviction for use of a firearm was vacated in light of Bailey v. United States, 116 S. Ct. 501 (1995). The defendant had been convicted of possession with intent to distribute cocaine base (21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)), and of using and carrying a firearm during a drug offense (18 U.S.C. § 924(c)). The district court vacated the defendant's section 924(c) conviction, but imposed the two level increase under USSG §2D1.1, concluding that the weapon clearly was present in the bedroom when the police arrested the defendant. The defendant argued that his acquittal on the 18 U.S.C. § 924(c) count should bar the USSG §2D1.1 enhancement. The Third Circuit, joining with the First, Fourth, Sixth, Seventh, and Tenth Circuits, held that "a weapons enhancement under USSG §2D1.1(b)(1) is permissible after an acquittal under section 924(c)(1)." *See* United States v. Ovalle-Marquez, 36 F.3d 212 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1322 (1995); United States v. Romulus, 949 F.2d 713 (4th Cir. 1991), *cert. denied*, 503 U.S. 992 (1992); United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995); United States v. Pollard, 72 F.3d 66 (7th Cir. 1995); United States v. Coleman, 947 F.2d 1424 (10th Cir. 1991), *cert. denied*, 503 U.S. 972 (1992). The Third Circuit followed the reasoning of Pollard, 72 F.3d at 68, which stated that USSG §2D1.1(b)(1) is broader than 18 U.S.C. § 924(c)(1) and encompasses conduct not within section 924(c)(1). Furthermore, the court noted that the standard of proof for the guideline enhancement is less than the burden for a conviction under the statute. The circuit court concluded that the weapon was present in the bedroom when the police arrested the defendant, and it was not improbable that the weapon was connected with the offense, and thus the guideline enhancement was properly applied. See USSG §2D1.1, comment. (n.3).

Eighth Circuit

United States v. Maza, 93 F.3d 1390 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1008 (1997). On the government's cross-appeal, the appellate court held that the district court committed clear error in finding that the government did not prove by a preponderance of the evidence that the drug distributed by the defendant was d- rather than l-methamphetamine. The defendant was sentenced to the statutory mandatory sentence of 120 months imprisonment for distribution of l-methamphetamine, a sentence lower than the guidelines range for such an amount of d-methamphetamine. The circuit court found that the evidence presented by the government did establish that the drugs involved were d-methamphetamine. After commenting upon various aspects of the evidence which convinced the appellate court that the government had sustained the burden of proof by a preponderance, the court vacated the sentence and remanded for resentencing.

Tenth Circuit

United States v. Richards, 87 F.3d 1152 (10th Cir.), *cert. denied*, 117 S. Ct. 540 (1996). The Tenth Circuit, en banc, reversed the decision of the district court. On the government's appeal, the court held that the Sentencing Commission's amendment to USSG §2D1.1, application note 1, defining "mixture or substance" to exclude materials such as liquid by-products which must be separated from a controlled substance before it is used, did not alter the definition of "mixture or substance" for purposes of applying the statutory minimum sentence under 21 U.S.C. § 841. The Supreme Court's decision in Chapman v. United States, 500 U.S. 453 (1991) controls. That decision held that the words "mixture or substance" had to be given their plain meaning for purposes of 21 U.S.C. § 841. "Applying the plain meaning of `mixture,' the methamphetamine and liquid by-products the defendant possessed constitute 'two substances blended together so that the particles of one are diffused among the particles of the other.'" Chapman, 500 U.S. at 462 (citing 9 Oxford English Dictionary 921 (2d ed. 1989)). The defendant must be sentenced based upon the 32 kilogram weight of the methamphetamine and its liquid by-products, rather than the 28 kilograms of pure methamphetamine.

United States v. Silvers, 84 F.3d 1317 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 742 (1997). The district court did not err in sentencing the defendant, who pleaded guilty to possession with the intent to distribute marijuana, to a mandatory minimum sentence under 21 U.S.C. § 841 based on the number of marijuana plants as opposed to the weight of the marijuana. The circuit court rejected the defendant's first argument that he should not be sentenced based on the number of marijuana plants unless the government proved by a preponderance of the evidence that the defendant was the grower of the marijuana. In addition to the fact that the statutory language of 21 U.S.C. § 841 is unambiguous, the court finds that the legislative purpose behind the statute, which is to punish growers more harshly, "does not mandate that the government must prove the defendant was a grower before the equivalency may be applied." If Congress had so intended, it could have inserted such language into the text of the statute. Further, the U.S. sentencing guidelines do not seem to require anything beyond the proof of the quantity of marijuana. The circuit court rejected the defendant's second argument that in order to impose the mandatory minimum sentence the government must not only meet the definition of plant as an "organism having leaves and a readily observable root formation," but also show that the plant in question is alive. The court found nothing in the language or legislative history of 21 U.S.C. § 841 to support such a requirement. To the contrary, the legislative history of that statute indicates an intent "to simplify, not to complicate, the method of determining the high end or low end mandatory sentences." Therefore, to add requirements to the plain meaning of the statute would undermine the legislative intent. The circuit court rejected the defendant's third argument that the district court erred in attributing 1000 marijuana plants to him for sentencing purposes. Giving deference to the district court's credibility determinations, the circuit court finds no clear error in the finding of factual support for the existence of 1000 plants.

Eleventh Circuit

United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996). The district court did not err in setting the appellants' base offense levels under USSG §2D1.1 based upon the total amount of marijuana seized during their arrests for conspiracy to manufacture and possess with intent to distribute marijuana plants, including amounts held for "personal use." There was no Eleventh Circuit precedent on this issue, and the appellants asserted that the district court should have followed the Ninth Circuit's decision holding that drugs possessed for personal use should not be included in determining the total drug quantity. United States v. Kipp, 10 F.3d 1463, 1465-66 (9th Cir. 1993). The Eleventh Circuit declined to follow the reasoning of the Ninth Circuit, and affirmed the district court's decision to join the majority of circuits in holding that where evidence showed the defendant was involved in a conspiracy to distribute drugs, the "defendant's purchases for personal use are relevant in determining the quantity of drugs that the defendant knew were distributed by the conspiracy." United States v. Innamorati, 996 F.2d 456, 492 (1st Cir.), *cert, denied*, 114 S. Ct. 409 (1993); *see also* United States v. Snook, 60 F.3d 394, 395 (7th Cir. 1995); United States v. Fregoso, 60 F.3d 1314, 1328 (8th Cir.); United States v. Wood, 57 F.3d 913, 920 (10th Cir. 1995). The circuit court held that the marijuana intended for personal use by Antonetti and Fink was properly included by the district court in determining their base offense levels.

United States v. Shields, 87 F.3d 1194 (11th Cir. 1996). The Eleventh Circuit, sitting en banc, upheld the district court's opinion that a marijuana grower who is apprehended after his marijuana crop has been harvested should be sentenced according to the number of plants involved in the offense, as opposed to the weight of the marijuana. The circuit court noted that both the text of 18 U.S.C. § 841 and USSG §2D1.1 contain the phrase "involve marijuana plants," but neither suggests that their application depends upon whether the marijuana plants are harvested before or after the growers are apprehended. The circuit court rejected defendant's argument that the district court should not have applied the equivalency provision of USSG §2D1.1 because the dead plants were not "marijuana plants" within the meaning of the guidelines. An interpretation of USSG §2D1.1 which depends upon the state of affairs discovered by law enforcement officers (*ie*., whether plants are live or have been harvested) contradicts the principle of relevant conduct. The circuit court stated that relevant conduct includes all acts and omissions committed by the defendant. If defendant's relevant conduct includes growing marijuana plants, the equivalency provision applies, and the offense level will be calculated using the number of plants.

United States v. Sloan, 97 F.3d 1378 (11th Cir. 1996), *cert. denied*, 1997 WL 120865 (1997). The district court did not err refusing to apply the rule of lenity to the defendant's sentence for distributing crack cocaine, despite the amendment of USSG §2D1.1(c), Note D to clarify the definition of "cocaine base" in the period between the defendant's commission of the offense and his sentencing. The appeals court concluded that prior to the amendment in question crack cocaine was within the category of drug known as "cocaine base" which Congress intended to punish more harshly than other forms of cocaine under both 21 U.S.C. § 841 and the sentencing guidelines. The court rejected the defendant's argument that the fact that "cocaine" and "cocaine base" are chemically synonymous rendered the meaning of the terms "cocaine" and "cocaine base" ambiguous prior to the amendment. The rule of lenity comes into operation only if Congress's intent with respect to statutory language (and sentencing interpretations) remains ambiguous after considering the structure, legislative history, and motivating policies behind the

legislation. A finding as to congressional intent to impose more stringent penalties upon §841(b) offenses involving crack cocaine is applied to construction of the guidelines' distinction between cocaine and cocaine base offenses given that the two work as a unified whole. The appellate court found that Congress intended to address the increased use of crack cocaine by creating a tiered punishment system and increasing penalties under §841(b) for a subset of the broad cocaine-related substances "described in clause (ii) which contain cocaine base." The legislative history and motivating policies support this interpretation of Congress's intent. Finally, although Congress's later view as to the meaning of pre-existing law is not dispositive, its recent rejection of the guideline amendment to end the 100:1 weight ratio disparity confirms its intent. Although the court determined that Congress could have enacted a statute which more clearly expressed its intentions, the statute was not so ambiguous as to lead the defendant to conclude that his action in distributing a form of rock-like cocaine was entitled to treatment under the lower tier penalties of §841(b) or USSG §2D1.1(c). Therefore, the rule of lenity does not apply to this case.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

First Circuit

United States v. Kelley, 76 F.3d 436 (1st Cir. 1996). The district court did not err in calculating the amount of loss under USSG §2F1.1. The Small Business Administration (SBA) loaned the defendant $55,100, secured by mortgages on his commercial boat and home. In the course of applying for this disaster relief and on a subsequent Progress Report, however, the defendant had made various false statements regarding the purchase of the vessel. The circuit court found that the formula set forth in §2F1.1, comment. (n.7(b)), which applies to fraudulent loan procurement cases, was applicable to this case. The commentary states that the court should take "the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." With respect to the valuation of his home, defendant asserts that he should be credited with the amount he could have obtained if he had sold the house himself. The circuit court found, however, that §2F1.1, comment. (n.7(b)) clearly states that the value of the loss is to be offset by the amount the lender could expect to recover on the collateral. As this represents the approach implemented by the district court, the circuit court affirmed the district court's determination of the amount of loss.

Second Circuit

United States v. Cheng, 96 F.3d 654 (2d Cir. 1996). The district court did not err in finding that the defendant had caused a loss of $3.5 million based on unlawful receipt and redemption of food stamps. The defendant, who owned and operated a wholesale food supplier, began receiving food stamps as payment for supplies, which he was not authorized by the USDA to do. The defendant, in turn, used $1.8 million in food stamps to pay one of his suppliers, who had illegally gotten USDA approval to receive food stamps. In 1992, the defendant illegally

received approval for his business to receive food stamps and converted $1.7 million in food stamps into cash. The defendant argued that the 13-level enhancement for causing a loss of $3.5 million was incorrect. The defendant's argument was based on USSG §2F1.1 n.7(d) which states that "[i]n a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses." The defendant argued that to divert food stamps from the intended recipient or uses, one must illegally obtain the stamps from the original food-stamp recipient. The defendant asserts that because he received the stamps second-hand, not directly from food-stamp recipients, his conduct does not fall within Application Note 7(d). Finding that the defendant's actions were part of the original wrongdoer's conversion of food-stamps into money, the circuit court held that the defendant's conduct caused a loss. In reaching this decision, the circuit court analogized this chain of events to receipt of stolen goods, which for purposes of determining loss is treated similarly to the original theft itself.

Third Circuit

United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996). The district court erred in holding that "loss," for USSG §2F1.1 purposes, included money paid by clients for satisfactory legal services despite their performance by an unlicensed attorney. The district court rejected the approach advocated by the PSR, whereby the probation office sent letters to all clients of the defendant inquiring whether they were satisfied with the defendant's services, and used the 27 dissatisfied clients to calculate "loss." Instead, the district court accepted the government's argument that "loss" should be the gross total of all fees collected by the defendant because none of the clients received the services of a licensed attorney for which they paid. The circuit court rejected the district court's reasoning and concluded that in the case of a fraud, which is not based on the straightforward taking of property and for which the "amount taken" will overstate the loss, "actual harm" should be the basis of the loss calculation. Basing the defendant's sentence on the "amount taken" would undermine the goal of the sentencing guidelines which is to treat "similarly situated" defendants similarly. The circuit court rejected the notion that an unlicensed attorney who represented his clients competently and provided them with a benefit should be treated the same as a defendant who represented his clients incompetently to their detriment. Once the court decided to use "actual harm" as the measure of loss, it sought to make a reasonable calculation of this amount. The circuit court remanded to the district court to determine whether the 27 dissatisfied client complaints were legitimate and whether the amounts contained in the 27 complaints are a reasonable calculation of "actual loss."

Fourth Circuit

United States v. Henoud, 81 F.3d 484 (4th Cir. 1996). The circuit court affirmed the district court's determination of loss under USSG §2F1.1(b)(1) and found no abuse of discretion in its calculations of the restitution award. The defendant challenged the restitution order as to the victims named and the amount awarded, claiming that the order improperly required him to pay to certain companies not named in the indictment an amount in excess of that alleged in the indictment. Under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663, 3664, a district court may order a convicted criminal to pay restitution to "any victim" of his offense. Determination of the amount of restitution to be paid is typically calculated by the amount of loss sustained by the victim. Additionally, the award must be limited to the losses caused by the

specific conduct of which the defendant was convicted; it cannot include unrelated losses. Hughey v. United States, 495 U.S. 411, 413, 110 S. Ct. 1979 (1990). The circuit court held that the district court was within its statutory authority with respect to the amount awarded and that it correctly adopted the broader definition of "victim" as "a party directly harmed by the defendant's criminal conduct in the course of a scheme or conspiracy" for purposes of restitution. In a scheme, the harm need only be a direct result of the defendant's criminal conduct, through or "closely related to" the scheme, conspiracy or pattern. The government proved that a scheme to defraud existed, in addition to proving specific incidents of fraud perpetuated on individual long distance companies. Therefore, the district court's inclusion of all losses to any victim caused by the scheme to defraud was not improper or in excess.

United States v. Marcus, 82 F.3d 606 (4th Cir. 1996). The defendant appealed the district court's decision on remand, affirming its prior sentence. On remand, the district court considered its finding of loss in light of the Fourth Circuit's decision in United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), and reaffirmed the original sentence. The defendant, president and chief executive officer of a company that manufactured generic drugs, had pleaded guilty to one count of conspiracy to defraud the United States, 18 U.S.C. § 371, but reserved the right to contest the calculation of loss under the guidelines at USSG §2F1.1(b)(1). The government asserted that the measure of loss should be the defendant's gross sales, exceeding $10 million, on the theory that the drug had no value because it did not meet FDA specifications. The district court agreed, and assessed the corresponding 15-level enhancement to the base offense level. The resulting guideline range was 41-51 months imprisonment. The defendant asserted that consumers suffered no loss because the drug possessed FDA approval, and the changes it made to the formula did not alter the safety of the drug. The appellate court disagreed, noting that unlike the case in Chatterji, the reason for the modification to the defendant's drug formula was a problem in passing dissolution tests, which bears on the therapeutic value of a time-released drug. The modification to the formula in Chatterji affected shelf life, but had no potential to affect the therapeutic value of the drug. In this case, the defendant conceded that "the modification would have been viewed by the FDA as significant enough to require additional bioequivalence testing." This testing would have been unnecessary if there was no possibility that the change could affect the therapeutic value or safety of the drug. This was the pivotal distinction, and the district court decision was affirmed.

Fifth Circuit

United States v. McDermot, 102 F.3d 1379 (5th Cir. 1996). The district court erred in refusing to enhance the defendants' sentence four levels under USSG §2F1.1(b)(6). The district court rested its decision on the basis that the failure of the reinsurer prior to the defendants' fraud rendered the institution insolvent and the enhancement inapplicable. The Court of Appeals rejected the district court's reasoning that once a financial institution becomes insolvent, it has no "safety" or "soundness" which can be jeopardized. This mandatory enhancement applies not only to insolvency, but also to cases in which the defendants' actions substantially reduced benefits to insureds, rendered the institution unable to refund deposits or payments or placed the institution in jeopardy of the same. Fraud upon an already insolvent institution may result in the loss of benefits

to insureds or render the institution unable to refund a payment or deposit. Alternatively, the court rejected the reasoning that the enhancement should not be applied because it was not intended to apply to situations in which the defendant established himself as principal stockholder of the financial institution. The court reasoned that the policy behind the enhancement was the protection of third-party interests, which are affected regardless of the financial interests of the defendants.

Sixth Circuit

United States v. Sanders, 95 F.3d 449 (6th Cir. 1996). The district court did not err by calculating the loss for sentencing purposes as the total amount of premiums collected by the conspiracy nor by distinguishing this fraudulent insurance scheme from secured loan fraud cases. The defendant argues that the district court should have calculated the amount of loss for sentencing purposes as the $97,835.60 the defendant was ordered to pay in restitution to the victims, rather than the $729,139.00 in premiums collected by the entire conspiracy. Under USSG §2F1.1(b), the district court is required to increase the defendant's base offense level depending on the amount of loss caused by the fraud at issue. Additionally, Application Note 7 states that "loss is the value of the money, property, or services unlawfully taken . . . [I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." The circuit court held that the Application Note clearly shows that the amount of loss should be the amount of premiums collected, and the entire amount involved in the conspiracy is attributable to the defendant, because "all the conspirators' activities were reasonably foreseeable" to the defendant. The appellate court also found no error in distinguishing fraudulent loan application cases from fraudulent insurance schemes. The court relied on the fact that in the former, the victim may recoup some of the losses by selling collateral that the defendant used to secure the loan, whereas in the latter, such as the defendant's scheme, the victims are not left with any collateral to sell.

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). The district court did not err in calculating the amount of loss under USSG §2F1.1. Using his position as a bank employee, the defendant defrauded the bank by causing $75,546.22 (including $1709 in interest on the account) to be placed into fictitious accounts that he had created. Prior to termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled him to a $64,712.40 commission. He completed the negotiation, and the bank retained the commission. At sentencing, the district court determined that the actual loss to the bank was $74,546.22. The defendant argued that since the bank received $64,712.40 from the commission earned by the defendant, the actual loss was only $9,834.60. The defendant's argument relies on the notion that collateral secured by the creditor in fraudulent loan transaction cases is used to offset the amount of the loss. The circuit court distinguished the present fraudulent lease transaction from fraudulent loan transaction cases by noting that collateral is not posted as security in the former cases. In doing so, the circuit court concluded that the voluntary offering to the bank, made after the offense was uncovered, of the earned commission is not the same as putting up collateral as security. Consequently, the district court was correct in assessing the amount of loss at $74,546.22.

United States v. Sparks, 88 F.3d 408 (6th Cir. 1996). The district court did not err in calculating the amount of loss under USSG §2F1.1. The defendant was convicted of falsifying bank records and misapplying bank funds, 18 U.S.C. §§ 656 and 1005, based on fraudulent loans made to third parties for the benefit of himself. The defendant asserts that the loss calculation was incorrect because the bank's loss was subsequently reduced when a third party paid the balance due on two of the loans. The circuit court stated that amount of loss is typically determined at the time the crime is discovered rather than at sentencing. The circuit court noted, however, that loss does not include amounts recoverable by "foreclosure, setoff, attachment, simple demand for payment, immediate recovery from the actual debtor and other similar legal remedies . . . ." The circuit court found that the subsequent repayment was not an immediate repayment as it was made over a year after the fraud was unearthed. The circuit court held that although this repayment reduced the amount of the bank's final loss, the "loss" at the time the crime was discovered is not lowered because, at that time, the bank did not have an expectation of "immediate recovery" from the actual debtor or by legal means. Lastly, while a reduction in the amount of loss is appropriate for amounts that a bank has or may expect to recover from assets originally pledged as collateral, the loans in question were not secured. Consequently, the circuit court held that the calculation of amount of loss was correct in this case.

Seventh Circuit

United States v. Boatner, 99 F.3d 831 (7th Cir. 1996). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2F1.1(b), finding the defendant responsible for the total $20,000-plus loss involved in the insurance fraud scheme, rather than the $4,600 portion of the loss that the insurance company paid to her. At sentencing, the district court found that the actions of the defendant, along with the other parties in the staged automobile accident, were jointly undertaken, the amount of loss involved exceeded the amount she received from her fraudulent claims, and that the entire amount of loss was reasonably foreseeable to her. The defendant argued that she should only be responsible for the $4,600 amount that the insurance company actually paid her, which would have resulted in a one level sentence enhancement instead four. Moreover, she maintained that the trial judge had to make an initial finding that the acts of the others involved in the scheme were within the scope of the defendant's agreement before the loss attributed to those claims could be imputed to her. The appellate court disagreed, and held that the evidence strongly supported the conclusion that the defendants were engaged in concerted activity. The court looked to its opinion in United States v. Smith, 897 F.2d 909 (7th Cir. 1990), and held that, as in that case, the activity of the others was reasonably foreseeable, and the focus is the victim's loss, not the defendant's individual profit.

United States v. Coffman, 94 F.3d 330 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1425 (1997). The court did not err in basing its calculation of the amount of loss under USSG §2F1.1 upon the intended loss as opposed to the actual loss suffered by Smith Barney as a result of the defendants' attempt to secure a loan with worthless stock. However, the court erred by increasing the amount of loss to reflect a fraud perpetrated by the defendants upon a different victim several years earlier. The court rejected defendants' argument that the appearance of the FBI prior to the completion of the transaction ensured that the actual loss suffered would be zero and in such

cases the intended loss can be no greater. Instead, the court relied upon USSG §2F1.1 Application Note 10, which authorizes a downward departure where a defendant attempts to negotiate an instrument so obviously fraudulent that it would not be honored, to support its conclusion that the existence of actual loss does not affect the calculation of intended loss. Because frauds with little chance of success remain punishable, the court found that it would be unfair not to consider the differing magnitudes of intended harm. The court did err in increasing the amount of loss for sentencing purposes to reflect the loss suffered by an unrelated victim several years earlier because the only connection between the previous and current fraud was the use of the same fraudulent stock in both instances. The prior conduct does not qualify as part of the current scheme and the previous loss should not have been used to calculate defendants' sentences.

United States v. Jackson, 95 F.3d 500 (7th Cir.), *cert. denied*, 117 S. Ct. 532 (1996). The district court did not err in calculating the amount of loss for purposes of USSG §2F1.1 based upon the defendants' gain, because the estimate was conservative, reasonable and fair. The defendants were involved in a fraudulent telemarketing scheme whereby they contacted persons who were informed that they were "guaranteed winners," ensured of receiving either a car, cash prize or five dream vacations in return for payment of the promotional fees and taxes on the prize. Once these amounts were paid, the defendants sent the winners travel vouchers to provide a small discount on certain vacation packages. In calculating loss under §2F1.1, the district court measured the defendants' gain by subtracting the cost of the prizes from the total money collected from the victims. The circuit court rejected the defendants' argument that the loss should have been calculated by subtracting the value of the prizes awarded, not simply their cost. The district court's calculation of loss was upheld because §2F1.1 Application Note 8 recognizes that "offender's gain from committing the fraud is an alternative estimate for calculating loss that ordinarily will underestimate the loss." The defendants' gain in this case was properly equated with profit. The court's characterization of this calculation as "conservative" stems from the fact that the court could easily have based the estimate on "loss" to the victim, ruled that the vouchers had no value, because they did not include travel costs, and determined "loss" to be the entire amount collected by the defendants from their victims.

United States v. Morris, 80 F.3d 1151 (7th Cir.), *cert. denied*, 117 S. Ct. 181 (1996). The district court did not err in interpreting the meaning of "loss" under USSG §2F1.1 to include the total actual loss suffered by the fraud victims. The defendants, former officers of Germania Bank, were convicted on two counts of mail and one count of wire fraud in connection with the bank's $10 million offering of subordinated capital notes. After the initial offering the bank—because of its deteriorating financial condition—was placed in conservatorship by the RTC. With the bank's demise, the notes became worthless, and investors recouped nothing on their investments. At sentencing, the court concluded that the actual loss to the victims of the defendants' scheme was the face amount of the notes. The defendants argued that they should not be allocated the entire loss of the notes because factors other than their fraud had contributed to the bank's failure. On appeal, the court distinguished between cases involving an intervening cause, and cases involving consequential and incidental losses. While the former would not serve to reduce the amount of loss attributable to a defendant's fraud, the latter are not counted in computing loss for purposes of sentencing under §2F1.1. In this case, defendants argue that intervening forces ultimately

contributed to the bank's demise. As a result, the district court was correct in calculating the loss to the victims of the defendants' scheme as the face value of the notes.

Ninth Circuit

United States v. Allen, 88 F.3d 765 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1565 (1997). In this case of first impression, the district court did not err in its calculation of amount of loss for fraudulent loan applications. The Ninth Circuit, joining with the Third, Fourth, and Tenth Circuits, held that in the case of fraudulent loan applications, the "actual loss" must take into account the amount recovered or reasonably anticipated to be recovered from collateral that secured the loan, plus loan payments made prior to default. *See* United States v. Kopp, 951 F.2d 521, 535 (1991); United States v. Rothberg, 954 F.2d 217, 219 (1992); United States v. Baum, 974 F.2d 496, 499 (1992).

United States v. Allison, 86 F.3d 940 (9th Cir. 1996). The district court erred in calculating the credit card fraud loss based upon the total amount charged to the fraudulent credit cards, as opposed to using the outstanding credit card balance prior to the discovery of the fraud. In reaching this conclusion, the appellate court relied heavily upon circuit precedent rejecting a mechanical application of the definition of loss in the theft guideline at USSG §2B1.1 to all fraud cases except those falling within the express exceptions contained in §2F1.1, comment. (n.7). Rather, the appellate court "should take a realistic, economic approach to determining what losses the defendant truly caused or intended to cause, rather than the use of some approach which does not reflect the monetary loss." United States v. Harper, 3 F.3d 1387, 1392 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1162 (1995). The court noted that the reasoning of Harper does not conflict with the language of §2F1.1, whereby loss in a fraud case will frequently be the same as the loss in a theft case. Note 7 to USSG §2F1.1 indicates exceptions to this general rule, but they are not exclusive. Because the defendant in this case was charged with fraud, as opposed to theft, the court concluded that on remand, the economic reality approach should be used whereby loss should reflect the outstanding credit card balance prior to the discovery of the offense.

United States v. Gallagher, 99 F.3d 329 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1274 (1997). The district court did not err in increasing defendant's offense level under USSG §2F1.1 based upon a finding that the defendant intended a loss totaling $3,000. The defendant had $3,000 in fraudulent checks deposited into the victim's account, but he was only able to obtain $1,000 because the victim reported the theft of her ATM cards and the bank blocked further transactions on the account. In reaching its conclusion, the circuit court rejected defendant's argument that §2F1.1 is unconstitutionally vague as applied to this case with respect to the definition of "loss." The §2F1.1 application notes define "loss" as follows: "loss is the value of the money, property, or services unlawfully taken . . . [I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." USSG §2F1.1 comment (n.7). The defendant argued that because this definition conflicts with the ordinary understanding of the term "loss," it fails to adequately inform a person of reasonable intelligence of the consequences of violating the criminal statute. The circuit court disagreed, and held that the statute defines loss in such a way as to make it sufficiently clear to a person of

reasonable intelligence that a defendant found guilty of committing an offense involving fraud will be held accountable for the intended loss, so long as that amount is determinable and greater than the actual loss.

United States v. Robinson, 94 F.3d 1325 (9th Cir. 1996). The court did not err in increasing the defendants' base offense level for amount of loss in connection with the offense of manufacturing and selling counterfeit credit cards. The court rejected defendants' argument that the enhancement for amount of loss should not be applied, because the credit cards were sold to undercover government agents which eliminated the possibility of loss to a victim. Instead, the court adhered to USSG §2F1.1 Application Note 7 which states that if there is no actual loss, the sentencing court should calculate the loss the defendant intended to inflict. This approach is consistent with Ninth Circuit precedent which holds that if a sentencing judge chooses to calculate intended loss, there is no requirement that the court consider the realistic probability of loss that would result from the execution of the defendant's plan. The court rejected defendant's additional argument that the calculation of the amount of loss should be analogized to the drug offense penalties under §2D1.1, whereby a defendant may not be sentenced for drug amounts which he did not intend to provide or was not capable of providing. Without reaching the issue of whether drug guidelines may be applied to counterfeit cases, the court noted the defendant was fully capable of manufacturing and selling all 2000 credit cards. In short, the court found there is no requirement that the amount of loss calculated for purposes of enhancement be realistically probable.

United States v. Welch, 103 F.3d 906 (9th Cir. 1996). The district court correctly enhanced the defendant's offense level for violation of a judicial process, pursuant to USSG §2F1.1(b)(3)(B). The district court found that the defendant violated the judicial process of the bankruptcy courts when she filed several false petitions. The defendant claimed that she did not violate a judicial process because the word "process," as defined by the guidelines, refers to summons, complaints, or writs, not specific adjudicatory processes. The circuit court joined the Seventh and Eighth Circuits in concluding that bankruptcy proceedings involve the same kind of formalities that undergird orders, injunctions and decrees and, therefore, the guideline correctly applies to such specific adjudicatory processes.

Eleventh Circuit

United States v. Toussaint, 84 F.3d 1406 (11th Cir. 1996). The district court did not err in its calculation of the amount of loss under USSG §2F1.1. The defendant was convicted of conspiracy to make false statements and making false statements on a disaster loan application to the Small Business Administration (SBA), wherein he averred that he had suffered over $360,000 in losses from damage caused by Hurricane Andrew, although he actually suffered no loss. The defendant's scheme was discovered prior to the processing of the application, and no actual loss was incurred by the SBA. Based on the finding that the defendant intended the SBA to incur a $360,000 loss, the district court enhanced the defendant's base offense level under §2F1.1. The defendant argued that an adjustment under §2F1.1 is only applicable if "some actual dollar amounts were lost." In rejecting this argument, the circuit court noted the commentary to §2F1.1, which states that "the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss)" and "where the intended loss is greater than the actual loss, the intended loss

is to be used" in calculating the amount of loss. The circuit court concluded that this language indicates that the defendant's intent to cause a loss is the relevant inquiry, and "the fact that no loss occurred is immaterial." *See also* United States v. Menichino, 989 F.2d 438 (11th Cir. 1993) (sentence enhancement under §2F1.1 appropriate despite fact that loan, secured via fraudulent appraisal, was never issued). The decision of the district court was affirmed.

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

Sixth Circuit

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996). The district court did not err in its refusal to apply the five-level increase under USSG §2G2.2(b)(4) because the enhancement is available only when there exists a pattern of behavior that is "relevant" to the offense of conviction. The government challenged the lower court's refusal to consider any testimony or exhibits pertaining to the defendant's uncharged prior acts of sexual abuse and exploitation of minors. The government contended that such evidence of a prior "pattern of activity" justified a five-level enhancement. Relying on the First Circuit's decision in United States v. Chapman, 60 F.3d 894, 901 (1st Cir. 1995), the circuit court held that there were limitations as to what conduct the court could consider to determine the applicability of USSG §2G2.2(b)(4). The offenses covered by §2G2.2 relate to trafficking in materials portraying the sexual exploitation of minors, not to the act of sexually exploiting a minor. The government's broad construction of subsection (b)(4) would have made the conduct apply to acts completely unrelated to the trafficking offenses addressed by the guideline. Additionally, the circuit court reasoned that the existance of application note 5, which allows an upward departure on the basis of the defendant's past sexual abuse or exploitation of minors "whether or not such sexual abuse occurred during the course of the offense," strongly suggested that non-discretionary enhancements under subsection (b)(4) were directed at a more limited class of conduct.

Part J Offenses Involving the Administration of Justice

§2J1.1 Contempt

Second Circuit

United States v. Cefalu, 85 F.3d 964 (2d Cir. 1996). The defendant was convicted of criminal contempt for his refusal to testify fully before the grand jury and at the drug conspiracy trial of a captain in the Gambino family, despite a grant of immunity. After serving some 18 months for civil contempt, he was convicted of criminal contempt, and sentenced to 33 months imprisonment pursuant to 18 U.S.C. § 3553(b). The Contempt guideline at USSG §2J1.1 directs the court to apply USSG §2X5.1, which instructs the court to look to the most analogous guideline, or in the absence of a sufficiently analogous guideline, to proceed under 18 U.S.C. §

3553(b). The Sentencing Commission does not provide a specific sentencing range for criminal contempt offenses, because they are very context-specific. Although the government asserted that the Obstruction of Justice guideline was most analogous in this case, and the defendant asserted that the most analagous guideline was Failure to Appear by a Material Witness, the appellate court cited the district court's reasons for declining to use those guidelines, and found no error. The district judge determined that there was no sufficiently analogous guideline. Employing the provisions of 18 U.S.C. § 3553(b), the district court looked to the guidelines for direction and decided that USSG §2X4.1, Misprision of Felony, was somewhat similar to defendant's the scenario in defendant's case where, despite his knowledge of the crime and grant of immunity, he refused to testify. The appellate court explained that although other guidelines may have fit, it gave deference to the district court's application of the guidelines to the facts, and the sentence was not "plainly unreasonable."

Part K Offenses Involving Public Safety

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

First Circuit

United States v. Disanto, 86 F.3d 1238 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1109 (1997). The district court correctly applied USSG §2K1.4(a)(1), the higher of two offense levels under the arson guideline, when computing the defendant's sentence and did not err in its findings that he "knowingly" created a substantial risk of death or bodily injury. The defendant argued that the district court should have applied USSG §2K1.4(a)(3), which requires computation of the base offense level as 2 plus the base offense level for "Fraud and Deceit." He contended that the overwhelming evidence at trial established that his primary purpose in setting the fire was to defraud the insurance company, not to create a substantial risk of serious bodily injury to bystanders. Similarly, the defendant argued that the district court's findings that he "knowingly" created this risk was not supported by a preponderance of the evidence. The appellate court disagreed, and held that the district court correctly applied §2K1.4(a)(1) because it yielded the highest base offense level, based on its findings that the defendant had created a substantial risk of bodily injury. The circuit court treated the issue of whether the defendant knowingly created that risk within the meaning of §2K1.4 as one of first impression, in that the court had not previously determined what level of knowledge was required under §2K1.4(a)(1)(A). The circuit court applied a two-prong test: (1) whether the defendant's actions created a substantial risk; and (2) whether the defendant acted knowingly to create that risk. Relying upon the PSR, the circuit court held that the defendant clearly created a substantial risk by causing a potential for a fuel air explosion. The fact that fortuitously no one was injured and extensive damage did not result, did not mean that the defendant did not endanger others. Additionally, the First Circuit adopted the definition of "knowledge" as outlined in the Model Penal Code which requires that the defendant be "aware that a substantial risk of death or bodily injury is `practically certain' to result from the criminal act." The circuit court held that the method used to set the fire and the defendant's timing satisfied the `practically certain' standard.

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

Seventh Circuit

United States v. Wyatt, 102 F.3d 241 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1325 (1997). The district court properly enhanced the defendant's base offense level by four levels, pursuant to USSG §2K2.1, based on its determination that the defendant possessed firearms in connection with a drug offense. The defendant maintained that the district court erred by enhancing his base offense level because the government failed to establish that the firearms found in his home were possessed "in connection with" his marijuana dealing. The appellate court rejected this argument, holding that the phrase "in connection with" should be given its logical and common meaning. The court further noted that the phrase, at a minimum, should be interpreted broadly to mean that firearms involved must have some purpose or effect with respect to the drug trafficking crime and its presence or involvement cannot be the result of an accident or coincidence. Instead, the gun must facilitate, or have the potential of facilitating the drug trafficking offense. In the instant case, the defendant's firearms were concealed under the bed and in the closet, but there is no indication that the weapons were not readily accessible. Additionally, the court held that the seizure of the firearms in close proximity to illegal drugs was a powerful inference that the firearms were used in connection with the drug trafficking operation.

Ninth Circuit

United States v. Hicks, 103 F.3d 837 (9th Cir. 1996), *cert. denied* (U.S. Apr. 21, 1997) (No. 96-8383). The district court did not err in sentencing the defendant to a life sentence as an armed career criminal. The defendant challenged the district court's decision to impose a life sentence following conviction on all three counts of armed carjacking, unlawful use of a weapon during a crime of violence, and being an armed career criminal. The appellate court disagreed, and held that the district court lawfully sentenced the defendant based on the sentencing guidelines for the charge of being an armed career criminal, maintaining that the gun was "used to initiate the events in question." The court noted that the district court correctly applied USSG §2K2.1(c)(1) of the sentencing guidelines, which provides that if a defendant used or possessed any firearm in connection with the commission of another offense, and if death resulted, an offense level of 43 with a guideline range of life imprisonment could be imposed. The court further noted that the district court could have reached the same result using the carjacking charge applying USSG §2B3.1 which allows a sentencing court to sentence a defendant to a term of life imprisonment if the robbery in question results in death.

Eleventh Circuit

United States v. Wimbush, 103 F.3d 968 (11th Cir. 1996), *cert. denied*, 1997 WL 220974 (1997). The appellate court affirmed the district court's calculation of the defendant's sentence pursuant to USSG §2K2.1. The defendant argued that USSG §2K2.1, as amended, was invalid because it substantially increased the punishment level without adequately explaining the reasons for the changes, as required by the Administrative Procedures Act ("APA"). The appellate court disagreed, and held that "Federal courts do not have authority to review the Commission's actions

for compliance with APA provisions, at least insofar as the adequacy of the statement of the basis and purpose of an amendment is concerned."

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

Seventh Circuit

United States v. Thomas, 77 F.3d 989 (7th Cir. 1996). The district court properly concluded that the mandatory five-year term of imprisonment under 18 U.S.C. § 924(c)(1) must be imposed consecutively to any prior state terms of imprisonment. The provision reads in relevant part: "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to imprisonment for five years, . . . the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried." The appellate court joined the Sixth and Eleventh Circuits in concluding that the language of the statute clearly evidenced a congressional intent that the mandatory punishment be in addition to any other term of imprisonment and that the phrase "term of imprisonment" included any state sentence. *See* United States v. Ospina, 18 F.3d 1332 (6th Cir. 1994); United States v. McLymont, 45 F.3d 400 (11th Cir. 1995). By contrast, the defendant relied on the Tenth Circuit's interpretation of 924(c) which held that the phrase "any other term of imprisonment" was ambiguous and could be construed narrowly to apply only to federal sentences. *See* United States v. Gonzales, 65 F.3d 814, 820 (10th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3830, 3837 (U.S. June 17, 1996). The appellate court refused to look beyond the statutory text and maintained that just because there was a general presumption that Congress intended federal statutes to relate to federal subjects, there was no need to rewrite the subsection 924(c) to include more specific language or resort to the legislative history. Additionally, the appellate court noted that section 924(c) not only says "any other terms of imprisonment," it says "any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried." In other words, the plain language of section 924(c) made it applicable to sentences beyond that for the underlying crime; to "any term of imprisonment." *See* United State v. Hunter, 887 F.2d 1001, 1002-03 (9th Cir. 1989) (*per curiam*).

Part L Offenses Involving Immigration, Naturalization, and Passports

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

First Circuit

United States v. Cuevas, 75 F.3d 778 (1st Cir. 1996). The district court did not err in its application of a 16-level enhancement pursuant to USSG 2L1.2(b)(2) for unlawfully entering and remaining in the United States. The defendant argued that the enhancement he received was improper because neither of the two previous offenses he committed before being deported were a conviction for an "aggravated felony" and at least one of the offenses was not a "conviction" under state law. The circuit court rejected the defendant's arguments and joined the Fifth, Ninth,

and Eleventh Circuits in holding that whether a particular deposition counts as a "conviction" in the context of a federal statute is to be determined in accordance with federal law. *See* Molina v. INS, 981 F.2d 14, 19 (1st Cir. 1992); Wilson v. INS, 43 F.3d 211, 215 (5th Cir. 1995); Ruis-Rubio v. INS, 380 F.2d 29 (9th Cir. 1967); Chong v. INS, 890 F.2d 284 (11th Cir. 1989). The appellate court also relied upon the Supreme Court's interpretation in Dickerson v. New Banner Institute, Inc., 460 U.S. 103 (1983), in which the court held that whether one had been convicted within the language of a federal statute is necessary . . . a question of federal, not state, law, despite the fact that the predicated offense and its punishment are defined by the law of the state. Additionally, the appellate court noted that even if the defendant's second prior possession offense was not a "conviction" his challenge to the application of §2L1.2(b)(2) failed because his earlier conviction for cocaine possession was itself for an "aggravated felony."

United States v. Restrepo Aguilar, 74 F.3d 361 (1st Cir. 1996). The district court did not err in adding 16 offense levels to the defendant's sentence based on a finding that the defendant had been previously "deported after a conviction for an aggravated felony." *See* USSG §2L1.2. The defendant had been previously deported after a state court conviction for possessing cocaine. At sentencing, the defendant unsuccessfully argued that the term "aggravated felony" should not include his state court felony that would have been punished only as a misdemeanor under federal law. On appeal the court noted that the commentary to §2L1.2 defines "aggravated felony" as "any illicit trafficking in any controlled substance." This definition, the court held, does not limit the application of the 16-level enhancement to offenses that would be classified as felonies if prosecuted under federal law. Rather, a previous conviction for "any illicit trafficking in any controlled substance" would require the 16-level increase. This position, the court noted, is further supported by the commentary to §2L1.2, which indicates that the "aggravated felony" enhancement applies to offenses "whether in violation of federal or state law."

Fourth Circuit

United States v. Campbell, 94 F.3d 125 (4th Cir. 1996), *cert. denied*, 1997 WL 274271 (1997). The district court correctly determined that the defendant's manslaughter conviction was a crime of violence included in the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and, therefore, properly applied a 16-level enhancement to the defendant's sentence. The defendant argued that the district court improperly applied the statute because his underlying "aggravated felony" conviction occurred in 1989 which preceeded the amendment date that extended the definition of an "aggravated felony" to include crimes of violence. The appellate court disagreed, and relied chiefly on United States v. Garcia-Rico, 46 F.3d 8 (5th Cir. 1995), in holding that the obvious intent of the amendment was to allow the predicated offenses to be used as enhancement penalties for those aliens who had been deported after being convicted of an aggravated felony. Additionally, the court noted that in considering a sentence under §2L1.2(b)(2), all prior felonies, no matter how ancient, were relevant in the determination of a sentence.

Tenth Circuit

United States v. Valdez, 103 F.3d 95 (10th Cir. 1996). The appellate court affirmed the district court's consideration of the defendant's prior conviction for aggravated felony in enhancing his sentence for unlawful entry after deportation by 12 levels. The defendant, relying on the Ninth Circuit's interpretation of USSG §2L1.2 in United States v. Campos-Martinez, 976 F.2d 589, 592 (9th Cir. 1992), contended that 8 U.S.C. § 1326(b) states a separate offense, requiring a prior conviction for an aggravated felony to be pleaded in the indictment and proven at trial. The defendant argued that because the government had amended to omit references to his 1994 conviction, the district court erred in sentencing him under that subsection. The circuit court disagreed, and held that a prior conviction for an aggravated felony under the statute was a condition triggering an enhanced penalty rather than a new offense and, therefore, the district court's calculation of the defendant's sentence was valid despite the fact that the conviction did not become final until after the defendant was deported.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

Eleventh Circuit

United States v. Malone, 78 F.3d 518 (11th Cir. 1996). The district court did not err in imposing a vulnerable victim enhancement to the defendant's sentence for the carjacking of a taxicab driver. The court noted that enhancing a defendant's sentence based solely on his membership in a more "vulnerable class" of persons is not consistent with the purpose behind USSG §3A1.1 because the vulnerable victim enhancement is intended to "focus chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability." However, in this case, the defendant testified that calling for a cab saved him from having to go out and find a victim. The cab driver in this case was obligated under a city ordinance to respond to all dispatcher calls, including the call in question to a deserted neighborhood making him more vulnerable than cab drivers in general to carjacking.

Part B Role in the Offense

§3B1.1 Aggravating Role

First Circuit

United States v. Cali, 87 F.3d 571 (1st Cir. 1996). The district court's holding enhancing the defendant's sentence based on his role as a manager was in error because the defendant managed property, but not people. USSG §3B1.1. However, the district court's alternative holding that a three-level upward departure was warranted because of the defendant's management of gambling assets was a proper assessment of an encouraged departure factor. USSG §3B1.1, comment. (n.2). The sentence was affirmed.

Sixth Circuit

United States v. Sanders, 95 F.3d 449 (6th Cir. 1996). On the government's cross-appeal, the circuit court vacated and remanded the defendant's sentence for further consideration because the district court failed to clearly articulate its reasoning for imposing a two-level enhancement rather than the four-level enhancement under USSG §3B1.1(a) for leaders or organizers. The government argued that the district court erred by imposing only a two-level enhancement when its own findings required a larger enhancement. The circuit court agreed that the district court had previously found that the defendant was the organizer of the conspiracy and that the conspiracy was "extensive" because the activities in furtherance of the offense took place in several states. Nonetheless, the circuit court noted that other portions of the sentencing transcript indicated that the district court may have been giving only its preliminary thoughts on the case when it made those findings inasmuch as the court ultimately concluded that only a two-level enhancement was warranted. Due to the speculative nature of the lower court's conclusion, the sentence was remanded for clarification on the organizer/leader and extensive conspiracy issues. If the district court finds that the defendant did play a leading role, and his fraud involved five or more participants or was otherwise extensive, the district court must impose the four-level enhancement.

§3B1.2 Mitigating Role

Third Circuit

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996). The district court erred in granting the defendant a downward departure for minimal or minor participation in an offense of possession of child pornography, 18 U.S.C. § 2252(a)(4). The defendant pleaded guilty to possession of child pornography and the government recommended a twelve month sentence, the bottom of the 12-18 month sentencing range. Although a mitigating role reduction was not available to the defendant under USSG §3B1.2 because the offense of possession is a "single person" act which does not involve concerted action with others, the district court departed down from the guidelines by analogy to that guideline. The district court sentenced the defendant to three year's probation, six months of which would be served in home confinement, and a $5,000 fine, citing the Third Circuit's opinion in United States v. Bierley, 922 F.2d 1061 (3d Cir. 1990), concerning departures analogous to mitigating role reductions. The government argued that the district court improperly departed under the holding in Bierley because to qualify for a mitigating role reduction, or an analogous departure, the offense must involve more than one participant. The defendant asserted that his act of possession was a minimal part of a larger distribution ring that was directed and controlled by other persons. He reasoned that had the other people involved in the scheme not been undercover agents, he would have been entitled to a sentence reduction. The circuit court rejected this argument and declined to extend Bierley to single actor offenses, agreeing with the government's position. The circuit court further noted that the defendant already received the benefit a lower offense level because his charge and conviction of simple possession, a five-year maximum and guideline level 13 offense, was significantly less serious than the ten-year maximum, guideline level 15 for receipt warranted by his actual conduct.

In overturning the departure, the appellate court noted that the commentary to §3B1.2 provides that a reduction for a mitigating role "ordinarily is not warranted" where a defendant is convicted of an offense significantly less serious than that warranted by his actual conduct.

Part C Obstruction

§3C1.1 Obstruction of Justice

Eighth Circuit

United States v. Iversen, 90 F.3d 1340 (8th Cir. 1996). The district court did not err in refusing to enhance defendant's sentence for obstruction of justice under USSG §3C1.1. The defendant, a fee collection officer for the Badlands National Park Service, was convicted of theft and embezzlement of public monies, based on money taken from fees she had collected. The government asserts that the obstruction of justice enhancement is warranted because the defendant committed perjury by claiming that she had been robbed and the fees had been taken. Noting that enhancements should not be imposed if a "reasonable trier of fact could find the testimony true," the circuit court found that the district court properly determined that a reasonable jury could have found the defendant's testimony to be true, despite the fact that both the judge and jury did not believe her. The circuit court also noted that the enhancement is proper only when the district court clearly finds both willfulness and materiality as to the alleged perjurious testimony. As the district court did not make these findings, the enhancement was properly denied.

Ninth Circuit

United States v. Magana-Guerrero, 80 F.3d 398 (9th Cir.), *cert. denied*, 117 S. Ct. 141 (1996). The court did not err in applying the USSG §3C1.1 enhancement for obstruction of justice based upon defendant's actions in lying to the pretrial services officer about his prior convictions and failing to correct the lie when he met with the probation officer. Although the defendant argued that his lie was immaterial because the probation officer could have easily discovered the deception, the question of whether providing materially false information to a pretrial services officer will qualify as obstruction of justice absent actual obstruction had never been resolved by this court. First, the court rejected the defendant's argument that his lies were immaterial because they didn't actually obstruct justice. Instead, the court noted that §3C1.1 Application Note 5 provides that a lie is "material" where it would tend to influence the issue under question. In addition, previous courts have deemed a thwarted attempt to obstruct justice sufficient to justify the enhancement. The court also rejected defendant's argument that the application notes in question covered only behavior involving probation officers, because the application notes are merely illustrative. The court noted that the Application notes which did not require actual obstruction anticipated a lack of candor on the part of the defendant. In short, the court held that actual obstruction is not required for application of the §3C1.1 enhancement.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

Third Circuit

United States v. Ketcham, 80 F.3d 789 (3d Cir. 1996). The circuit court reversed and remanded the defendant's sentence for offenses involving the transportation and distribution of child pornography in interstate commerce in violation of 18 U.S.C. § 2252(a)(1), (a)(2), & (a)(4)(B). The district court correctly refused to group the defendant's offenses pursuant to USSG §3D1.2(b) because each count involved different victims. The circuit court held that the primary victims that Congress sought to protect in the various sections of the Protection of Children Against Sexual Exploitation Act were the children, and not just society at large. Section 2252, by proscribing the subsequent transportation, distribution, and possession of child pornography, discourages its production by depriving would-be producers of a market. Therefore, since the primary victims of offenses under 18 U.S.C. § 2252 are the children depicted in the pornographic materials, and because the defendant's four counts of conviction involved different children, the district court correctly concluded that grouping the defendant's offenses pursuant to USSG §3D1.2(6) was inappropriate. Nevertheless, the circuit court reversed the defendant's sentence, because it found that the district court's conclusion for purposes of section 2252 was inconsistent with the court's application of the five-level increase under USSG §2G2.2(b)(4) for engaging in "a pattern of activity involving the sexual abuse or exploitation of a minor." The court explained that "sexual exploitation" is a term of art, and that "a defendant who possesses, transports, repreoduces, or distributes child pornography does not sexually exploit a minor even though the materials possessed, transported, reproduced, or distributed `involve' such sexual exploitation by the producer." "Section 2G2.2(b)(4) of the Guidelines singles out for more severe punishment those defendants who are more dangerous because they have been involved first hand in the exploitation of children." On remand, the defendant should be sentenced without the enhancement.

Seventh Circuit

United States v. Wilson, 98 F.3d 281 (7th Cir. 1996). The district court erred in failing to group the defendant's money laundering and mail fraud convictions pursuant to USSG §3D1.2. The circuit court held that the defendant's convictions for mail fraud and money laundering in connection with a Ponzi scheme were "closely related counts" and clearly meet the criterion to be considered part of the same continuing common criminal endeavor. All the money that the defendant laundered was money defrauded from investors, therefore, absent the fraud, there would have been no funds to launder. Moreover, the money laundering took place in an effort to conceal the fraud and keep the entire scheme afloat. The circuit court rejected the government's contention that the grouping of offenses was inappropriate because they involved different victims and different harms. Relying on similar decisions in the Third, Fifth, Sixth, Seventh, and Tenth Circuits, the court held that money laundering served to perpetuate the very scheme that produced the laundered funds and was not an "ancillary" offense.

§3D1.4 Determining the Combined Offense Level

Sixth Circuit

United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996). The district court erroneously departed upward two levels pursuant to USSG §3D1.4. The defendant appealed his sentence for seven bank robberies on the basis that the lower court improperly interpreted the guideline provision. The district court justified the departure on the basis that the defendant had robbed seven banks, but, under §3D1.4, which accounts for multiple group offenses, the defendant would only be punished for five. The guidelines only allow such departures for "significantly more than five units," and the appellate court, interpreting the inherently subjective language of the statute, concluded that "the Guidelines did not envision seven units as within that range of "significantly more than five." The appellate court further noted that the lower court's departure was unreasonable because it was at odds with the guidelines' fundamental principle of producing declining marginal punishments.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

District of Columbia Circuit

United States v. Forte, 81 F.3d 215 (D.C. Cir. 1996). The district court did not err in denying defendant's request for a two-level reduction in his base offense level for acceptance of responsibility under USSG §3E1.1 because he lied about the extent of his wife's participation in his prison escape. The district court took the view that defendant's lies went beyond a factor to be considered in granting a departure and precluded an acceptance of responsibility reduction. Although the circuit court doubted that the guidelines create an absolute bar to the reduction, it did not resolve the issue. USSG §3E1.1, Application Note 1 states that a defendant who falsely denies relevant conduct acts in a manner inconsistent with an acceptance of responsibility, but it differentiates between "conduct comprising the offense of conviction" and "additional relevant conduct." Both parties argued that the defendant's conduct fell into the "additional relevant conduct" category.

Third Circuit

United States v. Ceccarani, 98 F.3d 126 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1094 (1997). In this case of first impression, the Third Circuit joined with the First, Fifth, Seventh, Eighth and Eleventh Circuits in holding that a sentencing judge may consider unlawful conduct committed by the defendant while on pre-trial release awaiting sentencing, as well as any violations of the conditions of this pre-trial release, in determining whether to grant a reduction in the offense level for acceptance of responsibility under USSG §3E1.1. United States v. O'Neil, 936 F.2d 599 (1st Cir. 1991); United States v. Watkins, 911 F.2d 983 (5th Cir. 1990); United States v. McDonald, 22 F.3d 139 (7th Cir. 1994); United States v. Byrd, 76 F.3d 194 (8th Cir. 1996); United States v. Scroggins, 880 F.2d 1204 (11th Cir. 1989). *But see* United States v. Morrison, 983 F.2d 730 (6th Cir. 1993) (holding that acceptance of responsibility considers only conduct related to the charged offense). In this particular case, the sentencing court denied the defendant's request for an acceptance of responsibility adjustment after considering several factors, including that the defendant tested positive for drug use on five different occasions during his pre-trial release period in violation of the written conditions of his release. The appellate court

noted that USSG §3E1.1 Application Note 1 sets forth a number of non-exhaustive factors which may be considered in determining whether a defendant has accepted responsibility for his conduct. Included among the factors is consideration of whether the defendant undertook post-offense rehabilitative efforts. USSG §3E1.1, comment. (n.1(g)). The appellate court based its determination upon the notion that defendant's post-offense conduct, although unrelated to the offense conduct, sheds light on the genuineness of the defendant's claimed remorse. A plea or confession does not necessarily evince a genuine sense of remorse or an intent to pursue lawful activity. Finally, because courts consider a defendant's post-offense rehabilitative efforts in granting an acceptance of responsibility adjustment, it is consistent to consider the absence of such efforts in denying an adjustment.

Sixth Circuit

United States v. Surratt, 87 F.3d 814 (6th Cir. 1996). Upon the government's appeal, the appellate court reversed the district court's decision awarding the defendant a two-level reduction for acceptance of responsibility under USSG §3E1.1. The appellate court noted that whether the defendant has accepted responsibility for purposes of the guideline reduction is a factual determination which is accorded great deference; subject to reversal on appeal only if the decision was clearly erroneous. However, upon review of the entire record, the court determined that the defendant had not carried his burden of showing by a preponderance of the evidence that he merited the reduction. The presentence report stated that the defendant persistently attempted to deny and minimize his criminal conduct. It specifically noted that the defendant blamed his abuse of his wife and daughter and his act of ordering child pornography on drug abuse. The district court "did not refer to the `appropriate considerations' for such a determination listed in application note 1 to USSG §3E1.1."

Ninth Circuit

United States v. Casterline, 103 F.3d 76 (9th Cir. 1996), *petition for cert. filed* (U.S. Jan. 2, 1997) (No. 96-9211). The circuit court affirmed the district court's decision not to grant the defendant a two-level reduction of his offense level for acceptance of responsibility under USSG §3E1.1. The defendant contended that he went to trial for the sole purpose of testing the "Lopez interstate commerce issue," *see* United States v. Lopez, 115 S. Ct. 1624 (1995), and that this is one of those rare instances, wherein he demonstrated an acceptance of responsibility for his criminal conduct, despite exercising his right to trial. The circuit court disagreed, and found that the evidence did not establish that the defendant had "manifested acceptance of responsibility in any way, subject to litigation of the Lopez issue or not." The trial judge was within her discretion in so deciding. The case was remanded for resentencing on other issues.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.2 Definitions and Instruction for Criminal History

Seventh Circuit

United States v. Damico, 99 F.3d 1431 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1086 (1997). The district court properly assigned a criminal history point for the defendant's one year sentence of "conditional discharge" for careless or reckless driving. The defendant asserted that he should not have been assessed a point under USSG §4A1.2(c)(1)(A), because the sentence was not for a term of probation of at least one year or a term of imprisonment of at least 30 days. The district court concluded that an Illinois sentence of conditional discharge is the equivalent to a sentence of probation for purposes of that guideline; the defendant maintained that that the two are distinct and that his reckless driving sentence did not qualify as a "term of probation". The appellate court relied on United States v. Caputo, 978 F.2d 972, 976-77 (7th Cir. 1992), which held that an Illinois sentence of conditional discharge is "unsupervised probation" and that the Sentencing Commission equates "unsupervised probation" with supervised probation. Conditional discharge is the same as probation, but without a probation officer, and that is a distinction without a difference so far as the purposes of the guideline exception are concerned.

§4A1.3 Adequacy of Criminal History

Seventh Circuit

United States v. Walker, 98 F.3d 944 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1012 (1997). The district court correctly departed upward based on the defendant's history of convictions which, while placing him in the highest criminal history category, understated his true criminal history. The defendant argued that the court, in departing upward, relied on not only permissible factors, but impermissible factors, such as the defendant's many arrests that did not result in convictions, and prior convictions which occurred too long ago to be included in the computation of criminal history points. The appellate court held that the outdated convictions for serious offenses were usable for purposes of making an upward departure pursuant to application note 8 of USSG §4A1.3. The court reasoned that the previous offenses were pieces of a lifelong pattern of criminality and could be considered for the limited purpose of establishing the incorrigible character of the defendant's criminal propensities. The appellate court also held that the sentencing court's consideration of the defendant's 23 other arrests which didn't resulting in conviction was harmless error, in light of the sentencing judge's comments that the 37-month sentence was light for someone who qualified as a career criminal on the basis of his convicted offenses. The appellate court found that the sentence would not have been lighter had the presentencing report left out the arrests.

Eighth Circuit

United States v. McNeil, 90 F.3d 298 (8th Cir.), *cert. denied*, 117 S. Ct. 596 (1996). The district court abused its discretion in departing downward on the basis of overstated criminal history. The abuse of discretion standard set forth in Koon v. United States is consistent with Eighth Circuit precedent that "an abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgement." United

States v. Kramer, 827 F.2d 1174, 1179 (8th Cir. 1987). This defendant's criminal history began at age eight when he was caught breaking and entering and continued with three serious encounters with juvenile authorities and at least eight adult convictions ranging from breaking and entering to taking indecent liberties with children and sexual abuse. Despite this history, the court departed downward, basing its decision on the defendant's age when he committed the prior felonies, the circumstances of some of the cases, and the manner in which the cases were handled by the state court. The circuit court found that this departure was a "clear error in judgement" which did not accurately reflect the entire record, including the defendant's recidivist tendency, the fact that the seriousness of his crimes increased with his age, and the fact that incarceration has not deterred him from additional criminal activity.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

Third Circuit

United States v. McQuilken, 97 F.3d 723 (3d Cir. 1996), *cert. denied*, 1996 WL 693529 (1997). The Third Circuit joined the Seventh, Eighth and Tenth Circuits in holding that USSG §4B1.1, Application Note 2 is invalid because it conflicts with 28 U.S.C. § 994(h). United States v. Hernandez, 79 F.3d 584 (7th Cir. 1996); United States v. Fountain, 83 F.3d 946 (8th Cir. 1996); United States v. Novey, 78 F.3d (10th Cir. 1996). In disagreeing with the First and Ninth Circuit's opposite opinions, the circuit court concluded that the phrase "maximum term authorized" should be interpreted to mean "maximum enhanced term authorized." United States v. LaBonte, 70 F.3d 1396 (1st Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996); United States v. Dunn, 80 F.3d 402 (9th Cir. 1996). In reaching its decision, the court found that Note 2's instruction to ignore any increase in the offense statutory maximum based on the defendant's prior criminal record, is invalid because it is inconsistent with 28 U.S.C. § 994(h)'s direction to the Sentencing Commission to formulate sentences for violations of this section at or near the statutory maximum. Therefore, the district court did not err in assessing a penalty at or near the enhanced statutory maximum. The Supreme Court is currently reviewing this issue.

Fourth Circuit

United States v. Bacon, 94 F.3d 158 (4th Cir. 1996). The district court erred in relying upon defendant's allegation that newly discovered evidence proved his innocence of a prior state offense and in refusing to enhance defendant's sentence as required under USSG §4B1.1. The court held that the district court was required to count the previous state offense as a predicate offense, because the defendant did not allege that he was deprived of counsel or any other constitutional right. Once a conviction is found to meet the requirements of a predicate offense under §4A1.2, Application Note 6 to this section requires the conviction to be considered unless it has been reversed, vacated or invalidated in a prior case. A defendant may not collaterally attack his prior conviction unless federal or constitutional law provides a basis for such an attack. The court noted that 28 U.S.C. § 994 was enacted to ensure that career offenders received sentences

near the maximum term authorized by law and omitted any authority for collateral attacks under this provision. Therefore, the legislature did not intend to give career offenders the right of collateral attack on their prior convictions, and the defendant lacked authority for his collateral attack. As a policy matter, unrestricted challenges to predicate offenses would place a substantial burden upon prosecutors forced to defend the predicate offenses and judges forced to hear the appeals. The court vacated and remanded the sentence for recalculation characterizing the defendant as a career offender.

Seventh Circuit

United States v. Hernandez, 79 F.3d 584 (7th Cir. 1996), *cert. denied*, 1996 WL 375444 (1997). In considering an issue of first impression, the Seventh Circuit held that Application Note 2 to the Career Offender guideline, as modified by Amendment 506, is inconsistent with the statutory mandate in 28 U.S.C. § 994(h), and is therefore invalid. 28 U.S.C. § 994(h) requires the Sentencing Commission to adopt guidelines that would sentence career offenders "at or near the maximum term authorized." Additionally, 21 U.S.C. § 841 requires that certain repeat offenders receive enhanced penalties. The court noted that prior to the promulgation of Amendment 506, which defines the relevant statutory maximum as the unenhanced statutory maximum, the circuit courts uniformly held that the relevant statutory maximum should be the enhanced statutory maximum. Considering these prior opinions together with both the text and context of section 994(h), the court concluded that Application 2 is inconsistent with section 994(h). Although noting that the First Circuit found "relevant statutory maximum" ambiguous enough to defer to the Sentencing Commission's interpretation, the Seventh Circuit concluded that the phrase was not ambiguous. The court held that by interpreting "relevant statutory maximum" to mean the unenhanced statutory maximum, the Sentencing Commission "departs from the common sense of the term 'maximum' . . . and relegates the enhanced penalties Congress provided for in section 841 to the dust bin." In holding that section 994(h) requires the use of the enhanced statutory maximum, the court acknowledged that some sentencing disparity could result "by virtue of the uneven exercise of prosecutorial discretion in invoking the heightened penalties available under section 841." Although the court noted that a key mission of the Sentencing Commission is to eliminate disparity in sentencing, the specific statutory command that career offenders be sentenced "at or near the maximum term authorized" must take precedence over the more general concern for consistency in overall sentences. As a result, to the extent that disparities exist, the situation is one for Congress, not the courts to remedy.

Eighth Circuit

United States v. Fountain, 83 F.3d 946 (8th Cir.), *cert. denied*, 1996 WL 547024 (1997). On the government's cross-appeal, the Eighth Circuit addressed an issue of first impression in the circuit, and agreed with the Seventh and Tenth Circuits' holdings in United States v. Hernandez, 79 F.3d 584 (7th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 2627 (U.S. April 1, 1996)(No. 95-8469) and United States v. Novey, 78 F.3d 1483, 1996 WL 115326 (10th Cir. 1996) that Application Note 2 to USSG §4B1.1 (the Career Offender uideline), as modified by Amendment 506, is inconsistent with the statutory mandate in 28 U.S.C. § 994(h), and is, therefore, invalid. The statute, 28 U.S.C. § 994(h), requires the Sentencing Commission to adopt guidelines that would sentence career offenders "at or near the maximum term authorized." In addition, 21

U.S.C. § 841 requires that certain repeat offenders receive enhanced penalties. Through Amendment 506, the Sentencing Commission defined the term "Offense Statutory Maximum" in USSG §4B1.1 to mean the statutory maximum prior to any increase in that maximum term under a sentencing enhancement provision. Although noting that the First Circuit, in United States v. LaBonte, 70 F.3d 1396 (1st Cir. 1995) found "relevant statutory maximum" ambiguous enough to defer to the Sentencing Commission's interpretation, the Eighth Circuit concluded that the phrase was not ambiguous. The court reasoned that "[w]here a statute prescribes a range of punishment, the maximum is the upper end of the range. Where a statute provides two tiers of punishment, common sense dictates that the maximum must fall at the high end of the two tiers." In addition, the court noted that the Commission's current interpretation "reduces both section 994(h) and the penalty enhancing components of statutes such as section 841 to mere surplusage." The court acknowledged that, by promulgating Amendment 506, the Commission was attempting to ameliorate the severity of the sentences given to recidivist drug offenders and curb prosecutorial discretion. Nonetheless, the plain meaning of section 994(h) requires the use of the enhanced statutory maximum. As a result, to the extent that any unfairness exists, the situation is for Congress, not the courts to remedy.

Ninth Circuit

United States v. Dunn, 80 F.3d 402 (9th Cir. 1996). The Ninth Circuit held that the Amendment 506 does not violate 28 U.S.C. § 994(h). The circuit court rejected the government's argument that Amendment 506 is contrary to the requirement in 28 U.S.C. § 994(h) that career offenders' sentences be "at or near the maximum term authorized."

Tenth Circuit

United States v. Novey, 78 F.3d 1483 (10th Cir. 1996), *cert. denied*, 1996 WL 226781 (1997). The Tenth Circuit split with the First Circuit's holding in United States v. LaBonte, 70 F.3d 1396, 1404 (1st Cir. 1995), *cert. granted*, 64 U.S.L.W. 3741 (U.S. June 24, 1996). The Tenth Circuit held that the district court properly held that Amendment 506, which modified the definition of "offense statutory maximum," exceeded the authority of the Sentencing Commission. As a result of this amendment, Application Note 2 to §4B1.1 defines offense statutory maximum as "the maximum term of imprisonment authorized . . . not including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." The court refused to uphold this amendment for several reasons. It found Amendment 506 to be inconsistent with 28 U.S.C. § 994(h), which directs the Commission to ensure that the guidelines specify a sentence "at or near the maximum term authorized for categories of defendants in which the defendant is 18 years old or older and has been convicted of a crime of violence or an enumerated drug offense and has two such prior conviction." Because the phrase "maximum term authorized" is modified to include those defendants with two prior convictions, the court found the unambiguous meaning of the statute to include the enhanced sentences. Further, the court characterized the Commission's interpretation under Amendment 506 as implausible, because it contradicted the legislative intent to impose more stringent penalties upon recidivist criminals. Finally, Amendment 506 is inconsistent with prior court decisions

which interpreted the phrase "offense statutory maximum" to include the enhanced statutory maximum. United States v. Smith, 984 F.2d 1084, 1086-7 (10th Cir.), *cert. denied*, 114 S. Ct. 204 (1993); United States v. Sanchez, 988 F.2d 1384, 1394-7 (5th Cir.), *cert. denied*, 114 S. Ct. 217 (1993); United States v. Amis, 926 F.2d 328, 329-30 (3d Cir. 1991).

§4B1.2 Definitions for Career Offender

Third Circuit

United States v. Taylor, 98 F.3d 768 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1016 (1997). The district court did not err in designating the defendant as a career offender pursuant to USSG §4B1.1. After a guilty plea, the defendant was sentenced as a career offender based on a previous aggravated assault and two convictions for statutory rape. A 1980 statutory rape conviction was at issue on appeal. The Third Circuit has held that the sentencing court "should look solely to the conduct alleged in the count of the indictment charging the offense of conviction" to determine if an offense qualifies as a crime of violence. Joshua v. United States, 976 F.2d 844 (3d Cir. 1992). With regard to the 1980 conviction, Count One charged the defendant with statutory rape, and Count Three, charging the defendant with indecent exposure, alleged that the defendant "forced [the victim] onto her bed and while holding her down . . . ." The district court noted the decisions of several circuit courts of appeals addressing whether sex offense convictions constitute crimes of violence, *see* United States v. Bauer, 990 F.2d 373 (8th Cir. 1993) (holding sexual intercourse with child under 16 constitutes a crime of violence); United States v. Wood, 52 F.3d 272 (9th Cir.) (holding indecent liberties with a minor crime of violence), *cert. denied*, 116 S. Ct. 217 (1995); United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993) (finding sexual abuse a crime of violence under 18 USC § 16(b)). However, the appellate court did not need to determine whether statutory rape was a crime of violence per se, because the counts of conviction specifically alleged conduct creating a "potential risk of physical harm" sufficient to satisfy the guideline. The defendant asserted that the district court erroneously relied on the indecent exposure count to find a crime of violence in the 1980 offense. First, he alleged the district court inappropriately relied on the indecent exposure count because it was not cited as one of the three prior crimes of violence. Second, he contended that in using the statutory rape conviction as the predicate offense, the court could only look to the charging language for that count, and not to the indecent exposure count. The appellate court found that despite the original reference to statutory rape, the district court was clear in its consideration of the three separate 1980 counts of conviction, in sum, for purposes of assessing criminal history. Finding that the facts alleged in the indecent exposure count clearly demonstrated a potential for serious injury to the victim, the appellate court held that the district court's determination that the defendant was a career offender was correct.

Seventh Circuit

United States v. Shannon, 94 F.3d 1065 (7th Cir. 1996). The district court erred in its determination that second degree sexual assault in Wisconsin is per se a crime of violence under USSG §4B1.2. The defendant maintained that his prior conviction of second degree sexual assault under state law did not constitute a conviction for a violent felony and thus, should not be included in the calculations of his base offense level. The guidelines define a crime of violence as

a conviction for conduct that presents a serious potential risk of physical injury to another. The defendant averred that second degree sexual assault in Wisconsin is a statutory rape type of offense which does not require any physical force, or even the slightest threat of physical force, for a conviction. The circuit court agreed with the defendant, and held that by the terms of the state statute itself, his conviction should be excluded as a crime of violence under USSG §4B1.2. Although the criminal complaint alleged that the defendant dragged the 13-year-old complainant into a basement and raped her, the appellate court explained that guideline §4B1.2 plainly limits the court's inquiry into whether an offense "presented a serious risk of injury" to "an examination of the facts charged in the relevant indictment or information." United States v. Lee, 22 F.3d 736, 737 (7th Cir. 1994). Based upon the indictment, the appellate court did not find any suggestion that violence or injury was involved in the offense. The appellate court's decision was a significant departure from the Eighth Circuit's opinion in United States v. Rodriguez, 979 F.2d 138, 140-41 (8th Cir. 1992), which held that the defendant's lascivious acts with young children were by its very nature a crime of violence regardless of whether an element of violence appeared in the statute. At least three other circuits, including the Ninth, Tenth, and Eleventh Circuits, have relied on Rodriquez to reach the same conclusion where significant age disparities existed between the defendant and the victim or incest was involved. *See* United States v. Wood, 52 F.3d 272, 273-75 (9th Cir. 1995); United States v. Passi, 62 F.3d 1278, 1279 (10th Cir. 1995); Ramsey v. INS, 55 F.3d 580, 581 (11th Cir. 1995). The appellate court maintained that the instant case was distinguished from Rodriguez because the victim was almost 14 years of age and the defendant was 17—a situation which was not inherently violent. Additionally, the appellate court rejected the dissent's federal-state comity argument that because the Wisconsin legislature labeled second degree sexual assault an "assault," as opposed to "unlawful fornication," federal courts applying the federal sentencing guidelines to federal convictions should consider it a crime of violence. The majority noted that although labels in criminal codes may be useful, uniformity in federal sentencing may best be achieved by applying the guidelines without strict reference to state criminal law definitions.

Eighth Circuit

United States v. Hascall, 76 F.3d 902 (8th Cir.), *cert. denied*, 117 S. Ct. 358 (1996). The district court did not err in its determination that the defendant was a career offender pursuant to USSG §4B1.1 and properly labeled his two prior convictions as crimes of violence under USSG §4B1.2. The defendant maintained that USSG §4B1.1 was inapplicable because conspiracy to distribute metamphetamine was not a controlled substance offense under the guidelines. The defendant also argued that the court improperly labeled two prior second-degree burglary convictions as crimes of violence under the third requirement of §4B1.1 because the burglaries involved commercial properties. The appellate court rejected the defendant's challenges, and held that drug conspiracies were included in the career offender provisions of the guidelines thus, the offense satisfied the second requirement of §4B1.1. *See* United States v. Mendoza-Figueroa, 65 F.3d 691, 694 (8th Cir. 1995). Additionally, the appellate court joined the First Circuit in concluding that second-degree burglary of commercial space qualified as a crime of violence under §4B1.2 because a burglary of a commercial space still poses a potential for substantial episodic violence. *See* United States v. Fiore, 983 F.2d 1, 4 (1st Cir. 1992). In contrast, the

Tenth Circuit has held that commercial burglary is not a crime of violence because of the narrow scope of the §4B1.2 language which makes specific reference to burglary of a "dwelling," but excludes any reference to unoccupied, commerical structures. *See* United States v. Smith, 10 F.3d 724, 732-33 (10th Cir. 1993).

§4B1.4 Armed Career Criminal

Third Circuit

United States v. Bennett, 100 F.3d 1105 (3d Cir. 1996). The district court did not err in determining that the defendant's three Pennsylvania burglary convictions qualified as predicate offenses for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). The defendant pleaded guilty to possession of a firearm by a felon, 18 U.S.C. § 922(g), and was sentenced under section 924(e) for violating section 922(g) having previously been convicted of three "violent felonies" or "serious drug offenses." The defendant asserted that the Pennsylvania burglary statute was broader than the generic burglary definition in section 924(e) and, therefore, the government had the burden of showing that the trier of fact found all of the elements of generic burglary. For purposes of section 924(e), burglary must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." In determining if the elements of generic burglary were found in defendant's three state convictions, the court could look to the indictment or information, jury instructions and the certified record of conviction. However, the defendant's counsel at trial "volunteered sufficient information" concerning the conduct leading to Bennett's burglary convictions to satisfy us that the trier of fact necessarily found all of the elements of generic burglary for each of those prior convictions. Nothing prevents a court from relying on information "having its source in the defense rather than in the prosecution." The circuit court found the elements of general burglary to be included in the three state burglary convictions and, therefore, enhancement under section 924(e) was proper.

Tenth Circuit

United States v. McMahon, 91 F.3d 1394 (10th Cir.), *cert. denied*, 117 S. Ct. 533 (1996). In an issue of first impression for the appellate courts, the district court did not err in enhancing the defendant's sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA). The defendant claimed that his 1981 state conviction for distributing eight ounces of marijuana is not a "serious drug offense" for purposes of serving as a predicate offense for the ACCA enhancement. For a State law conviction to qualify as a "serious drug offense" under 924(e), it must carry a maximum term of imprisonment of ten years or more. The Oklahoma statute the defendant was convicted of violating carries a maximum of ten years imprisonment. The defendant asserts, however, that to ensure equality in sentencing under the ACCA, his state offense should be treated the same as the most analogous federal offense, in this case 21 U.S.C. § 841(b)(1)(D), which carries a five-year maximum sentence for the same offense. The circuit court noted that the categorical approach to determine predicate offenses, which looks to the statutory definition of the offense, has been endorsed by the Supreme Court. Taylor v. United States, 495 U.S. 575, 588-92 (1990). Because the Oklahoma statute satisfies the requirement of carrying a maximum of

ten-year prison sentence or more, the district court's use of the state sentence as a predicate offense was affirmed.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.4 Recommended Conditions

Fourth Circuit

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996). The district court did not abuse its discretion in ordering defendant to abstain from alcohol as a condition of supervised release. Pointing to United States v. Pendergast, 979 F.2d 1289 (8th Cir. 1992), the defendant contended that this condition deprived him of his liberty and freedom, and was not "fine tuned" as such restrictions on freedom should be. The circuit court distinguished this case, however, by indicating that the defendant in Pendergast did not have a history of alcohol abuse, while the defendant in this case has prior convictions for alcohol related offenses and had tested positive for drugs on various occasions. The circuit court joined with the First and Ninth Circuits in holding that this condition of supervised release was acceptable under such circumstances.

Part C Imprisonment

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

First Circuit

United States v. Martinez, 83 F.3d 488 (1st Cir. 1996). The First Circuit, in an issue of first impression, held that the safety valve (USSG §5C1.2(5)) requires the defendant to provide information to the prosecutor, not to the probation officer. The district court denied the defendant the safety valve because he did not provide information to the "Government" as required under USSG §5C1.2(5). The defendant appealed, arguing that his disclosure to the probation office satisfied the requirement of "providing information to the Government." USSG §5C1.2(5). The circuit court concluded that the "Government" in USSG §5C1.2(5) and section 3553(f)(5) refers to the prosecuting authority rather than the probation office. The circuit court noted that USSG §5C1.2 is properly understood in conjuction with USSG §5K1.1. The court stated: "it seems evident that USSG §5K1.1's reference to the 'government' and to 'substantial assistance in the investigation or prosecution of another person' contemplates the defendant's provision of information useful in criminal prosecutions." The court added that the legislative history of USSG §5C1.2 requires disclosure of information that would aid prosecutors' investigative work. The circuit court noted that while full disclosure to the probation officer may assist the officer in preparing the defendant's presentence report, the probation officer does not create a presentence report with an eye to future prosecutions or investigations. Thus, the circuit

court affirmed the district court's holding that the defendant did not satisfy the requirements of the safety valve.

United States v. Montanez, 82 F.3d 520 (1st Cir. 1996). The district court did not err in denying the defendant's request to be sentenced under the safety valve provision of USSG §5C1.2. However, the district court did err in concluding that §5C1.2 requires the defendant to offer himself for debriefing in order to satisfy the requirement that the defendant truthfully provide to the government all information and evidence that he possessed. In this case, the defendant pleaded guilty to conspiracy to distribute drugs and to five substantive counts of possession with intent to distribute. At sentencing, the defendant asked the court to apply the safety valve provision of §5C1.2. In denying the defendant's request, the district court intimated that Congress had intended the safety valve for defendants who tried to cooperate by being debriefed by the government. The circuit court refused to conclude that a defendant must offer to be debriefed. The court noted that nothing in 18 U.S.C. § 3553(f) specifies the form, place, or manner of the disclosure. However, the circuit court stated that because it is up to the defendant to persuade the district court that he has "truthfully provided" the required information and evidence to the government, a defendant who declines to offer himself for a debriefing takes a very dangerous course. When a defendant's written disclosure is drawn almost verbatim from a government affidavit, nothing prevents the government from pointing out suspicious omissions or the district court from deciding, as it did in this case, that it is unpersuaded of full disclosure.

United States v. Pacheco-Rijo, 96 F.3d 517 (1st Cir. 1996). The appellate court vacated and remanded the defendant's sentence for the district court to make supplemental findings to clarify on the record why it declined to grant the defendant relief from the mandatory minimum sentence pursuant to USSG §5C1.2. The defendant argued that she met the conditions set forth in the "safety value" provision and had explained the limits of her involvement in the conspiracy. Under USSG §5C1.2, a defendant may avoid the mandatory minimum and be sentenced below the applicable guideline term if the defendant meets the five requirements set forth in the provision, including cooperating fully with the government. The sentencing court held that the defendant had not cooperated fully with the government and had failed to negotiate for relief from the mandatory minimum in her plea agreement. The government did not specify details, however, concerning what the defendant had failed to provide. The circuit court noted that just because the government did not believe the defendant was a passive participant in the drug trafficking offense, did not automatically make her ineligible for relief under the guidelines. The court noted that mere speculation as to the extent of the defendant's cooperation was not intended by the guidelines, and should not be enough to thwart the defendant's efforts to avoid the imposition of a mandatory minimum sentence.

Second Circuit

United States v. Resto, 74 F.3d 22 (2d Cir. 1996). The district court did not err in refusing to apply the safety valve provision to the defendant. To qualify for a sentence reduction pursuant to USSG §5C1.2, the defendant must not have more than one criminal history point, as determined under the sentencing guidelines. The defendant had four criminal history points, placing him in Criminal History Category III. The district court, however, determined that this overstated his criminal history, and granted him a downward departure from Category III, to

Category I, pursuant to USSG §4A1.3. The defendant argued that because he was treated as if he had only one criminal history point, "he should be found to come within the specifications of 18 U.S.C. § 3553(f)." The circuit court rejected this argument, and held that "the safety valve provision is to apply only where the defendant does not have more than 1 criminal history point."

Fourth Circuit

United States v. Ivester, 75 F.3d 182 (4th Cir. 1996), *cert. denied*, 116 S. Ct. 2537 (1997). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court found that the defendant had failed to provide the government with any truthful information concerning his crime. The defendant contended that he is entitled to the departure because he would have provided truthful information to the government had it asked for any. On appeal, the defendant raised an issue of statutory construction that had not been decided by any circuit court: whether pursuant to 18 U.S.C. § 3553(f), defendants are required to affirmatively act to inform the government of their crimes, or whether it is sufficient that they are willing to be completely truthful. Although noting that a defendant cannot be denied section 3553(f) relief merely because of the uselessness of the information provided to the government, the court determined that granting section 3553(f) relief to defendants who are merely willing to be completely truthful would obviate the statutory requirement that defendants "provide" information. Therefore, defendants seeking to avail themselves of downward departures under §5C1.2 bear the burden of affirmatively acting to ensure that the government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes. Judge Hall's dissenting opinion asserts that the majority's opinion construes the word "provide" "to mean something much more specific than its commonly understood usage." "Nowhere in §3553(f) is it suggested that a defendant must, with respect to the fifth requirement, inititate contact with the government in order to avail himself of the safety valve. Indeed, several courts have made findings of fact regarding compliance . . . where the contact . . . has been initiated by the government or by the court."

Fifth Circuit

United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996). In addressing an issue of first impression in the circuit, the court held that "the defendant has the burden of ensuring that he has provided all the information and evidence regarding the offense to the Government." The government appealed the district court's application of the safety valve provision of USSG §5C1.2 to the defendant, who failed to affirmatively provide the government with information regarding the offense. At sentencing, the government argued that the district court should not apply the safety valve provision of 18 U.S.C. § 3553(f) because the defendant had not truthfully provided to the government all information and evidence he had regarding the offense. Noting that the government had never requested any information from the defendant, the district court sentenced

the defendant under the safety valve provision. On appeal, the government contended that it did not have the burden of attempting to solicit information from the defendant. The Fifth Circuit agreed. The court held that the language of the safety valve provision indicates that the burden is on the defendant to provide the government with all information and evidence regarding the offense. According to the court, the defendant has the burden of providing this information regardless of whether the government requests such information. *See also* United States v. Ivester, 75 F.3d 182 (4th Cir. 1996) (holding that the burden is on the defendant to demonstrate that he has supplied the government with truthful information regarding the offenses at issue), *cert. denied*, 116 S. Ct. 2537 (1997).

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996). The district court erred in failing to consider whether the defendant was eligible for the safety valve (USSG §5C1.2). The circuit court held that the district court did not consider the criteria listed in USSG §5C1.2, and mistakenly believed that it was bound by the mandatory minimum sentence set forth in 21 U.S.C. § 841(b))(1)(A). The circuit court vacated the defendant's sentence and remanded for resentencing to determine if the safety valve applied to the defendant.

United States v. Stewart, 93 F.3d 189 (5th Cir. 1996). In an issue of first impression, the Fifth Circuit held that the information requirement of USSG §5C1.2(5) is constitutional and does not impose cruel and unusual punishment on the defendant. The district court found that the defendant did not provide the government with all the information available to her because the defendant did not identify the other participants in the metamphetamine operation. The defendant argued that USSG §5C1.2(5) is unconstitutional because it subjects herself and her family to violent retaliation by the people she is required to identify and forces her to work as an informant for the government. The court noted that the Fifth Circuit had addressed similar challenges to USSG §3E1.1. In United States v. Mourning, 914 F.2d 699, 707 (5th Cir. 1996), the court held that USSG §3E1.1 was constitutional. The court stated: "[t]o the extent the defendant wishes to avail himself of this provision, any dilemma he faces in assessing his criminal conduct is one of his own making." Here, the circuit court upheld the constitutionality of USSG §5C1.2(5) stating: ". . . a more lenient sentence imposed on a defendant who gives authorities all of the information possessed by the defendant does not compel a defendant to risk his or his family's lives." The court added that a defendant can refuse the option and receive the statutory sentence under the regular sentencing scheme.

Sixth Circuit

United States v. Adu, 82 F.3d 119 (6th Cir. 1996). The district court did not err in denying defendant's request for a sentence reduction under 18 U.S.C. § 3553(f) and USSG §5C1.2. The district court's factual findings were not clearly erroneous. The defendant asserted that a statement in the presentence report that the he "may meet the provisions of 5C1.2," and the government's recommendation that he receive an acceptance of responsibility reduction under USSG §3E1.1 sufficed to qualify him for a reduction in sentence pursuant to §5C1.2. The defendant also contended that the government had the burden to show that he failed to comply with the fifth criterion set forth in §5C1.2. The government asserted that the defendant was not adequately forthcoming in providing information and, therefore, did not satisfy the fifth criterion.

The circuit court held that the defendant bears the burden of proof to establish compliance, by a preponderance of the evidence, as the burden is allocated to the party seeking a departure. United States v. Rodriguez, 896 F.2d 1031, 1032 (6th Cir. 1990); United States v. Silverman, 889 F.2d 1531, 1535 (6th Cir. 1989). After conducting a fact-specific analysis, the district court concluded that the defendant did not meet the burden to show compliance with the fifth criterion. The circuit court stated that the applicability of a §3E1.1 reduction does not, by itself, establish a §5C1.2 reduction because the "requirement of USSG §5C1.2 that a defendant provide `all information he has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan' is greater than the requirement for an accpetance of responsibility reduction under USSG §3E1.1." *See* United States v. Wrenn, 66 F.3d 1, 3 (1st Cir. 1995); United States v. Ivester, 75 F.3d 182, 185 (4th Cir. 1996). The district court concluded that the defendant did not meet this standard, as he did not provide a "completely forthright account" of his involvement in the offense and the information he provided regarding conduct that was "part of the same course of conduct or of a common scheme or plan" was even less complete. The findings were not clearly erroneous.

United States v. Bazel, 80 F.3d 1140 (6th Cir.), *cert. denied*, 117 S. Ct. 210 (1996). The defendant raised an issue of his eligibility for application of the "safety valve" provisions of 18 U.S.C. § 3553(f) and USSG §5C1.2. The appellate court, using a de novo standard of review because the issue was "the proper construction of the Sentencing Guidelines, and not their application," affirmed the district court's decision that the defendant did not meet the criteria set forth in 18 U.S.C. § 3553(f)(4) and USSG §5C1.2(4). Under these provisions, the defendant must "not [be] an organizer, leader, manager, or supervisor of others in the offense, as determined under the Sentencing Guidelines and [] not [be] engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." After finding that the defendant was an "organizer, leader, manager, or supervisor," the district court held that the defendant was not eligible for the "safety valve." The defendant argued, based on the presence of the conjunctive "and" within the criterion, that the government must prove that the defendant was not an "organizer, leader, manager, or supervisor" and also that he was not engaged in a CCE. The defendant contended that a denial of the safety valve based on the presence of one of the two requirements would be tantamount to replacing the "and" with an "or." The circuit court rejected this argument, concluding that the statute's criteria are "phrased in terms of what the defendant must show was not true of him," rather than what the government was required to prove was true of the defendant. The circuit court also concluded that proper grammatical structure and the legislative history of section 3553(f) supports the district court's conclusion. With respect to legislative history, the court noted that section 3553(f) was intended to grant sentence reductions for individuals deemed merely to be drug "mules," rather than individuals with leadership roles in the offense. Under 21 U.S.C. § 848(c)(2)(A), an individual engaged in a CCE is defined, in part, as an "organizer . . . supervisor[] or any other [kind] of manage[r]." Consequently, the circuit court concluded that to read two separate requirements into the statute would render the "organizer, leader, manager, or supervisor" requirement redundant, because this requirement is included in the CCE definition. The district court's construction of the guidelines was correct.

United States v. Maduka, 104 F.3d 891 (6th Cir. 1996). The appellate court affirmed the district court's interpretation of §5C1.2 criteria and its refusal to allow the defendant to rely on the guideline to avoid the statutory minimum sentence. The defendant argued that the court should have imposed a sentence below the statutory minimum because he qualified for relief pursuant to §5C1.2. The Circuit Court disagreed, and held that the defendant had not provided accurate and complete information to the government concerning the offenses charged in the indictment and, therefore, §5C1.2 was inapplicable. Every court which has considered the issue has held that §5C1.2 requires a defendant to provide full disclosure regarding the immediate chain of distribution, regardless of whether the conviction was for a substantive drug offense or for conspiracy.

United States v. Pratt, 87 F.3d 811 (6th Cir. 1996). The district court did not err in applying the "safety-valve" provision and in recognizing its discretion to depart downward when circumstances warranted a departure. The defendant was arrested with 4 kilos of cocaine in her luggage and pleaded guilty to possession with intent to distribute cocaine. She was subsequently sentenced to the applicable sentencing range within the discretion of the court for a mitigating role in the offense and acceptance of responsibility. The defendant argued on appeal that the district court did not recognize its discretion to sentence her to as little as 24 months based on the language in section 3553(f). The circuit court however held that this language alone does not provide a departure from the sentencing guidelines and affirmed the sentence imposed by the district court.

Seventh Circuit

United States v. Arrington, 73 F.3d 144 (7th Cir. 1996). The district court did not err in refusing to apply the safety valve to the defendant. The defendant received a three-level reduction for acceptance of responsibility under §3E1.1, but the district court determined that the defendant had not truthfully provided all the information concerning the offense under §3553(f)(5). The circuit court concluded that the admission of responsibility to obtain a reduction under §3E1.1(a) is not necessarily sufficient to satisfy section 3553(f)(5) because section 3553 requires more cooperation than §3E1.1. To satisfy section 3553(f)(5), the defendant must provide all information concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan; whereas, §3E1.1(a) requires that the defendant only admit the conduct comprising the offense(s) of conviction—there is no duty to volunteer any information aside from the conduct comprising the elements of the offense. Additionally, section 3553 states that a defendant must disclosure "all information" concerning the course of conduct—not simply the facts that form the basis for the criminal charge.

United States v. Marshall, 83 F.3d 866 (7th Cir. 1996). The circuit court affirmed the district court's refusal to consider the defendant's eligibility to be sentenced below the statutory minimum sentence under the "safety valve" provision of 18 U.S.C. § 3553(f), USSG §5C1.2. The defendant asserted that the district court's reduction of his sentence under 18 U.S.C. § 3582(c) amounted to a new sentence, thus triggering the potential applicability of the safety valve provision. The appellate court did not reach this issue, because the defendant's role adjustment made him ineligible for the "safety valve" reduction. The defendant further contended that the district court incorrectly labeled him as an organizer under USSG §3B1.1(c) for his role in

spraying LSD on blotter paper. He argued that the Supreme Court's decision in Chapman v. United States, 500 U.S. 453 (1991), holding that LSD's potency in its pure form makes it necessary to use some type of carrier medium, implies that applying the drug to the necessary carrier can't qualify one as a manager or an organizer. The defendant also claimed that several of the circuit's own opinions dating back to 1989 endorsed the principle that "a mid-level trafficker must do something more than fine-tune the mode of packaging of the drug" to qualify as an organizer. The circuit court disagreed, and held that the defendant's conduct was not "fine-tuning," but packaging, and his possession of over 11,000 doses of LSD was large enough to warrant a mandatory minimum sentence. The district court correctly labeled the defendant as an organizer, which precluded any subsequent resentencing under the safety valve provision.

Eighth Circuit

United States v. Burke, 91 F.3d 1052 (8th Cir. 1996). The district court did not err in concluding that the defendant was not eligible to be sentenced under the safety valve provision of USSG §5C1.2. To qualify for the safety valve, the defendant cannot possess a firearm or other dangerous weapon "in connection with the offense." 18 U.S.C. § 3553(f)(2). The district court denied the defendant's request for application of the safety valve after finding that he possessed the firearm "in connection with" the drug offense. The defendant argued that there was insufficient evidence to prove he possessed the firearm "in connection with the possession of cocaine conviction. The defendant, however, admitted that his possession of the firearm constituted relevant conduct for purposes of the offense. The Ninth Circuit, in an issue of first impression, held that the government is not required to show that a firearm was actually used to facilitate a felony offense to deny the "safety valve" provision. The circuit court held that "in connection with" should be interpreted consistently with identical language in USSG §2K2.1(b)(5), which gives a defendant an enhancement if he used or possessed a firearm "in connection with" another felony offense. In United States v. Johnson, 60 F.3d 422, 423 (8th Cir. 1995), the court held that the government was not required to show a firearm was actually used to facilitate a felony offense to support an enhancement under USSG §2K2.1(b)(5). *See also* United States v. Condren, 18 F.3d 1190, 1197 (5th Cir. 1994)(firearm possessed "in connection with" drug felony under USSG §2K2.1(b)(5) when firearm was merely present in location near drugs where it could be used to protect them). Here, the circuit court concluded the defendant ". . . was not eligible for sentencing under the safety valve provision."

United States v. Long, 77 F.3d 1060 (8th Cir.), *cert. denied*, 117 S. Ct. 161 (1996). The circuit court affirmed the district court's determination that the defendant did not meet the requirements of USSG §5C1.2 to be eligible for a sentence below the ten year mandatory minimum sentence because she did not timely provide truthful information to the government. USSG §5C1.2(5). The defendant argued that the district court incorrectly interpreted her prior misstatements to the government regarding the illegal purchase of airline tickets for a coconspirator as part of "the same course of conduct or common scheme or plan" as her crack cocaine trafficking. The defendant also argued that her subsequent truthful statements at the sentencing hearing allowed her to qualify for the reduction in sentence. The circuit court disagreed, and found that the defendant's misstatements to the government were clearly related to

the defendant's participation in the crack cocaine conspiracy offense. The defendant's subsequent truthful statements at the time of sentencing did not "cure" the prior misstatements and therefore, she was ineligible for relief under USSG §5C1.2.

Ninth Circuit

United States v. Ajugwo, 82 F.3d 925 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 742 (1997). The district court did not err in excluding parol evidence for the purpose of adding terms to or changing terms of an integrated plea agreement and finding that the government upheld its end of the plea agreement. The plea agreement stated in relevant part, "[i]n the event that USSG §5C1.2 is in effect at the time of sentencing, the government reserves the right to argue at sentencing that §5C1.2 is inapplicable based on the criteria set forth therein, including the right to argue that defendant had an aggravating role as defined in §5C1.2(4), notwithstanding its agreement not to seek the sentence enhancement under §3B1.1 as set forth above." The circuit court rejected defendant's argument for the application of a relaxed standard of ambiguity and found the plea bargain unambiguous. In making this determination, the court adhered to Ninth Circuit precedent and rejected the approach taken by other circuits. *See* United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (holding that the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law). The term "including" should not be read to limit the government's right to appeal defendant's sentence with respect to provisions other than §5C1.2(4). USSG §5C1.2(4) was specifically noted because this was a necessary qualification in light of the government's agreement not to seek an enhancement under §3B1.1. Because the terms were unambiguous, the government did not breach the plea agreement. The circuit court applied a deferential standard of review and found no error in the district court's factual finding with respect to the defendant's failure to be forthcoming with all information pertaining to the crime.

United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996). The Ninth Circuit held that in order to be eligible for the "safety valve," the defendant must truthfully provide all information and evidence pertaining to the offense available to him prior to sentencing, regardless of whether the information was useful or already known to the government. USSG §5C1.2(5). The appellate court also held that the defendant need not give the information to a specific government agent. The appellate court rejected the government's argument that the defendant failed to provide the information to the government because he did not discuss his involvements in a prior incident with the current prosecutor. Noting that "[t]he prosecutor's office is an entity," the circuit court stated that knowledge by one prosecutor was attributable to other prosecutors in that office. Furthermore, remand was necessary because the district court had failed to state its reasons for rejecting application of §5C1.2 at the time of sentencing. A district court's statements at proceedings prior to sentencing cannot provide the basis for appellate review. The appellate court remanded the case to the district court for a review consistent with this holding.

United States v. Sherpa, 97 F.3d 1239 (9th Cir. 1996). The district court did not err in reconsidering facts necessary to the jury verdict in making its safety valve determination. USSG §5C1.2; 18 U.S.C. § 3553(f). The defendant was convicted of possession with intent to distribute heroin and importation of heroin. At sentencing, the parties agreed that the defendant satisfied

the first four elements of the safety valve test, but the government appealed the district court's determination that the defendant met the fifth and final element of truthfully providing all information concerning the offense because the jury had found the defendant guilty of knowingly possessing the drugs, despite his denial at trial. The district court found that the defendant had cooperated with customs agents by providing names and details of his contacts, and that his story was consistent throughout in maintaining his innocence. The circuit court noted that a guilty verdict does not, even when the defendant maintains his innocence, preclude application of the safety valve. The circuit court stated that safety valve determinations are made by judges, rather than the jury, who will be privy to information not introduced at trial: defendant's statements not introduced into evidence, but heard at sentencing; witnesses, evidence or other testimony not presented at trial; and the opportunity to view the defendant in various circumstances apart from the stressful trial setting. Based on the Supreme Court's decision in Koon v. United States, 116 S. Ct. 2035 (1996), that sentencing judges be granted deference for sentencing decisions, the circuit court held that district court judges could reconsider, in making a determination with regard to the safety valve, facts rejected by the jury's verdict.

United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996). In determining an issue of first impression in the circuit, the Ninth Circuit held that a defendant does not have to meet the requirements of USSG §3E1.1 in order to qualify for relief under the safety valve provision of USSG §5C1.2. The defendant confessed to knowledge of the contraband and provided names of his contacts to custom agents. However, at trial and at sentencing, the defendant insisted that he did not know he was carrying drugs. The district court granted the defendant relief under §5C1.2. The government appealed, arguing that the "defendant's recantation of his guilty knowledge" cast doubt on his original confession, and that perjury at trial should automatically defeat a claim for sentence reduction under §5C1.2(5). The circuit court rejected the government's argument stating that: "[t]he safety valve statute is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is §3E1.1." The court added that the safety valve authorizes courts to grant relief to defendants who provide the government with complete information by the time of the sentencing hearing, and that the defendant's recantation does not diminish the information he had earlier provided.

Tenth Circuit

United States v. Hallum, 103 F.3d 87 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1710 (1997). The district court did not err in determining that the defendant did not meet the requirement set forth in USSG §5C1.2(2) that "the defendant did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense." The defendant and two codefendants were arrested as they carried 15 pounds of marijuana to their vehicles parked 200 to 300 yards away. In one of the vehicles Forest Service officers found a .22 rifle, which the defendant asserted was for shooting snakes in that area. The defendant stated that he neither had the intent to use the weapon against another person, nor would he have wanted to. Consequently, the defendant contended that the weapon was not possessed "in connection with the offense."

Noting that the weapon was accessible to the defendant, the defendant was carrying the marijuana to the location of the weapon, and that if the defendant feared the presence of snakes he would have carried the weapon with him, the district court found that it was not "clearly improbable that the weapon was possessed in connection" with the drug offense and, therefore, the defendant was ineligible for the safety valve. The defendant contends that the burden is on the government to prove, by a preponderance of the evidence, the connection element of USSG §5C1.2(2). The defendant further asserts that the "possess" element of USSG §5C1.2 should be analogized to the "use" language of §924(c)(1) as interpreted in Bailey v. United States, 116 S. Ct. 501 (1995) to require the government to show "active employment of the firearm in relation to the underlying offense." The Circuit court rejected this argument stating that the court had recently held that the defendant bears the burden of proving eligibility for the safety valve. United States v. Verners, 103 F.3d 108 (10th Cir. 1996). The Circuit Court also stated that in Bailey the Supreme Court found that "use" constituted more than just "possession" of a weapon. The Circuit court held that the proximity of the firearm to the underlying offense and the "potential to facilitate the offense" was enough to prevent application of the safety valve provision.

United States v. Verners, 103 F.3d 108 (10th Cir. 1996). In an issue of first impression, the Tenth Circuit joined the First, Fourth, Fifth, Sixth, Ninth and District of Columbia Circuits to hold that the defendant has the burden of proving, by a preponderance of the evidence, the applicability of USSG §5C1.2. The defendant contended that she met her burden of proving adequate disclosure of all the information she was aware of on the matter. The circuit court disagreed, finding that the record indicated that the defendant was not completely forthright. She disputed a prior statement she had made pointing to her awareness of drugs in her house (even though she admitted,in written objections, to making the statement). Upon resentencing, the defendant declined to comment on her knowledge of the crime and continued to deny the offense. As there is evidence indicating that the defendant did not disclose all information she had regarding the offense, it was not error for the district court to find that the defendant did not meet her burden of proof under §5C1.2.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

First Circuit

United States v. Gilberg, 75 F.3d 15 (1st Cir. 1996). Reviewing for plain error, the appellate court held that the district court erred in ordering the defendant to make restitution to banks whose loss, although caused by the defendant, was not caused by the specific conduct that was the basis of the offense of conviction. The defendant was convicted of conspiring to make false statements on 21 loan applications to three FDIC-insured financial institutions. Several additional banks, however, had been defrauded during the course of the defendant's criminal conduct. At sentencing, the district court noted that in 1990 Congress broadened the definition of "victim" in the Victim and Witness Protection Act ("VWPA") to include "any person directly harmed by the defendant's criminal conduct," 18 U.S.C. § 3663(a)(2), and ordered the defendant to make restitution to all of the banks defrauded as a result of the criminal conduct. The appellate court held that the retroactive application of the broader definition of the 1990 VWPA amendment to pre-November 1990 conduct violated the Ex Post Facto Clause. In so holding, the court joined the courts of appeals that have already addressed the issue. *See, e.g.*, United States v. Elliot, 62 F.3d 1304, 1313-14 (11th Cir. 1995); United States v. DeSalvo, 41 F.3d 505, 515 (9th Cir. 1994); United States v. Jewett, 978 F.2d 248, 252-53 (6th Cir. 1992).

United States v. Hensley, 91 F.3d 274 (1st Cir. 1996). In considering this issue of first impression, the district court did not err in applying the 1990 amendments to the Victim and Witness Protection Act, which provide that "a victim of an offense that inolves as an element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy or pattern." This amendment replaced prior court rulings which had limited restitution to "loss caused by the specific conduct that was the basis of the offense of conviction." The court required the defendant to make restitution payments to computer companies which were not listed as defrauded in the indictment under which the defendant was convicted, but whose contact with the defendant occurred during the same period and in the same manner as the fraud for which the defendant was convicted. The circuit court rejected the defendant's first argument that the instance of fraud not contained in the indictment did not fit within the "specifically defined" scheme for which he was responsible. The courts of appeals have consistently upheld restitutionary sentences based on evidence sufficient to enable the sentencing court to demarcate the scheme including its "mechanics . . . the location of the operation, the duration of the criminal activity and the methods used to effect it." United States v. Henoud, 81 F.3d 484, 489 n.11 (4th Cir. 1996); United States v. Turino, 978 F.2d 315, 318 (7th Cir. 1992). The determination as to whether there exists a unitary scheme should be based on the "totality of the circumstnaces." Undisputed evidence supported a finding in this case that the defendant undertook to defraud multiple computer companies by renting several drop boxes, placing all orders within a two week period, using interstate wires and paying for the goods with counterfeit instruments in each case.

United States v. Royal, 100 F.3d 1019 (1st Cir. 1996). The district court did not err in assessing $30,000 in restitution under USSG §5E1.1. The defendant was convicted of one count of conspiracy and eight counts of mail fraud related to fraudulent student loan checks. A defendant may only be ordered to pay restitution for losses "caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990). An individual convicted of a conspiracy, however, may be held responsible for conduct of co-conspirators in furtherance of the conspiracy that are reasonably foreseeable. Consequently, the defendant's restitution amount may include more than just the $9870 attributable to the mail fraud counts. The defendant also contended that the district court based its loss determination on events occurring prior to his joining the conspiracy. As the defendant waived this issue by failing to raise it below, he must show an error affecting "substantial rights" to reverse the district court's determination. Noting that the district court ordered the defendant to pay only $30,000 of the original $500,000 restitution amount because of his inability to satisfy the entire amount, the appellate court found that it was unlikely that the figure would drop to less than $30,000 even if it had not included losses attributable to conduct occurring before the defendant joined the conspiracy.

Second Circuit

United States v. Giwah, 84 F.3d 109 (2d Cir. 1996). The district court erred in assessing a restitution order requiring the defendant to pay 15% of his annual gross earnings to the victims of his fraud, because the court failed to consider the factors set forth in 18 U.S.C. § 3664(a) whereby the court shall consider "the amount of loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." The circuit court remanded the restitution order because the sentencing court failed to consider the financial needs of the defendant and his dependents and the court exceeded the PSR recommended payment rate of 10% of the defendant's salary in ordering payment of at least 15% of the defendant's salary. Given the district court's finding that the defendant lacks the ability to pay a fine, the circuit court required a finding as to whether 15% of the defendant's salary is an unduly harsh restitution order. The circuit court noted that the standard of review would have been more deferential if the trial court had provided a rationale reflecting consideration of 3664 factors or a suggested safety valve provision to justify the restitution order.

Third Circuit

United States v. Copple, 74 F.3d 479 (3d Cir. 1996). The district court erred in assessing a restitution order in the amount of $4,257,940 without making a finding with respect to defendant's ability to pay. Before ordering restitution, a court must consider the following factors: 1) the amount of loss, 2) the defendant's ability to pay and the financial need of the defendant and the defendant's dependents, and 3) the relationship between the restitution imposed and the loss caused by the defendant's conduct. United States v. Logar, 975 F.2d 958, 961 (3d Cir. 1992). The circuit court rejected the district court's conclusion that the defendant could pay because he was a college graduate who had been financially successful in the past. Such a finding does not reflect that the availability of financial resources with which to pay. Restitution depends not only on one's earning potential, but also on one's financial obligations. The district court also

failed to make specific findings about the defendant's financial needs despite observing that "the family is in dire straits at this time," a statement which the appellate court did not find to be supportive of the large restitution amount ordered. The sentencing judge needed to explain how the defendant could meet his restitution obligations given his family obligations. Further, the circuit court noted that if the restitution order was an attempt to capture holdings which the defendant had not volunteered, such findings would need to be explicitly noted.

United States v. Kones, 77 F.3d 66 (3d Cir.), *cert. denied*, 117 S. Ct. 172 (1996). The district court did not err in concluding that appellant could not be awarded restitution under 18 U.S.C. §§ 3663-3664, the Victim and Witness Protection Act of 1982 (VWPA). The VWPA provides that a defendant make restitution to "any victim of such offense," which has been interpreted to allow restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990). The VWPA was amended to allow restitution where a scheme, conspiracy, or pattern of criminal activity was an element of the offense of conviction. Under this provision, a victim is entitled restitution if they are harmed directly by the criminal conduct; "direct" is interpreted to require the harm to be closely related to the underlying scheme. The defendant pleaded guilty to mail fraud counts related to insurance claims for never performed medical services. Appellant, who was one of the patients to whom non-existent medical services were claimed, asserts that she is a "victim" due to malpractice by the defendant for proscribing drugs to her to further his underlying scheme. Since the conduct alleged by appellant is not covered by the mail fraud statute the defendant was convicted under, the circuit court held that appellant could not be considered a "victim" under the VWPA.

Fourth Circuit

United States v. Blake, 81 F.3d 498 (4th Cir. 1996). The district court erred in ordering the defendant to pay restitution to the persons from whom he stole credit cards. The defendant plead guilty to one count of fraudulent use of unauthorized access devices in violation of 18 U.S.C. § 1029(a)(2). At sentencing, the district court ordered the defendant to pay restitution to the individuals from whom he stole the credit cards. The defendant argued that their losses should not have been included in the restitution order because the individuals are not victims of his offense of conviction. The Fourth Circuit agreed. Although noting that the Victim and Witness Protection Act ("VWPA") was amended in 1990 to define "victim" as any person directly harmed by the defendant's criminal conduct, the individual is deemed a victim only if the harm results from "conduct underlying an element of the offense of conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction." While a pattern of criminal activity is present in the credit card thefts, the relevant inquiry is with respect to the offense of conviction. The elements of fraudulent use of unauthorized access devices are: 1) the intent to defraud; 2) the knowing use of or trafficking in an unauthorized access device; 3) to obtain things of value in the aggregate of $1,000 or more within a one-year period; and 4) an affect on interstate or foreign commerce. As credit card theft is not included in the conduct that underlies these elements, and the offense of conviction does not include "as an element a scheme, conspiracy, or pattern of criminal activity that encompasses such conduct," the individuals whose

credit cards were stolen are not "victims" for purposes of restitution under the VWPA. Consequently, the district court erred in including losses to such individuals in its order of restitution.

Sixth Circuit

United States v. Gifford, 90 F.3d 160 (6th Cir. 1996). The circuit court reversed and remanded for entry of a revised restitution order because the district court erred in designating a total restitution amount in excess of the loss from the offense for which the defendant was convicted. The defendant, relying on United States v.Webb, 30 F.3d 687 (6th Cir. 1994), argued that the district court lacked the authority to impose any restitution obligation because the obligation ceased upon revocation of his probation. The defendant also argued that the district court erred in failing to credit him for restitution payments that were mistakenly forwarded to the wrong financial institutions. The circuit court rejected the defendant's first argument because the restitution order was a discrete part of the defendant's sentence, rather than a condition of his probation. Additionally, the circuit court did find that the district court had erred in not crediting the defendant for misdirected restitution payments that were sent to the wrong victim. The circuit court held that the defendant should not have to bear the brunt of this mistake. Similarly, the federal courts do not have the authority to force a defendant to pay more than the prescribed amount of restitution which is measured by the amount of the loss caused by the conduct underlying the conviction.

United States v. Scott, 74 F.3d 107 (6th Cir. 1996). The district court erred in its determination of the amount of restitution the defendant was required to pay to the victim bank. Using his position as a bank employee, the defendant defrauded the bank by causing $75,546.22 (including $1,709.00 in interest on the account) to be placed into fictitious accounts that he had created. Prior to termination of his employment with the bank, the defendant was negotiating a transaction for the bank which would have entitled the defendant to a $64,712.40 commission. He completed the transaction, and the bank retained the commission money. Upon conviction, the district court ordered the defendant to pay $74,547 in restitution to the bank. The defendant contends that the appropriate amount of restitution was $7,500, which was the loss to the bank minus the amount of the commission that he was entitled to. Noting that 18 U.S.C. § 3663(e)(1) states that victims should not receive restitution for losses for which they have or will receive compensation, the court stated that the correct question for the court to ask was whether the restitution payment "results in the victim receiving compensation for the loss." Finding that the bank's retention of the commission was partial compensation, the circuit court concluded that the order of restitution was improper. The circuit court noted that while payment via a commission is "unusual," it can nonetheless only be characterized as compensation for the loss. The circuit court remanded the case to the district court "to determine by a preponderance of the evidence the commission [the defendant] would have earned."

Seventh Circuit

United States v. Lampien, 89 F.3d 1316 (7th Cir. 1996). The circuit court vacated and remanded the defendant's restitution order because the district court failed to accurately access the defendant's financial situation at the time of sentencing. The defendant maintained that the

district court abused it discretion in ordering her to pay restitution in the full amount of $498,972.94 and in ordering her to make monthly restitution payments that were impossible for her to meet. The circuit court agreed with the defendant, and held that the restitution order did not adequately reflect the defendant's ability to pay. According to 18 U.S.C. § 3664(a), in determining whether to order restitution and setting the appropriate amount of restitution, the district judge must balance the amount of the loss sustained by the victim with the financial resources of the defendant, the financial needs and earning ability of the defendant, and the defendant's dependants. The circuit court found that the presentencing report budget revealed that the defendant's adjusted gross income made it impossible for her to maintain timely restitution payments of $350 a month. Additionally, the defendant's mental health and the nature of her crime made it unlikely that she would be able to obtain remunerative employment in the future. Moreover, the budget was calculated on the assumption that the defendant would retain possession of her residence which she eventually relinquished as part of her initial lump sum payment.

Ninth Circuit

United States v. Reed, 80 F.3d 1419 (9th Cir.), *cert. denied*, 117 S. Ct. 211 (1996). The district court erred in ordering the defendant to pay restitution under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663-64. The defendant, allegedly in a stolen vehicle, was involved in a high-speed chase with the police, which ended with the defendant crashing into several other vehicles. After the defendant pleaded guilty to being a felon in possession of a firearm, the district court ordered the defendant to pay restitution for the damage caused to the other vehicles. Relying on Hughey v. United States, 495 U.S. 411 (1990), the defendant argued that restitution is not appropriate because under VWPA restitution may be imposed "only for the loss caused by the specific conduct that is the basis of the offense of conviction." The government's contention, however, was based on two Sixth Circuit cases that were implicitly overruled by Hughey and explicitly overruled by subsequent Sixth Circuit cases. The First, Fourth, Ninth, and Tenth Circuits have similarly held that restitution may only be ordered for losses caused by conduct for which the defendant has been convicted. The circuit court noted that the VWPA was amended subsequent to the Supreme Court's ruling in Hughey. However, this amendment, which allows for restitution for losses occurring as a result of a scheme, conspiracy, or pattern of criminal activity, was irrelevant in this case because the defendant was not convicted of such an offense.

§5E1.2 Fines for Individual Defendants

Eighth Circuit

United States v. Hines, 88 F.3d 661 (8th Cir. 1996). The district court erred in imposing a fine of approximately $300,000 based on the fact that the defendant was to receive $1,550,000 in personal injury payments over the next thirty five years. The defendant plead guilty to drug and firearm offenses, and challenged on appeal the amount of the fine, arguing that it was excessive and in violation of the Eighth Amendment. He also argued that its terms left his new wife and

stepson with no financial support during his incarceration, and that the court overlooked his legal obligation to take care of them. *See* Tyron v. Casey, 416 S.W. 252, 260 (Mo. App. 1967). Because the guidelines make no distinction based on when dependants are acquired, the district court erred in ignoring this mandatory sentencing factor and the circuit court remanded for further proceedings. In dicta the court further expressed concern that the record did not permit a comparison between the amount of the immediately payable fine and Hine's present ability to pay a fine.

Eleventh Circuit

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996). The district court erred in ordering that the defendant's fine would be waived if the defendant served his full prison sentence. On appeal, the court held that the sentencing guidelines, with limited exceptions, require the imposition of a fine in all cases. The court noted that there is no exception in the guidelines for the expiration of a fine based on the defendant's service of his full term of incarceration. As a result, the court of appeals could find no support for the district court's decision.

Part G Implementing The Total Sentence of Imprisonment

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

Eleventh Circuit

Tramel v. United States Parole Commission, 100 F.3d 129 (11th Cir. 1996). The United States Parole Commission did not err in using the applicable guidelines range, rather than the lower foreign sentence, as the baseline from which a downward departure would apply. After conviction in the Commonwealth of the Bahamas for possession of a dangerous drug with intent to supply, the defendant was sentenced to four years in prison. The defendant was transferred to the United States to serve his sentence pursuant to the Convention on the Transfer of Sentenced Persons, Council of Europe. The Parole Commission, which had jurisdiction under 18 U.S.C. § 4106A(b)(1)(A) to determine the appropriate release date and period of supervised release, determined that the defendant's entire four year foreign sentence should be served, followed by supervised release for six months. This determination was made by viewing the defendant as if he had been convicted in a United States district court of a "similar offense" subject to the sentencing guidelines. The defendant's guideline range under the sentencing guidelines was determined to be 87 to 108 months, but, due to the harsh prison conditions endured by the defendant in the Bahamas, the parole examiner determined that a downward departure from that range was warranted. However, the examiner rejected the defendant's request for a release prior to completion of the 48-month foreign sentence, finding that the lower foreign sentence was an adequate departure for the torture endured in the Bahamas. In situations in which the applicable guidelines range exceeds the foreign imposed sentence, the Commission is not required to ignore the guidelines range when determining whether a downward departure is warranted. Compare Thorpe v. United States Parole Commission, 902 F.2d 291 (5th Cir. 1990) (upholding refusal to release prior to completion of foreign sentence, despite abuse in foreign prison), with Trevino-Casares v. United States Parole Commission, 992 F.2d 1068 (10th Cir. 1993) (ordering release prior to expiration of entire foreign sentence). While the Commission acknowledged that

abuse at the hands of foreign officials is an appropriate basis for a downward departure, the circuit court found that the facts of the present case did not justify such a departure. The Parole Commission looked to USSG §5G1.1, which states: "Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." "In the end, a foreign sentence does not under §5G1.1(a) displace the applicable guideline range; it is the sentence required by the guidelines, but not a substitute for the guideline range itself."

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

Third Circuit

United States v. Brannan, 74 F.3d 448 (3d Cir. 1996). The district judge correctly looked to USSG §5G1.3(c), but erroneously read it to indicate that a concurrent sentence was required unless it believed an incremental punishment was required, in which case the sentence should run consecutively. Although expressing "discomfort" in doing so, the district judge did not see a need for an incremental punishment and, therefore, imposed a 100-month sentence concurrent with the undischarged term. The circuit court stated that §5G1.3(c) should be applied to determine a sentence had all of the offenses been federal offenses sentenced at the same time. The court noted that such a determination may involve an approximation and can be a departure. The court stated that the guideline is designed to "determine the appropriate sentence, and if as a result the sentence is less than the guideline sentence for the second offense, the guidelines . . . permit—but do not require or even encourage—this result." The court also noted that under the methodology of USSG §5G1.3(c), the court may recognize time already served for the undischarged sentence. The circuit court remanded for resentencing in accordance with the opinion.

United States v. Spiers, 82 F.3d 1274 (3d Cir. 1996). The district court did not err in declining to impose USSG §5G1.3's suggested penalty. At sentencing the district court found that the defendant did not deserve a concurrent sentence. Instead, the district court ordered the defendant to serve a 110-month federal sentence to run consecutively from the completion of his 50-year state sentence. The defendant argued that the reasons offered by the district court when it rejected the suggested penalty were inadequate and that the resulting sentence was impermissibly indeterminate. On appeal, the court reaffirmed its holding in United States v. Holifield, 53 F.3d 11 (3d Cir. 1995), that although a district court must determine the Guideline's suggested "reasonable incremental punishment" according to the commentary's methodology, the imposition of the commentary's suggested penalty remains within the district court's discretion. The court further held that the district court may impose a different penalty as long as it indicates its reasons for imposing the penalty in such a way as to allow the appellate court to see that it has considered the commentary's methodology. In addition, the court held that, because the date upon which practically any consecutive sentence will take effect is uncertain, a consecutive sentence will not be voided simply because its beginning or ending date is indeterminate.

Fifth Circuit

United States v. Alexander, 100 F.3d 24 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1273 (1997). The district court did not err in holding that the language "should be imposed to run consecutively" found in Application Note 6 of USSG §5G1.3 mandates that the sentence for the defendant's offense of illegal purchase of firearms run consecutively to his undischarged state sentence for attempted murder. The court noted that although paragraph (c) of USSG §5G1.3 is a catch-all provision and is designated a policy statement, both paragraph (c) and Application Note 6 are binding upon the court to the extent that they interpret the guidelines and do not conflict with the guidelines or with any statutory directives. *See* Williams v. United States, 503 U.S. 193 (1992). Such policy statements are binding upon the court because they inform the uniform application of the guidelines. The defendant argued that the language was not mandatory, in that it says "should," as opposed to "shall," and that such an interpretation conflicts with the circuit's prior decision in United States v. Hernandez, 64 F.3d 179, 182 (5th Cir. 1995). In rejecting these arguments, the appellate court noted that the word "should" is construed as mandatory, given the absence of any qualifications or reservations. Further, the facts of this case are distinguishable from those in Hernandez because the note at issue in that case contained limiting language that the methodology it set forth was meant to "assist the court in determining the appropriate sentence" and need be followed only to "the extent practicable." Because there is no limiting language in this case, nothing in the Hernandez case precludes the court from construing this note as mandatory.

United States v. Richardson, 87 F.3d 706 (5th Cir. 1996). The district court did not err in imposing a consecutive sentence in contradiction to the PSR recommendation that USSG §5G1.3 applied and mandated concurrent sentences. The defendant argued that the imposition of a consecutive sentence in this case was an abuse of discretion because the judge failed to consider factors set forth in 18 U.S.C. § 3553(a) required to be considered under 18 U.S.C. § 3584. Although the judge did not explicitly refer to section 3553 in his opinion, he did state orally that he considered "the sentencing objectives of punishment and deterrence." The appellate court accepted this statement as implying a general consideration on the part of the district court of the different factors embodied in section 3553. The statement was not detailed and specific, but it was not so lacking as to evince a disregard of section 3553 factors. Therefore, the district judge did not abuse his discretion in imposing consecutive sentences.

Seventh Circuit

United States v. Goudy, 78 F.3d 309 (7th Cir. 1996). In an issue of first impression, the Seventh Crcuit held that the district court did not err in sentencing the defendant to a split consecutive-concurrent sentence in which the concurrent sentence was shorter than that period of time remaining on the undischarged sentence. The defendant was serving a 57-month federal sentence in Wisconsin, with 30 months remaining at the time of sentencing in the instant case. Pursuant to USSG §5G1.3(c), the district court sentenced the defendant to a 37-month sentence, 16 months to run concurrently with the remaining 30-month Wisconsin sentence and 21 months to run consecutively. The defendant contends that the maximum allowable sentence for the instant offense was 30 months concurrent and 16 months consecutive, as imposition of a split sentence must begin at the time of sentencing. Noting that defendant's contention is not supported by either §5G1.3(c) or the relevant commentary, the appellate court found that the district court was within its authority in calculating such a sentence. The court also found support for its sentence

in comments made by John R. Steer, General Counsel, United States Sentencing Commission, "suggest[ing] that a court might impose a partially concurrent sentence commencing at a future date when neither a consecutive not a concurrent sentence would result in the appropriate punishment." Letter of John R. Steer, General Counsel, United States Sentencing Commission, to Tony Garoppolo, Deputy Chief U.S. Probation Officer, United States District Court for the Eastern District of New York 7-9 (Jan. 6, 1994). The circuit court further indicated that §5G1.3(c), as most recently amended, explicitly authorizes such sentences to achieve a reasonable punishment for the instant offense. Also, note 4(B) of 5G1.3(c) permits the court to specify when the partially concurrent sentence shall begin. The court considered these latter two arguments to the extent that they are set forth as clarifying changes to the guidelines. The circuit court concluded that the district court was within its authority in sentencing the defendant and, therefore, affirmed the district court's sentence.

United States v. Plantan, 102 F.3d 953(7th Cir. 1996). The district court properly imposed a 24-month consecutive sentence upon the defendant based on his criminal history. The defendant argued that the district court erred in refusing to impose his sentence concurrently to the sentence he already was serving for a 1992 offense, in conformity with Application Note 3 of USSG §5G1.3(c), such that he would only need to serve an additional eight months in jail. The court rejected this argument, holding that the sentencing guidelines applied to the defendant provide a formula for determining the sentence of a defendant who is already incarcerated. This formula was constructed to avoid sentencing disparity by ensuring that the total sentence for two offenses is the same regardless of whether the defendant was charged and convicted of the offenses at the same or different times. Offenses are often grouped for sentencing purposes when a defendant is charged for all offenses at the same time. A defendant charged separately for each offense ordinarily would serve significantly more time for the same acts. The guidelines avoid this result by providing a methodology to approximate the sentencing result if the offenses had been grouped as they would be if the defendant were charged for all offenses at once. The Application Note provides that, in some circumstances, such incremental punishment can be achieved by the imposition of a sentence that is concurrent with the remainder of the unexpired term of imprisonment. In the instant case, the judge imposed the entire sentence consecutively to the first sentence after determining that the former would not provide for a sufficient incremental penalty in light of the fact that the crime occurred three years after the one for which he was already incarcerated, and because of the extent of the defendant's ten-year criminal history.

Ninth Circuit

United States v. Scarano, 76 F.3d 1471 (9th Cir. 1996). The court did not err in imposing consecutive sentences upon defendant convicted of two counts of mail fraud despite the fact that one offense was pre-guidelines and one offense was post-guidelines. The court rejected both defendant's argument that the imposition of consecutive sentences violated the Double Jeopardy clause and his argument that consecutive sentences violated the sentencing guidelines. The defendant argued that the calculation of loss of his sentence to include an amount of loss previously counted toward a pre-guidelines sentence violated the Double Jeopardy clause. However, the court relied on the decision in Witte v. United States, 115 S. Ct. 2199 (1995),

which held that the use of relevant criminal conduct to enhance a penalty for an offense of conviction within statutory limits does not constitute "punishment" for the relevant conduct, to reject this argument. The court also rejected defendant's argument that aggregating the amount of loss for both the pre- and post-guidelines offenses was equivalent to treating both offenses as if they were post-guidelines offenses. Precedent supported the finding that courts have discretion to impose either concurrent or consecutive sentences upon a defendant convicted of a preguidelines offense. The court noted the factors to be considered in exercising this discretion to include the following: 1) nature of the offense, 2) history and characteristics of the defendant, 3) the need for deterrence, and 4) available sentences under the guidelines.

Part H Specific Offender Characteristics

§5H1.6 Family Ties and Responsibilities

District of Columbia Circuit

United States v. Dyce, 78 F.3d 610 (D.C. Cir. 1996). The appellate court vacated the district court's downward departure sentence, agreeing with the government that the defendant's family responsibilities and the totality of the circumstances were not so exceptional as to support the departure. The defendant was convicted of possession with intent to distribute crack cocaine, and asserted that her role was that of a courier. Although her guideline range was 121 to 151 months imprisonment, the sentence could not exceed the statutory limit of 60 months imprisonment. The district court departed to five years of probation, with the condition that she serve two years in a residential treatment program, followed by one year in a community correctional facility or halfway house. Strongly moved by the fact that the defendant had three children under the age of four years, one a nursing infant, the district court found that the needs of the innocent young children presented extraordinary family circumstances. He also found that a downward departure was supported by the totality of the circumstances, among them the fact that the defendant had no criminal record or history of substance abuse, she expressed remorse, explained her role, and her crime was an aberrational act. In addressing the issue of whether extraordinary family circumstances were present, the appellate court stated that the district court's determination would be "entitled to considerable respect on appeal." Therefore, it was not necessary to await the outcome of the Supreme Court's decision on the standard of review in Koon v. United States, which was pending (and subsequently decided at 116 S. Ct. 2015 (1996)). In examining the record, the court noted that the district court offered no reasons distinguishing this case from the ordinary one wherein a single mother is sentenced for a drug offense under the guidelines. "[T]he only factor that even arguably removes this case from the relevant heartland of cases is Dyce's breast-feeding of her youngest child." This could be accomodated by delaying the commencement of the sentence until the baby was weaned. The appellate court could find nothing to suggest that the family circumstances were "in any degree" extraordinary. "To the contrary, hers were demonstrably better than those of may defendants who have been denied departures for extraordinary family responsibilities." In examining the totality of the circumstances, the appellate court found that the factors relied upon by the court were already considered by the guidelines or were not properly invoked in this case. The appellate court then considered the assertion that the defendant's actions were an "aberration," and joined the Fifth and Seventh Circuit in concluding that this "generally contemplates a spontaneous and seemingly

thoughtless act rather than one which was the result of substantial planning." United States v. Carey, 895 F.2d 318, 325 (7th Cir. 1990); United States v. Burleson, 22 F.3d 93, 94 (5th Cir. 1994) (same); *but see* United States v. Takai, 941 F.2d 738, 743 (9th Cir. 1991) (court may consider an "aberrant behavior spectrum" consisting of a series of acts, not just a single spontaneous act). The defendant's reservation for a train trip to carry the drugs was made two days before she boarded. She had time to consider her actions. "It may have been out of character for her to have succumbed to the temptation of easy money for wrongful acts, but we cannot see how this would distinguish her case from that of others who embark on their first criminal venture." The case was remanded for resentencing.

Part K Departures

§5K1.1 Substantial Assistance to Authorities

Second Circuit

United States v. Brechner, 99 F.3d 96 (2d Cir. 1996). Upon the government's appeal, the appellate court vacated the sentence and remanded the case to the district court for resentencing. The district court erred in finding that the government breached its cooperation agreement in refusing to file a motion for downward departure for the defendant's substantial assistance. After being charged with tax evasion, the defendant entered into a written cooperation agreement with the government to provide substantial assistance in return for a downward departure under USSG §5K1.1. As part of the terms of that agreement, the defendant promised to provide "truthful, complete, and accurate information." The defendant actively helped the government in a related bribery investigation which led to an arrest. However, during a debriefing session with the government, the defendant denied receiving kickbacks related to his tax fraud scheme. At that point, defendant's attorney interrupted the session to speak with his client in private, and upon resuming the session, the defendant admitted receiving such payments. Based on the defendant's original misrepresentation and the difficult prospects of prosecuting the arrested individual with the defendant as the sole witness, the government declined to move for a downward departure. The district court ruled that the government's refusal to file the motion was in bad faith, and granted defendant's motion for specific performance. In examining the government's appeal, the standard of review requires the court to examine "if the government has lived up to its end of the bargain," and whether it acted fairly and in good faith. The cooperation agreement specifically released the government from its obligation to file a §5K1.1 letter if the defendant gave false information. Based on this, the appellate court noted that the defendant failed to live up to his end of the bargain by falsely denying the receipt of kickbacks. The district court, however, had found this breach to be immaterial because the defendant subsequently corrected his misstatements. The appellate court disagreed, finding that the false statements undermined the defendant's credibility as a future witness. The fact that the defendant would be the only government witness in the subsequent prosecution made his lack of credibility even more problematic. The defendant asserted that the government knew at the time of the agreement that a convicted "tax cheat" would be the sole witness. However, the appellate court found that the government, at the time of agreement, did not know that the defendant would lie during

cooperation. In any event, the agreement expressly allowed for the government's release from the agreement in such a situation, and thus the government was acting within its rights.

Seventh Circuit

United States v. Senn, 102 F.3d 327 (7th Cir. 1996). The district court properly accepted the government's modification of its motion to reduce the defendant's sentence for substantial assistance rendered to the government. In its original motion, the government allowed for a 50% or 14-level reduction with respect to the conspiracy count to 24 months, which in concert with the mandatory 60-month firearms charge, would result in a total sentence of 84 months. However, the Supreme Court decision in Bailey v. United States, 116 S.Ct. 501 (1995) invalidated the government's theory of firearm use for the 18 U.S.C. § 924(c) mandatory 60 month count, and the government moved to dismiss that count, and modify its sentence recommendation. The government adjusted its recommendation to maintain a reduction that would be 50% from the low end of the guideline range, but it changed its recommendation to a seven level reduction to recognize the reduction occaisoned by the dismissal of the firearms charge. The district court followed that revised recommendation. The defendant argued that the government violated his right of due process by failing to provide to the court an accurate, good faith assessment of his level of cooperation in its revised motion for downward departure. The appellate court found the defendant's arguments without merit, and held that the government's rationale for amending its motion for a downward departure was cogent and consistent with the reasoning laid out in its initial motion. The government's responsibility is to describe the defendant's cooperation, to evaluate the extent of the defendant's assistance, and to qualify, in some rationale fashion, the value of that cooperation by measuring the extent of the departure from the guidelines it believes reflects meaningfully the defendant's assistance. Furthermore, the appellate court noted that in accomplishing this task, it is not at all unusual for the government to recommend a sentence reduction based on a percentage of the defendant's total sentence.

§5K2.0 Departures

United States Supreme Court

Koon v. United States, 116 S. Ct. 2035 (9th Cir. 1996). The Supreme Court unanimously held that an "appellate court should not review the [district court's] departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion." In applying this standard, the court noted that "[l]ittle turns, however, on whether we label review of this particular question [of whether a factor is a permissible basis for departure] abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The court divided, however, in its determination of whether the district court abused its discretion in relying on the particular factors in this case. The majority of the court held that the Ninth Circuit erroneously rejected three of the five downward departure factors relied upon by the district court. The district court properly based its downward departure on 1) the victim's misconduct in provoking the defendants' excessive force, §5K2.10; 2) the defendants' susceptibility to abuse in prison; and 3) the "significant burden" of a federal conviction following a lengthy state trial which had ended in acquittal based on the same

underlying conduct. However, the district court abused its discretion in relying upon the remaining two factors, low likelihood of recidivism, and the defendants' loss of their law enforcement careers, because these were already adequately considered by the Commission in USSG §§2H1.4 and 4A1.3. The judgment of the Court of Appeals for the Ninth Circuit was affirmed in part and reversed in part, and the case was remanded for further proceedings.

District of Columbia Circuit

United States v. Anderson, 82 F.3d 436 (D.C. Cir.), *cert. denied*, 117 S. Ct. 375 (1996). The district court correctly determined that it had no power to depart from the guidelines' 100:1 ratio. The fact that Congress rejected the Sentencing Commission's recommendations to change the ratio, and invited the Sentencing Commission to study the issues further does not invalidate the state of the law at present.

First Circuit

United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996). In considering an issue of first impression, the First Circuit held that to determine whether an offense constitutes a single act of aberrant behavior, the court should review the totality of the circumstances. Two different standards have been employed by the circuit courts to determine whether the conduct at issue constitutes aberrant behavior. The narrow view finds aberrant behavior only for "spontaneous or thoughtless" acts, rather than actions taken after substantial planning. *See* United States v. Marcello, 13 F.3d 752 (3d Cir. 1994); United States v. Glick, 946 F.2d 335 (4th Cir. 1991); United States v. Williams, 974 F.2d 25 (5th Cir. 1992), *cert. denied*, 507 U.S. 934 (1993); United States v. Carey, 895 F.2d 318 (7th Cir. 1990); United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). The more expansive view calls for the court to make its determination based on the totality of the circumstances. *See* United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (affirming downward departure based on a lack of pecuniary gain, no criminal record and enticement by a government agent); *see also* United States v. Fairless, 975 F.2d 664 (9th Cir. 1992) (affirming downward departure based on defendant's manic depression, suicidal tendencies and recent unemployment); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (finding long-term employment, lack of abuse or prior distribution of controlled substances and economic support of family as factors indicating an aberration). The First Circuit held that the court should review such departure determinations under the totality of the circumstances. The circuit court specifically stated a few of the factors that may be considered: defendant's pecuniary gain, charitable activities, prior benevolent actions, and steps taken to mitigate the effects of the crime. The circuit court noted that spontaneity and thoughtlessness may be considered but are not required elements, and that status as a first-offender may be considered, but would not warrant a departure in and of itself. The circuit court also noted that "single acts of aberrant behavior" can include conduct involving multiple criminal acts. The circuit court remanded the case to the district court for its determination of whether the defendant's actions constituted aberrant behavior under the totality of circumstances standard.

United States v. Hardy, 99 F.3d 1242 (1st Cir. 1996). The district court did not err in granting an upward departure based upon either the defendant's criminal history involving similar offenses or the type of weapons involved in the offense. With respect to defendant's prior criminal activity, USSG §4A1.3 specifically encourages upward departures based on reliable information that a defendant previously engaged in prior similar adult criminal conduct not resulting in a conviction. Given the defendant's recent, persistent and escalating record of violent behavior, the appellate court found it was not an abuse of discretion for the sentencing court to depart upward. In reaching this conclusion, the circuit court rejected the argument that the Commission's decision against making weapon type a specific offense characteristic under §2K2.1 precluded a judicial finding that some types of weapons are more dangerous than others. In this particular case, the use and indiscriminate disposal of multiple weapons elevated the dangerousness of the offense, in keeping with the fact that heightened dangerousness occasioned by the usage and indiscriminate abandonment of the firearms is an encouraged factor for departure. Because this departure was based on both §4A1.3 and §5K2.0, the court's departure from Level 18, Criminal History Category III to Level 18, Criminal History Category VI was justified as an unguided departure.

Second Circuit

United States v. Delmarle, 99 F.3d 80 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1097 (1997). The district court did not err in departing upward in calculating defendant's sentence for knowingly transporting pictures of minors engaged in sexually explicit conduct based upon the following factors: 1) use of a computer to transfer child pornography for the purpose of soliciting a minor to engage in sexual activity; and 2) underrepresentation of his criminal history, in that his prior convictions for similar activities not counted under the guidelines. One conviction was older than the ten-year guideline limit, and one was a foreign conviction. Because the abuse of discretion standard is appropriate in evaluating a court's decision to depart, the circuit court affirmed the lower court's sentence. The lower court is in a better position to evaluate the underlying conduct and to determine whether it was outside the "heartland" considered by the guidelines. With respect to the departure for use of the computer, defendant argued that this activity was not outside of the "heartland" of cases contemplated under USSG §2G2.2, because that guideline is triggered by 18 U.S.C. § 2252, which makes it unlawful to transport a photograph of a minor engaging in sexually explicit conduct "by any means including the computer." The court rejected defendant's argument because the aspect of defendant's conduct that warranted departure was the use of the computer to solicit minors, as opposed to the mere transmission of photographs. The defendant's intent to solicit was evidenced by the messages he attached to the pictures. With respect to the criminal history departure, the defendant argued that the conduct underlying his 1970 misdemeanor conviction for unlawfully dealing with a minor and his Italian conviction for sexual misconduct with three young boys was not similar and the Italian conviction did not satisfy due process. The court rejected the defendant's argument with respect to the 1970 conviction because the presentence report indicated that the underlying conduct involved a 15 year old incapable of consent to sexual contact. That conduct was not identical to this case, but was sufficiently similar because it involved sexual contact with a minor. The court also rejected the defendant's argument with respect to the Italian conviction, because any alleged constitutional infirmities associated with a foreign conviction do not preclude a departure if there exists reliable information about the underlying conduct from other sources. In this particular

case, the sentencing court relied on an investigative report of the United States Military Police, undertaken when the defendant was working in Italy as a civilian employee for the United States military, which revealed that he had used his own children to lure neighborhood children into his home and had molested these children. The sentence was affirmed.

United States v. Londono, 76 F.3d 33 (2d Cir. 1996). The district court erred in granting a downward departure to allow the defendant and his wife to try to have a child during the wife's remaining childbearing years. The defendant pleaded guilty to conspiracy to distribute and possess cocaine. Because of extraordinary family circumstances, USSG §5H1.6, the district court departed from the applicable guideline range of 108-135 months to 37 months imprisonment. The circuit court held that although family responsibilities may present such "extraordinary circumstances" as to warrant a downward departure, the departure sought by the defendant would benefit chiefly himself. Incarceration inevitably impacts on family life and family members. Because "federal prison regulations do not provide for conjugal visits—a fact we assume is known to the Sentencing Commission—the inability to conceive children is therefore incidental to imprisonment." The court concluded that district courts should not depart based on purely personal issues of family planning.

Fourth Circuit

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997). The district court abused its discretion in granting a downward departure based on the defendant's "extraordinary restitution." The defendant, through the generosity of friends, repaid the bank the $250,000 she had embezzled to settle her civil liability. The district court determined that her efforts merited a five-level departure for "extraordinary restitution." The government appealed, arguing that the defendant's restitution was not "extraordinary." The circuit court stated that the standard of review for departure cases is now a "unitary abuse of discretion standard." Koon v. United States, 116 S. Ct. 2035 (1996). The circuit court concluded that because the guidelines already take restitution into consideration in the context of a sentence reduction for acceptance of responsibility, restitution is a discouraged factor that can support a departure only if the restitution in a particular case demonstrates an extraordinary acceptance of responsibility. *See* United States v. Hendrickson, 22 F.3d 170 (7th Cir.), *cert. denied*, 115 S. Ct. 209 (1994). Here, the court found that the defendant's restitution was not extraordinary as it equaled less than half the amount she embezzled and came not from her funds, but from the generosity of friends. Therefore, when compared to the efforts of defendant's in other cases, the district court abused its discretion in finding that the circumstances merited departure.

United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996). The Fourth Circuit, using a five-part test, found that none of the six factors underlying the district court's decision justified a departure and, thus, concluded that the district court abused its discretion in granting a five-level departure. The district court had departed downward based on a combination of factors, and the government appealed the departure. The circuit court prescribed the following analysis for sentencing courts to follow when deciding whether to depart, and clarified the standards for review of departure decisions: 1) The district court must first determine the circumstances and

consequences of the offense of conviction, a factual inquiry reviewed for clear error; 2) the district court must decide if the circumstances appear "atypical" and potentially take the case out of the heartland, a purely analytical determination never subject to appellate review; 3) the district court must classify each factor as "forbidden, encouraged, discouraged, or unmentioned," a matter of guideline interpretation reviewed de novo in the context of the ultimate review for abuse of discretion; 4) factors that are "encouraged, discouraged, or unmentioned" require further analysis. Encouraged factors, if not taken into account by the guidelines, are usually appropriate bases for departure. Discouraged factors are an appropriate basis for departure only in exceptional cases. Unmentioned factors may justify a departure if the factor takes the case outside the guideline's heartland. Finally, the district court must consider whether the circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure is warranted. The circuit court, relying on this analysis, held that none of the factors underlying the district court's decision justified a departure and concluded that the court abused its discretion in granting a five-level departure. The court held: 1) defendant's alcohol problem was a forbidden basis for downward departure; 2) defendant's 20 years of unblemished service to the United States, nor responsibilities to his wife and son, who had medical problems, provided bases for a departure downward; 3) district court committed legal error when it departed downward on the ground that the defendant did not commit serious fraud; 4) determination that all law officers suffer disproportionate problems when incarcerated was not proper basis for departure; and 5) finding that the defendant's status as a convicted felon was sufficient punishment was not proper basis for downward departure.

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996). The district court erred in departing downward based on the defendant's exposure to civil forfeiture. The defendant was convicted of submitting fraudulent claims to Medicaid and Medicare. Under the plea agreement, the defendant was to pay restitution of $545,000. However, in a consent judgment in a civil forfeiture action, the defendant agreed to forfeit over $600,000 which was credited against the restitution in the plea agreement. The district court departed downward under USSG §5K2.0 because the defendant had payed a sum "beyond" complete restitution. The circuit court reversed, holding that exposure to civil forfeiture is not a basis for a downward departure. The court noted that forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment. Additionally, civil forfeiture actions do not suggest any reduced culpability or contrition on the part of a defendant that might warrant a sentence reduction. The circuit court concluded that the district court's departure was an error of law and therefore, an abuse of discretion.

Fifth Circuit

United States v. Fonts, 95 F.3d 372 (5th Cir 1996). The district court did not err in refusing to depart based on the disparity between crack cocaine and powder cocaine. The defendant pleaded guilty to delivery of crack cocaine and was sentenced to fifty-seven months. The defendant appealed, arguing that the district court erred in refusing to make a downward departure based on the different treatment relating to crack cocaine and powder cocaine offenses

and the disparate impact the sentencing guidelines have on minorities. USSG §5K2.0. The Fifth Circuit, joining with the First, Fourth, Seventh, Eighth, and District of Columbia Circuits, held that a district court can not depart based on the disparity between crack cocaine and powder cocaine. *See* United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 117 S. Ct. 201 (1996); United States v. Ambers, 85 F.3d 173 (4th Cir. 1996); United States v. Booker, 73 F.3d 706 (7th Cir. 1996); United States v. Higgs, 72 F.3d 69 (8th Cir. 1996); United States v. Anderson, 82 F.3d 436 (D.C. Cir. 1996). The circuit court noted that granting a downward departure based on the disparity between the penalties for crack cocaine and powder cocaine offenses would be second-guessing Congress' authorities. The court stated: "it is not the province of this Court to second guess Congress' chosen penalty. That is a discretionary legislative judgment for Congress and the Sentencing Commission to make." (quoting United States v. Cherry, 50 F.3d 338 (5th Cir. 1996). The circuit court added: "[t]his court, as well as others, has declined to question the penalties for crack cocaine chosen by Congress, and we refuse to do so in this instance." Thus, the court concluded that the defendant's disparate impact argument must fail.

Seventh Circuit

United States v. Pullen, 89 F.3d 368 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 706 (1997). The district court did not err in refusing to grant the defendant a downward departure on the basis of extreme physical and sexual abuse as a child given the holding in Koon v. United States. The defendant argued that a departure would be in keeping with the Sentencing Reform Act's goal of retribution. The government responded that the guidelines consider the effect of a childhood history of abuse resulting in diminished capacity to comply with the law. In support of this argument, the government cited the following United States Sentencing Guidelines provisions: 1) §5H1.3 (policy statement) provides that "mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range" except as set forth in 5K2.0; 2) §5H1.12 (policy statement) provides that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range"; and 3) §5K2.13 allows diminished mental capacity as the basis for a departure only in the case of a non-violent offense. Because diminished capacity is a discouraged factor, as opposed to a prohibited factor, it may be used as a basis for departure "if the factor is present to an exceptional degree." Koon v. United States, 64 U.S.L.W. 4512, 4516 (1996). Limiting the application of this departure to the most extreme situations is important for the continued efficiency and consistency of the guidelines. The circuit court noted that the determination of whether a particular case is extraordinary is committed to the discretion of the trial judge. Given the evidence presented by the defendant, it would have been an abuse of discretion for the district court to have granted a departure in this case.

Eighth Circuit

United States v. Weise, 89 F.3d 502 (8th Cir. 1996). The district court erred in granting a downward departure to the defendant under USSG §5K2.0. The defendant, who lives on the Red Lake Reservation, was convicted of second degree murder for stabbing an individual after a night of drinking. The district court departed downward based on the difficult Reservation conditions,

the defendant's consistent employment record and unique family ties and responsibilities. The district court also determined that a departure was warranted based on the fact that the conduct was a single act of aberrant behavior. The circuit court reviewed this decision under the abuse of discretion standard. The circuit court stated that departures based on trying conditions on a reservation were not authorized if the defendant does not demonstrate that he himself had struggled under difficult conditions. *See* United States v. Haversat, 22 F.3d 790, 795 (8th Cir. 1994); United States v. One Star, 9 F.3d 60, 61 (8th Cir. 1993). In short, merely living on a reservation where conditions are difficult for some is not dispositive. The circuit court found that the defendant did not demonstrate personal difficulties on the reservation, and that the presentence report showed a good family upbringing and no evidence of physical or sexual abuse. Finding that it could not determine what made the defendant's case different from the typical case, the circuit court remanded for a "refined assessment" of the issue. On the issue of departure based on aberrant behavior, the circuit court stated that aberrant behavior is more than being out of character and contemplates an action that is "spontaneous and seemingly thoughtless." United States v. Garlich, 951 F.2d 161, 164 (8th Cir. 1991). Noting that the defendant, unprovoked, went and got a knife from across the room and returned to stab the victim, the circuit court found that the conduct was not a single act of aberrant behavior.

Ninth Circuit

United States v. Charry Cubillos, 91 F.3d 1342 (9th Cir. 1996). Upon the government's appeal, the circuit court determined that the district court erred in departing downward three offense levels. The circuit court held that the departure was inappropriately based on a belief that the severity of the defendant's sentence was related to her status as a deportable alien. The defendant maintained that her sentence would be increased due to her ineligibility for incarceration at a minimum security facility or in community confinement, alternatives only offered to those not classified as deportable aliens. The government maintained that deportable alien status was never an appropriate basis for departure. The appellate court agreed, but noted that following the Supreme Court's decision in Koon v. United States, 116 S. Ct. 2035 (1996), decided after the district court's opinion, the federal courts can no longer categorically proscribe a basis of departure—unless the Commission has proscribed consideration of that factor. Because "the Guidelines do not mention `increased sentence severity resulting from deportable alien status' as a factor in sentencing," the sentencing court must follow the procedure established by Koon in determining whether this unmentioned factor warrants a departure. "[T]he sentencing court must, after considering the `structure and theory of both relevant and individual Guidelines taken as a whole,' decide whether it is sufficient to take the case out of the Guideline's heartland," bearing in mind that such departures not mentioned in the guidelines will be "highly infrequent." The case was remanded for the district court to make a "refined assessment" of the facts in accordance with this opinion.

United States v. Chastain, 84 F.3d 321 (9th Cir. 1996). In considering an issue of first impression, the Ninth Circuit joined the Second, Fourth, Sixth and Seventh Circuits in holding that a judge may not depart downward to facilitate the defendant's payment of restitution. *See* United States v. Broderson, 67 F.3d 452, 458 (2d Cir. 1995); United States v. Bolden, 889 F.2d 1336, 1340 (4th Cir. 1989); United States v. Harpst, 949 F.2d 860,863 (6th Cir. 1991); United States v. Seacott, 15 F.3d 1380, 1388-89 (7th Cir. 1994). After being convicted of willfully

failing to timely pay income tax, the defendant was granted by the magistrate judge a two-month departure from his sentence to facilitate payment of approximately $118,000 in restitution. This departure was based on the fact that a lengthy sentence would ruin the defendant's law practice, making it even more difficult for the defendant to pay the restitution. Upon the government's cross-appeal, the district court vacated the departure. The defendant asserted that USSG §5K2.0, coupled with 18 U.S.C. § 3553(a)(7), justifies such a departure. The circuit court rejected the defendant's argument on three grounds. First, the circuit court found that restitution was already considered in USSG §3E1.1, which states in the commentary that restitution voluntarily paid before adjudication of guilt may be considered as a basis for a two-offense level decrease. Second, the circuit court stated that a downward departure based on ability to pay restitution was implicitly considered in §5H1.10, which states that socio-economic status is irrelevant to sentencing determinations. The circuit court reasoned, therefore, that a departure to ease the defendant's restitution burden would lead to the socio-economic sentencing disparity that the Guidelines were implemented to end. Third, the circuit court noted that a defendant's ability to pay restitution was a consideration in setting the restitution order. However, the fact that this determination is done apart from the sentencing itself indicates the Commission's desire to keep these determinations from affecting one another. The circuit court noted further that 18 U.S.C. § 3553(b), rather than section 3553(a)(7), which merely calls for the court to consider restitution in determining an appropriate sentence within the guideline range, controls departures from the range. Finding that the magistrate was without authority to depart as he did, the district court's decision was affirmed.

Eleventh Circuit

United States v. Allen, 87 F.3d 1224 (11th Cir. 1996). Upon the government's cross-appeal, the appellate court held that the defendant's responsibilities as primary (but not sole) caretaker of her 70-year-old father who suffers from Alzheimer's and Parkinson's diseases were not so extraordinary as to warrant a downward departure from the guidelines under USSG §5K2.0. The district court's five-level downward departure resulted in defendant being sentenced to one hour of imprisonment followed by 36 months of supervised release, instead of the guideline sentence of 12-18 months imprisonment. The appellate court agreed with the government that although the defendant's situation was difficult, the imposition of a prison sentence normally disrupts family relationships. *See* United States v. Mogel, 956 F.2d 1555 (11th Cir.), *cert. denied*, 506 U.S. 857 (1992) (rejecting downward departure where defendant had two minor children to support and a mother living with her). The appellate court noted that the sentence imposed must be within the guidelines range unless "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." As stated in USSG §5H1.6, the Commission concluded that family circumstances do not ordinarily justify a downward departure. The appellate court acknowl-edged the district court's unique "feel for the case," but noted that unfettered discretion by district court judges would lead to sentencing disparity.

United States v. Miller, 78 F.3d 507 (11th Cir. 1996). The district court did not make sufficient factual findings in granting the defendant a downward departure, and therefore, the

sentence was vacated and remanded. The district court granted the defendant a seven-level downward departure on the grounds that the Commission failed to adequately consider the impact of USSG §2S1.2(a) upon an attorney who derives knowledge of the source of the criminally derived property through a legitimate attorney-client relationship. *See* USSG §5K2.0. The government asserted that the defendant's status is taken into account through USSG §3B1.3 and, therefore, is adequately considered by the Commission. The defendant's argument rested on an exemption phrase amended into 18 U.S.C. § 1957(f)(1) stating "[T]he term `monetary transaction' . . . does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." As this amendment was never reflected in USSG §2S1.2, the appellant asserted that the Commission did not consider the effect that knowledge obtained via the attorney-client relationship can have on sentencing. The circuit court vacated the sentence due to the insufficient factual findings supporting the departure and remanded with instructions for the district court to explicitly make factual findings as to the circumstances warranting a departure, to state whether these circumstances are considered by the guidelines and are consistent with the guidelines goals, and if a departure is deemed appropriate, to state reasons justifying the extent of the departure.

United States v. Miller, 71 F.3d 813 (11th Cir.), *cert. denied*, 117 S. Ct. 123 (1996). The district court improperly departed downward by sentencing the defendant for conspiring to possess powder cocaine rather than crack, which was the substance delivered and charged in the indictment. The defendant argued that he was "trapped into supplying crack." The circuit court stated that the district court made no findings, and a careful review of the record does not reveal any mitigating circumstances justifying downward departure under USSG §5K2.0. Furthermore, the court rejected the defendant's entrapment argument and noted that sentencing entrapment is a defunct doctrine. *See* United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992); United States v. Markovic, 911 F.2d 613, 616 (11th Cir. 1990). The circuit court concluded that departure from the recommended sentencing range was neither reasonable nor consistent with the guidelines.

United States v. Shenberg, 90 F.3d 438 (11th Cir. 1996). The circuit court affirmed the district court's upward departure pursuant to USSG §5K2.0. The defendant was an elected county judge, who engaged in kickback schemes involving his judicial authority. The district court departed upward five levels from the sentencing guideline range upon finding that the defendant's conduct was part of a systematic corruption of a governmental function causing loss of public confidence in government. The appellate court employed a three-prong test which included: 1) determining whether the Commission adequately considered the particular factors the district court relied on as the basis of its departure; 2) assuming it had not, determining whether the district court's reliance on those factors furthered the objectives of the guidelines; and 3) if those factors did further the objectives, determining the reasonableness of the district court's departure. In the instant case, the court found that the language of USSG §2C1.1 and the commentary thereto indicate that the guideline did not adequately account for such systematic corruption resulting in loss of public confidence in government. An upward departure from the guidelines range was therefore permissible if aggravating circumstances existed. *See* United States v. Alpert, 28 F.3d 1104, 1108 (11th Cir. 1994). The appellate court held that the loss of public confidence in government qualified as an aggravating circumstance, despite the government's lack of proof of local sentiment, because the guidelines do not specifically require a

showing of actual public harm. The district court could properly "take judicial notice" of public reaction to the case when it contemplated the departure.

§5K2.11 Lesser Harms

First Circuit

United States v. Carvell, 74 F.3d 8 (1st Cir. 1996). The district court erred in concluding that USSG §5H1.4 barred a downward departure under USSG §5K2.11, the "lesser harms" provision. The facts indicate that defendant used marijuana to cope with depression and to prevent suicide. Although finding that a reduced sentence under USSG §5K2.11 was warranted because defendant was using marijuana to avoid the greater possible harm of suicide, the court believed that USSG §5H1.4, which states that drug dependence is not a reason for a departure, precluded such a departure. As USSG §5K2.11 is set forth in a different section than USSG §5H1.4, which precludes such a departure, USSG §5H1.4 is not intended to negate departures set forth in USSG Ch. 5, Part K. The court noted that USSG §5K2.11 contains a limitation on the "lesser harms" provision that states that "[w]here the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted." Noting that the avoidance of suicide, rather than the drug use itself, drives the application of USSG §5K2.11, the court stated that the interest in punishing drug manufacturing could be thought to be reduced in this case because the alternative to defendant's drug use was suicide. The government also urged that the classification of marijuana as a Schedule I substance under the Controlled Substance Act "evidences a legislative determination that marijuana `has no currently accepted medical use for treatment'" and, therefore, a departure is precluded. The circuit court rejected this argument stating that such a classification does not bear on the question of whether defendant acted "in order to avoid a perceived greater harm." The circuit court vacated the defendant's sentence and remanded for resentencing with the instruction that defendant be sentenced to the mandatory minimum of 60 months.

§5K2.16 Voluntary Disclosure of Offense

Seventh Circuit

United States v. Besler, 86 F.3d 745 (7th Cir. 1996). The district court erred in granting a downward departure under USSG §5K2.16 without making findings as to the likelihood that the offense of conviction would have been discovered absent defendant's disclosure. Departure under USSG §5K2.16 requires the following: 1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to its discovery; and 2) the offense was unlikely to have been discovered otherwise. The court considered whether USSG §5K2.16 allows downward departure in situations in which discovery is unlikely, regardless of whether the defendant is motivated by guilt or by fear of discovery. The court rejected defendant's argument that the relevant consideration is the defendant's subjective state of mind in disclosing details of the offense and found that the last sentence of the guideline clarifies that departure does not apply to a situation in which the defendant is motivated by fear. The court held that departure is

justified only where the defendant's motivation is guilt and discovery is unlikely. This reflected the court's belief that the drafters of §5K2.16 intended to focus on both the defendant's state of mind and the benefit derived by the government in receiving information otherwise undiscoverable. In order to apply this departure, a court must make "particularized findings" with respect to the objective likelihood of discovery. The sentence was vacated and remanded to the district court for findings as to the objective likelihood of discovery.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

District of Columbia Circuit

United States v. Sanchez, 88 F.3d 1243 (D.C. Cir. 1996). Joining the majority of circuits that have considered the issue, the District of Columbia Circuit held that violations of Rule 32(a)(2), which requires trial courts to advise defendants of their right to appeal, constitute per se error requiring the sentence to be vacated and remanded for resentencing. United States v. Benthien, 434 F.2d 1031, 1032 (1st Cir. 1970); Reid v. United States, 69 F.3d 688, 689 (2d Cir. 1995); United States v. Deans, 436 F.2d 596, 599 n.3 (3d Cir. 1971); Paige v. United States, 443 F.2d 781, 782 (4th Cir. 1971); United States v. Butler, 938 F.2d 702, 703-04 (6th Cir. 1991). *But see* Tress v. United States, 1996 WL 325936 (7th Cir. June 14, 1996) (overruling previous per se rule and applying harmless standard); United States v. Drummond, 903 F.2d 1171 (8th Cir. 1990) (applying harmless error standard); Biro v. United States, 24 F.3d 1140, 1142 (9th Cir. 1994) (subscribing to per se rule rationale while noting that certain circumstances may deem Rule 32(a)(2) admonishments unnecessary). The circuit court noted that a per se rule is necessary to ensure that defendants are informed of their appeal rights and to limit litigation over whether the defendant was adequately advised of his Rule 32(a)(2) rights. Finding that the district court's failure to inform the defendant of his right to appeal his sentence was error, the circuit court remanded the case for resentencing. The government argued that a remand was unnecessary because the defendant's pro se 28 U.S.C. § 2255 motion raised all of his sentence-related claims. The circuit court disagreed, holding that the defendant could raise in his direct appeal the sentence-related claims brought in his section 2255 motion for collateral relief. In a section 2255 appeal the defendant must meet the stringent standard of establishing the cause of the procedural error and actual prejudice to his case resulting therefrom. The circuit court reasoned that because the defendant was not originally advised of his right to appeal, he did not have the chance to have his claims examined under the lower standard of proof associated with claims brought on direct appeal. Consequently, the circuit court held that the defendant was entitled to raise all of his sentence-related claims on direct appeal.

Tenth Circuit

United States v. Jones, 80 F.3d 436 (10th Cir.), *cert. denied*, 117 S. Ct. 139 (1996). The district court did not err in its adoption of the sentencing guideline calculations recommended in the presentencing report. The defendant waived the statutory minimum period for review of the report when he failed to object at the sentencing hearing. The defendant maintained that he should be resentenced because the district court failed to allow him ample time prior to the hearing to properly review the presentencing report with his attorney. Under Rule 32(b)(6)(A) of the Federal Rules of Criminal Procedure, a defendant is given no less than 35 days in which the probation officer must furnish the presentence report to the defendant and the defendant's counsel for review. The appellate court joined the Fifth, Seventh, and Ninth Circuits in concluding that by participating in a sentencing hearing without objection, the minimum period provided by Rule 32(b)(6)(A) was automatically waived.

Part B Plea Agreements

§6B1.2 Standards for Acceptance of Plea Agreement

Eighth Circuit

Morris v. United States, 73 F.3d 216 (8th Cir. 1996). The district court did not err in allowing the government to cross examine a clinical psychologist at the sentencing hearing. The defendant set her unfaithful husband's bed on fire on a military reservation, and pled guilty to assault with intent to do bodily injury, 18 U.S.C. § 113(c). The plea agreement bound the government to take no position on a defense motion for a downward departure on the ground that the act was a single act of aberrant behavior. At the sentencing hearing, the defense called a clinical psychologist to testify about domestic violence. When the testimony began to develop additional expert testimony about spousal abuse, the government examined the witness to try to narrow the source of domestic turbulence to the incident of marital infidelity. The defendant argued that the government violated the plea agreement by "taking a position." In an issue of first impression in the Eighth Circuit, the appellate court addressed the "boundaries of 'taking a position' on departures from guideline sentences." The court noted that the control of cross-examination during a sentencing hearing "must be guided by specific facts and argument in each case." The court stated that there is no "black letter list of permitted and not permitted questions" at a sentencing hearing. The court in refusing to establish a black letter rule, held ". . . only that in this case where the witness began to shift the focus of the grounds for a downward departure from the agreed fact that marital infidelity had precipitated the offense, to a larger collection of grievances based upon spousal abuse, the prosecutor had the right to employ reasonable cross examination to bring the inquiry back to the agreed facts."

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.1 Classification of Violations

Seventh Circuit

United States v. Lee, 78 F.3d 1236 (7th Cir. 1996). The district court erred in considering sentence enhancements for habitual or recidivist offenders in determining the grade of a violation of supervised release pursuant to §7B1.1. Five days after the defendant completed a term of imprisonment and began his supervised release, he was arrested for shoplifting. The defendant was convicted in state court on five counts of theft, all Class A misdemeanors carrying a maximum penalty of nine months imprisonment. Due, however, to the defendant's criminal history, the state's habitual offender statute increased the maximum penalty for each count to three years imprisonment. The defendant's convictions violated the terms of his federal supervised release. At the revocation hearing, the defendant objected to the district courts use of the enhanced state sentence in determining the grade of his violation of supervised release. On appeal the court held that, according to the policy statements in Chapter 7, the defendant's actual conduct determines the grade of his supervised release violation. As such, it does not include sentence enhancements for habitual or recidivist offenders. However, because the Chapter 7 policy statements are only advisory and not mandatory, once a district court correctly interprets and considers the policy statements, the court may then disregard the recommended sentence and impose any sentence unless plainly unreasonable.

§7B1.3 Revocation of Probation or Supervised Release

Second Circuit

United States v. Conte, 99 F.3d 60 (2d Cir. 1996). The district court did not err in imposing as a condition of probation the requirement that the defendant report to a probation officer and truthfully respond to questions, or in revoking the defendant's probation upon his refusal to answer the probation officer's questions and to allow the officer to enter his home. With respect to the conditions of probation, the Sentencing Reform Act provides a list of probation conditions to be imposed at the sentencing judge's discretion, including the requirement that the defendant "answer inquiries by a probation officer." 18 U.S.C. § 3563(b)(18). In addition, at the time of defendant's sentencing, the Sentencing Commission had promulgated a policy statement recommending truthful communication with a probation officer to be a condition of probation. USSG §5B1.5(a)(2) and (3) (policy statement). The court rejected the defendant's argument that his Fifth Amendment rights were violated by implementation of these requirements. The court recognized that while a probationer is not entirely deprived of his Fifth Amendment rights, in asserting these rights he runs the risk that his actions will lead to a violation of probation. The argument fails in this particular case for two reasons: 1) a probation revocation proceeding is not itself part of the criminal proceeding and the right against self-incrimination does not attach; and 2) even if the right existed, the defendant waives this right by testifying in his own defense.

Fourth Circuit

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). In considering issues of first impression in the circuit, the appellate court held that the district court did not err in sentencing the defendant to a term of supervised release, even though the supervised release term both

exceeded the maximum term of imprisonment authorized by the assimilated state statute and was not authorized by the assimilated state statute. The appellate court noted that the Assimilated Crimes Act ("ACA") provides that a person who commits a state crime on a federal enclave shall be subject to a "like punishment." However, the federal courts are not completely bound by state sentencing requirements. "Like punishment" requires only that the punishment be similar, not identical. The appelalte court noted that although the state statute does not authorize supervised release, it authorizes parole. According to the court, both occur following a term of imprisonment, involve government supervision, and serve to facilitate a prisoner's transition into society. Consequently, supervised release was similar enough to parole that a term of supervised release did not violate the ACA's requirement that the defendant be subject to "like punishment." *Cf*. United States v. Reyes, 48 F.3d 435, 437-39 (9th Cir. 1995). The court further noted that, although the total sentence did exceed the maximum term of imprisonment authorized by the state statute, under the federal system, supervised release is not considered to be a part of the incarceration portion of a sentence. To remain faithful to the federal sentencing policy regarding the imposition of supervised release, the court refused to create an exception for ACA defendants. "[U]nder the ACA, the total sentence—a term of incarceration followed by supervised release—properly may exceed the maximum term of incarceration proided for by state law."

United States v. Woodrup, 86 F.3d 359 (4th Cir.), *cert. denied*, 117 S. Ct. 332 (1996). The district court did not err in imposing a 24-month sentence for the revocation of defendant's supervised release and then imposing a consecutive 240-month sentence for the bank robbery upon which the revocation was based. The defendant argued that the imposition of both sentences violated the Double Jeopardy Clause. In rejecting the defendant's argument, the appellate court noted that when a defendant violates the terms of his supervised release, the sentence imposed is an authorized part of the original sentence. The court noted that this conclusion is supported by the fact that the full range of protections given to a criminal defendant is not required for the revocation of supervised release. The imposition of a sentence upon revocation of supervised release is not a punishment for the conduct prompting the revocation, but a modification of the original sentence for which supervised release was authorized. Analogously, courts have consistently held that subsequent punishment for conduct that gave rise to the revocation of probation does not violate double jeopardy. United States v. Hanahan, 798 F.2d 187, 189 (7th Cir. 1986). The Fourth Circuit joined the Ninth Circuit, the only other circuit court to consider this issue, in holding that the sentencing of a defendant for criminal behavior that previously served as the basis or revocation of supervised release does not violate the Double Jeopardy Clause. *See* United States v. Soto-Olivas, 44 F.3d 788, 792 (9th Cir.), *cert. denied*, 115 S. Ct. 2289 (1995).

Sixth Circuit

United States v. Throneburg, 87 F.3d 851 (6th Cir.), *cert. denied*, 117 S. Ct. 411 (1996). The sentencing court did not err in holding the supervised release revocation hearing two years after the issuance of the violation warrant or in imposing the resulting sentence consecutive to a state sentence being served for another crime. With respect to the timing of the revocation hearing, the court noted that the violation warrant issued well within the three year term of

supervised release and the hearing was held two years into the three-year period. The court rejected defendant's argument that his rights were prejudiced by this delay based on the assumption that if the federal court held the hearing and imposed the 24-month sentence earlier, the state Department of Corrections would have likely paroled the defendant to the federal sentence. The court adhered to the ruling of previous courts that delay violates due process only when it impairs the defendant's ability to contest the validity of the revocation. In this case, defendant admitted to violating the conditions of his supervised release and failed to provide support for his assertion that delay constitutes a due process violation. The court also rejected defendant's argument that his sentence upon revocation should be served concurrently with his state sentence. Although USSG §7B1.3 contains a policy statement directing the sentencing court to impose revocation sentences consecutively to other terms of imprisonment, the court recognized its discretion in this matter and provided an explanation as to the reason for imposing consecutive rather than concurrent sentences.

Eighth Circuit

United States v. St. John, 92 F.3d 761 (8th Cir. 1996). The appellate court affirmed the district court's decision to impose a revocation sentence that included both a term of imprisonment and a term of supervised release pursuant to 18 U.S.C. § 3583(h). Upon revocation of supervised release, the defendant was sentenced to 14 months imprisonment to be followed by 22 months supervised release, totalling 36 months, the length of his original term of supervised release. The defendant, relying on the Ninth Circuit's construction of the statute, argued that at the time he was sentenced, 18 U.S.C. § 3583(e)(3) had been interpreted as not authorizing supervised release upon revocation of supervised release. Additionally, the defendant argued that section 3583(h), which increases the penalty for the offenses, was enacted subsequent to his conviction. The appellate court rejected the defendant's arguments, and held that the ex post facto clause did not apply to judicial constructions of statutes. Additionally, because the availability of supervised release under 18 U.S.C. § 3583(h) did not increase the penalty authorized under 18 U.S.C. § 3583(e)(3), there was no ex post facto violation.

Ninth Circuit

United States v. Colacurcio, 84 F.3d 326 (9th Cir. 1996). The district court erred in delegating authority to a magistrate judge to conduct a probation revocation hearing in connection with a felony offense. First, such a delegation violates the Federal Magistrates Act, 18 U.S.C. § 636(a)(3), which states that magistrates have the power to conduct trials under 18 U.S.C. § 3401 subject to the limitations of that section. 18 U.S.C. § 636(a)(3) authorizes a magistrate to conduct a probation revocation hearing only if the following conditions are satisfied: 1) defendant's probation was imposed for a misdemeanor, 2) the defendant consented to trial, judgement and sentence by a magistrate judge, and 3) the defendant initially was sentenced by a magistrate judge. The defendant's particular case fails to meet all of these criteria. Furthermore, the fact that the district court conducted an independent review of the magistrate judge's report and recommendation before revoking defendant's probation does not cure the absence of defendant's consent. The court rejected the government's argument that the amendment under the Federal Courts Administration Act of 1992 providing that, "[a] district judge may designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release, including

evidentiary hearings, and . . . in the case of revocation, a recommended disposition . . . " is applicable to this situation. "Supervised release" and "probation" are not interchangeable. Second, such a delegation violates the "catch all" provision, 28 U.S.C. § 636(b)(3), which provides that a magistrate may be assigned additional duties that are not inconsistent with the Constitution. The grant of authority applies to procedural and administrative matters, as opposed to a probation revocation hearing. A probation revocation hearing which requires fact-finding and credibility assessments cannot be considered a "subsidiary matter"; it is a "critical stage" of a criminal proceeding. The appellate court declined to interpret the "additional duty" provision in contravention to the general meaning of the entire statute. Finally, even if the court interpreted the "catch all" provision to cover this situation, it could not eliminate the petitioner's constitutional right to have a critical stage in this proceeding adjudicated before an Article III judge. On remand, the district court must conduct a new probation revocation hearing.

United States v. Plunkett, 94 F.3d 517 (9th Cir. 1996). In sentencing a defendant who had violated the terms and conditions of his probation, the district court did not err in returning to the original guideline range after concluding that the sentencing guidelines Chapter 7 policy statement ranges of 6-12 months for probation violation were inadequate. The defendant had contacted the FBI and confessed to robbing a bank several years earlier. In recognition of his voluntary disclosure, the district court departed downward pursuant to §5K2.16 and placed the defendant on probation. After testing positive for heroin, the defendant's probation was revoked. In sentencing the defendant, the district court returned to the original guideline range of 57-71 months, and departed downward to 46 months imprisonment. On appeal, the defendant argued that the 1994 amendments to 18 U.S.C. §§ 3553 and 3565 render mandatory the suggested imprisonment sentences for probation violators in the Chapter 7 policy statements. The court held that although section 3553 incorporates the policy statements by name, it does so in the disjunctive: "a sentencing court may consider the guidelines or the policy statements."

United States v. Schmidt, 99 F.3d 315 (9th Cir. 1996). The district court did not err in exercising jurisdiction over defendant's revocation of supervised release proceeding. The defendant contended that the district court lacked jurisdiction over his revocation proceeding because it failed to adhere to the procedural requirements of 18 U.S.C. § 3583(i), which require a court to issue a warrant or summons to revoke a term of supervised release after it has expired. Instead, the circuit court rejected this argument, because it found that the period of supervised release had not yet expired and, therefore, the section 3583(i) requirements were not triggered. The circuit court determined the period of supervised release had not yet expired by using a later starting date for supervised release. Although the defendant's term of imprisonment in connection with the offense for which supervised release was ordered expired on July 15, 1992, he remained imprisoned in connection with another offense until April 20, 1993. Therefore, the court found that supervised release commenced April 20,1993. The defendant argued for an alternative outcome based on the statutory language of section 3624(e), which states that a term of supervised release "runs concurrently with any Federal, State or local term of probation . . . for another offense to which the person is subject or becomes subject during the term of supervised release." He argued that supervised release should have commenced from the date at which he was released from prison for the offense for which supervised release was imposed, despite the

fact that he was still incarcerated in connection with another offense. The court rejected this argument and relied upon additional language contained in section 3624(e) which states that "a term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime . . . ." Because the court interpreted this additional language as unambiguous, the court refused to apply the rule of lenity to reach the conclusion desired by the defendant. The defendant's term of supervised release was determined not to have commenced until he was released from imprisonment in connection with all offenses, which meant that he was still serving a term of supervised release when it was revoked. Therefore, the court's jurisdiction in the absence of a warrant or summons was justified.

Eleventh Circuit

United States v. Hurtado-Gonzalez, 74 F.3d 1147 (11th Cir.), *cert. denied*, 116 S. Ct. 2513 (1996). In considering an issue of first impression, the circuit court joined the Second Circuit in holding that in cases where the defendant's original sentence was for a preguidelines offense, the sentencing guidelines do not apply to sentencing following revocation of probation. *See* United States v. Vogel, 54 F.3d 49, 51 (2d Cir. 1995). The Second Circuit held that the plain language of 18 U.S.C. § 3565(a), which governs revocations of probation, controlled. The pertinent statutory language states that the court "may revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing." The defendant contended that this reasoning should not be applied because the guidelines goal of sentencing uniformity is better achieved by sentencing under the guidelines. The court rejected this argument, finding that uniformity is not a goal of the guidelines with respect to probation revocations; sentencing uniformity would not result from applying the guidelines in this case because the is not a recent offender; and citing ex post facto concerns. "Finally, and more importantly, this court has held that defendants sentenced under the guidelines must, upon the revocation of their probation, be sentenced in accordance with the sentences available at the time they were originally sentenced." *See* United States v. Smith, 907 F.2d 133, 135 (11th Cir. 1990).

§7B1.4 Term of Imprisonment

Second Circuit

United States v. Cohen, 99 F.3d 69 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1699 (1997). In this case of first impression, the Second Circuit joined with the majority of circuits in holding that the Sentencing Commission's policy statements regarding revocation of supervised release are not binding. *See* United States v. Escamilla, 70 F.3d 835 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1368 (1996); United States v. West, 59 F.3d 32 (6th Cir.), *cert. denied*, 116 S.Ct. 486 (1995); United States v. Hofierka, 83 F.3d 357 (11th Cir. 1996). *But see* United States v. Plunkett, 94 F.3d 517 (9th Cir. 1996). The court elected to follow the majority because the statutory language indicates that the policy statements are not binding and there is "no clear legislative intent to the contrary." Title 18 U.S.C. § 3553(a) requires the court to consider the "applicable guidelines or policy statements" in sentencing a defendant for a violation of supervised release, while section 3553(b) requires a court to sentence within the "guidelines." Therefore, Congress' inclusion of "policy statements" among the sentencing factors to be considered and its omission of these statements with respect to mandatory sentencing practice, led the court to conclude that consideration of the policy statements is not required. Furthermore, Congress approved a Commission amendment which stated that its aim in issuing advisory policy statements was to give district courts greater flexibility.

United States v. Sweeney, 90 F.3d 55 (2d Cir. 1996). The judgment of the district court imposing 18 months imprisonment under USSG §7B1.4, revocation of supervised release, was revoked by the circuit court. The defendant was serving a term of supervised release when he pleaded guilty to sending obscene materials to a minor. This violation came as the culmination of the defendant's attempts to reduce the level of disturbance by his neighbors. After various acts of harassment, the defendant caused catalogs advertising adult films to be sent to the neighbors nine-year-old son in hopes of the father punishing him and, thereby, restraining the noise caused by the boy. The defendant asserts that the 18-month prison sentence imposed for this violation is "plainly unreasonable." Before reaching the defendant's contentions, the circuit court noted that the Chapter 7 policy statements are "advisory" in nature and may be reviewed on the appellate level. First, the defendant pointed out that the New Jersey state court had imposed only a four-month sentence for the underlying offense involving the obscene material. The circuit court noted that comparison of the sentences is not necessarily dispositive and stated that imposition of imprisonment after revocation was for the "breach of trust" against the district court, rather than as a criminal sanction. The circuit court, however, indicated that the state sentence suggested merely a minimal breach of trust. The defendant also asserted that his actions were without any prurient motive, which the government has conceded, and that he acted to rehabilitate himself while he was on supervised release, which is supported by his probation office's report. Without reaching the merits of defendant's claim, the circuit court found that the record indicated that the district court may not have realized its authority to sentence the defendant to as little as zero months in prison. Consequently, the circuit court vacated the sentence and remanded the case for resentencing.

Third Circuit

United States v. Brady, 88 F.3d 225 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 773 (1996). The district court did not err in revoking the defendant's supervised release and sentencing him to 12 months imprisonment to be followed by a three-year supervised release term. The defendant was indicted for knowingly, intentionally, and unlawfully possessing cocaine with intent to distribute and he argued that the district court applied 18 U.S.C. §§ 3551-86, which was not in effect when he was originally sentenced. He claimed that this additional punishment for his crime could not have been imposed when he committed that crime, and therefore violated the ex post facto clause of the Constitution. However, the circuit court rejected the defendant's contention on the grounds that he was not prejudiced by the enactment because the amended subsection (h) did not change the amount of time his liberty would have been restrained. Therefore, the circuit court did not find an ex post facto violation and affirmed the decision of the lower court.

Seventh Circuit

United States v. Beals, 87 F.3d 854 (7th Cir. 1996). The district court erred in requiring the defendant to serve a second term of supervised release following the 10 month term of imprisonment he had served upon the revocation of his original term of supervised release. The district court had ordered that defendant continue on supervised release pursuant to 18 U.S.C. § 3583(h). However, that section was enacted subsequent to the defendant's conviction, and application of that section violated the Ex Post Facto Clause of the Constitution. Art. I, s.9, cl.3. At the time of the defendant's conviction, 18 U.S.C. § 3583(e) was in effect. The majority of circuits, including the Seventh Circuit, had held that this section did not allow the district courts to revoke a defendant's supervised release in order to impose an additional term of supervised release following a period of incarceration. *See* United States v. McGee, 981 F.2d 271, 274 (7th Cir. 1992). Subsequently, Congress enacted 18 U.S.C. § 3583(h) which provides, in relevant part, that when a term of supervised release is revoked, the court may include a requirement that the defendant be placed on an additional term of supervised release following the incarceration for the revocation. The government argued that the new enactment was not a change in the law, but rather a clarification of it. The appellate court rejected this argument, and held that section 3583(h) did represent a change in the law which acted to the defendant's disadvantage, in that the defendant received no credit toward the imprisonment cap for "time previously served on post-release supervision," and it potentially increased the length of punishment for the original offense, without the defendant committing another crime.

United States v. Doss, 79 F.3d 76 (7th Cir. 1996). The district court did not err in making an upward departure upon revocation of appellant's supervised release. Based on a Grade B violation of supervised release and a Criminal History Category of III, the table in USSG §7B1.4 recommended a sentencing range of 8-14 months. The district judge, however, departed upward to a two-year sentence. Appellant argued that the judge was required to sentence within the guideline framework because the judge "talked in the language of Sentencing Guidelines" by using terms such as "depart upward." The circuit court found, however, that §7B1.4 is entitled weight, but, is not binding and the judge has discretion to depart outside of the recommended range. Appellant also argued that the judge abused his discretion in setting the sentence. The circuit court held that the appropriate standard for reviewing a sentence that has no sentencing guideline

is the "plainly unreasonable" standard. To determine whether the sentence was "plainly unreasonable," the circuit court questioned whether 18 U.S.C. § 3583 was complied with. Finding that the sentence was the maximum allowed under section 3583(e)(3), and that the judge took the policy statements into account and noted his reasons for the sentence on the record, the sentence was affirmed.

Tenth Circuit

United States v. Burdex, 100 F.3d 882 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1283 (1997). In an issue of first impression, the Tenth Circuit joined the Third, Fourth, Fifth and Eleventh Circuits in holding that the sentencing court need not give notice before departing upward from a sentencing range recommended by the policy statements of Chapter 7. *See* United States v. Hofierka, 83 F.3d 357 (11th Cir. 1996) ("[E]xceeding [the Chapter 7] range does not constitute a `departure'"); United States v. Davis, 53 F.3d 638, 642 n. 15 (4th Cir. 1995) (quoting Mathena for proposition that deviating from Chapter Seven is not equivalent to departure warranting notice); United States v. Mathena, 23 F.3d 87, 93 n. 13 (5th Cir. 1994) (stating that diverging from "advisory policy statements is not a departure such that a court has to provide notice"); United States v. Blackston, 940 F.2d 877, 893 (3d Cir.) (stating that when dealing with policy statements, the court need not find an aggravating factor warranting an upward departure in order to sentence out of the prescribed range), *cert. denied*, 502 U.S. 992 (1991). Upon violating the terms of his supervised release, the defendant was sentenced pursuant to Chapter 7. While the presentence report calculated the range of imprisonment at 8-14 months under the Chapter 7 policy statements, the sentencing court found that the recommended range did not adequately address the "gravity of the defendant's past criminal conduct," and departed upward to a 24-month sentence. The defendant asserted that the sentencing court erred in failing to notify defendant of its intent to depart upward from the policy statements in Chapter 7. The defendant relied upon the general proposition that defendants are entitled reasonable notice of the court's intent to depart from the guideline range based upon a "ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the Government." Burns v. United States, 501 U.S. 129, 137 (1991). The Circuit court adopted the position of the Third, Fourth, Fifth and Eleventh Circuits that those policy statements are not binding on the sentencing court, thus, a departure from a Chapter 7 range is not a "departure" from a binding guideline.

United States v. Hurst, 78 F.3d 482 (10th Cir. 1996). The district court did not err in imposing a sentence in excess of the range recommended in USSG §7B1.4. After violating a condition of his supervised release, the defendant was sentenced to the statutory maximum of 24 months imprisonment rather than the recommended range under §7B1.4 of between four to ten months. The defendant argued that in light of the Supreme Court's decisions in Stinson v. United States, 508 U.S. 36 (1993), and Williams v. United States, 503 U.S. 193 (1992), policy statements are authoritative and binding. The circuit court noted that every circuit court that has considered the impact of Stinson and Williams on §7B1.4 has concluded that it is only advisory and not binding. In Stinson, the Supreme Court held that a policy statement "that interprets or explains a guideline is authoritative." However, all of the circuit courts that have considered the

impact of Stinson and Williams have concluded that the "policy statements of Chapter 7 do not interpret or explain a guideline." *See* United States v. Davis, 53 F.3d 638 (4th Cir. 1995); United States v. Milano, 32 F.3d 1499 (11th Cir. 1994); United States v. Sparks, 19 F.3d 1099 (6th Cir. 1994); United States v. Anderson, 15 F.3d 278 (2d Cir. 1994); United States v. O'Neill, 11 F.3d 292 (1st Cir. 1993); United States v. Levi, 2 F.3d 842 (8th Cir. 1993); United States v. Hooker, 993 F.2d 898 (D.C. Cir. 1993); United States v. Hill, 48 F.3d 228 (7th Cir. 1995). In addition, unlike the policy statement at issue in Williams, the policy statements regarding revocation of supervised release are advisory rather than mandatory in nature. The court held that if a district court imposes a sentence in excess of that recommended in Chapter 7, it will only be reversed if its decision was not reasoned and reasonable.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C3.3 Reduction of Fine Based on Inability to Pay

Ninth Circuit

United States v. Eureka Laboratories, 103 F.3d 908 (9th Cir. 1996). The district court did not err in imposing a $1.5 million fine on the defendant organization. Unlike USSG §5E1.2, which applies to individuals, USSG §§8C3.3 and 8C2.2 do not require a sentencing court to determine whether a defendant organization has the ability to pay a fine, "so long as the ability to pay restitution is not impaired." Neither the statute at 18 U.S.C. § 3572, nor the guidelines precludes imposition of a fine on a defendant organization merely because it jeopardizes its continued viability. The appellate court held that USSG §8C3.3 permits, but does not require, a court to reduce a fine upon a finding that the defendant organization is not able to pay it. The only time that a fine reduction is mandated by USSG §8C3.3 is when the amount of the fine would impair the defendant's ability to pay restitution to the victim(s). In the instant case, the defendant organization was able to make restitution to the government, therefore, the plain language of USSG §8C3.3 did not require the district court to further reduce the fine. The contention that the sentencing court should have considered the impact of the fine on the organization's employees was without merit.